ETLA

ELINKEINOELÄMÄN TUTKIMUSLAITOS
THE RESEARCH INSTITUTE OF THE FINNISH ECONOMY
Lönnrotinkatu 4 B 00120 Helsinki Finland Tel. 358-9-609 900
Telefax 358-9-601 753 World Wide Web: http://www.etla.fi/

Keskusteluaiheita – Discussion papers

No. 810

Timo Kaisanlahti

MINORITY SHAREHOLDERS IN THE FINNISH SYSTEM OF CORPORATE GOVERNANCE

ISSN 0781-6847

10.06.2002

KAISANLAHTI, Timo, **MINORITY SHAREHOLDERS IN THE FINNISH SYSTEM OF CORPORATE GOVERNANCE.** Helsinki: ETLA, Elinkeinoelämän Tutkimuslaitos, The Research Institute of the Finnish Economy, 2002, 71 p. (Keskusteluaiheita, Discussion Papers, ISSN, 0781-6847; no. 810).

ABSTRACT: Recent ”law and finance” research implies that minority shareholder rights are heavily affected by the legal tradition. This in turn has economic implications for a company´s ability to raise equity capital from outsiders, *i.e.,* from minority investors. In a famous study by *La Porta et al*. (1998) it is concluded that the rights of shareholders are more advanced in English origin common-law countries than in ones with civil-law tradition. Moreover, within the sphere of civil-law, Finland and other Nordic countries are said to provide only an intermediate level of protection for minority owners.

An important difference between civil and common-law countries is also the role of the Court. According to this thesis, civil-law courts are required to apply the black letter law of codes quite mechanically to the cases to be decided. If a new case before a Court is not specially covered by the wording of the act or another statutory instrument, the judge will have little discretionary power to deal with it. Thus, an insider who finds a new – *i.e.* not explicitly forbidden in black letter law – way to take advantage of outside investors, can proceed without fear of legal consequences.

In this article we take a closer look at the claimed “mechanistic” nature of legal apparatus in civil-law countries. From a Finnish point of view we do not find the world as bipartite as it is claimed to be. Our main remark is that those studies do seriously belittle the Scandinavian concept for equal treatment of shareholders. Moreover, we review the special rules of minority protection in our Companies Act to provide a broader view of the legal landscape that Finnish minority shareholders inhabit. In passing, we make some comparisons to the company law in the US, the jurisdiction where many notable critics of civil law comes from. In this context, we provide also some remarks on the opinions expressed by La Porta et al. about the minority protection in Finland. The comments made are at least by large applicable to other Nordic countries as well because the companies legislation in Nordic is based on common preparatory work.

KEYWORDS: business law; company law; comparative jurisprudence; corporate governance; corporate law; economics of law; investor protection; law and economics; law and finance; minority shareholder; regulation of business; stock market.

KAISANLAHTI, Timo, **MINORITY SHAREHOLDERS IN THE FINNISH SYSTEM OF CORPORATE GOVERNANCE.** Helsinki: ETLA, Elinkeinoelämän Tutkimuslaitos, The Research Institute of the Finnish Economy, 2002, 71 s. (Keskusteluaiheita, Discussion Papers, ISSN, 0781-6847; no. 810).

TIIVISTELMÄ: Länsimaiset oikeusjärjestykset jaetaan vertailevassa oikeustutkimuksessa kahdeksi päälohkoksi. Suomi ja muut pohjoismaat kuuluvat romaanis-germanistiseen oikeusryhmään, jonka perustana ovat kansanedustuslaitoksen säätämät kirjalliset lait. Toisen ryhmän muodostavat ne valtiot, kuten Englanti ja Yhdysvallat, joissa vallitsee oikeuslaitoksen piirissä muodostuva common law -oikeus. Kirjoitetulla lailla on merkittävämpi asema romaanis-germanistisissa oikeusjärjestyksissä kuin common law -ryhmään kuuluvissa valtioissa, joissa oikeuskehitystä ohjaa ensisijaisesti tuomioistuinten ratkaisukäytäntö.

Tälle jaolle on annettu keskeinen merkitys myös taloustieteellisessä ”law and finance” -tutkimuksessa, etenkin yritysten rahoituskustannusten kannalta: pääteesin mukaan vähemmistöomistajan oikeusasema määräytyy suuressa määrin sen oikeusjärjestyksen mukaan, johon asianomaisen yhtiön rekisteröintivaltio kuuluu. Oikeusasema puolestaan vaikuttaa yhtiön mahdollisuuksiin hankkia oman pääoman ehtoista rahoitusta piensijoittajilta. Tunnetuimmassa law and finance -tutkimuksessa, La Porta et al. (1998), esitetään laajan empiirisen analyysin johtopäätöksenä, että Englannissa ja muissa ns. common law -oikeusjärjestyksissä vähemmistösuoja olisi kehittyneempää kuin romaanis-germanistisessa oikeudessa, jonka piirissä puolestaan pohjoismaiset oikeusjärjestykset tarjoaisivat vain keskinkertaisen oikeussuojan.

Tässä kirjoituksessa kyseenalaistetaan edellä kuvatun kahtiajaon merkitys vähemmistösuojan kannalta. Keskeisenä teesinä on, että pohjoismaisessa yhtiölainsäädännössä keskeinen yhdenvertaisuusperiaate tarjoaa aineellisesti vähintään vastaavan suojan osakasasemalle kuin se mihin voidaan päästä tuomioistuimen harkinnalla common law -järjestelmässä. Tarkastelun kohteena ovat ensisijaisesti aineelliset vähemmistösäännökset Suomen osakeyhtiölaissa (734/ 1978) ja arvopaperimarkkinalaissa (495/1989); näillä järjestettyä suojamekanismia arvioidaan tässä paperissa myös osakemarkkinoiltaan laajimmassa common law -järjestyksessä eli Yhdysvalloissa tarjottuun oikeusturvaan nähden.

Oikeusvertailun tulemana on, ettei aineellisissa normeissa ole merkittäviä eroja. Havaitsemme myös, että La Porta et al. -tutkimuksessa esitetyt arviot Suomen oikeussuojasta ovat ainakin joiltakin osin puutteellisia. Tämän vuoksi joudutaan kysymään, ovatko aineelliset suojanormit ylipäätään relevantteja indikaattoreita yksittäisen oikeusjärjestyksen tehokkuuden arvioimiseksi. Ennemminkin eroja on osoitettavissa prosessuaalisessa menettelyssä, mm. kannemahdollisuuksien sekä oikeudenkäyntikulujen korvaamisen osalta. Näitä koskevat säännökset Yhdysvalloissa laskevat kynnystä vähemmistösijoittajien kanteille selvästi alemmalle tasolle kuin mihin vastaavat prosessinormit ohjaavat Suomessa. Sama koskee valvontaviranomaisten voimavaroja ja toimintamahdollisuuksia arvopaperimarkkinoiden tasapuolisuuden valvonnassa.

AVAINSANAT: arvopaperimarkkinat; corporate governance; kauppaoikeus; oikeustaloustiede; osakeyhtiölaki; sijoittajansuoja; vertaileva oikeustiede; vähemmistöosakas; yritystoiminnan sääntely.

CONTENTS

1. **Introduction** ... 1
   1.1. Background ... 1
   1.2. Structure and Nature of the Finnish Company Regulation ... 3

2. **Majority Principle** ... 6
   2.1. Simple and Statutory Majority ... 6
   2.2. Veto Rights and the Propriertary Nature of Ownership ... 8
   2.3. Self-Interested Voting ... 9

3. **Requirement of Equal Treatment** ... 10
   3.1. Equality Among Shareholders ... 11
   3.2 Equal Treatment By the Board ... 15
   3.3. Share Issues and Pre-emptive Rights ... 17
   3.4. Classes of Shares ... 19
   3.5. Take-Overs ... 21

4. **Right to Participate in Decision-Making** ... 22
   4.1. Being Present and Voting at a GM ... 23
   4.2. Voting Caps in the Articles ... 25
   4.3. Voting Agreements ... 26
   4.4. Representation ... 26
   4.5. Convening an Extraordinary GM ... 27
   4.6. Agenda Setting and Counter-Motions at a GM ... 28

5. **Informational Rights** ... 29
   5.1. Notice of Meetings ... 29
   5.2 Financial Information ... 30
   5.3. Questions and Inspection of Books ... 32
   5.4. Information Provided by Auditor ... 34
   5.5. Special Inspection ... 36
   5.6. Transparency of Shareholders´ Ownership ... 37

6. **Right to Dividends and Buy-Backs** ... 39
   6.1. Declaration and Payment of Dividends ... 39
   6.2. Share Repurchases ... 40

7. **Transferability of Ownership – Right to Exit** ... 42
   7.1. Pre-emption Clause in the Articles ... 43
   7.2. Consent Clause ... 43
   7.3. Indivisibility of Administrative and Financial Rights ... 44

8. **Shareholders Actions and Remedies** ... 45
   8.1. Representative Action Against Unlawful Resolutions ... 45
   8.2. Derivative Suit for Damages ... 47
   8.3. Direct Suit ... 48
   8.4. Winding Up ... 49

8.5. Incentives for Litigation 50
8.6. Redemption and Appraisal Rights 51
8.7. Criminal Sanctions 52

9. Concluding Remarks 53
9.1. Is Common Law Procedurally Superior? 53
9.2. Required Return on Equity and Substantial Rules of Minority Protection 55

Appendix: Forms of Business Enterprises in Finland 65

Bibliography 67

1. INTRODUCTION[1]

1.1. Background

Finland belongs to the family of Scandinavian tradition of civil law.[2] Almost all law in Finland is "black letter".[3] This applies also to business enterprises. Recent research by scholars – particularly economists – implies that minority shareholder rights are heavily affected by the legal tradition. This in turn has its economic implications to a company′s ability to raise equity capital from outsiders *i.e.* minority investors.[4] In a famous article by *La Porta* et al. (1998) is concluded that the rights of minority shareholders are more advanced in English origin common-law countries than in ones with civil-law tradition. According to the argument the strict protection of minority shareholders in common-law countries has eased access to external equity financing of companies operating in those countries. On the other hand, within the sphere of civil-law, Finland and other Nordic countries are said to provide only an intermediate level of protection for minority shareholders.

> La Porta *et al.* draw their conclusions aggregating shareholders formal rights into so called "anti-director index".[5] This index is formed by adding one when: (*i*) the country allows to mail their proxy vote to the company; (*ii*) shareholders are not required to deposit their shares prior to a general meeting (later "GM"); (*iii*) cumulative voting or proportional representation of minority shareholders in the Board of Directors is allowed; (*iv*) an oppressed minority mechanism is in place; (*v*) the minimum percentage of shares that entitles a owner to call an extraordinary GM is less or equal to 10 per cent; and (*vi*) shareholders have pre-emptive rights that can only be waived by a shareholders′ vote. There are six relevant variables; thus the index ranges from 0 to 6. Finland scores only 3 points and the other Scandinavian countries from 2 to 4, while the highest rank, 5 points, is reached by several English origin common-law countries, among then the *United States* and *United Kingdom*.

As an important difference between civil and common-law countries is proposed to be the role of the Court. The common-law judges are understood to have a very wide discretion and that they use it clearly biased in favour of minority shareholders. A common-law Court

[1] An earlier version (dated 28th October 2001) of this review was prepared for the 16th Congress of the International Academy of Comparative Law (Brisbane, Australia; 14th July – 20th July 2002) as the Finnish national report on the topic ”Rights of Minority Shareholders”. The author gratefully acknowledges the helpful suggestions provided by Manne Airaksinen and Ari Hyytinen. Any opinions expressed or errors in this article, however, are the sole responsibility of the author.

[2] See Aarnio 2002, p. 12-13. Blomstedt (1985) provides a historical background of the Finnish legal system. For the basic facts of Finland see Bruun 2001, p. 15-17, Suviranta 1997, p. 15-20 or Ministry of Finance 1998.

[3] Aarnio 2002, p. 12-13.

[4] See La Porta *et al.* 1998.

[5] *Ibid*, p. 1126-1128.

applies what American academic *John C. Coffee* calls “a smell test” in order to sniff out whether a conduct by the “insider”, *i.e.* the majority shareholder or management, violates their duties.[6]

In contrast, Coffee claims that the civil-law courts are required to apply the black letter law of codes quite mechanically to the cases to be decided. If a new case before a court is not specially covered by the wording of the act or another statutory instrument, the judge will have little discretionary power to deal with it. Legal rules in civil-law countries are made by parliamentary legislatures. As the predictability of law is worshipped in civil-law countries, courts are not allowed to go beyond the exact wording of statutory rules. This means that the judges have to restrain from “smell-testing” so dear to their common-law counterparts. Mandatory self-restrain of judges is according to Coffee a clear invitation to imaginative self-dealing of insiders. An insider who finds a new – *i.e.* not explicitly forbidden in black letter law – way to take advantage of outside investors, can proceed without fear of legal consequences.

In what follows we shall take a closer look at the claimed “mechanistic” nature of legal apparatus in civil-law countries. From a Finnish point of view we do not find the world as bipartite as Coffee claims it to be.[7] Our main remark is that those studies do seriously belittle the Scandinavian concept for equal treatment of shareholders. The aim is not to provide an definite analysis about pros and cons of different jurisdictions: we limit our efforts just to sketching the reader how certain important issues are dealt within the equal treatment principle. Moreover, we review the special rules of minority protection in our Companies Act to provide readers a broader view of the legal landscape that Finnish minority shareholders inhabit. In passing, we make some comparisons – most of them only in footnotes due to the space limits – to the company law in the US, the jurisdiction where many notable critics of civil law comes from.[8] In this context, we provide also some remarks on the opinions expressed by La Porta *et al.* about the minority protection in Finland.

> The comments to be made are at least by large applicable to Scandinavian countries – *Denmark, Norway* and *Sweden* – because Nordic company statutes are based on common preparatory work.[9] Law reform committees of these countries worked in close co-operation particularly during the 1960s and early 1970s; the closeness is strikingly manifested in final reports which include all the proposals printed side by side to ease the comparisons. Due to this co-operation, Nordic statutes are quite

[6] Coffee 1999.

[7] To be fair, Coffee´s proposition is shared by many of his colleagues; see for example Rock 1997, p. 1101-1102.

[8] As we are in a pursuit of reviewing the features of a representative US company law, references are primary made to the Revised Model Business Corporate Act (later ”RMBCA”) that has been adopted in whole or in part by a majority of the US jurisdictions, see www.uslaw.com/library.

[9] See Sillanpää 2001, p. 80.

similar materially as well as structurally: *inter alia* the substance of the Finnish companies legislation reflects most of time the other Nordic jurisdictions, not to mention that the technical order of chapters is generally identical. This common basis is still effective after 30 years even though the legislative mutuality has somewhat loosened by the pass of time. On the other hand, in the field of the securities market laws that were enacted in the 1980s, the co-operation was generally limited only to *ad hoc* -meetings between the legislative civil servants of Nordic countries. This applies also to the preparation of accounting and auditing legislation in Scandinavia.

1.2. Structure and Nature of the Finnish Company Regulation

The core rules of the Finnish companies law are codified in the Companies Act of 1978 (No. 734 – September, 1978; later "FCA"). It is the general law on companies in which the owners liability is limited to their investment in the shares of the company.[10] This Act is also applied additionally, i.e. *lex specialis derogat legi generali*, even regards to companies separately regulated as is the case with banks and insurance companies.[11] However, the FCA does by no means cover all the regulation which is relevant to companies. The Finnish regulation is structured as a multi-tier system, particularly in matters that are related to securities markets.

In the context of shares and other securities issued to the public markets the Finnish Securities Markets Act of 1989 (No. 495 – May 26, 1989; later "FSMA") has a decisive role to play. The FSMA covers *inter alia* the procedures for issuing securities to the public as well for trading and quoting shares and other securities of listed companies. The Act is also aimed at levelling the playing field of information *i.e.* ensuring that all the players, even the small investors, receive timely correct and sufficient information of the listed securities as well on the financial standing of their issuers to permit a reasoned evaluation of securities issued and the issuing company. Listed companies are required to publish all information relating to decisions taken as well as to the company and its operations which fundamentally affect the value of the company's shares. Thus, major company actions *e.g.* a proposal for a share issue or a merger, has to be published promptly as soon as the decision on the proposal has been drawn by the management. Related to this, the Act prohibits strictly dealings on insider information by an universally applicable ban on the general misuse of insider information.[12]

[10] af Schultén 1993, p. 96; Astola 1994, p. 71.

[11] Commercial Banks Act 1990 (No. 1269 – December 28, 1990) and Insurance Companies Act 1979 (No. 1062 – December 28, 1979). See Toiviainen 1998, p. 5-6.

[12] More detailed regulation for the markets is provided by the Ministry of Finance. The supervisor of Finnish securities markets, the Financial Supervision Authority, has also released several guidelines on market conduct. The Authority operates in conjunction with the Bank of Finland. It is the responsibility of the Financial Supervision to ensure that those operating on the financial markets observe existing

Moreover, the Auditing Act of 1994 (No. 936 – October 28, 1994) includes some relevant provisions of corporate governance as well the Accounting Act of 1997 (No. 1336 – December 30, 1997) and certain regulations mandated by it. These are of importance *inter alia* in drawing a resolution at a AGM of the dividend to be distributed. The Accounting Act also obliges a company to file their financial statements with a public register, the Finnish Trade Register.[13]

The company law in Finland is markedly mandatory. It is generally believed that only the legal system is able to control the actions of a management – or of a major shareholder – in order to prevent them from taking advantage of their position to the detriment of minority owners and creditors. A casual study of Finnish company legislation strengthens this impression. A typical provision, for example, of the FCA in this respect is indispositive by nature: a deviation from it may be a burdensome exercise in practice even if the parties protected by the provision would consent to an exception.

On the other hand, however, certain instruments of the Finnish legislation provide shareholders considerable latitude in arranging their internal affairs. Most notable of these are articles of association (later “Articles”) which are governed by the FCA. Besides the Articles, in service of the shareholders are the general rules of contract law. Some if not all the shareholders may voluntary oblige to a common understanding on relations between themselves. This kind of shareholders´ agreement (“Agreement”) may be useful in mandating candidates for a membership in the Board of Directors (later also “Board”) or in ensuring unified voting policy at a general meeting of shareholders (“GM”).

The internal rules of procedure are stipulated by the Articles, which can therefore be regarded as the company´s internal statute.[14] Articles are the primary means provided in the FCA by which shareholders govern a company´s affairs and administrative management. Consequently the Articles of Finnish companies are subject to the requirements of the FCA. In Finland the Articles impose binding obligations on the members in their dealings with the company and *vice versa* on the company in its dealings with the members. Moreover, the members are also bound in their relations *inter se* by stipulations of the Articles. Shareholders enjoy a high degree of freedom in shaping rights provided for in the Articles to suit their interests.[15] The Articles may, at least in principle, deviate from the FCA even if the provisions do not expressly allow such deviation. However, the most notable feature of the FCA in the context of Articles is that the rights

rules and regulations. see Helakallio 1996, p. 57-58. Besides the Authority, the Helsinki Stock Exchange, as a private market place, has its own set of detailed requirements for admission to listing as well as for disclosure of listed companies, see Kauko – Saukkonen 1996, p. 28-30 and Sonninen 1998, p. 181-182 as well the homepage of the Financial Supervision Authority: www.rata.bof.fi.

[13] These acts cover both types of companies, the public as well as the private ones.

[14] Poutiainen 2001, p. 68.

[15] See Timonen 2002, p. 136-137.

which the legislator has granted on a certain minority cannot be limited by a stipulation of Articles to that effect. That is not possible even when the Articles are being drafted at the formative stage *i.e.* before the meeting founding the company. The freedom to adapt the Articles to the circumstances of a particular enterprise may not be used to lessen the minority protection provided by the statutes. The majority requirements can only be strengthened and not weakened.[16] On the other hand, there are no statutory limits to how much the minority rights may be strengthened by the Articles. Thus, in principle, the Articles could validly state that all resolutions at a GM shall be drawn unanimously and that each shareholder shall have her representative in the Board. In other words the company could be "frozen" into *status quo*.[17]

A shareholders´ agreement is in the Finnish jurisprudence a clearly different instrument than the Articles. While the latter are regulated by the FCA, the ordinary rules of contract law governs an Agreement. In Finland the base legislation of contract law is provided by the Act on Contracts (No. 228 – June 13, 1929).[18] Formal requirements for a valid Agreement are quite limited. There is no need for an Agreement to be in writing and thus, in principle, an oral one is binding.[19] The company itself is not obligated by the Agreement unless it has a bound itself to the contract. [20] Even in such case, however, the legal validity and significance of a stipulation of an Agreement will be considered if it limits the right and duties of the company or its organs. A company cannot by contract deprive itself to exercise its statutory powers. In general, the shareholders may lawfully agree between themselves as to how to exercise their voting rights, but where a company is one of the parties to the agreement its statutory powers cannot be fettered by any such agreement.

A certain provision or the whole agreement may be annulled by a Court if a provision is unfair in consideration of the agreement itself, the circumstances when the agreement was entered into, or with regard to circumstances as a whole. A Court has also an option to amend an unfair provision. However, also the Articles may be amended by the Court if they are considered to be unfair pursuant to Sc. 36 of the Act on Contracts.[21] The possibility of adjustment exists in order to prevent unbalanced contracts. Thus, if a party claims the Articles to be unfair, she has to show before the Court that she is paying more than she is getting. There is no room for the Court to modify the Articles in a particular case without

[16] Sillanpää 1994, p. 151-152.

[17] For obvious practical reasons, however, these kinds of stipulations are non-existent in the Finnish listed companies.

[18] See generally Pöyhönen 1993; Sevón 1985; Ylöstalo 1966; or Pöyhönen 2002.

[19] For obvious difficulties of evidence, an oral consent is rare phenomenon in company matters.

[20] The Supreme Court of Finland upheld, however, in its judgement 1567:1990 an Agreement which required interim accounts to be signed by all the members of the company; the company was also bind by the requirement of the Agreement as its Board had approved the Agreement on the behalf of the company, Tenhunen 1997, p. 66.

[21] See generally Wilhelmson 1984, p. 29-37.

evidence of clear-cut unbalance.[22] Moreover, as a company is a business arrangement identified by its Articles, the threshold to adjust is set at a higher level than normally is required in cases where Sc. 36 is applicable.[23]

2. MAJORITY PRINCIPLE

Shareholders exercise ownership control at a general meeting (later "GM") through the power of their votes.[24] In Finland – as in all market economies – the starting point is that every shareholder is entitled to one vote per share she owns. As a company is an organisation for economic activity in pursuit of profit, it would not be fair to require all decisions to be made unanimously. If each shareholder was able to veto any decision, economically reasonable action of the company would most likely be paralysed under self-interest.[25] A set of voting rules that takes into account the difference in financial stakes between the members is needed. In Finland, the starting point is that decision at a GM are made with a simple majority.

There are three types of resolution that may be passed by the members at a General Meeting of a Finnish company: (*i*) ordinary by a simple majority of votes represented at the meeting, (*ii*) extraordinary by a supermajority of votes, and (*iii*) elective by a relative majority. The majority required to pass a resolution depends upon the business being transacted, the stipulations of the FCA, and the Articles.

2.1. Simple and Statutory Majority

As regards normal business, the GM of a Finnish company reaches its decisions by a simple majority, *i.e.* the number of the votes cast in favour of a proposal must exceed the number of votes against.[26] If the votes are cast evenly, the opinion of the chairman will form the decision – even if she is not a shareholder. Unless stipulated otherwise in the Articles, in such case that only one vote is cast in favour and none against the proposal, it is accepted – even if all the other shareholders have attended the meeting but failed to vote.

[22] Pöyhönen 1993, p. 76.

[23] Savela 2001, p. 191.

[24] The GM constitutes the supreme organ of a Finnish company. The Board of Directors (later ”Board”), which is usually elected in its entirety by the GM, is responsible for the proper organisation of the company and its affairs. The Board appoints the Managing Director whose duty is the day-to-day management (Ch. 8 Sc. 6 Para. 1).

[25] Poutiainen 2001, p. 68. Timonen 2002, p. 137, describes the essence of the majority principle: " – – the majority decides upon the nature of business activities carried out by the company as well as the way they are carried out."

[26] Attending shareholders having failed to vote are disregarded as well as blank or otherwise invalid votes.

