Minimum Share Capital
Its Functions for Swedish Private Limited Liability Companies

Bachelor’s Thesis in Commercial and Tax Law
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Abstract

This thesis aims to investigate the effects of the Swedish minimum capital requirement in relation to the Swedish private limited liability companies. The issue whether there should be a requirement for minimum share capital has been debated in Sweden and the rest of the European Union. Sweden and other continental European countries have a tradition of providing a minimum share capital requirement in order to provide creditor protection. Countries that administer an Anglo-Saxon tradition such as England and the United States do not express the same belief in the minimum share capital’s function as creditor protection and has therefore abolished these requirements. The European Union’s Second Company Law Directive provides a minimum share capital of EUR 25,000 for companies similar to the Swedish public limited liability company. The companies comparable to the Swedish private limited liability companies is thus regulated under the law of the Member States themselves. In Sweden the frequently used arguments for abolishing the minimum share capital requirement are the rule’s dysfunction as creditor protection, the fact that the minimum share capital does not consider the specific capital demand of the company and the potential obstacle effect on entrepreneurship. The author agrees with these arguments but emphasises the minimum share capital’s function as an “entrance fee” to the private limited liability company form as an argument why the requirement should maintain in Swedish company law. The rules in ABL regarding protection of restricted equity could be replaced by a solvency-sufficiency test similar to the provision in § 6.40 MBCA. The minimum share capital’s obstacle effect on entrepreneurship could be reduced by introducing a beneficial loan with low interest rate provided by the state or the municipalities.
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Abbreviations

ABL        Aktiebolagslag
ApS        Anpartsselskab
CA         Companies Act
CJ         Court of Justice
DKK        Danish Krone
ECU        European Currency Unit
EEC        European Economic Community
EU         European Union
EUR        Euro
GBP        Great British Pound
GmbH       Gesellschaft mit beschränkter Haftung
GmbHHG     Gesetz betreffend die Gesellschaft mit beschränkter Haftung
Ltd.       Limited Company
MBCA       Model Business Corporation Act
P.         Page(s)
Para.      Paragraph(s)
Prop.      Proposition
SEK        Swedish Krona
SFS        Svensk författningssamling
SL         Selskabsloven
SOU        Statens offentliga utredningar
TFEU       Treaty on the Functioning of the European Union
UG         Unternehmengesellschaft
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<tr>
<td>UK</td>
<td>United Kingdom</td>
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<td>ÅRL</td>
<td>Årsredovisningslag</td>
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I Introduction

1.1 Background

Swedish limited liability companies can be categorized into two groups, the public form and the private form. In 1976 the European Union’s Second Company Law Directive\(^1\) introduced a requirement for minimum share capital regarding limited liability companies. The directive provides a minimum share capital requirement of EUR 25,000 for companies similar to the Swedish public limited liability company.\(^2\)

The company forms in the European Union, EU, comparable to the Swedish private limited liability company is not regulated by the EU’s Second Company Law Directive. These companies are governed under the law of each Member State.\(^3\) However, rulings from the Court of Justice, CJ, has had an impact on the effect of Member States’ legislation regarding companies similar to the Swedish private limited liability company. The outcome in Centros\(^4\) allows for a company to register a private limited company, Ltd., in England and create a branch in the Member States of trade, Denmark, merely to avoid the Danish minimum share capital rules. The CJ interpreted this behaviour as an expression of the freedom of establishment granted by the Treaty of Lisbon.\(^5\)

A Swedish private limited liability company is formed by one or several persons. A distinguishing feature for the private limited liability company is the absence of personal liability for the founders and shareholders. It is stated in Chapter 1, Section 3 of the Swedish Companies Act (Aktiebolagslag, SFS 2005:551), ABL, that the shareholders are not financially liable for the company’s obligations. Instead the company as a legal entity and the assets it controls are fully liable for the company’s commitments. The personal risk for the company’s founders is thus limited to the capital they wish to contribute to the company during its foundation.\(^6\)

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\(^4\) Centros Ltd v. Erhvervs-og Selskabsstyrelsen (Case C-212/97) [1999] ECR-1459.

\(^5\) Treaty on the Functioning of the European Union.

\(^6\) SOU 2008:49, p. 17.
The addition of capital to a Swedish private limited liability company is constituted by the paying of share capital. According to Chapter 1, Section 5 ABL the minimum share capital for a Swedish private limited liability company is SEK 50,000. The main purpose of the provision on minimum share capital is to serve as creditor protection and to prevent foundation of unserious businesses.\(^7\)

Member States of the EU present a variety of minimum share capital rules regarding companies similar to the Swedish private limited liability company. Chapter 1, Section 4 of the Danish Companies Act (lov om aktie- og anpartsselskaber (selskabsloven)), SL, provide a minimum share capital requirement of DKK 80,000, approximately SEK 95,000 for a Danish private limited company, anpartsselskab, ApS. The minimum share capital rules in Denmark has been motivated with arguments similar to the ones found in the Swedish debate, namely the minimum share capital’s function as creditor protection.\(^8\)

In England an **Ltd.** is the company form corresponding to the Swedish private limited liability company. An **Ltd.** can be founded with a minimum share capital of GBP 1. In Germany a **Gesellschaft mit beschränkter Haftung**, GmbH has a minimum share capital requirement of EUR 25,000, approximately SEK 225,000. However, the subcategory of the GmbH, the **Unternehmergeellschaft**, UG allows for registration with only EUR 1 in share capital.\(^9\) The share capital for an **UG** is paid with annual depositions from the company’s profits.

