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Transformation of Legal Capital Rules in Estonia — Inevitability or Permanent Misunderstanding?

1. Introduction

On 1 January 2006, extensive amendments to the Commercial Code (CC)[*1] entered into force with the aim of regulating some as yet unsolved problems, and elaborating on some as yet ambiguous regulations.[*2] Such aims are undoubtedly right and noble, and it would be unfair to doubt the intentions behind the attempts to improve legal regulations. Then again, a well intentioned aim does not in itself guarantee that the correct result is attained. This article studies some legal capital rules amendments, which corroborate the question whether we have understood the message of the EU and other Member States correctly, and what do we want to say with our laws to Estonian, as well as foreign, undertakings. This article is also concerned with the issue of whether our rules are objectively justified or not.

The following amendments to the CC were studied:

- an obligation came into force that a public limited company and a private limited company must use generally recognised experts for the valuation of assets upon a valuation of a contribution in kind, if they are available in that field (§ 143 (1), § 249 (1));
- a private limited company is prohibited to acquire or take as security own shares in an amount that exceeds 10% of share capital (§ 162 (2) 1^1)).

It is beyond doubt that both of the above amendments made the situation stricter than before. A valuation method for contribution in kind was not provided for by law before; it was regulated by way of articles of

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1 Äriseadustik. – Riigi Teataja (State Gazette) I 1995, 26–28, 355, 2006, 7, 42 (in Estonian).

2 V. Kõve. 10-aastane äriseadustik – tagasivaade senisele arengule (Ten Years of the Commercial Code – Reflections of Developments). – Juridica 2005/9, p. 603 (in Estonian).

association. It has always been provided in the Act, though, that an auditor must audit the valuation of the contribution in kind, whereas for a private limited company such a requirement has been in force only if all contributions, other than in cash, collectively form more than one-half of the share capital or if the value of a contribution in kind exceeds 40,000 kroons (i.e. minimum capital of a private limited company). The reason for the last derogation is to allow faster and simpler incorporation of a company.*3 The nominal limitation on the acquisition of own shares of limited liability company was not earlier prescribed by law.

2. Legal capital rules in the EU, Estonia and other Member States

Legal capital rules are enforced in Estonia in accordance with the 2nd Company Law Directive.*4 That directive has repeatedly been criticised by academics, whereas the position that the directive is too regulative, unreasonably strict and also ineffective, is quite unanimous.*5 Recent steps in the EU, with regard to that directive, also clearly show that at the EU level there is agreement with the criticism, and several conceptual amendments are being planned. The first of these will take place in the near future, since the European Parliament has already approved simplification amendments*6 to the 2nd directive based on the SLIM plan.*7 Those amendments do not concern the concept of the directive, only individual issues, including the payment for shares by contribution in kind. In addition, the Commission Company Law Action Plan*8, prepared on the basis of the report*9 by group of company law experts, sets forth that the possibility of enforcing alternative capital protection rules and preparation of the directive amendments based thereon should be studied. Since no clear position has been taken on future developments in this issue, then no amendments can be expected before 2009.

The abovementioned EU future amendments apparently show a clear message to the Member States — the current legal capital rules are not justified and must be significantly modified. Although the EU has neither amended the current rules, nor expressed any clearly unambiguous positions regarding the future, the general message should nevertheless be understandable: the current formality-based rules will change in the near future.

Valuation of application of the 2nd directive in Estonia shows that Estonia has transposed the directive to national law almost exactly, and, considering the very regulative nature of the directive, this is not surprising. Since the directive was already transposed before Estonia joined the European Union, then the Estonian message to the EU at that time was very clear — we will follow EU requirements and are thus an exemplary European country. This declaration was actually made without much of a sacrifice, as the provisions meeting the EU requirements were transposed to Estonian law with the Commercial Code that came into force in 1995, which for the first time in Estonian history enforced contemporary company law, and since it was a fresh start, the choice of sources was relatively free (at least there was no reason to exclude the transposition of EU requirements). This approach was fine with the EU, as there has never been a problem with Estonia in this regard.