The FCA does not include a general requirement for a quorum of shareholders present. The rule of simple majority reigns over most of the matters to be dealt at the GM even if the number sufficient to enough to qualify as a majority falls short of the amount that equals a majority of all outstanding stock. However, although seldom seen in practice, the Articles may stipulate that the validity of resolutions requires that the majority of shares are present at the GM.[27]

To balance, at least partially, the missing quorum requirement, certain extraordinary matters require statutory majority at a GM of a Finnish company.[28] Pursuant to FCA Ch. 9 Sc. 14 Para. 1 an amendment of the Articles requires in most cases that the resolution is favoured by both two-thirds of the votes cast and the very same quorum of the shares present at the meeting.[29] Even more notable is the rule that the quorum mentioned of shares present must be reached by all the classes of shares present at the GM. This is the requirement when the shareholders are casting a vote about accepting a merger with another company or dividing the company (FCA Ch. 14 Sc. 10 and Ch. 14a Sc. 13).[30]

Regarding elections of Board members in a Finnish company, the requirement of simple majority is only relative. In principle a candidate has to receive only one more vote than the other candidates for the post to be elected. The GM may, however, prior to the election accept by a simple majority that the new member is chosen according to the rule of simple majority. The Articles may require even a stricter majority of the votes cast than a simple majority´s as well as a cumulative voting structure.[31] The latter alternative, however, is utterly rare in the Finnish practice; none of the listed companies have implemented it. These rules apply as well for the election the members of the Supervisory Board[32] as for the appointment of the Auditors.

[27] Company law in the US typically requires a quorum to be present for shareholders to act during a GM. This condition is usually met when members holding more than 50 per cent of the outstanding shares are present; the Articles may, however, provide for a higher quorum (RMBCA § 7.25(a) and 7.27(a)). This is not the case in Finland.

[28] Coffee (1999) is concerned of low quorum requirements; he classifies them as an instrument for the majority shareholder to discourage minority owners to attend a GM.

[29] See Tenhunen 1997, p. 60.

[30] Pursuant to RMBCA § 7.27(a) the Articles of a US company may provide for a higher approval than a simple majority in extraordinary business matters, for example in mergers; however, this is not a mandatory rule as in Finland.

[31] Most states in the US permit or require the election of the Board members by cumulative voting. According to the RMBCA § 7.28(b), however, cumulative voting is by no means a default rule: it can be applied to the election of the Board members only if the Articles so provide. Neither it is a default rule in Delaware, the state of incorporation for most of the *Fortune 500* -companies.

[32] The status of a Supervisory Board in the organisational structure of a Finnish company is explained by Castrén 1998, p. 121-122; and Timonen 2002, p. 145-146. As the Supervision Board is not a mandatory organ in a Finnish company and quite rare phenomenon nowadays even among listed companies, we do not make any reference to it later. See Tainio *et al.* 2001, p. 160-162, of the decrease in the number of Supervisory Boards in Finnish companies.

La Porta *et al.* do not give Finland a positive mark for cumulative voting. We find this conclusion too harsh and oversimplified from a comparative point of view. Surely, as already mentioned, provisions providing for cumulative voting are not *de facto* seen in the Articles of Finnish listed companies while cumulative voting is in principle one of the alternatives available for the companies to elect the Board members. However, cumulative voting is unpopular among the US jurisdictions and companies as well: only a few US states still maintain a mandatory requirement for cumulative voting.[33]

2.2. Veto Rights and the Proprietary Nature of Ownership

Some decisions at a GM of Finnish company require even more broader acceptance by the shareholders than the "double" two-thirds rule mentioned above. Whenever (certain class of) current shareholders´ economic rights – *i.e.* the right to the profit of net assets – are diminished by an amendment of Articles, the decision must be supported at least by each and every shareholder whose economic rights are affected by the decision (FCA Ch. 9 Sc. 15. Para. 1 Subpara. 1). The rule is important as it states that a share´s nature is truly proprietary in the Finnish legal system: economic rights cannot be altered without every owner´s consent. Each member has an absolute veto right. Liability protection is not considered to be enough in the context of economic rights.

This can be illustrated by a reference to a famous Australian case *Gambotto vs. WCP Ltd.* The case was about acceptability of an amendment of Articles in order to expropriate shares of minority owners.[34] The Articles of WCP Ltd were amended in May 1992 by the GM to enable any member who had at least 90 per cent of the shares to acquire compulsorily the rest of the shares. The majority shareholder, Industrial Equity Ltd, held through its wholly-owned subsidiaries 99,7 per cent of the shares. Ownership of the rest of shares was dispersed, among the owners was Mr. Gambotto who objected compulsory acquisition even though he admitted that the price offered was fair. However, the High Court of Australia struck down the proposed alteration. Chief Justice *Mason* considered that the alteration would have been be justified only if majority had shown that it (*i*) was done for a proper purpose to secure the company against a significant detriment or harm (*e.g.* to en-

[33] Gordon 1994, p. 145, notes that by 1992 only six US jurisdictions – Arizona, Kentucky, Nebraska, North Dakota, South Dakota, and West Virginia – still require the companies to follow mandatorily cumulative voting procedure in electing Board members. On the other hand, the most important jurisdiction for listed US companies, Delaware, has allowed but not required cumulative voting since 1917, see Sec. 214 of Delaware General Corporation Law.
Due to these differences in national jurisdictions, Dalebout 1989 expresses a sceptical view of the importance of cumulative voting. On the other hand, Bhagat – Brickley study of 1984 provides clear evidence that minority shareholders do value the cumulative voting procedure: the authors found that elimination of cumulative voting by an amendment of Articles reduced shareholder wealth by 1,57 per cent on average; this result was statistically significant, *ibid*, p. 354.

[34] See Prentice 1996.

able a competing shareholder to be bought out) and (*ii*) non-oppressive procedurally – requiring that all relevant information leading up to the alteration is disclosed by the majority owner and the shares are valued by an independent expert – and materially – requiring that the price offered and other terms of expropriation are fair.

Considered from a Nordic point of view the weighing exercised in the Australian judgement would have been utterly irrelevant in Finland; the proprietary nature of a share is absolute in except in those cases stipulated in the FCA or some other Act.[35] Generally not a one share can be expropriated against its owner´s will by a decision of other shareholders no matter were the compensation just or not; she has an absolute veto right even both she and the company were better off. Thus her right to her shares is proprietary in the strictest sense.[36]

2.3. Self-Interested Voting

As a starting point each member of a Finnish company may usually exercise her rights to vote as she wish, so that she can take account of her own interests to the exclusion of conflicting interests of others. This freedom to vote is subject only to few exceptions. The underlying idea is that it is not obvious *ex ante* that *e.g.* a certain business transaction with one of the owners is disadvantageous to the company and other shareholders. Instead, the protection of the company is supposed to follow from a principle of equal treatment that is manifested in the General Standard of the FCA (see next section).[37]

The majority shareholder of a Finnish company is not allowed, however, in certain cases take advantage of her voting power if she has a personal interest in the issue. Pursuant to Ch. 9 Sc. 3 Para. 2 a shareholder – a majority owner as well as a member of minority – may not vote in a matter that relates to granting a discharge to her, an action against her or her discharge from liability in damages or from another obligation towards to company. Accordingly, a shareholder, who is also a member of the Board, may not vote for a resolution of an annual general meeting (later “AGM”) on discharge of the Board members from liability in connection with the adoption of the financial statements. The same applies to a

[35] Compare to the criticism expressed by Hill 2000, p. 64-67; *inter alia* Hill states (p. 65) that ”[t] the court´s approach [to the Gambotto case] effectively reverts to the old 19th century concept of vested rights, the inflexibility of which majoritarism was designed to overcome.”

[36] By chance the FCA stipulates that a owner of 90 per cent of shares has a right to redeem the other shares at a fair price set by an independent expert, but this stipulation is a outcome of reasoning of the legislature. Thus the limit cannot be set any lower than 90 per cent by an amendment of the Articles. See ch. 7.2 below.

[37] In this respect the Finnish law differs clearly from its American counter-party. In the US a self-interested (majority) shareholder is not generally permitted to ratify a transaction between itself and the company; she is excluded from the vote. Only the majority of votes cast by other shareholders, who are disinterested in the transaction, can ratify the transaction, see *e.g.* Coffee 1999.

matter that relates to an action against another person or her discharge from liability if the matter entails for her a material benefit that may conflict with the interest of the company. The aforementioned restrictions to voting are clear-cut exceptions to the one of the most basic rules of the Finnish company law *i.e.* that a shareholder has voting power in accordance with her ownership of the shares issued by the company. Therefore Finnish legal commentaries advice to interpret these stipulations restrictively. As there is no indication against, a shareholder may vote herself in an election of the Board members; neither she is denied the right to vote for a contract between herself and the company.[38]

3. REQUIREMENT OF EQUAL TREATMENT

The most universal statement for equality in the context of Finnish company law is included in the Ch. 3. Sc. 1 of the FCA: All the shares in a company shall entitle their holders to equal rights in the company. The Articles may, however, provide that the company shall have different classes of shares. In such case the Articles must also include provisions regarding the differences between the classes, the number of shares in each class, and the shareholder's right to subscribe to new shares in new issue. Companies may also issue *non-voting shares* with a specific interest in the company's assets, in most cases a specific right to dividends or a right to non-distributive return. These *preferential shares* must be issued within the limits of minimum and maximum share capital to the effect that the shares with voting rights must always amount to the minimum share capital.[39]

The various classes of shares may have different rights to the assets of the company or different voting power in the GM or have other differences as stipulated in the Articles. With the exception of preferential shares,[40] each share shall have at least one vote in the GM and the difference between the voting power of different classes of shares may not, however, be greater than twenty to one (FCA Ch. 3 Sc. 1a Para 1).[41] Also the preferential shares shall have voting rights in certain specific situations.[42] We shall have a closer look on voting structures in the section 3.4 of this article.

[38] Toiviainen 1998, s. 108.

[39] In the US the RMBCA (§ 6.01(c) and (d)) permits as well the issuance of shares with different preferences, limitations, and relative rights. A notable difference between the Finnish and the American law is that while in Finland the authorisation of different share classes and their features can be decided only by shareholders at a GM, the RMBCA § 6.02(a) provides that this decision can be delegated to the Board through a stipulation to that effect in the Articles.

[40] The preferential shares are entitled to a dividend or non-distributive return without an authorising decision of the GM thereto. Such s right arises from the provisions of the FCA and the Articles (FCA Ch. 3 Sc. 1b and 1c).

[41] In contrast the US state laws do not generally set any limits to voting differences that can be adapted in the Articles; RMBCA § 6.01(c)(1): ”The articles – – may authorise one or mores classes of shares that have special, conditional, or limited voting rights, or no right to vote, except to the extent prohibited by this Act.”

[42] Voting rights of preferential shares are activated in a situation where Articles are to be amended if it

3.1. Equality Among Shareholders

Besides to multiple provisions requiring decisions to be made with qualified majority, the core of minority protection in Finland is generally understood to derive from so called “General Standard” of equal treatment. The right of a (majority) shareholder to exercise her voting rights at a GM as she pleases is subject to equitable considerations that will make it unjust to exercise them in certain ways. The requirement of equal treatment is to be understood as a counterweight to majority principle.[43] The requirement for equal treatment is manifested in the ”General Standard” of the FCA (Ch. 9 Sc. 16): ”A general meeting of shareholders may not make decisions liable to cause a shareholder or a third person unjust enrichment at the cost of the company or another shareholder.”[44] The nature of general standard is mandatory – as a statement of its importance. Thus a company cannot deviate from the standard by inserting a clause to that effect in the Articles.[45]

Importance of this standard cannot be overemphasised in the Finnish context. It overrides all the other provisions – even those explicitly expressed in black letter law – of decision making at a GM. It is all-embracing as well completing: the minority is protected beyond the specific rules stipulated in FCA.[46] Even if the proposal put forward in a GM is formally in accordance with the specific provisions of the act, it can breach the general standard if it gives an undue advantage to the detriment of the company (*i.e.* all the other shareholders as a whole) or a certain (minority) shareholder. The general standard provides that the GM – even if a resolution is made in compliance with the majority requirements of FCA and Articles – cannot pass any resolution whereby certain shareholders or other persons may clearly obtain an undue advantage at the expense of other shareholders. Majority shareholders are not allowed to commit a wrong on the minority in the exercise of their votes at a GM.

> A textbook example of wrongful action is the majority shareholder authorising the sale of company products or other property to themselves at a price under the current market price. In this so called “tunnelling” method a majority owner takes advantage of her voting power at a GM to pass a resolution on a transaction involving company property and then the Board executes the resolution with consequent damage to the other shareholders.[47]

would alter the rights of holders of preferential shares or in other situations possibly stipulated for in the Articles. Further, the preferential shares gain voting rights if the shares have not been paid the required dividend within 6 months of the end of the required period.

[43] Timonen 2002, p. 138.

[44] See Tenhunen 1997, p. 66-67.

[45] This standard was introduced in the Finnish companies legislation back in 1935, see Cederberg 1936. Of the Scandinavian tradition in this respect see Olsson 1967.

[46] Poutiainen 2001, p. 67. Usually the preventive effect of these clauses is stressed in the literature: they are aimed to deter potential abuses before they occur.

[47] Even if the minority owners could sue to challenge resolution taken by the GM, Coffee (1999) claims that they would not be able to raise an effective challenge because in civil-law countries the requirements

On the other hand, it should be noted that the general standard neither provides each shareholder equal powers nor evens out the quantitative differences between shareholdings. Thus the general standard does not promote capital equality.[48]

Johnson et al. (2000) makes a general claim that in civil-law countries group interest has priority over principle over equal treatment. However, that does not apply to Finland. The group interest is alien to FCA: A majority shareholder is not allowed to "tunnel" funds from a subsidiary company at the cost of other (minority) shareholders. Although Finnish tax legislation[49] recognises a possibility of "group subsidy" between two companies if a one of them owns at least 90 per cent of the other,[50] the General Standard of the FCA does not allow this kind of transaction to the detriment of other shareholders in a subsidiary company. It is objectionable for a subsidiary to support its parent company if that transaction leads to non-equitable treatment of other shareholders in the subsidiary. This applies also to possible loans between companies belonging to same group. Even though loans from a subsidiary to its parent company are not prohibited (FCA Ch. 12. Sc. 7), the parent has to pay (at least) a market interest for the loan in order to ensure that the principle of equal treatment is not breached in case that the subsidiary has also minority shareholders.

> Empirical tests do no support the hypothesis that tunnelling is an actual threat for the minority shareholders in Finland. For sure, it is quite "a mission impossible" to measure directly the private benefits that are – instead of being shared equally – tunnelled to the controlling owner. Nevertheless, economists have customised methods to assess indirectly the magnitude of private benefits.
>
> One method is to estimate the price difference between two classes of shares that are identical in all other aspects but the voting rights attached to shares meaning *e.g.* that the shares in the first class have multiple voting rights while a share belonging to the other class entitles its holder only to one voting right.[51] If control is valuable, then the mechanisms allocating the control – *i.e.* the different votes attached to shares – should be valued as well. In a fresh cross-country study sponsored by professor *Tatiana Nenova* assessed the control benefits of multiple voting rights structures; the study covered 661 dual-class firms in 18 countries, using data for 1997.[52] Nenova found that in Scandinavian civil law countries the av-

for disclosure of a transaction are minimal.

[48] Poutiainen 2001, p. 67.

[49] Finnish Act on Group Contribution in Taxation (No. 825 – November 21, 1986). See Ministry of Finance 2001, p. 44 and Sonninen 1998, p. 235-236.

[50] Pursuant to the aforementioned act, a contribution between a parent company and its subsidiary can be deducted from the taxable profits of the contributing company if it is as well added to the taxable income of the recipient company.

[51] Of the Finnish legislation regarding dual voting structures see sc. 3.4 below.

[52] See Nenova 2000. The determinants of control benefits were explored in a consistent fashion across countries. Nenova applied measures of the general strictness of the legal environment, an index of takeover regulations, and a measure of power-concentrating provisions of Articles, the probability of a con-

erage private benefit was the lower (0,5 %) compared to common law countries (4,5 %); for Finland the outcome was negative (-5 %) while in American firms the owners of multiple voting shares enjoy a benefit of 0,2 %. Thus this result does not provide any evidence of that the controlling shareholder, who derives her power position from multiple voting shares, could in Finland tunnel significantly higher private benefits to herself than in the US.

This conclusion is further strenghtened by an another cross-country research published in 2002 by *I.J. Alexander Dyck* and *Luigi Zingales*. They apply a different methodology than Nenova: in their paper the private benefits of the major owner are estimated by assessing control block transactions; altogether 412 control transactions in 39 countries are examined between 1990 and 2000. Whenever a control block of shares changes hands, Dyck and Zingales measure the difference between the price per share paid by the acquirer and the price quoted in the market the day after the sale´s public announcement. If the price of the block is higher that the market price in the following day, the difference represents an estimate of the private benefits enjoyed by the block´s owner.[53] In their results the authors report that the estimated block premia in Finland is on average 2,5 per cent of the company´s equity capital while the same figure for the US firms is 1,8 per cent.[54] This difference in not so significant that on it could be based a claim that the possibilities for tunnelling private benefits to a major owner are clearly larger in Finland than in the US.

To put some more flesh on the bare bones of the General Standard we can consider a famous American case, *Nixon v. Blackwell* of year 1993, from a Finnish perspective of equal treatment. In this case directors were offered by the company the possibility to have their Class B shares redeemed with funds from "key man" insurance purchased by the company. The other – *i.e.* non-employee – Class B shareholders sued, alleging they were improperly

trol contest, and costs of holding the control block. She controlled for differences in the security value of the share classes, *e.g.* differences in dividend payments and liquidity. The value of control, or equivalently the total value of votes in the control block, ranged from about 0 per cent in Denmark to 50 per cent of firm market value in Mexico. Legal environment variables explained 75 per cent of the cross-country variation in the value of control benefits. See also Coffee 2001 who concludes (p. 2162) from Nenova´s results that "– – the assumed superiority of common law to civil law represents a gross oversimplification."

[53] Dyck – Zingales 2002. The authors found that the value of control ranges between –4 and +65 per cent, with an average of 14 per cent. In countries where private benefits of control are larger capital markets are less developed, ownership is more concentrated, and privatisations are less likely to take place as public offerings. Dyck and Zingales also analyse what institutions are most important in curbing these private benefits. A high degree of statutory protection of minority shareholders and high degree of law enforcement are associated with lower levels of private benefits of control, but so are a high level of diffusion of the press, a high rate of tax compliance, and a high degree of product market competition. It is even suggested that the 'non traditional' mechanisms have at least as much explanatory power as the legal ones commonly mentioned in the literature: in a multivariate analysis newspapers' circulation and tax compliance seem to be the dominating factors.

[54] *Ibid*, see Table IV.

excluded from the repurchase program. As the program was launched after the plaintiffs had purchased their Class B shares, they could not have been able take the program into account in the price they were willing to offer for the shares they bought. Nevertheless, the Delaware Supreme Court rejected the plaintiffs′ allegation, because the Court identified a company benefit with the exclusive repurchase program: to prevent the shares from passing to descendants of employees. Chief Justice *Veasey* put it bluntly: "shareholders need not always be treated equally for all purposes".[55]

Most unlikely this kind of judgement would have ever been possible in Finland. The General Standard Ch. 9 Sc. 16 of the FCA provides the "smell test" that is open for Courts to apply. The General Standard does not, however, ever allow a Court to look beyond a person′s status as a shareholder. Nowadays also the Finnish commentators accept in principle, at least, the Anglo-American *Business Judgement Rule*,[56] but it cannot overcome the General Standard. Thus the Rule applies only to the management of business is the pursuit of profit, not to the relationship between the owners of a company or division of profit that has accrued to the company.

The General Standard requires the majority to act loyally towards the company as well the minority. A breach of this duty sets the majority under the threat of being made liable for damages caused by the decision made at GM in accordance with the majority′s votes. Chapter 15 Section 3 of the FCA stipulates that "a shareholder shall be liable to compensate a damage caused to the company, a shareholder or a third person to which he has contributed through a wilful or grossly negligent act infringing FCA or the Articles." In the Finnish legal literature it has been stated that this duty accentuates proportionally as the number of shares and votes the majority owns increases. On the other hand, it can be clearly seen from the wording that liability can follow only from active participation in the decision making. If majority remains passive, there is no threat of liability for damages.[57]

The decisive factor for a court to consider is the actual consequences of the act or measure by the GM. Thus the judgement has an objective nature. It is nor required from to plaintiff to provide proof that the shareholders at the GM understood that the consequences will breach the general standard. On the other hand, she has the burden of proof that damage actually occurred.[58] The concept of "unjust enrichment" lies also in the heart of the general standard. It is noteworthy that there is no requirement for enrichment to be essential. On the other hand the word "unjust" is to be read that shareholders may, to a certain extent, pursue their own interests in exercising their influence.

[55] Cox 1997, p. 617-619.
[56] The Business Judgement Rule is examined closer in the next chapter.
[57] Toiviainen 1998, p. 134.
[58] Savela 1999, p. 210-211.

3.2. Equal Treatment By the Board

The principle of equal treatment of shareholders applies also to the decision making below the GM; pursuant to the General Clause (FCA Ch. 8 Sc. 14 Para. 1) the Board " – – may not undertake an act or a measure which is likely to cause unjust enrichment to a shareholder or a third person at the cost of the company or another shareholder" The Board is also under threat of liability (Ch. 15 Sc. 1): A Board member is liable to compensate all damage she caused in office to a shareholder by an act infringing the FCA or the Articles either wilfully or negligently. A member is as well liable for a wilful or negligent action that causes damage to the company; in this context it is not required that the action from which the liability derives from violates the FCA or the Articles. Liability does not require proof of intent – it is sufficient to show before the Court that the Board member acted negligently.[59]

A Board is bound to the company – and its shareholders – by a *duty of loyalty* that requires members of the Board subordinate their personal interests to the welfare of the company. The obligation to watch over the company interest is based on the above-referred Ch. 8 Sc. 14 Para. 1 of the FCA.[60] Consequently members of a Board may not use company assets or confidential information to their personal advantage.[61] Similarly they must refrain from putting their personal interests above of those of the company; a membership in a Board may not be used in such way that is contrary to the interests of the shareholders.

The status of a Board member is clearly distinct from the role of a shareholder. However, a member may operate in capacity of a shareholder.[62] While a shareholder can generally vote in a GM as she pleases subject to equitable considerations referred to in the previous section, a member of the Board does not – in her position as a Board member – enjoy same kind of freedom in her actions in the Board even if she were a (majority) owner of the company. Pursuant to Ch. 8 Sc. 14 Para. 1 she surely is under the very same requirement to take into her consideration the equitable treatment of shareholders as a shareholder at a GM, but, in addition to that, she can never vote as a Board member in favour of transaction in which she has a personal interest. She has to abstain from voting on the proposed transaction in a Board meeting, even if she could second the proposal at a GM. Secondly, she must also reveal to other Board members her conflict of interest. The interested member is not relieved from the requirements of loyalty by simply being absent from the Board meeting that accepts the transaction in which she has personal interest in. Disclosure must be made to the Board in order to fulfil the duty of loyalty. Loyalty requires that each Board

[59] *Ibid* 1999, p. 221.

[60] *Ibid*; Castrén 1998, p. 125.

[61] This kind of activity violates also certain provisions in the Finnish Penal Code that protect a company´s trade secrets and – in context of a listed company – provisions to prevent misuse of insider information in trading with securities issued by the company.

[62] Savela 1999, p. 230.

member – absent or not – discloses in full any potential conflict of interest that might arise in a business transaction decided by the Board. The Managing Director, even as a non-member of the Board, is under the same duty.

> This is well-established in the Finnish case law, as ruled by the Supreme Court of Finland, for example, in Case 1997:110. The ruling dealt with the question what is the essence of full disclosure -requirement in fulfilling the duty of loyalty. The defendant in the case was a bank director, who was also a Board member in the same bank. On the other hand he had a personal interest in form of significant ownership in a company which had applied for a major loan from his bank. Before the Board was to make the decision on whether to grant a loan or not, the director had duly notified the other Board members that he had personal interest in the company applying for the loan and he also abstained from the decision making. Thus the formal requirements for handling the application by the Board were followed orderly. The loan was granted. However, the applicant company turned later on red and could not pay interest on the loan nor repay the principal; the company ended up in a bankruptcy finally. Then it was discovered that the financial standing of the company had been worse than the information provided in the application had led the other Board members to understand in the first place. The Supreme Court held the director was liable for the damages to the bank. According to the judgement the Managing Director had not duly assured himself that the information in the application was true and fair. This was required due to his personal interest in the applicant. In this sense he had violated the full disclosure -requirement and had not fulfilled his duty of loyalty towards the bank where he held the position of a director and a membership in the Board.

