The Regulation of Discharge from Liability in Swedish Company Law

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The Regulation of Discharge from Liability in Swedish Company Law

Origin, Guidance and Outlook

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Preface

This book is the result of a one-year post-doctoral research project in company law that has been made possible through the *Sven Unger Company Law Scholarship* funded by the law firm Mannheimer Swartling. The research has been conducted in cooperation with the Swedish Corporate Governance Institute at Stockholm Centre for Commercial Law, Stockholm University.

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Stina Bratt

List of Abbreviations

ACA	Annual Accounts Act (*årsredovisningslag*, ÅRL, 1995:1554)
AEA	Act on Economic Associations
AGM	Annual general meeting
AktG	*Aktiengesetz*
BCCA	Belgian Code for Companies and Associations
BJR	Business judgment rule
CA	(Swedish) Companies Act (*aktiebolagslag*, ABL, 2005:551)
CA 2006	Companies Act 2006 (United Kingdom)
CEO	Chief Executive Officer
Ch.	chapter
CO	(Swiss) Code of Obligations
DCA	Danish Companies Act (*selskabsloven*, LBKG 2023-09-01)
DCC	Dutch Company Code
ET	*Erhvervsretslig tidsskrift*
EU	European Union
FCA	Finnish Companies Act (*Aktiebolagslag*, 21.7.2006/624)
FSA	(Swedish) Financial Supervisory Authority (Sw. *Finansinspektionen, 'FI'*)
GmbH	*Gesellschaft mit beschränkter Haftung*
GmbHG	*Gesetz betreffend die Gesellschaften mit beschränkter Haftung*
LSC	Spanish Companies Act
NCA	Norwegian Companies Act(s) (*Lov om allmennaksjeselskaper*, LOV-1997-06-13-45) (*Lov om aksjeselskaper*, LOV-1997-06-13-44)
No.	Norwegian
Nft	*Nordisk Försäkringstidskrift*
NTS	*Nordisk Tidsskrift for Selskabsret*
p.	page
para.	paragraph

sec.	section, §
Sw.	Swedish
UK	United Kingdom
US	United States

1 General Introduction

1.1 The Regulation of Discharge from Liability

A special feature in Swedish company law is the obligation of the annual general meeting (AGM) of shareholders to resolve on discharge from liability for the members of the board and the chief executive officer (CEO). Such discharge relates to each person individually to the effect that the management of the company is approved and that no claims for damages may be brought against the individual – unless an exception applies. Thus, the discharge limits the liability of the board towards the company.

Major shareholders typically participate in the AGM, whereas many institutional investors are represented by proxies.[1] The discharge regulation in Swedish company law is topical considering the new benchmark policy from the *Institutional Shareholder Services*[2] (ISS), one of the leading proxy advisory firms. In the 2023 ISS benchmark proxy voting policies of 1 December 2022, it is recommended that shareholders vote against discharge from liability in companies with shares with unequal voting rights.[3] This has raised the issue of minority protection in regulation and the potential abuse of minority rights.

1 Skog & Sjöman (2014), *Corporate Governance in Sweden*, 257.

2 Institutional Shareholder Services (ISS) provides proxy voting advice for institutional investors. Proposals can range from voting for board members to approving important corporate actions, see https://www.issgovernance.com/about/about-iss/.

3 See *ISS Announces 2023 Benchmark Policy*, where it is stated that the 'updated policies will generally be applied for shareholder meetings taking place on or after Feb. 1, 2023, except for those, as noted, that are being announced now with a one-year transition period and which will become effective in 2024, or those relating to a small number of markets that have off-cycle main proxy seasons'. According to the guidelines, under the heading 'Accountability for capital structure with unequal voting rights' the advice is to generally vote against directors or against the discharge of (non-executive) directors, if the company has a share structure with unequal voting rights, see https://insights.issgovernance.com/posts/iss-announces-2023-benchmark-policy-updates/.

Recent developments in case law in several Nordic countries show that board liability has gained increased topicality, and that limitation of liability is an issue of great practical importance. In Denmark and Norway, the supreme courts have ruled on several large cases concerning director liability and there are many cases from lower instance courts.[4] In Denmark especially, studies show that the insurance premium costs for liability insurance have increased. This has resulted in some large companies changing their approach to the protection of company directors against liability by other means, for example through discharge resolutions at the AGM, even though it is not mandatory for the AGM to resolve on the matter.[5] In Norway, it has been concluded that board responsibilities have increased over the last 20 years, leading to a more strict liability for individual board members.[6]

The afore-mentioned developments are of significance to the discussion of board liability and have called into question the effects of a discharge resolution in Swedish law. Hence, it is of interest to further investigate the regulation of discharge, to contribute to a better understanding of the effects of a discharge resolution on the liability of company directors.

1.2 The Purpose and Scope of the Study

The overall objectives of this study are to increase the understanding of the *origin* of the discharge regulation, to provide knowledge that serves as *guidance* in connection with its application, and to give an *outlook* on how the rules may and should change in the future.

The research takes as its starting point the question of how the discharge regulation in Swedish company law has evolved. The legal historical study of the origin and development of the concept of discharge in Swedish law aims to create a better understanding of the current legal approach to the particu-

4 In Norway, at least 70 cases have been subject to review in high courts (No. *lagmansretter*) and the Supreme Court of Norway, see Schwenke (2023), *Styreleders plikter og erstatningsansvar i aksje- og allmennaksjeselskap*, 17 and Dahlum (2021), *Styreansvar i praksis*. Several decisions from the Supreme Court in Denmark have also cast light on the question of board liability and on whether the liability for the board is becoming stricter, see for example Fode (2022), *Ledelsesansvar og ansvarsbegrænsninger*, 84ff.

5 See in general on director liability insurance in Denmark, Stubkjær Andersen (2001), *Forsikring af bestyrelsesansvar*, Stubkjær Andersen & Werlauff (2020), *Ansvarsforsikring af bestyrelse og direktion*, Birkemose & Sørensen, (2021), *Ledelsesansvarsforsikringer – en undersøkelse af deres anvendelse og selskabsretlige implikationer*, ET.2021.173.

6 See Buskerud Christoffersen (2024), *Erstatningsansvar for styremedlemmer i aksjeselskaper – blir det stadig strengere?*, 75ff.

lar features of the regulation, and the basic arguments used for its justification. This focuses primarily on the development of Swedish law but to some extent also considers the development in the other Nordic countries, which in this study includes Denmark, Norway and Finland. The study focuses on the regulation of Swedish public limited companies and their equivalents in other Nordic jurisdictions.[7]

The project further examines the scope of a discharge resolution and how it affects the liability of board members towards a company.[8] In this respect, the regulation on discharge from liability is examined from a general civil liability perspective, which means considering rules whose function is to limit the liability of a board in relation to its company. In doing so, certain aspects of the Swedish regulation on discharge are specifically analysed, such as the protection of *rights of minority shareholders* in connection with discharge and rules promoting *disclosure of information* to the company and its shareholders. In viewing these different features of the regulation, as described within the company law framework as well as general rules on civil liability, the aim is to assess whether the rules on discharge are appropriate for these purposes and, if necessary, to make proposals for amendments.

Comparisons are made with other legal systems and the rules that provide limitations on board liability towards the company. This comparative analysis is focused on Nordic and European legal systems containing regulations on discharge from liability similar to the Swedish regulation. However, the purpose of the comparative analysis is also to compare rules with similar functions to the Swedish regulation on discharge. This means that not only legal systems with regulations on resolutions on discharge from liability are examined, but also other regulations that concern other possible limitations of the liability of a board of directors, for example in the UK and the US. The comparative study does not provide a complete comparison of the liability of directors in different legal systems. Nor does it analyse the rules on limitation of liability in the company law context fully and comprehensively.[9]

7 In Nordic law, the limited company form is regulated by the Danish Companies Act (DCA), the two separate Norwegian Acts *aktieselskapsloven* and *allmenaktieselskapsloven* (NCA) and the Finnish Companies Act (FCA).

8 In the following, 'the board' is used to refer to the board, individual members of the board and the CEO, unless otherwise is stated or implied by the context.

9 For a comparative law overview on waiver of claims and indemnification of liability, see Deakin, Koziol & Riss (2018), *Directors' & Officers' (D&O) Liability*, 913–915.

Only key features will be highlighted, to give a more complete picture of the possibilities of limiting the liability of directors across different legal systems.

1.3 Sources and Method

A wide range of sources are used in the study. The study has Swedish company law as its core subject matter and encompasses legal materials relevant for this, such as statutory regulations, case law and preparatory works relating to limited companies.[10] The legal framework of the Swedish corporate governance model is based on a range of norms.[11] The regulation of damages in the Companies Act (CA) is central to the study, but several liability issues are not explicitly dealt with in the CA. They include, for example, the division of responsibilities within the company management, the significance of the board's internal division of labour and the significance of the general meeting's consent to measures causing damage. Therefore, some comparisons are made with legislation and case law concerning other types of associations, where there are solutions aimed at serving the same or similar functions.[12] In addition, official regulations, primarily from the Swedish Financial Supervisory Authority (FSA), which focus on the public law regulation of companies and corporate governance, are considered. Legal literature is also used as a source of analysis, where the regulation of discharge from liability and the liability matter as such have been examined by Swedish legal scholars.[13]

The inclusion of legal history means that earlier legislation, preparatory works, case law and literature have been used to paint a picture of how the

[10] This material is usually available only in Swedish and translations of the Swedish material are my own and do not constitute official translations of legal texts, court cases or the like.

[11] There are statutory regulations in the CA, and in the public company self-regulation through the Swedish Corporate Governance Board, which has issued a Swedish Code of Corporate Governance (the Code). See the current Code, https://bolagsstyrning.se/current-code (reviewed 2024-03-18).

[12] See in general regarding different types of associations in Swedish law, Arvidsson (2022), *Law of Associations*, 328ff. Although the following presentation is limited to public limited companies, rules on discharge from liability exist in several different types of associations in Swedish law and the meaning of the regulation is often very similar. However, for questions relating more specifically to other forms of association, reference is made to other studies. The widespread use of discharge decisions is also reflected in the fact that they are commonly used in associations that are not regulated by statutory provisions, for example in non-profit associations, see further Lindskog (2023), *Ideella föreningar*, 556ff.

[13] See Svernlöv (2007), *Ansvarsfrihet*, Svernlöv (2022), *Ansvarsfrihet* and Dotevall (1989), *Skadeståndsansvar för styrelseledamot och verkställande direktör*, and Dotevall (2017), *Bolagsledningens skadeståndsansvar*.

law has changed over time and describe the origin of the discharge regulation. At this level, mainly Swedish legal sources have been used, but also to some extent historical sources from other Nordic countries. This is the case because Swedish regulation is the focus of the study and detailed explanations of Nordic law are not necessary to fulfil this purpose. However, at the level of abstract ideas, there are clear influences from German law throughout Nordic law, and there is reason to deal with these theoretical similarities in the legal history section, albeit still emphasising the national characteristics by clearly distinguishing between the different Nordic countries.

The comparative method used is based mainly on a functionalist comparative approach.[14] This approach aims to find rules or institutions that fulfil a certain function in society or solve a certain problem. It is based on a comparison of the function of different rules, and how different legal systems solve problems, without being limited to the design of the rules or conceptual differences. Because of the purpose of the study, this method is combined with a structural comparative approach. A structural approach means that the reasons that support a particular solution are considered to constitute a 'legal formant', shaping the legal system. The legal structuralist approach improves the understanding of a system or framework and its inherent elements by observing the relationship between the elements themselves. This also means that legal systems where the same result is achieved but justified differently cannot be perceived as 'identical'.[15] Rather than comparing a particular function of different rules or examining how different legal systems solve a particular problem, the approach aims to examine how legal actors think about a particular problem and how this is expressed in the legal culture of both individual rules and parts of a whole system.

The selection of jurisdictions varies depending on the purpose of comparison, as will be shown in the respective sections. With regard to the company law framework in Chapter 2, this account has not been based on a choice of different jurisdictions, but rather on the abstraction of different corporate governance models, where the legal systems using a given model are not necessarily identical in detail. The functionalist approach used with regard to the rules on liability has also necessarily been limited to certain legal systems where specific aspects have been highlighted; regulation that is uniform is not described in detail. For example, major jurisdictions in Europe such as

[14] See Zweigert & Kötz (1998), *An Introduction to Comparative Law*, 32ff.

[15] See Sacco (1991), *Legal Formants: A Dynamic Approach to Comparative law*, 30.

Germany, the UK, France and Spain are covered, and to some extent also smaller jurisdictions. Although the German and Austrian rules are very similar, particular features and differences are sometimes mentioned. The aim has not been to make an equally comprehensive comparative study in all respects but to provide insights into different solutions to similar problems. To some extent, the US is covered, with a primary focus on the general governance model and some comparisons with the regulation in Delaware. The reason this state is used as the subject of a comparative analysis is that most US public limited companies have, since the early 20th century, been incorporated in Delaware.[16] Comparisons are made regarding the liability of the board – including management and supervisory boards, regardless of board structure – in both one-tier and two-tier systems. It has not been possible to take into account the historical development of all the jurisdictions analysed, but comparisons with these legal systems have been made on the basis of the legal situation discussed herein.

The comparative material is also used to provide inspiration for the argumentation in various liability issues in Swedish law and to show alternative regulations. This is particularly the case with regard to the Nordic jurisdictions. The Nordic source material has not been treated in a technically uniform manner in the study, but – as will be shown – there are no conditions for analysing a uniform Nordic line of development. However, the conditions for using the Nordic material to analyse the scope of discharge and to provide guidance on how to interpret the rules are met, to the extent that its operation corresponds to that of other Nordic rules. The comparisons are based on legislation, case law and legal literature. A major advantage of using material from Nordic jurisdictions is that there is a great deal of legal similarity in the Nordics. Thus, the material from other Nordic can contribute to a better understanding of the Swedish regulations.[17]

16 Kirshner (2018), *Directors' and Officers' Liability in the United States*, 723.

17 It has not been possible to fully and in detail analyse board liability and limitations under other Nordic legal systems. Instead, reference is made to the extensive literature available in other Nordic countries, see for example in Denmark, Gomard (1997), *Samarbejde og ansvar i selskaber og koncerner*, Sofsrud (1999), *Bestyrelsens beslutning og ansvar*, Fode (2022), *Ledelsesansvar og ansvarsbegrænsninger*, Høy (2020), *Bestyrelsens ansvar – med særlig fokus på finansielle virksomheder*, Ulfbeck (2021), *Erstatningsretlige grænseområder I*, 123ff, and in Norway, Normann (1994), *Styremedlemmers erstatningsansvar i aksjeselskaper*. In Norway, the latest addition is a dissertation from 2023 that deals specifically with the responsibility of the chairman of the board, see Schwenke (2023), *Styreleders plikter og erstatningsansvar i aksje- og allmennaksjeselskap*. In Denmark, there are also several studies concerning the responsibilities of the board in public and private companies. See in

Other legal systems in Europe that contain discharge regulations have been considered in this respect, to show varying legal solutions and, above all, to highlight the arguments that form the basis of the legal regulation.

As regards the comparison between jurisdictions which also contain specific regulations on discharge, the intention has not been to provide an exhaustive examination of these but to exemplify the existence of such regulations in other legal systems, with the aim to place the Swedish regulation in an 'international context'. The Nordic countries have been the primary objects of comparison, which is linked to the Nordic legal similarity described above and – as will be detailed in Chapter 2 – the Nordic model of corporate governance.

1.4 Outline

The study is structured in a way that reflects its aim and methodology. Following this General Introduction, Chapter 2 provides a brief account of the Swedish company law framework insofar as it is relevant to the discharge regulation in Swedish law. This is followed by Chapter 3, which traces the origin of discharge from liability in Swedish company law and discusses the line of development in Swedish, and to some extent also Nordic, law. The purpose of the chapter is to show how discharge worked as a legal mechanism and its functions from a historical perspective. The aim is also to aid understanding of the meaning of the current regulation. Chapter 4 provides a brief overview of jurisdictions that contain rules on discharge in some form, both those that release the board of directors from liability and those where discharge is not perceived to have any direct legal effect.

Chapter 5 deals with discharge in relation to procedural aspects of a company's action for damages against its board, and the significance of a decision to refuse or grant discharge for the right to bring an action, both for the company and for individual shareholders. Chapters 6 and 7 then deal with the form of the board's liability and the possibilities of limiting this liability, notwithstanding the possibility to resolve on discharge. The conditions for

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general about corporate governance and management responsibility in Stubkjær Andersen (2004), *Corporate governance and management responsibility*, RR.2.2004.6 and Fode & Neville (2018), *SMV-bestyrelsen – hele vejen rundt*. It may also be noted that certain older literature relating in particular to Finnish law has been used to demonstrate certain uniform views in at least Swedish and Finnish law. For example, several works by Finnish scholar Taxell, who wrote in Swedish, have been used to substantiate certain claims where it may be assumed that there are uniform views on the legal situation.

liability and the possibilities for limiting such liability are dealt with in separate chapters, although the fundamental issue in both is the extent of the directors' liability. The purpose of this division is to provide the reader with a clear structure for the assessment of liability and to highlight the different elements for further analysis. In this part, the study contains comparative analyses with regard to the nature and limits of liability but sticks to the current law in force in other legal systems, without looking back at legal history.

Chapter 8 deals with the scope and effects of a discharge decision. It addresses the issues of who is covered by the discharge and the applicable exceptions. The comparative analyses in this part are made only with legal systems that allow for decisions such as discharge, which links back to the comparative overview in Chapter 4. Chapter 9 deals with the majority requirements for a discharge decision and specific rules on minority protection, where the historical background helps to explain the view in current law. This view is contrasted with those in other Nordic countries, as well as developments in case law and the discussion that has arisen regarding decision-making on this point.

Lastly, Chapter 10 provides a summary and concluding remarks on the origin and meaning of the rules. In addition, suggestions are made as to how the rules could be amended to achieve greater harmonisation on this matter.

2 The Company Law Framework

2.1 Introduction

The company law framework can be understood as the system by which companies are directed and controlled. The purpose often ascribed to this framework is that it should facilitate the raising of capital by strengthening confidence in the company among shareholders, the capital market and other stakeholders, and thus contribute to the long-term success of companies. Rules on the board's responsibility and possible liability are elements of this framework. In the following section, the Swedish model of corporate governance will be presented and discussed briefly in comparison with other models of corporate governance. This forms the foundation for a discussion on the purpose of discharge from liability from a company law perspective. The aim is to provide insight into the regulation of discharge and aid an understanding of the justifications for the discharge regulation within this framework.

2.2 The Models of Corporate Governance

According to the CA, a Swedish limited company ('AB') must have three decision-making bodies, which have a hierarchical relationship to one another: the shareholders' meeting, the board of directors and the chief executive officer. There must also be a control body, the statutory auditor, appointed by the shareholders' meeting. A long tradition of legal collaboration and harmonisation has created a Nordic model of corporate governance.[18] This corporate governance model is roughly uniform, although some details and features are not entirely identical. As there is a common ground in legislation

[18] Lekvall (2014), *The Nordic Corporate Governance Model*, 38f.

and regulation in the field of company law, these jurisdictions form a common Nordic corporate governance model and can be described together.[19]

One observation that has been made is that 'the Nordic corporate governance model allows the shareholder majority to effectively control and take long-term responsibility for the company that they own'.[20] Thus, the model can be understood as containing strong (majority) shareholders and is sometimes referred to as an *ownership model* of corporate governance. Dominant shareholders exercise control over the company, which is balanced by minority protection rules. This is the case because strong shareholder influence based on the majority principle entails a risk of abuse of power by the majority, which is dealt with through rules on minority protection under company law.[21] An ever-present question is therefore how to optimise regulation for the majority, which is controlling and taking long-term responsibility for the company, while at the same time protecting the minority from the majority's potential abuse of power.

A comparison can be made with corporate governance models in other jurisdictions. These models can be distinguished from the Nordic model in several different ways. With regard to the issue of board liability, a special feature in the German corporate governance model is the division of labour between two separate organs.[22] Under German law, the *Aktiengesellschaft* (AG) is the only company form with shares that can be traded on stock exchanges.[23] In Germany, a division is made between the management board (*Vorstand*) and the supervisory board (*Aufsichtsrat*); thus the AG has a two-tier system governance, with the management function in the management

[19] There are some differences in details regarding legislative measures. For example, in Norway company law regulations are divided into two separate legislative documents, concerning private and public limited companies, respectively.

[20] See Lekvall (2014), *The Nordic Corporate Governance Model*, 13.

[21] See Skog (2023), *Rodhes aktiebolagsrätt*, 23–24 and Sjöman (2008), *Bolagsordningen, aktieägaravtalet och minoriteten*, 49.

[22] The corporate governance model in *Austria* is similar that in Germany. This means that the company is run by a management board and a supervisory board. Austrian public limited companies or stock companies (*Aktiengesellschaft*, 'AG') are regulated in the Austrian AktG. Similarly, the *Belgian* Code for Companies and Associations (BCCA) provides several options for governance structures, depending on the legal form of the company, and a two-tier system is possible for public companies.

[23] Wagner & Klein (2018), *Directors' and Officers' Liability in Germany*, 159. The law also draws a distinction between private and public AGs, with the main difference being that public companies are subject to special protective regulations under the laws governing stock exchange, for example trading in securities and takeovers, see op. cit., 160.

board and the control function with the supervisory board.[24] The shareholders, through the general meeting (*Hauptversammlung*), decide on the fundamental goals and course of the company, with the management board responsible for putting these objectives into action.[25]

In comparison to the Nordic corporate governance model, which in general follows a one-tier[26] system of corporate governance, the shareholders in Germany have less influence over the management of the company. The Nordic model gives greater scope for shareholders to decide on the management of the company. The general meeting is the supreme body, whose instructions the board of directors must obey – although this obligation is not without exceptions.

In *French* law, a public limited company (*Société anonyme*, SA) can be managed by a board of directors with a chairman or by a supervisory board with an administrative director. In the *Netherlands*, the NV (*Naamloze Vennootschap*) is equivalent to the public limited company.[27] The Dutch corporate governance model is based on a two-tier board structure and only relatively recently (2013) was a legal basis for the one-tier system introduced.[28]

According to the *English* Companies Act 2006, the one-tier board can comprise executive and non-executive directors. All directors, whether executive or non-executive, have the same general duties to the company, as set out in the Act.[29] Non-executive directors participate in directors' meetings on the same basis as executive directors and do not constitute a separate board or body of the company. Unlike in certain continental jurisdictions, two-tier board structures are not recognised in the UK.

In the *US*, the organisation of a public limited company forms a triangle, with the shareholders at the base, officers at the top and the board of directors

[24] Wagner & Klein (2018), *Directors' and Officers' Liability in Germany*, 161.

[25] Wagner & Klein (2018), *Directors' and Officers' Liability in Germany*, 161. In comparison to the private company form, the GmbH, an AG is more heavily regulated. It must have a management board (*Vorstand*), a supervisory board (*Aufsichtsrat*) and a general meeting of shareholders (*Hauptversammlung*).

[26] It should be noted that there are possibilities of a two-tier system also in the Nordic model – a board of directors and a CEO can be viewed as partly based on this.

[27] Wuisman & Wolf (2018), *Directors' and Officers' Liability in the Netherlands*, 308–309.

[28] Wuisman & Wolf (2018), *Directors' and Officers' Liability in the Netherlands*, 310ff. Much like in these systems, in *Switzerland*, the public limited company does not uphold a strict separation into an executive and supervisory organ within the board of directors, like that in the German system. See Krauskopf, Sommer & Märki (2018), *Directors' and Officers' Liability in Switzerland*, 566.

[29] Cabrelli & McAlpine (2018), *Directors' and Officers' Liability in the United Kingdom*, 671.

in the middle. The US organisation of corporate board is based on a one-tier system.[30] The shareholders own the business, elect the board of directors and have exclusive competence on deciding on certain matters, whereas officers execute policies from the board and derive their authority from the board.[31] The board of directors is the primary direct stakeholder influencing corporate governance. Directors are elected by shareholders or appointed by other board members and charged with representing the interests of the company's shareholders. Thus the US has a 'shareholder model', which is designed so that the board of directors and shareholders are in control.