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[3] A. Vutt. Osaühing ja aktsiaselts (A Private Limited Company and a Public Limited Company). – Juridica 1995/4, p. 151 (in Estonian).

[4] Second Council Directive of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (77/91/EEC). – OJ L 26, 31.01.1977, pp. 1–13.

[5] Ch. Villiers. European Company Law – Towards Democracy? Aldershot: Dartmouth 1998, pp. 28–29; J. Armour. Share Capital and Creditor Protection: Efficient Rules for a Modern Company Law. – Modern Law Review 2000 (63) 3, p. 355 et seq.; L. Enriques, J. R. Macey. Creditors versus Capital Formation: The Case Against the European Legal Capital Rules. – Cornell Law Review 2001 (86) 6, p. 1165 et seq.; F. Kübler. The Rules On Capital Under The Pressure Of The Securities Markets. – K. J. Hopt, E. Wymeersch (eds.). Capital Markets and Company Law. Oxford: OUP 2003, p. 95 et seq.; E. Ferran. Legal Capital Rules and Modern Securities Markets — the Case For Reform, as Illustrated by the UK Equity Markets. – K. J. Hopt, E. Wymeersch (eds.). Capital Markets and Company Law. Oxford: OUP 2003, p. 115 et seq.; W. Schön. The Future of Legal Capital. – European Business Organization Law Review 2004 (5) 3, p. 429 et seq.

[6] Proposal for a Directive of the European Parliament and of the Council amending Council Directive 77/91/EEC, as regards the formation of public limited liability companies and the maintenance and alteration of their capital (presented by the Commission). Brussels, 21.09.2004, COM(2004)final. Available at http://ec.europa.eu/internal_market/company/docs/capital/2004-proposal/proposal_en.pdf.

[7] Company Law SLIM Working Group on the Simplification of the First and Second Company Law Directives. Proposals Submitted to the European Commission. Brussels, October 1999. Available at http://www.law.ugent.be/fli/WP/SLIM.pdf.

[8] Commission of the European Communities. Communication from the Commission to the Council and the European Parliament. Modernising Company Law and Enhancing Corporate Governance in the European Union — a Plan to Move Forward. Brussels, 21.05.2003, COM (2003) 284 final. Available at http://europa.eu.int/eur-lex/en/com/cnc/2003/com2003_0284en01.pdf.

[9] Report of the High Level Group of Company Law Experts on a Modern Regulatory Framework for Company Law in Europe. Brussels, 4.11.2002. Available at http://europa.eu.int/comm/internal_market/en/company/company/modern/consult/report_en.pdf.

Complying with the EU rules is in itself a positive thing, but raises the conceptual question whether Estonia has not been too eager to adhere to those rules. Such a question is relevant especially due to the fact that in Estonian law the 2nd directive requirements are applied equally to public limited companies as well as to private limited companies.

Pursuant to article 1 of the 2nd directive, it is mandatory for the Member States to apply the directive to public limited companies only. Since a public limited company and a private limited company are similar companies by nature, then the Member States face a question whether and to what extent should the directive be applied to private limited companies. Whereas practice varies from one Member State to another — some have provided altogether different rules to private limited companies in comparison with public limited companies, others apply the principles of the directive to all companies. The difference is especially striking in Germany where practically no provisions of the directive are applied to a *GmbH* — this is especially noteworthy, since the directive was largely based on German law.