The principle of equal treatment and on it grounded requirement for a Board member and the Managing Director to act loyally towards company and its shareholders is conceptually above so-called *Business Judgement Rule.* Decisions by the Board or the Managing Director may concern situations in which it is necessary *ex ante* to consider with sufficient care the possible benefits and risks with regard to the action. If the action is considered acceptable beforehand, even the fact that the action ended on red later, *ex post*, due to a miscalculation of the decision-makers, cannot create liability pursuant to Ch. 15 Sc. 1 of the FCA.[63] A honest mistake cannot be deemed negligible in sense of the said provision. A Board member or a Managing Director is not to be held liable for the realisation of risks connected to business activity without having established her own conduct as blameworthy. She is not an insurer of business success. [64]

[63] In the *trauvaux prépratoires* of the FCA is stated that members of the Board are required to manage the company affairs with all care and they are liable for the damages they cause by an action or omission, irrespective of whether the negligence is gross or slight.

[64] Castrén 1998, p. 123.

To benefit from the Business Judgement Rule, the Board members and Managing Director must act *bona fide* in the best interests of the company as a prudent person in a similar position would exercise in the same situation – a fact that a member participates in the work of the Board with the same care as she manages her own affairs is not a sufficient condition to remove the liability.[65] Although the FCA includes no explicit provision on *duty of care*,[66] it is in force as general principle of law requiring rational decision-making on informed basis in the interests of the company.[67] To become informed, a Board member and a Managing Director must do whatever is necessary: attend meetings, read proposals thoroughly and ask for extra information if needed – if a member lacks the expertise that is required in the Board work of particular company, she should either use the help of expert inside or outside the company or resign from the Board.[68]

In determining liability the Finnish courts will distinguish between members of the Board who are insiders and outsiders, holding insiders to higher standards of care.[69] Thus a difference is made between those that are on the company´s payroll also in another role than as a member of the Board, *e.g.* in the position of a division manager, and those who are not; the same distinction applies to the chairman of the Board and its ordinary members.[70] Besides, if a certain person is placed on the Board due to her specialised skills, her performance may be tested by different (*i.e.* higher) standard.[71]

3.3. Share Issues and Pre-emptive Rights

The principle of equal treatment is manifested clearly in the pre-emptive rights of shareholders. As a general rule, when a Finnish company issues new shares or other equity-related instruments, the current owners are provided a right to participate in the issue in order to keep their relative share in the company intact. In this purpose existing shareholders have pre-emptive rights to subscribe to the new shares, stock options or convertible loans in the same proportion to which they own shares prior to the capital increase. The fact that the shares of different classes are issued in the mutual proportion of shares of different classes shall not be deemed as a deviation from the pre-emptive right if the shareholders have, in proportion to their previous share ownership in the company, a primary

[65] Savela 1999, p. 225.

[66] According to the preparatory works of the FCA the Board is under a duty to see to it that the affairs of the company are managed properly. This is made explicit in the Ch. 8 Sc. 6 Para. 1: "The Board – – shall be responsible for the management and the proper arrangement of the operations of the company."

[67] The duty of care -concept has similar substance in the US; RMBCA § 8.42(a): "An officer with discretionary authority shall discharge his duties under that authority: (*i*) in good faith; (*ii*) with the care an ordinary prudent person in a like position would exercise under similar circumstances; and (*iii*) in a manner he reasonable believes to be in the best interests of the corporation."

[68] Savela 1999, p. 225.

[69] This difference is acknowledged also in the US law, see Pinto 1998, p. 267.

[70] Castrén 1998, p. 120-121 and 126.

[71] Savela 1999, p. 225. This is the case in American companies as well, Pinto 1998, p. 267.

right to shares of the same class and a secondary right to shares not subscribed under the primary right (FCA Ch. 4 Sc. 2 Para 1).

> As La Porta *et al.* correctly state, the Finnish shareholders enjoy the prerogative right in share issues. If new shares will be issued by means of an increase of the share capital ("new issue"), it must be approved by the GM. If the increase remains within the limits of the share capital authorised in the Articles, the Articles are not required to be amended. Hence, such decision can be adopted in the GM by the vote of a simple majority of all votes cast unless the Articles provide that the approval of a qualified majority is required.

A new issue must be approved by the GM.[72] However, the GM may authorise the Board for a certain period, maximum one year, to increase the share capital by a specific amount or up to the maximum share capital authorised in the Articles. The GM may also give authorisation for setting aside the shareholders´ pre-emptive rights in connection with this.[73]

The shareholders may give-up their pre-emptive rights in the interest of the company. Pursuant to the FCA Ch. 4 Sc. 2 Para. 2, it is possible, for a weighty financial reason of the company, to deviate from the pre-emptive rights of the shareholders if a majority of at least 2/3 of the votes cast and represented in the shareholders meeting agree ("*directed share issue*").[74] The FCA contains no provisions what constitutes a weighty financial reason. In practice listed companies have deviated from the pre-emptive right, *inter alia,* in order to issue shares to their employees. However, also a deviation of this kind must be in accordance with the General Standard to ensure that no resolution of GM shall provide a third party with an undue advantage at the expense of the company.[75]

> Disapplication resolutions have become quite routine items on an AGM agenda of listed companies in Finland. In practice the Boards are usually authorised to issue

[72] If the increase remains within the limits of the share capital already authorized in the Articles, the Articles are not required to be amended. Hence, such decision can be adopted in the GM by the vote of a simple majority of all votes cast unless the Articles provide that the approval of a qualified majority is required.

[73] Unlike a new issue, a "*bonus issue*" may only be effected by the GM. In a bonus issue an amount corresponding to the aggregate nominal value of shares is transferred to the share capital from the cumulated profits and other "non-restricted" equity in the balance sheet.

[74] If the deviation proposed is in favour of the inner circle of the company, the proposal shall also contain an account of the portion of the share capital in the company held by a member of the inner circle and the portion of the voting rights held by him as a share of the voting right attaching to all the shares of the company before and after the new issue in case he subscribes to all the shares offered to him and the new issue is also otherwise subscribed to in full (FCA Ch. 4 Sc. 4 Para.1 *in fine*).

[75] Most US company statutes either (*i*) grant pre-emptive rights but allow them be negated in the Articles; or – as stated in the RMBCA § 6.30(a) – (*ii*) deny pre-emptive rights except to the extent that they are granted in the Articles. As explained above, the FCA does not allow such general negation of the pre-emptive right that is possible in the US.

> new shares without pre-emptive rights up to amount equalising one fifth of the current share capital. The authorisation can be formulated in general terms, stating precisely only the maximum amount of the issue, leaving to the Board the decision concerning subscribers, the number of shares and the issue price.[76] However, an authorisation can be granted only for a year; to stay in force for a longer period it has to be renewed in the next AGM.

3.4. Classes of Shares

3.4.1. Ordinary shares. Pursuant to Ch. 3 Sc. 1 Para. 1 of the FCA "*[a]ll the shares – – shall entitle their holders to equal rights in the company.*" The Articles may, however, stipulate that the company has shares with different rights. In such case the rights attaching to each particular class of shares are to be set out in the Articles. Different classes may be established at the formation of a company but a new class can be introduced as well later, in the context of increasing the equity capital by a share issue or by dividing an existing class in two or more classes.

> An introduction of a new class which grants the holders of shares less benefits or other rights than those conferred on existing shares may be passed at a GM by the supermajority generally required for an amendment of Articles. On the other hand, the division of existing unitary share capital into different classes will require the consent of each and every shareholder whose legal position will be impaired (Ch. 9 Sc. 15 Para. 1 Subpara. 4). Thus this kind of procedure is cumbersome in practice unless each share of a existing class is divided into new ones in which case – as the current shareholders receive all the new shares – no shareholder can claim that her benefits or other rights are diminished by this action.

The Articles may stipulate that an ordinary share entails economic rights that distinctive to its class. Among these are *inter alia* different rights to share in the profits of company or preferential status to the assets in liquidation. A more typical stipulation, however, is that the shares of a certain ordinary class carry more votes the others. Thus, as *La Porta* et al. inform us,[77] the principle of "one share one vote" is not a mandatory rule in Finland. The law sets, however, an absolute maximum for voting differences: the number of votes carried by a share belonging to a class may not be more than 20 times the number of votes entitled by a share of another ordinary class (FCA Ch. 3 Sc. 1a Para. 1 *in fine*). In other words, the difference in voting rights may not be greater than twenty-fold. For example, if a company has issued two classes of ordinary shares, whereof the shares in class A entitle

[76] Timonen 1992, p. 298.
[77] La Porta *et al.* 1998, p. 1131.

to one vote each, the highest possible number of votes for each share in class B is 20. However, each share shall always carry at least one vote.[78]

Even the widest allowed difference mentioned above does not lead to a nullification of the lesser class in the governance of the company. Despite the difference the FCA requires voting per class in certain matters. A majority has to be obtained in each and every class of ordinary shares to have a resolution of a merger adopted.[79] Thus a majority of the shares with multiple voting rights does not guarantee *per se* to their owner an absolute power to form the terms of a merger to the detriment of the holders of shares with lesser voting rights. The same rule applies also to a division of a company as well to share repurchases: the required majority has to be obtained in every class of shares present at the GM.[80]

The right to have multiple voting rights does not necessarily need to be general, covering all the issues that may be put on a vote at a GM. A share may entitle to multiple voting rights only in certain issues. Examples of these, *inter alia*, are amendments of Articles and election of Board members.[81]

> It should be noted that the voting rights that a share entitles its holder to, cannot be stipulated as dependent on the holder´s person. This means *inter alia* that so called “golden shares” that allow the government as an owner to have absolute veto right over other shareholders in certain matters are not recognised in Finland unless they are re-classified as a separate class distinct from other shares.[82]

Moreover, the voting right differences the Articles may stipulate that a class is entitled to special rights of administrative nature in the company. For example, holders of shares in a certain class might have the right to nominate a specific number of Board members. Such right may be provided for the election of Auditors as well. In practice, at least for of listed companies, this kind of terms are almost non-existent.

The Articles may provide extra rights in voting or the context of another administrative matter. On the other hand, the holders of shares in an ordinary class cannot, by the Articles, be deprived the basic administrative rights of membership in a company. Companies are thus denied the possibility to issue a class of ordinary shares, of which may, for example, not include a right to attend a GM or bring a suit against a resolution of shareholders.

[78] Toiviainen 1998, p. 109.

[79] Toiviainen 1999, p. 91.

[80] Due to this class voting structure Hyytinen *et al.* 2001, p. 14, are ready to claim that rule of one share – one vote applies in Finland as a matter of fact.

[81] Poutiainen 2001, p. 68.

[82] See Pezard 1995, p. 85-95.

3.4.2. Non-voting preferential shares. Besides stating thoroughly the rights attached to each class of ordinary shares issued by the company, the Articles may provide for preferential non-voting shares as well. The FCA specifies statutory features of those shares. As a prerequisite to issue non-voting preferential shares carrying a right to vote only in certain matters handled at a GM, the act requires those shares to carry a specific economic benefit compared to ordinary ones (Ch. 3 Sc. 1a Para. 2). The FCA does not provide any detailed description of the specificity. Thus, in practice any financial advantage, even a trivial one, qualifies. Typically the benefit is connected to the right of dividends. This right may be determined as a prerogative to ordinary classes of shares or as a higher dividend rate.

Moreover, the Articles must stipulate the status of holders of preferential shares in various company actions: the Articles shall provide for the rights that a preferred share is entitled to *inter alia* upon a raise of the share capital and a merger with another company (FCA Ch. 3 Sc. 1c Para. 4). The Articles may as well exclude the pre-emptive subscription right of preferred shares which do not carry a right to a distributive share in the company assets in a liquidation (Ch. 3 Sc. 1c Para. 3).

The non-voting feature of preferential shares is not absolute. Firstly, a holder of preferred shares acquires voting rights, according to the number of shares in her ownership, whenever the GM draws a decision upon an amendment of the Articles if that amendment relates to the rights of a holder of preferred shares (FCA Ch. 3 Sc. 1b Para. 1). This right cannot be waived by a stipulation in the Articles to that effect. Secondly, a more general voting feature is triggered if the specific benefit to which a preferred share entitles to is determined as a non-equitable portion of profits and assets, *i.e.* fixed in the Articles to *e.g.* EUR 2 per share, and it has not been paid within eight months; in such case she obtains with her shares a right to vote in all matters handled at the GM until the benefit has been paid to her in full (Ch. 3 Sc. 1b Para. 2). This is a mandatory rule as well. On the other hand, the FCA provides as an enabling rule that the Articles may stipulate other situations in which voting rights are awarded also to preferred shares (Ch. 3 Sc. 1b Para. 1).

3.5. Take-overs

Equal treatment is vital also in the context of a take-over. However, the General Clause of Ch. 9 Sc. 16 in the FCA does not extend itself to acts taken outside the GM *e.g.* in an attempt to take-over the company. Therefore it has been considered reasonable to include in the FSMA a provision which requires the principle of equal treatment to be respected in a tender offer.

Equal treatment in a tender offer means that the terms of a offer must be same for all the offerees.[83] Thus a certain shareholder – *e.g.* owning the decisive shares for the tender to succeed – cannot be offered a higher price than others for her shares. This is a quite common rule in market economies.[84] In Finland the rule is mandatory; it cannot be negated by amending the Articles to that effect.

Perhaps a more striking feature of the Finnish system is that the offerees of a tender offer cannot be segregated in respect to their ownership in the company: an offer to buy a same number from each and every offeree is a breach of equal treatment because it would make possible for the offeror to favour certain shareholders at the cost of others. If this kind of segregation were allowed it would mean a sort of "counter-greenmail": a major shareholder could be actually left outside the sphere of offerees by preventing her from accepting the bid for an important part of her shares.[85]

The rule entails that offerees must be treated equally. However, as the rights and duties for the different classes of shares – *e.g.* with ordinary *vis-á-vis* double or higher voting rights – lead to the different valuation between the classes at the stock market, the investors holding only the ordinary shares cannot claim for the same (read: higher) price that the higher voting shares are entitled to. Thus the equality is "only" equality within each class of stock: investors owning shares at the same class must be offered the same price for their shares.

4. RIGHT TO PARTICIPATE IN DECISION-MAKING

Shareholders exercise ownership control at a GM through the power of their votes. Therefore the right of each shareholder to participate in decision-making of the GM is central to the Finnish system. Pursuant to the FCA several major decisions can only be made by the GM. Company affairs that are within the exclusive competence of a GM are explicitly stated in the FCA as well the issues which pursuant to the FCA can be decided at a GM if so stipulated in the Articles. This has significance in connection of minority protection. Generally powers of the GM cannot be without explicit provision of the delegated to the Board simply by including a stipulation to that effect in the Articles. The mandatory nature of the powers of a GM has the impact that a majority shareholder cannot eliminate the minority owner´s right to participate and hide real decision making from her fellow share-

[83] On the other hand, the principle of equal treatment means that the offeror does not have to care about the different economic circumstances of offerees may find themselves in respect for example to taxes.

[84] In the US similar rule is provided by the federal Williams Act of 1968.

[85] Astola 1994, s. 75. The Finnish rules are very similar to the American ones on this matter. Pursuant to the Rule 14d-10 established by the US Securities Exchange Commission (later "SEC") a tender offer for over five per cent of voting shares in a public US company must include all shareowners; in a case where the offer is partial, *i.e.* for less than all of the outstanding shares, tendered ones must be taken up by the offeror on a pro rata basis if the offer is oversubscribed, Ratner 1999, p. 112.

holders behind the scenes by simply passing through her decisive voting power at a GM such resolution that generally delegates the decision authority of certain matters to the Board and then let the Board members nominated by her votes to draw decisions that are favourable to her but possibly oppressive to the minority. Thus the provisions of the FCA that state the issues that are within the competence of the GM are no default rules in order to ensure the minority´s right to participate in decision making at a GM is respected in every company.

Of those matters which are exclusively within the powers of GM, the prime example is an amendment to the Articles. The Board can make a proposal for an amendment but the real decision making body is the GM.[86] On certain other matters the GM may delegate its decision power to the Board for a fixed period of time. This is the case in issuing new shares and other equity related securities and as well in redeeming and buying back shares (FCA Ch. 4 Sc. 4a, Ch. 6 Sc. 9 Para. 2 and Ch. 7 Sc. 3); nevertheless the ultimate power the delegate these issues to the Board is at the hands of the shareholders.[87]

4.1. Being Present and Voting at a GM

Generally, the right to participate in the decision making by voting is inherent in the ownership of a share. Thus the right to participate a GM of a Finnish company may not be restricted to shareholders who have a given number of shares in the company or who have held shares for a given period. Even a person who owns only one ordinary share issued by the company has the right to participate the GM.[88] This is a mandatory provision of the FSA: the Articles cannot provide a minimum requirements for a participation. On the other hand, as mentioned above, there is no general requirement of a quorum for the majority of the outstanding shares to be present at the GM.

The Articles may require prior notification of a shareholder´s intention to participate the GM. Such notification simplifies the administrative arrangements for the meetings. However, in order to eliminate the possibility of any abuse of this rule by the company insiders, who might set the date excessively early, the FCA (Ch. 9 Sc. 1 Para. 2) provides that the shareholder need not notify his participation earlier than ten days before the GM.

[86] The different approach of the US legal system is manifested in recent academic comments concerning attempts made by institutional investors to limit the power of the Board through the adoption of by-laws requiring the Board to redeem the anti-takeover poison pill. The mere fact that this kind of issue is raised by several American company law commentators may be considered as a statement that fundamental allocation of powers between the Board and the GM in the US is unclear; for a review see Ferrarini 2000, p. 11.

[87] *Cf.* Toiviainen 1998, p. 21-22.

[88] This ground rule applies also in the US: As each owner has the right to vote, she must as well have to right to be present at a meeting. A shareholder has the right to participate if she held shares on the ”record date” that the Board set for the meeting (RMBCA § 7.07).

The owner of an ordinary share has the right the participate the GM. On the other hand, participation of the owner of a preference share depends on the voting rights: if the preference share is non-voting on the matter, its owner has no right to participate the meeting. (FCA Ch. 3 Sc. 1b).

In a private company as well as in such public company whose shares have not been dematerialised (*i.e.* converted to book-entries), the right to participate is not depend on the registration of the ownership in the company´s share register: the shares can be presented at the GM and right to participate is granted if the person´s ownership of those shares is valid.

Pursuant to the FCA (Ch. 3 Sc. 5 Para. 1) a share may be issued only to a specified person. The law does not contemplate the issuance of *bearer shares*. However, the person named on the stock certificate or his transferee may endorse the stock certificate with a blank endorsement. The transferee of a share may not exercise any rights in the company arising out of the ownership before his name appears on the stock certificate and the transfer has been duly registered or alternatively, if registration has not occurred, she has notified the company of the transfer and has produced proof thereof.[89]

If the shares issued by a public company have been dematerialised, the participation right is established by the share register: the ownership must be recorded in the register 10 days before the GM (FCA Ch. 3a Sc. 11 Para. 1). If a person buys or acquires shares before the GM but after the record date she cannot participate in the meeting. However, in principle the seller is allowed to be present and vote at a GM even though she is no longer the ”real” beneficial owner of the shares.[90]

> In their paper La Porta *et al.* grant Finland a plus for not requiring that owners deposit their shares prior to a GM. Their conclusion is correct. The aforementioned requirement of registration does not mean that Finnish shares are technically blocked for trading between the record date and the GM. Thus the respective shares may be still be sold and bought on Helsinki Stock Exchange. The very idea of the recording procedure is only to allow the real shareholder to prove her right to vote

[89] The person must provide evidence of her ownership when she requests registration of a share in the company records or when she wants to be present in the GM without registration in books of the company. Generally, it is sufficient to show possession of the share certificate together with a chain of transfers beginning with the owner appearing in the share register of the company and ending with the person requesting registration. However, further evidence is required if there is reason to suspect that the person is not the legitimate owner, *e.g.* due to fraud in making the endorsement or theft of the share certificate. A share purchase agreement or other agreement evidencing ownership is needed to establish the ownership in the event that the company has not issued share certificates.

[90] See generally Kasanen 1999, p. 28; Sonninen 1998, p. 182. See also the homepage of the Finnish Foundation for Share Promotion: www.porssisaatio.fi. Similarly in the US a investor who buys shares after the record date does not have a right to participate in the GM.

and to prevent the share from being represented by two or maybe more “shareholders” at the GM.

4.2. Voting Caps in the Articles

The starting point of the FCA is that a member may take advantage of all the voting rights attached to her shares at a GM.[91] The Articles may, however, stipulate that a shareholder may only exercise her voting rights only to a certain, in the Articles specified maximum, for example up to five per cent of all the voting rights.[92] This “voting cap” -clause may be extended even further by stipulating that shareholders acting in concert, *e.g.* companies belonging to same group, are deemed to be one common interest which cannot vote with more votes than the maximum conferred on a single member. The Articles may in principle go as far as providing that each member shall have only one vote at a GM notwithstanding the number of shares in her ownership.

Besides, each and every owner of ordinary shares must have at least one vote. Thus, it is possible to prescribe in the Articles that a member is entitled to one vote for every tenth share that she owns, but not that an owner needs ten shares for one vote. In the first case the member may vote when she owns only one share, but she will not acquire the second voting right until she has eleven shares, in the second case the member could not vote at all until she had ten shares.

The votes can also be graded. The Articles may provide for an increasing or descending scale of votes. In an increasing scale the voting power of a shareholder is strengthened over-proportionally compared to the number of shares in her ownership. For example, a shareholder may be entitled to one vote per share for the first 10 shares she owns, but for shares from 11 to 100 she acquires two votes each, shares from 101 to 1000 three votes each and so forth.[93] She thus achieves more than one vote per share when the number of her shares increases. If the Articles stipulate for descending scale of votes, the case is opposite: the number of a member´s voting rights increases in a slower pace than the number of shares in her ownership presumes.

In theory, the Articles could also stipulate descending scale for the votes attached to shares of a certain class and a descending scale for the votes in another class. This possibility cannot, however, be taken advantage of in order to evade the above mentioned “twenty to one -rule” of maximum difference for voting rights between classes as the FCA (Ch. 9 Sc.

[91] If a shareholder participates in voting at a GM, she cannot vote in favor of proposal with some of her votes and against it with others; she has to cast all her votes in the same way. Toiviainen 1998, p. 114.

[92] The Insurance Companies Act 1979 provides a mandatory requirement for capped voting by limiting the votes that a shareholder may cast to 1/10 to all votes represented at a GM (Ch. 8 Sc. 5 Para. 1).

[93] This example is provided by Toiviainen 1998, p. 112.

3 Para. 1 *in fine*) provides that "– – *the number of votes carried by the shares of a [member] may not exceed twenty times the number of votes carried by the same number of shares of another [member].*" Thus, despite of possible contradicting stipulations of Articles, the number of votes of a shareholder is limited by the act to be at most twenty times greater than the number of voting rights entitled to another member who owns the same number of shares as the shareholder mentioned firstly.[94]

4.3. Voting Agreements

In order to secure investments in the company it may be desirable that the interested parties are able to bond their common understanding that the company will be managed according to certain predetermined rules. However, all the structures the parties would prefer are not allowed to be included in the Articles. A prime example is an absolute veto right in form of a "golden share";[95] arrangements that provide *de facto* such absolute right for the State, however, may be established by an Agreement, if the other parties of the Agreement, calculated together, posses with the State the absolute majority of voting rights in the company.

A holder of a share has the opportunity to vote at a GM at least with one vote. On the other hand, a duty to vote cannot be arranged by a stipulation to that effect as the FCA does not recognise this kind of an option. However, in an Agreement the parties to it may *de facto* establish such duty among themselves.

An opposite arrangement is possible as well: an example of the options that can be provided by an Agreement is a duty not to vote. As the FCA provides that each and every owner of an ordinary share has always at least one vote at a GM, one or more of the parties to the Agreement may consent – for a financial or another benefit – not to participate in the decision making of shareholders in order to rise the relative importance of the other parties of the Agreement.

