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The principle of equality of shares and shareholders

1. Introduction

The so-called principle of equality is one of the fundamental principles governing the relations between shareholders and the relations between directors and shareholders in companies limited by shares. In brief, the principle of equality means that all shares of the company shall be treated equally, if not otherwise stipulated in law or provided in the articles of association. In addition this *principle of equality of shares* reflects the *principle of equality of shareholders*, which means that the company may not make decisions or take other measures that are capable of causing a shareholder or another person an undue benefit at the expense of the company or a shareholder of the company.¹ This rule is affiliated with the purpose of the company, which is to promote the interests of the shareholders – meaning *all shareholders* of the company – if not otherwise provided in the articles of association.

The doctrine of the principle of equality of shares and shareholders (later “the principle of equality”) is somewhat similar in the Nordic countries – meaning here Denmark, Finland, Norway and Sweden. The topic in both the academic and practical context is very important and has been analyzed rather comprehensively in jurisprudence. For example, in Norway *Filip Truyen* wrote his doctoral thesis on shareholders’ abuse of authority (“Aksjonærenes myndighetsmisbruk”, 2005)² and in Finland *Ville Pönkä* wrote his second academic monograph on the principle of equality in companies limited by shares (“Yhdenvertaisuus osakeyhtiössä”, 2012).³ In Sweden such authors as *Jan Andersson*, *Clas Bergström*, *Peter*

¹ See also Jan Andersson – Lars Pehrson: Likhetsprincipen och generalklausulerna. In Carl Svernlöv (ed.): Aktiebolagslagens minoritetsskydd. Västerås 2008 pp. 109–144, p. 123: “Två väsentlig skillnader mellan likhetsprincipen å ena sidan och generalklausulerna å den andra sidan är dels att den förra hänvisar till aktier medan den senare hänvisar till aktieägare... ”

² Filip Truyen: Aksjonærenes myndighetsmisbruk – en studie av asl./asal. § 5-21 og uskrevene misbruksprinsipper. Oslo 2005. See also Filip Truyen: General principles on the abuse of shareholders’ rights in Nordic legislation. In Mette Neville – Karsten Engsig Sørensen (eds.): Company Law and SMEs. København 2010 pp. 171–190.

³ Ville Pönkä: Yhdenvertaisuus osakeyhtiössä. Helsinki 2012.

Högfeldt, Lars Pehrson, Erik Nerep, Per Samuelsson and Ola Åhman⁴ and in Denmark Mette Neville and Erik Werlauff⁵ have also conducted noteworthy research on the said topic.

The purpose of this article is to provide a common Nordic perspective on the principle of equality. In the following chapters I first introduce briefly the statutory background of the topic in Denmark, Finland, Norway and Sweden (Chapter 2). After this introduction I discuss the justification of the principle of equality, in other words, why there is such a rule and is it really necessary (Chapter 3). Finally, I concentrate on the question what does the principle of equality mean in practice and what is its relation to other company law principles, especially the purpose of the company (Chapter 4). The main findings of this article are briefly summarized in the concluding chapter (Chapter 5).

2. Statutory background

When introducing the statutory background of the principle of equality one must distinguish the equality of shares from the so-called *general clause*, meaning the principle of equality of shareholders. In Finland these two “dimensions” of the principle of equality are expressed in the same norm, but in the other Nordic countries in different contexts.⁶

In Denmark the principle of equality of shares is stated in section 45 of the companies act (lov om aktie- og anpartsselskaber nr. 470/2009, later “DAASL”): All shares of the company carry similar rights unless

⁴ See e.g. Andersson – Pehrson 2008, Clas Bergström – Peter Högfeldt – Per Samuelsson: Om kravet på likabehandling av aktieägare. Tidskrift for Rettsvitenskap 1994 pp. 117–165, Erik Nerep: Aktiebolagsrättslig analys. Ett tvärsnitt av nyckelfrågor. Stockholm 2003 pp. 271–311, Per Samuelsson: Den aktiebolagsrättsliga likhetsprincipen. In Nis Jul Clausen (ed.): Nye tendenser i skandinaviske selskabsret. Randers 1995 pp. 77–100, Lars Pehrson: Generalklausuler i aktiebolagslagen. In Mats Müllern – Stefan Lindskog – Sven Unger (eds.): Festskrift till Sveriges Advokatsamfund 1887 – 1987. Rättsvetenskapliga studier. Stockholm 1987 pp. 483–502 and Ola Åhman: Behörighet och befogenhet i aktiebolagsrätten. Om aktiebolagets ställföreträdare och gränserna för deras representationsrätt. Uppsala 1997.

⁵ See e.g. Mette Neville: Conflicts in small and medium-sized enterprises. In Paul Krüger Andersen – Nis Jul Clausen – Rolf Skog (eds.): Shareholder Conflicts. København 2006 pp. 85–129 and A statutory buy-out right in SMEs – an important corporate governance mechanism and minority protection? In Mette Neville – Karsten Engsig Sørensen (eds.): Company Law and SMEs. København 2010 pp. 247–293 and Erik Werlauff: Selskabsmasken – loyalitetspligt og generalklausul i selskabsretten. København 1991.

