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Systematics of Shareholder Remedies—Origins and Developments^{*1}

The effectiveness of a legal provision serves as demonstration of its actual impact in the society, as well as whether that specific provision can be implemented in practice.^{*2} Law is effective only if it is possible to enforce it. Connected with this principle is a succinct maxim often applied in Anglo-American jurisprudence: For every right, there's a remedy—a statement derived from the Latin concept of *ubi ius ibi remedium*.^{*3} Accordingly, law needs remedies—opportunities established for the benefit of an entitled person to eliminate the negative consequences of the violation of an obligation that occurred with respect to him or to prevent the realisation of such consequences.

The meaning of a remedy (accordant with the German concept of *Rechtsmittel*) is in most cases associated with a certain violation, and the objective of a remedy is primarily to rectify, in one way or another, a violation of a subjective right of a person. The meaning and objectives of a remedy may vary according to the branch of law in question. For instance, in judicial proceedings law, remedies are understood as legal opportunities that a party to a proceeding may exercise to contest a judicial decision in a court of higher instance. The legal literature notes that the objective of such remedies is primarily to correct and alter the decision while remedies may have a different procedural effect. The principle is that a party to a proceeding is granted an opportunity to contest the decisions that said party considers to be unlawful and unfavourable to him.^{*4} State liability law recognises primary and secondary remedies—with the former, the objective of the remedy is to prevent or eliminate the causation of damage, and in the second case compensation for damage is granted in the direct (i.e., monetary) sense of the term.^{*5} Environmental law too speaks of a comprehensive approach to remedies and to the violations associated with one particular area of the law.^{*6}

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² A. Aarnio. *Õiguse tõlgendamise teooria* (Theory of Interpretation of Law). Tallinn 1996, p. 77 (in Estonian).

³ About this principle, see, e.g., T. A. Thomas. *Ubi Jus, Ibi Remedium: The Fundamental Right to a Remedy under Due Process*. – San Diego Law Review, November 2004 (41). Available at SSRN <http://ssrn.com/abstract=564302> (23.03.2009); J. Kahn. *The Search for the Rule of Law in Russia*. – Georgetown Journal of International Law 2006 (37) 2. Available at SSRN <http://ssrn.com/abstract=1011822>.

⁴ T. Rauscher *et al.* (Hrsg.). *Münchener Kommentar zur Zivilprozessordnung mit Gerichtsverfassungsgesetz und Nebengesetzen*. 3. Aufl. München 2004. Vorbemerkung zu den § 511 *ff.*, margin No. 1–3.

⁵ E. Andresen. *Õigusvastaste tagajärgede kõrvaldamine ja kahju hüvitamine riigivastutusõiguses* (Elimination of Unlawful Consequences and Compensation for Damage in State Liability Law). – *Juridica* 2006/3, p. 160 (in Estonian).

⁶ M. Kloepfer. *Saksamaa tulevase keskkonnaseadustiku mõte ja sisu* (The Idea and Content of the Future German Environmental Code). – *Juridica* 2007/7, p. 513 (in Estonian).

This article aims to investigate the specific nature and objectives of shareholders' remedies under company law and the approaches employed by different legal systems and countries to the systematics of shareholders' remedies. The paper will also provide an assessment of the regulation of this particular issue under Estonian law.

1. Specifics of remedies under company law

In the Estonian legal space, with its influences from the Germanic legal tradition, the complex concept of legal remedy has perhaps been defined best in the law of obligations, where a remedy is treated as an opportunity that a creditor has at his disposal for eliminating, when an obligation has been violated, the negative consequences of said violation or for preventing such consequences. A remedy may include both an opportunity to claim something from the other party to the obligation (the right of claim, e.g., such as an action for the compensation of damage) and the right to unilaterally alter the obligation (in German, *Gestaltungsrecht*, e.g., the right to withdraw from or cancel a contract). The legal literature ties the opportunity to apply a remedy in the law of obligations to the concept of liability.⁷ Proceeding from the principle of private autonomy, it is characteristic of remedies in the law of obligations that it is up to the creditor to decide on their application and neither courts nor other institutions can interfere and apply a remedy whose application the creditor has not requested or upon which he has not relied.⁸

However, one certainly cannot claim that remedy as an independent legal concept is something characteristic solely to the Germanic law of obligations. The term can be found in the Principles of European Contract Law⁹, whose Article 8:101 (1) provides that whenever a party does not perform an obligation that is set forth in the contract and the non-performance is not excused, the aggrieved party may resort to remedies. These are remedies under contract law, and their systematics proceeds from the violation, providing for which remedies are available. Likewise, Chapter 3 of Book III of the Common Frame of Reference¹⁰ contains regulation of remedies for non-performance.

Relations under company law are characterised by their multifacetedness, which arises from there being numerous parties to such a legal relationship, and these relations are also multi-layered. Therefore, creation of an appropriate system of remedies is a rather challenging task in this domain. Internal relations include, simultaneously, the relations of the members of management with the company, relations between directing bodies, relations among the shareholders, and the relations of the shareholders with the members of the directing bodies. In addition, account should be taken of the relations of the public limited company, as a legal entity acting in commerce in its own name, with third parties because the legal capacity of a legal entity is realised by its management board via the members thereof.¹¹

The dilemma under company law lies in the fact that, on the one hand, any company, in order to operate, needs a stable environment. The managers of a company need to act independently within the limits of the powers conferred upon them and to have a guarantee that, under normal circumstances, there will be no interference in the day-to-day economic activities of the entity they manage. On the other hand, there is a risk of abuses because of conflicts between the management board and the shareholders, characteristic especially of companies with fragmented holdings, as well as conflicts between the majority and minority, which are burdensome for those companies with one strong majority shareholder and a number of minority shareholders.¹² Contradictions may also develop, and proper remedies are necessary in the case of closed limited companies in which the shareholding is evenly split between two shareholders or between two homogenous interest groups who, whilst having similar interests and acting together, compete with each other.¹³ Thus it can be seen that the requirements imposed on the catalogue of remedies under company law are more diverse.

