HELSINKI CAPITAL PARTNERS

MEMORANDUM

To: Dario Chari, B Lab Europe

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Subject: Country analysis for Finland

Background:

Helsinki Capital Partners (below, "HCP") is a Finnish asset management firm. On 26.5.2017 HCP was awarded B-Corp status as the first ever Finnish firm.

This memorandum discusses the concept of "triple bottom line" in the light of Finnish business law.

Shareholder value -concept

The "shareholder value" or "shareholder value maximization" -concept is one of several competing theories describing the purpose of firms. Important intellectual inputs to the theory have come from i.e. the Nobel Prize–winning economist Milton Friedman and professor Alfred Rappaport.

In its most orthodox and narrow interpretation, the concept states the following about the purpose(s) of a corporation :

(a) a corporation has one – and only one – purpose ("exclusivity"), which is;

(b) to maximize the economic value of the corporation ("value maximization");

(c) in the here and now ("temporal dimension");

(d) using all and every means within the law ("legal constraints only"), including aggressively exploiting legal loopholes, venturing into legal "grey-zones", and other methods that – while formally legal – might clash with commonly held ethical and moral sentiments.

Triple bottom line –concept

The "triple bottom line" -concept (a.k.a. "TBL" or "3BL") is another, more recent theory describing the purpose and function of firms.

According to the concept, a firm should attempt to strike a harmonious balance between three goals:

(1) "people" (i.e. the social aspect);

(2) "planet" (i.e. the environmental aspect); and

(3) "profit" (i.e. the economic aspect)

There is a fundamental structural and even "philosophical" difference between the shareholder value and the triple bottom line –concepts.

The shareholder value –concept is a *maximizing* philosophy, in which success is measured by (only) one metric (shareholder value), which is to be maximized.

By contrast, the triple bottom line –concept is an *optimizing* philosophy (i.e. one involving trade-offs), in which success is measured by the achievement of a (more or less subjective) optimal balance between several (potentially competing and at least to some extent mutually exclusive) metrics (some of which are challenging or even impossible to measure or quantify).

Consequently, the two concepts are fundamentally at odds, and a firm cannot credibly apply both concepts simultaneously.

Legal status

Of the two above theories of the firm, the shareholder value –concept is older and more established, both as a basic premise in academic economics and finance, and as a fundamental concept in the corporate legal framework.

In some countries, both written law and case law explicitly supports the shareholder value –concept (at the exclusion of competing concepts). A well known example is the 9.9.2010 Delaware court decision, according to which:

> *"Directors of a for-profit Delaware corporation cannot deploy a [policy] to defend a business strategy that openly eschews stockholder wealth maximization - at least not consistent with the directors' fiduciary duties under Delaware law."* (eBay vs Craigslist)

This decision seemingly established the status of shareholder value –concept as the only legal theory of firms registered under US corporate law (or at least under Delaware law.)

In jurisdictions that have clearly established shareholder value –concept as the only legal theory of firms, firms wishing to operate under some other, competing concept might have to make changes in the basic legal framework of the firm itself, e.g. by making changes in the articles of association or by incorporating under some alternative legal entity form (e.g. non-profit or benefit corporation.)

Legal status under Finnish law

The purpose of this document is to give a general presentation of the Finnish corporate legal environment, especially as to the question of how accommodating it is to the triple bottom line –concept.

The structure of the document follows the one laid out in the document “ESELA B Lawyers Group, Country Analysis for Finland”.

Section one: Description of the law in force

1. Question: To what extent do current legislation and case law allow, require, or prevent companies from having a triple bottom line purpose of being financially profitable while also seeking to have a positive impact on society and the environment?

Answer:

Finnish limited liability companies are regulated mainly through the Finnish Limited Liability Companies Act (624/2006) (below: the "Companies Act"). (The excerpts below are taken from the unofficial translation published by the Finnish Ministry of Justice in 2012)

For this discussion, the most relevant sections of the a Companies Act are probably the following.

Provisions regarding the purpose of the firm:

> *"Chapter 1: Main principles of company operations and application of this Act*
>
> *Section 5: Purpose*
>
> ***The purpose of a company is to generate profits for the shareholders, unless otherwise provided in the Articles of Association.**"*

At first glance, this section might be interpreted as establishing the shareholder value –concept.