⁶ In jurisprudence the equality of shares has been characterized as the *formal* dimension and the general clause as the *material* dimension of the principle of equality. See e.g. Curt Olsson: Aktiebolagslagens generalklausul, modell Finland. In A. E. Abitz – Stig Juul – Vilh. Boas – Torben Lund – A. Vinding Kruse (eds.): Festskrift til professor, dr. juris O.A. Borum 30. juli 1964. København 1964 pp. 349–363, p. 353–354, Pönkä 2012 p. 231, Samuelsson 1995 p. 81 and Erik Werlauff: Selskabsretlig loyalitetspligt – udvikling gennem EF-retten. Ugeskrift for Retsvæsen 1990 B pp. 427–433, p. 428.

otherwise provided in the articles of association.⁷ A similar rule is found from chapter 1, section 7 of the Finnish companies act (osakeyhtiölaki 624/2006, later “FCA”)⁸; chapter 4, section 1 of the Swedish companies act (aktiebolagslag 2005:551, later “SABL”)⁹ and chapter 4, section 1 of the Norwegian companies acts (lov om aksjeselskaper nr. 45/1997, later “NASL” and lov om allmennaksjeselskaper nr. 46/1997, later “NAASL”).¹⁰ Hence there seems to exist no legislative differences concerning the equality of shares, or to be exact, the equality of the rights and obligations attached to shares.

Within the Nordic regime the general clause – or the prohibition to abuse authority – was first introduced by Professor *Lauri Cederberg*.¹¹ Cederberg presented the idea of enhancing the protection of minority shareholders with a general prohibition to abuse authority in the 15th Nordic lawyers meeting (“Nordiska juristmötet”) held in Stockholm in 1931. Based on Nordic jurisprudence and court practice¹² and especially on the German *Treu und Glauben* doctrine Cederberg proposed that a principle of equality of shareholders (“yhtäläisyysperiaate”) should be included in company law. Cederberg taught that casuistic prohibitions on the abuse of authority did not provide sufficient protection for minority shareholders and therefore a statutory general clause was needed. Cederberg, however, noted that such a rule already existed as unwritten law, but without the support of written law it was too vague to provide sufficient protection.¹³

In 1935 the general clause, as proposed by Cederberg, was included in section 30.4 of the Finnish Companies Act of 1895 (laki osakeyhtiöistä 22/1895). Later in 1944 a similar rule was introduced in Swedish legislation, in 1973 in Danish legislation, and finally in 1976 in Norwegian legislation. Nowadays the prohibition to abuse authority is included in a rather similar form in all Nordic company laws: The general

⁷ “I kapitalselskaber har alle kapitalandele lige ret i selskabet. Vedtægterne kan dog bestemme, at der skal være forskellige kapitalklasser. I så fald skal vedtægterne angive de forskelle, der knytter sig til den enkelte klasse af kapitalandele, og størrelsen af den enkelte klasse.”

⁸ “Kaikki osakkeet tuottavat yhtiössä yhtäläiset oikeudet, jollei yhtiöjärjestyksessä määrätä toisin.”

⁹ “Alla aktier har lika rätt i bolaget, om inte annat följer av 2-5 §§.”

¹⁰ “Alle aksjer gir lik rett i selskapet. I vedtektene kan det likevel bestemmes at det skal være aksjer av ulike slag (flere aksjeklasser). Vedtektene skal i så fall angi hva som skiller aksjeklassene, og aksjenes samlede pålydende innen hver klasse.”

¹¹ In Nordic jurisprudence Cederberg has been widely acknowledged as “the founding father” of the general clause. See e.g. Erik Werlauff: *Generalforsamling og beslutning. En aktieretlig studie i generalforsamlingsbeslutningers indhold, tilblivelse on anfægtelse*. Viborg 1983 p. 50.

¹² E.g. UfR 1921 p. 250.

¹³ See Lauri Cederberg: *Förhandlingar på det femtonde Nordiska juristmötet*. Stockholm 1931 pp. 60–83 and *Till frågan om likställighetsprincipens tillämpning inom handelsbolagsrätten*. In *Minnesskrift ägnad 1734 års lag av jurister i Sverige och Finland den 13 december 1934 200-årsdagen av riksens ständers beslut II*. Stockholm 1934 pp. 499–522.

meeting, the board of directors, the managing director, or the supervisory board shall not make decisions or take other measures that are capable of causing an undue benefit to a shareholder or another person at the expense of the company or a shareholder of the company.¹⁴ There are minor differences between the Nordic general clauses, but nevertheless, the main idea of the rule is the same: A company organ may not undertake such measures that are “unjustly beneficial” to somebody at the expense of the company or a shareholder of the company.¹⁵ As later described in Chapter 4, the significant material question concerning the general clause is, *what does undue benefit* (“utilbørlig fordel”, “epäoikeutettu etu”, “urimelig fordel”, “otillbörlig fördel”) *mean as stated in the Nordic companies acts?*