In the United States the minimum share capital rules have been debated since the introduction of the Model Business Corporation Act, **MBCA**. The requirement for minimum share capital was abolished in the **MBCA** reform in 1969. The arguments for this decision was that the minimum share capital rules did not provide any realistic creditor protection and that they were too complex and also subject to manipulation.\(^10\)

The minimum share capital for Swedish private liability companies was SEK 100,000 up to 1 April 2010 but has been reduced to today’s SEK 50,000. The reduction was the effect of an ongoing discussion about the minimum share capital’s function as creditor protection.

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\(^7\) Prop. 2009/10:61, p. 5.

\(^8\) SOU 2008:49, p. 67.


\(^10\) Andersson, Jan, Kapitalskyddet i aktiebolag, 6\(^{th}\) edition, LitteraturCompagniet, Stockholm 2010, p. 34 f.
and its supposed obstacle effect on the use of the Swedish private limited liability company form as such. A central argument in the debate has been the need for a modern and attractive legislation that would increase the amount of registered companies in Sweden by foreign entrepreneurs.\footnote{SOU 2008:49, p. 17 f.}

1.2 Purpose and Delimitations

The purpose of this thesis is to discuss and analyse the functions of the minimum share capital requirement in Swedish private limited companies.

This thesis will display minimum share capital rules in Sweden, Denmark, England, Germany and the United States. The display of minimum share capital rules in other Member States and the United States functions to put the Swedish minimum share capital rules into perspective.

1.3 Method and Materials

Material presented in chapter two to four uses a descriptive method in relation to Swedish, Danish, English, German and American rules on minimum share capital and creditor protection. Since the purpose of the thesis is to discuss and analyse the functions of the Swedish minimum share capital requirement, a deeper presentation of minimum share capital rules regarding Swedish law is made. Chapter five and six uses a problem oriented method in order to present the arguments for and against minimum share capital requirement.

Material used in the thesis are legislation, preparatory works, case-law and doctrine. The different sources have been valued according to their respective legal dependability. The respective company acts for Sweden, Denmark, England, Germany and the United States have been used to present minimum share capital rules. The CJ’s decision in Centros together with Article 49 TFEU have been used to present the development of minimum share capital in the European Union. The preparatory works SOU 2008:49 and Prop. 2009/10:61 has been used to present the government’s motivation for a minimum share capital requirement. Relevant doctrine is used to explain details in the different countries national legislation.
2 Creditor Protection in Swedish Limited Liability Companies

2.1 Introduction

Since there is no personal responsibility involved in the Swedish private limited liability company structure, a creditor is prevented from directing a claim towards a company shareholder.\textsuperscript{12} In order to better the creditors position there are several capital protection rules provided in \textit{ABL}. The purpose of the capital protection rules are to protect the company’s creditors by creating a margin between the company’s assets and liabilities.\textsuperscript{13}

The creditor protection in \textit{ABL} consists mainly of two types of rules that constitute creditor protection. The first type of rule is the requirement for a minimum share capital which serves to create a buffer on behalf of the company’s creditors.\textsuperscript{14} The rules regarding minimum share capital are found in Chapter 1, Section 4-6 \textit{ABL}. The central provision for this segment of the presentation is Chapter 1, Section 5 \textit{ABL} in which the minimum share capital for a Swedish private limited liability company is set to SEK 50,000.

The second type of rule regarding creditor protection is the protection of restricted equity.\textsuperscript{15} The rules aim to protect assets from being transferred from the company to shareholders or other parties through transactions that do not benefit the company through a counterperformance. By protection of restricted equity and thus the company’s solvency the creditors are put in a better position regarding their interest in the company. Provisions regarding protection of restricted equity are found in Chapter 17 \textit{ABL}. In this chapter the rules regarding minimum share capital and protection of restricted equity are displayed.

2.2 Requirement for Minimum Share Capital

The main purpose of minimum capital requirement is to provide creditor protection by safeguarding a specific amount of capital on the company’s balance sheet.\textsuperscript{16} This form of capi-

\textsuperscript{12} Bergström, Clas, Samuelsson, Per, Aktiebolagets grundproblem, 3\textsuperscript{rd} edition, Norstedts Juridik, Stockholm 2009, p. 177.

\textsuperscript{13} Prop. 2009/10:61, p. 5.

\textsuperscript{14} Andersson, Jan, Kapitalskyddet i aktiebolag, 6\textsuperscript{th} edition, LitteraturCompagniet, Stockholm 2010, p. 33 f.

\textsuperscript{15} Anderson, Jan, Kapitalskyddet i aktiebolag, 6\textsuperscript{th} edition, LitteraturCompagniet, Stockholm 2010, p. 33 f.

\textsuperscript{16} Prop. 2009/10:61, p. 5.
tal serves as a built-in credit safety in the Swedish private limited liability company structure. During the establishment of a Swedish private limited liability company the addition of share capital is made by the founders through the application of shares. The shares are paid for either in cash or in capital contributed in-kind. In both cases the value of the capital added should be enough to cover the share capital set out in the articles of association. If the payment is made with capital contributed in-kind the valuation must be made by an authorized accountant. After this point and through the company’s further existence there should be enough capital in the company’s assets to cover the share capital.