However, according to the Government Bill (HE 109/2005) (page 39) that includes detailed comments on the correct interpretation of the Companies Act:

> *"This section **does not constitute an obligation to maximize profit in the short run**, but instead profit generation should be observed over the long run."*
>
> *The generation of profit over the long run and **the maximization of company value often require observing socially acceptable conduct, even in situations where it is not strictly required by the law.** For example, the public image of the company may have a material impact on the business and on the value of the company. Very often the generation of profits require charitable projects and the giving of gifts. Profit generation should therefore be analyzed from a holistic perspective."*
>
> *"Instead of, or parallel to, asset distribution, the generation of profits for shareholders may also be approached through attempting to maximize the value of the shares. [ ] However, **an attempt to purely maximize share value is probably best suited to listed companies,** where the shareholders may easily turn their shares into cash by selling them."*
>
> *"In the company articles of association, **some other purpose than the generation of profits for shareholders may be stipulated. In principle, the provisions could***

regulate the question of whether or not profit should be generated in the first place, or the question of who the beneficiaries of any such profit will be. *In principle, they may also be hybrid rules, in which the purpose of the company is to generate a modest amount of profit that is to be distributed to non-shareholders. If the purpose is not to generate any profit at all, the purpose may be stated as non-profit, such as the support of a particular association or charitable foundation."*

*"**The articles of association may also stipulate that the profits are to be distributed to other parties than shareholders. Even in such cases, managers must attempt to maximize economic surplus.**"*

(translation and highlighting by the author)

Provisions regarding the distribution of firm assets:

"Chapter 1: Main principles of company operations and application of this Act

Section 3: Capital and the permanence of the capital

*(2**) **The assets of a company may be distributed only as provided in this Act.**"*

"Chapter 13: Distribution of assets

Section 1: Methods of distribution of assets

(1) The assets of the company may be distributed to the shareholders only as provided in this Act on:

(1) the distribution of profits (dividend) and the distribution of assets from reserves of unrestricted equity;

(2) the reduction of the share capital, as referred to in chapter 14;

(3) the acquisition and redemption of own shares, as referred to in chapters 3 and 15; and

(4) the dissolution and deregistration of the company, as referred to in chapter 20.

(2) Under section 9 of this chapter, the company may have some other purpose than generating profits for the shareholders. Section 8 contains provisions on the donation of company assets.

*(3) **Other transactions that reduce the assets of the company or increase its liabilities without a sound business reason shall constitute unlawful distribution of assets.***

Miscellaneous provisions on the distribution of assets

Section 8: Donations

The General Meeting may make a decision on a donation for philanthropic or other corresponding purposes, if the amount of the donation can be deemed reasonable in view of the purpose, the state of the company and other circumstances. The Board of Directors may use funds for such purposes in so far as their amount is insignificant in view of the state of the company.

Section 9: Not for profit company

If the company has, in full or in part, a purpose other than generating profits for the shareholders, a provision to this effect shall be included in the Articles of Association. In this event, the Articles of Association shall contain provisions on the use of equity in the situations referred to in section 1(1).”

Observations and comments:

On the purpose of the firm: the default assumption of Finnish law is that the purpose of a company is to generate profits for its shareholders.

However, this does not automatically mean that Finnish law adheres to the shareholder value maximization –concept, at least not in its strict form. (I.e. “value maximization at any cost.”)

On the contrary; the comments in the Government Bill explicitly give companies and management the freedom to voluntarily adhere to social, ethical and moral rules of conduct that presumably are:

(a) stricter than those dictated purely by law, and which therefore;

(b) involve economic trade-offs (i.e. the sacrificing of some profit in order to achieve some other good.)

On purposes other than profit generation: the Finnish Companies Act does allow companies to have other purposes than profit generation, provided that such purpose is stated out in the company articles of association.

However, from the wording of the comments in the Government Bill, and from a holistic analysis of the Companies Act, it seems like such provisions in the articles of association are mainly intended for two special situations:

(1) the company is intended to be a non-profit company, or;

(2) the company is intended to be a for-profit company, but any profit (or a major part thereof) is intended to be distributed to non-shareholders (in the form of cash or cash-equivalent handouts.)

Conclusions: based on this analysis, the Finnish Companies Act seems to allow companies and management the freedom to pursue a triple bottom line –strategy.

Pursuing a triple bottom line –strategy should be possible without any amendments to the (default / regular) articles of association of the company. (In fact, if the above analysis is correct, such amendments could possibly be an impediment to a triple bottom line –strategy.)

2. Question: To what extent do current legislation and case law allow, require, or prevent directors from taking into consideration stakeholders' interests (as distinct from only shareholders' interests) when making a decision?

Answer:

Based on this analysis, current Finnish legislation seems to allow directors considerable freedom and flexibility when pursuing the purpose of the company. This should allow for taking into consideration stakeholders' interests (as distinct from only shareholders' interests) when making a decision. (See discussion above)

3. Question: Under current legislation and with reference to relevant case law, to whom are directors' duties owed? Please specify whether the law provides that the duties are owed specifically to shareholders, the company, or also stakeholders? Would you describe that the directors have to act in the "best interests of the company"? If so, is it clear what this means in practice?