Before proceeding to the next section, it is important to notice that the Nordic doctrine on the principle of equality also has a significant connection to EU company law. For *listed companies* the normative background of the principle lies – at least partially – in the Second Council Directive (77/91/EEC, Art. 43), the Takeover Directive (2004/25/EC, Art. 5.1) and the Shareholder Rights Directive (2007/36/EC, Art. 4). According to Nordic scholars, for example, the “equality article” of the Second Council Directive is so explicit that its direct applicability within individual member states is possible.¹⁶ However, no general principle of equality – or prohibition to abuse authority – can be derived from EU company law.¹⁷

3. The justification of the principle of equality

As mentioned above, the principle of equality has two dimensions: the equality of shares and the equality of shareholders. In Nordic jurisprudence the justification for the principle of equality of shares has been derived from the rule of *pacta sunt servanda* – agreements must be kept. When people acquire shares in a company they implicitly agree with the other shareholders and the company that their rights and duties within the company – as portrayed by the shares – remain unchanged unless otherwise agreed (e.g. stipulated in law or provided in the articles of association).¹⁸ In other words, the main rule is that if the company decides to dilute the rights or increase the obligations attached to a share, the shareholders have

¹⁴ See DAASL 108 § and 127.1 §, FCA 1:7, NASL/NAASL 5:21 and 6:28.1, and SABL 7:47 and 8:41.

¹⁵ See e.g. Pönkä 2012 pp. 162–164 and 247–350, and Truyen 2005 pp. 45–55.

¹⁶ See e.g. Ari Savela: Osakeyhtiölain yhdenvertaisuusperiaate. Defensor Legis 2010 pp. 3–24, p. 22 and Erik Werlauff: EU-Company Law. Common business law of 28 states. 2nd edition. Copenhagen 2003 p. 177.

¹⁷ See especially Audiolux C-101/08.

¹⁸ See e.g. Clas Bergström – Per Samuelsson: Aktiebolagets grundproblem. Tredje upplagan. Vällingby 2009 pp. 54–57, Jonathan R. Macey: Svensk aktiebolagsrätt I omvandling – en rättsekonomisk analys. Stockholm 1993 pp. 98–101, Pönkä 2012 pp. 231–232 and Seppo Villa: Onko yhdenvertainen kohtelu aina tasavertaista? Lakimies 2008 pp. 563–581, p. 567.

to mutually agree on this. For example, according to FCA chapter 5, section 29.1 (8) “(t)he consent of a shareholder shall be obtained for the amendment of the Articles of Association, where the balance between the rights carried by shares in the same class is altered and the change affects the shares of the shareholder.”

In company law theory the relations between the different interest groups of the firm are often described as contract-like relations.¹⁹ Therefore, the provisions of law governing these relations can be understood as “model terms,” in other words, terms which the shareholders can use as such or which they can alter in the articles of association.²⁰ In the light of this theory the purpose of the principle of equality of shares is to ensure that whatever rights and obligations have been attached to shares when issuing them, these decisions remain unchanged until the parties (shareholders) agree otherwise. If this agreed balance of rights and obligations could be changed by, for example, a majority decision, it would *de facto* mean that an investor could never make a realistic assessment of the risks of shareholding. Thus no reasonable person would be willing to acquire a minority stake in such a company.²¹

The justification of the general clause is very similar to the justification of the principle of equality of shares: No reasonable person would be willing to accept the risk of another shareholder or the directors of the company having the possibility to acquire unjust benefit on her/his expense. From a law and economics point of view the freedom to abuse authority would, of course, result in inefficiency: Gathering equity from investors would become virtually impossible and as a result companies could only rely on debt financing. In fact, the idea of giving someone arbitrary authority to decide on company matters (e.g. freedom to decide how the assets of the company are distributed amongst the shareholders) is so absurd that many scholars have considered the general clause to be compulsory law²²: The decision-making organs of a company may not make unjustly beneficial decisions unless the shareholder at whose expense the unjust benefit is to be given gives her/his consent.²³ An upfront general consent for such decisions

¹⁹ See especially Armen A. Alchian – Harold Demsetz: Production, Information Costs, and Economic Organization. *American Economic Review* 1972 pp. 777–795 and Michael C. Jensen – William H. Meckling: Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure. *Journal of Financial Economics* 1976 pp. 305–360.

²⁰ See e.g. Macey 1993 pp. 43–49.

²¹ See also Bergström – Samuelsson 2009 p. 55.

²² See e.g. Pönkä 2012 pp. 151–153, Savela DL 2010 p. 10 and Truyen 2005 p. 137.

²³ See e.g. FCA 5:29.3.

cannot be included in the articles of association.²⁴ Also, such terms in shareholders' agreements would most probably be considered invalid or unfair.

Early Nordic scholars such as *Per Augdahl*, *F. W. Ekström*, *Håkan Nial*, *Carl Martin Roos* and *Lars Erik Taxell* approached company law from a general civil law perspective instead of seeing it as a “closed” system without any actual connections to property law. However, around the 1960s and 1970s many authors in the Nordic regime began to dissociate company law from the property law tradition.²⁵ During this era – which at least in Finland can be described as the “dark ages” of company law research – the theoretical dimensions of the discipline were forgotten by many.²⁶ Therefore also the civil law roots of the general clause were rather systematically ignored.