This can be illustrated as follows:

Table 1

<table>
<thead>
<tr>
<th>Assets</th>
<th>Liabilities</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cash</td>
<td>SEK 20,000</td>
</tr>
<tr>
<td>Bank</td>
<td>SEK 80,000</td>
</tr>
<tr>
<td>Profit</td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>SEK 100,000</td>
</tr>
<tr>
<td></td>
<td>Total liabilities</td>
</tr>
<tr>
<td>Debts</td>
<td>SEK 20,000</td>
</tr>
<tr>
<td>Share capital</td>
<td>SEK 50,000</td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>SEK 100,000</td>
</tr>
</tbody>
</table>

The balance sheet above represents a company that has a minimum share capital of SEK 50,000 which is accounted for on the liability section of the balance sheet. The share capital is not to be considered as an asset since the company has an obligation to cover the amount for creditor protection. In other words, the share capital is for the creditors to rely on and for the company to be liable for.

### 2.3 The Protection of the Restricted Equity

#### 2.3.1 Value Transfers

Any one-sided transaction from the company to shareholders or other party decreases the company’s assets without any remuneration. These kinds of transactions are defined in Chapter 17, Section 1 *ABL*. Consequently, such transaction leaves a company creditor in a less beneficial position after the transaction than before it was carried through. In order to maintain a balance between capital that flood out from the company’s assets and creditor

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protection, ABL provides measures that regulate situations regarding one-sided transactions—value transfers—from the company.\textsuperscript{20}

Chapter 17, Section 1 ABL states:

"Med värdeöverföring avses i denna lag

1. vinstutdelning,

2. förvärv av egna aktier, dock inte förvärv enligt 19 kap. 5 §,

3. minskning av aktiekapitalet eller reservfonden för återbetalning till aktieägarna, och

4. annan affärshändelse som medför att bolagets förmögenhet minska och inte har rent affärsmässig karaktär för bolaget.

Om överföring av tillgångar i samband med fusion eller delning av aktiebolag och om utskiftning vid likvidation finns särskilda bestämmelser i 23–25 kap."

A value transfer consists of either 1) Dividends to the shareholders, 2) Purchase of own shares, 3) Reduction of the Contingency fund or 4) Any other transaction that results in a decrease of the company’s assets and that does not have a defined commercial character for the company. In common for these statements are that they constitute a transfer of assets from the company without an equally quantitative counter-performance.\textsuperscript{21} The first three statements of the section above regulate specific situations that constitute value transfers. However, the wording in the fourth statement refers to a number of different transactions. These transactions does not resemble a value transfers on the surface in the sense that they are connected to a counter-performance.\textsuperscript{22} Instead, the provision aims to prevent assets from flooding out from the company under the pretext of a business agreement.\textsuperscript{23} A clear example illustrating this scenario is when a company asset such as a machine is sold at a price that is obviously below its real value.\textsuperscript{24} These kind of transactions are in the context of value transfers known as concealed value transfers.


\textsuperscript{22} Sandström, Torsten, Svensk aktiebolagsrätt, 3rd edition, Norstedts Juridik, Stockholm 2010, p. 295.


\textsuperscript{24} Sandström, Torsten, Svensk aktiebolagsrätt, 3rd edition, Norstedts Juridik, Stockholm 2010, p. 296.
A problematic aspect relating to concealed value transfers is how to separate transactions stemming from bad business decisions from those which constitute unlawful value transfers under Chapter 17, Section 3 ABL.\textsuperscript{25} The demarcation is primarily characterized by two aspects. Firstly, a clear and identifiable discrepancy between the value of the assets that flood out from the company and the value of the counter-performance should be present.\textsuperscript{26} Secondly, the transfer should be the result of an intended purpose to utter assets to a price significantly lower than the assets real value.\textsuperscript{27}

2.3.2 Restricted Equity

A shareholders motivation to invest capital in any limited liability company is the expectation for profit or increased share value. The shareholders may decide that the company’s profit should be used for dividends or that it should be used to reinvest in the company and hopefully accumulate larger profits in the future. The board of the company is bound to obey the majority shareholders opinion as long as it can uphold its obligations regarding restricted equity.\textsuperscript{28}

Chapter 17, Section 3 ABL provide rules which protect the company’s creditors by only allowing distributions to be made without intruding on restricted equity. According to Chapter 5, Section 14 of the Swedish Annual Accounts Act (Årsredovisningslag, SFS 1995:1554), ARL, the restricted equity consists of share capital, revaluation reserve, reserve fund and capital fund (kapitalandelsfond). The purpose is to provide creditor protection by safeguarding the restricted equity on the balance sheet.\textsuperscript{29}

Chapter 17, Section 3 ABL states:

"En värdeöverföring får inte äga rum om det inte efter överföringen finns full täckning för bolagets bundna egna kapital. Beräkningen skall grunda sig på den senast fastställda balansräkningen med beaktande av ändringar i det bundna egna kapitalet som har skett efter balansdagen."