⁷ I. Kull *et al.* *Võlaõigus I. Üldosa* (Law of Obligations I. General Part). Tallinn 2004, p. 192 (in Estonian).

⁸ P. Varul *et al.* *Võlaõigusseadus I. Kommenteeritud väljaanne* (Law of Obligations I. Commented edition). Tallinn 2006, § 101, commentary 3 (in Estonian).

⁹ Principles of European Contract Law. Available at http://frontpage.cbs.dk/law/commission_on_european_contract_law/PECL%20engelsk/engelsk_partI_og_II.htm.

¹⁰ C. von Bar *et al.* (ed.). Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference. Outline edition. Available at <http://www.law-net.eu/>.

¹¹ K. Saare. *Eraõigusliku juriidilise isiku õigussubjektsuse piiritlemine*. Doktoritöö (Delimitation of the Legal Subjectness of a Legal Entity under Private Law. Doctoral thesis). Tartu 2004, p. 132 (in Estonian).

¹² H. Hansmann, R. Kraakman. Agency Problems and Legal Strategies—The Anatomy of Corporate Law. A Comparative and Functional Approach. R. Kraakman *et al.* Oxford 2004, p. 21.

¹³ At first glance, such a distribution of shareholding may seem democratic, but in essence in such a case both shareholders and voting blocs need to vote for every resolution in order to adopt it. Conflicts of a principle nature may render a company incapable of acting if, e.g., the term of office of the directing bodies elapses and, because of the differences between the shareholders, new members cannot be appointed into the directing bodies.

A remedy under company law is, it may be said, a legal measure whose objective is to eliminate or prevent the negative consequences of violations committed by subjects in company law (such as a company, members of its directing body, or shareholders). However, a remedy under company law may, in equal measure, be directed toward the prevention of future violations.

2. The nature and objectives of the remedies for a shareholder

At the turn of the century, the theory of company law brought to the fore the company as a whole, and the interests of the shareholders, as one interest group among many, were pushed into the back seat.^{*14} This tendency has of late started to change. In the light of the financial crisis that originated in the United States of America in 2008, there has been increasing talk about broadening the rights of shareholders in order to balance the powers of the management board.^{*15} In Germany too, there is ongoing legal debate, unlike in the past, about the rights of a shareholder, even going as far as to discuss the possibility of claiming compensation for personal damages of a shareholder.^{*16}

While the legal literature discusses protection of the shareholders, the emphasis has differed: in America, it has been on protection of shareholders as a class, in contrast to Europe, where the focus is on the protection of minority and small shareholders. These approaches have been conditioned by the differences between the relevant capital markets—compared to the USA, Europe (in particular, continental Europe) features considerably more limited companies that are controlled by a majority shareholder.^{*17} Majority interest has been the basic principle guiding company law. However, as Finnish researcher Seppo Kinkki has explicitly stated, the existence of minority protection is the very reason for which a person, instead of just giving his money to a random stranger, would invest it in a limited company.^{*18} In fact, Japanese jurist Eiji Takahashi has posited minority protection to be the paramount task of modern company law.^{*19} Whilst a majority shareholder should be able to protect his rights by voting, the minority shareholder does not have that option.

The shareholder, being the original owner of the investment, will, according to the legal principle of *casum sentit dominus*^{*20}, generally bear the risks inherent to the company.^{*21} However, according to that principle, the owner bears only the so-called risk of accidental destruction^{*22}, while for errors of the management clearly beyond the scope of the business judgement rule^{*23}, the liability shall be borne by the person who made such an error. This means that the shareholder carries a risk to lose his investment should the business fail. Where the directing bodies have acted in keeping with the business judgement rule—i.e., when they have observed the due-care obligation of a prudent entrepreneur—any consequences of loss of assets invested in the company by the shareholders shall be borne by those shareholders if the business fails. However, if the directing bodies have not exercised due care in management, the shareholders need not bear the negative consequences and the

¹⁴ Even in the USA, which is classically considered to be at the forefront of shareholder protection, in the post-Enron times the need to consider the broader goals of corporate governance has been intensely emphasised. See, e.g., T. Baums, K. E. Scott. Taking Shareholder Protection Seriously? Corporate Governance in the United States and Germany. – American Journal of Comparative Law, Winter 2005 (53); ECGI – Law Working Paper No. 17/2003; Stanford Law and Economics Olin Working Paper. Available at SSRN <http://ssrn.com/abstract=473185>.

¹⁵ As noted by Jennifer Hill, in reference to an article in The Financial Times, business once again has a ‘legitimacy problem’, adding that the financial crisis represents an opportunity to reassess whether shareholders should be afforded stronger power, as a check on managerial control. See J. G. Hill. Who’s Afraid of Shareholder Power? A Comparative Law Perspective. Unpublished Paper, 2009, pp. 2–3. Available at http://works.bepress.com/cgi/viewcontent.cgi?article=1003&context=jennifer_hill.

¹⁶ See, e.g., G. Wagner. Schadensberechnung im Kapitalmarktrecht. – Zeitschrift für Unternehmens- und Gesellschaftsrecht, August, 2008 (4), pp. 495–531.

¹⁷ K. J. Hopt. The German Two-Tier Board: Experiences, Theories, Reforms. – Comparative Corporate Governance—The State of the Art and Emerging Research. K. J. Hopt, H. Kanda *et al* (ed.). Oxford 1998, p. 232.

¹⁸ S. Kinkki. Minority Protection and Dividend Policy in Finland. – European Financial Management, 2008 (14) 3, p. 471.

¹⁹ E. Takahashi. Der Gleichbehandlungsgrundsatz im japanischen Aktienrecht als Aufgabe der Rechtswissenschaft. – Zeitschrift für Vergleichende Rechtswissenschaft. Archiv für Internationales Wirtschaftsrecht. 108. Band. Mai 2009, p. 105.

²⁰ *Casum sentit dominus* is a principle derived from Roman law under which the owner of a thing is primarily the one to bear the risk of accidental destruction or damage of a thing. See, e.g., R. Lieberwirth. Latein im Recht. 3. Aufl. Berlin: München 1993, sv “casum sentit dominus”.