Answer:

For this discussion, the most relevant sections of the act are probably the following:

> *"Chapter 1: Main principles of company operations and application of this Act*
>
> *Section 8: Duty of the management*
>
> ***The management of the company shall act with due care and promote the interests of the company.**"*
>
> *"Chapter 6: Management and representation of the company*
>
> *Section 2: General duties of the Board of Directors*
>
> *(1) The Board of Directors shall see to the administration of the company and the appropriate organisation of its operations (general competence). The Board of Directors shall be responsible for the appropriate arrangement of the control of the company accounts and finances.*
>
> *(2) **The Board of Directors or a Member of the Board of Directors shall not comply with a decision of the General Meeting, the Supervisory Board or the Board of Directors where it is invalid owing to being contrary to this Act or the Articles of Association.**"*

According to the Government Bill (HE 109/2005) (page 41):

> *"Acting to promote the interests of the company means that a director has a duty of loyalty towards the company and, ultimately, towards all shareholders. Acting to promote the interests of the company naturally includes acting in accordance with the purpose of the company. Unless stated otherwise in the articles of association, the purpose of the company business operations is to create benefit to the shareholders."*

Observations and comments: under the Finnish Companies Act, directors' duties are owed specifically to the company. However, the comments in the Government Bill make it obvious that such duties are also ultimately and by analogy extended to all shareholders (collectively).

Neither the Finnish Companies Act, nor the relevant Government Bill, make any references to stakeholders. (As far as the author knows, this also applies to case law.)

4. Question: Please indicate whether current legislation or case law specifies what it means for directors to act in the “best interests of the company”.

Answer:

Neither the Finnish Companies Act, nor the relevant Government Bill, gives any detailed specifications as to the exact meaning of what it is to act in the “best interests of the company”. (As far as the author knows, this also applies to case law.)

5. Question: Under current legislation and with reference to relevant case law, how can shareholders (or in the case of a two-tier board also the supervisory board) hold directors accountable for not respecting the provisions embedded in the articles of incorporation?

Answer:

For this discussion, the most relevant sections of the act are probably the following:

> *"Chapter 22: Liability in damages*
>
> *Section 1: Liability of the management*
>
> *(1)* ***A Member of the Board of Directors, a Member of the Supervisory Board and the Managing Director shall be liable in damages for the loss that he or she, in violation of the duty of care referred to in chapter 1, section 8, has in office deliberately or negligently caused to the company.***
>
> *(2) A Member of the Board of Directors, a Member of the Supervisory Board and the Managing Director shall likewise be liable in damages for the loss that he or she, in violation of other provisions of this Act or the Articles of Association, has in office deliberately or negligently caused to the company, a shareholder or a third party.*
>
> *(3) If the loss has been caused by a violation of this Act other than a violation merely of the principles referred to in chapter 1, or if the loss has been caused by a breach of the provisions of the Articles of Association, it shall be deemed to have been caused negligently, in so far as the person liable does not prove that he or she has acted with due care. The same provision applies to loss that has been caused by an act to the benefit of a related party, as referred to in chapter 8, section 6(2)."*

Observations and comments: under the Finnish Companies Act, a shareholder (acting on behalf of the company) can sue a director that has violated or neglected his fiduciary duties (duties towards the company) for damages.

6. Question: Under current legislation and with reference to relevant case law, do stakeholders (as distinct from shareholders) have standing to challenge actions by directors (apart from tort law)? Please refer specifically to the possibility of holding directors accountable for a breach of provisions embedded in the articles of incorporation.

Answer:

For this discussion, the most relevant sections of the act are probably the following:

> *"Chapter 22: Liability in damages*
>
> *Section 1: Liability of the management*
>
> *(1) A Member of the Board of Directors, a Member of the Supervisory Board and the Managing Director shall be liable in damages for the loss that he or she, in violation of the duty of care referred to in chapter 1, section 8, has in office deliberately or negligently caused to the company.*
>
> *(2)* ***A Member of the Board of Directors, a Member of the Supervisory Board and the Managing Director shall likewise be liable in damages for the loss that he or she, in violation of other provisions of this Act or the Articles of Association, has in office deliberately or negligently caused to the company, a shareholder or a third party.***
>
> *(3) If the loss has been caused by a violation of this Act other than a violation merely of the principles referred to in chapter 1, or if the loss has been caused by a breach of the provisions of the Articles of Association, it shall be deemed to have been caused negligently, in so far as the person liable does not prove that he or she has acted with due care. The same provision applies to loss that has been caused by an act to the benefit of a related party, as referred to in chapter 8, section 6(2)."*

Observations and comments: under the Finnish Companies Act, a third party that has suffered damages as a result of a violation of the Companies Act or the company articles of association can sue a director responsible for the violation.