\textsuperscript{25} Sandström, Torsten, Svensk aktiebolagsrätt, 3\textsuperscript{rd} edition, Norstedts Juridik, Stockholm 2010, p. 299.

\textsuperscript{26} Sandström, Torsten, Svensk aktiebolagsrätt, 3\textsuperscript{rd} edition, Norstedts Juridik, Stockholm 2010, p. 298 f.

\textsuperscript{27} Sandström, Torsten, Svensk aktiebolagsrätt, 3\textsuperscript{rd} edition, Norstedts Juridik, Stockholm 2010, p. 299.

\textsuperscript{28} Sandström, Torsten, Svensk aktiebolagsrätt, 3\textsuperscript{rd} edition, Norstedts Juridik, Stockholm 2010, p. 290.

\textsuperscript{29} Prop. 2009/10:61, p. 5.
A value transfer—defined in Chapter 17, Section 1 ABL— is lawfully carried through if two main requirements are fulfilled.\(^3\) Firstly, restricted equity must be intact after the value transfer has been carried through. Whether restricted equity is kept intact or not is based on information from the company’s latest compiled balance sheet. Secondly, a value transfers must be defendable by the company’s demand for restricted equity and solvency in general.

The first requirement is not associated with any difficulties in particular. The company’s compiled balance sheet must show that restricted equity is kept intact.\(^3\) However, the second requirement can give rise to a problematic demarcation. On one hand, there are value transfers which are motivated by the company’s demand for restricted equity and solvency in general. On the other hand, there are value transfer that are not to be seen as such.\(^3\) The problem is thus where to draw the line between these two types of value transfers. Clear is thus that the second requirement in the section above empathize on cautiousness regarding value transfers on behalf of the company in order to protect the company’s creditors.\(^3\)

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\(^3\) See Table 1.


3  European Development

3.1  Introduction

This chapter presents minimum share capital rules in three Member States, Denmark, England and Germany. This is to present an example of the variety of solutions that Member States provide regarding minimum share capital in companies comparable to the Swedish private limited liability company. The presentation starts off with a report on circumstances and judgement in Centros which resulted in substantial changes regarding the possibility for any Member State to regulate companies operating in its geographical territory.

3.2  Centros Ltd

3.2.1  The Circumstances in the Case

A Danish couple registered an Ltd., Centros Ltd, in the UK. A branch was set up in Denmark where the couple wanted to create the company’s primary establishment. The company did not trade in the UK. The Danish authorities refused to register the branch for two reasons. Firstly, the set up of a branch was an attempt to avoid the Danish requirement for minimum share capital. A minimum share capital is required for companies which register in Denmark. Secondly, the registration of the branch could not be accepted since the founders of the company did not seek to trade in the UK where it was registered. The intention was merely to trade in Denmark. The Supreme Court of Denmark, Højesteret, asked the CJ, for a preliminary ruling on the matter.34

The CJ stated that this case concerned the freedom of establishment and that it was within the scope of Article 49 TFEU. Article 49 TFEU states:

“Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

34 Centros Ltd v. Erhvervs- og Selskabsstyrelsen (Case C-212/97) [1999] ECR-1459, paras. 2-13.
Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.”

The CJ held that if a company has been formed under the law within a Member State, the set up of an establishment in any other Member State to avoid or seize national company legislation is an expression of the freedom of establishment. The fact that the Member States’ national company legislation is not fully harmonized does not affect a citizen’s freedom of establishment.35

The CJ also sided on the matter of when a national provision was liable to restrict or hinder the freedom of establishment. One of the criteria found was that the national provision must be proportionate to its purpose. This means that the provision must achieve its purpose with the least restrictive means to justify a restriction on the freedom of establishment. The Danish provision regarding minimum share capital aims to protect the company’s creditors from insolvency and to reduce the occurrence of fraudulent entrepreneurship. The CJ stated that—in this case—the minimum share capital requirement did not result in improved creditor protection. This because if the company had traded in the UK the registration of the branch in Denmark would have been accepted without the requirement for minimum share capital. By conclusion of such event a Danish creditor would have been in the same position regarding creditor safety.36

3.2.2 Effects of the Centros-case

The outcome in Centros was unexpected in relation to the CJ’s liberal interpretation of the freedom of establishment. The most surprising element in the case was that a company’s intention to trade in one part of the internal market, Denmark, and at the same time avoid its national company legislation by registration of the company in another Member State was not considered an abuse of the freedom of establishment. Instead, the Danish rules con-

36 Centros Ltd v. Erhvervs-og Selskabsstyrelsen (Case C-212/97) [1999] ECR-1459, paras. 32-37.
cerning minimum share capital requirements was an unjust restriction to put upon a foreign registered company like *Centros Ltd.*

After the ruling in *Centros* the minimum share capital rules for countries like Denmark and Sweden became less effective regarding creditor protection. Since a company can be registered under the law in one Member State and establish a branch in any other Member State, the effect of the national rules regarding minimum share capital is seriously undermined. National company legislation can only effect undertakings registered in the Member States’ own geographical territory. A company can thus avoid undesirable minimum share capital rules by registration in a Member State that does not administer them and still trade in any other Member State without abusing the freedom of establishment. A creditor that conducts business with an established branch from a company registered elsewhere does not necessarily enjoy the same creditor protection as if the company itself would have been registered in the Member State where the national legislation proclaim a minimum share capital requirement.