²¹ H. C. von der Crone. Haftung und Haftungsbeschränkung in der aktienrechtlichen Verantwortlichkeit. – SZW/RSDA 2006/1, p. 159. Available at http://www.rwi.uzh.ch/lehre/forschung/alphabetisch/vdc/cont/Haftung_und_Haftungsbeschaenkung.pdf.

²² Of course, here we can speak about the risk of accidental destruction only conditionally as in legal sense there is not necessarily a linear relationship between the ‘destruction’ of the shareholder’s investment and the bad economic situation of the limited company.

²³ For more on this, see, e.g., T. Tiivel. Äriühingu juhtorgani liikme kohustused ja vastutus. Magistritöö (Duties and Liability of a Member of a Directing Body of a Company. Master’s thesis). Tartu 2004, p. 30 (in Estonian).

members of management must compensate for the damages they have caused. Such is the principle of *casum sentit dominus* as expressed in the structure of a limited company as a legal entity.

A remedy available to a shareholder under company law is, in the broadest sense, any right vested in a shareholder to prevent a planned violation or to respond to a violation already committed in the company (by taking action to clarify the violation; demand the elimination of the consequences of the violation, restoration of the original situation, or claim damages; etc.). In this sense, among the remedies a shareholder can exercise are also the right to call a general meeting when the management board has not summoned a general meeting after receiving a demand from the shareholders (set forth in § 292 (2) of the Commercial Code^{*24}), the right to demand a special audit (see § 330 (2) and (2¹) of the CC), claims related to merger and winding-up procedures, and other remedies.^{*25} In a narrower sense, the remedies available to a shareholder may be understood primarily as claims directed toward the elimination of the consequences of violations, of which contestation of the resolutions of the general meeting or directing bodies and compensation for damages are the primary ones.

In addition to remedies under company law, a shareholder may avail himself of the remedies provided under, for example, the law of obligations.^{*26}

In comparison to remedies under the law of obligations, for which the objective is to eliminate a violation arising from an obligation, the objectives of the remedies available to a shareholder under company law are somewhat broader. The objective of remedies under company law are not necessarily limited to the enforcement of a particular, purely subjective right (such as compensation for damages); rather, they are targeted at protecting the interests of the company as a whole—catering to reasonable resolution of conflicts within the company, alleviating discord between majority and minority shareholders, preventing abuse by directing bodies, or creating an adequate and flexible system to address the consequences of violations already committed. This logically gives rise to the question of whether remedies under company law should be always and in any event guaranteed to each individual shareholder or whether it makes sense to establish in certain cases some specific majority vote requirements.

3. Proportionality of legal regulation

Responses to a violation may generally be divided into responses in private law and those in public law, according to whether the response requires state intervention or not.^{*27} In view of this, the legal literature treats various forms of control and mechanisms of liability created by the state under penal law as sanctions under public law.^{*28}

The literature makes mention of a goods market as one possible alternative to remedies under company law (including options for response to any violations committed by a member of the directing body); however, it is stressed that the regulatory impact of the market varies significantly in different countries and legal orders.^{*29} B. Black and R. Kraakman believe that the use of various options of legal intervention and regulators based on market forces depends, *inter alia*, on the type of economy in place in the country in question, and they also hold that, for example, an emerging economy needs a company-law environment different from that of a developed, stable economy.^{*30} These authors also highlight the prohibitive economic model that was characteristic of the British and US company law in the 19th century and wherein the main legal regulator was the

²⁴ Äriseadustik. Adopted on 15 February 1995. – RT I 1995, 26/28, 355; 2010, 9, 41 (in Estonian). Hereinafter ‘CC’.

²⁵ E.g., under § 378 (4) of the CC, shareholders who represent at least one tenth of the share capital may bring an action with a court, in a liquidation proceeding, within two months after the date on which the shareholders were informed that the balance sheet and asset distribution plan are presented to the shareholders for examination. The shareholders may demand the preparation of a new balance sheet or asset distribution plan, or supplementary liquidation.

²⁶ As stated in CCSCd 10.02.204, 3-2-1-16-04 (RT III 2004, 6, 64 (in Estonian)), a claim for payment of dividend, e.g., is an enforcement claim under the law of obligations. The adoption of a resolution to pay dividend creates an obligation between the company and the shareholder under which the company is required to pay the dividend when the claim falls due and there exist no other objections such as, e.g., those arising from the prohibition to abuse rights. If the company refuses to pay to a shareholder the dividend allocated to him by a resolution of the general meeting, the shareholder may demand the payment of the dividend and resort to other appropriate remedies under the law of obligations (paragraph 15 of the decision).

²⁷ The author believes that such a distinction is rather conditional because sanctions under private and public law are understood differently in different legal systems. In the Germanic legal system, on which our classification of the branches of law is built on, e.g., the meaning of public law is understood more broadly and as the enforcement of an action for compensation of damage in private law also requires, if not obeyed voluntarily, enforcement via a court proceeding carried out by the public authorities, then in our legal theory, civil court procedure is treated as a part of the public law. See R. Narits. *Õiguse entsiklopeedia* (Encyclopedia of Law). Tallinn 2004, p. 47 (in Estonian).

²⁸ A. Reisberg. *Derivative Actions and Corporate Governance. Theory and Operation*. New York 2007, p. 31.

²⁹ *Ibid.*, p. 37.