German choices clearly show that making the choice has depended greatly on whether the Member State has chosen the system of one or two limited liability companies. A fine example of the first is Great Britain, where the transposition of the requirements of the 2nd Company Law Directive did not mean formation of two independent legal forms; instead the existence of two types of companies was achieved by enforcing special rules.[*10] The same solution was used in the Nordic Countries.[*11] Yet, similar technical solution has not entailed the same result, as a private limited company in Great Britain is known as an especially liberal type of company, whereas the same cannot be claimed about a Swedish *privata aktiebolag*. The main difference here is the fact that Great Britain has not provided a minimum capital requirement for the private limited company and, above all else, this clearly evident, yet substantively irrelevant circumstance, has brought about a situation where a private limited company in Great Britain has become extremely popular in all of Europe.[*12]

Estonian private limited company rules are created on the basis of the traditional continental European two companies system, but the actual difference in the rules of those companies, at least with regard to capital rules, is not remarkable. There are several reasons for that, one of the most important being the need to establish a structured legal environment in the place of the earlier lack of regulation, a part of which was the enforcement of very clear and strict rules on private limited companies.

Two types of trends are evident in European countries today. On one hand, there are the Nordic Countries, where Sweden, as a typical example, has, regardless of the Public Limited Company Act[*13] coming into force from 2006, not changed the current situation, where mostly the same rules are applied to all companies. On the other hand, several other Member States have amended their laws to try to liberalise rules on private limited companies or establish alternative types of companies to enable undertakings to use limited liability with less formalities.[*14]

With regard to applying the 2nd directive to private limited companies, a noteworthy change has also occurred in the EU. As the 1993 Commission study on the application of the 2nd Company Law Directive's requirements for limited liability companies[*15] gave a recommendation to apply the requirements of the directive also to those companies, then today no more such recommendations are given. If to analyse the recent developments, then it is evident that the EU has not concentrated even to all public limited companies but to listed companies only, which in turn gives a reason to doubt whether the application of the 2nd directive requirements for private limited companies, as carried out in Estonia, is still reasonable.

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[10] P. L. Davies. Gower and Davies' Principles of Modern Company Law. London: Sweet & Maxwell 2003, p. 14.

[11] Aktiebolagslagen och EG: Statens offentliga utredningar (Companies Act and EU: State's Public Inquiry) 1992:83. Juristdepartment. Stockholm: Delbetänkade av Aktiebolagkommittén 1992, pp. 21–22.

[12] M. Becht, C. Mayer, H. F. Wagner. Corporate Mobility and the Costs of Regulation. ECGI Law Working Paper N°.70/2006. Available at http://www.ecgi.org/wp/wp.php?series=Law, p. 30.

[13] *Aktiebolagslag* (2005:551). Available at http://lagen.nu/2005:551#K2 (in Swedish).

[14] France is a fine example, where as of 1.08.2003 the minimum capital requirement for limited liability companies was abolished, whereas previous years witnessed a discussion only about whether the 7500 Euros requirement valid then was too low. See W. Schön (Note 4), p. 436. Another example is Italy, where after the last reform considerations are allowed in private limited companies also in the form of services. See P. Montalenti. The New Italian Corporate Law: an Outline. – European Company and Financial Law Review 2004 (1) 3, pp. 370–371.

[15] Commission of the European Communities. Study on Second Directive's Extension to Other Types of Companies (Summary). Brussels 1993, p. 23.

3. Valuation of contribution in kind

Coming back to the amendments viewed in this article, it is necessary to clear up the reasons of these amendments. The motivation for the amendments to § 143 (1) and § 249 (1) of the CC that regulate the valuation method of contribution in kind is given in the explanatory memorandum: it is not reasonable to valuate contribution in kind "pursuant to the procedure prescribed by the articles of association" in a situation where generally recognised experts are available.[*16] Unfortunately, it remains unclear in that motivation what the actual problem is, since the reference to the alleged inadequacy is not accompanied by grounded motives. Had major problems arisen in that regard, it would have shown in case law, but the author is aware of no such judgements. Hence, the reason for the amendment could not have been the need to solve practical problems, but since the explanatory memorandum includes no other motives, then it must be concluded that there is no actual reason.