In modern company law doctrine academic interest towards property law has once again risen²⁷ and, for example, the connection between the general clause (the prohibition to abuse authority) and the general civil law *prohibition of abuse of rights* has been discovered in jurisprudence.²⁸ In brief, the prohibition of abuse of rights means that law must not be allowed to be used to cause intentional harm to others. For example, *Jens Evald* has argued that this general principle has various concretizations in both written and unwritten law, such as the provisions on adjusting unfair contract terms and the principle of loyalty in contractual relationships.²⁹ In the light of the studies of Evald – and taking into consideration the connection between company law and property law – one can claim that the general clause in company law is nothing more than a concrete expression of the civil law prohibition of abuse of rights. This is an important observation when determining whether an unwritten prohibition to abuse authority in company law exists without the support of a (written) general clause.³⁰

²⁴ In other words, it is not possible to provide in the articles of association that the decision-making organs of the company are not obliged to take into consideration the general clause.

²⁵ See also Pekka Timonen: *Yhtiöoikeus*. In Urpo Kangas (ed.): *Oikeustiede Suomessa 1900–2000*. Juva 1998 pp. 275–284, pp. 277–283.

²⁶ See also Jukka Mähönen: *Parempi myöhään kuin ei silloinkaan*. In Heikki Halila – Pekka Timonen (eds.): *Miten meistä tuli oikeustieteen tohtoreita*. Jyväskylä 2003, 507–513, p. 510.

²⁷ See e.g. Manne Airaksinen: *Onnistuiko vuoden 2006 osakeyhtiölakiuudistus?* *Defensor Legis* 2006 pp. 443–460, p. 458 and Ville Pönkä: *Osakkeen lunastaminen. Osakeyhtiö- ja sopimus oikeudellinen tutkimus*. Liettua 2015 p. 13.

²⁸ See e.g. Petri Mäntysaari: *Osakeyhtiö toimijana*. Porvoo 2002 p. 84, Pönkä 2012 pp. 233–240 and Truyen 2005 pp. 63–68 and 2010 pp. 177–178.

²⁹ Jens Evald: *Retsmisbrug I formueretten*. København 2001 pp. 264–265 and 296–301. In fact, Erik Werlauff has even suggested that the prohibition of abuse of rights has no independent legal value without the support of a more concrete legal rule or principle. Erik Werlauff: *Anmeldelse: Jens Evald: Retsmisbrug i formueretten (doktor disputats)*. *Juristen* 2002 pp. 137–148, p. 137.

³⁰ Pönkä 2012 pp. 241–242 and Truyen 2010 p. 177.

Furthermore, it has been argued that the prohibition to abuse authority in company matters can be derived from both the *duty of loyalty of directors* and the *duty of loyalty of shareholders*.³¹ As far as directors are concerned, it is, of course, possible to argue that since the directors owe fiduciary duties to the company and to *all* shareholders, they must treat all shareholders equally in their decision-making. One way to structure the relation between the duty of loyalty of directors and the principle of equality of shareholders is to see the general clause as a concretization of the abstract duty of loyalty.³²

On the other hand, the connection between the duty of loyalty of shareholders and the general clause is questionable. One has to remember that shareholders owe no fiduciary duties towards one another and they have the right of self-interest in company matters.³³ In fact, many scholars argue that especially in larger (listed) companies the duty of loyalty of shareholders refers solely to the prohibition to abuse authority.³⁴ In small and medium-sized enterprises (later “SMEs”) it is, however, possible to argue that the freedom to promote one’s own interests is limited not only by a general prohibition to abuse authority but also by the principle of loyalty of shareholders, which is similar to the principle of loyalty in contractual relationships. Here one has to remember that in SMEs the co-operation between shareholders is usually based on mutual trust, thus treating entrepreneurs as egoistic investors is not appropriate.³⁵ Some

³¹ See e.g. Timo Kaisanlahti: *Minority Shareholder Rights in Finland*. In Tore Modeen (ed.): *Aspects of Finnish Contemporary Law. Finnish National Reports of the XVIth Congress of the International Academy of Comparative Law*. Brisbane, 2002. Saarijärvi 2002 pp. 131–183, p. 142, Jori Munukka: *Kontrektuell lojalitetsplikt*. Stockholm 2007 p. 314, Jukka Mähönen: *Kansainväliset tilinpäätösstandardit ja yhtiöoikeus*. Helsinki 2005 p. 44 and Truyen 2005 pp. 31–32 and 2010 pp. 177–178.

³² See e.g. Jukka Mähönen: *Lojaalisuus ja yhteisöoikeus*. In Anne Kumpula (ed.): *Juhlajulkaisu Leena Kartio 1938 – 30/8 – 1998*. Turku 1998 pp. 231–248, 240–241, Pönkä 2012 p. 236 and Villa LM 2008 p. 570.

³³ The right of self-interest means that it is legitimate for shareholders to use their vote in a general meeting to safeguard their own interests. On the other hand, when the shareholder acts as a director of the company (e.g. as a member of the board of directors), he/she does not possess such freedom.