³⁰ B. Black, R. Kraakman. *A Self-enforcing Model of Corporate Law*. – *Harvard Law Review*, June, 1996 (109) 8, p. 1939. Available at SSRN <http://ssrn.com/abstract=10037>.

prohibition of various activities that by their nature would be conducive to the most violations (e.g., related-party transactions). Black and Kraakman concede that in the early phases of an emerging economy such a model might be justified, but they argue that a self-enforcing model may also be effective in the conditions of an emerging economy.^{*31} They consider the market as regulator to be an alternative not only to the remedies of a shareholder but to legal regulation in general. How great a role legal provisions should have at all in the regulation of a capital market is the starting point of the discussion. However, the collapses of Enron and other major listed companies, which cast a shadow over the turn of the century, have demonstrated that even the capital market of the USA can no longer be the corresponding environment's sole regulator. The literature notes that, in reality, market mechanisms and protection of shareholders and investors go hand in hand and that where no proper protection measures are in place, flow of capital from outside the company dries up (or just becomes too expensive) and abuse related to insider trading begins to spread.^{*32}

The existence of any remedy is justified by the right whose enforcement the corresponding remedy purports to serve. A concrete remedy can be viewed from two angles—firstly, from that of the right protected and secondly from the perspective of violation as consequence. The question is of whether individual shareholders (or a minority holding a certain number of votes) should have the possibility of controlling only the resolutions adopted at a general meeting, by contesting the resolutions that are unlawful or adopted in violation of the rules of procedure, or they should also be granted the same right of control over the activity of the directing bodies, vesting in the shareholders, *inter alia*, the right to bring charges against the members of the directing bodies to remedy a violation or to compensate for damage.^{*33} On the topic of democracy in company law, the literature notes that it is not so much democracy of shareholders as it is democracy of the shares, meaning that the general emphasis leans toward building the catalogue of other legal options on one's proportion of property rights.^{*34} The principles of company law do, however, accept to a certain extent the right of the shareholders to control the activities of the directing bodies, and, despite the general rule that the majority decides, it is deemed necessary to protect the rights of the minority against abuse by the directing bodies and the majority shareholder.

Contrary to the stance that every shareholder should have a maximum arsenal of legal remedies, specialists in economics argue that even granting each shareholder the right to contest the resolutions of a general meeting may cause excessive problems for a limited company. In Germany, for example, it has been opined that individual shareholders have for much too long had an excessively wide playing ground for blocking vital reforms in a company by first provoking a basis for invalidating or nullity of a resolution of the general meeting and then bringing the case before a court in order to sway the company to employ, instead of the economic choice expressed in the contested resolution, another solution, one preferable to that particular shareholder.^{*35} Such court proceedings are often very distressing and time-consuming for the company, which is why the threat of court proceedings has indeed been used as a means of exerting pressure on a company.^{*36}

In creating a catalogue of remedies for shareholders under company law, one should take into account more factors than merely the need to restore someone's subjective right that has been violated. In addition to the interests of shareholders, the interests of a company as a social whole and those of its other interest groups must be born in mind as well as the need to launch changes vital to the shaping of a secure investment environment and the normal operation of the company. It should also be considered that the system of measures should be developed in a balanced and proportionate way.

In summary, it can be stated that the affording to shareholders of remedies under company law is a rather significant issue of legal regulation; the only question concerns the objectives sought and whether or not such measures are consistent with the general legal and economic environment of the state.

³¹ *Ibid.*, pp. 1930–1932.

³² W. W. Bratton, J. A. McCahery. Comparative Corporate Governance and the Theory of the Firm: The Case Against Global Cross Reference. – Columbia Journal of Transnational Law 1999 (38) 2, p. 60. Available at SSRN <http://ssrn.com/abstract=205455>.

³³ A. van Aaken. Shareholder Suits as a Technique of Internalization and Control of Management. A Functional and Comparative Analysis. Heidelberg 2004, p. 7. Available at <http://www.uniformterminology.unito.it/downloads/papers/AakenShareholder.pdf>.

³⁴ P. L. Davies. Gower and Davies' Principles of Modern Company Law. Seventh Edition. London 2003, p. 328.

³⁵ H.-U. Wilsing. Der Reiz der Anfechtungsklage. Der ökonomische Gastkommentar. – Handelsblatt, 2.10.2007. Available at <http://www.handelsblatt.com/politik/handelsblatt-kommentar/der-reiz-der-anfechtungsklage;1330686>.

³⁶ A draft act has been prepared in Germany which, *inter alia*, purports to reduce the time consumed by contesting a resolution and therefore also to alleviate the burden of such a proceeding on a company. See Entwurf eines Gesetzes zur Einführung erstinstanzlicher Zuständigkeiten des Oberlandesgerichts in aktienrechtlichen Streitigkeiten. Bundesrat. Drucksache 901/07 (Beschluss). 14.03.2008. Available at <http://dip21.bundestag.de/dip21/btd/16/090/1609020.pdf>.

4. Various possibilities of systematics of shareholders' remedies

4.1. France and Belgium

Different legal systems approach shareholders' remedies differently, and sometimes when speaking about shareholders' remedies, different phenomena are understood as being referred to. Therefore, the systematics of remedies also may differ. French lawyer Bernard Grelon, for instance, divides claims for remedying violations of shareholders' rights into, first, those against the directing bodies of the company and, second, claims against the other shareholders, and for the latter claims he distinguishes, further, between claims arising from the abuse of rights and those arising from the shareholders' agreements. Grelon divides claims against the directing bodies into temporary measures, whose aim is to collect evidence or prevent damages, and measures to restore rights in order to eliminate a violation.^{*37}

According to Grelon, the so-called nullity lawsuits are the measures directed toward elimination of a violation. The author cites as the most characteristic nullity lawsuits those cases wherein a shareholder files a lawsuit to establish the nullity of a transaction concluded by the members of management with that particular shareholder or with a person having the same economic interest in a situation in which the transaction was entered into without the prior consent of the board of directors (in the case of a one-level management structure) or the supervisory board (where a two-level structure applies).^{*38 *39} French law is affirmative of the shareholder's right of intervention in such a situation even where the violation occurred before that person acquired the shares in the company, and also where the relevant person, while a shareholder at the time of violation, later transferred his shares. However, in the latter case it is important to prove, if one is to rely on nullity, the existence of justified interest.^{*40}