2.3 The Purposes and Key Features of Discharge

It has been argued that discharge resolutions are 'not compatible with good corporate governance' because they mean that shareholders lose their protection against the harmful actions of the board.[32] In this view, 'the management' is considered an agent of the shareholders, the principal. In economic theory, this situation can be referred to as the *principal-agent problem*. Agency problems can arise in relationships involving several actors, both between the board and the shareholders as a whole and between shareholders.[33]

The agency problem creates costs for the principal, as it requires control mechanisms to monitor the agent's performance of its duties. These costs can be reduced by, for example, rules imposing obligations on the agent to *inform* the principal or *imposing penalties and sanctions* on the agent in case of a breach of the duty to act in the principal's interest. Legal strategies to reduce agency costs can be categorised as regulatory strategies or governance strategies. Regulatory strategies are normative; they specify substantive requirements that govern the contents of the principal-agent relationship. These strategies tend to limit the agent's behaviour directly. Governance strategies instead attempt to promote or facilitate the principal's control over

30 Kirshner (2018), *Directors' and Officers' Liability in the United States*, 725.

31 Kirshner (2018), *Directors' and Officers' Liability in the United States*, 724.

32 Cf. Rose (2002), *Om anvendelsen av decharge i börsnoterede selskaper*, 200ff.

33 The relationship between majority and minority shareholders constitutes an agency problem, and the typical example is the control of the majority over the interests of the minority. However, agency problems can also arise if, for example, the minority has a veto right in certain decisions, see Kraakman (2017), *The Anatomy of Corporate Law*, Section 1.2.1. In all agent problems, the challenge is often greater where there are multiple principals, especially in situations where they have diverging interests, or heterogeneous preferences, which will increase both information and coordination costs.

the agent's behaviour.[34] This section will discuss the discharge regulation as a strategy to promote control over the agent's behaviour and the purpose, functionality and potential effects of the regulation of discharge from liability, in relation to the purpose of mitigating these problems.

In light of these agency problems, it is necessary to explain the purpose of the regulation of discharge.[35] Several purposes have been put forward. These include promoting efficient determination of the liability issue (efficiency purpose), openness and information to the shareholders (information purpose) and reducing litigation costs (litigation cost purpose).[36] These relate to the different features of the Swedish regulation.

The *information purpose* relates to the exception in the CA from a resolution of discharge when the AGM has not received correct information. This is aimed at giving the board of directors and CEO incentives to disclose all information relevant to the resolution on discharge.[37] The *litigation cost purpose* is aimed at speeding up the processing of compensation issues in the company.[38] The *efficiency purpose* relates to the interest of both the company and the directors of fast-working and effective rules on liability.

The fact that the liability issue is kept 'open' is said to have negative effects on the management of the company, especially with regard to its operational initiatives and activity.[39] The question of discharge from liability is therefore of practical importance, as denial of discharge means that the company (through the board) needs to investigate if the company should file a lawsuit against the board of directors.[40] Such a claim must be made within a year from the presentation of the annual report and the auditor's report at the general

[34] Kraakman (2017), *The Anatomy of Corporate Law*, Section 2.2.

[35] In the following, the term *purpose* is used to describe the policy arguments or justifications for the regulation. This can be separated from the *functionality* of the regulation, which is aimed at describing how well this purpose is met by the regulation at hand, i.e., how the regulation affects the behaviour of different persons to achieve the purpose. These concepts can also be separated from other *effects* of the regulation, which may not be the aim of the lawmaker but are *unintended consequences*. This is somewhat similar to the external effects (or externalities), a term used in economic theory to describe effects on persons not involved in a particular transaction.

[36] See further Svernlöv (2022), *Ansvarsfrihet*, 35ff. According to Svernlöv, efficiency is the main purpose of the discharge rules, with the other two purposes being subordinate, see op. cit., 40.

[37] See Svernlöv (2022), *Ansvarsfrihet*, 38–39.

[38] See Svernlöv (2022), *Ansvarsfrihet*, 40.

[39] See with further references Svernlöv (2022), *Ansvarsfrihet*, 37–38.

[40] See Båvestam (2016), *Om bolagsstämmans ansvarsfrihetsbeslut*, 79.

meeting.[41] Thus, it is connected to the limitation period. This promotes closure on behalf of both the company and its directors on the matter of board liability. Hence, the regulation protects both the company and the board of directors from costs. Another argument in favour of the view that discharge is not necessarily bad for the company is that limiting the personal liability of the board makes it easier to attract competent directors, who are willing to take a certain amount of risk in order to create value to the company.[42]

Although these purposes are correct in the sense that they serve as possible justifications for the key features of discharge, it should be emphasised that the immediate function of the regulation is to release the board from liability. From a functional perspective, therefore, the discharge rules could be replaced by other mechanisms. In this study, I have chosen to analyse two of the special features in the Swedish regulation on discharge: the protection of the *rights of minority shareholders* in connection with discharge and the rules promoting *disclosure of information* to the company and its shareholders. Though the protection of minority rights is not described as an overall objective of discharge, there are certain components in the regulation that provide such protection. In the following sections, the two features will be discussed from a general company law perspective.

2.4 Rules Protecting Minority Shareholders

As the ownership model implies that strong shareholders have the power to decide over the company, there is a need for protection against potential abuse. The possibilities of abuse of power can be described as a principal-agent problem that can be dealt with through rules protecting the minority shareholders. Hence, rules protecting the minority are put in place to balance the interests of different shareholders and to prevent the abuse of power on the part of the majority shareholders.[43] In Swedish law, there are several different types of minority protection rules and not all of them

[41] In general, the limitation period for an action for damages against the board of directors begins at the time of the presentation of the annual report and auditor's report. This must take place within six months of the end of the financial year. The AGM may postpone the discharge issue for a maximum of eight weeks. The limitation period is discussed in Section 7.5.

[42] Cf. Reiersen (2007), *Ansvarsbegrensning og ansvarsfrihet i aksjeselskaper*, 47ff.

[43] See generally on minority protection rules in prop. 2019/20:194, Nial (1941), *Minoritetsskyddet i aktiebolag*, 702ff, Johansson (1990), *Minoritetsrätt på bolagsstämma*, 8, and Skog (2023), *Rodhes aktiebolagsrätt*, 232–262.

are addressed in this study. As an example, rules protecting minority rights include the general clause in Ch. 7 § 47 CA, describing general restrictions on the right of decision-making at a general meeting. According to Ch. 7 § 47 CA, a resolution may not be passed at a general meeting if it is likely to give an 'undue advantage'[44] to a shareholder or other person, to the detriment of the company or another shareholder.[45]

The rules protecting the minority can be divided into special rules that limit the decision-making power of the majority or give the minority certain rights, and general rules that prohibit the majority from abusing its power in combination with rights for the minority – or a single shareholder – to take legal action by challenging a resolution or to make a claim for damages against the company or the company body or shareholder.[46] The special rules thus give the minority shareholders a possibility to take action against a company body or assign certain powers to the minority shareholders in the decision-making process. The general rules impose duties on other company bodies, including to balance the interests of majority and minority shareholders, in combination with a right of the minority of enforcement either by challenging a resolution or by for example making a claim for damages for the harms caused by a resolution.

Another way of describing the minority protection rules is to divide them into *protection rules* and *minority right rules*. The purpose of protection rules is to protect minority shareholders from abuse by the majority, without any action being required on the part of the minority. The rules on rights can instead be utilised by a minority shareholder if they so wish, i.e., they are put 'into play' by the minority's actions.[47] The rights are available to different minority shareholders or groups of minority shareholders and may depend on the size of their holdings.[48] The purpose of the minority protection rules,

[44] Sw. *otillbörlig fördel*.

[45] There are for example rules concerning the right to propose an auditor on behalf of minority shareholders to be appointed by the Companies Registration Office, see CA Ch 9 § 9. The minority shareholders may also in certain circumstances request distribution of profits according to CA Ch. 18 § 11. Minority shareholders have the right to demand that an extraordinary general meeting is held, concerning a specified matter, see Ch. 7 § 13, demand that a special examiner is appointed, see Ch. 10 §§ 21–22 and apply for compulsory liquidation of the company, see Ch. 25 § 21.

[46] See Nial (1941), *Minoritetsskydd i aktiebolag*, 703.

[47] Beyer & Båvestam (2008), *Är minoritetsskyddet befogat – finns det risk för minoritetsmissbruk?*, 13.

[48] Beyer & Båvestam (2008), *Är minoritetsskyddet befogat – finns det risk för minoritetsmissbruk?*,13–14. Another way of referring to different minority protection rules is to char-

limiting the control of the majority, can be explained as rational from the point of view of raising capital – protection of minority shareholders is not primarily a question of fairness.[49] A related matter is how to prevent *abuse of minority rights*.[50] This problem occurs mainly in the case of minority right rules, since it is up to the minority shareholders to decide whether the rules should be utilised.

Company law contains special minority protection rules in connection to resolutions on discharge. According to Ch. 29 § 7 CA, an action for damages for the company may be brought if the majority or a minority comprising owners of at least one-tenth of all shares in the company has voted against a resolution on discharge from liability. The minority protection in the discharge regulation is designed as a rights-based regulation, i.e., it is possible for minority shareholders to choose whether or not to apply the rules.[51] The rules require the minority to hold a certain minimum number of shares, at least one tenth of the shares in the company. The minority's right to prevent discharge and sue the board on behalf of the company is considered to be one of the 'proper' minority rights.[52] Pursuant to Ch. 29 § 9 CA, if at least ten percent of the shareholders have voted against a proposal for discharge from liability, they may bring an action against the board in their own name but on behalf of the company (*actio pro socio*).[53]

As the shareholders' invested capital is managed inside the company, and the claim for damages against the board of directors is on the part of the company, the question of whether the board of directors should be discharged of liability is considered a matter for the general meeting. The Swedish model of directors' liability means that shareholders have little opportunity of claiming damages from the board directly. Instead, they are required to assert the company's claims. This implies that conflicts between individual share-

acterise them as negative or positive protection rules. The negative ones are those where the minority is given rights to prevent certain decisions or actions. The positive ones are those in which the minority itself is entitled to act based on certain rights granted to it, e.g., the right to make claims or assert that errors have been made.

[49] See Skog (2023), *Rodhes aktiebolagsrätt*, 23–24, and Sjöman (2008), *Bolagsordningen, aktieägaravtalet och minoriteten*, 50.

[50] Cf. with several suggestions on this Beyer & Båvestam (2008), *Är minoritetsskyddet befogat – finns det risk för minoritetsmissbruk?*, 45–46. See also further on the matter of abuse of minority rights in Almlöf & Östberg (2024), *Om rättsmissbruk i aktiebolagsrätten*, 167ff.

[51] Beyer & Båvestam (2008), *Är minoritetsskyddet befogat – finns det risk för minoritetsmissbruk?*, 20.

[52] Nial (1941), *Minoritetsskydd i aktiebolag*, 719.

[53] See further regarding the minority action in Chapter 5.

holders and the board are primarily dealt with within the framework of the company's rights against the board. Therefore, it is necessary to have rules that protect the minority from the abuses of the majority, including rules on the possibilities of limiting the liability of the board of directors towards the company. A later chapter of this study discusses how the Swedish regulation fulfils this purpose of protecting minority shareholders in connection with the resolution on discharge.[54]

2.5 Discharge and the Disclosure of Information

A fundamental problem in the context of corporate governance and the relationship between the company and the board is that shareholders typically have little insight into how the company is managed. As the decision-making concerning company matters lies with the board of directors, the principal-agent problem can arise due to the existence of 'misaligned incentives.[55] As presented above, the Swedish model is based on the notion that the shareholders should have a controlling influence over the company. This influence is expressed through the general meeting, see Ch. 7 § 1 CA.

The resolution on discharge from liability fulfils a function in the context of corporate governance by regulating the relationship between the company and its management. It aims to eliminate the possibility for the company to claim damages against the board in relation to the preceding financial year. The discharge regime also contains components that incentivise the board of directors to *provide information* to the general meeting on how the management has been conducted, to enable the general meeting to take informed decisions in the context of corporate governance. There is an exception from discharge if the board has provided materially incorrect information.[56]

Thus, by exempting the case when information of material importance that has been omitted or is incorrect, the discharge decision creates an incen-

[54] See Chapter 9.

[55] Gilson (2014), *The Nordic Model of Corporate Governance*, 95.

[56] See Ch. 29 § 11 CA. This provision will be discussed in the following, see Section 8.4.2. It should also be noted that the board has a duty to provide information according to other provisions in the CA. For example, at the request of shareholders under Ch. 8 § 32 CA, the board shall at the general meeting provide information on circumstances that may affect the assessment of an item on the agenda and the company's financial situation, if it can be done without significant damage to the company. In public companies, the duty of disclosure applies only at a general meeting where the annual accounts or consolidated accounts are discussed, see Ch. 8 § 57 CA.

tive for the board of directors to provide information to the general meeting on business decisions that have been detrimental to the company. The provision of such information is essential for the shareholders' resolutions at the general meeting about the company's continued operation. The linking of the discharge from liability to the information presented at the general meeting thus gives the board of directors an incentive to present information that may show that the board has negligently caused damages to the company.

2.6 Summary

The above presentation has shown that the Swedish model of corporate governance, which is part of the Nordic model, has certain distinctive features. These are mainly based on a strong influence of the owners in the company, resulting in the term 'the ownership model'. In this model, the general meeting is the highest decision-making body. Unlike the 'continental model', the Nordic model is primarily based on a one-tier system. The continental model means that the influence of shareholders is reduced in favour of the two boards. This is distinct from the models in the UK and US. The conflicts of interest identified are managed through different legal strategies in the different models.

Hence, it should be noted that the design of the legal strategies to solve these problems should be appropriate for the relevant model of corporate governance. This chapter has discussed the place of discharge in the Swedish company law framework, in particular in the context of protecting minority shareholders and providing information to shareholders. The view that the discharge has these very specific purposes, in addition to limiting the liability of the board of directors towards the company, can be seen in the light of the development of the Nordic corporate governance model. This relates to the question of why Swedish company law contains the possibility for the general meeting to decide on discharge from liability, which will be discussed in greater detail in the next chapter.

3 The Development of the Discharge Regulation

3.1 From the Early Modern Period to the First Companies Act in Sweden

In the 16th century, during the so-called early modern period, what can be defined as the first limited companies were formed in Sweden. These were private organisations that managed capital independently of the owners, i.e., capital associations. The charters of the oldest trading and industrial companies, from the 18th century, contained provisions on discharge from liability. In an early account of the development of Swedish company law, it is mentioned that one of the letters of privilege relating to the (Swedish) East India Company from 1746 stated that the executive board, i.e., the board of directors, was to be elected among the major shareholders. These shareholders, the principal partners, were to audit the accounts for each expedition through delegates and, if there were no objections, the delegates could grant discharge to the management (commonly referred to as *décharge*).[57] Similar rules existed for other trading companies during this period. In all these cases, it was the larger owners that had control over the discharge issue, e.g., by appointing auditors authorised to discharge the management.[58] The legal technique of the rule, i.e., *ex-post* relieving the management of liability, probably originated in the French civil service, whose model very likely influenced the public liability regime in several other countries at the time.[59]

57 See Hammarskjöld (1890), *Redogörelse*, 70.

58 See Hammarskjöld (1890), *Redogörelse*, 71 and 73.

59 The concept of 'décharge' is according to the Swedish Academy Dictionary documented in Sweden from around the 18th century and existed in the Swedish state administration. According to some legal literature, the concept was used even earlier in the statutes of the Norrland Tar Trading Company ratified in 1648, see Sillén (1952), *Om förvaltningsrevision i svenska aktiebolag*, 7. It was also a central concept in the national and state audit

The first legislation on limited companies in Sweden was enacted in 1848; the Ordinance of 6 October 1848 on the Law on Limited Companies (CA 1848).[60] The act, which consisted of only 15 sections, was strongly influenced by French legislation. It clarified the registration procedure for the formation of companies and contained certain regulations for the conduct of business, to avoid personal liability of shareholders. The act did not contain rules on for example general meetings or shareholders' decision-making powers. The CA 1848 contained certain provisions concerning the board of directors and only to some extent personal liability of the directors. The directors of the board were considered to have obligations towards the company in their capacity as agents, according to Ch. 18 Commercial Code.[61]

Discharge was not regulated in CA 1848, but the legal literature from the 19th century suggests that directors could be released from liability towards the company through contractual solutions.[62] According to this view, all shareholders were bound by a discharge resolution, regardless of whether they voted in favour of or against such a proposal, and thus the majority principle applied. However, it was considered possible to leave open in the articles of association the possibility for individual shareholders to make claims for damages against the board. In addition, it was considered possible to bring action against the board of directors if the company went bankrupt. The right to damages accrued only to the company, not to individual shareholders.[63] The legislation stated that shareholders were free from personal liability, but it was possible to regulate the company's internal affairs in general through contracts. There were few formal requirements for corporate bodies and, as mentioned, the relationship between the company and the board was not regulated in detail.

The regulation of discharge developed from the earliest company statutes and was later enshrined in legislation as a means of limiting the liability of company directors. One possible explanation for the use of discharge was that the association was a new and complex legal construct. It is possible that *ex-post* discharge was based on the perception of the difficulties for the partners to jointly agree in advance to limit the liability of the board of directors

in Norway in the 19th century, see, e.g., Espeli & Nilsen (2016), *Riksrevisjonens historie 1816–2016*, 52, 147, 246, and 479ff.

60 SFS 1848:43.

61 Sw. *Handelsbalken*.

62 See Hagströmer (1872), *Om aktiebolaget enligt svensk rätt*, 246.

63 See Hagströmer (1872), *Om aktiebolaget enligt svensk rätt*, 246.

and the management of the company, as the owners could not legally bind new partners by contract. Since it was in practice necessary for the association to appoint a board of directors for the management of day-to-day business, but in order that neither the owners nor the representatives of the company would be personally liable for the company's obligations, there was a need for a legal mechanism to relieve them of liability.

In the earlier parts of the 19th century, theories on the association as a legal entity or legal person were developed.[64] However, in Sweden it was still uncertain during this period to what extent a limited company could be held responsible for non-contractual liability if the company caused damages to other parties due to the conduct by persons in the management (or 'company bodies').[65] The rights and obligations of the company under various rules thus developed over time. This was also the case in the development of rules relating to the 'internal' matters of the company and the legal discourse soon came to focus on the decision-making in the company. During the same period, the majority principle emerged in company law, which presumably made the governance of the company considerably easier. The fact that the company could decide to release the board of directors from any liability for the previous year – provided that the board had fulfilled its duties to the company – contributed to effective governance though still maintaining the older approach that release from liability through discharge should only occur after an assignment had been performed.

3.2 The Late 19th Century and the Emergence of a Capital Market

The CA 1848 soon came to be criticised from several quarters, in particular due to the system of authorisation for the formation of companies. In 1895 new legislation – the Companies Act of 28 June 1895 (CA 1895) – was introduced.[66] The main aim of the legislation was to introduce a different system

[64] It can be noted that the earliest legal literature in Swedish company law is largely focused on the theories of the limited company as a legal entity, see Hagströmer (1872), *Om aktiebolaget enligt svensk rätt*, 246. See also Björne (1998), *Den nordiska rättsvetenskapens historia (Part II)*, 356f and on the perception of the theories of limited personal liability in limited companies from a Danish perspective, Dübeck (1991), *Aktieselskabernes retshistorie*, 97ff.

[65] Cf. Dotevall (1989), *Skadeståndsansvar för styrelseledamot och verkställande direktör*, 481.

[66] SFS 1895:65.

for creating companies, influenced by the German normative system.[67] The CA 1895 was also more detailed than the previous law.[68]

The CA 1895 contained, among other things, provisions that the board should present a management report and balance sheet at the AGM. A further innovation was the statutory auditor function. In § 65 of the CA 1895, there were provisions on the liability of directors towards the company. According to the provision, the board would be liable for damage caused by violations of the law or articles of association. The CA 1895 contained a provision regarding discharge from liability, and in § 49 it was stated that the question of discharge from liability was a mandatory item at the AGM. For decisions at the AGM, the act stated that the opinion receiving the majority of the votes cast would prevail, i.e., the majority principle applied. However, shareholders were not allowed to participate in decisions for themselves or as proxies for others in matters affecting them personally or, if a shareholder was a member of the board of directors, to participate in decisions on discharge from liability for management actions.[69]

If no action concerning the management of the board of directors during the period covered by the management report was brought within one year of the presentation of the report to the general meeting, discharge was deemed to have been granted. There was no possibility for minority shareholders to oppose a discharge decision, but shareholders with a total shareholding of at least one tenth of the share capital could obtain a two-month postponement of the discharge. There was an *exception* to the discharge if the action concerned a member of the board who, against their better judgment, had made a false statement in the management report or balance sheet, if the statement could be assumed to have affected the decision on discharge.

3.3 The Early 20th Century and Legal Developments in the Nordic Countries

Sweden was the first Nordic country with legislation on limited companies, first introduced in 1848, and was at the turn of the century already on its second law, the CA 1895. In the latter part of the 19th century, the legislation came to be criticised for not adequately addressing issues such as minority

67 Cf. Broberg (2006), *Konsten att skapa pengar*, 69.

68 This was probably influenced by the relatively new German Act of 1884 (AktG), which was considerably stricter and more detailed than the first German Act of 1870.

69 See § 32 CA 1895.

protection and the position of shareholders. Soon, therefore, the CA 1895 was amended again, by a new CA in 1910 (CA 1910).[70] The background to the rapid amendment was, among others, dissatisfaction with previous regulations regarding control over the formation of limited companies, control over the board's management and protection of the minority shareholders against possible majority abuse. The reasons given included that the legislation was intended to provide the public with stronger protection against 'unsound companies' and to give shareholders greater security against the board's mismanagement of the company's affairs, as well as protection for minority shareholders. The rules were also influenced by the new German legislation on limited companies, which had been enacted in 1897 to protect against abuse and fraud of various kinds.

The CA 1910 still contained provisions on discharge from liability but was altered in connection with minority rights regarding discharge. Around this time, theories on the distinction between procedural and substantive legal relations were developed, especially in German jurisprudence. This may have influenced the wording of rules on minority protection. In the CA 1910, the minority was given facility for a 'minority action', if shareholders holding at least one fifth of the shares had voted against discharge. Discharge has since then been perceived as a procedural prerequisite, i.e., a decision to deny discharge to the management is a prerequisite for a court to hear a claim for damages by the company against the board.[71]

Two exceptions to discharge were included in the CA 1910. One was the provision in § 86(4), that an action based on a criminal offence could be brought against a board member unless the discharge from liability expressly covered that offence. The second exception was the bankruptcy exception, which according to § 90 CA 1910 applied to bankruptcy that had begun within two years of the presentation of the management report at the general meeting. The exception in § 49 CA 1895, which meant that an action could be brought within two years of the presentation of the management report against a board member who had intentionally provided incorrect information, was thus removed from the CA 1910. The reason was that the act of a board member providing false information in the balance sheet or the management report against their better judgment was a criminal offence. Retaining the general exception in the CA 1895 would therefore have had

[70] SFS 1910:88, 1.

[71] The difference in this respect will be dealt with below in Chapter 5 and the minority protection in connection with the decision-making will be dealt with below in Chapter 9.

the paradoxical effect that if the incorrect information affected the discharge decision, the two-year limitation rule would apply, whereas in the opposite case the company's claim would be subject to the general ten-year limitation rule.[72]

Around the same time, legislation was put into place in other Nordic countries. In Finland, legislation had been introduced in 1895.[73] In 1910, the same year that the new Swedish legislation, Norway introduced its first legislation on limited companies (NCA 1910).[74] Although the country had been in a union with Sweden since 1814, there had been no common legislation on limited companies. The Swedish-Norwegian union was dissolved in 1905. The NCA 1910 was similar to both Swedish and German legislation.[75] Towards the end of the First World War, corresponding legislation was introduced in Denmark, in the DCA 1917.[76] Although the legislations in the Scandinavian countries were introduced close together in time, this was not a pan-Nordic legislative project.[77]

The Finnish Companies Act of 1895 was similar to the Swedish legislation of the same year. The duties of the board towards the company were regulated in § 41, but the issue of discharge was not explicitly regulated.[78] However, the general meeting had to decide on 'measures'[79] due to the board's

[72] See Proposal 1908, 64f.

[73] See Finnish CA 1895, *lag om aktiebolag* 2.5.1895. In Finland, certain matters relating to limited companies had previously been regulated by the Ordinance of 24 November 1864, see Chydenius (1897), *Nyare inhemsk lagstiftning, Civilrätt: Aktiebolag*, 167ff.

[74] Lov 19 juli 1910 nr. 1. A few years later there was specific legislation on shipping companies, 26 July 1916 No 9 (*skibsaksjeloven*).

[75] The 1910 Companies Act had similarities with Swedish and German legislation. The link between the legislation in the Nordics in the early 20th century is sparsely documented in legal historical studies. See further regarding the introduction of the NCA 1910 in Espeli (2021), *Kontraktsfrihet, aksjeselskapstetthet i verdenstoppen og debatten om aksjeloven av 1910*, 195ff, Espeli (2021), *Redernes motstand mot aksjeloven av 1910*, 7ff, and Langeland (2021), *Aksjelova av 1910. Freistnaden på å organisere norsk kapitalisme*, 22–35.