³⁴ See e.g. Niklas Arvidsson: *Aktieägaravtal. Särskilt om besluts- och överlåtelsebindningar*. Stockholm 2011 p. 135, Anders Holm: *Den avtalsgrundade lojalitetsplikten – en allmän rättsprincip*. Linköping 2004 p. 151, Paul Krüger Andersen: *Aktie- og anpartsselskabsret. Kapitalselskaber*. 12. udgave. København 2013 p. 440, Juhani Laine: *Osakkeenomistajan lojaliteettivelvollisuudesta*. Lakimies 2012 pp. 79–101, pp. 99–100, Larry E. Ribstein: *The Rise of the Uncorporation*. New York 2010 p. 166, Samuelsson 1995 p. 79, Savela DL 2010 p. 3–4 and Geir Woxholth: *Selskapsrett*. 5. utgave. Polen 2014 p. 73. See differently e.g. Jukka Mähönen – Seppo Villa: *Osakeyhtiö I. Yleiset opit*. 3., uudistettu painos. Liettua 2015 pp. 413–420 and Beate Sjøfjell – Andrew Johnston – Linn Anker-Sørensen – David Millon: *Shareholder Primacy: The Main Barrier to Sustainable Companies*. In Benjamin J. Richardson – Beate Sjøfjell (eds.): *Company Law and Sustainability – Legal Barriers and Opportunities*. Cambridge 2015 pp. 79–147, pp. 135–137.

³⁵ Karsten Engsig Sørensen: *Duty of Loyalty for Shareholders – A Possible Remedy for Conflicts in SMEs?* In Mette Neville – Karsten Engsig Sørensen (eds.): *Company Law and SMEs*. København 2010 pp. 127–170, p. 151, Pönkä 2012 p. 239 and Truyen 2010 p. 177.

scholars have assumed that the duty of loyalty of shareholders is under development in the Nordic countries as well as in the United Kingdom.³⁶

The above-mentioned observations concerning the relation between the general clause and the principle of loyalty of shareholders is not purely theoretical since it can have an influence on how the concept of “unjust benefit” is interpreted: In larger companies – where shareholders are often anonymous investors – the assessment of the unreasonableness condition is based on more formal evaluation than in SMEs, where the shareholders usually know one another, in other words, where the shareholders are business partners, not anonymous investors.

4. The principle of equality in practice

When assessing the practical dimensions of the principle of equality one must, once again, distinguish the equality of shares from the equality of shareholders. In jurisprudence it has been argued that the principle of equality of shares is such an unambiguous rule that disputes concerning it can be resolved rather effortlessly.³⁷ For example, if a company only has shares of the same class and it decides to distribute more dividends to shares owned by A than to shares owned by B, there usually remains no leeway for discretion when determining if the principle of equality has been breached.³⁸ In practice, the equality of shares is most open to interpretation when the company decides to amend the articles of association so that the changes effect (directly or indirectly) the rights and obligations attached to shares. Occasionally, it can be quite difficult to determine which amendments require the consent of the shareholders (or the shareholders who are effected by the amendment) and which ones only the qualified majority of votes.

³⁶ See e.g. Engsig Sørensen 2010 p. 151.

³⁷ Pönkä 2012 p. 247.

³⁸ See also Woxholth 2014 p. 73. In smaller companies it is, however, very common that the shareholders agree that dividends are not divided evenhandedly but are based on e.g. the workload of the shareholders. Such an agreement can usually be interpreted as a consent to deviate from the principle of equality of shares and therefore the breach of the said principle cannot be later challenged on a company law basis.

On the other hand, the principle of equality of shareholders – the general clause – is open to interpretation and disputes concerning it are somewhat common in the Nordic countries. These disputes usually concern (1) the scope of application of the general clause or (2) the interpretation of the concept of unjust benefit.

1. The scope of application of the general clause is very broad and the prohibition to abuse authority concerns all decisions made and all other actions taken by the company organs, meaning the general meeting, the board of directors, the managing director, and the supervisory board.³⁹ Other (“non-statutory”) directors are not directly bound by this prohibition, although their actions can fall under the scope of application of the general clause if a superior executive, such as the managing director, has neglected his/her duty of supervision. In addition, it is important to notice that the general clause is “effect-oriented,” meaning that the issue for assessment is what effects a decision or action is capable of causing. Therefore, it is usually irrelevant to prove that the unjustly beneficial effects of the said decision or action have actually taken place.⁴⁰ Furthermore, the subjective motive behind the decision or action in breach of the general clause is irrelevant: The purpose of benefitting unjustly at the expense of others does not – as such – constitute an abuse of authority and, on the other hand, the lack of such a motive does not mean that the general clause cannot be applied.⁴¹

The scope of application of the general clause is limited to decisions and actions that are capable of causing harm to the *shareholders* of the company. In other words, outside investors (debtors) cannot benefit from the protection reflected by the general clause, and their risk position in relation to the company is a matter of bargaining: Outside investors are only protected by statutory rules on asset distribution and by contract terms negotiated between the debtor and the company. This rule might, of course, seem unjust from the perspective of such an outsider whose risk position in relation to the company is *de facto* similar to the risk position of a shareholder. Nevertheless, the general clause does not protect debtors or

³⁹ See e.g. Pönkä 2012 pp. 248–256 and Truyen 2005 pp. 150–155.