### 3.3 Minimum Share Capital in Europe

#### 3.3.1 Introduction

*EU’s Second Company Law Directive and the minimum capital rules it provides for companies similar to the Swedish public limited liability company originates from the continental European tradition of accounting.*

The continental European tradition of minimum share capital rules is characterized by a credence of the rule’s function as creditor protection.

The Anglo-Saxon tradition of accounting is also represented within the *EU*. England is an example of an Anglo-Saxon Member State that does not express belief in a minimum share capital in order to provide creditor protection.

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In this chapter minimum share capital rules for companies comparable to the Swedish private limited liability company in Denmark, England and Germany is briefly presented.

### 3.3.2 Denmark

Danish company law experienced changes on 1 March 2010 when the first part of the new Danish Companies Act came into force. The new Act is the result of an investigation which was initiated by the Danish Treasury Department (Økonomi- og Erhvervsministeriet) in 2006. The purpose was to create a modern and more flexible legislation that would reduce administrative costs without decreasing protection for the company’s creditors. Before the new Act entered into force the minimum share capital requirement for an ApS which is similar to the Swedish private limited liability company was DKK 125,000, approximately SEK 150,000. Today the minimum share capital requirement for an ApS has been reduced to an amount of DKK 80,000, SEK approximately 95,000.

Chapter 1, Section 4 SL states:

"§ 4. Kapitalæg og omfattet af denne lov skal have en selskabskapital, der skal opgøres i danske kroner eller euro, if. dog stk. 3.

Stk. 2. Aktieselskaber skal have en selskabspanal svarende til mindst 500.000 kr., og anpartsselskaber skal have en selskabskapital svarende til mindst 80.000 kr.

Stk. 3. Erhvervs- og Selskabstyper kan fastsætte nærmere regler om betingelserne for at angive selskabskapitalen i en anden valuta end danske kroner eller euro."

The Danish minimum share capital rules are similar to the provisions in ABL. The minimum share capital may be calculated in either Danish currency or in European Currency Units, ECU. The board can also decide that said capital should be calculated in any other currency.

The new Danish minimum share capital requirement of approximately SEK 95,000 was up to 1 April 2010 comparable to the Swedish minimum share capital requirement of then

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41 SOU 2008:49, p. 68.
42 SOU 2008:49, p. 68.
SEK 100,000. Today the Danish requirement adds up to almost twice the provided minimum share capital in ABL which is SEK 50,000. Denmark has like Sweden went towards a lowering of the minimum share capital requirement. Like mentioned above the continental European countries has a tendency to maintain a minimum share capital requirement on behalf of the protection of company creditors. The trend is thus clear, that the minimum share capital is somewhat redundant in the aspect of creditor protection and the need for a more flexible and cost effective legislation is an incentive to reduce the minimum share capital requirement.

### 3.3.3 England

The Companies Act 2006, CA, do not provide a minimum share capital for the companies comparable to the Swedish private limited liability form. An Ltd. can thus have a share capital of GBP 1.44 The creditor protection in an Ltd. is thus built around the CA’s provisions on distributions.

Section 830 CA states:

> “(1) A company may only make a distribution out of profits available for the purpose.

> (2) A company’s profits available for distribution are its accumulated, realised profits, so far as not previously utilised by distribution or capitalisation, less its accumulated, realised losses, so far as not previously written off in a reduction or reorganisation of capital duly made.

> (3) Subsection (2) has effect subject to sections 832 and 835 (investment companies etc: distributions out of accumulated revenue profits).”

Distributions from the company can only be made with certain realised profits. This provision in combination with a solvency statement found in Section 643 CA are rules that hinder the company from making decisions harmful to creditors.45 Another aspect of creditor

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44 Andersson, Jan, Kapitalskyddet i aktiebolag, 6th edition, LitteraturCompagniet, Stockholm 2010, p. 32.

protection is found in Section 993 CA which provides provisions on “fraudulent trading” which served to protect creditors from deceiving behaviour on behalf of the company.

3.3.4 Germany

A GmbH is comparable to the Swedish private limited liability company. The GmbH is regulated in the German Companies Act (Gesetz betreffend die Gesellschaft mit beschränkter Haftung), GmbHG. A GmbH require a minimum share capital of EUR 25,000, approximately SEK 225,000. The currency must be calculated in ECUs.

Chapter 1, Section 5 GmbHG states:

“(1) Das Stammkapital der Gesellschaft muß mindestens fünfundzwanzigtausend Euro betragen.

(2) Der Nennbetrag jedes Geschäftsanteils muss auf volle Euro lauten. Ein Gesellschafter kann bei Errichtung der Gesellschaft mehrere Geschäftsanteile übernehmen.


(4) Sollen Sacheinlagen geleistet werden, so müssen der Gegenstand der Sacheinlage und der Nennbetrag des Geschäftsanteils, auf den sich die Sacheinlage bezieht, im Gesellschaftsvertrag festgesetzt werden. Die Gesellschafter haben in einem Sachgründungsbericht die für die Angemessenheit der Leistungen für Sacheinlagen wesentlichen Umstände darzulegen und beim Übergang eines Unternehmens auf die Gesellschaft die Jahresergebnisse der beiden letzten Geschäftsjahre anzugeben."