The measures for restoring rights or the claims for compensation for damage may, according to Grelon, be original or derivative. Derivative claims are directed against the members of management who were in breach of their obligations and the compensation has to be paid by, instead of the company, another person—i.e., in the context of these systematics, by the shareholder. Grelon calls those lawsuits *ut singuli* lawsuits. In their case, unlike that of nullity lawsuits, should the claim be enforced, the shareholder needs to own a certain number of shares both at the time of filing suit and throughout the whole course of proceedings. Original claims, on the other hand, are claims to compensation made by shareholders for their own personal damage that the shareholders may bring against the members of the directing bodies in a situation wherein damages have been caused directly to the shareholders. Although, in theory, claims for compensation of shareholders' personal costs are possible according to Grelon, the courts tend to ignore such compensation claims of shareholders. Judicial practice has generally demonstrated the stance that bad management primarily harms the company and even where the market price of the shares drops as a result of the wrongdoing of the managers, the shareholders are not deemed to be aggrieved parties.^{*41}

Belgian lawyers Alexia Bertrand and Arnaud Coibion generally share the systematics of shareholder protection outlined above. Namely, they distinguish among shareholder suits against the directors of the company, suits against other shareholders, claims against the company, and shareholder suits in so-called summary proceedings whose aim is to provide for provisional and prompt regulation of a certain legal relationship.^{*42} The group of suits classed as summary proceedings includes, for example, suspension of the holding of a convened shareholders' meeting, suspension of the effects of the resolutions of the company, prohibition of certain activities of the company (sale of assets, publication of an official announcement, publication of a press release, etc.), and also curtailing of a shareholder's right to information.^{*43} The cases cited here can be treated as measures for securing an action or as measures for provisional regulation of a legal relationship.^{*44}

³⁷ B. Grelon. Shareholders' Lawsuits against the Management of a Company and its Shareholders under French Law. – European Company and Financial Law Review, August 2009 (6) 2/3, pp. 205–218.

³⁸ See Code de Commerce (Code de Commerce (Commercial Code) accordingly. Last amendment: Act No. 2006-11 of 5 January 2006 Art. – Official Journal of 6 January 2006, Article L.225-38 and Article L225-86. Available at <http://195.83.177.9/code/liste.phtml?lang=uk&c=32>.

³⁹ B. Grelon (Note 37), p. 210.

⁴⁰ *Ibid.*, p. 211.

⁴¹ *Ibid.*, p. 213.

⁴² By their nature, these measures are similar to the measures for securing an action or provisional legal protection, as known in the Estonian law, which must be connected with a particular court case, already initiated or pending initiation.

⁴³ A. Bertrand, A. Coibion. Shareholder Suits against the Directors of a Company, against other Shareholders and against the Company itself under Belgian Law. – European Company and Financial Law Review, August, 2009 (6) 2/3, p 270–271.

⁴⁴ Thus, § 378 (1) 3) of the Code of Civil Procedure (Tsiiviikohtumenetluse seadustik (RT I 2005, 26, 197; 2010, 8, 35, (in Estonian)), hereinafter 'CCP', allows a prohibition on the defendant from entering into certain transactions or performing certain acts, clause 10) of the same subsection also allows another measures considered necessary by the court. In the case of a register proceeding, a court may, under § 598 of the CCP, suspend the proceedings in the matter of the petition for entry until the time the dispute has been adjudicated by way of actions.

As the main cases of shareholders' suits against other shareholders, Bertrand and Coibion highlight suits connected with exit from the company. These authors note that for a long time, the only solution set forth by law for an enduring dispute among the shareholders of a company was the judicial liquidation of said company. Since 1996, a minority shareholder in Belgium has been able to request that one or several other shareholders sell all of their shares or other securities in the relevant company, for so-called valid reasons (exclusion), or that one or several other shareholders buy all of their shares in the company (withdrawal), also for valid reasons and on the premises that other measures would not provide solutions to the dispute and the dispute is likely to lead to the winding up of the company. Today, Belgium has significant judicial practice of such proceedings; therefore, it can be seen that these remedies do actually work.^{*45} Bernard and Coibion mention, as the main type of shareholder suits against a company, the challenging of a resolution of the company. They also mention remedies (predominantly claims to compensation for damages) applied in the course of various categories of take-overs, mergers, divisions, and restructuring proceedings.^{*46}

4.2. The United Kingdom

The systematics of the shareholders' remedies in the United Kingdom are reflected in the consultation paper prepared by the Parliament-commissioned Law Commission (Shareholder Remedies Consultation Paper, hereinafter 'SRCP').^{*47} The document analyses the rights of shareholders as well as the main types of existing remedies and their application. Shareholders' remedies are accorded a rather broad meaning, and distinction is made among personal actions of shareholders, derivative actions^{*48}, unfair prejudice remedies (in German, *Beeinträchtigung*), and additional remedies arising from the law.^{*49} The main remedies the paper deals with are the shareholders' derivative actions and unfair prejudice remedies. The last of the remedies mentioned here, also called oppression remedy, allows the minority to contest any abuse of the minority rights and also contest acts damaging the company generally. This remedy has been treated as an effective measure also in Canadian corporate law, into which it was incorporated in 1983.^{*50} Such a remedy was already in place in the law of the UK as far back as in 1948, and before the corporate-law reform of 2006, it was regulated by Articles 459–561 of the Companies Act. The Companies Act in effect since 2006^{*51} also provides for such remedy; namely, Article 994 specifies that a member of a company may apply to the court, by means of a petition, for an order on grounds that the company's affairs are being, or have been, conducted in a manner that is unfairly prejudicial to the interests of members generally or that an actual or proposed act or omission of the company is, or would be, so prejudicial. The persons whose rights are affected may represent all or only some of the shareholders, but in order for them to bring charges, the condition necessary is that at least the rights of the petitioner have been violated.

This remedy is considered to be a complex and flexible legal option that can be exercised by the court to assess the various aspects of the company's business operations and simultaneously resolve different types of disputes.^{*52} A. Reisberg has called this measure a substitute for a derivative action and referred to the fact that British courts continue to be more keen to process such actions than derivative actions.^{*53} The SRCP too indicates that this is an important procedural alternative to a derivative action. Part 9 of the SRCP analyses the instances wherein the unfair prejudice remedy is used the most, among which are exclusion from management, failure to provide information, increase of the share capital issued, alteration of articles of association, diversion of company business and 'misappropriation' of assets^{*54}, excessive remuneration or non-payment of dividends, and mismanagement (SRCP, 9.33–9.44).