⁴⁰ See e.g. Manne Airaksinen – Pekka Pulkkinen – Vesa Rasinaho: *Osakeyhtiölaki I. 2., uudistettu painos*. Hämeenlinna 2010 p. 42 and Truyen 2010 p. 179.

⁴¹ RP 27/1977 till Riksdagen med förslag till ny lagstiftning om aktiebolag (Finnish government bill concerning the 1978 Companies Act) p. 68.

other stakeholders of the company⁴² nor potential investors who have not yet acquired shares in the company⁴³ – nor the company itself.⁴⁴

The concept of a shareholder cannot, however, be strictly narrowed down to persons who already possess shares in the company. The definition of a shareholder is not as such open to various interpretations, but when assessing the scope of application of the general clause it has to cover both shareholders and persons who have the *legal* right to become shareholders in a company.⁴⁵ For example, according to Finnish law, share subscribers are protected by the general clause before they become actual shareholders in the issuing company, in other words, before the shares have been registered. A similar interpretation applies to shareholders of a merging company who become actual shareholders of the acquiring company only after the implementation of the merger has been registered (FCA 16:16).⁴⁶ Before the moment of registration it is possible that the acquiring company makes, for example, property arrangements which infringe the rights of the shareholders of the merging company.⁴⁷

2. As mentioned above, the concept of unjust benefit is open to interpretation. Because the company limited by shares is an economic enterprise – i.e. because the purpose of the company is to generate profits for the shareholders, unless otherwise provided in the articles of association – benefit (“fordel,” “etu,” “fördel”) refers to something with monetary significance.⁴⁸ Therefore, the general clause cannot be applied in a situation where a shareholder finds a decision made by the company, for example, unethical or immoral.⁴⁹ In other words, the general clause protects the *economic equality* of shareholders.

⁴² Truyen 2010 p. 181.

⁴³ Pönkä 2012 p. 264. As for potential investors, it is unclear whether the general clause protects a share transferee in a situation where the articles of association include a consent clause and the board of directors is deciding whether to accept the acquisition or deny it. This question has been discussed thoroughly by Stine Winger Minde: Er anvendelsen av regler om myndighetsmisbruk og regler om samtykkenektelse én og same øvelse? Nordisk Tidsskrift for Selskabsret 2015:3 pp. 47–63.

⁴⁴ Especially in older literature some authors have mistakenly argued that the company can also be seen as an independent entity whose interests are protected by the general clause. See e.g. Stefan Lindskog: Om aktiebolags anspråk på grund av olovlig kapitalanvändning; särskilt om s. k. bristtäckningsansvar. Svensk Juristtidning 1992 pp. 81–107, p. 84 and Gerhard af Schultén: Osakeyhtiölain kommentaari II. Luvut 9–17. Jyväskylä 2004 p. 124.

⁴⁵ See also Werlauff 1991 p. 101: “Beskyttelsesobjekter for lighedsgrundsætningen er aktuelle og potentielle selskabsdeltagere.”

⁴⁶ RP 109/2005 till Riksdagen med förslag till ny lagstiftning om aktiebolag (Finnish government bill concerning the FCA) p. 40.

⁴⁷ Raimo Immonen: Yritysmuodot ja liiketoiminta. Jyväskylä 2002 pp. 611–612.

⁴⁸ See e.g. Airaksinen – Pulkkinen – Rasinaho 2010 p. 40.

⁴⁹ See e.g. Erik Nerep – Per Samuelsson: Aktiebolagslagen. Kapitel 1-10 – en lagkommentar. Stockholm 2009 p. 498: “Om otillbörlighetsrekvisitet ska tillåtas inkorporera andra värden än vad som kan förknippas med att bereda aktieägarna vinst, blir effekterna långtgående. En sannolik bieffekt av sådan förskjutning är minskad villighet att satsa riskkapital i aktiebolag, med svåröverblickbara samhällsekonomiska konsekvenser.”

When assessing what kind of benefit can be considered unjust, a good starting point is to rule out benefits which cannot fall under the scope of application of the general clause. First, it has been argued that if the shareholders agree that a benefit is not unjust – i.e. if the shareholders give their consent to an unjustly beneficial decision – the benefit cannot be later contested.⁵⁰ Also, benefits that are based on the provisions of the articles of association should not usually be considered unjust.⁵¹ It is, of course, possible that the articles of association are later found unfair in which case the articles themselves should be adjusted.⁵² Furthermore, a benefit on which the shareholders have agreed in a shareholders' agreement should not usually be considered unjust on the company level.⁵³ Especially in equality disputes between shareholders of SMEs, courts should pay careful attention to shareholders' agreements because they can shed important light on what the shareholders have initially understood as a fair division of risks.

The most problematic question concerning the general clause is, if a decision made by the company can be considered unjustly beneficial if it benefits the company, meaning the shareholders as a collective. The tension between the principle of equality (“likställighetsprincipen”) and the interest of the company (“bolagets intresse”) has received much attention especially in Sweden where some authors have argued that a decision based on a sound business reason cannot be considered unjust (“otillbörlig”) even though it breaches the principle of equality⁵⁴. Others, such as Nerep, have argued that a sound business reason does not automatically mean that a decision made by the company cannot be contested by the general clause.⁵⁵

In Norway Truyen has done extensive research on the question at hand and claimed that the general clause should be understood as “a kind of business judgment rule” so that not all breaches of the equality

⁵⁰ See e.g. Pönkä 2012 pp. 306–309 and UfR 1985 p. 183. The problemacy of shareholder consent (“principen om samtliga aktieägares samtycke”) has been recently discussed by Hanna Almlöf: *Bolagsorganens regleringen och dess ändamålsenlighet. En aktiebolagsrättslig studie om ägarledda bolag*. Stockholm 2014 pp. 243–302.