[76] After several legislative attempts and a protracted legislative process, Denmark's first Companies Act was enacted in 1917. The Danish legislation was similar to the Swedish legislation in certain respects, e.g., with regard to the formation of companies, but due to political compromises it was not very detailed, see Torp (1919), *Den danske selskabsret*, 182–183.

[77] However, the question of joint legislation, or at least cooperation in the legislative field, had been discussed at the second Nordic lawyers' meeting in 1875, see *Förhandlingar vid andra nordiska juristmötet i Stockholm den 26–28 Augusti 1875, utgifna genom den svenska lokalstyrelsens försorg*, 49–82.

[78] Chydenius (1897), *Nyare inhemsk lagstiftning, Civilrätt: Aktiebolag*, 223.

[79] Sw. '*åtgärder*'.

management and the reporting thereof. This was considered a possibility to resolve on discharge for the board, although it was not explicitly stated.[80] The Act did not contain any rules on shareholders' disqualification in certain matters.[81] There was no specific minority protection provision in the discharge regulation. A discharge decision was not considered to affect the company's right to bring an action against the board of directors for criminal offences. Moreover, a decision on discharge was considered to relate only to management actions of which the company had been able to obtain knowledge through the board's report and the auditor's review.[82]

According to the Norwegian Act from 1910, it was for the general meeting (No. *generalforsamlingen*) to resolve on discharge.[83] The majority principle applied to resolutions on discharge. The Norwegian Act did not explicitly regulate the liability of directors and others. Such liability was based on general principles of civil liability, and it was therefore not considered necessary to lay down rules in legislation.[84] A resolution on discharge meant that a member of the board of directors was released from liability. Under this approach, the question of liability could not be reopened except in the event of a minority action regulated in the same provision.[85] In 1921, a provision was introduced to make discharge a mandatory item at the AGM.[86] The provision was introduced to prevent companies from having provisions in the articles of associations stating that the management[87] could resolve on discharge concerning the annual accounts.[88] It was understood to be within the exclusive competence of the general meeting to resolve on the matter of discharge.[89]

80 Chydenius (1897), *Nyare inhemsk lagstiftning, Civilrätt: Aktiebolag*, 230.

81 Chydenius (1897), *Nyare inhemsk lagstiftning, Civilrätt: Aktiebolag*, 222.

82 Chydenius (1897), *Nyare inhemsk lagstiftning, Civilrätt: Aktiebolag*, 230.

83 See § 69 NCA 1910.

84 See Platou (1911), *Forelaesninger over norsk Selskabsret II*, 244.

85 See Augdahl (1931), *Nogen bemerkninger om decharge i aktieselskaper*, 850. Minority shareholders were, generally, bound by the discharge (in Norwegian '*Decharge for Regnskabet eller Billigelse af trufne Dispositioner*'), even if it was later shown that the company had been damaged. However, a prerequisite for the minority to be bound by the general meeting's decision on discharge was that the party liable was not guilty of fraud or gross negligence, i.e., *dolus* or *culpa lata*. See Platou (1911), *Forelaesninger over norsk Selskabsret II*, 246f.

86 Cf. Reiersen (2007), *Ansvarsbegrensning og ansvarsfrihet i aksjeselskaper*, 66 with further references.

87 No. '*representantskapet*'.

88 Reiersen (2007), *Ansvarsbegrensning og ansvarsfrihet i aksjeselskaper*, 66.

89 Reiersen (2007), *Ansvarsbegrensning og ansvarsfrihet i aksjeselskaper*, 66.

In the Danish Companies Act from 1917, the issue of discharge from liability was not expicitly regulated, but in the legal literature it was considered that, according to § 32(3), the question of discharge was to be decided by the general meeting. The DCA 1917 did not contain any explicit disqualification rules and shareholders who were also members of the board could, among other things, vote in favour of discharge for themselves.[90] However, a decision on discharge required that correct information concerning potential harmful conduct was given to the general meeting.[91]

3.4 Developments after the Financial Crisis of the 1930s

The previous section described that the company laws in the Nordic countries at the beginning of the 20th century were based on similar models, even though the regulations were not the result of any formal legislative cooperation. On Sweden's initiative, more formalised Nordic cooperation on company law was initiated in 1934.[92] The legislative collaboration had to be put on hold because of World War II, and Sweden continued the work on its own.[93] In 1941, a proposal was presented by the legislative drafting committee. The CA 1944[94] came into force on 1 January 1948.

The CA 1944 contained twice as many sections as the CA 1910 and aimed at financial consolidation of the limited company, including changes to the rules on dividends and a more detailed regulation of annual reports.[95] The law committee's directive called for particular attention to be paid to the emergence of groups of companies[96], which led, among other things, to rules on consolidated accounts.[97] Auditing was also dealt with in greater detail. The CA 1944 contained a regulation on liability for damages, which meant that the board of directors and the managing director, in the fulfilment of their duties, were obliged to compensate the company for any damage caused to it.[98]

[90] Torp (1919), *Den danske selskabsret*, 237.

[91] Torp (1919), *Den danske selskabsret*, 250f.

[92] See Christensen (2008), *Faellesnordisk aktieselskabslovgivning?*, 71–72.

[93] Skog (2018), *Svensk aktiebolagsrätt – några utvecklingslinjer*, 24.

[94] SFS 1944:705.

[95] See SOU 1941:9, 3.

[96] Sw. *koncerner*.

[97] SOU 1941:9, 4.

[98] Rules on disqualification were contained in § 117 CA 1944. According to § 117(2), a member of the board of directors or the managing director was not allowed to participate

The question of discharge from liability was regulated in § 128 CA 1944.[99] Pursuant to § 128(1) CA 1944, discharge from liability was not deemed to have been granted if shareholders holding a total of at least *one tenth* of the entire share capital voted against it. Hence, the CA 1944 reduced the proportion of the share capital needed to have the right to prevent discharge, compared with the CA 1910. In other respects, § 128(3) CA 1944 corresponded to the law previously in force. The limitation period for bringing an action of six months after the presentation of the accounting documents and the auditor's report at the general meeting was retained.[100]

Under § 128(4) CA 1944, there were two exceptions to granted discharge. If discharge had been granted, an action could still be brought if the board of directors, a member of the board of directors or the managing director had *deliberately or negligently* provided *materially incorrect or incomplete information* in the accounting documents or otherwise to the general meeting or to the shareholders in accordance with § 127(3) or also through the accounts or otherwise to the auditors.[101] In other words, there was an exception for incorrect or missing information, but this only applied in the case of intent or negligence. In addition, there was a separate exception from discharge in the case of criminal offences, unless the discharge clearly related to the criminal act.

Furthermore, the 'bankruptcy exception' in § 131 CA 1944 was essentially unchanged compared with in the CA 1910. The time within which an action had to be brought was set at six months from the first meeting of creditors. Unlike the special two-year limitation rule in § 49(4) CA 1895, the provision in § 128 CA 1944 contained no specific time limitation. Thus, an action under that provision could be brought only subject to the general limitation of claims.

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in decisions on discharge from liability for management actions for which they were responsible, or in the election of auditors. Ordinary general meetings were regulated in § 121.

[99] Prior to the CA 1944, discharge from liability, according to the wording of the law, only covered the members of the board of directors. Thus, it did not apply to any managing director, a position that existed in many companies, despite the absence of statutory regulation. The CA 1944 provided that the managing director would also be covered by the discharge decision.

[100] The provision stated that 'if no action was taken within six months of the presentation of the accounting documents and the auditor's report to the general meeting, discharge is deemed to have been granted'.

[101] See § 128(4) CA 1944.

As mentioned above, the Swedish legislation was a result of the work that began in the 1930s when a joint legislative project materialised in the Nordic countries. However, during this period, there was a lack of common legislation in the Nordic region. Norway kept its 1910 law until 1957. Some provisions were added in 1930, including rules on minority auditors. Finland retained its law from 1895, but several changes were made over time, including the introduction of new provisions on discharge from liability in the 1930s. A new Danish law on limited companies was introduced in 1930, but Denmark was nevertheless part of the initial Nordic cooperation.

Despite the lack of unified legislation, the development of the law up to that time had been fairly uniform. However, the Nordic legislative cooperation did not result in a uniform set of rules on company law, even though the basic elements were the same. The legislation that resulted from this cooperation was enacted in different years in the different Nordic countries. Attitudes to discharge from liability differed at this time, and it can be seen here that the different views led to a division on the matter.

In some of the other Nordic countries, the necessity of discharge resolutions began to be called into question. The attitude towards the obligation for the general meeting to decide annually on the discharge of the board of directors had changed significantly. In some Nordic countries discharge as a legal concept was viewed with great scepticism. Under the Norwegian Act of 1957 (NCA 1957), resolutions of discharge were not mandatory. In the preparatory works to the NCA 1957, it was stated that one objective was to reduce the use of resolutions on discharge.[102] The background to this was that discharge (called *decharge*) was used as a resolution to both approve the annual accounts and discharge the board from liability – one resolution was made for both matters. Such resolutions, concerning the '*decharge* of the accounts', were seen as inappropriate, as their legal consequences were uncertain.[103] Hence, discharge as a mandatory item at the AGM was removed from the legislation.

102 Reiersen (2007), *Ansvarsbegrensning og ansvarsfrihet i aksjeselskaper*, 75.

103 Reiersen (2007), *Ansvarsbegrensning og ansvarsfrihet i aksjeselskaper*, 75, with further references.

3.5 Nordic Legislative Cooperation after 1950s and the CA 1975

The CA 1944 was soon criticised for being an overly detailed and complicated regulatory framework. Attempts at Nordic legislative cooperation began already in the 1950s and continued during the 1960s and 1970s resulting in joint legislative proposals. There was a major push for joint Nordic legislation with the aim of arriving at uniform Nordic company law.[104] In the end, it did not lead to a uniform 'pan-Nordic' legislation on limited companies.[105] The Danish and Finnish proposals were presented in 1969. The Norwegian proposal was finalised in 1970 and the Swedish proposal in 1971.[106] The Swedish CA 1975 came into force on 1 January 1977.

The justifications for the existence of discharge in the CA 1975 were similar to those found in the CA 1944. This had to do with the view that discharge was of importance, as otherwise the matter of liability would be active for a long time and could disrupt the company's operations.[107] Hence, the provisions on discharge from liability in the CA 1944 were transferred to the CA 1975 largely unchanged. In the 1971 report, it was proposed that the provision on the mandatory item at the general meeting should be made a default rule, i.e., that the articles of association could provide that the question of discharge need not be decided at the ordinary general meeting.[108] However, this was criticised during the consultation process of the draft, and the legislator did not put forward the proposal of making it possible to 'opt out' of resolutions on discharge at the AGM.[109]

[104] Knudsen (2018), *Norsk selskapsrett. Utvikling og status*, 31ff, see further Skåre (1988), *Det nordiske aksjelovsamarbeidet*, 606f.

[105] See further Skåre (1988), *Det nordiske aksjelovsamarbeidet*, 606f.

[106] Knudsen (2018), *Norsk selskapsrett. Utvikling og status*, 32 and Skåre (1988), *Det nordiske aksjelovsamarbeidet*, 606f. The results of the Swedish study were presented in SOU 1971:15. See further Skog (1996), *Aktiebolagslagstiftning i förändring – not om pågående lagstiftningsarbete i de nordiska länderna*, SvJT 1996, 42ff, Skog (2008), *Nordiskt lagstiftningssamarbete på aktiebolagsrättens område – behövs det?*, 57ff and Skog (2019), *Nordic Legislative Collaboration in the Area of Company Law – Then and Now*, NTS 2019:4, 6ff.

[107] SOU 1971:15, 229.

[108] The committee also suggested that it would be possible to raise the issue of discharge at the meeting at the request of an individual shareholder, see SOU 1971:15, 133, 229f.

[109] See prop. 1975:103, 395f. The critique was based the on argument that the liability question would risk being suspended for an unreasonably long time, as it would entail that the action against the management could be kept open for three years (which was the proposed limitation period) from the end of the financial year in which the conduct took place.

Some changes concerning the exceptions from granted discharge were made. The CA 1944 required *intentional or reckless* omission of information. This requirement was removed from the CA 1975.[110] The other exception, i.e., that an action on the basis of a criminal offence could be brought despite discharge being granted, unless the discharge clearly covered this act, was removed. In the explanatory memorandum, it was stated that the exception was clear from the wording of the provision, and that no special rule on this was needed.[111]

3.6 The 21st Century and the Challenges of Globalisation

During the 1990s, in connection with Sweden joining the European Community (now the EU), several aspects of company law were adjusted to adapt the rules to the European Community company law directives. The overall aim was to facilitate the right of establishment across Member States by harmonising various aspects of company law.[112] The need for adaptations to EU company law, as well as economic and societal developments in general, led to several government inquiries during the 1990s.[113] Despite the fact that the major adaptations to EU legislation had already been made, a completely new CA was deemed necessary. Certain matters were also left out of the EU rules, including the liability of the board. The Swedish rules on liability for damages were thus transferred virtually unchanged from the CA 1975 to the CA 2005.

Since the introduction of the CA 2005, there have been several changes in the legislation. In connection with the proposal to remove the management audit, the issue of discharge was also investigated.[114] This study put forward similar arguments in favour of retaining the discharge regulation in Swedish company law. The conclusion, unsurprisingly, was that it should not be

[110] See SOU 1971:15, 360f and prop. 1975:103, 546f. Amendments were also made to the provision stating that the discharge related to the period covered by the accounts, although no substantive change was intended.

[111] SOU 1971:15, 357 and prop. 1975:103, 545.

[112] SOU 1992:83, 5ff.

[113] This was done by the Limited Companies Committee (Sw. *Aktiebolagskommittén*). See further SOU 1992:13, SOU 1995:44, SOU 1997:22, SOU 1997:168, SOU 1999:36 and prop. 2004/05:85.

[114] When the audit became voluntary for some companies, the question of whether the management audit should be included in the statutory audit was raised. The issue was considered to be so closely related to the discharge regulation, that these two issues should be dealt with in one context, see prop. 2009/10:204, 58 and prop. 2013/14:86, 79.

removed.[115] In the proposal, it was emphasised that the purpose of the discharge is to give the management of the company, already at an early stage, a binding decision as to whether the company intends to bring an action for damages in respect of the management of the company by the board during the financial year.[116] The criticism levelled at the regulation has in recent years often been linked to unfamiliarity with the meaning of the rules, but is also based on different perceptions of the meaning of minority protection and the opinion that the so-called 'information exception' does not provide the board with sufficient protection against liability. However, the concept of discharge has survived, and the criticism has not been considered sufficient to materially change or remove it. A push for possible harmonisation on the matter has not gained traction in the EU.

3.7 Summary

Discharge originated in the early days of company law and was closely linked to the emergence of the limited company. The above account shows that the introduction of limited companies and the first Swedish company law regulation was influenced by other countries' solutions to the problem of how to *limit the liability* of company management. There is early evidence that the discharge from liability served this function in the Swedish East India companies. Although there was no legislation on limited companies in the early modern period, some organisations made use of the possibility for partners to approve the management's administration of the business and reporting of their duties afterwards, which was later regulated in the statutes of these companies.

There were probably several factors that led to the possibility of limiting the liability of the management towards the company through *ex-post* authorisation. Provisions on discharge from liability were probably developed against the background of uncertainty about the status of the limited company as a legal entity, where several interests, i.e., owners, were clustered within the framework of the limited company as a legal construct. This probably meant that it was perceived as difficult to construct rules limiting

[115] Prop. 2013/14:86, 82. An appendix sets out the background to the investigative report from 2009, where Svernlöv was appointed special investigator, see prop. 2013/14:86. Regarding the arguments not to remove the discharge regulation, and the main features of the current regulation, see SOU 2009:34, 270f, 267.

[116] Prop. 2013/14:86, 82.

the liability of the board of directors in relation to future owners of the limited company. In addition, the decision-making principles, particularly the majority principle, had the possible consequence that a majority of shareholders would use their power at the expense of minority shareholders. This problem led to the need for rules to protect minority shareholders in terms of management liability, introduced at the beginning of the 20th century.

The exceptions to discharge have evolved over time and are often criticised for making it very difficult for the board to be 'properly' released from liability by discharge. This is especially the case with the 'information exception', which requires disclosure to the general meeting on all information relevant to a possible claim. Although discharge is often described as more of a social norm, or a rule without any 'real' legal meaning, the regulation has survived. The fact that the discharge from liability has been the subject of such widespread criticism has not been seen as a sufficient reason to remove it altogether. Furthermore, as will be shown in the following chapter, Sweden is not alone in having the concept of discharge in company law.

4 A Comparative Overview – Resolutions on Discharge

4.1 Introduction

In the following section, I will examine some of the details of discharge resolutions in jurisdictions where such resolutions are common or subject to legislation. Resolutions on discharge from liability and discharge proposals occur in several European countries. However, the legal bases of discharge decisions and their implications for shareholders differ between countries.[117]

In some countries, resolutions on discharge from liability are *not binding* and cannot shield directors from claims for damages. This is the case in several major European jurisdictions such as Germany, Austria, France and Spain.[118] In other countries, a discharge resolution is binding, in the sense that it can hinder a company's claim for damages against the board of directors. This is the case in the Nordic countries, Belgium, Greece, Luxembourg, the Netherlands, Portugal and Switzerland.[119] As noted above, the legislation

[117] A comparative overview, although not exhaustive, is provided in Unanyants-Jackson (2008), *Directors' Liability Discharge Proposals – The Implications for Shareholders*, 4. The 2008 overview has been used in this study as a readily available source, in English, in order to exemplify the understanding of the meaning of the rules. Although it was presented some years ago, the content in terms of reports from national legal experts has been used to gain knowledge of the implications of discharge resolutions in the mentioned jurisdictions. The overview has been supplemented by studying the primary sources (legislation), and to some extent case law and legal literature from the jurisdictions covered. It has not been possible within the scope of this study to conduct in-depth investigations of all the jurisdictions mentioned here.

[118] Unanyants-Jackson (2008), *Directors' Liability Discharge Proposals – The Implications for Shareholders*, 4.

[119] Unanyants-Jackson (2008), *Directors' Liability Discharge Proposals – The Implications for Shareholders*, 4.

of other major jurisdictions, such as the UK and the US, does not contain regulations on discharge resolutions.[120]

4.2 Discharge that is Not Legally Binding

In *Germany*, discharge (*Entlastung*) from liability is a mandatory decision of the AGM in an *Aktiengesellschaft*.[121] However, a decision to discharge the board from liability does not mean that the board is released from its liability for damages. The discharge decision has no legal effect. It is merely a statement by the general meeting that the board has done a good job – a statement of confidence.[122] In practice, decisions on discharge often refer to so-called total discharge, meaning that the entire management board is discharged from liability in a single resolution. However, it is possible to resolve upon discharge in relation to each individual member. As the discharge from liability has no direct consequences, it is still possible for the company to bring action for damages against the board.[123] However, refusal to grant discharge may often constitute a withdrawal of confidence, which can be the starting point for extraordinary dismissal of the management board.

In *Austria*, much like in Germany, discharge from liability of the management board and supervisory board is a regular item on the agenda of the AGM. However, a resolution on discharge is only an expression of trust; it does not release the board members from personal liability.[124]

In *France*, the general meeting cannot resolve to exonerate directors from liability for a negligent act committed in the performance of their duties.[125] Hence, resolutions on discharge (Fr. *quitus*) are possible, but cannot release

[120] As will be discussed below, these jurisdictions have different ways to protect the board from liability. For example, in the UK, the provision in § 239 CA 2006 is the only means available for a company to effectively waive its right to claim against a director for damages.

[121] See § 120 AktG.

[122] Unanyants-Jackson (2008), *Directors' Liability Discharge Proposals – The Implications for Shareholders*, 21.

[123] This is not the case for the GmbH, where discharge has consequences for the possibility to make a claim for damages.

[124] Unanyants-Jackson (2008), *Directors' Liability Discharge Proposals – The Implications for Shareholders*, 11.

[125] See Art. L225–253, Livre II, Titre II, of the French Code of Commerce ('Aucune décision de l'assemblée générale ne peut avoir pour effet d'éteindre une action en responsabilité contre les administrateurs ou contre le directeur général pour faute commise dans l'accomplissement de leur mandat.').

the board from liability. Although discharge from liability has no legal effect in French law, it is nonetheless common at shareholder meetings.[126]

In *Spain*, resolutions on discharge are possible, but do not exonerate the board from liability, and Art. 134(3) of the Spanish Companies Act (LSC) explicitly states that approval of the annual accounts will not prevent or hinder liability for the directors. If a company proposes to discharge directors from liability for acts during the past financial year, the matter is often resolved upon together with proposals for approval of the annual report and accounts. Approval will neither hinder or annul any proceeding that may already have been agreed or implemented.[127]

4.3 Discharge that Affects Board Liability

As mentioned above, the Nordic corporate governance model is based on strong shareholder influence and protection of minority shareholders, and the legal challenges associated with this are similar.[128] As noted in the previous chapter on the development of discharge, Nordic legal unity has been significant in this area as well. However, the regulations in the various Nordic countries have gradually come to diverge in their details.

In *Finland*, much like in Sweden, it is mandatory to decide on the discharge of liability at the AGM.[129] In both *Denmark* and *Norway*, meanwhile, a resolution on discharge is not a mandatory item at the AGM. However, resolutions on discharge from liability are subject to regulation within the framework of the provisions on the company's ability to bring an action for damages against the board.[130] Resolutions on discharge are for example possible if it is stipulated in the articles of association or otherwise proposed at the general meeting. Although not mandatory, resolutions on discharge are sometimes used in Danish public limited companies.[131] There are no studies on their use in Norwegian law, but they are said to be very rare.

[126] Unanyants-Jackson (2008), *Directors' Liability Discharge Proposals – The Implications for Shareholders*, 19.

[127] Unanyants-Jackson (2008), *Directors' Liability Discharge Proposals – The Implications for Shareholders*, 31.

[128] See above in Section 2.2.

[129] See Ch. 5 § 3 FCA.

[130] See § 364 DCA and § 17-4 and § 17-5 NCA.

[131] A survey of AGM decisions in Danish listed companies in 2019 found that in about one third of all large cap companies, the AGM decided to discharge the board from liability. See Birkemose & Sørensen (2021), *Aktionærdemokrati og aktivt ejerskab – en*

In recent years, a few large cases in Denmark concerning the liability of bank directors have garnered attention.[132] This has called into question the role of insurance and discharge resolutions.[133] One view in the Danish legal literature is that discharge from liability creates a false sense of security that no longer serves its original purpose, namely that the management can put the previous financial year behind them.[134] Due to recent developments in connection with board liability, discussions about the different forms of limitations of liability have grown more common. One reason companies decide to discharge directors from liability is that liability insurance has become much more expensive for some companies. As mentioned in Chapter 3 on the development of the discharge regulation, the aversion to discharge in other Nordic countries meant that it was removed as mandatory item at AGMs. Although they have great similarities with other Nordic countries regarding the design of the discharge regulation, Swedish and Finnish law have retained this as a mandatory point.

If the general meeting resolves to discharge the relevant persons from liability, the company unilaterally waives its right to claim damages from the persons subject to such decision. The regulations on discharge are, in all Nordic jurisdictions, designed as exceptions, and describe the situations where the discharge from liability does not affect the company's, or individual shareholders', ability to bring a claim for damages. Hence, the extent of the discharge from liability is not explicitly stated but appears from an analysis of the exceptions in certain matters. The implications of discharge resolution are closely related to the perception of how wide these exceptions are.

Discharge resolutions limit board liability towards the company in several other European jurisdictions.

In *Belgium*, company law provides that the AGM of shareholders should decide whether to discharge directors from liability for their actions or omis-

dansk status, 140. The study covered Danish C25 companies, i.e., companies listed on the OMXC25, which refers to the 25 most traded shares on the Copenhagen Stock Exchange.

132 See in general about these cases and the liability of Danish bank management: Clausen (2020), *Den danske bankledelses erstatningsansvar – banditter i habitter?*, 161ff and Lau Hansen (2021), *Director Liability in Banks under Danish Law – Business as usual?*, 375–399.

133 See in general about director liability insurance in Denmark, Stubkjær Andersen (2001), *Forsikring af bestyrelsesansvar*, Stubkjær Andersen & Werlauff (2020), *Ansvarsforsikring af bestyrelse og direktion*, Birkemose & Sørensen (2021), *Ledelsesansvarsforsikringer – en undersøkelse af deres anvendelse og selskabsretlige implikationer*, ET.2021.173.