GmbHG provides an alternative company option to register without payment of the minimum share capital of EUR 25,000. The UG is a subcategory to the GmbH that allows for the minimum share capital to be paid annually with the company’s profits. The word Unternehmergesellschaft which can freely be translated to ”Entrepreneurial limited liability company“ is a subcategory of the GmbH. The UG is regulated under one single section in the GmbHG.46

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Chapter 1, section 5a GmbHG states:

"(1) Eine Gesellschaft, die mit einem Stammkapital gegründet wird, das den Betrag des Mindeststammkapitals nach § 5 Abs. 1 unterschreitet, muss in der Firma abweichend von § 4 die Bezeichnung "Unternehmergesellschaft (haftungsbeschränkt)" oder "UG (haftungsbeschränkt)" führen.

(2) Abweichend von § 7 Abs. 2 darf die Anmeldung erst erfolgen, wenn das Stammkapital in voller Höhe eingezahlt ist. Sacheinlagen sind ausgeschlossen.

(3) In der Bilanz des nach den §§ 242, 264 des Handelsgesetzbuchs aufzustellenden Jahresabschlusses ist eine gesetzliche Rücklage zu bilden, in die ein Viertel des um einen Verlustvortrag aus dem Vorjahr geminderten Jahresüberschusses einzustellen ist.

Die Rücklage darf nur verwandt werden

1. für Zwecke des § 57c;

2. zum Ausgleich eines Jahresfehlbetrags, soweit er nicht durch einen Gewinnvortrag aus dem Vorjahr gedeckt ist;

3. zum Ausgleich eines Verlustvortrags aus dem Vorjahr, soweit er nicht durch einen Jahresüberschuss gedeckt ist.

(4) Abweichend von § 49 Abs. 3 muss die Versammlung der Gesellschafter bei drohender Zahlungsunfähigkeit unverzüglich einberufen werden.

(5) Erhöht die Gesellschaft ihr Stammkapital so, dass es den Betrag des Mindeststammkapitals nach § 5 Abs. 1 erreicht oder übersteigt, finden die Absätze 1 bis 4 keine Anwendung mehr; die Firma nach Absatz 1 darf beibehalten werden."

The possibility for an UG to register without an initial payment of the minimum share capital is conditioned by two requirements. Firstly, the word “Unternehmergesellschaft“ or “UG“ must be added to the company’s name. This is to signal the company’s status as a lesser form of the GmbH. Since the minimum share capital is not paid a creditor of an UG does not benefit from the same protection as he or she would from a GmbH. Secondly, the company is required to set aside one fourth of the company’s profit every in order to pay

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the minimum share capital of EUR 25,000. Gradually as the minimum share capital is paid the company gets closer to achieving the status of a GmbH. When the full amount is paid the company may register as a GmbH. The intended purpose for an UG is thus to in time become a GmbH.\footnote{Bachner, Thomas, Creditor Protection in Private Companies, Anglo-German Perspectives for a European Legal Discourse, Cambridge University Press, New York 2009, p. 16.}
4 Minimum Share Capital in the United States

4.1 Introduction

The MBCA is an American model act developed by the American Bar Association which was first published in 1928. The model act was developed with the purpose to coordinate the states’ legislation into one coherent legislation regulating shareholder companies. The impact of the first version of the model act was not immediately felt when only three states decided to sign the evidence agreement. One explanation for this was that the solutions provided in the model act was said to be ahead of its time. Today the model act is adopted by thirty states.49

The 1969 MBCA reform provided the model act with a new set of rules regarding creditor protection. The requirement for minimum share capital was abolished and distributions of capital from the company to any party is now regulated by § 6.40 MBCA.50

4.2 § 6.40 MBCA

Since there is no minimum share capital requirement provided in the MBCA there is no use for protection of the restricted equity in relation to creditor protection.51 Instead of safeguarding a specific amount on the company’s balance sheet, § 6.40 MBCA aims to keep the company solvent before and after a distribution of capital.

§ 6.40(c) MBCA states:

“No distribution may be made if, after giving it effect:

(1) the corporation would not be able to pay its debts as they become due in the usual course of business; or

(2) the corporation’s total assets would be less than the sum of its total liabilities plus (unless the articles of incorporation permit otherwise) the amount that would be needed, if the corporation were to be dissolved at the time of the distribution, to sa-

tify the preferential rights upon dissolution of shareholders whose preferential rights are superior to those receiving the distribution.”

The section above can in some aspects be compared to the provision on protection of restricted equity found in Chapter 17, Section 3 ABL. However, § 6.40(c) MBCA regulates all distribution regardless of form from the company.52 MBCA provide a simple test of solvency and sufficiency to be made before a distribution from the company is carried through. If the company is unable to pay its debts as they come into existence or have debts that exceed the assets, a distribution is unlawful. The company’s financial status is estimated as a whole instead before a distribution is made.

MBCA also provide an exception to the provision found in § 6.40 MBCA. Distributions that result in insolvency or insufficiency on behalf of the company may be carried through on decision of the board.

§ 6.40(d) MBCA states:

"The board of directors may base a determination that a distribution is not prohibited under subsection (c) either on financial statements prepared on the basis of accounting practices and principles that are reasonable in the circumstances or on a fair valuation or other method that is reasonable in the circumstances.”