⁵¹ See e.g. Pehrson 1987 p. 491, Prop. 2004/05:85. *Ny aktiebolagslag* (Swedish government bill concerning the SABL) pp. 247–248 and Pönkä 2012 pp. 309–314.

⁵² In Finland, e.g. redemption clauses have quite often been adjusted. Pönkä 2015 pp. 280–294.

⁵³ See e.g. Nerep 2003 p. 295 and Pönkä 2012 pp. 314–319.

⁵⁴ See e.g. Bergstöm – Samuelsson 2009 pp. 152–153, Rolf Dotevall: *Skadeståndsansvar för styrelseledamot och verkställande direktör. En aktiebolagsrättslig studie i komparativ belysning*. Malmö 1989 p. 287, Gösta Kedner – Carl Martin Roos: *Aktiebolagslagen Del I (1–9 kap.) med kommentarer*. Göteborg 1995 p. 307, Pehrson 1987 pp. 491–949 and Samuelsson 1995 p. 99.

⁵⁵ Nerep 2003 pp. 294–308, Rolf Skog: *Rodhes Aktiebolagsrätt. Tjugofjärde upplagan*. Poland 2014 p. 250 and Åhman 1997 p. 805.

of shareholders are unlawful: “The equality principle can be infringed if there are objective grounds for doing so.” Furthermore, Truyen finds the unreasonableness condition in the general clause a mechanism for balancing the contradiction between the principle of profit maximization and the principle of equality. He illustrates this finding with the rules on directed share issues. An issue that does not follow the rules on pre-emption always dilutes the rights of shareholders who are not allowed to subscribe new shares. Therefore a directed share issue *de facto* breaches the principle of equality of both shares and shareholders, but it is still lawful if it is capable of increasing the company’s profit maximization in the long term.⁵⁶

In Finland, Pönkä has supported Truyen’s findings and emphasized that when assessing the unreasonableness condition, it is very important to pay attention to the type of company in question: If a large (listed) company, whose shareholders are often anonymous investors, makes a decision that treats the *shares* equally and that is based on a sound business reason, it is quite difficult to argue that such a decision could breach the principle of equality of *shareholders*. As for companies with dispersed ownership structures it is, of course, impossible to require that the subjective interests and expectations of every shareholder is taken into account and therefore in all decision-making situations the shareholders should be treated as an anonymous collective whose interest is to maximize profits in the long run.⁵⁷ This does not, however, mean that a decision made by, for example, a listed company can never be successfully contested by the general clause: such situations are uncommon, not nonexistent.⁵⁸

On the other hand, in SMEs where shareholders are often aware of the subjective interests and expectations of one another, it is sometimes possible – and even necessary – to take into account what kind of individual effects a decision has on the shareholders. This does not mean that the company should always take into consideration the personal necessities of its shareholders. It only means that in SMEs, the assessment of the unreasonableness condition is more material- and shareholder-oriented than in companies with dispersed ownership structures.⁵⁹ In SMEs the general clause might be applied, for example, in a situation where the company decides on a pre-emptive share issue knowing that a shareholder does not

⁵⁶ Truyen 2010 p. 182.

⁵⁷ Pönkä 2012 pp. 337–344. See also Bergström – Högfeldt – Samuelsson TfR 1994 p. 140, Bergström – Samuelsson 2009 p. 153 and Samuelsson 1995 p. 99.

⁵⁸ See e.g. Finnish Supreme Court decision KKO 2015:105, where a minority shareholder of a listed company (Finlines Oyj) claimed that the group contributions given to a subsidiary breached the principle of equality. The Supreme Court did not accept these allegations.

⁵⁹ Pönkä 2012 pp. 337–344.

have the financial capabilities to subscribe new shares and it is evident that the true purpose of the issue is to dilute his/her rights.⁶⁰ On the other hand, for example, an asset distribution decision that is more tax favorable to a majority shareholder than to the minority shareholders does not constitute an abuse of authority because even in SMEs a reasonable balance between the principle of majority rule and the principle of equality has to be retained.⁶¹ It is important that the general clause is never used as an instrument to shift actual decision-making powers to minority shareholders.