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

Estonian law is in compliance with the above requirements of the 2nd directive, and since the directive establishes minimum requirements only, then it is formally irrelevant to refer to any inconsistency or deficiency in Estonian law here. A substantial problem exists, though, in the directive requirement, that only an independent third person (an expert) can be used to valuate a contribution in kind — this means that Estonian law provides, in certain cases, for the double use of a third person (expert valuation and audit control). It is justified to ask, here, whether such a double requirement is reasonable in the European context. Even a single general assessment of the requirements of the 2nd directive — they make the incorporation of a company and increasing of share capital too costly[*17] — shows that the requirements applied in Estonia must be considered too burdensome.

In the evaluation of our law in comparison with the 2nd directive, it cannot be ignored that amendments to the directive are planned. The amendments are based on the Company Law SLIM Working Group report that found that the requirements in the directive are not always useful or necessary, and a proposal was made *inter alia* to decrease the number of cases that require valuation of contribution in kind. A specific proposal was made to exclude the requirement of the valuation of contributions in kind, all together, in case the object of the contribution are transferable shares traded on the securities market, as well as if the asset had recently been valued and its value had not suffered any substantial changes.[*18] The same suggestion was given in the Company Law Winter Working Group report.[*19] The proposal of amendments to the 2nd directive has taken these suggestions into account; it is emphasised, however, that the current situation is "expensive but not necessarily always offering a total guarantee for establishing the precise value of the asset concerned"[*20]. The draft directive gives the right to the Member States to decide not to apply article 10 where transferable securities[*21], as defined in article 4 (1) 18) of directive 2004/39/EC[*22], are valued at the weighted average price at which they have been traded in the three months preceding the effectuation of the respective contri-

[16] Äriseadustiku muutmise seaduse eelnõu seletuskiri 14.12.2004 (Explanatory Memorandum to the Draft Amendments of the Commercial Code. 14.12.2004). Available at http://web.riigikogu.ee/ems (in Estonian).

[17] F. Kübler (Note 5), p. 101.

[18] Recommendations by the Company Law SLIM Working Group on The Simplification of The First And Second Company Law Directives. – Company Law SLIM Working Group on the Simplification of the First and Second Company Law Directives. Proposals Submitted to the European Commission. Brussels, October 1999. Available at http://www.law.ugent.be/fli/WP/SLIM.pdf, p. 3.

[19] Winter Report (Note 8), p. 91.

[20] Commission Working Document: Detailed explanation (by article) of Proposal COM (2004)…..final of ….. October 2004 (2004/….(COD)) for a Directive of the European Parliament and of the Council amending Council Directive 77/91/EEC, as regards the formation and public limited liability companies and the maintenance of their capital, paragraph 1. Available at http://ec.europa.eu/internal_market/company/docs/capital/2004-proposal/explanation_en.pdf.

[21] Pursuant to that article transferable securities mean shares and other equivalent securities and depositary receipts in respect of shares, bonds or other forms of securitised debt and depositary receipts in respect of such securities and other securities giving the right to acquire or sell any such transferable securities or giving rise to a cash settlement determined by reference to transferable securities, currencies, interest rates or yields, commodities or other indices or measures.

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bution in kind. The draft directive also allows the Member States to apply simplified valuation procedures where assets contributed as contribution in kind have already been subject to a fair value opinion by a recognized independent expert who is sufficiently trained and experienced; the fair value is determined for a date not more than three months before the effective date of the asset's contribution and the valuation has been made in accordance with the pertinent valuation standards and principles. Another option of simplified valuation is to derive the value of an individual asset from the published and audited accounts of the previous financial year. A limitation of the described conditions must be taken into consideration — they are not applicable if the value of the valued asset has significantly changed due to new circumstances, and minority shareholders, whose shares represent at least 5% of the company's share capital, may require a re-valuation of the asset. In itself these rules express no unknown principle, as the current directive also excludes the valuation of assets in case of post-incorporation, if the asset is a stock exchange acquisition (article 11 (2)).