134 See Fode (2022), *Ledelsesansvar og ansvarsbegrænsninger*, 171.

sions in the past financial year.[135] Such discharge only results in a release of liability towards the company. If discharge has been validly granted, only the shareholders not voting in favour of the discharge may claim damages from the directors. In some circumstances, however, the validity of the discharge given can be challenged and the directors' responsibility reinstated retrospectively.[136] The prevailing opinion in the legal literature is that discharge is possible at any time, not only after the approval of the annual accounts at the annual shareholders' meeting.[137]

In the *Netherlands*, discharge (*décharge* or *kwijting*) resolutions are possible and will release the directors from liability towards the company. A discharge resolution limits the company's possibility to sue its directors.[138] Discharge is not regulated in statutory company law.[139] Despite this, several articles in the legislation mention the concept of discharge.[140] Discharge from liability may cover liability for mismanagement of the company based on 2:9 of the Dutch Company Code (DCC) and may cover liability based on 2:216 DCC regarding distributions to shareholders.[141] In general, discharge is granted at either the AGM in which the annual accounts for a financial year are adopted or at the end of the director's term as a member of the board by way of a shareholders' resolution as part of an exit agreement.[142] Discharge can be granted only for management conducted in the period prior to the resolution granting discharge, i.e., discharge cannot be forward-looking.[143] In Dutch law, it was formerly customary to automatically grant discharge when adopting or approving the financial statements. This often followed from a statutory provision. This 'implicit' granting of discharge was removed

135 Unanyants-Jackson (2008), *Directors' Liability Discharge Proposals – The Implications for Shareholders*, 13.

136 Unanyants-Jackson (2008), *Directors' Liability Discharge Proposals – The Implications for Shareholders*, 13.

137 Cf. Suykens (2019), *Discharge in an M&A context*. Retrieved from https://www.eylaw.be/2019/05/24/discharge-in-an-ma-context/.

138 Cf. Doorman & Timmerman (2002), *Rights of minority shareholders in the Netherlands*, 72.

139 Wuisman & Wolf (2018), *Directors' and Officers' Liability in the Netherlands*, 343.

140 See Bulten & Kreileman (2017), *De dans ontspringen door decharge?*, 418.

141 Wuisman & Wolf (2018), *Directors' and Officers' Liability in the Netherlands*, 343.

142 Wuisman & Wolf (2018), *Directors' and Officers' Liability in the Netherlands*, 344. However, it is debated whether the 'final discharge' intends to ensure that the company cannot sue the former director for actions that the latter has concealed, see Bulten & Kreileman (2017), *De dans ontspringen door decharge?*, 421.

143 Wuisman & Wolf (2018), *Directors' and Officers' Liability in the Netherlands*, 344.

in 2001, and the DCC now explicitly stipulates that adoption of the financial statements does not discharge a director from liability.[144]

In *Switzerland*, the general meeting can decide to discharge the members of the board of directors from actions for liability in company law under to Art. 698 § 2 para. 5 CO.[145] The board members can be released from liability for either a specific period, such as the previous business year, or for a particular business transaction.[146] The discharge is granted to individual members, not to the board as a whole. The discharge from liability of the members of the board is viewed as one of the inalienable powers of the general meeting under Swiss company law. Discharge may hinder claims against directors even when such claims pertain to wilful misconduct, fraud or criminal offence, but does not eliminate liability towards third parties or under other bodies of law, such as criminal law.[147]

In *Greece*, discharge is possible and provides a release from liability for activities during the previous year, which means that the company can no longer claim damages from the board. The company is through the general meeting empowered to discharge the directors from liability. A discharge decision is binding for all shareholders of the company.[148] In *Luxembourg*, discharge can be granted to directors at the AGM.[149] The same is the case in *Portugal*, where resolutions on discharge from liability are possible.[150] According to Art. 74 of the Portuguese Commercial Companies Code (PCCC), the discharge has the effect of a waiver of the company's right to compensation only if the shareholders were expressly informed of the facts related to liability before the approval was granted. A special feature of the Portuguese regulation is that the effect of discharge as a waiver of claims is

144 Bulten & Kreileman (2017), *De dans ontspringen door decharge?*, 423. This is also stated in the provisions on best practice in 4.1.3 of the Dutch Corporate Governance Code 2022, see https://www.mccg.nl/publicaties/codes/2022/12/20/dutch-corporate-governance-code-2022.

145 Krauskopf, Sommer & Märki (2018), *Directors' & Officers' Liability in Switzerland*, 597.

146 Unanyants-Jackson (2008), *Directors' Liability Discharge Proposals – The Implications for Shareholders*, 35.

147 Unanyants-Jackson (2008), *Directors' Liability Discharge Proposals – The Implications for Shareholders*, 35.

148 Unanyants-Jackson (2008), *Directors' Liability Discharge Proposals – The Implications for Shareholders*, 24.

149 Unanyants-Jackson (2008), *Directors' Liability Discharge Proposals – The Implications for Shareholders*, 25.

150 Unanyants-Jackson (2008), *Directors' Liability Discharge Proposals – The Implications for Shareholders*, 29.

null if a minority of shareholders representing at least ten percent of the share capital vote against it.[151]

4.4 Summary

In summary, discharge resolutions exist in all Nordic countries and in several European countries. In some jurisdictions, a discharge decision limits the company's ability to take legal action against its management. In other European countries, discharge does not have a similar legal effect, but is nevertheless used as a way of confirming that the board has performed acceptably or to signal disapproval of the board's performance over the past year. The basic features of the discharge are that it is a matter that requires a decision by the general meeting, that it only addresses the liability of the board vis-à-vis the company and that the discharge is only retroactive, i.e., it only concerns the board's behaviour in the past.

The scope of discharge and the conditions for decision-making by the general meeting on these issues vary between jurisdictions and it has not been possible to analyse these differences and similarities in detail for all jurisdictions. The material scope of the discharge also differs between jurisdictions, and this issue will be addressed in greater detail in Chapter 8. However, the presentation shows clear support for the existence of discharge from liability in countries other than Sweden and indicates that the regulations of this issue have many similar features. The rights of minority shareholders are regulated differently in relation to discharge, in terms of both the requirements of a resolution and which shareholders are bound by the discharge. The existence and form of minority protection thus takes different forms in different legal systems.

[151] Unanyants-Jackson (2008), *Directors' Liability Discharge Proposals – The Implications for Shareholders*, 29.

5 Procedural Aspects

5.1 Introduction

In Swedish law, the rules on discharge are closely linked to the company's ability to bring an action against the board of directors. The effects of the outcome of a resolution on discharge are reflected in the rules in the CA concerning the possibility for the company – and in some cases the shareholders – to bring an action for damages. This raises certain procedural issues in the context of discharge.

If the general meeting decides to grant discharge from liability, this means that no action may be brought against the person in question, see Ch. 29 § 7 CA. This also means that an action for damages cannot be brought and must instead be *dismissed* from the courts.[152] Hence, a resolution on discharge from liability entails a procedural obstacle or hindrance.[153]

If the general meeting has decided not to grant discharge, or owners of at least ten percent of the shares have voted against the proposal, an action may be brought against the person in question for damages to the company within one year of the presentation of the annual report and auditor's report, see Ch. 29 § 10 CA. This will be discussed below in connection with minority action. Thus, a decision to sue for damages or to deny discharge is a procedural prerequisite, which is expressed in Ch. 29 § 7 CA.[154] The procedural prerequisite is such that it must be considered by the court *ex officio*, and the court must issue an injunction to the plaintiff before dismissing a dispute.[155]

[152] Sw. *avvisning*.
[153] Sw. *processhinder*. See further Lindblom (1974), *Processhinder*.
[154] See for example NJA 2009 p. 594 on the liability of company liquidator.
[155] See Ch. 34 § 1 of the Swedish Code of Judicial Procedure (Sw. *rättegångsbalken*, 1972:740) and NJA 2009 p. 594. It has long been discussed if the Swedish system with procedural hindrances should be abolished, see Bylund (1975), *Bör processhindren avskaffas?* 334ff. Similar rules on procedural hindrances are also found in bankruptcy proceedings, see Ch. 2 § 10 Bankruptcy Act (1987:672), and Heuman (2020), *Specialprocess*, 185.

The above implies that the resolution on discharge is of procedural significance, meaning that procedural aspects need to be taken into account when assessing the impact of a discharge decision on the liability of the board of directors, as well as those elements of the regulation that aim to ensure a right of action for others. The latter refers to the treatment of the company's action as well as the rules that recognise the right of certain shareholders (in Swedish law, a minority of shareholders holding a certain amount of the shares, either as a group or individually) to bring an action towards the board. These issues will be dealt with below and are related to the company's and the shareholders' actions against the board.

5.2 The Company's Claim for Damages – Competence and Legal Standing

In *Sweden*, the general meeting decides on the matter of the company's claim for damages towards the board.[156] This is also the case in *Norway*[157] and *Denmark*[158]. In *Finland*, decision-making concerning a claim for damages is regulated in Ch. 22 § 6 FCA. Decisions on matters concerning the right to damages are made by the board of directors under this provision. However, decisions on such matters can be made by the general meeting.

Hence, in the Nordic countries, the claim for damages towards the company is made by consent from the general meeting. This is also the case in most European countries. For example, in *Germany*, in public limited companies, § 147 AktG allows the company to bring an action for damages against a member of the *Aufsichtsrat* (supervisory board) or *Vorstand* (management board) following a resolution of the general meeting adopted by a simple majority.[159] In *Austria*, the rules on limited companies are similar; a

[156] See Ch. 29 § 7 CA.

[157] See § 17-3 NCA.

[158] See § 364 DCA. Danish law has previously been unclear as to the possibility for individual creditors to bring an action for damages alongside the bankruptcy estate. In the decision U 2014.1346 H (E-huset), the Danish Supreme Court held that such a claim is permitted if it relates to damages that have directly and individually affected an individual creditor.

[159] The main rule for private companies, GmbH, is that a company can bring an action for damages against management if a majority of the votes cast are in favour of a proposal for an action for damages, see Wagner & Klein (2018), *Directors' and Officers' Liability in Germany*, 195.

resolution of the shareholders approving a lawsuit against a company body is required.[160]

Only some systems allow minority shareholders, as a group or individually, to bring actions in their own name but on behalf of the company (a so-called minority action or derivative claim). In *the Netherlands*, claims for damages can be made by the company itself and derivative claims are not possible.[161] Damages caused to shareholders to the extent that the share value is diminished, i.e., derivative damage (*afgeleide schade*), are not honoured by the court, unless a shareholder can prove a violation of the relevant standard of care. Such a claim, which is not derivative (i.e., not based on the company's damage), could be based on either Art. 2:9 DCC or tort rules in Art. 6:162 DCC.[162] For the claim to be successful under the DCC, it is required that the shareholder can demonstrate a violation of a specific statutory provision that protects the interest of the shareholder that has been violated.[163]

5.3 Protection of Minority Shareholders and Discharge

The above presentation on the origin of the Swedish regulation on discharge shows that when this legal concept was introduced, no distinction was made between the procedural and substantial implications of a resolution on discharge. For example, in the 19th century, the Swedish scholar Hagströmer explained that any shareholder could claim compensation from the board of directors after the dissolution of the company, but that the discharge granted would limit the possibility of such a claim, i.e., it had a substantive meaning.[164]

The perception of granted discharge as a procedural hindrance, or as a matter of 'legal standing',[165] came about when the minority action was put into place.[166] This meant that a resolution to deny discharge would be seen

[160] Karollus & Riedler (2018), *Directors' and Officers' Liability in Austria*, 64.

[161] Wuisman & Wolf (2018), *Directors' and Officers' Liability in the Netherlands*, 330.

[162] Wuisman & Wolf (2018), *Directors' and Officers' Liability in the Netherlands*, 330.

[163] Cf. Wuisman & Wolf (2018), *Directors' and Officers' Liability in the Netherlands*, 331.

[164] See Hagströmer (1872), *Om aktiebolag enligt svensk rätt*, 246, who stated the following (translated to English): 'After the company has been dissolved, the individual shareholders shall not be prevented from claiming compensation from the board of directors, unless a discharge has been granted'.

[165] Sw. *talerätt*.

[166] Of course, this is difficult to separate from the fact that the minority protection rules, regarding the majority required for discharge, is debated. This matter is discussed in Chapter 9. However, the majority of shareholders voting for discharge does not have a substantial effect on the liability of the board (anymore), as there is still a claim against

as a procedural prerequisite for the company to make a claim for damages towards the board. The procedural concept of legal standing means the right to be a party to proceedings concerning the matter in question.[167] Lack of standing has the legal consequence that the action is dismissed *ex officio* under Ch. 34(1)(2) of the Code of Judicial Procedure. There are no general provisions on standing in the Code of Judicial Procedure, but this follows from rules in other legislation, such as the CA.

When the CA 1910 was introduced, certain provisions on minority protection were designed with a basis in two components: an influence on the substantive issue of liability and a right of action for the minority. This was at a time when legal standing as a procedural prerequisite was being developed in legal doctrine, and the possibility of bringing an action on behalf of someone else (as a form of agent) was separated from the question of how the company should proceed in the actual decision-making (the question of competence).[168] Presumably, the new 'right of action' (i.e., the minority action) meant that discharge could no longer be considered a substantive issue, as the company then would not be able to obtain damages 'via' the minority action. When creating a right of action for the minority, the substantive issue of liability also had to be left 'open' to the company; discharge therefore became a 'procedural prerequisite' for both the company and the minority.

In the next section, the possibility for minority shareholders to bring a claim towards the board (minority action) will be discussed in connection with discharge. A comparison will also be made with legal systems regarding the issue of legal standing and protection of minority shareholders in procedural aspects. This will reveal the link between the discharge regulation and

the board towards the company. On the other hand, if more than 9/10 of all shareholders vote in favour of discharge, this should lead to the elimination of the claim (in substance) and a procedural hindrance against an action before the court.

167 See Lindblom (1974), *Processhinder*, 171.

168 The right of action conferred on the minority can be characterised as a right of action concerning the legal position of another. There are situations in which the right of action is granted to a person who is not the subject of the legal relationship in question and in which that subject is not authorised at all, or only in conjunction with others, to assert the disputed interest in legal proceedings. Accordingly, Swedish doctrine usually uses the term 'right of action concerning the legal position of another', see Lindblom (1974), *Processhinder*, 191. This use and categorisation of different legal relationships as either substantive or procedural was originally developed in German law and received into Swedish law at about the time when the regulation of these issues in company law was first introduced, cf. Lindblom (1974), *Processhinder*, 194ff.

rules on minority protection providing a minority action. However, as will be explained below, minority actions and shareholders' 'derivative claims' exist in jurisdictions that do not allow discharge. This raises the question of whether a regulation on discharge is necessary to contribute to sound minority protection.

5.4 Minority Actions

According to Ch. 29 § 9 para. 1 CA, shareholders representing at least one tenth of all shares in the company in total may bring an action for damages against the company in their own name but on behalf of the company. Such a minority action for damages is called *actio pro socio*, referring to a kind of 'procedural commission'.[169] If a shareholder abandons the action after it has been brought, the remaining shareholders may nevertheless pursue it. Further, the minority that brings the action does not have to be the same as the one that voted against a discharge decision. Minority actions can be brought by several groups separately, and even if the board is bringing an action on behalf of the majority.[170] This solution is considered 'necessary to ensure that neither the majority nor different minority groups are able to prevent each other from acting in a way that each group considers appropriate'.[171] Pursuant to Ch. 29 § 9 para. 2 of the CA, the shareholder bringing the action is responsible for the costs of the proceedings but is entitled to compensation from the company for costs covered by what has benefited the company through the proceedings.[172]

[169] Sw. *processkommission*. See NJA 2002 p. 446, where the Supreme Court stated that the shareholder minority may bring an action if it holds at least one tenth of the shares in the company. The case concerned the application of Ch. 15 § 9 CA 1975. The legal text has subsequently been clarified through the addition in Ch. 29 § 9 CA, stating that the minority brings an action 'in its own name', see further Svernlöv, *Ansvarsfrihet* (2007), 294, Svernlöv (2022), *Ansvarsfrihet*, 167ff, and Lindskog (2021), *Något om actio pro socio och om processkommission i allmänhet*, 494ff.

[170] Samuelsson, *Aktiebolagslag* (2005:551), 29:9 Karnov (JUNO).

[171] See Samuelsson, *Aktiebolagslag* (2005:551), 29:9 Karnov (JUNO).

[172] This rule also has its origin in the CA 1910 and has been transferred largely unchanged to the current act. Most likely, the rule has played out its role as protection for the minority if the claim should succeed, as Ch. 18 § 1 of the Code of Judicial Procedure provides that the losing party bears full responsibility for costs in court. When the CA 1910 was enacted, the general rules on the allocation of the costs of the procedure stated that the obligation of a party to pay the other party's costs depended on the extent to which they, as the losing party, were to blame for the institution of proceedings. This view was based on the fact that the reimbursement of legal costs was considered to be a form of damages.

A particular question is whether the *actio pro socio* requires that owners of at least ten percent of the shares in the company have voted against a proposal for discharge from liability, or whether a minority action under Ch. 29 § 9 CA is possible even if discharge is granted. In the preparatory works to the CA 1975 and in the legal literature, the view is that the rules are only applicable in situations where at least ten percent have voted against discharge from liability.[173] In other words, a minority action is conditional on the general meeting having taken a position on a proposal for discharge. It can be said that the minority of shareholders thus prevents a 'fully effective' decision on discharge from liability through a minority action.[174] Although the wording in Ch. 29 § 9 CA does not state that a minority action requires that a minority consisting of at least ten percent of the shareholders has voted against a proposal for discharge from liability, a prerequisite for such an action is that the question of damages or, in the case of a board member and the CEO, the question of discharge from liability, has been dealt with at a general meeting.[175] However, the preparatory works to the CA 1975 state that the exception from granted discharge in the event of incorrect or omitted information does not require a decision by the general meeting if the minority wishes to bring an action for damages.[176]

The Swedish regulation on minority protection in connection with minority claims is similar to the regulation in other Nordic jurisdictions. However, there are some differences in connection with the proportion of shareholders needed to make a claim for damages towards the board and the requirements for such a claim in relation to a claim being made by the company itself.

In *Denmark*, an action is possible under § 364(3) DCA. If shareholders representing at least ten percent of the shareholders oppose a decision to discharge the board from liability or to waive the right to bring an action, *any shareholder* may bring an action requiring the liable party or parties to pay damages to the company. According to the second sentence of the same provision, shareholders are liable for the costs of such an action but may be

Instead, the current rules on costs relate primarily to the outcome of the proceedings. See further Fitger et al. (2024), *Rättegångsbalken*, Section 18:1.

[173] See the opinion of the Legislative Council in prop. 1975:103, 778ff and SOU 1971:15, 358ff. See further Svernlöv (2007), *Ansvarsfrihet*, 292.

[174] Andersson, Johansson & Skog (2024), *Aktiebolagslagen – en kommentar*, Section 29:7.2.

[175] Andersson, Johansson & Skog (2024), *Aktiebolagslagen – en kommentar*, Section 29:9.1.

[176] See prop. 1975:103, 780.

indemnified by the company to the extent that the costs are covered by the amount awarded to the company in the action.

In *Norway*, § 17-4 (1) NCA contains rules on claims on behalf of the company. According to the first sentence, if the general meeting has resolved to discharge the board from liability or to reject a claim for compensation under the NCA, shareholders representing at least one tenth of the share capital may make a claim for damages on behalf of the company and in the name of the company. In addition, according to the second sentence, if the company has 100 or more shareholders, the claim may also be brought by shareholders representing at least ten percent of the total number. If an action for damages has been brought, it can continue even if individual shareholders withdraw their action or dispose of their shares.

Thus, in Norwegian law, there is a special form of minority action, namely that in certain cases a minority can bring an action on behalf of the company and *in the name of the company*.[177] However, the shareholder bears the costs of the litigation according to § 17-4(3) NCA, but with the possibility of being reimbursed by the company for what has benefited the company in the process. There is one exception to the possibility of bringing an action in § 17-4(4) of the NCA, which states that the provision does not apply when the decision mentioned (on discharge from liability) has been taken by 'a majority as for amendment of the articles of association'. The same applies if a settlement has been reached. The minority's right of action is subsidiary to that of the company and presupposes that the company has decided not to bring proceedings or has decided to grant discharge.[178]

In *Finland*, shareholders have the right to bring an action in their own name on behalf of the company pursuant to Ch. 22 FCA (*actio pro socio*). This is regulated in Ch. 22 § 7, which states that this right is valid if, at the time the action is filed, it is likely that the company will not ensure that the claim for damages is pursued, and if 1) the plaintiffs then hold at least one tenth of all shares, or 2) it is shown that failure to pursue the claim for damages would be contrary to the principle of equality under Ch. 1 § 7 FCA. The same provision, Ch. 22 § 7 FCA, states that the company shall, unless it is clearly unnecessary, be given the opportunity to be heard in the matter. The shareholders bringing the action are themselves responsible for the costs

[177] Skjefstad & Strandberg (2017), *Directors' and Officers' Liability in Norway*, 416.
[178] Reiersen (2007), *Ansvarsbegrensning og ansvarsfrihet i aksjeselskaper*, 99.

of the proceedings but are entitled to have them reimbursed by the company if the funds obtained by the company through the proceedings are sufficient.

Furthermore, Ch. 22 § 7 FCA states that if the person liable for compensation has been discharged from liability by a decision of the general meeting, an action shall be brought within three months of the decision of the general meeting. If at the same general meeting, as provided for in Ch. 7 § 7, a motion for a special audit has been presented and supported at the same general meeting, the action may always be brought within three months of the presentation of the audit report to the general meeting or the rejection of the application for the appointment of an auditor.

Although it is not mandatory to address the issue of discharge in Denmark or Norway, a decision on the matter is an alternative prerequisite for the minority to bring an action for damages against the board. The prerequisites for such an action differ as to the possibilities of combining a minority action with an action by the majority. Even though discharge is perceived to be of less importance in Danish and Norwegian law, the concept has a special status in both countries, which also complicates the picture of the implications of discharge.

Several of the other European jurisdictions covered by this study contain minority actions but the requirements for such actions differ. The minority action must usually be brought by a shareholder or group of shareholders holding a certain proportion of the shares or acting within a certain period of time in connection with a resolution on discharge. There may also be substantial requirements on the claim itself, for the minority to be able to act.

Even in jurisdictions where a decision on discharge is not binding on the company, there are rules on minority actions. For example, in *Germany*, there is a possibility for minority actions in public companies, under certain circumstances. A court may, at the request of shareholders holding at least ten percent of the share capital or shares with a nominal value of at least EUR 1 million, grant them authorisation to participate in the action for damages through a representative.[179] In addition, a minority shareholder holding at least one percent of the shares in the company or shares with a nominal value of at least EUR 100.000 may also apply to the court to bring an action against a member of the executive body for damages to the company.[180] The action is brought in the shareholder' name but any proceeds earned are to

[179] See § 147 (2) AktG.
[180] See § 148 AktG.

be paid to the company.[181] This rule is described in the legal literature as the offspring of the US derivative suit.[182]

However, the German regulation requires that the shareholders making such a request have acquired the shares before becoming aware of the breach of duty in question. Furthermore, they must have informed the company of their plans, so that the company has had an opportunity to pursue an action. In addition, shareholders must present proof showing it likely that the member of the corporate body failed to fulfil their duties under the law or the articles of association. The shareholder must also show that the company had the opportunity to pursue an action. Lastly, the shareholder must show that the person who caused the damage acted with gross negligence in breach of the law or the articles of association and that the claim for damages is not manifestly contrary to the interests of the company. Hence, in order to pursue an action, there are several prerequisites that must be met, in addition to there being a shareholder with a certain proportion of shares.[183]

In *Austria*, minority shareholders of a private limited company are entitled to raise a claim themselves if a majority of shareholders have refused to approve a claim. If a minority claim is made, the minority shareholders act in their own name, on behalf of the company, which means that damages are paid to the company.[184] No such minority claim is possible in public limited companies, but minority shareholders may demand that a claim shall be raised by the company on the condition that the claims are not obviously without merit.[185]

In *France*, any breach of director duties which causes damage to the company can result in liability to the company, which can be asserted by the

[181] Wagner & Klein (2018), *Directors' and Officers' Liability in Germany*, 196.

[182] Wagner & Klein (2018), *Directors' and Officers' Liability in Germany*, 196.