Furthermore, *Veikko Vahtera* in his doctoral thesis has separated *business decisions* (“liiketoimintapäätös”) from *internal decisions* (“sisäinen päätös”) when assessing the unreasonableness condition of the general clause. As for business decisions, Vahtera claims that the principle of equality of shareholders is contained within the principle of profit maximization. In other words, a business decision cannot promote the purpose of the company – i.e. the decision cannot be based on a sound business reason – if it is unjustly beneficial to a shareholder or another person. If the company, for example, purchases machinery from a majority shareholder and pays overprice for the merchandise, such a transaction breaches both the principle of equality and the purpose of the company (and the rules on asset distribution). On the other hand, internal decisions of the company – and especially decisions concerning asset distribution and financing – are usually within the boundaries of the purpose of the company, but this does not mean that they cannot breach the principle of equality. For example, it is quite hard to argue that a share issue does not support the purpose of the company, but as demonstrated above, it can still be unjustly beneficial to one shareholder at the expense of another.⁶²

Vahtera’s findings are important because they shift the focus to internal decisions when examining the casuistic situations where the protection inflicted by the general clause is crucial for the minority shareholders. It is also important to notice that it is usually much easier to show that a decision breaches the principle of profit maximization than that it is unjustly beneficial. In fact, for business decisions Vahtera emphasizes the purpose of the company (or the principle of profit maximization) as a central minority protection rule.⁶³

⁶⁰ See e.g. Finnish Supreme Court decision KKO 1991:46.

⁶¹ See e.g. Airaksinen – Pulkkinen – Rasinaho 2010 p. 39, Stephen M. Bainbridge: *Corporation Law and Economics*. New York 2002 s. 822, Pönkä 2012 p. 258, Rt. 1999 p. 330 and Woxholth 2014 pp. 75–76.

⁶² Veikko Vahtera: *Osakeomistuksen riski ja sääntely*. Hämeenlinna 2011 pp. 166–167.

⁶³ Vahtera 2011 p. 461.

Altogether in both larger companies and in SMEs one should ask three questions when assessing the unreasonableness condition: 1. Is there a sound business reason for the decision at hand? 2. Are there alternative methods to reach the pursued objectives? 3. Are the expected positive effects of the decision (improvement in the profit maximizing capabilities of the company) in the long term such that they are capable of compensating the short-term disadvantage inflicted to the shareholders? If the answer to questions 1 and 3 is yes and to question 2 no, it is highly likely that no one is benefitting unjustly from the decision. Finally, it is important to remember that it is unrealistic to pursue absolute equality in the decision-making of the company. Thus, minority shareholders have to tolerate inequality to some extent because the purpose of the general clause is solely to prevent actual abuses of authority, not to shift the balance of power between the shareholders.

5. Conclusions

In this article I have examined the Nordic doctrine on the principle of equality of shares and shareholders on a theoretical and general level. My findings indicate that the doctrine is somewhat similar in the Nordic countries, meaning here Denmark, Finland, Norway and Sweden.

When assessing the principle of equality it is always necessary to distinguish the principle of equality of shares from the principle of equality of shareholders. Both rules are found to form the Nordic companies acts and even though they are usually separated from one another, they serve the same purpose: The objective of the principle of equality of shares is to ensure that “agreements shall be kept”, in other words, that the rights and obligations attached to shares remain unchanged until the shareholders agree otherwise. The principle of equality of shareholders – the general clause – on the other hand, is necessary in such decision-making situations where the shares are treated equally but the decision (or other action) at hand is still capable of causing unjust benefit to a shareholder or someone else at the expense of another shareholder (or the company). As Cederberg has already argued, the purpose of the general clause is to “fill in the gaps” where casuistic prohibitions and the principle of equality of shares do not provide sufficient protection for the minority shareholders against abuses of authority.

The problemacy concerning the principle of equality of shareholders culminates in the concept of unjust benefit. This so-called unreasonableness condition refers to the tension between the benefit of the company (the principle of profit maximization) and the benefit of a sole shareholder (the principle of equality). Nordic scholars have presented many noteworthy methods of approaching this tension, such as understanding the unreasonableness condition as a kind of a business judgment rule so that not all breaches of the equality of shareholders are unlawful (Truyen). When assessing the unreasonableness condition it is also important to take into account the type of company (Pönkä) and the type of decision (Vahtera) in question. Finally, it ultimately comes down to a case-by-case evaluation of the circumstances at hand: a decision which is found unjustly beneficial in one situation might be found totally lawful in other circumstances.

Even though the Nordic doctrine on the principle of equality of shares and shareholders seems rather established, many important company law issues related to it are under development. For example, the discussion around the duty of loyalty of shareholders seems to be under constant debate within the Nordic countries. Also the purpose of the company – a topic which I have mostly ignored in this article – is evolving.⁶⁴ As for the principle of equality of shares and shareholders the question of the purpose of the company is not, however, particularly important because the principle of equality governs the relations between shares and shareholders, not the relations between shareholders and stakeholders.

⁶⁴ See e.g. Beate Sjøfjell – Jukka Mähönen: Upgrading the Nordic Corporate Governance Model for Sustainable Companies. *European Company Law* 11, no. 2 (2014) pp. 58–62, who have claimed it should be included in the Nordic companies acts that “(t)he purpose of a company is to create sustainable value through the balancing of the interests of its investors and other involved parties within the planetary boundaries” and e.g. Rolf Skog: Om betydelsen om vinstsyftet i aktiebolagslagen. *Svensk Juristidning* 1/2015 pp. 11–19, who has claimed that the shareholder primacy doctrine cannot be reasonably contested. These perspectives represent the opposite ends of the discussion concerning the problemacy of the purpose of the company.