4.4. Representation

A shareholder may vote or exercise her other rights at the GM either by herself or through a representative (FCA Ch. 9 Sc. 2);[96] the right to have a representative is mandatory law, *i.e.* the Articles cannot stipulate that the voting right can be exercised only by the shareholder in personal. Thus she does not have to show up in the meeting by herself. A owner can always give her proxy to her husband or to her fellow shareholder or any other person. Neither can the Articles limit the number of proxies which a person can dispose of.

[94] *Ibid*, p. 115.

[95] See generally Pezard 1995.

[96] In the US the RMBCA § 7.22(a) provides the same possibility for representation as the Finnish law by stating that "[a] shareholder may vote his shares in person or by proxy."

Pursuant to the new provisions included in the Act year 1997, the Articles may allow for voting by mail; in this case a proxy is sent in mail (or as a facsimile) to the Board or, in a similar manner, a shareholder can also authorise for herself another representative than the Board (Ch. 9 Sc. 2a). The proxy is by no means a general document to power the Board to support its own proposals. Instead, voting takes place through a detailed form allowing the shareholder to choose between adoption, rejection or abstention to each resolution to be made at the GM. Thus this procedure allows voting against the resolutions proposed by the Board without the need to be present at the GM or to designate a special proxy to a representative. However, up till now, this procedure has been adapted by only few Finnish companies as the new proxy voting provisions are not mandatory or default rules in the FCA: before the rules of proxy voting can be applied, the Articles have to be amended by a supermajority of votes represented at a GM.[97]

> Here the data used by La Porta *et al.* is outdated. They state that there is no possibility of sending proxy by mail in Finland. In reality, as mentioned above, this possibility was established in 1997. However, proxy voting is not a mandatory or a default rule in the FCA: before the rules of proxy voting can be applied, the Articles have to be amended by a supermajority of votes represented at a GM. Therefore the score of 0 for Finland by La Porta *et al.* can be motivated.

On the other hand, GMs of Finnish listed companies make more and more use of electronic voting systems; this allows for immediate announcement of the outcome, as well a more advantaged possibility of having the GM convened at two or more different places. This has been already been tested in company practice: A certain Scandinavian financial institution held in Spring 2000 its AGM at very the same time in the capitols of Finland (Helsinki) and Sweden (Stockholm); the voting was carried out in both places by electronic means that were connected to each other in real time. New provisions of the FCA (Ch. 9 Sc. 4 Para. 2) support this progress.

4.5. Convening an Extraordinary Meeting

One of the main rules of transparency is that a public call must be given for every annual GM as well as for extraordinary ones – or in American parlance – “special meetings”. An extraordinary GM can be called whenever the Board sees it fit. However, shareholders holding at least 1/10 of the registered share capital can have an extraordinary meeting convened if they so require in writing for a specified matter.[98] The Board of Directors must

[97] Proxy voting – also by electronic means – is claimed to be one of the most distinctive features of the US corporate governance system, see *e.g.* Klausner – Elfenbein 1999, p. 360 - 363.

[98] Also in the US the RMBCA § 7.02(a)(1) authorises the owners holding at least 10 per cent of ”– – all votes entitled to be cast on any issue proposed to be considered at the proposed meeting” to call such

issue the notice of the meeting to other shareholders within 14 days from the request. The Articles may set the limit lower than 1/10 but not higher (FCA Ch. 9 Sc. 6 Para. 2). This means that in principle the Articles could stipulate that each shareholder, regardless of her holding, has the right to have an extraordinary meeting called. However, this kind of stipulations are very rare in corporate practice.[99]

> On this matter La Porta *et al*. correctly grant 1 point to Finland as the mandatory upper limit is set at the one tenth of the shares registered.

4.6. Agenda Setting and Counter-Motions at a GM

A fundamental precept is that a GM can make decisions only on topics that have been entered on a agenda that has been made known for the shareholders before the meeting. The convening notice ("call") of a GM shall include an agenda specifying the items to be decided. Items that are not in the agenda and thus not made known to the members in the call *ex ante* the GM, may be discussed at the meeting if, and only if, the chairman of the meeting so approves; however no resolutions can be passed with respect to those items. Only in case that all the shareholders are present at the GM and unanimous, the meeting may pass a resolution even in a matter not mentioned in the call (FCA Ch. 9 Sc. 10).

The Articles must state the matters to be handled at an AGM (Ch. 2 Sc. 3 Para. 8). This provision in not exhaustive: it only expresses the matters that shareholders must consider at their annual meeting. Owners can through their voting rights bind the Board in almost any matter concerning the company; at a GM the shareholders can as well express their non-binding view on matters that they cannot make formally decide.

The right to bring matters on the table at a GM is not a monopoly of the Board or the majority owner. Pursuant to the FCA Ch. 9 Sc. 7 each member, regardless the number of shares she owns, may submit a proposal to be included in the agenda and to be decided at a GM. This is possible if the requirement is made for the Board early enough to have the item included in the call. Proposals may be made for an AGM as well for an extraordinary GM. [100]

There is no statutory limits for the content of proposals. Thus the Board does not have in discretion over the proposals; in principle they have to be included in the agenda no matter of their substance.[101] So far proposals in listed Finnish companies, however, have typically

meeting.

[99] Toiviainen 1998, p. 30.

[100] In contrast the Rule 14a-8 issued by the SEC states that all shareholders who own stock worth at least $ 1000 are eligible to submit proposals.

[101] The SEC Rule 14-8 provides a shareholder in a American listed company the right to place in manage-

related to significant matters. For example, in Spring 2001 a private shareholder took advantage of this right in his attempt to have Supervisory Boards abolished from those listed companies in which the Finnish State is the major shareholder.

A shareholder´s right to make proposals applies to annual meetings as well as to extraordinary ones. The right cannot be completely eliminated by a stipulation in the Articles. A time limit for such proposals may be set; however, even if the date specified by the Articles has been passed, the Board must include the late proposal in the agenda and in the call, provided that this can be made without inconvenience. However, if one or several members of the Board – or of the Supervisory Board – are to be elected in the GM and this matter has been mentioned in the agenda included in the call, any shareholder has the right to present her candidature, even during the GM. Prior notice of the candidate´s person is not required.

Moreover, each member has the right to make counter-motions at a GM on those issues that are on the agenda. If a shareholder makes such counter-motion against a proposal of the Board during the discussion,[102] the chairman brings it to a vote even if it has not been expressly supported by any other member. The possible counter-motions brought through a proxy voting system, have to be voted on as well.[103]

5. INFORMATIONAL RIGHTS

5.1. Notice of Meetings

Firstly, in order to participate in the decision-making, a member has to know where and when the meeting takes place. Thus shareholders have to be notified by the Board of the date, hour and place of a GM. Notification can be made by a written announcement ("call") that is mailed to all known shareholders or published in a one or more newspapers as stipulated in the Articles.[104] The General Standard requires that the call is prescribed in the Articles so that it can – objectively considered – reach all shareholders in time.[105]

A Finnish minority shareholder is protected also by the rule that a GM may generally pass resolutions *only* on those matters that have been stated in the call.[106] Thus, each issue is to

ment´s statement proposals; the right, however, is not unlimited as in Finland: the management may exclude matters that they consider to be unrelated to ordinary course of business, see *e.g.* Pinto 1998, p. 271.

[102] See ch. 5.3 below.

[103] Toiviainen 1999, p. 89.

[104] In a similar way the US shareholders have to be notified of the date, hour and place of a GM in a written announcement (RMBCA § 7.05).

[105] Toiviainen 1998, p. 35.

[106] The American rules are almost identical with the Finnish ones. Pursuant to RMCBA § 7.05(c) the notice

be described in such way that its content is understandable for a shareholder from the call; description does not necessarily have to be utmost detailed; the requirement can be fulfilled *e.g.* by a reference to the Articles that state issues to be dealt at an AGM.[107] Besides, pursuant to Ch. 9 sc. 10 of the FCA, if the Articles require that a certain issue is to be dealt at meeting, the GM may pass a resolution on it even if a reference to the matter was not made in the notice.[108]

The FCA provides a mandatory time limits for the call to be made. The ground rule is FCA Ch. 9 Sc. 9 Para. 1 stating that the announcement must be made at most two months and at least one week prior the GM.[109] The minimum serves as a means to prevent unexpected *ad hoc* meetings orchestrated by the insiders in order to advantage of missing quorum requirements. The Articles must also stipulate the place of the meeting, *i.e.* the city or town in Finland where the GM is to be convened; thus the insiders cannot discourage the participation via changing the place unexpectedly from meeting to meeting. Thus the insiders cannot schedule the meeting at a remote site on little notice to discourage minority shareholders from participating.[110]

5.2. Financial Information

One of the most important legal means whereby minority shareholders acquire information is through mandatory disclosure. In Finland the disclosure requirements are stricter in a listed (*i.e.* publicly traded) company than in a private one. Central of these requirements from a point of view of minority owner is the Ch. 2 Sc. 7 Para. 1 of the FSMA: The listed company must, without undue delay, make public all its decisions and as well all information on the activities of the company that are likely to have material influence on the value of the shares (and other securities) issued by the company.[111] Any major development that is not yet public is informed via Stock Exchange and press release to the investors. The

of an extraordinary meeting of a US company ”– – must include a description of the purpose or purposes for which the meeting is called.” This kind of description, however, is not needed in call for an AGM unless the act or the Articles require otherwise (RMCBA § 7.05(b)).

[107] Toiviainen 1999, p. 84.

[108] There are certain issues which the Finnish legislator has considered to be so important to all shareholders that a separate call must be mailed even if the Articles stipulate that a GM is to be announced only by a public notice in one or more newspapers. In a pursuit of as high participation rate of the members as possible the FCA (Ch. 9 Sc. 9 Para. 2) requires that an additional personal notice is posted to all known members if at the GM is to be decided on: (*i*) an amendment of the Articles that substantially affects the position of present members; (*ii*) a reduction of the capital through redemption of shares; (*iii*) a buy-back of issued shares; (*iv*) winding up the company or cancelling the liquidation process; (*v*) merging the company with another one or dividing the company into a number of new ones; and (*vi*) transforming a public company into a private one. In the US there is no general requirement of a separate notice for this purpose.

[109] Of statutory exceptions to this ground rule see Toiviainen 1998, p. 33-34.

[110] In the US, pursuant to the RMBCA § 7.05(a), the notification has to made ”– – no fewer than 10 and no more than 60 days before the meeting date.”

[111] The American state laws require a company to in certain contexts to fully disclose material information on specific issues, see *e.g.* Pinto 1998, p. 270.

developments to be informed are not exhaustively stated in the Act: all that is required is a development which may lead to substantial movement in the price of the share by virtue of its effects on assets or liabilities or financial position or on the general course of the company´s business.

Thus all shareholders in a listed company must have equal footing on information: if a major shareholder knows – *e.g.* via her membership in the Board – a major development before it is published, she cannot take advantage of this informational advantage in her transactions with shares. She must refrain from dealings before the development it is published also to other investors. A breach of this duty establishes an act of insider dealing that is a criminal offence in Finland. Pursuant to the Finnish Penal Code (No. 39 – December 19, 1889) insider dealing is punishable by a fine or imprisonment up to four years (Ch. 51 Sc. 2).[112]

The financial statements of a listed company must disclose material and exceptional business transactions between the company and its parent company during the financial year. The Finnish Accounting Standards Board requires that a special note is made in financial statements *e.g.* if the prices applied in this kind of transactions deviates from the current market prices (General Standard of December 17, 1999: Sc. II:2.3.5.). The requirement is in essence the same as in the *International Accounting Standards*.[113] This provides an instrument for shareholders to raise questions of these transactions.

> According to a study by *the Center for International Financial Analysis & research, Inc.* annual reports of Finnish companies are among the most informative ones: on average they scored 77 points of 90 while their US counter-parties got only 71.[114]

The financial statements of all Finnish companies – private or not – are public. This means that anyone can get a copy of a certain company´s statements from the Trade Register.[115] Every company, no matter the size, has to file its financial statements within 2 months after the annual GM where the statements were adopted (FCA Ch. 11 Sc. 14). However, the financial statements are in effect made public *ex ante* the annual GM: pursuant to the Ch. 9 Sc. 9 Para. 4 of the FCA the financial statements have to be available for members´ in-

[112] See generally Kasanen 1999; Sonninen 1998, p. 183-184.

[113] In the US, this information is required to be included in the annual report (Form 20-F) that is filed with the SEC.

[114] Finland came out as the third in the study; *United Kingdom* and *Singapore* beat Finland by a single point, they both scored 78 points, see Kane 2000, p. 45. Generally, however, the US GAAP (Generally Accepted Accounting Principles) are considered to be more demanding than European or other standards, see Horsmanheimo 2001, p. 284.

[115] Pursuant to Sc. 12 of the federal Securities Exchange Act of 1934, publicity applies in the US only to the companies that are registered by the SEC; this means listed companies and other companies with dispersed ownership, *i.e.* number of the shareholders is at least 500, with at least $ 10 million in assets. See Pinto 1998, p. 269.

spection at least one week prior to the GM at the head office and, if she so requests, must be mailed to a shareholder without delay.

Financial statements have to provide true and fair view of the company´s financial position and result for the financial period ended (Accounting Act, Ch. 3 Sc. 2 Para. 1). Moreover, listed companies have to publish quarterly reports to that effect (FSMA Ch. 2 Sc. 5).[116]

5.3. Questions and Inspection of Books

At a GM any shareholder has the right to ask the Managing Director or the Board for further information on matters that may be relevant in assessing a matter being handled at the meeting, most notably the financial statements and the economic status of the company; the right to ask questions applies also to the relationship of the company to another company in the same group (FCA Ch. 9 Sc. 12).[117] Therefore, every member can raise questions of *e.g.* possible transactions between the company and its parent company if she finds these transactions suspicious.[118]

The chairman, chosen by the shareholders, conducts the meeting. Thus the Board or the Managing Director does not control who may speak.[119] There are no beforehand set time limits for speakers to formulate and set their question. Normally every member present at a GM has the right to speak as long as she pleases in order to explain her views. A restriction on the speaking time is often on the verge to be interpreted by the minority owners as the chairman´s condemnable attempt to breach the ground rule of equal treatment of the members.[120] In company practice, however, a speaker can be hastened or even cut off by the chairman if she considers that the speaker is not formulating a question pertinent to the business of the company. When all those willing to take the floor have spoken, the chairman declares the discussion ended. If counter-motions are made in the discussions, they will be voted on.[121]

However, the shareholder´s right to have her question *answered* is conditional: the information is provided only if the Board considers that it can be done without causing essential damage to the company. This stipulation justifies the denial to disclose business secrets to competitors. On the other hand, if the possibility of essential damage is present, the Board must provide the information asked for to the Auditors of the company and within one

[116] Also a public company that is not listed has to publish in an interim report its financial status and result at least on semi-annual basis, FCA Ch. 11 Sc. 12.

[117] Tenhunen 1997, p. 62.

[118] Similarly, at a meeting of an American company, a shareholder may ask any question pertinent to the business, including items not formally on the agenda, Klausner – Elfenbein 1999, p. 359.

[119] In the US, the Board has the control of speakers, *ibid.*

[120] Toiviainen 1998, p. 102.

[121] *Ibid*, p. 101-102; Toiviainen 1999, p. 89.

month from the GM the Auditors shall provide the Board a written statement on the matter. In this statement the Auditors have to express their opinion whether the information that the shareholder required would have affected an audit report or any other statement they had provided or were required to give to the GM. The statement is a public document: it has to be sent to the shareholder who asked for the information as well as made available to other shareholders.[122]

The Board or the Managing Director may try to take advantage of the right not to answer. When the minority shareholder suspects that to this right has been used unjustifiably, she can take the matter to the Court. However she has the burden of proof to present evidence for her claim.[123]

If the question asked by a shareholder cannot be answered on the basis of information available at the GM, the Board and the Managing Director must provide the answer after the meeting. The answer cannot be postponed forever: the FCA stipulates that the time-limit for providing a written answer to the question is two weeks from the meeting. The answer is sent to the shareholder who asked for it; other shareholders may study it as well at the premises of the head office.[124]

In principle a shareholder´s right for further information is limited to GMs. A minority owner cannot ask questions outside the meeting.[125] However, in a company with no more than 10 shareholders, everyone of them has the right to familiarise herself with the book-keeping records as well as other documents relating to the operations of the company if this is necessary to assess the financial statements and economic status of the company or any other matter handled at a GM (FCA Ch. 9 Sc. 12 Para. 4).[126]

However, this right is subject to the Board´s consideration: if it is deemed that the familiarisation will cause essential harm to the company, the Board may deny the right. The power of inspection is fraught with potential abuses, and the Board is allowed to protect the company from them. For example, a shareholder may properly be denied access to the company books and records to protect harassment or to protect trade secrets or other confidential information. In such case the Board is under obligation to provide the information to the Auditors in a similar manner as already referred above. In every case the shareholder who has familiarised herself with company´s documents, may not disclose or make use of

[122] Toiviainen 1998, p. 96. Obviously this kind of procedure is unknown to the American company law and practice.

[123] *Ibid*, p. 98, fn. 176.

[124] Also this sort of conduct seems to be alien to American companies.

[125] Toiviainen 1998, p. 97.

[126] In principle, the Articles of a company with an even wider owner base could provide for this kind of inspection right for a shareholder.

any information that she obtains from those if the disclosure or use of the information may cause essential harm to the company.[127]

5.4. Information Provided by Auditor

Besides their own efforts, minority shareholders can rely on other parties, most notably auditors, to ensure that the company is being operated on behalf of the common good of owners. In Finland auditors can be either lay persons or professional *i.e.* certified auditors.[128] An auditor is required to have such experience about auditing as well as accountancy and business affairs as is necessary in respect to the nature and scope of the activities carried out by the company to be audited. Also a lay auditor has to fulfil these general requirements of expertise (Auditing Act, Sc. 10 Para 1).

Auditors provide the AGM with the audit report on each financial year. In this report they have to state whether: (*i*) the financial statements have been prepared in accordance of Accounting Act and other relevant provisions and requirements; (*ii*) the financial statements give true and fair view of the result for the financial year; (*iii*) the financial statements can be approved by the GM; (*iv*) the net earnings (after taxes) should be dealt with as proposed by the Board; and (*v*) the Board and the Managing Director may be discharged from liability for the financial year (Auditing Act, Sc. 19 Para. 1).

To provide a report the Auditor has to examine the accounting records and the financial statement as well the governance of the company (Auditing Act, Sc. 17 Para. 1). If the financial statements do not disclose information required in the Accounting Act and other relevant regulation, the Auditor has to make a statement of this in her audit report and if possible, provide the missing information; moreover, she has always the right to include in her report information that she considers relevant to the shareholders (Auditing Act, Sc. 19 Para. 3). The Board does not have a veto right in this respect.

[127] In the US, inspection right is not limited to companies with 10 owners at maximum; each shareholder in every company has the right to examine specified company records for a proper purpose (RMBCA § 16.02). On the other hand, the Board has – as in Finland – the power to deny the access to the records. If an American shareholder is denied the right, she can apply to the Court of Chancery for an order to compel such inspection (see *e.g.* Delaware General Corporation Law, Sc. 220).

[128] At least one certified auditor is required if two or more of the following requirements were fulfilled during the preceding financial year: (*i*) balance sheet total was more than EUR 340.000, (*ii*) the turnover exceeded EUR 680.000, (*iii*) the average number of employees was 10 at least (Auditing Act, Sc. 11 Para. 1). For companies in which only certified auditors can be elected the limits are respectively: EUR 2.100.000, EUR 4.200.000, and 50 persons (Sc. 11 Para. 2). A certified auditor can be elected also for a smaller company. Minority shareholders are granted a special right in this respect: owners holding at least one-tenth of all the shares may require at a GM than a certified auditor shall be elected to be Auditor in a private company (FCA Ch. 10 Sc. 4 Para. 2).

If the Auditor finds that a member of the Board or the Managing Director has acted or failed to act in a way which may entail liability for damages, she has to state this in her audit report to the GM. The Auditor has the same duty in case where a member or the Managing Director has violated laws or the Articles of the company in another way (Auditing Act, Sc. 19 Para. 2). The Board or the Managing Director cannot veto against publication of this kind of information.

In such case that the company to be audited is a parent to some other companies, the Auditor has to examine also the consolidated financial statement as well as the relationship between the companies (Auditing Act, Sc. 17 Para. 2). Besides, in a group at least one of the auditors elected for a subsidiary company has to be an auditor of the parent company as well (Sc. 13 Para. 2). This requirement is vital as it guarantees that the Auditor of a subsidiary can have at her disposal all the relevant records to sort out possible transactions between the subsidiary and its parent company.

The Auditor is not required to examine only the accounting books and records, she examines the governance of the company as well. In the Finnish company practice the Auditor checks from the minutes of the Board that decisions drawn are in accordance (at least) with the FCA. If she finds irregularities that breach, for example, the equality of owners, she is under obligation to draw attention to this in her public audit report to the GM, as already mentioned above.[129]

The Auditors are elected by the AGM;[130] decision is taken by a simply majority of the votes given in the poll. This right of shareholders underlines the independence of the Auditors from the Board and the Managing Director.[131] On the other hand, the Auditors proposed at a GM are usually sought by the Board. However, any shareholder may make a counter-proposal at the meeting; the name of her nominee does not need to be provided to the Board or the other shareholders before the meeting. Thus the counter-proposal may be made even on *ad hoc* -basis.

Moreover, each shareholder has the right to demand an extra Auditor be appointed to participate in the audit besides the other auditors. If this motion is supported by shareholders holding at least 1/10 of all the shares or 1/3 of the shares represented at the GM, the shareholder who made the proposal may, within one month from the GM, apply to the Provincial Administration Board to have an approved auditor appointed as an extra auditor.[132]

[129] If the Auditor of a US company finds something in the books that appears to be fraudulent or otherwise inconsistent, she has to report it to the shareholders in a same manner as her Finnish colleague in order to escape her own liability for negligence, Pinto 1998, p. 270.

[130] The same principle applies also of American companies to those that are registered by the SEC.

[131] Of the independence requirement see Horsmanheimo 2001, p. 243-244.

[132] Tenhunen 1997, p. 63. State laws in the US do not seem to provide shareholders this sort of right.

Before the appointment, the Board of company has the right to be heard on the matter (FCA Ch. 10 Sc. 1 Para. 4).

The extra auditor is not an auditor only for those minority shareholders who seconded the motion of her appointment: her duties and rights are exactly the same as the other members of the auditing team have. Thus she cannot provide extra information for the shareholders. Her role is to be understood as an additional bond for the minority shareholders that they can trust the report of the auditors.

The Auditing Act includes also rules on the liability. An Auditor is liable to pay damages in accordance with the same kind rules as the Board members and the Managing Director (Sc. 44). The Supreme Court of Finland has ruled that Auditors who had recommended to the GM adoption of the financial statements and discharging the Board members from liability for the financial year, even if the Auditors should have noticed the defects in the accounts and the control systems, were liable to pay damages to the company. A criminal sanction may also be imposed on an Auditor guilty of misconduct in her duties.[133]

5.5. Special Inspection

Any shareholder may at the annual GM or at a meeting where the matter is on the agenda, propose a special inspection of certain specified matters connected with the governance or the accounts of the company. The right for an special investigation is of importance for minority when the seek to initiate a claim for damages against the members of Board, the Managing Director or the Auditor who has committed negligence.[134] If the motion is seconded by shareholders representing at least 1/10 of share capital or 1/3 of the shares present at the meeting, a shareholder may, not later than one month, request a public authority – the Provincial Administration Board – to appoint inspectors; in a public company with dual or several classes of shares (having different voting or monetary rights) the minimum support of 1/10 or 1/3 as stated above has to be acquired at least in one of the classes (FCA Ch. 10 Sc. 14 Para. 1).[135] The limits cannot be set higher but in the Articles may stipulate that the limits are lower than is stated in the default rule of the FCA.

The Provincial Administration Board hears, before making its decision, the Board of the company about the matter. In case the application for special inspection concerns a specific person, also that person has the right to be heard. The request for inspection shall only be met, if the Provincial Administration Board finds such request is sufficiently well founded

[133] Pursuant to the Auditing Act (Sc. 43 Para. 1) an Auditor who has submitted to an AGM an improper report may face a fine or imprisonment for a maximum period of one year, unless the offence is minor.