⁴⁵ A. Bertrand, A. Coibion (Note 43), p. 290.

⁴⁶ *Ibid.*, pp. 298–301.

⁴⁷ The Law Commission. Shareholder Remedies. Consultation Paper No. 142, 1996. Available at <http://www.lawcom.gov.uk/docs/cp142.pdf>.

⁴⁸ A shareholder derivative claim is a claim originally owned by the company which the shareholder or the shareholders representing certain share capital may, in the presence of the prerequisites provided by law, enforce against a member of a directing body by demanding (primarily) that the violation of an obligation is stopped and the damages caused by such violation are compensated to the company. A. Reisberg has more thoroughly explored the shareholder derivative action as a remedy (Note 28).

⁴⁹ Special rights vested into the shareholders by law are treated as such; e.g., the right to challenge a resolution changing the goal of the company (Article 12.11 *ff.*), the right to request information, etc.

⁵⁰ I. Ellyn, K. de Champlain. Shareholders' Remedies in Canada. Toronto, 28.03.2005, p. 15. Available at <http://www.ellynlaw.com/PDFs/ellyn%20shareholders%20remedies%20in%20canada.pdf>.

⁵¹ Companies Act 2006. Available at http://www.opsi.gov.uk/ACTS/acts2006/pdf/ukpga_20060046_en.pdf.

⁵² I. Ellyn, K. de Champlain (Note 50), p. 17.

⁵³ A. Reisberg (Note 28), p. 298.

⁵⁴ For the purposes of Estonian law: violation of the loyalty obligation, competing activities, etc.

4.3. Germany

Germanic company law, in contrast, is characterised by different procedures and remedies being provided for different types of violations. Less attention is devoted to a complex analysis and systematics of shareholders' remedies. The possibility of challenging the resolutions of the general meeting and directing bodies—establishment of nullity or revocation of a resolution—is one of the fundamental shareholders' remedies in Germany. The term 'shareholder action' (equivalent to the German concept of *Aktionärsklagen*) is used to denote the remedies available to shareholders in a narrower sense. In the legal literature, it has been argued that a corresponding, comprehensive realm of law is still in the process of developing, with the support of legal theory and judicial practice. German lawyer Walter Bayer has classified shareholder actions as actions directed toward the remedy of defective resolutions, on one hand, and as defence actions or actions for compensation for damage, on the other. The first type of action is applicable in the case of defective resolutions; depending on the nature of the defect, a shareholder may turn to a court and demand that either the nullity of the resolution be declared or the resolution be annulled.^{*55} This right arises primarily out of §§ 241 and 245 of the German *Aktiengesetz*^{*56}, which grant the shareholders the right to demand revocation of an unlawful resolution of their general meeting or recognition of its nullity. As this is one of only a few remedies available to minority shareholders, it is employed widely, which, in turn, has prompted extensive criticism. For instance, in the legal literature it has been opined that in many instances shareholders initiate actions to contest or annul a resolution for provocative reasons, in order to interfere purposefully with the operations of the company.^{*57}

As regards the second type of shareholder actions (defence actions or actions for compensation of damage), Bayer highlights those sets of instances wherein the corresponding remedies are applied most often: illegal meddling of the directing bodies with the rights of the shareholders, causing of damages to the company by the members of the directing bodies, breach of law by the directing bodies in preference of the interests of a particular shareholder, damages unlawfully caused to the company by third parties, and unlawful affecting of the directing bodies by third parties (shareholders included).^{*58} However, the enforcement of actions for compensation for damages is a matter of some debate in German law.^{*59} Problems are also caused by practices contrary to articles of association where those practices are based on non-formalised resolutions—i.e., contesting the *de facto* alteration of the articles (*faktische Satzungsänderung*).^{*60} Namely, it has been argued in German legal theory that *de facto* alteration of the articles of association does not necessarily constitute a violation of the provisions of the articles and that this situation involves *de facto* behaviour beyond one's competence, which may prove difficult to challenge.^{*61}

5. Shareholders' remedies in Estonian company law—haphazard versus systematic

If we proceed from the classification according to which shareholder actions are divided into actions aimed at correcting resolutions and so-called defence actions, it becomes clear that Estonian corporate law focuses on the opportunity granted to a shareholder to contest the resolutions of a general meeting or directing bodies. Both the General Part of the Civil Code Act^{*62} (hereinafter 'GPCCA') and the Commercial Code distinguish, in the case of contested resolutions of a general meeting, between invalidation of resolutions and nullity of resolutions. In respect of public limited companies, the special provision made in § 302 (1) of the CC applies. Under this provision, on the basis of an action filed against a public limited company, a court may revoke a resolution of the general meeting of shareholders that is in conflict with the law or the articles of association.

⁵⁵ W. Bayer. *Aktionärsklagen de lege lata und de lege ferenda*. – Neue Juristische Wochenschrift 2000, Heft 36, p. 2610.

⁵⁶ Aktiengesetz vom 6. September 1965 (BGBl. I p. 1089), zuletzt geändert durch Artikel 11 des Gesetzes vom 16. Juli 2007 (BGBl. I p. 1330). Available at <http://bundesrecht.juris.de/bundesrecht/aktg>. Hereinafter 'AktG'.

⁵⁷ E. Wiedmann. *Der Rechtsmissbrauch im Markenrecht*. Dissertation zur Erlangung des Doktorgrades der Rechtswissenschaft der Rechts-, Wirtschafts- und Verwaltungswissenschaftlichen Sektion der Universität Konstanz, Fachbereich Rechtswissenschaft. Konstanz, 2002, pp. 42–43. About the criticism, see also H. -U. Wilsing (Note 35).

⁵⁸ W. Bayer (Note 55), p. 2610.

⁵⁹ See, e.g., H. C. von der Crone *et al.* *Aktienrechtliche Verantwortlichkeit und Geschäftsführung*. Bibliothek zur Zeitschrift für Schweizerisches Recht. Beiheft 43. Basel, 2006, p. 38. Available at http://www.rwi.uzh.ch/lehrforschung/alphabetisch/vdc/cont/Verantwortlichkeit_und_Geschaeftsfuehrung.pdf.