Section three: Integration between the legal requirement and current law

A. Question: On the basis of your answer to question 1 of section 1 above, if a company were to adopt the legal requirement under current law, would the pursuit of the triple bottom line approach be an enforceable obligation of the directors?

Answer:

Most probably yes. However, neither Finnish written law nor case law includes any guidance concerning the legal status of a triple bottom line –strategy. This means that it is very difficult to predict how such obligation would be interpreted in practice, e.g. before a court of law.

However, in my opinion, current Finnish corporate law is flexible enough to accommodate a triple bottom line –strategy. Consequently, a company wishing to pursue a triple bottom line strategy does not necessarily need to adapt the legal requirement (i.e. making amendments to its governing documents to include a commitment to a triple bottom line –strategy) in order to legally pursue a triple bottom line –strategy.

B. Question: On the basis of your answer to question 2 of section 1 above, if a company were to adopt the legal requirement, would the directors be obliged to consider all stakeholder interests when making decisions?

Answer:

Most probably yes. However, neither Finnish written law nor case law includes any examples of how stakeholder interests should be considered in corporate decision making. This means that it is very difficult to predict how such obligation would be interpreted in practice, e.g. before a court of law.

C. On the basis of your answers to questions 3 and 4 of section 1 above, if directors owe duties to the company and they have to act in the 'best interests of the company', would the adoption of the legal requirement redefine what is the 'best interests of the company'? (Especially refer to the amendment of the object clause: if the purpose of the company is both creating a positive impact and having a profit, does operating in the best interests of the company have a different meaning after the adoption of the legal requirement?)

Answer:

Most probably yes. However, neither Finnish written law nor case law includes any guidance concerning the legal status of a triple bottom line –strategy. This means that it is very difficult to predict how such obligation would be interpreted in practice, e.g. before a court of law.

D. Question: On the basis of your answer to question 5 of section 1, if a company were to adopt the legal requirement, would shareholders or a supervisory board have (additional) rights to demand that directors pursue a mission of being profitable and also having a positive impact on other stakeholders' interests?

Answer:

Most probably yes.

E. Question: On the basis of your answer to question 6 of section 1 above, would the adoption of the legal requirement increase directors' liability towards stakeholders? Please specify whether, after the adoption of the legal requirement, stakeholders will have additional rights to challenge directors' decisions.

Answer:

Most probably yes. However, neither Finnish written law nor case law includes any guidance concerning the legal status of a triple bottom line –strategy. This means that it is very difficult to predict how such obligation would be interpreted in practice, e.g. before a court of law.

This also means that for companies that have adapted the legal requirement (i.e. they have amended the governing documents to include a commitment to a triple bottom line –strategy) the risk of legal chicanery (made possible by the legal requirement) cannot be ruled out. Examples of such potential chicanery would be e.g. spurious, malevolent lawsuits to enforce some true or imagined stakeholder right according to the legal requirement, initiated by e.g. anti-business activists or anarchists claiming to represent one or several stakeholder groups (e.g. "the environment" or "the people").

Author's concluding remarks and recommendations

Based on the conducted analysis, it is the opinion of the author of this report that current Finnish corporate law neither explicitly nor implicitly requires companies to pursue a pure "shareholder value maximization" –strategy. On the contrary, the law seems to be flexible enough to accommodate a triple bottom line –strategy.

Consequently, a company wishing to pursue a triple bottom line -strategy does not necessarily need to adapt he legal requirement (i.e. making amendments to its governing documents to include a commitment to a triple bottom line –strategy).

It thus seems that for Finnish companies wishing to pursue a triple bottom line –strategy, adapting the legal requirement (i.e. making amendments to its governing documents to include a commitment to a triple bottom line –strategy) should be considered optional.

Adapting the legal requirement most probably has both pros and cons.

At least the following pros of adapting the legal requirement seem plausible:

(1) a decrease in the risk of some shareholders challenging the triple bottom line –strategy;

(2) brand benefits through the outward signaling of commitment to the triple bottom line –strategy.

At least the following cons of adapting the legal requirement seem plausible:

(1) an increased risk of the company becoming a target for legal chicanery (see answer to question "E" above.);

(2) increased legal complexity due to the additional beneficiaries and their unclear legal status;

(3) other currently unknown legal and business risk as a result of the uncharted legal territory.

In the spirit of *"Primum non nocere"* ("First, do no harm") and in order to avoid naïve interventionism, the author of this report would recommend that Finnish companies wishing to pursue a triple bottom line –strategy abstain from adapting the legal requirement, at least until some new development (e.g. new case law) indicates that pursuing the strategy without the legal requirement is no longer possible or advisable.