[134] af Schultén 1993, p. 108; Tenhunen 1997, p. 63.

[135] This kind of procedure is unknown to the American company law.

so that there are weighty reasons for the inspection. The Provincial Administration Board decides the number of the inspectors. Such investigator does not necessarily have to be an auditor by her training; she may be a lawyer as well. The inspectors issue a report of their findings to the GM and they entitled to a fee from the company (FCA Ch. 12 Sc. 14 Para. 2 and 3).

5.6. Transparency of Shareholders′ Ownership

The Finnish ownership in listed companies is utmost transparent because the book-entry legislation has the effect that name of every Finnish shareholder – even if the ownership consists of only one share – is marked in a public share record of the company and that register is open for everyone to study.[136] A register must be kept of the owners of shares issued by a Finnish company. In Finland bearer shares are not allowed; all shares have to be registered to a specified person. The basis for share registration is transparency: a share register has to be open for inspection not only for the management and fellow shareholders of the company but also for the general public. In a private company the share register is kept by the company itself. On the other hand the Finnish Securities Centre maintains the share register for each and every listed company; before a Finnish company can be listed in the Helsinki Stock Exchange it must join the Centre to have its shares dematerialised.[137]

Despite the principle of transparency, in a listed company whose shares are dematerialised *i.e.* transferred into the Finnish book-entry system, a foreign beneficial owner may have her ownership registered under the name of a custodian. In the Finnish stock market parlance this is called “nominee registration”. In practice nominee registration means that the beneficial owner cannot be identified from the shareholder list. However, pursuant to the Act on Book-Entry Accounts (No. 827 – May 17, 1991) Sc. 52 Para. 1, nominee registration is allowed only for foreign investors. Finnish investors must always be registered under their own name in the books of the company.[138]

The custodian, in whose name the shares appear on the list of shareholders, receives the dividends from the company and passes them on to the “real” beneficial owner. On the other hand, the custodian is not allowed to vote with nominee registered shares. The real owner has to come out and have her name stated on the shareholder list before she can gain the right to vote at a GM. Thus, if a foreign investor, whose shares are nominee registered

[136] See generally Kasanen 1999, p. 28. In an American company the list of shareholders is generally not open to the public. Only a shareholder has the right to inspect the list. However, even she must have a “proper purpose” for her inspection (RMBCA § 16.02 and 7.20(b)); this requirement intents to prevent shareholders from using information of shareholders for unjust personal benefit in pursuit to harass management or otherwise, Pinto 1998, p. 270-271, fn. 100.

[137] af Schultén 1993, p. 100-101.

[138] See the homepage of the Finnish Foundation for Share Promotion: www.porssisaatio.fi.

under a custodian, is going to attend a GM, she has to unbundle the nominee registration in a good time before the meeting to be able to have his ownership registered in the books of the company.[139]

The list of shareholders must be available at a GM. The chairman ensures that a list of shareholders present at the meeting is drawn up by her secretary and that the number of shares and votes of each member is marked on that list as well. The list is appended to the minutes of the meeting; the shareholders can examine the minutes at the head office and have a copies of the list against paying the expenses (FCA Ch. 9 Sc. 11 Para. 1 and 2).[140]

The Finnish Securities Markets Act contains certain obligations with respect to acquisition of shares in a listed company. These “flagging rules” – typical to all market economies – are of importance to investors and the management of the company as notable acquisitions often indicate a prospect of a take-over. Pursuant to Ch. 2 Sc. 9 of the FSMA anyone whose ownership in a listed company reaches, exceeds or falls below 1/20, 1/10, 3/20, 1/5, 1/4, 1/3 and 2/3 of voting rights or of the share capital, has a duty to disclose her ownership to the company and to the special supervisory agency (*Financial Supervision*).[141] The company notifies further the Stock Exchange which subsequently brings the disclosure to the public. [142] Moreover, the Finnish legislation requires that in the notes of a listed company´s financial statement is indicated all the investors who own at least 1/20 of the voting rights as well as the names of the 10 largest shareholders in terms of voting rights and the names of the 10 largest in terms of the share capital.[143] The same information must be included also in listing documents.[144]

[139] As already referred in the ch. 4.1 above, the ownership must be recorded in the books five days before the GM (FCA Ch. 3a Sc. 11 Para. 1).

[140] In a similar way, pursuant to the RMBCA § 7.20(c), the list of shareholders of an American company has to be available at a GM, and any shareholder of the company is entitled to inspect the list at any time during the meeting.

[141] See the web-page of the Finnish Foundation for Share Promotion: www.porssisaatio.fi. In the US the lowest disclosure threshold is the same as in Finland: 1/20 (the federal Williams Act of 1968, § 13(d)).

[142] Disclosure has to be made also in case where the shareholder enters into an agreement (*e.g.* option to buy more shares in the future) or other arrangement that effectively means leads her ownership to reach, exceed or fall below the limit referred above. Also the shares owned by others who can be considered to be under the influence of a person are taken into account when the extent of her holding is considered. In calculating the portion of ownership, a shareholding shall also include shares owned by a company controlled by the shareholder as well as shares which the shareholder may control under a contract concluded with a third party. See Astola 1994, p. 80-81; Timonen 1992, p. 300-301.

[143] Decision of the Finnish Ministry of Finance on the Regular Duty of Disclosure of the Issuer of Securities (No. 390 - March 25, 1999) Sc. 5 Para. 1(7).

[144] Decision of the Finnish Ministry of Finance on Listing Particulars (No. 197 - November 19, 1998) Sc.13 Para. 1(11).

6. RIGHT TO DIVIDENDS AND BUY-BACKS

6.1. Declaration and Payment of Dividends

In Finland the distribution of dividends is decided by the shareholders at a GM (FCA Ch. 12, Sc. 4.1).[145] The divided may not exceed the sum of profit for the financial period and the distributable funds consisting of accumulated (net) profits from the earlier years. The resolution of the GM is passed by simple majority unless supermajority is required in the Articles.

As a general rule, the GM may not distribute more dividends than the Board has proposed. This power may not be taken over by the GM, not even by an amendment of Articles to that effect. However, minority shareholders – representing at least 1/10 of all shares – have a right to require the company to distribute as a minimum dividend of an amount at least half of the distributable profit of the financial year (*i.e.* the profit net of deduction for reserve funds pursuant the Articles).[146] The shareholders may not, however, require more than eight per cent of the equity, stated in the balance sheet, to be distributed. If these requirements are not fulfilled, and the Board fails to propose a dividend, shareholders cannot in practice successfully bring a suit claiming for it.[147] On the other hand, if the Articles provides for a higher dividend, the Board must naturally comply with the stipulation (FCA Ch. 12 Sc. 4 Para. 4).[148]

> Sometimes dividends are improperly paid to the shareholders Generally, in such cases, a Finnish shareholder is obliged to return to the company the dividends or other assets she has received in breach of the Act but only if she knew or should have known the illegality of the dividend when she received it. Thus she can keep the dividend (or other assets received) if it was for her justified to assume that the distribution was executed in accordance with the FCA. If there remains any deficiencies after an attempt has been made to recollect the dividend from shareholders, the Board members as well any other persons – *i.e.* the shareholders who voted in favour the illegal dividend at a GM and Auditors – who participated in making or implementing the decision of distribution or in preparation or adoption of the faulty financial statements are held personally liable for the amount not recollected (FCA Ch. 12 Sc. 5).[149]

[145] Of the principles of profit sharing see generally Timonen 2002, p. 148-149.

[146] Tenhunen 1997, p. 64.

[147] This applies also to the US: American courts are reluctant to interfere with decisions on dividends because it would mean replacing the Board´s business judgement for that of the court´s, Mann – Roberts 1999, p. 700.

[148] However, this kind of provisions are quite rare, at least in the Finnish listed companies.

[149] In the US the RMBCA § 6.40 expressly provides that the members of the Board who voted for or assent to an illegal dividend or other distribution are liable for that amount to the company. On the other hand, the ground rule is the same as in Finland, *i.e.* an unsuspecting shareholder cannot be compelled to refund an illegal dividend she has received from a solvent company, see *e.g.* Mann – Roberts 1999, p. 702.

LaPorta *et al.* evaluate in their cross-country research also minority shareholders´ right to claim a dividend. Their variable "Mandatory Dividend" is defined in the following way: [150]

> "Equals the percentage of net income that the company law or commercial code requires firms to distribute as dividends among ordinary shareholders. It takes a value of zero for countries without such restriction."

On this account the authors grant zero points for Finland – and for the US as well. On the surface, this might appear to be a fair conclusion because, as described above, the Finnish legislation does not provide each and every shareholder a right to require half of the net profit to distributed as dividends; this right is granted only for the holders of (at least) 10 per cent of all shares unless even a smaller percentage is provided by the Articles.

However, we find the classification applied by La Porta *et al.* all too rough to describe the national differences in a meaningful way. This comes clear when one turns to the US where the decision whether or not to pay dividends usually rests in the sole discretion of the Board. Not even an unanimous GM can veto the Board´s decision. Shareholders cannot assume the right to declare dividends; they can only replace the Board members later with new ones having more favourable attitude towards shareholders´ expectations on dividends.[151] Therefore we cannot hold the US system as equal to the one in Finland in this respect: evidently the minority in Finnish company has more say on the pay-out policies than their counter-parties in American enterprises.

6.2. Share Repurchases

A Finnish listed company may buy-back shares it has issued through public markets. In order to ensure equal footing for all shareholders, detailed information of the buy-back plan is to be provided to shareholders prior to acquisition of shares. The company is not allowed to repurchase shares in such public trade unless at least one week has passed before the company made public the decision of the Board to begin with acquisitions (FCA Ch. 7 Sc. 5).

If shares are to be acquired outside public markets, the bid has to be made to all shareholders proportional to their existing holdings. This rule alleviates the equality of shareholders. Thus "green-mail" (*i.e.* repurchase transactions favouring one particular investor) so typical to US company practice are strictly forbidden in Finland. On the other hand it is should be admitted that Finnish rules are not compatible with advanced practices of international markets: exotic procedures such as the "Dutch auction" do not fit to our regime.[152]

[150] LaPorta *et al.* 1998, p. 1122.
[151] Mann – Roberts 1999, p. 700.
[152] See Airaksinen 2000, p. 2.

The decision of a repurchase in a Finnish company is drawn by the GM. However, the GM may as well authorise the Board on this matter.[153] If the company has only one class of shares vested with voting rights and if these shares are planned to be acquired in proportion to the stock-owners´ holdings and for the same price, the decision at the GM of a public company has to be approved by supermajority but in private company a simple majority is enough (FCA Ch. 7 Sc. 4 Para. 1). If there are several classes of shares the decision rules are more complicated.[154] In principle each and every shareholder has an absolute veto right against share buy-backs that do not respect the principle of equal treatment in form of proportionality and equal price; the only exception is acquisitions that is executed through public markets and even then a publication of the acquisition plan is required before the acquisition.

The procedure just sketched is a quite cumbersome exercise from a Finnish management´s point of view, not at least compared to common practice in the US. By large American law equals buy-backs with dividend distributions. From an economic viewpoint this is logical: *de facto* both systems are about returning capital to investors. US state laws do not require the GM´s consent for a repurchase; it is left completely to the discretion of the Board as well as declaration of dividends.[155] On the other hand, as already noted above, the AGM may authorise the Board to arrange repurchases for a time of one year maximum, and in it is a quite common practice for Finnish listed companies that Boards are granted this right. Thus, in a sense, the matter of decision making power is simply a technicality by large.

A more crucial feature in Finland is that the number of shares that may be reacquired by the company is strictly limited by the law. Pursuant to Ch. 7 Sc. 6 a buy-back transaction has to be arranged in such way that aggregate nominal values of the repurchased shares or the voting rights attached to them do not exceed five per cent of the share capital or to-

[153] The GM normally, at least in listed companies, authorises the Board to decide of acquisitions. In such case the decision of the GM shall set out: (*i*) the maximum number of shares to be reacquired per class of shares; (*ii*) the order of the acquisition of the shares unless the Board is granted to decide thereupon; (*iii*) the purpose for which the authorisation my be used if the Board is granted the right to acquire shares otherwise than in proportion to the holdings of current owners; (*iv*) the grounds on the basis of which the buy-back price is to be determined unless the Board is granted the right to decide thereupon; and (*v*) the period of authorisation (FCA Ch. 7 Sc. 3 Para. 1).

[154] The proposal must have the support of 2/3 of the shares represented at the GM in each class of shares when shares are to be acquired: (*i*) in proportion to the holdings of the current shareholders and for the same price per class of shares; or (*ii*) in proportion to the classes of shares so that shares publicly traded shall be acquired through the public markets and other shares in proportion to the holdings of shares for the same price per class of shares (FCA Ch. 7 Sc. 4 Para. 2). In cases other than referred above, the decision requires also the consent of all those shareholders whose shares are affected by the decision (FCA Ch. 7 Sc. 4 Para. 3).

[155] RMBCA § 6.31(a) states plainly that ”[a] corporation may acquire its own shares – –” and according to § 6.40 ”[a] board of directors may authorize – – distributions to its shareholders – –.” The definition of a ”distribution” covers all transfers of money and property from the company for the benefit of shareholders: it ”– – may be in the form of a declaration or payment of a dividend; a – – acquisition of shares; – – or otherwise” (§ 1.40(6)).

tal.[156] This restriction, however, applies only to listed companies: in private enterprises all but one share can be reacquired. Due to the restriction the flexibility buy -backs is thus severely lost in the Finnish listed companies from, *inter alia*, the American point of view. Boards of US companies are free to repurchase shares as long as the test of solvency required by the state law is passed;[157] generally a company, going concern, without any qualification in the latest Auditor´s report and subsequent adverse events normally qualifies the test.[158]

7. TRANSFERABILITY OF OWNERSHIP – RIGHT TO EXIT

Free transferability of shares is one of the very basic starting points in the Finnish company law. Pursuant to the Ch. 3 Sc. 2 of the FCA *"[a] share may be transferred and acquired without restriction unless other provided for by law or the Articles – –.*" The FCA allows only two kinds of restrictions to be included in the Articles: clauses of pre-emption and consent clauses.[159]

> On the other hand, even these kinds of clauses establish a barrier for official trading: the Helsinki Stock Exchange may admit for listing only securities that are "freely transferable" (FSMA Ch. 3 Sc. 10 Para. 1). However, this is not required for all classes of shares that are issued by a listed company. Besides the classes that are listed, such company may have another non-listed class of shares which are furnished with a pre-emption or consent clause - typically in exchange for multiple voting rights. In other words, the Finnish stock market regulation does not prevent a company from floating one class of transferable shares to the public and list them subsequently on the Exchange and at the same time keep the class of shares with superior voting power but restricted in respect to their transferability from being listed. However, in practice, this kind of class structures are less and less popular among the Finnish listed companies.

[156] When the five per cent threshold is crossed ”accidently” through a merger, the shares exceeding the threshold have to be conveyed within three years from the acquisition (Ch. 7 Sc. 8 Para. 1).

[157] RMBCA (§ 6.40(c) applies equity insolvency test: ”No distribution may be made if, after giving effect: (1) the corporation would not be able to pay its debts as they come due in the usual course of business; or (2) the corporation´s total assets would be less than the sum of its total liabilities – –."

[158] Offcial comments to § 6.40.

[159] This kind of a *numerus clausus* –principle does not apply to American companies. For example, provisions of first refusal that obligate the exiting shareholder first to offer the company or other owners a opprotunity to acquire her shares are common in the US (see RMBCA § 6.27(d)(1)). Most of company statutes in the US do not include any provisions regarding share transfer restrictions. In practice such restriction is commonly held to be valid if it has been adopted for a lawful purpose and it does not restrain transferability unreasonably, *ibid*, p. 704. The RMBCA § 6.27(a)(1) states as well that to be authorized a restriction must have a ”reasonable purpose”.

7.1. Pre-emption Clause in the Articles

The Articles may provide that a member, the company or a third person is entitled to redeem a share being transferred to a new holder from a party other than the company. The provision shall specify *inter alia* the persons entitled to the right of pre-emption and whether certain kinds of acquisitions, *e.g.* inheritance, are to be exempted from that right. The Articles must also state the time limit within which a person entitled to pre-emption must notify the Board that she is willing to exercise her right (Ch. 3 Sc. 3 Para. 1). If no such person notifies the Board in time, the acquisition is accepted and the transferee´s status as a shareholder of the company is established by entering her name in the share register.[160] Thus, until decision of who will acquire the shares is finally made, the transferee does not have the right to participate a GM and take advantage of the voting power that the shares entitle to.[161]

The person who has acquired shares subject to pre-emption clause is under duty to inform the Board of her acquisition. Before it has been established whether a right of redemption will be exercised, the transferee cannot, as against the company, avail herself of any rights related to the share except the right to receive dividends and the preferential right to subscribe for new shares issued by the company. However, if the pre-emption right is exercised and the share passes to the person that has availed herself the pre-emption right, the rights and obligations following from such subscription of new shares are also automatically passed to that person (FCA Ch. 3 Sc. 3 Para. 5).[162]

7.2. Consent Clause

Besides the pre-emption clause, the Articles may provide that the consent of the company is required through conveyance.[163] However, the FCA does not allow this kind of consent clause to be applied to shares acquired in a forced sale or from a bankruptcy estate (FCA Ch. 3 Sc. 4 Para. 1). On the other hand, the Articles may specify other conditions for the consent to be granted.[164]

The decision regarding the consent is made by the Board unless otherwise provided for in the Articles. The Board has to inform the transferee of the decision in writing within two

[160] The register of a private company is kept by the company itself but the Central Share Depositary manages a common register for all listed companies, see ch. 1.1 above.

[161] See Timonen 1992, p. 297.

[162] Disputes regarding the redemption right or price are handled in a Court unless the Articles provide that they are to be settled by arbitrators under the Arbitration Act 1992 (Ch. 3 Sc. 3 Para. 3). Where the price clause of pre-emption provision would give an undue advantage to any person, the price may be modified, for example in order to adjust the redemption price to the actual value of the share.

[163] This kind of a transfer restriction is also recognized in the US (RMBCA § 6.27(d)(3).

[164] Timonen 1992, p. 297.

month from the transferee´s application for ownership. If the Board fails to do this, the consent is deemed to be granted (Para. 2). Before the decision is made, the transferee does not have any rights, not even financial ones, in the company. The transferor is receives even the dividends before the decision of the consent is made by the Board.

> The principle of free transferability is highly respected in the Finnish company law. Pursuant to the FSMA (Ch. 6 Sc. 6) anyone whose ownership in a listed company exceeds two thirds of the voting rights is under to duty to purchase the remaining shares as well equity-related securities at a fair price. Some companies have further tightened this duty by including a provision in the Articles that requires a redemption offer to made even prior crossing the limit of two thirds; a provision may state that a redemption is to be made *e.g.* at the level of one third of all the voting rights.[165] However, some Finnish academics have doubted whether these modifications are in accordance with free transferability as they are neither pre-emptive clauses nor consent clauses that are expressly allowed by the FCA.[166]

7.3. Indivisibility of Administrative and Financial Rights

The Finnish jurisprudence relies heavily on a doctrine of indivisibility: the voting rights, as well as other administrative rights, that a share entitles its holder to are indivisible from the financial rights of this share. Thus, voting right should not be separated from share ownership. An owner can neither give up nor transfer her voting rights without transferring the ownership altogether.[167]

The doctrine has practical implications. Firstly, the prohibition against separating voting rights from share ownership excludes the use of irrevocable voting proxy. The FCA Ch. 9 Sc. 2 Para. 1 sets a mandatory time maximum for an authorisation: a proxy is valid only for three years after its issue. But, even during this time, the shareholder may draw back her authorisation without a reason in respect to the GM.

Secondly, an entry in the company´s register of shareholders as a "real" shareholder is a mandatory prerequisite for voting at a GM. It is not generally permissible to register anyone but the real shareholder. However, as already explained above, in a listed company with dematerialised shares as book-entries, a foreign shareholder may have her shares registered under a nominee´s name (Act on Book-Entry Accounts, Sc. 5a). On the other hand,

[165] See Kaisanlahti 1997.
[166] See Astola 1994, p. 99; *cf.* generally Sillanpää 1994.
[167] Poutiainen 2001, p. 69.

this type of arrangement has an disadvantage: the voting rights of shares are not in the nominee´s or the real owner´s disposal. Only a registered shareholder may vote at a GM.[168]

8. SHAREHOLDER ACTIONS AND REMEDIES

When considering a shareholder´s rights La Porta *et al.* (1998) put also weight on remedies available for unfairly treated (minority) shareholders. The authors state that some countries give minority shareholders legal mechanism against perceived oppression. These mechanisms may include the right to challenge the directors´ decision in court (as in the American derivative suit) or the right to force the company to repurchase shares of the minority who object certain fundamental decisions of the management or of the GM, such as mergers or assets sales. On this reasoning La Porta *et al.* have formed a variable for their study – "oppressed minority mechanism" – that is described in the following way (p. 1122):

> "Equals one if the – – law – – grants minority shareholders either a judicial venue to challenge the decisions of management or of the assembly or the right to step out of the company by requiring the company to purchase their shares when they object certain fundamental changes such as mergers, asset dispositions, and changes in the articles of incorporation. The variable equals zero otherwise."

According to La Porta *et al.* there are no such mechanism available for minority shareholders in Scandinavian that fulfils adequately the requirements described above; Finland scores zero among others. Among the member states of the European Union only three qualify: *England, Ireland* and *Spain*. Considered from a Nordic point of view this outcome is the most puzzling one in the paper by La Porta *et al.* In the following we describe the Finnish instruments available for a aggrieved minority in a search for a remedy.

8.1. Representative Action Against Unlawful Resolutions

The ultimate recourse of a shareholder, short of selling her shares, is to bring an action against the decision-makers on behalf of herself or the company. Firstly, a resolution that has not been approved in proper order at the GM, or which is otherwise against to the FCA or the Articles, may be sued upon by a shareholder (as well as by a member of a Board).[169]

A textbook example would be a case where a shareholder sues to restrain a threatened alteration of Articles by a passage of an solution by a simple rather than a special majority. The FCA stipulates the reasons for a lawsuit only generally: the action may be based on

[168] See the homepage of the Finnish Foundation of Share Promotion: www.porssisaatio.fi.

[169] Tenhunen 1997, p. 68.

breaches of formalities as well as on material grounds. Thus, the reason may be, among others, that the resolution is against the principle of equal treatment expressed in the General Standard of FCA Ch, 9 Sc. 16.[170]

A shareholder is entitled to bring an action against an unlawful resolution of a GM, but only if she has not contributed to it by voting for it. Moreover she has to own at least one share in the company in order have this right. The nature of the action is representative in such sense that the owners who were not parties to the legal action shall also be bound by the decision of the Court (FCA Ch. 9 Sec. 17 Para. 4.).[171] This feature is designed to prevent multiplicity of actions. On the other hand, it means that even those minority shareholders who had been quite satisfied with the resolution of the GM have to obey the Court judgement if it is for the plaintiff. [172]

If it is found that the resolution passed by the GM breaches the FCA or the Articles, the Court may set the resolution aside or modify it. However, a modification can only be ordered if a claim for it is set up, and the Court is able to establish the contents that such resolution should to have had (FCA Ch. 9 Sc. 17 Para. 3). Thus the modification is possible only in case where the "right" decision is obvious.[173]

The right to challenge a resolution can, on the other hand, be used to obtain a temporary court order that hinders the Company from executing the resolution. Pursuant to the Ch. 16 Sc. 3 of the FCA a shareholder may request an injunction to delay or prohibit the execution of an illegal resolution pending a suit. This temporary order cannot be subject to separate appeal but the Court may, if it is considered necessary, withdraw the order. If a minority shareholder succeeds in obtaining such order, the Board may, in order to avoid a time-consuming legal process, be ready to hear her and settle out of court.[174]

[170] Toiviainen 1998, p. 130; Timonen 2002, p. 138.