[183] In private companies, according to § 50 GmbHG, ten percent of the shares are required for such an action to be brought. An individual shareholder, whose shareholding has not reached ten percent, may bring an action against the management on behalf of the company according to rules developed in case law (*actio pro socio*). Some special rules exist for group companies, where the parent company is an *Aktiengesellschaft*, allowing the parent company to bring an action against the management of the parent company under §§ 309 (4), 317 and 318 AktG. However, there is no equivalent to the derivative action in the GmbH. Hence, the *actio pro socio*, if it is defined as legal standing based solely on the claimant being a shareholder or owning certain proportion of the shares, exists almost exclusively for private companies (GmbH).

[184] Karollus & Riedler (2018), *Directors' and Officers' Liability in Austria*, 64.

[185] See § 134 Austrian AktG, see further Karollus & Riedler (2018), *Directors' and Officers' Liability in Austria*, 65.

company itself or, if the company does not act, by one or more shareholders on its behalf. They may act either individually or, if they represent a minimum percentage of its capital, as a group (a *ut singuli* claim).[186] A shareholder can on their own behalf assert liability against board members or executive officers only to the extent that the shareholder suffered damages separate from the damages suffered by the company. This means that the possibility of asserting liability against board members is similar to that of third parties in general, i.e., it has to concern acts committed outside the context of official duties. As discharge from liability does not affect the company's possibilities to sue the board, the minority action in French law is not connected to resolutions on discharge.

In *Spain*, the principles on director liability can give rise to corporate action for damages (Art. 238 LSC) and individual action for liability (Art. 241 LSC), which allows claims for the direct damage caused by the unlawful conduct of the directors towards third parties.[187] The main rule is that a resolution by the general meeting is required in order to bring an action for liability against the directors, but minority claims are possible (see Art. 239.1 LSC). In summary, in jurisdictions where discharge is possible but not binding upon the company, the possibilities of minority actions vary.

By contrast, minority actions are not always regulated in connection with discharge, even if discharge has the legal effect of restraining a company's ability to take action against its board. Thus, in the *Netherlands*, discharge is binding but there are no minority protection rules in connection with discharge resolutions. Neither is there a possibility for derivative action for minority shareholders in Dutch law.[188] Shareholders can sue directors and members of the supervisory board on their own behalf on the basis of tort (external liability).[189] As discharge is limited to a director's contractual internal liability towards the company, it cannot prevent the external liability to third parties.[190] This applies also to shareholders, which means that a shareholder can (under certain circumstances) sue a director with a basis in tort.[191] However, another way of 'impairing' the discharge decision is if the discharge resolution itself is challenged. As this is a resolution at the general meeting, it

186 Requirements differ for different types of companies.
187 del Olmo (2018), *Directors' and Officers' Liability in Spain*, 485.
188 Doorman & Timmerman (2002), *Rights of minority shareholders in the Netherlands*, 78.
189 Wuisman & Wolf (2018), *Directors' and Officers' Liability in the Netherlands*, 317.
190 Wuisman & Wolf (2018), *Directors' and Officers' Liability in the Netherlands*, 343.
191 Bulten & Kreileman (2017), *De dans ontspringen door decharge?*, 419, 437–438.

can be challenged by shareholders. In Dutch law, it could be possible to challenge the discharge resolution due to violation of reasonableness and fairness (see Art. 2:8 DCC).[192] Hence, a discharge resolution is voidable pursuant to Art. 2:15 (1)(b) DCC if the interests of the minority shareholders or other persons involved, who fall within the scope of Art. 2:8 DCC, have been disproportionately harmed. This may be the case if the discharge decision was made with abuse of majority power, for example.[193]

In *Switzerland*, discharge is effective only towards the company and the shareholders consenting to the resolution or later acquiring shares, with knowledge of the resolution.[194] According to Swiss law, the company, shareholders or creditors are entitled to file suits for performance to the company, and the consent of the general meeting is necessary if a lawsuit is directed against the board or management.[195] Shareholders that did not approve of discharge resolution have to file an action within six months after the resolution was adopted.[196] Hence, all shareholders that did not consent to the resolution on discharge have a possibility to take action regardless of the decision of the majority at the general meeting. This provides a strong protection for the minority shareholders, although there is a short limitation period for such a claim.

As already mentioned, the possibilities of minority actions and shareholders derivative claims are not necessarily connected to there being a regulation on discharge. This is especially clear in view of the possibilities of such claims in the UK and the US. In the *UK*, only the company can sue a director for negligence, default, breach of duty or breach of trust.[197] UK law provides some possibilities for minority shareholders to bring actions on behalf of the company. Under § 260 of the Companies Act 2006, it is possible for an individual shareholder to bring a derivative action.[198] Such an action can be brought against a director who has negligently failed to fulfil their duties to

[192] A director may not invoke discharge as a ground of release from liability if this is in breach of the principle of reasonableness and fairness (*redelijkheid en billijkheid*), which is assessed on the basis of all the relevant circumstances.

[193] Bulten & Kreileman (2017), *De dans ontspringen door decharge?*, 439.

[194] Unanyants-Jackson (2008), *Directors' Liability Discharge Proposals – The Implications for Shareholders*, 35.

[195] Krauskopf, Sommer & Märki (2018), *Directors' and Officers' Liability in Switzerland*, 608.

[196] Unanyants-Jackson (2008), *Directors' Liability Discharge Proposals – The Implications for Shareholders*, 35.

[197] Cabrelli & McAlpine (2018), *Directors' and Officers' Liability in the United Kingdom*, 715.

[198] Cabrelli & McAlpine (2018), *Directors' and Officers' Liability in the United Kingdom*, 715.

the company, if the criteria in §§ 263 or 268 are satisfied. If the shareholder is successful, the compensation or remedy will be of benefit to the company, rather than the shareholders themselves.

In the *US*, the derivative suit (or a derivative claim) is an action brought by a shareholder on behalf of a company, which is technically an action to compel the company to sue.[199] Initially, the company controls the decision to make a claim and the shareholder must make a demand to the board, which will initiate the litigation.[200] A shareholder may allege 'demand futility' and thereby prevent directors or controlling shareholders from blocking derivative suits that implicate them. There are substantial requirements of such a suit: the shareholder must show that demand would be futile or unavailing for the suit to go forward.

In summary, the differences regarding both the decision-making in connection with the company's claim for damages and the varying possibilities for shareholders to make claims on behalf of the company show that discharge is in some situations linked to the possibilities of company claims as well as shareholders claims for damages. However, this is not necessarily the case. The US derivate action shows this most clearly. In this context, it can be emphasised that the shareholders' right of action against the company is regarded as a way of inducing the company to act in the interests of the shareholders, which means that the time of their exercise of power is shifted in comparison with legal systems where the general meeting can decide on discharge from liability.

5.5 Summary

As can be seen from the above, the discharge from liability in Swedish law is perceived as a procedural rule; discharging the board from liability means that an action for damages must be dismissed by the court. This means that the court does not need to conduct a full examination of the validity of a claim for damages against the company's management in substance, which contributes to a brief court process.

Discharge from liability as a procedural rule is probably linked to the development of a right of action for the company and its minority shareholders and, based on the above, has probably been developed in light of the fact

[199] Kirshner (2018), *Directors' and Officers' Liability in the United States*, 755.
[200] Kirshner (2018), *Directors' and Officers' Liability in the United States*, 755.

that the legislator in Swedish law wanted to ensure that the minority had its own right of action and the right to bring action against the company if it opposed discharge. To avoid the majority shareholders using – or abusing – their power over the minority in this respect, the minority action was added as a means of protection. Hence, the minority protection also has a bearing on the decision of the general meeting to grant discharge.[201]

The comparative analysis shows that the question of the company's standing to bring a claim for damages is often linked to the decision of the general meeting to bring such an action, which is the case in Swedish law. In the case of a decision by the general meeting, there is generally a requirement that a majority of shareholders has voted in favour of such a decision. In addition, it is shown above that protection of minority shareholders is often provided for in the rules on discharge from liability, which has the same effect by enabling a minority action.

As discussed above, there are differences in the possibilities for minority actions, including requirements for a certain proportion of minority shareholders to bring an action. In some cases, even individual shareholders can do so. In jurisdictions where discharge does not affect the liability of the board, there are in some cases rules allowing minority shareholders to bring action against the management of the company.

To conclude, the possibility of a minority action should therefore be seen separately from the company's ability to discharge the board of directors, although it should be noted that the Swedish regulation of discharge from liability contains a component that makes a minority action possible. The fact that it is possible to decide on discharge is thus not necessary to recognise a right of action or minority protection for the minority. Nor is the reverse true, i.e., there does not have to be a right of action to protect the minority, even if there is a possibility of discharge. For example, it may be considerers as sufficient minority protection that the minority has the possibility to challenge certain decisions.

[201] The details of the development of the rules on the general meeting's decision-making in these situations, the majority requirement and how the board should deal with a majority voting in favour of discharge and a minority of shareholders voting against discharge are dealt with in Chapter 9.

6 The Liability of the Board of Directors

6.1 Introduction

The matter of board liability has become increasingly controversial in recent years. This study deals with the liability of the board of directors towards the company, and the link to the Swedish discharge regulation. Therefore, it is of importance to analyse the liability of the board of directors in Sweden. In Swedish company law, the provisions on the liability of the board, CEO and auditor were transferred largely unchanged from the CA 1975 to the current CA.[202] These provisions were in turn based on the former legislation – the rules on directors' liability can be traced back to the CA 1895. The fact that the board can be liable to the company was historically based on the view that the relationship between the shareholders and the board is like that between an assignee and an assigner[203] – the board should be liable for damages if it exceeds its authorisation or negligently causes damage to the company.[204]

A board member or CEO may be liable for damages caused negligently during the performance of his or her duties under Ch. 29 § 1 CA.[205] The regulation of discharge from liability is connected to the rules on liability for damages caused by directors and officers *vis-à-vis* the company.[206] The liability is based on a general duty of care towards the company, but also entails

202 See prop. 2004/05:85, 492. This is also in line with the Swedish Companies Committee's proposal, see SOU 2001:1, 401ff. Liability was previously regulated in Ch. 15 CA 1975.

203 Sw. *syssloman*.

204 See Hagströmer (1872), *Om aktiebolaget enligt svensk rätt*, 245ff.

205 The competence of the CEO is set out in Ch. 8 § 29 CA and Ch. 8 § 36 CA. The CEO shall handle the day-to-day administration, i.e., continuous management of the business, in accordance with the board's guidelines and instructions, see further Åhman (1997), *Behörighet och befogenhet i aktiebolagsrätten*, 568ff. The division of responsibilities between the board and the CEO will not be addressed in the following.

206 In legal literature, there have been some discussions on whether discharge can be granted for *de facto* or *shadow directors*, see, e.g., Dotevall (2017), *Bolagsledningens skadeståndsansvar*, 41ff. This issue will not be discussed further in the following.

several duties explicitly defined in the CA or other regulations. So-called *internal liability* refers to the board's liability towards the company.[207]

The damages provision is aimed at damage incurred to the company in the fulfilment of the directors' duties and is based on the *culpa* principle (negligence).[208] Under Swedish law, several other prerequisites must be met for a company to be able to claim damages. According to Ch. 29 § 1 CA, the damage must have occurred during the fulfilment of an assignment, a fact that is discussed below. In addition, the breach of duty must have caused a *legally relevant damage*, and there needs to be an *adequate causal link* between the conduct and the damage. It is important to note that the regulations on liability for the board describe a balance of interests and risks between the company and the board of directors. Hence, the possibility of claiming damages is limited through the regulation in the CA. If liability is established, there is a possibility to *adjust* the damages, according to Ch. 29 § 5 CA. Adjustment of liability, as a tool for limitation, is discussed in Chapter 7.

To some extent, the board may have an *external liability*, which refers to the liability towards shareholders and other third parties. For this to apply, the damage must be caused by a breach of the CA, the Annual Accounts Act (ACA) or the articles of association. Hence, the Swedish regulation makes it more difficult to establish liability directly against individual shareholders and external parties. In general, company law can be viewed as a regulation aimed at protecting a nexus of interests. Thus, company law contains rules aimed at protecting the interest of the company as well as the interest of other parties, such as shareholders and company creditors.[209] Although the concept of the company's interest might be debated, it is clear that the provisions on liability to a great extent channel losses through the company, and thus indirectly provide protection for other stakeholders.[210]

[207] See for example Taxell (2001), *Bolagsledningens ansvar*, 15, 51.

[208] Arvidsson & Dotevall (2023), *Shareholder Power and Sustainability in the Swedish Corporate Governance Model*, 293.

[209] Cf. Arvidsson (2022), *Law of Associations*, 325f.

[210] The purpose of the limited company is to make a profit for distribution among the shareholders, cf. Ch. 3 § 3 CA. The company's interest can therefore be defined as a 'profit interest' and this is the overall aim that the board should observe. However, the content of the company's interest is quite elusive. For example, one definition is that the interest of an association consists 'exhaustively of the interests of those who are members of the association at any given time', see Arvidsson (2014), *Associationsrättsligt samtycke och skadestånd*, 654. See further Dotevall (1989), *Skadeståndsansvar för styrelseledamot och verkställande direktör*, 357ff, Svernlöv (2022), *Ansvarsfrihet*, 28, and Skog (2015), *Om betydelsen av vinstsyftet i aktiebolagslagen*, 11.

Similarly, in several other European jurisdictions, the difference between internal and external liability is evident from the fact that there are typically stricter requirements for external parties to claim damages directly from the board, either for themselves or on behalf of the company. For example, in *Germany*, as far as shareholders' private property is concerned, § 93 (2) AktG is based on the principle of concentration of liability (*Haftungskonzentration*).[211] This means that breach of duty by a director triggers liability only towards the company, not towards third parties, including shareholders. This is based on the idea that the damages bring compensation to the company; the shareholders or creditors suffer no loss. Thus, it is not necessary to compensate third parties in addition to the company itself.[212] Directors may become liable towards third parties under general liability rules outside of company law, such as general contractual liability and tortious liability, but this is rare.[213]

In other legal systems, the distinction between internal and external liability is not as clear, at least not from the wording of the statutes. In some jurisdictions, the liability rules are similar regardless of which party is claiming damages from the board. However, the liability situations differ, depending on whether liability relates to obligations arising from the duties of a director or other tortious behaviour. For example, in *Spain*, liability under the general principles of company law is attributed to directors for negligence or wilful misconduct towards the company, its shareholders and creditors for the damage caused by violation of the law, the articles of association or the duties inherent to their position.[214] At first sight, therefore, liability appears to be the same irrespective of which entity is claiming damages, although the perception in Spanish law is that the standards of liability differ depending on if the liability relates to the company or third parties, such as shareholders.

In Swedish law, the assessment of negligence is done *individually* for each member of the board, even though the board makes decisions collectively. Individual liability means that courts, in assessing culpability, consider the

[211] Wagner & Klein (2018), *Directors' and Officers' Liability in Germany*, 171, 186–187.

[212] Wagner & Klein (2018), *Directors' and Officers' Liability in Germany*, 171.

[213] Wagner & Klein (2018), *Directors' and Officers' Liability in Germany*, 171. Similarly, in *Austrian* law, directors and members of the supervisory board are liable for all damage caused to the company by violation of their duties. Liability towards third parties, such as shareholders and creditors, is limited to certain cases, for breach of duties aimed at protecting third parties, see Karollus & Riedler (2018), *Directors' and Officers' Liability in Austria*, 32.

[214] See Art. 236 and 241 LSC and del Olmo (2018), *Directors' and Officers' Liability in Spain*, 484f.

actual division of labour between the members of the board.[215] This is the case in many other European jurisdictions as well.[216] In the US, it is unclear whether fiduciary liability should be assessed individually or collectively.[217]

If the board members are jointly and severally liable for damages, they have a right to recourse according to rules in general law of obligations. This would apply to other parties as well, such as auditors, who are liable for damages against the company. However, it is not possible for those responsible to base a claim on rules regarding damages in Ch. 29 of the CA.[218]

6.2 Duties and Due Diligence Standards

6.2.1 Standards of Care – a Comparative Perspective

The Swedish rules on the board's liability towards the company are similar to those in the other Nordic countries. In *Finland*, the liability of the board towards the company is governed by Ch. 22 § 1 of the FCA, which states that a member of the board of directors, supervisory board and the CEO shall compensate the company for damage which they have caused intentionally or negligently in their duties, contrary to the duty of care prescribed in Ch. 1 § 8. This refers only to liability towards the company. External liability towards third parties exists only if the board has acted in breach of the FCA or the articles of association.

Although the basic criteria in the FCA for internal liability are similar to those in the CA, there are some differences in details. The wording in the FCA on a presumption of negligence differs from that in the Swedish regulation. In the event of certain breaches of the FCA or a breach of the provisions of the articles of association, the damage is deemed to have been

[215] See SOU 1995:44, 243, with reference to the legal cases NJA 1936 p. 78 and NJA 1973 p. 587.

[216] Cf. Deakin & Riss (2018), *Directors' and Officers' Liability – Comparative Report*, 899. In *French* law, liability of board members can be joint, for example assessed against the entire board, or assessed only against individual board members. Clear opposition by a board member to a given board action can be an effective defence against liability. In *Spanish* law, directors are individually liable, but the liability is joint and several according to Art. 237 LSC.

[217] See further Ibrahim (2008), *Individual or Collective Liability for Corporate Directors*?, 929ff.

[218] In the Swedish Supreme Court case NJA 2017 p. 1101 (*Q-bolaget*), it was held that an auditor cannot be liable for damages under Ch. 29 § 2 of the CA against a board member due to deficiencies in the audit.

caused by negligence, unless the person responsible for the conduct proves that he or she has acted diligently.[219] Hence, under the FCA, the burden of proof concerning the question of negligence is more favourable for the injured party in certain cases. As the assessment of negligence is made in light of the circumstances in the individual case, it may lead to the same result in Swedish law in terms of liability. However, this shows that the designs of the laws are not identical.

In *Denmark*, founders and 'members of the management' are liable towards the company for damage incurred in the performance of their duties, if the damage is caused intentionally or through negligence.[220] According to the wording of the Danish legislation, an equally extensive external liability applies, i.e., liability towards shareholders or third parties.[221] In *Norway*, the internal and external liability are governed by the same provision.[222] The provision means that the company, shareholders or others can claim damages from the CEO, board members, members of the management or shareholders for damages caused intentionally or negligently.[223]

Thus, the wording implies a more far-reaching *external liability* in both Denmark and Norway, meaning that it is easier for third parties, such as shareholders, to make claims towards the board in these jurisdictions than it is in Sweden and Finland. This is to some extent connected to the regulation on damages for pure economic loss in general civil liability (tort liability), where Swedish law for historical reasons has been more restrictive.[224] Although the issue of external liability will not be addressed in detail, given the purpose of the study, there is reason to return to the Norwegian regula-

[219] The same applies to damage caused by a measure in favour of a person related to the company.

[220] § 361(1) DCA.

[221] See, with further references, Andersen (2024), *Aktie- og Anpartsselskabsret*, 543ff. Recent cases in Danish Supreme Court are for example U 2019.1907 (Capinordic), U 2020.3547 (Eik Bank), U 2023.945 (Roskilde Bank) and U 2023.1282 (Eik Bank II, anke).

[222] See § 17-1 NCA. Cf. Normann (1994), *Styremedlemmers erstatningsansvar i aksjeselskaper*, 69, and Aarbakke et al. (2023), *Aksjeloven og allmennaksjeloven*, 944ff with further references.

[223] In addition, there is a special contributory negligence rule in § 17-2(2) NCA, according to which it is possible to claim compensation from a person who has intentionally or negligently contributed to damage caused as described in the first paragraph. Compensation can be claimed from the contributor even if the primary injurer cannot be held liable because he or she has not acted intentionally or negligently. This issue will not be discussed further in this study. See further Aarbakke et al. (2023), *Aksjeloven og allmennaksjeloven*, 698ff.

[224] Cf. Kleineman (1987), *Ren förmögenhetsskada*, 106.

tion in particular when discussing the possibilities of limiting the liability of the board in various ways.[225]

A comparison can be made with the liability of the board in other legal systems. For example, in *Germany*, members of the management board are liable to the company if they fail to comply with their duties and the company suffers damage because of these actions.[226] This liability differs from general civil liability in two ways: the standard of care and the burden of proof – the latter meaning that the burden of proof is reversed, and breach of duty is presumed.[227] In *Austria*, the burden of proof falls on the directors and members of the supervisory board. Board members may be released from liability if they can prove that they have taken the care necessary. However, it is uncertain how this evidence rule should be interpreted and if and to what extent it deviates from general principles of civil liability.[228] Similar requirements concerning the scope of duties are applied in *Switzerland*, where the liability is based on a wilful or negligent breach of duties and an objectified standard of fault is assumed.[229]

Similarly, in *Spain*, negligence is presumed if an act is contrary to the law or the articles of association, which means that the director needs to prove that he or she was not negligent, which implies that the directors' liability regime is stricter than the general liability regime.[230] The standard of care is similar to that in general civil liability, in both contract and tort. However, it is adjusted to the professional status of the director (or standard of an 'orderly businessperson'), which means that it refers to the reasonable average professional.[231]

Thus, many of the jurisdictions mentioned provide support for the notion of a general *presumption of negligence*, albeit not concerning all harmful conduct of the board, only breach of specific duties. On the other hand, many jurisdictions express a more lenient assessment of the board's actions with regard to at least some harmful measures taken by the board. For example, in relation to the standards of care previously described in connection with Spanish law, it can be noted that the LSC establishes two general duties for directors: 'duty of good management' (Art. 235 LSC) and 'duty of loy-

[225] See further Section 7.2.1.
[226] § 93(2) AktG.
[227] Wagner & Klein (2018), *Directors' and Officers' Liability in Germany*, 164.
[228] Karollus & Riedler (2018), *Directors' and Officers' Liability in Austria*, 33.
[229] Krauskopf, Sommer & Märki (2018), *Directors' and Officers' Liability in Switzerland*, 570.
[230] See Art. 236(1) LSC and del Olmo (2018), *Directors' and Officers' Liability in Spain*, 486f.
[231] See Art. 225 LSC) and further del Olmo (2018), *Directors' and Officers' Liability in Spain*, 497.

alty' (Art. 227 LSC). However, in 2014, the legislator introduced a rule that meant that the board was given more room for *discretion in making business decisions*. Further, under Art. 236 LSC, the director is not forced to guarantee the *results* of his or her management, but is instead under a so-called 'obligation of means'.[232] According to Art. 226 LSC, if the director is acting in good faith, with no personal interest in the matter, with sufficient information and according to appropriate decision-making procedure, the conduct falls under the rule and does not give rise to liability. Basically, this is understood as a *business judgment rule* and means that those who make such decisions are only under an obligation to do so with due care.

Similar approaches to the need for discretion and leniency in the culpability assessment are found in other European jurisdictions. In the *Netherlands*, liability due to mismanagement can only be established if the director is severely held to blame, taking all relevant circumstances into consideration. This means that directors have discretion when it comes to risky business decisions. Hence, the threshold for liability is raised.[233] The diligence standards have developed through case law, taking several circumstances into account, and are objective standards for determining liability. If a director acts in breach of statutory provisions or the articles of association, it presumably gives rise to improper management and severe blame. If this is the case, in order to avoid liability, the director has to prove that the conduct did not harm the interests of the company.[234] However, if the claim is based on mismanagement by the director, the conduct must still be severely blameable.[235]

In the *UK*, general duties of the board are set out in §§ 171–177 of the Companies Act (CA) 2006 and are a codification of the duties owed by a director under common law.[236] These include the duty to exercise reasonable care, skill and diligence of a reasonably diligent person (§ 174), which is a

232 del Olmo (2018), *Directors' and Officers' Liability in Spain*, 491.

233 Wuisman & Wolf (2018), *Directors' and Officers' Liability in the Netherlands*, 318.

234 Wuisman & Wolf (2018), *Directors' and Officers' Liability in the Netherlands*, 318.

235 Cf. Wuisman & Wolf (2018), *Directors' and Officers' Liability in the Netherlands*, 319.

236 See § 170 CA 2006 and Cabrelli & McAlpine (2018), *Directors' and Officers' Liability in the United Kingdom*, 678. It can be noted that duties under common law and specific statutory provisions may also apply in this context, concurrently with the duties under the CA 2006. The remedies when a director has breached one of the general duties that is fiduciary in character are much broader than would be the case in contract or tort. For example, not only damages may be sought – an order for specific performance, injunctive relief and restitutionary remedies in equity are also possible, which differs from the general law of contract and tort, see Cabrelli & McAlpine (2018), *Directors' and Officers' Liability in the United Kingdom*, 675. As this study relates to damages, these differences in

measure containing both an objective and subjective test for diligence. There are also duties to promote the success of the company (§ 172) and to avoid conflicts of interest (§ 175); fiduciary duties considered to be concerned with the directors' loyalty towards the company.[237]

Similarly, in the *US*, the directors have a fiduciary relationship with the company and the shareholders of the company. This means that they must exercise good faith in carrying out their work and deal honestly and fairly with the company and on its behalf.[238] This duty is primarily towards the company, and a director can be liable for failure to act as well as acting improperly. In US law, the burden of proof is reversed if a claimant argues that a director has violated his or her fiduciary duty, which means that the fiduciary must establish that he or she acted properly.[239] However, if the board acts in accordance with the interest of the company, a bad business decisions cannot be reviewed by the courts, and liability cannot be imposed on the board of directors, in accordance with the 'business judgment rule' (BJR).