The board of the company have been given the power to decide that a distribution prohibited under § 6.40(c) MBCA should be carried through. This is done by presenting financial statements that supports the decision of making a distribution even if it leave the company insolvent or insufficient.

5 Why a Minimum Share Capital in Sweden?

5.1 Introduction

This chapter of the thesis will present the government’s motivation for the minimum share capital requirement in Swedish private limited liability companies. The observed inadequacies will also be presented. The arguments found in the preparatory works SOU 2008:49 and Prop. 2009/10:61 will be displayed. The purpose of this chapter is to present a clear view of the reasons why we have a minimum share capital for the Swedish private limited liability companies.

The second purpose of this chapter is to work as a help for the reader when approaching the final chapter (Analysis and discussion) of this thesis. The reader can easily meet and reflected upon the line of arguments in said chapter if the basis for the arguments are perspicuously presented. The author hope to create a discussion from where the reader can draw his or her own conclusions.

5.2 SOU 2008:49 and Prop. 2009/10:61

The share capital is incorporated in the Swedish private limited liability company structure in several aspects. According to Chapter 3, Section 1 ABL the minimum share capital should be registered in the articles of association. Chapter 1, section 5 ABL states that said capital should amount to at least SEK 50,000. According to Chapter 5, Section 14 ÅRL the share capital is part of the company’s restricted equity which must be kept intact. Chapter 17, Section 3 ABL only allows for a value transfer to be made if it can be done without intruding the restricted equity. The main functions of the minimum share capital are:

1) To create a margin between the company’s assets and debis in order to provide protection for the company’s creditors.53

2) To hinder the foundation of unserious entrepreneurs and to work as a motivator for sound businesses.54

3) To benefit raising of new capital.55

The observed faults with the minimum share capital are:

1) It is not considerate of the monetary inflation.\textsuperscript{56}
2) It can constitute a hinder for entrepreneurship.\textsuperscript{57}
3) It is not considerate of the specific operations capital demand.\textsuperscript{58}
4) Creditors do not rely on the minimum share capital as a safety, they surveil their interests by other means.\textsuperscript{59}

\textsuperscript{56} SOU 2008:49, p. 12.
\textsuperscript{57} Prop. 2009/10:61, p. 9.
\textsuperscript{58} Prop. 2009/10:61, p. 9.
\textsuperscript{59} SOU 2008:49, p. 12 f.
6 Analysis and Discussion

6.1 Introduction

The thesis so far has presented a descriptive look on the minimum share capital rules in Sweden, Denmark, England, Germany and the United States. The Swedish rules has been discussed more in detail since the purpose of this presentation is to reach a conclusion on whether Sweden should have a minimum share capital requirement or not for private limited liability companies.

This final chapter will balance arguments for and against a minimum share capital requirement in ABL in the light of the presentation above. The problems that arises from the discussion will also be presented separately with suggestions for solutions. In order to make this chapter more perspicuous, these solutions are presented in a subchapter. The main message of this part of the thesis is thus to present why the minimum share capital requirement in ABL should be kept in the legislation with some modification.

6.2 Arguments For and Against a Minimum Share Capital Requirement

The minimum share capital’s function as creditor protection is obsolete in modern company law. The rules in ABL concerning value transfers and protection of restricted equity is thus redundant. However, this does not mean that the minimum share capital is without function for the Swedish private limited liability company as such. The debate about the Swedish minimum share capital requirement has been focused almost exclusively on its function as creditor protection. What is missing is a serious discussion about the other effects the minimum share capital requirement give rise to. The author believes that the real functions of the minimum share capital has very little to do with creditor protection. It merely works as an “entrance fee” for the privilege of freedom of personal liability.

Since the ruling in Centros a company seeking to trade in a Member State is able to lawfully avoid that country’s national company legislation by registration of the company in another Member State. For example, a Swedish national can, if he or she does not approve of the minimum share capital requirement provided by Swedish company law, register an Ltd. in England with a minimum share capital of GBP 1 and still operate in Sweden. This contributes, of course, to the fact that Swedish legislation is of less importance for commercial ac-
tivity in Sweden than before the ruling in Centros. This is not however a specific phenomenon regarding company law but a consequence of all EU collaboration. This development is an argument besides the minimum share capital’s function, or dysfunction, as creditor protection to abolish the minimum requirement of SEK50,000.

From a creditor protection point of view the minimum requirement for SEK50,000 ought to be of no or very little comfort. The preparatory works of ABL states that a future creditor rarely rely solely on the minimum share capital as a credit safety. Instead creditors consult banks or financial institutes that specialize in credit rating. An important step in the debate is to fully recognize the inadequate protection for creditors that the minimum share capital rules provide. The rules in ABL regulating the protection of the restricted equity in value transfer situations should therefore be removed. However, this does not mean that the minimum share capital requirement in Chapter 1, Section 5 ABL is without effect as a motivator for well-reasoned businesses.

The minimum share capital is not proportionate to the specific operation of the business is a frequently used argument why the requirement should be abolished. It is clear that different kinds of operations demand different amounts of capital. SEK50,000 for a small service company might be a considerable part of said company’s assets compared to a mining industry that needs to purchase machines for substantially larger amounts. In the latter case, SEK50,000 is not a reliable safety for a creditor that has lent the company money for the purchase of an expensive machine. This illustrates in a good way why the minimum share capital has a weak effect as creditor protection.