[171] *Ibid*, p. 131

[172] An action shall be brought within three months of the passing of the resolution; failing that, the resolution is deemed valid (FCA Ch. 9 Sc. 17). However, the period for action may be prolonged up to 1 year if, in view of circumstances, the Court finds that application of the three months provision would be obviously unreasonable for a shareholder who had a valid reason for the delay. If the action is not brought within the period stipulated, the decision becomes valid. Then the Board and Managing Director are entitled – or maybe even required – to fulfil the decision. Under specific conditions, however, the decision of the GM is considered to be void without the lapse of time. A resolution is deemed to be nullity, if: (*i*) it could not be lawfully passed even though approved by all the shareholders; (*ii*) pursuant to the FCA or the Articles, the consent of all or certain shareholders were required and such consent has not been given; or (*iii*) the GM has not been convened, or if the provisions on notice to convene the GM have been grossly breached. In principle, no appeal against the nullity is necessary; if the resolution is a nullity, it does not allow the management from enforcing it. However, in order to make sure that no one obeys the unlawful resolution, it may be useful to bring an action claiming that the Court should confirm the nullity. *Ibid*, p. 130-132.

[173] *Ibid*, p. 129.

[174] Tenhunen 1997, p. 68.

The Finnish Companies Act contains no provisions regarding a shareholder´s right for action to challenge a decision made by the Board. Nevertheless this right has been established in Court practice but, on the other hand, under quite exceptional circumstances. In order to intervene in a Board decision a shareholder had to show, pursuant to case 1995:213 of the Finnish Supreme Court, before the judge that the Board´s action was intended to take advantage of the company and not in the company´s interest. Moreover, it was required to establish probability that due to the lack of means of the Board members would be judgement-proof against a either liability for damages or a right of recourse.[175]

However, as a main rule, it is most exceptional for a Court to grant a shareholder the right of action in the Finnish system of representation. Therefore, for example, if a GM has delegated the Board the right to make decisions on a new issues of shares, a current shareholder cannot effectively challenge the decisions that the Board actually makes about *e.g.* the issue price and to whom the shares are allocated if these matters have not been specified in the delegation made at the GM.

8.2. Derivative Suit for Damages

As in all market economies, in Finland a company limited by shares is treated as a legal person distinct from its owners. Therefore it is the company and not the individual members that is the proper plaintiff in any action; the main rule is that a company is represented not by its members but the directors.[176] Where a breach of duty or any other wrong has been committed against a Finnish company, only the company can sue in respect of it. Thus the law in Finland echoes the famous English case of *Foss v. Harbottle* in this respect.[177]

There are, however, a number of exceptions, to the aforementioned ground rule. Finnish shareholders representing at least 1/10 of the share capital or 1/3 of the shares represented at the GM are eligible to bring a claim for damages on behalf of the company if the majority at the GM has decided not to bring such claim (FCA Ch. 15 Sc. 6).[178]

Examples of this kind of “derivative suits” are actions to recover damages from the Board for breach of duty. In such situations, where the Board members represent also majority of votes at a GM, they may well be hesitant to bring a suit against themselves.

[175] Savela 1999, p. 234-235.

[176] Not even the Articles may be altered to grant the shareholders this right; Savela 1999, p. 235.

[177] Of the case mentioned see, for example, Hodge 1999.

[178] In this respect the rules of the Finnish derivative suit differs significantly from its American counterpart which provides for each individual shareholder the right to bring a derivative suit. The procedure is also more straightforward in the US: Pursuant to the ground rule of RMBCA § 7.42 a shareholder may commence a derivative proceedings as soon as 90 days have expired from the shareholders demand for the company to take suitable action.

There is no requirement for the plaintiff (*i.e.* the minority shareholders) to post a bond. Moreover, the shareholders do not have to show the Court any material facts, *e.g.* wrongdoers control of the resolution of the GM, before the Court can allow the minority owners to launch a derivative action. Neither there is a statutory requirement that a shareholder must have owned her shares at the time of the complained transaction occurred in order to bring a derivative suit.

The (minority) shareholders´ derivative suit is singular in that those suing are not pursuing damages for themselves but are acting on behalf of the company as guardians of all shareholders as an unitary group. The shareholder, as a nominal party, has no right or interest in the claim itself. Therefore, any damages obtained by derivative action will accrue to the company, not the suing shareholders personally. However, the Court may order that the shareholders who have brought the action shall be paid from the funds obtained the portion that devolves on their shares. On the other hand, the costs of such action are of no concern to the company; the shareholders that bring the action are responsible for the litigation costs. They have, however, an entitlement to a compensation from the company to the extent of the funds obtained to the company through the action (Ch. 15 Sc. 6 Para. 4).

8.3. Direct Suit

Derivative actions materialise quite seldom in the Finnish company practice.[179] The possibility of a derivative suit, however, does not stop a (minority) owner of the company to bring direct actions for damages; a derivative suit is also not a exclusive remedy for a minority shareholder. Each and every shareholder has the right to demand from the majority owner or other shareholders all the damage they have caused her by assisting a violation of the FCA or the Articles. It is possible to base this demand on a violation of the “equality principle” manifested in the General Standard of the FCA Ch. 9 Sc. 16.[180]

In Finland tort law has a general starting point that each party must take responsibility for herself for damages she may have suffered: this means that to have somebody else to cover the damage, the requirement must be grounded. To win damages for herself, a minority owner has to prove before the Court that (*i*) damages were actually caused by a resolution of the GM or another action of shareholders;[181] (*ii*) the action or resolution infringed the FCA or the Articles; and (*iii*) the infringement was intentional or grossly negligent (FCA Ch. 15 Sc. 3). The burden of proof is on the plaintiff (*i.e.* minority owner): the culpability

[179] Airaksinen 2000, p. 2.

[180] See Tenhunen 1997, p. 68; and Timonen 2002, p. 150.

[181] The causal connection in the Finnish tort law is evaluated on the basis of *conditio sine qua non*: had the damages not materialised without the action, then the action is the cause of the effect, Pöyhönen 1993, p. 84. See also Aurejärvi 1985, p. 134; and Pöyhönen 2002, p. 67-71.

of the majority owner or other shareholders is not presumed. For negligence there is no single unambiguous criteria. [182]

The same applies also to the minority shareholder´s claim against the members of the Board or Managing Director (FCA Ch. 15 Sc. 1).[183] She has to show that they acted intentionally or negligently and the act breached the FCA or the Articles. The threshold for negligence, however, is lower than in claims against other shareholders: even a minor negligence qualifies as a ground to sue the Board members or Managing Director . Moreover, a breach of the FCA or the Articles constitutes a legal presumption of negligence; in such case the burden of proof lays on the member of the Board: she has to show that her acts were not negligent. The illegality of the action must also have caused such damages that the plaintiff (*i.e.* shareholder) can demonstrate.

The liability of each shareholder or a Board member is personal. To avoid the liability a shareholder or a Board member may argue that she did not participate in the meeting or did not vote in favour of the resolution. A shareholder or a Board member may register her contrary vote in the minutes of the meeting. Unless a dissent is entered in the minutes, the member of the Board is presumed to have assented. For this reason, a Board member who is absent from given meeting should register latest in the following meeting if she dissents.[184]

Each member has to reimburse all damages she has caused. Mitigation of damages may be applied in case where reimbursement would be too burdensome and ruin a member´s financial situation. Damages cannot, however, be adjusted downwards by mitigation without a specific reason if the member´s offence was intentional.

8.4. Winding Up

The FCA provides each shareholder the right to apply to a court to have the company rounded up if the other shareholders (*i.e.* majority) have voted in a GM for a resolution that conflicts with the general clause; the minority has the same right in a situation where the majority have otherwise wilfully misused their influence in the company.[185] Winding up,

[182] *Ibid*, p. 83.

[183] See *e.g.* Timonen 2002, p. 150. The FCA does not include any provisions for the liability of the company itself against a shareholder for the acts and omissions of its management, Rudanko 1992, p. 220 and 226-227. Meanwhile, in the US, a shareholder may bring a direct suit, for example, to compel payment of dividends properly declared; this action is against the company (see *e.g.* Mann – Roberts 1999, p. 720-721) – not the other shareholders or the members of the Board as is in the Finnish direct suit.

[184] In this respect the US rules are the same.

[185] Tenhunen 1997, p. 68. The US law of judicial dissolution resembles the Finnish one. A court may dissolve a company in a trial brought by a shareholder if it is established, for example, that an action of the Board or the majority shareholder is illegal, oppressive or fraudulent, Mann – Roberts 1999, p. 752. The coverage of this right is, however, wider than in Finland as the FCA does not allow for winding up on

however, is most drastic measure. Therefore the FCA provides that such order can be made only where there are exceptional grounds for it. In practice this means that actions are utmost rare. However, the FCA provides an alternative route: the court may, upon the request of the plaintiff, order the company to redeem the shares held by her at a reasonable price (Ch. 13 Sc. 3).

8.5. Incentives for Litigation

The plaintiff, the challenging minority shareholder, has the burden of proof. This means in practice that claims for damages are not raised light-heartedly. If she fails to show before the Court the unlawfulness of the resolution, she has to pay, not only her own, but also the trial expenses of the winning side.[186] Due to this financial risk, the resolutions of GMs are not so often challenged in Finnish Courts.

Compared internationally, litigation expenses are relatively low in Finland.[187] However, as the losing party is also liable for the costs of the winning party, the monetary risk in litigation is considerable. The introduction of value added tax on legal services has driven the costs up even further.[188] Under the standard "American Rule" each side bears its own legal fees. As already stated, the rules in Finland are opposite to this as the losing side is normally liable for the winner´s legal expenses. When a minority owner sues a major Company or its Board members and Managing Director, the defendants are likely to incur the large fees and other expenses, and this disproportion is likely to be an prohibitive deterrent to litigation; few individual shareholders will face sufficiently substantial loss to justify the cost of litigation individually. Thus there is a bias for a minority shareholder to remain passive even if she learns about an action or negligence that, for example, breaches the equality of shareholders.

Punitive damages are alien to Finnish legal system; the starting point is the principle of full compensation but damages are normally adjustable downwards.[189] Whenever damages are awarded, they are not intended to punish the party committing the breach but to compensate the insured party for any loss or damages arising from the breach. The damages that may be awarded to the plaintiff must be based on realised economic losses shown to the Court. The basic principle is that the injured party should be restored financially as nearly as possible to the position she would have been had the breach not been committed.[190] The

the basis of improper action by the Board.

[186] See Jokela 2002, p. 388-389.

[187] Jokela 1993, p. 278.

[188] Airaksinen 2000, p. 3.

[189] Aurejärvi 1985, p. 134.

[190] Damages for pure economic loss, *i.e.* loss not connected with bodily injury or material damages, are also awarded; this is not the case generally in the Finnish tort law, see Rudanko 1992, p. 218; Savela 1999, p. 224.

damages are assessed by the Court on the actual loss to the injured party, and not on the basis of any gain made by the other party. Thus the recovery to be judged cannot, for example, be based on the profit the Board member made by secretly taking to herself a company opportunity, unless it can be shown that the company would have made the profits that she succeeded to acquire. So far the value of damages awarded have been quite moderate in the Finnish company practice.

Moreover, there is no legislation in force supporting class actions in Finland. Thus the personal actions for damages are in principle brought on individual basis. Incentives for attorney driven actions are diminished even further by the fact that contingent fees are a rare event in the Finnish procedure;[191] thus the risks of litigation are seldom transferred to the plaintiff´s attorney. [192]

8.6. Redemption and Appraisal Rights

At least partly due to the trial expenses and other disincentives for litigation, another types of remedies are considered to be of importance to ensure the rights of minority shareholders.[193] Both the FCA and FSMA reserve individual shareholders the opportunity to have their shares redeemed when the company ownership structure changes in a manner prescribed by law. If a majority shareholder – typically a parent company – has come to own more than 9/10 of the shares of a company and these shares give right to at least 9/10 of the total voting rights, a minority shareholder of the company has, according to the FCA (Ch. 14 Sc. 19), the right to demand the majority owner to redeem her shares. In such case also the majority owner has the right to redeem the remaining minority shares, paying the "fair price". The majority shareholder is liable for the costs of appraisal as well as the other expenses of the redemption process.[194]

The minority owner may also have her shares redeemed by the company due to a merger with another company (FCA Ch. 14 Sc. 12) or a division of a company (Ch. 14a Sc. 3 Para. 5) or a "going private" decision (Ch. 17 Sc. 3). The only condition is that she has voted against the resolution and reserved the right for redemption for herself. On the other hand there is no appraisal right due to a sale of company´s (major) assets or an amendment of Articles.[195]

[191] Jokela 2002, p. 372.

[192] The existence of the contingent fee agreement has been considered to be an important means to correct the bias towards non-litigation in the US, Coffee 1999.

[193] Airaksinen 2000, p. 3.

[194] Tenhunen 1997, p. 69.

[195] RMBCA § 13.2(3) and 13.2(4) provide an American shareholder with appraisal rights also in connection of substantial assets sales and material amendments of Articles. On the other hand, however, several American states deny the appraisal rights in listed companies – the idea is that in the liquid and efficient securities markets a minority can always get a fair price for her shares.

Appraisal right is not an exclusive remedy: despite the fact that a redemption is in process the shareholder may in principle demand damages or turn to other remedies if she feels that she has a cause for such action. However, as already mentioned, the burden of proof lies on the plaintiff; this requirement makes these remedies less tempting alternatives compared to the redemption procedure.

According to the *travaux préparatoires* of the FSMA, the redemption stipulation is not sufficient to secure minority rights in a company that has its shares listed on a Stock Exchange. This is the motivation for including a provision in the FSMA (Ch. 6 Sc. 6), according to which anyone whose ownership increases to exceed 2/3 of all voting rights of the company, has to offer to redeem remaining shares, as well as the convertibles and warrants issued by the company. Also the shareholder whose ownership in a listed company exceeds 2/3 of the voting rights has an obligation to offer to purchase the remaining shares as well equity-related securities from other shareholders at the fair price. The offer price cannot be set freely as in a voluntary tender offer: one has to take into consideration the medium market price of the preceding 12 months as well as the higher prices paid by the acquirer outside the public markets. Besides, minority shareholders are to be treated in all terms as equally as in a voluntary bid (see section 3.6 above). [196]

> Some listed companies (*e.g*. Nokia Ltd) have further tightened the redemption obligation by including a clause in their Articles, in virtue of which the redemption obligation arises already prior the reaching the redemption limit with the SMA. These clauses typically set the redemption limit at 1/3 of voting rights.[197]

8.7. Criminal Sanctions

Criminal penalties are generally considered to be justified by high detection and prosecution costs as well as limited private incentives to sue in private courts.[198] Despite the aforementioned disincentives to bring private action in Finland, there are only few provisions in the FCA violating which are punishable by criminal prosecution. Without an exception a criminal penalty can follow only from a wilful violation of the FCA. The penalty threat is a fine or an imprisonment of unless the violation is considered to be minor or subject to a more severe punishment according to the Finnish Penal Code or elsewhere in the law (FCA Ch. 16 Sc. 8).

[196] Astola 1994, p. 78-79; Kaisanlahti 1997, p. 5-6; Sonninen 1998, p. 183; Tenhunen 1997, p. 70; Timonen 1992, p, 301.

[197] For a detailed description see Sillanpää 1994; *cf.* Astola 1994, p. 88, who is doubtful whether this kind of modifications are in accordance with the principle of free transferability of shares.

[198] Deakin 2000, p. 1.

Criminal sanctions are mostly connected to public interest, to such conduct as filing false documents to the Trade Register. However, threat of criminal liability has a major role to play in returning assets of the company that have been taken a from a company in breach of the FCA. Illegal distribution of assets is a criminal offence in Finland. Prospect of facing a imprisonment up to one year is a real threat for even bankrupt or "pseudo-bankrupt" persons. The fact that illegal distribution is a criminal offence also turns it to be a police matter: a minority owner can get assistance from police in detecting the relevant fact and winning the assets back to the company.[199]

As already mentioned, insider dealing in Finland is illegal; a violation of the law is punishable by fines or imprisonment up to 4 years.[200] A criminal offence is also to breach the provisions of the TSMA that are aimed to ensure all market participants equal footing on the information of the listed company and its securities; the penalty is a fine or imprisonment for 2 years maximum (Penal Code, Ch. 51 Sc. 5).

The principal rule in Finland is that criminal liability can be imposed on individuals only in company law matters; the provisions of corporate criminal liability in the Finnish Penal Code do not apply in the context of the FCA. However, the duty of a listed company to provide information to securities market pursuant to the FSMA is covered by the threat of corporate criminal liability (Penal Code, Ch. 51, Sc. 8).

In attributing the liability the starting point is that the person whose conduct constitutes a crime is liable. The Managing Director, a member of the Board as well an Auditor may face criminal liability.[201] The FCA includes specific provisions on the division of liability; for example, the Board has to administer that the governance of the company is properly organised (FCA Ch. 8 Sc. 6.), *i.e.* in accordance with laws and regulations. Courts put importance as well in the actual prospects of the accused to influence the decision-making in the company. Therefore also internal regulations of the company may be relevant *in casu*.[202]

9. CONCLUDING REMARKS

9.1. Is Common Law Procedurally Superior?

In the introduction of this paper was presented a hypothesis according to which civil-law encourages less gap-filling than common-law. This hypothesis of La Porta *et al*´s research

[199] Airaksinen 2000, p. 2.
[200] See ch. 5.2 above.
[201] Of an auditor´s criminal liability see ch. 5.4 above.
[202] Riihimäki 1994, p. 168.

is surely intriguing but we are not totally impressed. We agree that one can challenge – by pointing to the judicial procedure – the effectiveness of Finnish remedies against minority oppression;[203] there are several procedural features that can be interpreted to be biased against a minority shareholders. First, in the field of derivative suits the Finnish legislation deviates clearly, *inter alia*, from its US counterpart by requiring that in order to raise a suit, the plaintiff has to be backed by investors representing at least 1/10 of the shares or 1/3 of the votes represented at a GM (FCA Ch. 15 Sc. 6).[204] On the other hand, each shareholder has a subjective right to make a direct claim against the Board members and the Managing Director for the damages they have caused to her by intentional or negligent infringement of the FCA or the Articles.[205]

Another significant Finnish feature is the rule that the losing party of a trial has to bear also the litigation expenses of the winning side. On the other hand, the upside potential of a favourable judgement is diminished by the fact that in direct actions for damages the defendant is not the company but the Board members or the Managing Director or even the other shareholders. Thus, in practice the damages that have been awarded have been moderate in company law cases. In accordance with that, punitive damages are non-existent in the Finnish legislation.[206] With these features Finland may easily be classified as one of the less litigation-friendly jurisdictions, at least in the field of company law.

Even if we accept this classification, there remains a question: Would the life be better for the Finnish minority shareholders if the American-style derivative suit was in place here? Several econometric studies – after having tortured statistical data based on the US cases – come to the negative conclusion: derivative suits produce few immediate and direct gains to shareholders. Besides, despite the litigation-friendly jurisprudence, a derivative action is still relatively rare occurrence even in the US.[207]

With this outcome we are almost back to the point where we started from *i.e.* pondering whether there is a direct causal relationship between the minority protection rules of a certain country and the efficiency of local securities markets.[208] And from a comparative point

[203] Also La Porta *et al.* 2000, p. 7, recognize the crucial role of enforcement: "When the enforcement of private contracts through the court system is enough, other forms of protecting property rights, such as judically-enforced laws or even government-enforced regulations, may be more efficient."

[204] See ch. 8.2.

[205] Ch. 8.3. However, as Airaksinen 2000, p. 2, points out that, according to the practice of the Finnish Supreme Court, minority has succeeded only rarely in a legal action against Board members or a Managing Director.

[206] Ch. 8.5.

[207] For a survey see Ramsay 1999, p. 276. West (2000) comes to the same conclusion in his study of Japanese cases.

[208] It seems that Finland in not an exception among the Nordic countries. See Angblad *et al.* 2000, who on the Swedish data question the relevance of La Porta *et al*'s research (p. 30): "With strong separation of ownership and control and poor minority protection, outside shareholders, in particular, individual investors should be reluctant to invest. Yet financial markets in Sweden are well developed with a high

of view an even more important question is what are the really relevant features of minority protection. At the moment we remain quite sceptical to the economic exercises in this respect; to date we have not witnessed a study that had succeeded to distil these features out of various jurisdictions.[209] It maybe that this kind of efforts are all in vain as the development in different countries is first of all a path-dependent interplay between market and political forces.[210] Even if one is quite easily assured of the idea of convergence of corporate governance due to the ever-hastening globalisation of capital markets, we should be utmost cautious to jump too hastily to the conclusion that the convergence can find its way through only in a certain, predetermined form.[211]

9.2. Required Return on Equity and Substantial Rules of Minority Protection

Besides the issues of procedural nature set out in the previous chapter the hypothesis of superiority of common law deserves to be evaluated from a more practical viewpoint, in terms of financing costs carried by enterprises. Is it really for the benefit of outside investors (minority owners) that common law provides – without the limitations set by mandatory rules of black letter statutes – judges such wide latitude in order to detect possible injustices incurred by insiders, majority owners or management? In other words, translated into to the language of finance, does this latitude lower the return that shareholders require on their investment in equity.

A straightforward approach towards answering this question is to consider the possible actions of Board members and other insiders which may cause a conflict to arise between them and outside investors. In order to classify these actions broadly one has to bear in mind that every business enterprise has two general functions: on one hand to bring in profit and on the other to distribute it. Thus, possible conflict may arise from: (*i*) disagree-

level of market capitalisation in relation to GDP, relatively large number of firms go public, and individuals invest heavily in stocks, primarily through mutual funds. International investors have a considerable and increasing presence even though many of the largest listed firms are privately controlled and well entrenched using dual class shares. Expropriation of minorities seems less frequent than suggested by the measures of formal legal protection by La Porta *et al.* and remarkably absent as an issue of public debate.” Holmén – Högfeldt 2001, p. 24-27, provides another critical comment of the correlation proposed by La Porta *et al.*

[209] *Colin Mayer* and *Oren Sussman* who have reviewed the economic studies summarise their findings by stating that (Mayer – Sussman 2001, p. 464) ”– – more detailed analysis of actual legal systems raises questions about the relevance or validity of [legal origin] variables. Correlations are straightforward, but it is much harder to draw inferences about causality.”

[210] See Bebchuk – Roe 1999.

[211] A fresh efford has been made by professor *Ronald J. Gilson* who identifies three different channels for convergence (Gilson 2001, p. 356): ”– – *functional convergence*, when existing institutions are flexible enough to respond to the demands of changed circumstances without altering the institutions´ formal characteristics; *formal convergence*, when an effective response requires legislative action to alter the basic structure of existing governance institutions; and *contractual convergence*, where the response takes the form of contract because existing governance institutions lack the flexibility to respond without a formal change, and political barriers restrict the capacity for formal institutional change."

ment upon operations; or (*ii*) divergence of opinions on how the result of operations should be divided between the owners.[212] Moreover, access to information is essential for outside investors to assess both operations and results of the company; correspondingly, insiders and outsiders may have conflicting views of what is to be considered as relevant disclosure.

9.2.1. Distributions – Repurchases and Dividend Payments. Division of results is one of the most elementary reason for conflicts between insiders and outsiders. The payment of dividends, repurchase of shares or any other imaginable way for distribution of assets from the companies for the benefit of owners is simply a division of wealth. In theory nothing can be gained by this slicing exercise. Therefore any diversion from equality, absent consent *ex ante*, cannot enhance the value of shares. In Finland this is reflected clearly in the material legislation: the rule of equal distributions reigns. This is not, however, the case universally. As already explained, a US Board may buy-back shares discriminatingly, *i.e.* from a certain stock-owner without providing other investors the same option,[213] while being covered by the Business Judgement Rule at the same time.[214] It is hard to imagine how this diversion of equality would not be taken into account by those who participate in the financing of enterprises: logically, investors are willing to put their money on stake only if offered a higher return for their equity participation than in a jurisdiction where the principle of equality is respected within distributions. American professors *Frank Easterbrook* and *Daniel Fischel* summarised this neatly in early 1990s: a rule allowing unequal distributions makes shareholders "– – worse off because they – – have an incentive to incur wasteful expenditures by monitoring the withdrawal of assets – –."[215] The more severe is the possibility of infringement of equal distribution, the higher the investor´s requirement on return from the relevant shares, which means that the subscription or buying price is set at a lower lever than otherwise. Therefore it is most likely that investors would be willing to switch the flexibility of buy-backs to a system were they are guaranteed of getting equal share of the wealth accumulated in companies.[216]

Professors *Luca Enriques* and *Jonathan Macey* criticise harshly limitations on repurchases in Europe. According to them these limitations may raise the costs of disputes among shareholders. Enriques and Macey argue that the restrictions "– – will prevent a company from purchasing the stock of dissenting shareholder, making it more difficult to overcome

[212] Within economics this dualism corresponds to the division into investments and financial decisions, see for example Megginson 1997, p. 4-5.