In conclusion, the liability in several of the jurisdictions compared is defined as a *presumption of negligence* for breaches of certain duties. There is at the same time a tendency in many jurisdictions to define the role of the board as based on a duty to act in the interest of the company, which to some extent may imply a more lenient assessment of board liability. This is probably influenced by the US 'business judgment rule'. As this study focuses on the regulation of discharge, it will not be possible to delve deeply into the details and differences in European adoption of the business judgment rule. The following sections in connection with the duties and due diligence standards will only to a minor extent deal with this matter, and then in particular from a Swedish perspective.

6.2.2 Starting Points for Assessing Liability

The liability of the board towards the company under Ch. 29 § 1 CA is based on the notion of negligence. When assessing negligence, or *culpa*, a compari-

English law concerning corporate liability and general civil liability will not be discussed in detail in the following.

237 Cabrelli & McAlpine (2018), *Directors' and Officers' Liability in the United Kingdom*, 676. This division of duties also has a bearing on the remedies that can be applied in the event of a breach, and it is only in the event of a breach of a fiduciary duty that the remedies other than damages may be applied, see further op. cit., 677.

238 Kirshner (2018), *Directors' and Officers' Liability in the United States*, 726.

239 Kirshner (2018), *Directors' and Officers' Liability in the United States*, 726.

son is made with how the board should have acted in a particular case.[240] The starting point for assessing the board's liability to the company is the care and loyalty required of a trustee or contractor in general. Applicable standards include the CA, the ACA and the articles of association. In addition, other regulations under which the board has obligations to the company are to be considered in this assessment. The 'subjective' side of negligence assessment usually focuses on personal circumstances.[241] However, it does not refer to the insights of individuals in a particular case. Rather, it is an objectified judgment of how a person in the situation at hand should have acted. In general, lack of knowledge is not considered an excuse for liability, but division of labour may affect the liability of individual board members.[242]

The duty of the board towards the company encompasses a duty to actively work to ensure that the company's purpose is fulfilled.[243] This implies that the board can be held accountable not only when it actively overrides the company's interest, but also if it is passive or does not do enough to ensure the protection of the company's interest.[244] The board is obliged to take protective measures against risks, not only refrain from actively causing harm.[245]

6.2.3 Specific Duties and Due Diligence Standards

A fundamental question in connection with the assessment of liability is whether there are specific duties to act in relation to the company and how this affects the due diligence standard. The duties of the 'company management' towards the company are expressed in a variety of ways and apply to the members of the board and the CEO to different extents. In the following, the duties of the board will be in focus.

The main duties of the board are described in Ch. 8 § 4 CA: to safeguard the company's organisation and the management of its affairs. The board is responsible for continuously assessing the company's financial situation and ensuring that the organisation is designed so that accounting, asset manage-

[240] SOU 1995:44 242f, Dotevall (1989), *Skadeståndsansvar för styrelseledamot och verkställande direktör*, 98ff, and Dotevall (2017), *Bolagsledningens skadeståndsansvar*, 2008, 60ff. Cf. Taxell (1963), *Ansvar och ansvarsfördelning i aktiebolag*, 66ff, and Normann (1994), *Styremedlemmers erstatningsansvar i aksjeselskaper*, 187ff.

[241] Dotevall (2017), *Bolagsledningens skadeståndsansvar*, 58.

[242] See Dotevall (2017), *Bolagsledningens skadeståndsansvar*, 59f.

[243] Cf. Sandström (2023), *Svensk aktiebolagsrätt*, 220.

[244] Cf. Sandström (2023), *Svensk aktiebolagsrätt*, 220 and 263–264, and 408.

[245] See Dotevall (1989), *Skadeståndsansvar för styrelseledamot och verkställande direktör*, 89–90.

ment and the company's financial circumstances are reviewed in a satisfactory manner. The board is responsible for reporting its management and the company's position, i.e., provide information through the annual report with income statement, balance sheet and management report. In addition, the board has a duty to monitor, or supervise, the company's operations.

Some of the duties of the board are aimed at protecting the shareholders or the public, if the shares are listed. If a specific duty is aimed at protecting both the company and external parties, a breach of this duty may still give rise to a claim for damages on the part of the company. For example, the general clause in Ch. 8 § 41 CA prohibits undue decisions or undue favouritism to the detriment of the company. This can be explained as a rule regulating conflicts of interest, meaning that it is prohibited to put one's other interests before those of the company. This also expresses the principle of equal treatment of shareholders. In the event of a breach of the general clauses, for example, both the company and individual shareholders may suffer damage. It is thus sometimes difficult in practice to distinguish the company's damage from the shareholder's damage, and both may be considered to have a claim for damages in a particular case. The difficulty with multiple damages is that the assessment of culpability differs depending on which party is bringing the action. However, it is likely that the board has different duties towards different actors in situations where a damaging event affects several parties at the same time.

Thus, the legislation – e.g., the CA but also other statutory provisions – may contain specific duties for the board. Specific duties to act, such as keeping accounting records in order and organising operations in an efficient manner through operating procedures, must have the purpose of protecting the damaged interest, in order for damages to potentially be awarded. In case of breach of such specific duties, negligence can more easily be considered, as there is a specific duty to act in a certain way, making the assessment of what the board *should have done* easier. This means that specific duties to act serve as a standard of comparison for what behaviour is diligent.[246] This is often understood as a presumption of negligence if specific duties are breached, though it requires that the interest harmed is intended to be protected by the specific duty breached. If, for example, a duty to organise procedures for the work of the board of directors is aimed at creating a well-functioning stock

[246] Ulfbeck (2021), *Erstatningsrechtlige grænseområder I*, 209f.

market in general, there is hardly a possibility for the company to claim damages on the basis that the board had duties of care towards the company.[247]

As will be discussed further in Section 7.2.4, the board is, in Swedish law, obliged to comply with the instructions given by the general meeting. However, the board must make an independent assessment of whether these decisions are compatible with legislation and articles of association. From a historical perspective, this was explained with the fact that the 'principals' of the board are the shareholders, not the general meeting, and the general instruction is contained in the articles of association. As that is the case, the general meeting cannot 'organise a measure' contrary to it. Hence, the board of directors is not entitled to 'blindly follow the instructions of the general meeting'. If the decision of the general meeting is contrary to the articles of association, the board of directors is obliged to 'refuse to participate'.[248] Although the basic assumption was, and still is, that it is the shareholders who ultimately decide on the company's activities, the rules nevertheless help to maintain a dichotomy between the interests of the shareholders and those of the company, giving precedence to legal rules and the articles of association in the governance of the company.[249]

There may be internal instructions in connection with specific measures, defining how the board should act. If this is the case, not all deviations result in liability, but measures that are contrary to or outside the business purpose give rise to liability.[250] Thus, the general duty to exercise care concerns the company purpose, and the interest of the company to make a profit.[251] This is in the interest of the company, as stipulated in Ch. 3 § 3 CA, but also in

[247] Cf. Ulfbeck (2021), *Erstatningsrechtlige grænseområder I*, 210.

[248] Hagströmer (1872), *Om aktiebolag enligt svensk* rätt, 243. How such a refusal to participate in board decisions would affect the boards responsibility in practice is uncertain, because the board in principle has a duty to participate in the board's work. However, a board member can make a reservation against a decision and should in such case ensure that the reservation is documented in the minutes of the board's meeting.

[249] This issue is too broad to be explored further in the following, but it is nevertheless an important starting point for understanding the assessment of liability in Swedish law in relation to the instructions of the general meeting.

[250] In the Danish court case U 2019.1907 H (Capinordic), the responsibility of the company management for payments of loans in violation of the company's internal guidelines was assessed. The Danish Supreme Court then stated that not every deviation from internal guidelines is grounds for liability for the board of directors. Liability presupposes that, after a concrete assessment in each individual case, it appears unjustifiable to deviate from one's own guidelines or to accept such a deviation, see Ulfbeck (2021), *Erstatningsrechtlige grænseområder I*, 210f.

[251] Skog (2015), *Om betydelsen av vinstsyftet i aktiebolagslagen*, SvJT 2015, 11–19.

the interest of the shareholders. The obligation of the board members to exercise care in relation to the profit interest means that any act or failure to act which was not motivated by this purpose is forbidden.

What has just been said makes it possible to understand the rules as meaning that the board has a *duty of loyalty* to the company, which means that the board must act in the interest of the company.[252] This duty of loyalty may be divided into several more specific duties for the board towards the company. For example, a member of the board is prohibited from carrying out competing business activities.[253] Rules on disqualification due to conflicts of interest are stipulated in Ch. 8 § 23 CA.[254] They entail, among other things, that a board member is prevented from handling contracts between the member and the company or contracts between the company and another company in which the member has a potential interest.[255] The duty of loyalty also entails a duty of confidentiality.[256] In light of what has been said above about the way in which breaches of such specific duties are assessed in Swedish law, i.e., that it is easier to establish negligence and thus impose liability, the function of the duty of loyalty can therefore be described as increasing liability in Swedish law. This is not necessarily different from the result reached in other situations, but it means that the assessment of liability is made from a slightly different starting point.

A comparison can be made with *German* law, where members of the board have a duty of loyalty towards the company. This includes for example the prohibition of competition between board members and the company and a duty of confidentiality.[257] According to § 93(1) AktG, members of the board are bound to apply the care of a diligent and conscientious businessperson in managing the company. The duty to apply care is measured by objective criteria.[258] However, the board enjoys a broad discretion regarding the management and administration of the company, including the power to take on serious risk, which is understood as a German equivalent to the US

[252] Cf. Sandström (2023), *Svensk aktiebolagsrätt*, 262. See further regarding the duty of loyalty in Swedish company law, Östberg (2016), *Styrelseledamöters lojalitetsplikt*, *passim*, and Munukka (2007), *Kontraktuell lojalitetsplikt*, 312ff.

[253] Sw. *konkurrensförbud*. See further Östberg (2016), *Styrelseledamöters lojalitetsplikt*, 210ff.

[254] Sw. *jäv*.

[255] Cf. Sandström (2023), *Svensk aktiebolagsrätt*, 262–263.

[256] Sw. *sekretess/tystnadsplikt*. See further Sandström (2023), *Svensk aktiebolagsrätt*, 264–265.

[257] See § 88 AktG and § 93(1) AktG. See further Wagner & Klein (2018), *Directors' and Officers' Liability in Germany*, 165.

[258] Wagner & Klein (2018), *Directors' and Officers' Liability in Germany*, 168.

business judgment rule.[259] According to this, directors cannot be held liable if three conditions are met: 1) the relevant action was a business decision, 2) the decision was made on a sufficient informational basis and 3) the decision was made in the interest of the company. The rule is supposed to reflect the developments in case law as well as the application of the business judgment rule in the US and the UK.[260]

The business judgment rule has also evolved in other European jurisdictions. In *Austria*, it was incorporated into legislation through an amendment in 2015.[261] Before that, similar principles had already been adopted in case law.[262] The rule means that if a director acted in good faith in a reasonable way, based on an informed and disinterested judgment, the duty of care is deemed not to be violated.[263] The rule only applies to business decisions, not to mandatory legal rules, such as prohibition of repayments or the allocation of competences.[264] In Austria, members of the board are obliged to apply the standard of care and diligence of a prudent businessman in their management of the company.[265] This is identified as an objective standard of care, as opposed to the subjective standard of care often used in tortious and contractual liability, based on individual responsibility, which is usually understood as a 'high standard of care'.[266] The incorporation of the business judgment rule implies that the high standard of care for directors and the supervisory board is lowered when it comes to business decisions. The need for the company bodies to use their discretionary judgment thus affects the standard of care in these cases, and this is related to the duty to act in good faith or in the interest of the company. In the following section, the development of a Swedish equivalent to the business judgment rule will be discussed.

6.2.4 Business Risks and Business Judgments

Running a business involves risk-taking and the limited company provides a vehicle for taking risks. This may be argued to place particularly high

[259] See § 93(1)(cl2) AktG. See further Wagner & Klein (2018), *Directors' and Officers' Liability in Germany*, 168.

[260] Wagner & Klein (2018), *Directors' and Officers' Liability in Germany*, 168.

[261] See § 84(1a) Austrian AktG and further Karollus & Riedler (2018), *Directors' and Officers' Liability in Austria*, 33.

[262] Karollus & Riedler (2018), *Directors' and Officers' Liability in Austria*, 33, 56.

[263] Karollus & Riedler (2018), *Directors' and Officers' Liability in Austria*, 33.

[264] Karollus & Riedler (2018), *Directors' and Officers' Liability in Austria*, 34.

[265] Karollus & Riedler (2018), *Directors' and Officers' Liability in Austria*, 35.

[266] Karollus & Riedler (2018), *Directors' and Officers' Liability in Austria*, 36–37.

demands on decision-makers. In addition, it sometimes creates a need for specific mechanisms to protect decision-makers from disproportionate liability. A particular question is whether there is an equivalent to the US *business judgment rule* in Swedish law, and if so, what significance it has for the liability concerning either individual business decisions or the general management of the company's affairs. The question relates mainly to the extent to which poor business judgments are a basis for liability and, above all, how a duty of care can be imposed on the board for business decisions that turn out to be unfavourable for the company.

In the *US*, the directors' duties are generally defined as the duties of care and loyalty. The duty of care requires directors to perform their functions with a minimum standard of care. Directors may not act negligently, mismanage the company or intentionally decide to commit unlawful acts.[267] Directors are generally protected from liability by the *business judgment rule*, which is a standard of judicial review for their decisions to the extent that these were independent, informed, made with due care and in the honest belief that the actions taken were in the company's best interest. Hence, the rule presupposes that the directors have satisfied their duty of loyalty to the company and restricts the operation of the duty of care.[268] In the absence of evidence to the contrary, the board's decision will be upheld, unless it cannot be attributed to any rational business purpose.

There are differences of opinion among Swedish legal scholars as to the existence of a Swedish equivalent to the business judgment rule.[269] The rule is not stated in the CA, nor has this concept been further developed in case law. The business judgment rule is sometimes defined as a kind of reverse presumption of fault or *culpa*, i.e., a presumption against *culpa*.[270] In fact, it

[267] Kirshner (2018), *Directors' and Officers' Liability in the United States*, 727.

[268] Cf. Kirshner (2018), *Directors' and Officers' Liability in the United States*, 728.

[269] In this context, it should be noted that there are differences of opinion among legal scholars as to what the *US rule* means. For example, Dotevall regards this as a liability rule, which governs the assessment of negligence in that only abnormal business actions lead to liability for damages, see Dotevall (2017), *Bolagsledningens skadeståndsansvar*, 90ff, but Andersson perceives it rather as a procedural rule, or a procedural prerequisite for pursuing an action for damages, see Andersson (2021), *Business judgement rule (BJR) och ansvarsfrihet i svensk rätt*, 42. Irrespective of whether the US rule is to be understood as a procedural or a substantive rule, it can be explained as entailing a *higher threshold for liability* when it comes to business decisions. See also Svernlöv (2020), *En svensk business judgment rule?*, 193ff.

[270] See e.g., Söderström (2019), *Skadeståndsanspråk mot ledande befattningshavare i banker – särskilt om culpaprövningen vid osunt risktagande*, 343–356.

intends to define a *higher threshold* for liability in particular situations.[271] In evaluation of the business *judgment* of individual members of the board, there is a need to take into consideration the large measure of discretion of the board in the decision-making process. The rule has been described as meaning that actions in the company's 'normal operations' that prove to cause damage do not result in liability for a member of the company management.[272]

Another definition is that it is based on a general principle of *verifiability*, and that this principle in the company setting would mean that the board is not liable if it has acted in good faith, with the care of a reasonable person and in the best interests of the company.[273] The main support for this view is the case NJA 2012 p. 858 (*Trollhotellen*), which concerned the application of the capital deficiency rules under Ch. 25 CA and the liability for board members who had taken office during the period of responsibility. According to the capital deficiency rules, a board member can avoid co-liability by showing that he or she has not been negligent.[274] The Supreme Court stated that an assessment of negligence in connection with the question of the deficiency rules should be based on an overall assessment of all conditions, whereby,

[271] In my opinion, it seems odd to define the rule as a presumption against negligence, since the usual rule of evidence in cases of negligent causation of damage is that the injured party has to prove negligence, and thus the starting point is that the tortfeasor has not been negligent.

[272] See Dotevall (2015), *Aktiebolagsrätt*, 315.

[273] This is referred to by Andersson (2021), *Business judgement rule (BJR) och ansvarsfrihet i svensk rätt*, 42, who discusses a speech of Lindskog during the Swedish Bar Association's conference, where Lindskog presented the opinion that the Swedish equivalent to the BJR concerns a requirement of verifiability and methodology. The speech was published in summary in the journal Advokaten (2017), see *Business judgement rule och principen om efterkontrollbarhet*, 36f. However, it can be emphasised that most of the cases Lindskog refers to in his presentation do not relate to directors' liability. Instead, they address the issue of duty of care in decision-making in general, which in his view should be formulated as a duty of 'best effort', not a duty to achieve a specific result. This is irrespective of whether liability is asserted in the company law context, e.g., it applies also to liability for public authorities or lawyers advising clients.

[274] If the board of directors has failed to act in the manner prescribed in Ch. 25 of the CA, there is what is usually called a presumption of negligence. However, this is referred to by the Supreme Court in the present case as a 'reversal of the burden of proof' and not a presumption of negligence, see NJA 2012 p. 858 (*Trollhotellen*), Sec. 20. Although I do not agree with the Supreme Court's choice of terminology, the distinction clarifies that the burden of proof may be on the alleged tortfeasor, while at the same time a higher threshold for negligence applies.

e.g., competence and division of labour between the board members may be important, in addition to the history in the company.[275]

In the *Trollhotellen* case, the Supreme Court stated that the assessment of negligence focuses on the question of whether the board member has, overall, acted justifiably in the situation that the company was in.[276] The difficult decisions that a board member in a company in crisis often has to make, justify a court's or other examiner's a relatively generous and sympathetic retrospective view of what should have been done and not done.[277] In addition, the Supreme Court stated that as long as the board member has fulfilled reasonable requirements in terms of 'staying informed and making a serious evaluation of the situation', there is rarely reason to question the conclusions that the board member arrived at.[278] Thus, the assessment of negligence is concerned with the basis of the decision and the investigations and measures to obtain information when the decision was made, rather than the 'result after the fact', even if it turns out that it was an unfavourable decision for the company.

If the director has fulfilled reasonable requirements for keeping him- or herself informed and making a serious evaluation of the situation, there is rarely any reason to question the positions taken. In the case, the Supreme Court stated that after the board members had joined the company's board, and within the time that could be requested, they took the adequate measures that could be demanded with regard to the capital shortfall in question. They had therefore not, in this respect, been negligent in their roles as board members in the company.[279]

Thus, liability for damages in the case of *business judgments* would relate to the *basis* for the decision in question, rather than its outcome. Hence, the assessment of negligence is not related to the possible harmful result, but rather to the conduct leading up to it. The goal of such a liability requirement is that the person will act with due care in the performance of his or her duties, not that he or she should be responsible for the achievement of the intended result.[280] In this respect, the liability for business judgments is no different from other *duties of care*, such as in the context of legal advice

[275] See NJA 2012 p. 858 (*Trollhotellen*), Sec. 21.
[276] See NJA 2012 p. 858 (*Trollhotellen*), Sec. 22.
[277] See NJA 2012 p. 858 (*Trollhotellen*), Sec. 22.
[278] See NJA 2012 p. 858 (*Trollhotellen*), Sec. 22.
[279] See NJA 2012 p. 858 (*Trollhotellen*), Sec. 32.
[280] Cf. Svernlöv (2020), *En svensk business judgment rule?*, 200f.

where a lawyer advises a client to carry out certain transactions or an agent carrying out a transaction with the client's authorisation and acting directly on behalf of the principal.

However, liability for poor business decisions and risk-taking at the company's expense does not apply to breaches of all obligations to the company. If behaviour in breach of the *general clauses* causes damage to the company or shareholders, the assessment of negligence is different. If a business decision involves an undue favouring of someone at the company's expense, there is reason to place higher demands on the board's diligence regarding the measure in question. In such cases, it is relevant to look at the person's behaviour in terms of preventing the undue advantage and the damage to the company. Although the ability of the board to prevent that harm – for example by putting into place checks of potential conflicts of interest and the effects of such decisions – constitutes a form of duty of care, the breach of the rules itself can serve as a starting point for the assessment of culpability. Here, there is a clear standard of behaviour for the board and breaches of that standard should give rise to liability for when harming the interest protected by the standard.

NJA 2016 p. 962 concerned the liability of the board members of an economic association for having decided to exclude several members from the association, even though there was no basis in the law of associations for that decision. The issue on which the exclusion decision was based was considered legally complex and legal expertise had been involved. The board members were not considered to have been negligent. The Supreme Court stated that several circumstances are to be considered when assessing negligence. One such circumstance is the care that the board takes to produce an *adequate basis for decision*.[281] If the exclusion issue is complicated and could have major repercussions for the member, more detailed considerations and special expertise may be required.[282] As the case concerned the external liability of the board towards the members of the association, it is uncertain if the same assessment would have been made if damages had been sought by the company. However, as the board took reasonable measures to prevent the damage by relying on expert advice, the assessment can be explained as an equivalent to the business judgment rule in this respect. Although the negligence standard is therefore seen as less strict, the Court in this case was not applying a 'presumption against liability' by assuming that there was

[281] See NJA 2016 p. 962, Sec. 22.

[282] NJA 2016 p. 962, Sec. 22.

adequate basis for the decision. Neither are there arguments related to the duty of loyalty or the interest of the association, since the case concerned the external liability towards the members.

In conclusion the perception of the responsibilities of the board of directors towards the company varies considerably between different legal systems. It has not been possible to examine these issues in detail above, but in view of the questioning of the discharge regulation, there is reason to place the regulation in the broader context of the liability of the board. Seen in combination with rules on discharge from liability, which exist in Swedish law, for example, but not in the UK or the US, the perception of its importance may reflect a national preconception of the content of the basic liability rules. In the context of the question of the right to damages to sanction misbehaviour on the part of the board (as a separate legal consequence alongside, for example, termination of office, repayment, non-receipt of severance pay), there are also several differences in comparison with other jurisdictions. In this respect, the directors' liability in different legal systems differs, as Swedish law contains rules on the directors' repayment obligation and liability towards the company, other than rules on damages.

A starting point for all legal systems discussed herein is that the board, within the scope of its mandate, acts at the risk of the company, which means that the board deals with the company's affairs and assets. In the case of commercially favourable decisions and prudent behaviour, it follows that the board is therefore free from liability. The threshold for shifting the cost of the damage to the board of directors varies depending on the nature of the action and the liability situation at hand. Although the developments in other European jurisdictions create a more complex picture of the business judgment rule and its possible implementation in Swedish law, it is uncertain whether the current assessment of board liability provides a greater protection from liability according to the BJR than is the case in current Swedish law. To my knowledge, the rule has been explicitly referred to only on a few occasions in lower instance courts and its application has not been developed further.[283] As stated above, precedents from the Supreme Court show that the assessment of liability is not necessarily specific to the company law context; although some cases concern other forms of liability in similar circumstances.

The analysis presented above shows that even though the starting point for the liability assessment differs, several components of the *business judg-*

[283] Cf. Svernlöv (2020), *En svensk business judgment rule?*, 201.

ment rule are found in Swedish law. On the other hand, there is no clear 'presumption against liability', in that the board's actions are assumed to be in the company's interest. In comparison to discharge from liability, where the company gives notice in advance on the issue of liability, there is also the element that the business judgment rule is applied only if an action for damages is being brought, which clearly indicates that the issue of the board's duties is decoupled from the owners' decision-making powers. In other words, influence, or control, may be shifted from decisions at the general meeting to court control and liability actions putting pressure on the board. These differences are important for proper understanding of the consequences and meaning of the discharge regulation in Swedish law. This will be discussed in further detail below in Chapter 8.