A considerable risk with the trend in the EU of removing the minimum share capital requirement is that private limited liability companies become “give it a go” companies. The natural balance of any agreement is that to have something you must present a counter-performance. The benefit of freedom of personal liability is a privilege that not necessarily should come free. Not because the company must think of future creditors but because one should be serious before going into a business. Therefore, the minimum share capital has an important purpose as an “entrance fee” for the benefit of freedom of personal liability.

The company options available in Sweden provides different solutions for personal responsibility, accounting and venture capital. The idea is that the choice of company form is determined by the kind of operation, the number of people involved and access to capital. If the minimum share capital were to be removed for Swedish private limited liability compa-
nies it may result in a less frequent use of other company forms. If there is no “entrance fee” for the benefit of limited liability the choice of company form should not be a big issue. If limited liability is free the question of risk in the preface of a business venture is removed and replaced by an attitude that any idea for a business is worth a try.

The preparatory work of ABL mentions that the reputation of the Swedish private limited liability company is desirable to keep intact. Why this should be is not specified. However, if the Swedish private limited liability company can benefit from a better reputation than similar companies in the rest of the EU, Sweden may have an advantage in making business with other countries in the whole world.

The ambition of creating an modern and more attractive company legislation is a weak argument supporting the removal of the minimum share capital requirement in Swedish private limited liability companies. The main reason for wanting companies to register in a country is the income the government profits from corporate taxes. The companies that pay substantial amounts of taxes are the larger ones. Sweden has one of the world's highest tax bases for companies regardless of form, a system that is far more counterproductive for attracting company registration than minimum share capital requirement. The desired tax profits from large corporations is not likely to default because of a minimum requirement of SEK 50,000. Said requirement is not a fact that will discourage these companies from registration in Sweden. These companies avoid Sweden for tax reasons. Because of this, the process of creating a more attractive legislation is not benefited from a reduction or complete removal of the minimum share capital requirement.

The fact that the United States—in 1969—and many European countries more recently have abolished the minimum share capital requirement is not to be seen as an argument why Sweden also should reform its legislation in such a manner. Firstly, The United States is a country much bigger than Sweden that has in many aspects a totally different climate regarding companies, government interference and expectations on individuals in general. That is why the author thinks it is dangerous to compare the transatlantic situation to the one we have in Sweden. Secondly, The trend in the EU of removing the counter-performance—paying the minimum share capital—for freedom of personal liability is for many Member States so far just that, a trend. Similar to the decision of having a common currency in Europe the effects in many countries was not the expected nor desired ones.
This is because it is impossible to predict the effects of a decision before some time has passed and the development can be analyzed in the review mirror.

The government decision to reduce the minimum share capital from SEK 100,000 to SEK 50,000 is according to the author a correct way of approaching a final decision on how to put a price on freedom of personal liability in Swedish private limited liability companies. The effects of this reduction should be measured after the response and development on the Swedish company market and how other countries respond to it. Therefore the author believes that it is sane to await the results of the reduction of minimum share capital before a complete removal of the requirement is carried through.

6.3 Alternative Solutions

The fact that the minimum share capital is not considerate of the monetary inflation could be solved by adjusting the value by index every year or by using the system with price base amounts which is used in Swedish tax law. In this way the value of the minimum share capital automatically follows the changes in monetary inflation. Another benefit with designing the legislation in this manner is that there would be no need for a annual amendment which is cost effective.

The minimum share capital requirement of SEK 50,000 can in fact be an obstacle for some entrepreneurs to start a Swedish private limited liability company. A solution for this could be for the state or the municipalities to introduce a beneficial borrowing system with low interest rate similar to the students’ education loan. In this way the obstacle effect of the minimum share capital rules ought to be reduced.

To adopt a system similar to the one in the § 6.40 MBCA would provide a simpler legislative solution in order to keep companies from insolvency and insufficiency. This would make ABL’s framework wieldy for its primary users which are the people conducting business regulated by ABL. The minimum share capital rules has in reality very little to do with creditor protection but for the minimum share capital to work as an “entrance fee” the paid share capital must be kept from immediately leaving the company. This could be done by a provision stating that the company must control assets of SEK 50,000 at all times. This may in turn result in a kind of creditor protection in some aspects but the main purpose would be to keep cash in the company to assure the seriousness of the entrepreneurs behind it, not creditor protection.
Appendix

**List of References**

**European Union Law**

**Directives**

Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent

**Case Law**

Centros Ltd v. Erhvervs-og Selskabsstyrelsen (Case C-212/97) [1999] ECR-1459

**Swedish Law**

**Legislation**

Swedish Companies Act (SFS 2005:551)

Swedish Annual Accounts Act (SFS 1995:1554)

**Preambles**

Prop. 2009/10:61  
*En sänkning av kapitalkravet för privata aktiebolag*

SOU 2008:49  
*Aktiekapital i privata aktiebolag*

**Other National Law**

Danish Companies Act (lov om aktie- og anpartsselskaber (selskabsloven))

German Companies Act (Gesetz betreffend die Gesellschaft mit beschränkter Haftung)

Model Business Corporation Act 4th edition
Appendix

Doctrine