[213] See ch. 6.2 above.

[214] We evaluate the Business Judgement Rule in more detail later in this chapter (see section "Duty of Care – Business Judgement Rule").

[215] Easterbrook – Fischel 1991, p. 143.

[216] However, this is not say to that the owners cannot agree *ex ante* of unequal distribution, for example, by establishing several classes of shares with different right to dividends.

deadlock or disharmony which may negatively affect the company´s operations."[217] Thus the required return on share-holding is higher *ceteris paribus*: restrictions on buy-backs make "– – equity investments less liquid, and hence less attractive ex ante because reselling shares to the company may often be the only way for shareholders – – to liquidate their investment."[218]

This argument, while logical in itself, is too limited. For sure, it is appealing in the context of small private companies where the advantages of liquid public stock market are lacked. On the other hand, Enriques and Macey do not consider at all the possibility that the other owners agree to buy the dissident´s shares for themselves. If all, the dissident and her fellow stock-owners, share the view that the dissident must leave the company, it should be no concern for the dissident who, the company or the other shareholders, is to buy back her shares. The most difficult part of the dispute will always be – outside public markets – the appraisal of dissident´s shares, and this dispute is not more easily solved when the company is the one which repurchases the shares.

Naturally, it is possible that the shareholders lack financial resources to buy the dissident´s shares. For such cases repurchase by the company is a relevant alternative. The Finnish companies legislation permits shares to be bought back only with distributable funds *i.e* accumulated net profits on the balance sheet (FCA Ch. 7 Sc. 3 Para. 1). Compared with this (and law in other European Union countries as well) the American rule is – as Enriques and Macey correctly suggest – formulated in a more flexible way: buy-backs may be carried out as long the company remains going concern, meaning that it can meet its debt and other business payments while in Finland the test, based on figures of the most recent balance sheet, allows repurchases only to the extent that accumulated net profits are exhausted.[219]

Considered from the viewpoint of Finnish shareholders, however, it is not self-evident that they would prefer the US-style test to the "technical" European approach. The tests, both the American and Finnish one, are for the benefit of creditors; the aim is to protect their interest, not minority shareholders. When shares are repurchased despite the fact that the rule is not met, the creditors are allowed to claim damages, if the monies paid for the shares are not returned to the company.[220] In this respect the burden of proof is more easily satisfied under the current Finnish rule because the shareholders can assure themselves *ex ante* – simply by studying the most current balance sheet – that they will not be held liable if the company goes bankrupt after the repurchase. If the test was more flexible the shareholders would be likely to forego a repurchase to avoid the trouble and cost of determining

[217] Enriques – Macey 2001, p. 1197.

[218] *Ibid.*

[219] See ch. 6.2.

[220] Illegal repurchases constitute a criminal offence in Finland, see ch. 8.7.

whether the buy-back can be carried out; and even after a careful study Board members would not be without the fear that after the buy-back a Court might erroneously hold such distribution to be against the law. Therefore, we think, the validity of Enriques and Macey´s claim may be debatable.

The same argument applies also to dividends. Enriques and Macey propose that the European balance sheet test constraining dividend payments inhibits an active signalling function of dividend policy. According to them dividends can provide an important information channel: by paying out large dividends the Board can credibly transmit its confident in the future prospects.[221] The signal is supposed to be credible because if the true prospects are not as profitable as the amount of dividend leads the investors to believe, the company would have to acquire new financing in order to survive and then the Board would be in the investors´ mercy. New financing would be more expensive to company after the attempt to mislead the investors through its pay-out policy. Therefore, arranging such sham is not a rational course action for a Board; a Board would propose an increase in dividends only if it is confident that sufficient income would flow in to cover the increase. This is a well-accepted view in financial economics since 1980´s, repeated in all text-books.[222]

Even when the question of "real" motivation for distributions is left aside, the argumentation of Enriques and Macey remains doubtful. They suggest that flexible US rules are more favourable to dividend payments compared to the European balance sheet test which is based on accounting numbers: "Due to the complexity of accounting issues and to the wide discretion accounting principles and rules leave to decision makers, the possibility of courts making errors in judgements is more than sufficient to deter risk-averse managers from making distributions."[223] We are not convinced by this argument; in fact the opposite thesis is more appealing to us. Enriques and Macey do not seem to pay any attention to the fact that the lawfulness of dividend payments are challenged afterwards, in a later bankrupt by the estate. Then the Board may have to provide evidence for the Court that the amount of dividend paid was proper at the time of its declaration. If the Board can derive its argument from the accounting numbers that were verified by an independent Auditor its case is without any doubt on a firmer ground than by trying to assure the judge within the vague US test that the Board presumed properly that the company would remain going concern even after the dividend payment. – The bankruptcy itself proves that the presumption of going concern did not hold.

[221] Enriques – Macey 2001, p. 1196.

[222] *E.g.* Brealey – Myers 2000, p. 444-445; Ferran 2000 , p. 410-411; or Megginson 1997, p. 373-374. On the other hand, it should be noted that this view is challenged in the newest econometric studies. According to *Franklin Allen*´s and *Roni Michaely*´s utmost thorough review of these studies (Allen – Michaely 2001), the accumulated evidence indicate that changes in pay-out policies are not motivated by companies´ desire to signal their value and prospects to the investors; instead, both dividends and repurchases seem to be paid in the first hand to reduce potential over-investment by companies.

[223] Enriques – Macey 2001, p. 1197.

9.2.2. Pre-emptive Rights. To maintain her relative share in a company and to the distributions from it, a Finnish shareholder is provided by FCA a pre-emptive right in issues of shares and other equity-related securities; her prerogative is waivable only by a resolution made at a GM by a supermajority.[224] Some academics have criticised this basic right of shareholders in a similar manner as the principle of equality in distributions. A representative example is offered again by professor *Jonathan Macey*: "– – pre-emptive rights impose transaction costs on firms seeking to recapitalise, but do not provide any corresponding benefits whatsoever. [– –] Rational shareholders may not want pre-emptive rights because the availability of such rights can interfere with the ability of corporations to sell stock in the capital markets."[225]

Empirical evidence, however, suggests that investors do value this right dearly; it has a real meaning for them. Already in 1983 economist *Sanjai Bhagat* carried out a study of American companies that took the advantage of new legislation which allowed them to get rid of the pre-emptive rights by amending the Articles: due to amendments the market price of shares in those companies fell on average. The conclusion is clear-cut: pre-emptive right has a true value for rationally acting investors.[226]

9.2.3. Duty of loyalty. Delegation of a company´s operations to the Board and other members of management rests basically on the trust that owners have for managers´ loyalty. The core of this loyalty is a strict requirement for Board members and other managers not to act in their own interest. The easiest way to comply with this is to abstain altogether from "self-dealing" transactions that involve a conflict of interest.[227] Neither in Finland or elsewhere in developed economies disloyalty of directors and other managers is tolerated. A theft establishes wrongful conduct, nevertheless the form of transaction in which it is concealed. Because disloyalty is never a matter of business judgement, there is no logical reason to offer the shelter of Business Judgement Rule to managers in a case where their disloyalty is uncovered by a court. This is American law but also applied in Finland.[228]

Evaluated from a comparative angle there are no serious differences in the concept of loyalty. Thus here the issue boils down again to the thesis of superiority of common law judges. Based on anecdotal evidence from few cases in Continental Europe claims have been made that the civil law countries tolerate more self-dealing than their common law counter-parts.[229] On the other hand, this conclusion might be well doubted when one studies reports of those excessive perks that US Directors customarily grant to themselves.

[224] For details see ch. 3.3.

[225] Macey 1993, p. 111-112.

[226] See Bhagat 1983.

[227] Black 2001, p. 2.

[228] On the other hand, one has to bear in mind that if the permission is acquired from the owner there can be no theft, Macey 1999, p. 1279.

[229] Johnson *et al.* 2000.

These cases are not just few entertaining stories but common practice tolerated by American judges.[230] Are these extravagances also in the interest of investors? – For sure, were they eliminated, the return that equity investors require for their stake would be lowered to a corresponding extent.

Moreover, the possibilities of "tunneling" funds from the company to the illegal benefit of the insiders are almost non-existent in Finland as the FCA does not allow transactions from a subsidiary to its parent company below market prices to the detriment of the minority shareholders of the subsidiary. In the mandatory Finnish auditing system which covers all the companies, listed or not, the Auditor has a special duty to examine the governance of a company and its relations to the other companies in the same group; the information needed for this study is at her disposal as the Finnish Auditing Act requires that one of the subsidiary´s auditor is also an auditor in the parent company. To provide effective incentives for the examination, the Auditor may be held liable for the damages in accordance with the Act, if she fails to perform properly this exercise.[231]

9.2.4. Duty of Care – Business Judgement Rule. The other general duty of decision makers of company operations, in situations where no conflict of interest is involved, is the duty of care. Much attention has been paid to the American Business Judgement Rule as it creates a higher threshold for liability than under general tort law. In the US a corollary to the rule is gross negligence standard. American courts simply do not hold Board members or Director liable for a informed business decision, absent a conflict of interest, unless it is completely reckless or otherwise irrational.[232]

The current Finnish law can be interpreted as a version of this non-interference rule: an honest miscalculation or mistake shall not be deemed negligent pursuant to Ch. 15 Sc. 1 of the FCA. In other words, if an action pursued in the interest of the company is based on informed evaluation by the Board or the Managing Director, the fact that the action did not succeed does not create liability; in addition to damage, it has to be proven before the

[230] For a set of current examples see *Joann S. Lublin´*s special report of executive pay in *The Wall Street Journal Online*, April 11, 2002.

[231] See ch. 5.4 above. In addition, it is worth noticing that in international comparative studies Finland repeatedly comes out as one of the least corrupted jurisdictions. For example, the *International Country Risk Guide* gives Finland the highest points on scale 0 to 6. In the same study the US scored only 5,18, see Kane 2000, p. 45. See also the Global Competitiveness Report published by the *World Economic Forum* in February 2002. Finland got the highest score in the public institutions index concerning neutrality in government procurement, judical independence, clear delineation and respect for property rights, and costs releated to organized crime (see McArthur – Sachs 2001, p. 46.)

[232] Black 2001, s. 6, offers a compact justification for the rule: "First, judges are bad at second-guessing in hindsights decisions that turned out poorly. Second, an investment in a business can turn out badly, for a whole host of reasons. Bad management decisions are only one of these reasons. They are a risk that management knowingly assume. Third, some risky decisions will work out wonderfully, while others will work out terribly. If the directors risk being found personally liable for bad outcomes, they would be reluctant to take risks, and we will get fewer really good decisions also. We may not get better decisions on average, just more cautious decisions."

Court that the decision makers were intentional to cause damage or negligent. However, in Finland the unacceptable negligence does not have to be gross: even a minor negligence is – at least in principle – enough to rebutt the presumption of non-interference. Does this mean that the threat of potential liability is set at too low level compared to US, directing the Finnish Boards to be over-cautious with their actions, missing risky but profitable business opportunities?

This difference between formal thresholds – gross negligence (US) and minor negligence (Finland) – however, may be only superfluous. First, there is no clear-cut unambiguous criteria to define different degrees of negligence. Second, we have to bear in mind that American courts evaluate the decision-making process of Boards in a most detailed manner: a major transaction carried out hastily without the help of outside experts is likely to be doomed as grossly negligent which in turn denies the management´s access to the shelter of Business Judgement Rule. In the landmark case of *Smith* v. *Van Gorkom* of 1985, the Delaware Supreme Court held that Board members had breached their duty of care by agreeing to sell the company at a meeting that lasted only two hours solely on the oral presentation by the company´s Managing Director.[233]

The requirements for an informed decision are not so strict in Finland: statements of outside experts are a prerequisite only for those matters stated in the FCA (*e.g.* in issuing shares against property) and the practice of the Finnish Supreme Court provides only few guiding lines for proper process needed to form an informed Board decision. Moreover, it is noteworthy that pursuant to American law, at least in Delaware, a plaintiff does not have the burden to prove that an injury has resulted from the management´s breach of due care. While most US states place burden on a minority shareholder as plaintiff of proving breach of care and damages proximately caused by breach, Delaware places duty on Board members to prove "entire fairness" once a breach has been proven by plaintiff. In this respect the threshold for the non-interference to be rebutted is lower than in Finland where the plaintiff has to always to prove the Court that the injury resulted from the management´s negligence or action and the quantity of injury. Therefore, one remains uncertain where – in Finland or US – the threshold is lower actually.[234]

One of the most striking features of the US system is that the outside Board members may be excluded *ex ante* from the liability arising from the breach of duty of care. At least in forty states the liability of Board members is limited by law. For example in Delaware the

[233] See *e.g.* Hamilton 2001, p. 455-459.

[234] Another point worth noticing is that the Business Judgement rule is applied in the US only to cases where the issue at hand is a real business decision *i.e.* actions taken by a Board or a Director; a conscious decision to refrain from action qualifies as well as a valid exercise of business judgement. This means, on the other hand, that the Business Judgement Rule has no role to play when the Board or the Director has failed to direct or supervise their subordinates. Doing nothing without more can never be protected by non-interference rule. *Ibid*, p. 454.

General Corporation Law (§ 102(b)(7)) provides that the Articles may contain a provision eliminating or limiting the personal liability of a Board member to the company or to stock-owners for monetary damages, provided that such provision does not eliminate or limit liability for (*i*) any breach of loyalty; or (*ii*) acts or omissions lacking good faith or involving intentional misconduct or a knowing violation of law; (*iii*) unlawful dividend payments or redemptions; or (*iv*) any transaction from which the Board member derived personal an improper personal interest.

These kinds of restrictions serve as internal insurance system: a company may decide include such provision in the Articles instead of taking out a insurance for the Board members. On the other hand, if the outside members are excluded almost completely from liability it may dilute the deterrent effect of threat for litigation. Does this possibility increase investors confidence on the incentives of outside Board members for proper conduct? In other words, is due care of the Board best served by excluding outside members of potential liability? – We find it doubtful. Therefore, the restrictions on due care requirements of outside Board members may well raise the return that investors require for their investments.[235]

9.2.5. Duty to Inform – Prohibition of Insider Dealing. Among other European Union member countries Finland prohibits trading by Board members and other insiders at times when they have unequal access to material company information that has not (yet) been made public to other market participants. In contrast to this, the American doctrine maintains that insider trading occurs only in the breach of a fiduciary duty, trust or confidence. Moreover, US securities law define "material information" by considering whether the information would affect a reasonable market participant´s decision to invest[236] while in Finland the focus is on the question whether the information would be likely to affect substantially the market price of the company´s shares or other securities issued by it. [237]

Also regarding the management´s duty to inform the public, the approach of the Finnish law differs essentially from its American counterpart. Pursuant to the FSMA Ch. 2 Sc. 7 Para. 1 any information that will cause a significant movement on a company´s share price at the stock exchange must be immediately disclosed to the market participants. The purpose is to provide all market participants equal access to the information of material events.[238] In contrast, American investors lack equal footing on information because the general requirement of timely disclosure is absent in the US law. During the periods between quarterly and other filings, US companies do not have affirmative duty to disclose

[235] So far this question has been unsettled also in economics despite numerous statistical studies. For a current summary of these see Bhagat – Romano 2001, p. 11

[236] Ratner 1998, p. 150 and Steinberg 2001, p. 291.

[237] See ch. 5.2.

[238] *Ibid.*

material changes except in specific circumstances.[239] From a comparative viewpoint, if the substantial rules are considered, there would be no doubt that market participants prefer the Finnish system of prompt and equal disclosure of all material information.

9.2.6. Summary. The material provisions of the Finnish legislation in the field of minority protection and securities markets are quite modern. At least one is confident to argue that they are not so undeveloped as some studies let us to understand. We cannot identify any substantial differences in the Finnish concepts of loyalty and care in comparison – were it even executed as superfluously as above – to their American counterparts. Similarities are clearly more common than exceptions. The substance of a Board member´s or Managing Director´s basic duties In Finland are basically the same as in the US. Also the Finnish rules of disclosure which provide for the minority owners information for decision making and control are generally in line with the American ones. Thus, a conclusion that the common law system is more effective from the viewpoint of investors is not as easily derived as the studies of La Porta *et al*. suppose.

> As the Nordic company statutes are based on common preparatory work, the doubts expressed above are at least by large applicable to other Scandinavian countries – *Denmark, Norway* and *Sweden* – as well.

It should also be noted that the principle on equal treatment is well-respected in the Finnish courts. This means that the majority shareholder or the management cannot take advantage of the Business Judgement Rule as a "safe-harbour" to justify their actions that are against the equality of shareholders. Fair treatment means in Finland equality especially in the context of inter-shareholder relations and in division of the profit accrued in the company. As the equal treatment can be quite objectively observed as the decisive factor is the effect of an decision or another action; it is not relevant whether the Board or the GM understood the unequal consequences of the decision.[240] Due to this objectiveness the principle can also serve effectively as a self-enforcing deterrent against non-proper transactions of insiders. One can even claim that the principle of equal treatment guarantees the interests of minority shareholders in a superior way: equal right to distributions is more likely to lower the costs of equity financing as the stock-holders require not so high return for their participation in the enterprise which provides this kind of guarantee either by law or in its Articles.

The remaining question is again the one of efficient enforcement. The American regulatory system is generally found to be pre-eminent because of its excellent enforcement mecha-

[239] Steinberg 2001, p. 270. In a similar manner an American insider has to obey the rule of disclose-or-abstain: she must choose between disclosure and abstaining from trading but she is under no general obligation to disclose the material, non-public information.

[240] Savela 1999, p. 211.

nisms: resources are devoted to detection and prosecution of violators to such extent with which Finland or any other economy cannot compete.

APPENDIX: FORMS OF BUSINESS ENTERPRISES IN FINLAND

Finland, as a member of the European Union since 1995, has implemented the company law directives of the Union.[241] A formal effect of the adaptation process is that the Finnish companies providing limited liability for all shareholders are now divided to private companies and public ones;[242] private companies are excluded from the possibility to raise capital by offering shares or other types of securities to the public. That right is reserved only to public companies.[243] However, in principle, there are no legal obstacles for a private company having hundreds of shareholders.

> The provisions of the FCA equally apply to private and public companies, unless the contrary is specifically provided. The FCA contains such provisions only on limited number of matters.

All in all there were 228.847 limited-liability companies at the beginning of 2002.[244] On the other hand Finland has only 65.010 partnerships[245] and 2.809 co-operative societies.[246] The reasons for limited-liability companies being so popular are mainly found in the earlier tax regulation. Fiscal laws provided a powerful incentive for entrepreneurs to carry out their business formed as a limited-liability company as the tax rates were significantly lower for companies than for a self-employed person or a member of a partnership. Nowadays this kind of differences in taxation are almost non-existent.[247] Nevertheless, the limited-liability company has remained by far the most popular form for business enterprises despite the minimum capital requirements: at the formation the share capital of

[241] See Sillanpää 2001, p. 80, for a compact summary of the recent legislation.

[242] The Finnish namesake for a “limited liability company” or “company limited by shares” is “*osakeyhtiö*”.

[243] FCA Ch. 1 Sc. 2. See Timonen 2002, s. 131-132.

[244] This number excludes housing companies (71.328), that are non-business entities. Numbers were provided by the Finnish Trade Register, see: www.prh.fi. In addition, it should be noted that only some 90.000 companies are actually running a business at the moment – the rest have closed down their operations *de facto* or are dormant ones that have not began functioning yet, Sillanpää 2001, p. 81.

[245] The Finnish legal system acknowledges two types of partnerships: “*avoin yhtiö*” – in English “general partnership” – and a “*kommandiittiyhtiö*” – “limited partnership”. Both types are regulated by the Finnish Act on General and Limited Partnerships 1988 (No. 389 – April 29, 1988). A limited partnership restricts for some – but not all – partners liability of debts and other obligations to an agreed investment. For others, so called “responsible” members of a limited partnership, as well for all the members of general partnership the liability is unlimited – *e.g.* all their personal property can be, at least in principle, reached – and joint with the company. See Castrén 1993, p. 91-94; Sonninen 1998, p. 139-140; Toiviainen 1998, p. 2-3; or Timonen 2002, p. 130.

[246] Pursuant to Finnish Act of Co-operative Societies (No. 1448 – December 31, 2001; § 2) a co-operative is a society that aims at carrying on economic activities in order to benefit the businesses of its members. Neither the number of members nor the equity capital of a co-operative is fixed in advance. The amount of equity is depended of on the number of members at any given moment, and the contributions they have made. In principle, the liability of members is limited; the by-laws may, however, stipulate a supplementary fee for them to pay. See Olsson 1966, p. 140-141; Aro 1985, p. 118-121; Castrén 1993, p. 94-95; or Timonen 2002, p. 151.

[247] Ministry of Finance 2001, p. 27-49; Sonninen 1998, p. 229-239; and Myrsky 2002, p. 570-573, provide a general view on the Finnish tax regulation concerning enterprises. Of the Finnish system of taxation considered from a comparative point of view see Ministry of Finance 1998, p. 51-76.

a private company must be EUR 8.000 minimum while the requirement for a public one is EUR 80.000 (FCA Ch. 1 Sc. 1 Para. 3).

A public company, as defined in the FCA, can be listed on the Helsinki Stock Exchange or some other public market for transferable securities. At the moment (April 2002) there are 151 companies whose shares are publicly traded. However, they are of great importance to the Finnish economy:[248] the market capitalisation of listed companies was EUR 217 billion at the end of year 2001.[249]

Equities trading is centralised on the Helsinki Stock Exchange.[250] Equity trades are centrally cleared through the Finnish Central Securities Depository Ltd, which is a part of the Helsinki Exchanges Group.[251] The Depository also maintains the book-entry securities system, which is an on-line holdings register.[252] The majority of corporate bond issues are included in the book-entry securities system as well.

Equity ownership tends to be institutionally concentrated in Finland. Major institutional investors include pension funds and insurance companies. Foreign investors make up the largest owner group, holding some one third of the listed shares but 68 per cent of the aggregate stock market value.[253] The number of local stockholders in Finland is roughly 750.000 at the moment.

As indicated by the figures presented above, the limited-liability company is still the most common legal vehicle to organise business in Finland.[254] Nevertheless, our aim is not to claim that other juridical forms for business in Finland are obsolete or inferior to limited-liability companies. For example, if the possibility of disposing company funds is crucial to the entrepreneur-to-be, a partnerships would be a more useful alternative to her than company form which allows only the net profit to distributed to a owner.[255]

[248] Of the Finnish economy generally see Suviranta 1997, p. 18-20 and Ministry of Finance 1998.

[249] See the publication ”Finnish Financial Markets 2001”, available at the homepage of the Finnish Bankers´ Association (www.pankkiyhdistys.fi). Over 1996-2000, the market capitalization to GDP was on average 148 per cent. However, if the impact of *Nokia Ltd* is eliminated, the size of the Finnish stock market is not so impressive: in relative terms it is smaller than that of the US, Sweden and the UK but larger than that of Norway and Germany, see Ali-Yrkkö *et al*. 2001, p. 11.

[250] See the homepage of the Helsinki Stock Exchange: www.hex.fi.

[251] Virolainen 1996, p. 43-44.

[252] Participation in the book-entry system is compulsory for listed companies. Stockholders of companies belonging to the system are required to open a book-entry account in the register of the Securities Central Depository. Certain information contained in the stockholder register, such as the account-holder's name, address and the number of shares owned, is public. Foreigners may register their holdings in the name of a custodian (nominee registration). Beneficial owners of stocks registered under a nominee are entitled to dividend and all other subscription and financial rights relating to the stocks. Should a stockholder wish to exercise her voting rights she is required to register in her own name not less than 10 days prior to the general meeting. Participation in the general meeting generally requires advance notification. See *e.g*. af Schultén 1993, p. 100-102; and Kasanen 1999, p. 28.

[253] These figures are provided by the Helsinki Stock Exchange (31st March 2002).

[254] See also Sillanpää 2001, p. 80-81.