6.3 Responsibilities in Fulfilment of the Assignment

The requirement that the damage must have arisen in the *fulfilment of the assignment* means that the liability must be based on obligations arising from one's capacity as a board member or CEO. A common example of a situation where no liability is attributed according to the legislation is if there is some other kind of contract between an individual member and the company, e.g., a contract for the sale of goods. In such a case, the liability rules in the CA are not applicable. Instead, the liability is based on the rules of contract law that apply to the contract in question.[284]

The fact that the damage must have arisen during the fulfilment of the assignment means that actions outside the assignment do not necessarily give a right to compensation, at least not according to the CA. The *assignment* as a member of the board (or CEO) thus sets the framework for liability, meaning that actions outside the assignment are subject to other liability rules. Regarding damage arising outside the assignment, it may be noted that the general liability for pure economic loss is typically limited to certain

[284] A relationship between the company and the CEO may also give rise to a dispute arising from the employment contract, which may then be subject to special procedural rules, with disputes being decided by the Labour Court. See NJA 2022 p. 179 (*VD och arbetstvist*), where the Supreme Court stated that if the basis for action has a clear connection to the employment contract and for its assessment is legally relevant to the CEO's employment relationship, the Labour Disputes Act (1974:371) is applicable. If, on the other hand, the action is based entirely on the CEO's position of trust and responsibility as a supervisor, for example in matters relating to mismanagement of the accounts, this is not a labour dispute, and the existence of an employment contract has no independent significance.

qualified cases.[285] In addition, the assignment as board member can give rise to liability which in certain cases may go beyond the liability under company law, as illustrated above by the situation where there is another contract, e.g., for the sale of goods, between a board member and the company.

The fact that the damage must have been caused within the framework of the assignment does not mean that actions outside the assignment exclude liability. On the contrary, actions outside the competence of the board of directors and the CEO may entail liability to the company if they result in damage. Often, however, actions outside the mandate can lead to for example invalidity of a contract entered on behalf of the company. In such cases, the company is not bound by any legal action taken. However, if there is an abuse of authority, for example in decision-making, and the decision is implemented without the approval of the competent body, the damage may already have been done. In such cases, it is likely that liability for damages exists under Ch. 29 § 1 CA. This is probably also a common damage situation in practice, making of great importance to the company that liability can be claimed from the board member in such cases. Other rules may apply in the case of, for example, a contract for the sale of goods, where the contract stipulates that a board member may be liable according to legislative provisions specific to the sale of goods, for instance regarding payment and liability for defects.

6.4 Compensable Damages

In Sweden, there is no general definition of the concept of a 'damage'. The question of whether a loss constitutes a legally relevant damage is determined on a case-by-case basis when liability is asserted, depending on the nature of the injury or loss at hand. In the context of company law, a damage usually refers to pure economic loss, such as increased cost, loss of earnings or loss of value of a certain property.[286] The injured party has the burden of proof concerning the existence of a loss as well as its extent.[287]

[285] Cf. Ch. 2 § 2 Swedish Tort Liability Act (1972:207).

[286] Cf. Dotevall (1989), *Skadeståndsansvar för styrelseledamot och verkställande direktör*, 98ff and Svernlöv (2024), *Skada enligt 29 kap. ABL*, 353.

[287] In Swedish law, however, there is a procedural rule in Ch. 35 § 5 of the Code of Judicial Procedure, stating that if full evidence cannot be recovered or can be recovered only with difficulty, the court may estimate the damage at a reasonable amount. The same applies if provision of the evidence can be assumed to entail costs or inconveniences that are not

A damage has occurred if the loss is a fact.[288] However, in cases of losses that consist of the company having received a claim against it, it is probably sufficient that the claim against the company has been made and that it is not obviously without legal basis.

6.5 Proximate Causation and Protected Interests

To succeed with a claim for damages, the company must prove that there is a causal link between the conduct of the board and the damage incurred.[289] Also, there must be proximate causation between the damage and the board's conduct.[290] The board's conduct need not be the sole cause of the damage; it is sufficient that the board has contributed to the damage. In some instances, strict liability for certain conduct is a consequence of a breach of a certain duty. In Swedish tort law, liability for breaches of specific duties is strict in the sense that no negligent behaviour needs to be proven. Thus, the limit of liability is connected to the question of whether the norm that the injurer has breached is aimed at protecting the economic interests of the injured party. This so-called norm protection rule or 'protective purpose doctrine'[291] further delimits the scope of liability and compensatory damages and is also applicable in the company law context.[292] Norm protection is intended to clarify the limits of the damage that can be compensated in the event of a breach of one or more norms of conduct. It thus serves as a complement to the doctrine of proximate causation.

6.6 Summary

This chapter contains an analysis of the liability of a board towards its company in Sweden, in comparison with other jurisdictions. Most jurisdictions provide for a limited liability of the management, with the board's functions as an executive and decision-making body determining the framework of liability. Depending on the corporate governance model used and the organ-

reasonable in relation to the size of the damage and the claimed damages pertain to a smaller amount.

288 See Dotevall (2017), *Bolagsledningens skadeståndsansvar*, 54ff, and Svernlöv (2024), *Skada enligt 29 kap. ABL*, 348ff.

289 Cf. Dotevall (1989), *Skadeståndsansvar för styrelseledamot och verkställande direktör*, 94ff.

290 Sw. *adekvansläran*.

291 Sw. *skyddsändamålsläran*.

292 See NJA 2014 p. 272 (*BDO*).

isation of the board, the division of responsibilities takes different forms. Influenced by the US approach of the duty of care and the duty of loyalty, in some other jurisdictions an area has developed in which mismanagement by the board does not give rise to liability, as long as the board performs its basic duty of loyalty by using reasonable endeavours, being sufficiently informed and acts in the interests of the company. The liability assessment in such situations therefore tends to be viewed as more lenient.

It has been discussed above whether there is a Swedish equivalent to the business judgment rule. As stated above, the cases from the Swedish Supreme Court on this matter concern not only questions of board liability. Imposing a more lenient assessment in connection to decision-making would not necessarily constitute a specific rule in connection with 'business' judgments. Instead, the cases can be understood as providing general rules covering judgments made by, for example, legal advisors whose duties to their clients are based on a duty of best efforts, not a duty to achieve a specific result. This assessment may be in line with the business judgment rule, but it remains uncertain if specific parameters may further mitigate the liability solely because it relates to a director's liability towards the company.

Under Swedish law, the board of directors may be exempt from liability, even if it later turns out that a decision was bad for the company. If it facilitates the understanding of the board liability in Swedish company law to characterise this as a business judgment rule, then this is fully legitimate. The point of such a rule is that the court should not review the commerciality of decisions made, as these sometimes necessarily involve high risk-taking. Contrary to a general negligence assessment, it would mean that high risks do not lead to requirements for high damage prevention measures. In comparison, the discharge from liability has provided a practical solution for settling the liability issue at an early stage in many of these cases. This is because there is no need for the company to further investigate the issue of liability if discharge has been granted – and the only way to bring about such an examination is if there are circumstances that could form the basis for applying one of the exceptions to the discharge. The following chapter deals with the possible limitations and exclusions of the liability of the board.

7 Limitations of Board Liability

7.1 Introduction

A resolution to grant discharge is considered to release the board from liability towards the company, unless a specific exception is applicable. This means that the discharge is part of a comprehensive regulation concerning limitations of board liability. Because this is how discharge is perceived, there is reason to examine how the discharge from liability relates to other possibilities of limiting board liability. This is done in the following by comparing it to other legal strategies to limit board liability in Swedish law and in other jurisdictions. There are several legal strategies to limit liability. They can be considered to be either *ex-ante* or *ex-post* limitations, meaning that the limitation of liability takes place either before or after the damage has occurred. In some instances, the company's actions, for example a resolution in connection with a measure taken by the board, will take place at the same time as the damage. Thus, the *ex-ante* and *ex-post* distinction is not clear-cut, but it is used to simplify for the reader.

The structure of the following presentation first deals with the possibilities of *ex-ante* limitations of liability through different measures. The *ex-ante* limitations concern both what can be defined as contractual solutions, in specific agreements and in the articles of association, and questions relating to shareholders' consent and the company's own risk-taking in particular matters. Also, the possibility of contracts to indemnify the board will be analysed in comparison with the approaches to the matter in other legal systems. Further, the possibility of *ex-post* limitations – that is: the possibility of a waiver of claims and settlements between the company and the board – will be discussed, as well as rules on mitigation and adjustment of damages. Other matters that will be discussed are the *limitation period* for claims and the possibilities of *liability insurance*.

A particular matter in relation to the liability of the board is whether grounds for exemption from liability under general tort law can be invoked,

e.g., rules excluding liability based on the injured party's consent to the damage or rules on the adjustment of damages. This matter will be discussed in the following in connection with the question of consent. Other issues relating to the application of general civil liability will not be considered in detail.[293] The implications for limitations of board liability will be compared with possible limitations of general civil liability. The focus will be on exemption or limitation from liability for the future and the duties of the injured party, for example duty of diligence, duty to mitigate damages and time limits for liability, all of which are mechanisms that can be used to limit the liability of the board.

7.2 Starting Points for *Ex-ante* Limitations of Board Liability

7.2.1 The (Often) Mandatory Nature of Board Liability

In Sweden, the prevailing view is that it is not possible to change the scope and duties of the board or to *ex-ante* limit the board's liability towards the company. However, as will be discussed in the following, shareholder consent may in some cases affect the liability of the board. Although consent is possible in some respects, it is not possible, for example, to limit liability by contract – this is true even though the law does not directly state it. In other words, the liability rules according to Ch. 29 § 1 CA are mandatory.[294]

In most jurisdictions covered by this study, the possibility to alter the standard of care and scope of duties is restricted.[295] However, the nature and

[293] For example, a related matter is the application of the limitations of employee's liability according to Ch. 4 § 1 Tort Liability Act to board liability according to Ch. 29 § 1 CA. The prevailing view is that an employee's liability is limited under Ch. 4 § 1 of the Tort Liability Act only to the extent that it relates to work in the company that could have been entrusted to another employee of the company, whereas the liability of the board of directors is applied to such negligence that is related to the assignment of the board, see prop. 1972:5, 433, 564, and with further references, Dotevall (2017), *Bolagsledningens skadeståndsansvar*, 40. A similar question is if a board member is an employee of a parent company (i.e., a shareholder in a subsidiary). If he or she is to be regarded as carrying out board duties during the employment, this could mean that the parent company (shareholder) is liable according to Ch. 3 § 1 of the Tort Liability Act and the employee is only personally liable if there are exceptional reasons for this. These issues are not addressed in the following.

[294] See Dotevall (2017), *Bolagsledningens skadeståndsansvar*, 183, and Grönfors (1966), *Några synpunkter på tvingande rättsregler i civilrätten*, 204ff.

[295] Cf. Deakin & Riss (2018), *Directors' and Officers' Liability – Comparative Report*, 910.

scope of the possibilities of limiting the statutory liability of the board show large differences in these opportunities in terms of the detail of the rules. For example, in *German* law, directors' liability for damage cannot be limited or excluded. The board's duties are of mandatory nature and cannot be derogated by contract. However, as the law does not specify the content of these duties, they can be defined in more detail in the employment contracts of the individual directors.[296] This is also the prevailing view in *Austrian* law, and the duties may not be altered, at least not to the detriment of the company, by the articles of association, a shareholders' resolution or an individual contract between the company and the directors.[297] This includes adopting a standard of care expected of the board and its members or reducing the due diligence standard.[298]

In *French* law, limitations of the directors' liability through the articles of association are prohibited.[299] Most scholars of *Spanish* law are of the opinion that the general conditions for liability of the board are mandatory.[300] The reasons for this is not only related to private law, but also the wish to improve corporate governance and protect the interests of the creditors.[301] The liability regulation cannot be altered by the articles of associations or other instruments, such as internal regulations, management contracts or resolutions by the general meeting.[302]

A special feature in *Belgian* law is that the Belgian Code for Companies and Associations (BCCA) has introduced caps on director's liability.[303] The caps apply per fact or set of facts that can give rise to the liability and are independent of the number of claimants or defendants. The caps apply towards both the company and third parties, for contractual liability, tort liability, liability in case of wrongful continued trading and any other liability under the BCCA or any other laws and regulations. They do not cover all errors, for example fraud, intent to harm or the liability for unpaid corporate

[296] Wagner & Klein (2018), *Directors' and Officers' Liability in Germany*, 174.

[297] Karollus & Riedler (2018), *Directors' and Officers' Liability in Austria*, 45.

[298] Karollus & Riedler (2018), *Directors' and Officers' Liability in Austria*, 46.

[299] See Art. L225-253, Livre II, Titre II, of the French Code of Commerce, where it is explicitly provided that any clause in the memorandum and articles of association to the effect of making the exercise of any action subject to prior notice or the consent of the general meeting, or to waive the right to any such action in advance, shall be deemed non-existent. The same provision contains a prohibition on discharge.

[300] del Olmo (2018), *Directors' and Officers' Liability in Spain*, 505.

[301] del Olmo (2018), *Directors' and Officers' Liability in Spain*, 505.

[302] del Olmo (2018), *Directors' and Officers' Liability in Spain*, 506.

[303] See Art. 2:57 BCCA.

income tax. The liability of directors cannot be limited in advance beyond the liability caps included in law. Further, there is a prohibition on all mechanisms pursuant to which a company in advance exempts or exonerates its directors from liability towards both the company and/or third parties; such provisions are null and void.[304]

In the *Netherlands*, the general duties of the directors can be changed pursuant to the articles of association, and may be either limited or extended, though within a certain scope.[305] Exemptions or limitations of liability, for example by altering the standard of care expected of the board, are not possible.[306] In *Switzerland*, the possibilities of modifying the standard of care is subject to discussion and the matter is not settled. It is certain that the board of directors can delegate management tasks to one or several board members (managing directors) or to third persons (executive officers), which limits the liability of the delegating board.[307]

In the *UK*, it is not possible for the company to alter the scope and contents of the duties under §§ 171–177 CA 2006 by contract or through the company's articles of association. According to § 232(1) of the CA 2006, any provision that purports to exempt or limit the liability of a director that would otherwise be attributed to him or her in connection with negligence, default, breach of duty or breach of trust in relation to the company is void.[308]

In the *US*, it is not possible to change or alter the content and scope of the board's duties. In some cases, it is possible to alter the consequences of breach of duty, for example including provisions that reduce or eliminate

[304] See Article 2:58 BCCA.

[305] Wuisman & Wolf (2018), *Directors' and Officers' Liability in the Netherlands*, 333. If the articles of association are in violation of the law, *boni mores* (*goede zeden*) or the public order, they are not binding, according to Art. 3:40 DCC. Directors acting in violation of the law can be held liable for damages based on Art. 2:9 DCC (by the company) or Art. 6:162 (by the shareholders, the company and third parties), see op. cit., 335.

[306] Wuisman & Wolf (2018), *Directors' and Officers' Liability in the Netherlands*, 335.

[307] Krauskopf, Sommer & Märki (2018), *Directors' and Officers' Liability in Switzerland*, 584. However, this can only be done within the scope of Art. 716b Swiss Code of Obligations (CO). According to new provisions in the CO from 2023, Art. 716b I CO stipulates that unless otherwise provided for in the articles of association, the board of directors may delegate all or part of the management to one or more of its members or to third parties on the basis of organisational regulations. These organisational regulations must set out the terms of the management, determine the necessary positions, define the responsibilities and regulate the reporting obligations within the board of directors or between the management and the board of directors (Art. 716b III CO).

[308] Cabrelli & McAlpine (2018), *Directors' and Officers' Liability in the United Kingdom*, 699ff.

monetary damages resulting from a breach, although this does not affect the duty of care itself. The duty of loyalty and the consequences of breaches of this cannot be changed.[309] In Delaware, there is also a regulation on exculpation of officers, which will be discussed below in Section 7.2.2. In the US, the possibility of limiting or excluding liability can be defined based on three different tools. These are exculpation clauses, shareholder agreements and indemnification. A shareholder agreement will only limit the liability in special circumstances and is only possible for a company whose shares are not publicly traded.[310] Furthermore, the use of the business judgment rule also has the function of limiting the scope of liability for the directors within its application, thus reducing the due diligence standard.

A commonly used argument against *ex-ante* limitations of the board's liability is the protection of minority shareholders and creditors. In Sweden, Nial was one of the early critics of *ex-ante* limitations of liability through agreements or majority resolutions by the general meeting. He argued that such limitations (or 'prior discharge' as he called it) should not be allowed without 'the review which lies in the auditor examination and in allowing a certain period of time to elapse, during which the meaning and consequences of the act often becomes clearer'.[311] He referred here to § 92 in the Swedish CA 1944, in the light of suggestions made by Danish scholar Kobbernagel concerning the possibility of 'prior discharge' in Danish law.

According to the mentioned provision, the board of directors and other representatives could not comply with a decision by the general meeting manifestly contrary to the interests of the company. This rule, explained Nial, 'protects the minority of shareholders or individual shareholders against actions and decisions of the board; if the board acts with the *consent of all the shareholders* (and there is no violation of creditor protection rules), the board is not liable for damages'.[312] Hence, *ex-ante* limitations should only be valid with all shareholders' consent. According to Nial, the fact that the minority shareholders, in Danish law, could not prevent discharge or make a minority claim, did not constitute a sufficient reason to equate approval by a *majority* of shareholders at the general meeting with approval by *all* the company's shareholders. He considered this to be the case 'especially as a majority decision may be made by shareholders representing only a small proportion of

[309] Kirshner (2018), *Directors' and Officers' Liability in the United States*, 735.
[310] Kirshner (2018), *Directors' and Officers' Liability in the United States*, 737.
[311] Nial (1945), *Kobbernagel. Ledelse og Ansvar*, 630.
[312] Nial (1945), *Kobbernagel. Ledelse og Ansvar*, 630 (emphasis added).

the company's total number of shares'.[313] He was also critical of the idea that the management's liability for fault could be limited by contract between the company and the board (or by a clause in the articles of association).[314]

The fact that it is not possible to limit the liability of the board of directors towards the company beforehand (*ex-ante*) was, and still is, justified by the aim to protect not only the company, but also external third parties (such as shareholders), from the company taking on more risk in relation to the board of directors than what is prescribed by law. Hence, the interests of third parties are protected by the lack of possibility for the company to voluntarily assume all of the company's losses.

Therefore, it is also interesting to compare the approaches to contractual limitations and prior consent in Swedish law with the Norwegian solution. In *Norway* it is possible for the company to agree upon limitations of liability *ex-ante*. Under § 17-3 of the NCA, the general meeting (*generalforsamlingen*) has the competence to decide whether an action for damages shall be brought on behalf of the company against the liable parties and also if the company shall enter into a contract which regulates or limits the liability of a party under the NCA.[315] The provision in § 17-3(2) was introduced in 1997 and deals with *ex-ante* limitations of liability by contract.[316] The wording has given rise to questions of interpretation regarding the scope of application of other rules in Ch. 17 concerning board liability. For example, it is uncertain whether the minority action in § 17-4 and the exceptions from discharge due to wrong or omitted information in § 17-5 are applicable to such contracts.[317] The purpose of the legislation was to ensure that the general meeting has full control over the liability issue.[318] Before the introduction of the provision in 1997, it was possible to enter into a contract limiting the liability of the board, but the legislator wanted to clarify that making such contracts was exclusively within the competence of the general meeting.[319]

313 Nial (1945), *Kobbernagel. Ledelse og Ansvar*, 630.
314 Nial (1945), *Kobbernagel. Ledelse og Ansvar*, 630.
315 No. *forhåndsavtale*.
316 See further the discussions in Reiersen (2007), *Ansvarsbegrensning og ansvarsfrihet i aksjeselskaper*, 61ff.
317 Cf. Reiersen (2007), *Ansvarsbegrensning og ansvarsfrihet i aksjeselskaper*, 61.
318 Reiersen (2007), *Ansvarsbegrensning og ansvarsfrihet i aksjeselskaper*, 65.
319 See with further references Reiersen (2007), *Ansvarsbegrensning og ansvarsfrihet i aksjeselskaper*, 65. The contractual limitation of liability is connected to the competence of the general meeting to make claims for damages and the rules on board members' incapacity to participate in such decisions. Thus the competence of such contracts lies with the general meeting, see op. cit., 68–69. Other exceptions from modifications of the liability still

In conclusion, although the basic conditions are often similar as regards the possibilities of modifying the liability of the board, the above shows that the approach to the matter of *ex-ante* limitations of board liability does not follow the same model. This is shown particularly by the comparison to the Norwegian regulation on contractual limitations. In the following section, these different possibilities of *ex-ante* regulation of board liability through various measures will be discussed in greater detail.

7.2.2 Contractual Limitations and Exclusion from Liability

From a contractual perspective, the possibility of limiting a contracting party's liability is an expression of the risk regulation in the contract. In general, limitations or exemptions from liability are allowed under Swedish contract law, unless they are contrary to mandatory rules or general principles, or if a contract is unfair, leading to adjustment under § 36 of the Contracts Act.[320] This may for example be the case if the contracting party has acted with gross negligence, which may result in adjustment of terms limiting or excluding the party from liability.[321]

In general, a possible consequence of *ex-ante* limitations of liability by contract is negative impact on the deterrent effect of liability for damages.[322] However, there are arguments in favour of *ex-ante* limitations. For example, it can be argued that the liability should balance the interest of the company and the board in such a way that the board's freedom of action is not necessarily restricted. If the board feels that there is a high risk of being liable for damages, this can reduce the board's risk-taking. The possibility to limit the liability of the board may restore the balance.[323]

Less flexibility in this sense, i.e., by not allowing a company to alter liability contractually, may also by extension be detrimental to the company's operations, because the board does not take the business-related risks that it might otherwise have taken. From a general contractual perspective, con-

exist, for example a waiver of claims and limitations of liability (by shareholder decision) is invalid if the waiver is based on damage that was inflicted intentionally or by gross negligence, according to Norwegian Code 1687, § 5-1-2, see Skjefstad & Strandberg (2018), *Directors' and Officers' Liability in Norway*, 405.

320 Cf. Ramberg & Ramberg (2022), *Allmän avtalsrätt*, 218ff.

321 See NJA 2017 p. 113 (*Den övertagna överlåtelsebesiktningen*) and NJA 2022 p. 354 (*Skatterådgivarens ansvarsbegränsning*).

322 Reiersen (2007), *Ansvarsbegrensning og ansvarsfrihet i aksjeselskaper*, 52–53.

323 Reiersen (2007), *Ansvarsbegrensning og ansvarsfrihet i aksjeselskaper*, 53.

tractual limitations of liability for other professionals, such as lawyers and advisors, are common in both standard contracts and individually negotiated contracts, although the threshold for liability is often based on professional negligence in performance of a task. It can also be added that general exceptions to contractual limitations, such as possibilities to adjust limitation clauses due to gross negligence or under § 36 of the Contracts Act, mean that the risk of undermining the purpose of the compensation rules decreases.[324]

However, the contractual perspective on this issue centres around the scope and applicability of limitations of liability and does not deal with issues concerning the joint decision-making process for those affected by the contract, i.e., related to the fact that the company is considered an aggregate of the interests of all shareholders. Another feature of the company context that has a bearing on the company's ability to contract with the board is that company law aims at protecting other interests. This implies that the use of contractual solutions needs to consider the company law context.

Another way of balancing the interests of the company and the board is to design the liability prerequisites so that the board's business risk-taking is not prevented. It should also be noted that the possibilities for external parties, such as shareholders and creditors, to obtain compensation for damages directly from the board may vary between different jurisdictions. This means that the possibilities of contractual limitations vis-à-vis the company are not decisive for the possibility of shareholders to be compensated for their losses. This might be the case in Norwegian law, for example.

In the *US*, the Delaware state rules contain provisions on *exculpation* of directors.[325] The provision states that companies may have a clause on limitations of liability for board members in the articles of incorporation (or association). Since 2022, these rules also apply to the exculpation of *officers*, i.e., exculpation for other than the board of directors, in the event of a breach of fiduciary duties of care. This means that the company can exempt persons in the company from liability in advance, though this requires an amendment to the articles of incorporation. Such amendments have been made to a number of companies in Delaware.[326] It has also raised issues of minority protection and voting rules, in particular regarding shares with voting differences. To summarise, it is clear from the foregoing that there is

324 Reiersen (2007), *Ansvarsbegrensning og ansvarsfrihet i aksjeselskaper*, 53.

325 See § 102(b)(7) of the Delaware Corporate Code.

326 See Breheny, Land & Adams (2023), *Officer Exculpation Under Delaware Law – Encouraging Results in Year One*.

typically little scope for *ex-ante* limitation of liability in Swedish law, even in comparison with other legal systems, and that similar problems arise even for legal systems that do provide for such possibilities.