Estonia will not have a formal conflict with the 2nd directive, even after adoption of the amendments, since they do not require the Member States to simplify the procedure already in force, but simply give the option to do so. Considering the fact that other Member States (or at least the majority) will definitely use that option, then there is no real choice for us in deciding whether to go along with the changes. Thus, the issue does not come down to whether to comply with the requirements of the directive, but, when taking the legal competition of states into consideration, it is necessary to establish as favourable an environment for undertakings as possible. It is technically possible to implement the amendments to the directive by providing individual derogations, which would mean a partial return to the CC version in force prior to 1.01.2006. That would abolish the need for any valuation upon payment with transferable securities. That would also abolish the obligation to control the valuation in a case where the asset was valued by an expert or the asset's value was derived from disclosed reports. It must be emphasised that the idea behind the amendment to the directive is to abolish additional valuation in case the valuation of contribution in kind is based on objective circumstances, which is definitely reasonable.

The next question in assessing the reasonability of the rules valid in Estonia is what kind of rules are applied in similar situations in other countries. The comparison of the valuation rules of a contribution in kind with the rules in force in other countries is not in our favour here either. In Germany, for example, the data about a contribution in kind and the valuation thereof must be shown in the incorporation report. Members of the first elected management board and supervisory board must give their opinion upon the incorporation of the company, which must include data on contribution in kind (§ 33 II 4 of the AktG[*23]). Additionally, the valuation of assets must be carried out by independent experts (*Gründungsprüfer*), who are chosen by the court, from among of auditors. Since assets must be valuated several times and by different people, then it is only natural that opinions in reports may be different. Consequently, the final check is effected by the commercial register, whose opinion is based on the documents submitted thereto or a new valuation, if deemed necessary (§ 38 of the AktG). If it is found that the contribution in kind has been overvalued, then the court may refuse to register the public limited company in the commercial register.[*24]

In France, valuation of contribution in kind of a public limited company must also be carried out by an auditor, whereas the foundation meeting may reduce the value of the contribution in kind by a unanimous vote (*Code de Commerce*[*25] articles L225-8 and L225-14). Similarly, Swedish law provides that an auditor must give an opinion about a contribution in kind (*Aktiebolagslag* 2:19). And in Holland there is also an obligation to use an auditor, but it is not mandatory in case all founders agree otherwise, the contribution in kind is transferred by a company whose reports are disclosed, the founding company has non-distributable reserves at its disposal in the amount of the contribution in kind or the founding company issues a warranty in the amount of the contribution valid for at least one year (BW article 94a). The latter requirements may even be more complicated than using an auditor, but at least there is a possibility of not using an auditor and thereby avoiding the extra cost.

If to compare the requirements for private limited companies of the same countries, it can be seen that differences between Estonia and other countries are even significant. Germany has no external valuation requirements for contribution in kind. France has a requirement that valuation of contribution in kind have to be effected by an auditor, but only if the value of the contribution in kind exceeds 7500 Euros or more than half the share capital has to be paid by contribution in kind (*Code de Commerce* article L223-9). Holland requires a report about contribution in kind, and it must be prepared by an auditor only in case the contribution in kind is given to a company with an audit obligation or if the value of the contribution exceeds 3,600,000 Euros. Founders can decide not to use an auditor or other expert by their decision in case the

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[23] Aktiengesetz, 6 September 1965. – BGBl I 1965, 1089. Zuletzt geändert durch Art. 5 G v. 15.12.2004 I 3408. Available at http://bundesrecht.juris.de/bundesrecht/aktg.

[24] P. van Ommeslaghe. Capital. – International Encyclopaedia of Comparative Law. Vol. XIII: Business and Private Organizations. Chapter 5: Capital and Securities of Marketable Share Companies, p. 18.

[25] Code de Commerce: Partie Legislative. Loi 2003-775 du 21/08/03 (JO 22/08/03). Commercial Code: The Legislative Part. Available at http://www.legifrance.gouv.fr/html/codes_traduits/commercetextA.htm.

contribution in kind is transferred by a company who submits a confirmation to the commercial register that it assumes sole responsibility for the recipient's debts, its report is disclosed, and its own equity exceeds the nominal value of the shares issued for the contribution in kind (BW article 204a). The approach of Swedish law is different: the same requirements are applied to both type of companies and the use of an auditor in a *privata aktiebolag* cannot thus be excluded.