[255] af Schultén 1993, p. 91.

BIBLIOGRAPHY[256]

AARNIO, Aulis (2002). “Introduction.” In: PÖYHÖNEN, Juha (Ed.), *An Introduction to Finnish Law (Second, Revised Edition)*. Jyväskylä. ISBN 952-14-0340-3.

AIRAKSINEN, Manne (2000). *Enforcement of Minority Shareholders′ Rights*. A Paper Presented at OECD/World Bank Corporate Governance Roundtable for Russia – Shareholders Rights and Equitable Treatment.

ALLEN, Franklin – MICHAELY, Roni (2001). *Payout Policy.* (Working Paper 01-21, Financial Institutions Center at the Wharton School of the University of Pennsylvania.) USA.

ALI-YRKKÖ, Jyrki – HYYTINEN, Ari – LIUKKONEN, Johanna (2001). *Exiting Venture Capital Investments: Lessons from Finland*. (The Research Institute of the Finnish Economy (ETLA)). Helsinki. ISSN 0781-6847.

ANGBLAD, Jonas – BERGLÖF, Erik – HÖGFELDT, Peter – SVANCAR, Helena (2000). *Ownership and Control in Sweden – Strong Owners, Weak Minorities, and Societal Control.* (Stockholm School of Economics, Mimeo (May 26, 2000)). Stockholm.

ARO, Pirkko-Liisa (1985). “Carrying On a Trade and Forms of Business.” In: UOTILA, Jaakko (Ed.), *The Finnish Legal System (Second, Completely Revised Edition)*. Mikkeli. ISBN 951-640-244-5

ASTOLA, Tiina (1994). “Corporate Take-overs through the Public Markets.” In: SUVIRANTA, Antti (Ed.), *Finnish National Reports to the Fourteenth Congress of the International Academy of Comparative Law*; Athens. Helsinki. ISBN 951-640-734-X.

AUREJÄRVI, Erkki (1985). “General Principles of the Law of Obligations.” In: UOTILA, Jaakko (Ed*.), The Finnish Legal System (Second, Completely Revised Edition).* Mikkeli. ISBN 951-640-244-5.

BEBCHUK, Lucian Arye – ROE, Mark J. (1999). “A Theory of Path Dependence in Corporate Ownership and Governance.” *Stanford Law Review*. Pp. 127-170.

BHAGAT, Sanjai (1983). “The Effect of Pre-Emptive Right Amendments on Shareholder Wealth.” *Journal of Financial Economics*. Pp. 289-310.

BHAGAT, Sanjai – BRICKLEY, James A. (1984). Cumulative Voting: The Value of Minority Voting Rights.” *Journal of Law and Economics.* Pp. 339-365.

BHAGAT, Sanjai – ROMANO, Roberta (2001*). Event Studies and the Law: Part II – Empirical Studies of Corporate Law*. USA.

BLACK, Bernard S. (2001). *The Principal Fiduciary Duties of Boards of Directors*. (Presentation at Third Asian Roundtable on Corporate Governance; Singapore, 4 April 2001.)

BLOMSTEDT, Yrjö (1985). “A Historical Background of the Finnish Legal System.” In: UOTILA, Jaakko (Ed.), *The Finnish Legal System (Second, Completely Revised Edition)*. Mikkeli. ISBN 951-640-244-5.

BREALEY, Richard A. – MYERS, Stewart C. (2000). *Principles of Corporate Finance (Sixth Ed.)*. United Kingdom. ISBN 0-07-709565-0.

BRUUN, Niklas (2001). *Intellectual Property Law in Finland*. The Netherlands. ISBN 90-411-1544-7.

CASTRÉN, Martti (1998). ”Corporate Governance – The Responsibilities of the Board of Directors and the Supervisory Board.” In: *Finnish National Reports to the Fifteenth Congress of the International Academy of Comparative Law*. Helsinki.

[256] Of the Finnish jurisprudence reference is made only to writings published in English.

CEDERBERG, Lauri (1936). ”The New Provisions of the Joint Stock Company Law for Safeguarding the Rights of Shareholders and Shareholder-Minorities.” *Bank of Finland – Monthly Bulletin (March)*. Pp. 25-30.

COFFEE, John C. (1999). *Privatization and Corporate Governance: The Lessons From Securities Market Failure*. (Columbia Law School, Center for Law and Economics Studies. Working Paper No. 158.) USA.

COFFEE, John C. (2001). “Do Norms Matter? – A Cross-Country Evaluation.” *University of Pennsylvania Law Review*. Pp. 2151-2178.

COX, James D. (1997). “Equal Treatment of Shareholders: An Essay.” *Cardozo Law Review*. Pp. 615-635.

DALEBOUT, Richard S. (1989). “Cumulative Voting for Corporate Directors: majority Shareholders in the Role of a Fox Guarding a Hen House.” *Brigham Young University Law Review*. Pp. 1199-1226.

DEAKIN, Simon (2000). *Economic Effects of Criminal and Civil Sanctions in the Context of Company Law*. Research Note for the DTI Company Law Review. England.

DEMOTT, Deborah (1999). “The Figure in the Landscape: A Comparative Sketch of Directors′ Self-Interested Transactions.” *Law and Contemporary Problems*. Pp. 243-271.

DYCK, I.J. Alexander – ZINGALES, Luigi (2002*). Private Benefits of Control: An International Comparison* (CEPR Discussion paper 3177). USA.

EASTERBROOK, Frank H. – FISCHEL, Daniel R. (1991). *The Economic Structure of Corporate Law*. USA.

ENRIQUES, Luca – MACEY, Jonathan R. (2001). “Creditors versus Capital Formation: The Case against the European Legal Capital Rules.” *Cornell Law Review*. Pp. 1165-1204.

FERRAN, Eilís (2000). *Company Law and Corporate Finance*. Great Britain. ISBN 0-673-99765-0.

FERRARINI, Guido (2000). *Are American Takeover Defences Exportable to Europe?* A Paper Presented at the 1st European Conference of Corporate Governance – Brussels, 16th & 17th November 2000.

GILSON, Ronald J. (2001). “Globalizing Corporate Governance Converging of Form or Function.” *The American Journal of Comparative Law*. Pp. 329-357.

GORDON, Jeffrey N. (1994). “Institutions as Relational Investors: A New Look at Cumulative Voting.” *Columbia Law Review*. Pp. 124-194.

HAMILTON, Robert W. (2001). *The Law of Corporations* (Fifth Ed.). USA. ISBN 0-314-24132-9.

HELAKALLIO, Esa (1996). ”Supervision of the Financial Markets.” *Bank of Finland – Bulletin*. Pp. 55-59. ISSN 0784-6509.

HILL, Jennifer (2000). “Visions and Revisions of the Shareholders.” *The American Journal of Comparative Law*. Pp. 39-79.

HODGE, David (1999). *Minority Shareholders*. A Lecture at the Professional Negligence Bar Association – Back to Basics Course, 10th November. England.

HORSMANHEIMO, Pasi (2001). *Free Movement of Auditors and Audit Firms*. Jyväskylä. ISBN 952-14-0480-9.

HÖGFELDT, Peter – HOLMEN, Martin (2001). *A Law and Finance Analysis of Initial Public Offerings*. (A Study Presented at Tuck-JFE Contemporary Corporate Governance Conference.)

JOHNSON, Simon – La PORTA, Rafael – LOPEZ-de-SILANEZ, Florencio – SHLEIFER, Andrei (2000). "Tunneling." *AEA Papers and Proceedings*. Pp. 22-27.

JOKELA, Juha (1993). "Legal Procedure." In: PÖYHÖNEN, Juha (Ed.), *An Introduction to Finnish Law*. Jyväskylä. ISBN 951-640-622-X.

JOKELA, Juha (2002). "Legal Procedure." In: PÖYHÖNEN, Juha (Ed.), *An Introduction to Finnish Law (Second, Revised Edition)*. Jyväskylä. ISBN 952-14-0340-3.

KAISANLAHTI, Timo (1997). "The Finnish Perspective of The Proposal for a 13th Company Law Directive on Take-overs: a Multi-jurisdiction Survey, Part 2." *European Financial Services Law*. January. Pp. 5-7. ISSN 1350-2018.

KANE, Edward J. (2000). *Designing Safety Nets to Fit Country Circumstances* (mimeo, http://econ.worldbank.org).

KASANEN, Juha (1999). "Corporate Insider Trading and Its Regulation in Finland." *Bank of Finland – Bulletin*. Pp. 27-32. ISSN 0784-6509.

KAUKO, Karlo – SAUKKONEN, Erja (1996). "The Stock Market." *Bank of Finland – Bulletin*. Pp. 29-34. ISSN 0784-6509.

KLAUSNER, Michael – ELFENBEIN, Jason (1999). "The United States." In: BAUMS, Theodore – WYMEERSCH, Eddy (Eds.), *Shareholder Voting Rights and Practices in Europe and the United States*. Great Britain. ISBN 90-411-9750-8.

La PORTA, Rafael – LOPEZ-De-SILANEZ, Florencio – SHLEIFER, Andrei (1998). "Law and Finance." *Journal of Political Economy*. Pp. 1113-1155.

La PORTA, Rafael – LOPEZ-De-SILANEZ, Florencio – SHLEIFER, Andrei (2000). "Investor Protection and Corporate Governance." *Journal of Financial Economics*. Pp. 3-27.

MACEY, Jonathan R. (1993). *Corporate Law and Corporate Governance in Sweden: A Law and Economics Perspective*. (A Report Prepared for the Studieförbundet Näringsliv och Samhälle.) SNS Occasional Paper No. 48. Sweden.

MACEY, Jonathan R. (1999). "Fiduciary Duties as Residual Claims: Obligations to Nonshareholder Constituencies from a Theory of the Firm Perspective*." Cornell Law Review*, s. 1266-1281.

MANN, Richard A. – ROBERTS, Barry S. (1999). *Business Law and the Regulation of Business (6th Ed.)*. USA. ISBN 0-538-88482-7.

MAYER, Colin – SUSSMAN, Oren (2001). "The Assessment: Finance, Law, and Growth " *Oxford Review of Economic Policy*. Pp. 457-466.

McARTHUR, John W. – SACHS, Jeffrey D. (2001). The Growth Competitiveness Index: Measuring Technological Advancement and the Stages of Development. In: WORLD ECONOMIC FORUM: *The Global Competitiveness Report 2001 – 2002*. USA. ISBN 019-521-837-X.

MEGGINSON, William L. (1997). *Corporate Finance Theory*. USA. ISBN 0-673-99765-0.

MINISTRY OF FINANCE (1998). *Benchmarking Finland – An Evaluation of Finland's Competitive Strengths and Weaknesses*. Helsinki. ISBN 951-804-028-1.

MINISTRY OF FINANCE (2001). *Taxation in Finland 2001*. Helsinki. ISBN 951-37-3538-9.

MYRSKY, Matti (2002). "Tax Law." In: PÖYHÖNEN, Juha (Ed.), *An Introduction to Finnish Law (Second, Revised Edition)*. Jyväskylä. ISBN 952-14-0340-3.

NENONA, Tatiana (2000). *The Value of Corporate Votes and Control Benefits: A Cross-Country Analysis*. USA.

OLSSON, Curt (1966). "The Organization of Business and the Right of Establishment." In: UOTILA, Jaakko (Ed.), *The Finnish Legal System*. Helsinki.

OLSSON, Curt (1967). “General Clauses for the Protection of Minority Shareholders in the Scandinavian Companies Acts.” In. SCHMIDT, Folke (Ed.), *Scandinavian Studies in Law, Vol 11*. Uppsala.

PEZARD, Alice (1995). “The Golden Share of Privatized Companies.” *Brooklyn Journal of International Law*. Pp. 85-95.

PINTO, Arthur A. (1998). “The United States.” In: PINTO, Arthur A. – VISENTINI, Gustavo (Eds.), *The Legal Basis of Corporate Governance in Publicly Held Corporations – A Comparative Approach*. Great Britain. ISBN 90-411-9663-3. POUTIAINEN, Annika (2001). “Shareholders and Corporate Governance. The Principle of One Share – One Vote.” *European Business Law Review*. Pp. 67-75.

PRENTICE, D.D. (1996). “Alteration of Articles of Association – Expropriation of Shares.” *Law Quarterly Review*. Pp. 194-197.

PÖYHÖNEN, Juha (1993). “Torts.” In: PÖYHÖNEN, Juha (Ed.), *An Introduction to Finnish Law*. Jyväskylä. ISBN 951-640-622-X.

PÖYHÖNEN, Juha (2002). “The Law of Obligations.” In: PÖYHÖNEN, Juha (Ed.), *An Introduction to Finnish Law (Second, Revised Edition)*. Jyväskylä. ISBN 952-14-0340-3.

RAMSAY, Ian M. (1999). “Directors′ Duties in Australia: Recent Developments and Enforcement Issues.” *Company Financial and Insolvency Law Review*. Pp. 260-285.

RATNER, David L. (1998). *Securities Regulation (6th Ed.)*. USA.

RIIHIJÄRVI, Marja (1994). ”The Criminal Liability of Enterprises.” In: SUVIRANTA, Antti (Ed.), *Finnish National Reports to the Fourteenth Congress of the International Academy of Comparative Law*; Athens. Helsinki. ISBN 951-640-734-X.

ROCK, Edward B. (1997). “Saints and Sinners: How Does Delaware Corporate Law Work?” *UCLA Law Review*. Pp. 1009-1106.

RUDANKO, Matti (1992). “Civil Law and the Regulation of Financial Services.” In: TIMONEN, Pekka (Ed.), *Nordic Perspectives on European Financial Integration – Proceedings of Nordic Seminar on European Financial Integration*; Hanasaari, April 27 – 28, 1992. Helsinki.

SAVELA, Ari (1999). *Hostile Takeovers and Directors – Regulation of Takeover Defences in Finland, the United Kingdom, the United States and the European Union*. Turku.

SAVELA, Ari (2001). [Summary:] ”Company Law and Section 36 of the Contracts Act.” *Lakimies*. Pp. 191. ISSN 9923-7353.

af SCHULTÉN, Gerhard (1993). “Company Law.“ In: PÖYHÖNEN, Juha (Ed.), *An Introduction to Finnish Law*. Jyväskylä. ISBN 951-640-622-X.

SEVÓN, Leif (1985). ”Contract Law.” In: UOTILA, Jaakko (Ed.), *The Finnish Legal System – Second, Completely Revised Edition*. Mikkeli. ISBN 951-640-244-5.

SILLANPÄÄ, Matti J. (1994). ”Enhancing Shareholders Equality by a Take-over Bid in the Articles of Association.” In: SUKSI, Markku (Ed.), *Law under Exogenous Influences*. Turku. ISBN 951-29-0284-2.

SILLANPÄÄ, Matti J. (2001). ”The European Private Company from a Nordic Point of View.” In: NEVILLE, Mette – ENGSIG SÖRENSEN, Karsten (Eds.), *The Internationalisation of Companies and Company Laws*. Denmark. ISBN 87-574-0477-1.

SONNINEN, Jari (1998). ”Finland.” In: GUSTAFSSON, Leif (Ed.), *Business Laws in the Nordic Countries – Legal and Tax Aspects*. Stockholm. ISBN 90-411-1010-0.

STEINBERG, Marc I. (2001). *Understanding Securities Law* (Third Ed.). USA. ISBN 0-8205-4865-0.

SUVIRANTA, Antti J. (1997). *Labour Law and Industrial Relations in Finland (Second Ed.)*. The Netherlands. ISBN 951-640-932-6.

TAINIO, Risto – HUOLMAN, Mika – PULKKINEN, Matti (2001). "The Internationalization of Capital Markets: How International Investors are restructuring Finnish Companies." In: MORGAN, Glenn – KRISTENSEN, Peer Hull – WHITLEY, Richard (Eds.). Great Britain. ISBN 019-9247-552.

TENHUNEN, Pauliina (1997). "Finland." In: STECHER, M.W. (Ed.), *Protection of Minority Shareholders*. Cornwall.

TIMONEN, Pekka (1992). "Different Interests Involved in Takeovers." In: TIMONEN, Pekka (Ed.), *Nordic Perspectives on European Financial Integration – Proceedings of Nordic Seminar on European Financial Integration*; Hanasaari, April 27 – 28, 1992. Helsinki.

TIMONEN, Pekka (2002). "Business Law." In: PÖYHÖNEN, Juha (Ed.), *An Introduction to Finnish Law (Second, Revised Edition)*. Jyväskylä. ISBN 952-14-0340-3.

TOIVIAINEN, Heikki (1998). *Ownership and Control in Companies Limited by Shares in Finland*. Helsinki. ISBN 952-14-0121-4.

TOIVIAINEN, Heikki (1999). "Finland." In: BAUMS, Theodore – WYMEERSCH, Eddy (Eds.), *Shareholder Voting Rights and Practices in Europe and the United States*. Great Britain. ISBN 90-411-9750-8.

VIROLAINEN, Kimmo (1996). "Securities Settlement Systems." *Bank of Finland – Bulletin*. Pp. 43-47. ISSN 0784-6509.

WEST, Mark D. (2000). *Why Shareholders Sue: The Evidence From Japan*. (University of Michigan 1993 – John M. Olin Center for Law and Economics: Paper #00-010). USA.

WILHELMSSON, Thomas (1984). "The Power of a Court to Adjust Unreasonable Terms in the By-laws of a Corporation." In. ROOS, Carl Martin (Ed.), *Stock Exchange Law and Corporation Law – Report form a Symposium in Lund 27 February 1984*. Lund. ISBN 91-544-1651-5.

YLÖSTALO, Matti (1966). "Remarks on the Finnish Law of Contract and the Law of Torts." In: UOTILA, Jaakko (Ed.), *The Finnish Legal System*. Helsinki.

ELINKEINOELÄMÄN TUTKIMUSLAITOS (ETLA)
THE RESEARCH INSTITUTE OF THE FINNISH ECONOMY
LÖNNROTINKATU 4 B, FIN-00120 HELSINKI

Puh./Tel. (09) 609 900 Telefax (09) 601753
Int. 358-9-609 900 Int. 358-9-601 753
http://www.etla.fi

KESKUSTELUAIHEITA - DISCUSSION PAPERS ISSN 0781-6847

No 777 RITA ASPLUND, Koulutus, palkkaerot ja syrjäytyminen. 22.11.2001. 20 s.

No 778 STEFAN LEE, Financial Analysts´ Perception on Intangibles – An Interview Survey in Finland. 26.11.2001. 44 p.

No 779 JYRKI ALI-YRKKÖ – PEKKA YLÄ-ANTTILA, Globalisation of Business in a Small Country – Does Ownership Matter? 10.12.2001. 20 p.

No 780 PENNA URRILA, Suhdanneindikaattoreiden käyttö talouskehityksen seurannassa. 12.12.2001. 66 s.

No 781 JYRKI ALI-YRKKÖ – ARI HYYTINEN – JOHANNA LIUKKONEN, Exiting Venture Capital Investments: Lessons from Finland. 17.12.2001. 54 p.

No 782 JUHA FORSSTRÖM – JUHA HONKATUKIA – PEKKA SULAMAA, Suomen asema EU:n komission vihreän kirjan hahmottelemassa unionin laajuisessa päästökaupassa. 31.12.2001. 56 s.

No 783 ARLINDO VILLASCHI, An Analytical Framework for Understanding the Finnish National System of Innovation. 10.01.2002. 24 p.

No 784 AKI T. KOPONEN, Competition in Local Loan Markets, An Application of Linear City-Model with Price Discrimination. 15.01.2002. 15 p.

No 785 MATHIAS CALONIUS, Findings about Design and the Economy. 30.01.2002. 46 p.

No 786 PETRI ROUVINEN, Competitiveness in the New Economy. 01.02.2002. 17 p.

No 787 PASI HUOVINEN – HANNU PIEKKOLA, Early Retirement and Use of Time by Older Finns. 25.02.2002. 19 p.

No 788 PANU PELKONEN, Esitutkimus rekrytointiongelmien ja tuotannon yhteyksistä Suomen teollisuudessa 1987-2000. 18.02.2002. 24 s.

No 789 ERKKI KOSKELA – MARKKU OLLIKAINEN – MIKKO PUHAKKA, Saddles, Indeterminacy and Bifurcations in an Overlapping Generations Economy with a Renewable Resource. 18.02.2002. 30 p.

No 790 MINNA JUKOMAA – JUSSI KOIVISTO – MARJA TAHVANAINEN, Recruitment of Foreign IT Professionals in Finland. 22.02.2002. 23 p.

No 791 KARI E.O. ALHO, EU Labour Markets and Immigration Connected to Enlargement. 28.02.2002. 18 p.

No 792 JYRKI ALI-YRKKÖ, Mergers and Acquisitions – Reasons and Results. 05.03.2002. 32 p.

No 793 ANTTI KAUHANEN – HANNU PIEKKOLA, Rent Sharing as Part of Incentive Payments and Recruitment. 20.03.2002. 26 p.

No 794 HANNU PIEKKOLA, Transferability of Human Capital and Job Switches. 20.03.2002. 22 p.

No 795 MIKA MALIRANTA, From R&D to Productivity Through Micro Level Restructuring. 18.03.2002. 39 p.

No 796 MIKA MALIRANTA, Factor Income Shares and Micro-Level Restructuring. An analysis of Finnish Manufacturing. 18.03.2002. 23 p.

No 797 LAURA EHRLICH, The EU Single Market and Customs Policy: Impact on Estonian Foreign Trade. 19.03.2002. 24 p.

No 798 PETRI BÖCKERMAN, Understanding Regional Productivity in a Nordic Welfare State: Does ICT Matter? 22.03.2002. 20 p.

No 799 JYRKI ALI-YRKKÖ – RAINE HERMANS, Nokia Suomen innovaatiojärjestelmässä. 11.04.2002. 35 S.

No 800 JUHA FORSSTRÖM – JUHA HONKATUKIA, Energiaverotuksen kehittämistarpeet Kioton pöytäkirjan toteuttamiseksi. 26.03.2002. 31 s.

No 801 JUHA FORSSTRÖM – JUHA HONKATUKIA – ANTTI LEHTILÄ, Maakaasun hinnan vaikutukset ilmastopolitiikan kustannuksiin. 27.03.2002. 26 s.

No 802 ELINA RISSANEN, Reflections of Globalisation – The Influence of Economic Factors on the International Development Assistance Allocations. 09.04.2002. 19 p.

No 803 ELINA RISSANEN, Foreign Aid Policies – Comparing Finland and Ireland. 09.04.2002. 22 p.

No 804 RAIMO LOVIO, Suomalaisten monikansallisten yritysten T&K-toiminnan kansainvälistyminen – perustietoja ja kysymyksenasetteluja. 11.04.2002. 22 s.

No 805 ARI HYYTINEN – MIKA PAJARINEN, External Finance,Firm Growth and The Benefits of Information Disclosure: Evidence from Finland. 24.04.2002. 40 p.

No 806 MATTI LAMPINEN, Uusi talous – tapaustutkimuksia suomalaisyrityksissä. 25.04.2002. 13 s.

No 807 OLAVI RANTALA, Kansantalouden ja toimialojen pitkän ajan kasvu – Vertailua ilmastostrategian BAU-skenaarioon. 06.05.2002. 11 s.

No 808 JUSSI V. KOIVISTO – MATTI LAMPINEN, Comparative Analysis of Finno-Sinic Management: In-Depth Study of the Dimensions of Cross-Cultural Friction and Synergy in Management of Finnish Firms in Hong Kong. 22.05.2002. 18 p.

No 809 JUKKA LIIKANEN – PAUL STONEMAN – OTTO TOIVANEN, Intergenerational Effects in the Diffusion of New Technology: The Case of Mobile Phones. 22.05.2002. 16 p.

No 810 TIMO KAISANLAHTI, Minority Shareholders in the Finnish System of Corporate Governance. 10.06.2002. 71 p.

Elinkeinoelämän Tutkimuslaitoksen julkaisemat "Keskusteluaiheet" ovat raportteja alustavista tutkimustuloksista ja väliraportteja tekeillä olevista tutkimuksista. Tässä sarjassa julkaistuja monisteita on mahdollista ostaa Taloustieto Oy:stä kopiointi- ja toimituskuluja vastaavaan hintaan.

Papers in this series are reports on preliminary research results and on studies in progress. They are sold by Taloustieto Oy for a nominal fee covering copying and postage costs.