⁶⁰ B. Kropff, J. Semler. *Münchener Kommentar zum Aktiengesetz*. Band 4. 2. Aufl. München 2004, § 179, margin No. 44.

⁶¹ B. Helmke. *Satzungsdurchbrechungen bei der GmbH*. Dissertation zur Erlangung des Grades eines Doktors der Rechtswissenschaft des Fachbereichs Rechtswissenschaft I der Universität Hamburg. Hamburg 2001, p. 10.

⁶² Tsiiviiseadustiku üldosa seadus. Adopted on 27 March 2002. – RT I 2002, 35, 216; 2010, 38, 231 (in Estonian).

Pursuant to subsection 3 of the same section, a shareholder who did not participate in the general meeting may demand the revocation of the resolution. A shareholder who did participate may demand revocation only if said shareholder's objection to the resolution has been entered in the minutes of the general meeting. Thus, the law does not require that a shareholder necessarily prove that a resolution violates his rights (a violation may be objective), but, instead, it directs the shareholder to take proactive measures and at least have his objection recorded in the minutes. The purpose of such regulation is to reduce the opportunities to file protection actions.

An action to establish nullity of a resolution is provided for in § 301¹ (1) of the CC, under which the resolution of the general meeting of shareholders is void if it violates a provision of law established for protection of the creditors of the associated public limited company or for reasons of other public interest, if it is contrary to good morals, if the minutes of the general meeting that passed the resolution have not been notarised in the manner prescribed by law, or the procedure for calling a meeting was violated in the calling of the general meeting that passed the resolution. Nullity of a resolution may be relied upon in court proceedings through filing of an action or objection. At the same time, reliance in legal practice on the nullity of a resolution requires that a court have previously established such nullity (see the second sentence of § 38 (2) of the GPCCA).

As regards those persons who are entitled to demand that a court establish that a resolution of the general meeting is void, the law does not list the subjects who have such rights of contestation. Subsection 301¹ (3) of the CC just sets out that nullity of a resolution may be relied upon in court proceedings by filing an action or objection.

For the purpose of determining the list of persons with the right of contestation, when cases of nullity are involved, one can turn to § 38 (3) of the GPCCA—in this provision, the term 'interested person' is used. The author believes that the question as to which shareholders may demand the establishment of nullity can be approached in two ways. Firstly, it is possible to claim that, as the person whose rights are violated by a resolution has the right to demand the establishment of nullity, in order for that shareholder to demand the establishment of the nature of that resolution, it must directly violate his rights. Secondly, because of the specific character of relations under company law, it can be argued that the shareholder is indeed the interested person, in view of the fact that he, as the provider of capital, has a special relationship with the company and also that the shareholder's right to rely on nullity and demand the establishment of nullity is precluded only in exceptional cases (first and foremost, when he abuses his rights in the filing of his action) The author of this article leans toward the second interpretation and believes that a shareholder's right of claim is generally to be deemed worthy of regard; however, the prohibition of abuse of one's rights and the principle of good faith rule out the possibility of a claim being enforced by a shareholder who was present at the meeting and voted in favour of the resolution (see §§ 32 and 138 of the GPCCA).⁶³ Such a restriction arises, *inter alia*, from the fact that the holder of a subjective right must not exercise a right vested in him contrary to the objective of such a right.⁶⁴

Contestation of resolutions as a legal remedy has found its most in-depth treatment in Estonian legal theory⁶⁵, and it is also the remedy exercised most widely by shareholders in judicial practice.⁶⁶ The situation is somewhat more complicated for actions for compensation of damage filed against members of directing bodies. Estonian law proceeds from the principle that the filing of an action shall be decided upon and the company represented during the proceedings by a person appointed to this task by the supervisory board. Although the practice of the Supreme Court shows that quite a number of actions against members of directing bodies for compensation of damage have been processed, civil cases in which a member of the management board has been held accountable are rather rare. One of the features of proceedings directed against members of the management board is that they are carried out in the name of the bankrupted company.⁶⁷ The compensation for personal damages of shareholders has not been discussed in the legal literature. However, the CC includes provisions that allow such actions. For instance, § 403 (6) of the CC sets out that the members of the management board and supervisory board shall be liable to the company for any damage wrongfully caused by the merger. In addition, the CC contains several provisions that, although providing for the obligation of certain persons to compensate for damage, do not specify to whom such persons are liable. For instance, § 33 (8) of

⁶³ Under § 32 of the GPCCA, the shareholders or members of a legal person and the members of the directing bodies of a legal person shall act in accordance with the principle of good faith and consider each other's legitimate interests in their mutual relations. Subsection 138 (2) of the GPCCA provides that a right shall not be exercised in an unlawful manner or with the objective to cause damage to another person.

⁶⁴ I. Kull. *Hea usu põhimõtte kaasaegses lepinguõiguses*. Doktoritöö (The Principle of Good Faith in Modern Contract Law. Doctoral thesis). Tartu 2002, p. 169 (in Estonian).

⁶⁵ A. Vutt has more thoroughly explored the issues related to the contestation of the resolutions of the general meetings of companies. See A. Vutt. *Äriühingu organi otsuste vaidlustamisega seotud probleeme* (Problems related to the Contestation of the Resolutions of a Body of a Company). – *Juridica* 2005/1, pp. 53–61 (in Estonian).

⁶⁶ On the basis of the index provided at the web site of the Supreme Court (www.nc.ee), a total of 19 such cases have been processed by the highest national judiciary since 1998.