It can be concluded from the above that Estonia has higher requirements for valuation of contribution in kind than the other above-mentioned countries. Whereas the requirements applied to private limited companies in Estonia are significantly different from those applicable in other countries.

Coming back to the alleged inadequacy of the earlier rules stated in the explanatory memorandum of the draft amendments to the CC, one cannot but ask whether such an inadequacy is indeed possible in a situation where similar or more liberal legal frameworks have been in force in other countries for years. We might have found, in principle, be a significant problem in our legal order, which has for some reason not been noticed in other countries, and in such a situation it should be our duty to inform others that such a problem exists. However, such a conclusion sounds absurd and there is a more reasonable explanation — we have managed to create a pseudo problem and enthusiastically solved it.

Besides sending the signal with this amendment that private limited companies have very rigid requirements in Estonia, we also have problems on the practical side. Since a "recognised expert" is an undefined legal term, and the explanatory memorandum refers only to real estate experts as an example, then there have already been cases where commercial registers also require the use of an expert in situations where objects of the contribution in kind are cars, office equipment, production facilities and such. A striking example was a company used as a contribution in kind, where an opinion was expressed that its value should be valuated by an expert who is an auditor and another auditor should control the valuation. The first question to be asked here is whether an auditor is qualified as a recognised expert. And second, the auditor's independence requirement and his or her liability[*26] alone should ensure a correct result if the valuation was only controlled by an auditor. Additionally, it would require choosing one auditor from outside the company, which is not necessary from the point of view of the auditor's independence or the assurance of controlling the valuation.[*27] Thus, we can ask whether using two auditors in such situations has really been the aim of the regulator. Evidently what we have here is an incorrect interpretation of the law, but we cannot state that the text of the act excludes such an interpretation. Based on the same logic, it could also be concluded that a contribution of transferable securities should be valued by an expert, which is especially absurd in the view of the draft 2nd directive, which not only intends to allow an option to abolish the control of the valuation requirement of a relevant contribution in kind, but even rule out the valuation all together.

4. Acquisition of own shares

The first question regarding the limitations on the acquisition of own shares is whether and what are they useful for at all. Taking the acquisition of own shares from the capital protection point of view means that any such acquisition should be forbidden, since that would be the way of returning the contribution to the shareholder. This limitation is mostly needed, though, because acquisition of own shares means conflict of interests between shareholders and other interest groups (mainly creditors), although a similar conflict also occurs upon payment of dividends or the taking of new loans.[*28] However, the acquisition of own shares may be necessary in certain cases — in a private limited company, which is a closed company, it may be necessary to enable a shareholder to exit the company, solve disputes between shareholders, as well as making the company more attractive to external investors.[*29] Although there are several objections to allowing the acquisition of own shares, especially from the point of view of the maintenance of capital, the given examples should be sufficiently clear to demonstrate the need for allowing the procedure.

The 2nd directive regulates the acquisition of own shares by public limited company (article 19) only and any requirements for private limited companies are left for the Member States to decide. Consequently, it is important to ensure for our companies at least an equal legal environment with the other Member States. In this regard the situation in other Member States is different, and it can be generalised that Sweden, for example, has provided for quite strict rules, whereas in Germany and Holland the rules are liberal.

The need for § 162 (2) 1^1) of the CC is justified in the explanatory memorandum with the fact that without such a regulation a situation could occur where all shares of a private limited company belong to that private

[26] Section 37 and § 40 (1) of the Authorised Public Accountants Act (Audiitortegevuse seadus). – Riigi Teataja (State Gazette) I 1999, 24, 360; 2003, 23, 133 (in Estonian).

[27] A. McGee. Share Capital. London: Butterworths 1999, p. 49.

[28] B. Cheffins. Company Law: Theory, Structure and Operation. Oxford: Clarendon Press 1997, pp. 79–80.