⁶⁷ See, e.g., CCSCd 3.05.2002, 3-2-1-75-02. – RT III 2002, 18, 208; CCSCd 30.04.2003, 3-2-1-41-03. – RT III 2003, 17, 164; CCSCd 11.05.2005, 3-2-1-41-05. – RT III 2005, 17, 181; CCSCd 25.04.2006, 3-2-1-27-06. – RT III 2006, 17, 162, etc.

the CC sets out that if incorrect information is submitted to the commercial register, the persons who signed the petition shall be solidarily liable for any damage wrongfully caused.^{*68} The author of the present article believes that in actuality we lack a theoretical treatise about the area of protection of those provisions as well as a clear understanding of whether they have ever been applied in practice and, if they have, which problems have been encountered and whether they could be treated as the shareholder protection provisions—and, if so, which of them could.^{*69}

When defining the areas of protection related to actions for compensation for damage, Bayer posed, among other questions, those of the opportunities that a shareholder should have for enforcing his personal claims and of his opportunities to enforce them on behalf of the company. The author of this article believes that Bayer's approach, in material published about 10 years ago, is meaningful for the current analysis of Estonian company law because it broadly reflects our current legal situation and problems. The part of company law that Bayer calls defence actions has not been explored or developed in Estonia. One cannot but arrive at the view that the development of shareholders' remedies has lacked proper systematic attention and that, in this domain, further development of the law has been haphazard and limited to just a few, often half-masted solutions. For instance, by the amendments of 1 January 2006, § 289² was introduced into the Commercial Code. Under this new section, a person who, by misusing his powers of control, influences a member of the management board or supervisory board to act contrary to the interests of the public limited company, has become liable for compensation of any damage incurred thereby by the public limited company; however, no attention was paid to the fact that the persons who, in such a situation, could initiate proceedings to enforce an action for compensation of damage might be and actually often are those very members of the directing bodies who were influenced.^{*70} Another problem is that currently a shareholder must be able to navigate amid a plethora of requirements, objections, and procedural problems, and also often the opportunities for protecting the rights of a failing company and the persons connected with it are unclear or undefined. The author of this article has already expanded upon the problems related to the lack of a derivative action as an institute in Estonian company law.^{*71}

Therefore, the protection of the rights of shareholders is defective in the Estonian context, because often measures such as contesting resolutions made by the directing body of the company, requesting information, commissioning a special audit, or employing other preventive measures are of no avail in defending against the abuse perpetrated by the directing bodies or the majority shareholder, while, on the other hand, the compulsory dissolution of the company would be either impossible or disproportionate because of the extremity it involves, or simply not desirable.^{*72} The author of this article is of the opinion that not enough attention has been paid in Estonian law to the areas where most of the problems are expected to occur: abuses by the majority at the expense of the minority, influencing the directing bodies and thereby causing damages for the company, and creation of flexible (additional) measures to enforce actions for compensation of damage. Models are plentiful in the laws of other countries, and closer analysis of such models as well as identification of the problems we face in practice will allow us to develop our law in the direction we want.

⁶⁸ Similar provisions are, e.g., § 223 (3) of the CC which sets out that the issuers are liable to compensate for the damage caused by the issue of shares with a nominal value of less than ten kroons, § 249 (4) which provides for the obligation to compensate for any damage caused by an inaccurate valuation of the non-monetary contribution, etc.

⁶⁹ The Supreme Court made its first ruling on an action for compensation of damages to a shareholder on 31 March 2010 (civil case 3-2-1-7-10). In this case, a shareholder filed, on the basis of § 403 (6), an action against the members of the management board and supervisory board for compensation of damages caused by a merger; the Supreme Court affirmed the existence of the shareholder's right of claim on the basis of the general elements of liability set forth in law.

⁷⁰ True, the situation is a bit different where a company is bankrupt because the enforcement of claims is decided and the company is represented in the proceedings by a bankruptcy trustee. However, the author does not believe that lenience just towards the enforcement of claims by a bankruptcy trustee is the correct path to take.

⁷¹ M. Vutt. Shareholder's Derivative Claim—Does Estonian Company Law Require Modernisation? – *Juridica International* 2008 (XV), pp. 76–85.

⁷² The bases of compulsory dissolution are set forth in § 40 (1) of the GPCCA and in the context of the topic at hand, the following instances may be highlighted: the objective or activities of the legal person are contrary to law, public order or good morals; the articles of association of the legal person are contrary to law to a significant extent; incapability to appoint new persons in place of the removed members of the management board, etc. The person with the right of action is in this case the Minister of Internal Affairs or 'any other person or agency so entitled by law'. Compulsory dissolution, being by its nature extreme, cannot therefore be treated as a normal measure to be employed for solving disputes encountered in business activity.

6. Conclusions

The objectives of remedies under company law are multifaceted, covering not just the elimination of the negative consequences of violations committed by subjects in company law (companies, members of directing bodies, shareholders, etc.) or the prevention of the arrival of such consequences. They are also directed at the avoidance of further violations and initiation of restructuring within the company as needed, as well as at the protection of the interests of the company as a whole and at reasonable resolution of internal conflicts.

Different countries have tackled the matter of shareholders' remedies at differing levels. During a recent reform, the United Kingdom developed, in the preparatory state of the reform, a consultation paper that provides an in-depth analysis of the various forms of shareholders' remedies. Likewise, French and Belgian practitioners of jurisprudence are actively discussing the subject of shareholder actions and more interest is being shown in the so-called defence actions and their enforceability (actions for compensation for damages). In German legal literature too, though this area has not been addressed systematically to any great extent, increasingly more writings have been published on the topic of potential actions for compensation of damage. However, in contrast, shareholders' remedies have not been systematically developed in Estonia.

On the basis of the above reasoning, the author of this article concludes that this domain of company law needs to be analysed in Estonia and that related regulations should be reviewed. The starting point should be to map out the typical circumstances of violations on the basis of our judicial experience as well as the experiences of other countries as to situations that involve a greater risk of violations (e.g., mergers, divisions, take-over proceedings, excessive remuneration of members of directing bodies, and also cases wherein a legal entity has been penalised for a crime by means of a fine but there is no functioning mechanism of recourse against the members of the directing bodies). After this, the current laws and judicial practice should be analysed from the standpoint of the effectiveness of remedies (with assessment of their enforceability and also procedural aspects, as well as, for instance, the alternatives provided in protection measures under public law). The problems should be compiled in a coherent manner, and the necessary amendments to the law should be formulated on the basis thereof in consideration of issues of suitability for the general legal and economic backdrop.