[29] E. Ferran. Company Law and Corporate Finance. New York: Oxford University Press Inc 1999, pp. 430–431.

limited company, and not providing similar limitations for private limited companies, as are in force for public limited companies in the acquisition or taking as security of own shares, would most likely be a mistake on the regulator's part. Such an allegation may even be justified, but on different grounds. The initial texts of the draft CC included nominal limitations in the amount of acquisition of acquisition of own shares regarding up to half of the share capital.[*30] That principle was based on Dutch law (at BW2 article 207[*31]). Just before the adoption of the law a proposal was submitted to decrease the limit to 1/3 of share capital.[*32] The final vote left the nominal limitation completely out, based on the reasoning that such limitations in the amount of acquisition may be unreasonable and not appropriate to the nature of a private limited company. For example, the fact that a private limited company has, as a rule, few shareholders and an acquisition of own shares could concern a relatively big shareholding, which would make it impossible to buy back shares from a partner whose interest is bigger than that percentage (which is quite common in a private limited company), was indicated as a problem. It is preferable to limit instances where a private limited company acquires all of its shares or majority shareholding, since that could lead to a situation when the company loses its power to express its will through its management bodies, which is, in the long term, unacceptable.[*33] Such a situation would undoubtedly mean ambiguity in the company's management; it is also doubtful whether the aims of such acquisitions can be in the best interests of the company. Therefore it might be claimed that the parliament made a mistake providing the earlier set of rules without the nominal limitation, but now the question is whether the provision for extremely restrictive nominal limitations was not even a substantial mistake.

5. Conclusions

The amendments to the CC that came into force on 1.01.2006, and were discussed in this article, are clearly aimed to make the legal capital rules more rigid. In the situation where the EU has aimed to liberalise the legal capital rules, the increase of normative capital rules in Estonia is a clear sign of the legal environment being made less favourable for undertakings. Considering the developments in the EU, such changes are clearly contradictory to overall trends — i.e. liberalisation of small company rules and the creation of a more favourable environment for undertakings. If the reason for the EU's more liberal trends is primarily the need to be legally competitive with the USA, then similar competition is also present between EU Member States. Unfortunately, it must be admitted that the above-mentioned processes have not been perceived here and the discussed amendments to the CC give reason to state that we have made serious efforts to be the losers in this competition. It is impossible to state that those developments, especially the rigid capital rules, are inevitable. Instead, it is the question of our misinterpretation of what is happening in the world, and such mistaken perception has brought along incorrect solutions.

The liberalisation of company law is on the agenda in Estonia, as the plan "Entrepreneurial Law: Action Plan for Improving the International Competitiveness of the Corporate Legal Environment"[*34] published by the ministry of Justice in February 2006, also includes *inter alia* provisions to amend the current company law, the most important of which is declared to be the need to control the substantive reasonability of the current rules, whereas the need to establish flexible rules for small and medium size enterprises is underlined. Such an aim is completely justified and there is hope that these issues will actually be dealt with. What can definitely be considered positive with the amendments to the CC, viewed in this article, is the fact that those extremely rigid and limiting amendments have established a good platform for liberalisation, since only the repealing thereof (which is inevitably necessary for the most part) allows to speaks about making the law considerably more flexible and entrepreneur-friendly.

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[30] Section 174 of the Draft Companies and Registration of Companies Act (SE 733 II) 30.01.1995. (The author has a hold of the draft.)

[31] Burgerlijk Wetboek. Boek 2 1976. Available at http://www.burgerlijk-wetboek.nl/BW2.html.

[32] Table of amendments of the Draft Companies and Registration of Companies (733 SE III) 8.02.1995, § 174. (The author has a hold of the draft.)

[33] A. Baumbach, A. Hueck. GmbH-Gesetz: Beckliche Kurzkommentare. Bd. 20. 18. Aufl. München: Beck 2004, § 33:19.

[34] Available at http://www.just.ee/19426.