7.2.3 Indemnification Agreements

Beyond using contractual limitations or exclusions from liability, the company may sometimes want to protect the board from liability through indemnifications. Indemnification means that the company has an obligation to reimburse any damages that the board member or CEO has been ordered to pay an injured party. From a Swedish perspective, such indemnifications can be said to undermine the mandatory nature of the liability rules based on the arguments presented above and would therefore not be valid.[327] However, an indemnification in connection with liability towards third parties would be possible.[328]

The question of corporate indemnification has recently been discussed in *Denmark*, due to an increase in insurance premiums for liability (D&O) insurance. According to a statement of the Danish Business Authority in April 2023, it is possible to make a resolution regarding indemnification of the board of directors. This statement drew attention among legal practitioners, as it puts forward solutions concerning *ex-ante* limitation of liability.[329] This possibility does *not* apply to the company's own claims against the board, i.e., *internal* liability, and the Danish Business Authority stated that damage directly affecting the company is not covered. In *Norway*, indemni-

[327] Dotevall (2017), *Bolagsledningens skadeståndsansvar*, 184.

[328] Dotevall (2017), *Bolagsledningens skadeståndsansvar*, 186. Similarly, it would be possible for the board to enter into an agreement with the parent company or another company in the same group to reimburse the latter for damages it has to pay as a result of a minority shareholder bringing an action on behalf of the company, see op. cit., 185.

[329] See, e.g., *Skadesløsholdelse af ledelsen – ny guidance fra Erhvervsstyrelsen*, Retrieved from https://gorrissenfederspiel.com/skadesloesholdelse-af-ledelsen-ny-guidance-fra-erhvervsstyrelsen/#_ftn (04-05-2023, retrieved 31-10-2023), *Nye retningslinjer om skadesløsholdelse af ledelsen*, by Line Frøkjær, EY, https://www.ey.com/da_dk/law/nye-retningslinjer-om-skadeslosholdelse-af-ledelsen (23-05-2023, retrieved 31-10-2023), *Med ledelse følger ansvar: Ledelsens ansvar og afdækningsmetoder*, by Line Frøkjær Helsinghoff & Tina Aae Christiansen, EY, Retrieved from https://www.ey.com/da_dk/law/med-ledelse-folger-ansvar-ledelsens-ansvar-og-afdakningsmetoder (19-06-2023, retrieved 31-10-2023), and *Erhvervsstyrelsen har afgivet en vejledende udtalelse om skadesløsholdelse af ledelsesmedlemmer*, Retrieved from https://www.bechbruun.com/da/nyheder/2023/erhvervsstyrelsen-har-afgivet-en-vejledende-udtalelse-om-skadeslsholdelse-af-ledelsesmedlemmer (15-05-2023, retrieved 31-10-2023).

fication agreements for damages caused to third parties are possible, but not regulated in the NCA.[330]

The possibilities to indemnify the board varies in the European jurisdictions covered in this study, but the matter does not necessarily relate to the approach to discharge. For example, in *German* law – where discharge does not affect the liability of the board – an indemnification agreement to protect the directors against claims from the company is not valid because of the mandatory nature of the liability rules. The legislative purpose behind this is to deter directors from breaching their duties towards the company.[331] In *Austria*, the reasoning is similar.[332] In the *UK*, where discharge is not allowed, it is not possible for a director to be protected by the company, directly or indirectly, through an indemnity.[333]

In jurisdictions where discharge affects the board's liability towards the company, there are often limitations concerning the possibilities of indemnifications. For example, in the *Netherlands*, a company may indemnify directors against personal liability and claims invoked by third parties. However, such claims must be related to the performance of the duties as a director. It is not possible for the company to indemnify the director against liabilities based on breach of statutory duties towards the company itself.[334]

In *Switzerland*, there are different opinions in the legal literature regarding the possibility of modification of the standard of care.[335] However, the leading opinion supports the view that indemnification agreements between the company and the board are valid only in relation to negligent breaches of duty, and only if the company is not in a state of bankruptcy.[336] If the agreement violates mandatory provisions, it is void. Hence, only minor negligent breaches of duty can be excluded in advance.

In the *US*, apart from the exculpation provisions, indemnifications are also possible to some extent. According to Delaware Corporate Code § 145, indemnification of officers and other persons is possible, although such indemnification cannot result in relieving the person of liability towards the

[330] Skjefstad & Strandberg (2018), *Directors' and Officers' Liability in Norway*, 406.

[331] Cf. Wagner & Klein (2018), *Directors' and Officers' Liability in Germany*, 185.

[332] Karollus & Riedler (2018), *Directors' and Officers' Liability in Austria*, 46.

[333] Cabrelli & McAlpine (2018), *Directors' and Officers' Liability in the United Kingdom*, 699.

[334] Wuisman & Wolf (2018), *Directors' and Officers' Liability in the Netherlands*, 345.

[335] This is based on differences with regard to the legal nature of the liability for administration, business management and liquidation in Art. 754 and the following articles.

[336] Krauskopf, Sommer & Märki (2018), *Directors' and Officers' Liability in Switzerland*, 587f.

company or for improperly receiving a personal benefit if this was done wilfully or intentionally. Nor can the company indemnify a director who has breached the duty of loyalty.[337]

In conclusion, based on the above account of indemnification agreements and similar provisions in the articles of association, it appears that such clauses are permitted in several European jurisdictions, at least in respect of claims by third parties against the board of directors. However, it is also clear that the possibilities of such agreements are greater than the corresponding possibilities to completely exempt the board of directors from liability, i.e., to *ex-ante* limit liability in general, either by contract or by provisions in the articles of association. In several of the jurisdictions where discharge is not possible, including the US, there is instead a possibility of indemnification agreements between the board and the company.

7.2.4 Shareholder Consent and Instructions from the General Meeting

As previously mentioned in connection with the discussions of the mandatory nature of board liability, there are some possibilities in Swedish law to influence board responsibilities through 'shareholder consent'. This is based on the view that the general meeting is the supreme decision-making body of the company, that the board of directors has an obligation to follow instructions from the general meeting, and that the general meeting is in principle able to decide on the vast majority of the company's affairs. A distinction may be drawn between shareholder consent in relation to individual actions by the board which are harmful to the company, and consent to measures taken in general. The contractual limitations, if allowed, may prescribe general limitations or exemptions from liability. Prior shareholder consent, on the other hand, must relate to a specific measure taken or decision made by the board.[338]

In general, the board can avoid liability by obtaining the general meeting's consent for a particular measure.[339] The principle of consent is also recognised in Swedish general civil liability; if an injured party has consented to the damage, liability may generally be reduced or eliminated.[340] This is also

[337] Kirshner (2018), *Directors' and Officers' Liability in the United States*, 737.

[338] Arvidsson (2022), *Law of Associations*, 327.

[339] Dotevall (2017), *Bolagsledningens skadeståndsansvar*, 84.

[340] See generally on the injured party's consent and own risk-taking, Hellner & Radetzki (2023), *Skadeståndsrätt*, 116ff, and Agell (1962), *Samtycke och risktagande*, *passim*. On the question of adjustment in the case of contributory negligence, see Section 7.4.

the case if the injured party is deliberately taking a risk or is aware of the risk but acts in a way that triggers the risk or allows someone else to act in such a way. However, certain decisions that may be contrary to rules protecting individual shareholders or others, such as creditors, cannot be approved by a majority of shareholders at the general meeting with this effect.

If the general meeting has decided on a certain measure it does not mean that the board of directors is exempt from liability if the measure is implemented and subsequently proves to be detrimental to the company. The fact that the shareholders' meeting decided on the harmful measure is not always enough to avoid liability.[341] Thus, the *principle of consent* means that *all shareholders*, or equivalent members of any other association, must consent to decisions that are incompatible with ownership or membership protection standards.[342] The principle of consent also means that the consent of all makes it impossible to claim damages for the decision made. In Swedish company law, the principle is sometimes referred to as the 'SAS principle'.[343]

The principle of consent is dealt with, *inter alia*, in the case NJA 2013 p. 117 (*Kamelian*). The case concerned claims for damages against board members of an association of tenant owners, controlled by a property developer, which is sometimes called a 'builder's association of tenant owners'.[344] Although the case did not concern a limited company, it provides guidance for the general application of the principle. The case concerned a decision by the board, made with consent from all then-current members of the association, agreeing to an amendment to an existing works contract for the construction of garages without requesting any adjustment to the price of the works. The amendment was unfavourable to the association and, when its subsequent members (buyers of the flats) learned about the agreement, the association claimed damages corresponding to a price reduction in the construction contract. At the time of contracting, the association had been represented by three board members, who were interim members of the association and also the owners of the construction company. The Supreme

[341] Cf. Taxell (1963), *Ansvar och ansvarsfördelning i aktiebolag*, 22f, and Dotevall (2017), *Bolagsledningens skadeståndsansvar*, 98ff.

[342] See Arvidsson (2014), *Associationsrättsligt samtycke och skadestånd*, SvJT 2014, 653ff, who states the following: '*Membership protection norms* refer to norms that are exclusively aimed at satisfying the interests of those who at any given time are members of the association', op. cit., 653 (author's emphasis).

[343] Sw. *samtliga aktieägares samtycke*. See further Östberg (2020), *Svensk rättspraxis i associationsrätt 2011–2020*, 1129ff.

[344] Sw. *byggherreledd bostadsrättsförening*.

Court stated that the consent of all members of the association at the time the decision was made, meant that there was no liability for the members of the board, even if the decision was unfavourable to the association. Therefore, the claim was dismissed.[345]

The *principle of consent* thus means that it is possible for a company to consent to certain conduct by the board, and limit the liability of the board for breaches of certain duties. In the case, the Supreme Court stated that rules that aim to protect the members of an association against practices by the board or individual board members that are unfair either to the association or to individual members can be set aside if all members consent to the behaviour in question.[346] For example, minority protection rules may, given the purpose of the rules, be set aside. However, if a decision is contrary to a rule other than the rules for the protection of shareholders, consent does not mean that the decision by the board is authorised. The consent of all shareholders to a decision is limited to shareholder protection standards. This means that a decision can be unauthorised under company law, even if all shareholders agree, and thus the company's (or other's) right to damages is preserved.[347] In other words, shareholders cannot at all times dispose of the *association's* right to damages.[348]

It may also be added that the rules aimed at protecting the members of the association – or shareholders of a company – apply to current members as well as former members who may have a right under member protection standards even though they are no longer represented at the general meeting.[349] However, in the *Kamelian* case, the Supreme Court stated that the

[345] One of the judges in the Supreme Court (Edlund) in NJA 2013 p. 117 dissented and considered that the behaviour was contrary to the general clause in the Tenant-Owners' Rights Act (and the Economic Associations Act), and that it would be possible to make claims against the board despite the consent of all members.

[346] See NJA 2013 p. 117 (*Kamelian*), Sec. 14.

[347] Cf. Arvidsson (2014), *Associationsrättsligt samtycke och skadestånd*, 657ff.

[348] See Arvidsson (2014), *Associationsrättsligt samtycke och skadestånd*, 658.

[349] Cf. NJA 2021 p. 776, Sec. 19. The case concerned if the assignment as a special examiner could be terminated prematurely. In the legislation, those who were members at the time of the general meeting where the issue of appointing the special examiner was dealt with have the same right to receive the examination report as current members. The same applies to former members who have applied to the Swedish Companies Registration Office for the appointment of a special examiner. According to the Supreme Court, there should therefore be an agreement covering all members as well as these former members. Such an agreement cannot be replaced by a decision of the general meeting, regardless of who participates in the decision (and thus independent of the consent of all members).

consent of current members is binding upon subsequent members of the association. This means that the consent to a decision that is unfavourable to the association will provide a possibility of *ex-ante* limitations of liability (from the subsequent shareholders' perspective).

The question of whether the members may, by consent, dispose of the association's right to damages requires an assessment of how the interest of the association is constructed under the applicable law.[350] Hence, shareholders cannot dispose of the association's right to damages, because a distinction can be made between the individual and the corporate interests of the shareholders.[351] On the other hand, it is conceivable that the aggregate of the interests of individual members or shareholders can correspond entirely to the interest of the association.[352]

A related matter is whether it would be possible for all shareholders to agree to *ex-ante* discharge or limitation of liability, and if they thus can dispose of the company's right to damages. With regard to the time of consent, it seems as if this would be possible. However, the consent must, as mentioned above, relate to individually determined ('particularised') decisions. This means that consent cannot relate to the board's decision-making in general, e.g., the entire financial year or overall conduct of the board.[353] This means that if the general meeting were to consent to modifications of the standard of care, the lack of individuality and connection to a certain decision would cause the consent to be rejected and the measure to be considered unauthorised.

In comparison to the discharge regulation, which is a procedural rule, the issue of consent is assessed as a matter of substantive law. It can also be noted that in NJA 2013 p. 117 (*Kamelian*), the board had been granted discharge and the impact of that decision had also been called into question in the first instance court. The first instance court stated that the claim for damages could be brought even though discharge had been granted.[354] Hence, the

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This is the case because the general meeting does not have the competence to decide on the matter and thus lacks the competence to decide to terminate the assignment.

350 Arvidsson (2014), *Associationsrättsligt samtycke och skadestånd*, 658.

351 See Arvidsson (2014), *Associationsrättsligt samtycke och skadestånd*, 658.

352 Cf. Arvidsson (2014), *Associationsrättsligt samtycke och skadestånd*, 660–661, concerning the possibilities to restrict rather than redefine the 'interest of the association'.

353 Cf. Arvidsson (2014), *Associationsrättsligt samtycke och skadestånd*, 654.

354 The proceedings in the first instance court (the district court) were somewhat unusual and the issues of consent and discharge were dealt with simultaneously, through an intermediate judgment. This was because the board of directors had objected that the claim for

consent principle can provide a stronger protection from board liability than discharge in a particular case, although this requires a unanimous decision.

In *Norway*, much like in Swedish law, a *majority* of shareholders can give prior consent to a harmful act in a way that does not make the board liable for damages. However, there are different views on the interpretation of the effects of the 'prior consent' when it comes to the minority shareholders' possibility to claim damages. According to the Swedish scholar Dotevall, even given the consent of the general meeting (by a majority), a minority of the shareholders holding at least one tenth of the shares can still claim compensation on behalf of the company against the board.[355]

The Norwegian scholar Normann is of the opinion that (at least in Norwegian law) minority claims on behalf of the company are *not* possible where there is prior consent from a *majority* of shareholders. She argues that the rules on retrospective approval (i.e., discharge from liability) and the ten percent rule do *not* allow the minority to bring an action against the company in the case of *prior* consent. This is because the rules in the corresponding Norwegian regulation are procedural, i.e., rules on the right of minority action. They concern who can bring a claim on behalf of the company and thus apply to the company's loss, not the shareholders' loss. With the prior consent of the general meeting, the board's actions are deemed to be lawful against the company; there is therefore no basis for liability on part of the board.[356] From a Swedish perspective, it could therefore be argued that the substantive effect of prior consent is only given if *all* shareholders consent, and that this is based on the fact that the rules on minority protection in connection with discharge would otherwise be ineffective. It also means that the design of the discharge regime, and the '*ex-post* authorisation' it implies, has a bearing on the question of prior consent.

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damages should be dismissed (Sw. *ogillas*), based on both the fact that discharge had been granted and the consent of all members to the particular decision of the board. In the intermediate judgment from the district court, it was decided that the association's claim for damages could be asserted even though the board members had been discharged from liability for their management during the period in question at the association's AGM. In the proceedings in the Supreme Court, only the issue of consent of all members was considered, not the issue of discharge. Hence, the question of discharge was not brought to a head and if discharge had been considered granted, it should have led to the dismissal of the claim (Sw. *avvisning*), as granted discharge is a procedural hindrance.

[355] See Dotevall (2017), *Bolagsledningens skadeståndsansvar*, 85, see further Dotevall (1989), *Skadeståndsansvar för styrelseledamot och verkställande direktör*, 179, 182.

[356] See Normann (2000), *Bokanmeldelse: Rolf Dotevall, Bolagsledningens skadeståndsansvar*, 246.

In *Finland*, Ch. 22 § 9 FCA states that the provisions of the FCA are to some extent mandatory. According to Ch. 22 § 9(1), the articles of association may not limit the company's right to damages under the same chapter, if the damage has been caused by either 1) a violation of provisions from which deviations may not be made through the articles of association, or if the damage 2) has otherwise been caused wilfully or by gross negligence. Furthermore, under Ch. 22 § 9(2), the company's right to damages can only be limited by the *articles of association* with the *consent of all shareholders*. In Ch. 22 § 9(3), it is stated that the articles of association may not limit the right to damages or the right of action that a shareholder or other person has under the same chapter (or Ch. 10 § 9 of the Auditing Act). Much like in the Swedish regulation, limitations of the board liability therefore require the consent of all shareholders and cannot be based on a majority decision. On the other hand, this consent can relate to general limitations of the board liability and does not require consent from all shareholders in connection with specific conduct or activities and decisions of the board, as long as there is no violation of the provisions in the articles of association, or the damage is caused wilfully or by gross negligence.

The discussion thus far has centred on the decision-making process in the case of consent, which shareholders are bound by and which standards the shareholders can consent to a breach of with exonerating effect for the board. Another issue is the content of the shareholders' consent. This relates to the requirements on the content of a decision to consent to a certain action. The question is whether it is necessary for the general meeting to explicitly instruct the board to take action or if it is sufficient that the shareholders have knowledge about a particular measure or decision by the board. It would be going too far to discuss all these issues in this context. In general, it can be assumed that consent to a particular measure presupposes informed decision-making, where the general meeting has taken a concrete and clear position on a particular issue. The mere information by the board that a decision has been made, without the meeting taking a clear position on the matter, cannot be considered sufficient, even if all shareholders were present at the meeting or if it can be shown that all shareholders received the information. However, in such cases, as will be shown in Section 8.4.2, a decision to grant discharge based on information provided may be a procedural hindrance for the company to bring an action for damages against the board. This is the case because information of the measures taken can be considered to have

been provided to the general meeting and the so-called *information exception* cannot be applied.

In this context, a comparison can also be made with how the issue is treated in other legal systems. In *Germany*, it is possible for the general meeting to authorise the conduct of the management board, through a resolution.[357] However, if the supervisory board has authorised an apparently disadvantageous transaction, this does not exclude the director's obligation to pay compensation for damage to the company. Neither the shareholders' meeting nor the supervisory board is authorised to issue binding instructions to the management board.[358]

In *Austria*, it is also possible for the company to authorise conduct in a particular case. This can be done by ratification, meaning that shareholders can ratify conduct by a director through a majority resolution.[359] Such a resolution would require that the votes of the directors concerned or connected persons are excluded. Ratification only absolves the directors from liability towards the company, not third parties. In Austrian law, there is no obligation to pay compensation to the company if a course of action is based on a lawful resolution by the general meeting. A director can never be held liable for not adopting an illegal instruction, for example if an instruction from the general meeting is in violation of the law.[360]

In the *UK*, even though it is not possible to alter a director's liability through contract or provisions in the articles of association, it is possible for the company – via a simple majority vote of the shareholders – to pass a resolution under § 239 CA 2006, to ratify a director's breach and relieve that director of any liability for breach of duty. In such case, the company can no longer bring legal proceedings against the director.[361] The same applies to instructions to the board to implement certain management decisions, except in situations where the company is insolvent or insolvency is imminent.[362]

In Swedish law, it is also a generally accepted view that the general meeting's superior position over company management affects the board's respon-

[357] See § 93(4) AktG.

[358] Wagner & Klein (2018), *Directors' and Officers' Liability in Germany*, 180.

[359] Karollus & Riedler (2018), *Directors' and Officers' Liability in Austria*, 48–49.

[360] Karollus & Riedler (2018), *Directors' and Officers' Liability in Austria*, 34.

[361] Cabrelli & McAlpine (2018), *Directors' and Officers' Liability in the United Kingdom*, 699f, 703f.

[362] Cabrelli & McAlpine (2018), *Directors' and Officers' Liability in the United Kingdom*, 704f.

sibility. As the board has an obligation to follow instructions from the general meeting, this means that, as a starting point, the general meeting can reduce the board's room for manoeuvre through its instructions. However, an instruction given to the board of directors does not have to be followed if it would be detrimental to the company. This means that difficult questions of judgment may arise for the board when it is confronted with instructions from the general meeting that are harmful to the company. In the light of what has been presented above concerning the competence of the general meeting to limit the board's liability for damages through the behaviour of all shareholders, clear instructions on a specific issue can limit the board's liability, if it follows said instructions.

7.3 *Ex-post* Waiver of Claims and Settlements

A waiver of claims can be defined as a promise not to file liability claims against company directors. This can be done in a contract before the issue of liability has arisen (*ex-ante*). However, in this section, the matter will be discussed as an *ex-post* waiver of claims similar to a settlement. This can also be described as an indemnification, although the resolution on the matter must take place after the event. According to Ch. 29 § 8 CA, a settlement regarding liability for damages to the company may be reached only by the general meeting and only on condition that holders of at least one tenth of all shares in the company do not vote against the proposal for settlement. Thus, the provision is similar to the minority protection in the regulation of discharge.

In *German* law, the company may waive its right to claim damages from the management board after a delay of *three years* from when the claim arose.[363] The supervisory board has to represent the company in connection with such an agreement, but the waiver is only effective if the general meeting has approved it and only if no objection is raised in the minutes by a minority whose shares together amount to at least one tenth of the share capital.[364] The rules on waiver of claims thus mean that claims arising less than three years prior to the agreement are not affected by a settlement or waiver. As earlier explained, future claims can never be waived, due to the mandatory nature of the liability.

[363] See § 93(4) (cl 3) AktG.

[364] See § 112 AktG and § 93(4) (cl 3) AktG.

According to *Austrian* law, it is to some extent possible for a company to indemnify the directors against certain liabilities incurred to third parties.[365] Such an indemnification can only be made between the company and the respective director *ex-post*, i.e., after a fine has been imposed or liability was confirmed by court and a waiver of claims against a member of the management or supervisory board of a company is permissible only in very limited circumstances. Waivers and settlement agreements may only be concluded five years after the respective claim came into existence, and only if they are not blocked by a minority of shareholders, who hold at least twenty percent of the company's capital. The five-year-restriction does not apply if all the shareholders give their consent.[366]

Hence, the waiver of claims regulations in Germany and Austria shows similarities with the regulation of discharge, as it provides the opportunity to relieve the board from liability. However, in comparison to the Swedish discharge regulation, the requirements of such a resolution are very strict as regards both timing and the majority requirements.

7.4 Adjustment of Damages

If the board has acted in a way that gives rise to liability and the other requirements for liability are met, there may still be a possibility to adjust the damages. An adjustment means that the liability is reduced or completely cancelled. In Swedish company law, damages can be adjusted under Ch. 29 § 5 CA. According to this provision, the damages may be adjusted as is reasonable in view of the nature of the act, the size of the damage and the circumstances in general. Similar rules on adjustment of damages are found in Ch. 6 § 2 Tort Liability Act.[367] The rule on adjustment of damages is, according to the Supreme Court, applicable only as a 'last resort'.[368] This means that it is only in exceptional cases that the liability for damages can be adjusted and that the requirements for this to happen are high.

Adjustment of damages in view of the *nature of the act* is possible for example if a small degree of negligence leads to a great loss.[369] Also, the size of

365 Karollus & Riedler (2018), *Directors' and Officers' Liability in Austria*, 55.
366 See § 84(4) Austrian AktG.
367 Cf. NJA 2019 p. 978 (*Benchmark II*), Sec. 22. As the *company's* liability for damages is not regulated in the CA, the provision in Ch. 6 § 2 of the Tort Liability Act is applicable.
368 Cf. NJA 2019 p. 978 (*Benchmark II*), Sec. 22.
369 Cf. NJA 2019 p. 978 (*Benchmark II*), Sec. 23.

the damage in relation to the nature of the act may lead to an adjustment of the damages. Other circumstances in favour of adjusting the damages are if the injurer has no means to pay a large claim. In this assessment, it is also relevant whether the injurer has or should have had liability insurance covering the damage in question. If there is an insurance that covers the damage, this speaks against an adjustment and the possibility to adjust the damages is very limited, as the burden of paying the damages cannot be seen as unreasonable. However, if the insurance only covers damages up to a certain amount, it could be possible to adjust the damages to that level.[370] Only in cases where it would not be possible to insure liability at fair terms would this impossibility be taken into account.[371]

The economic situation of the injured party may also be taken into account. For example, if damages are of great importance to the injured party's livelihood or economy, this is an argument against adjustment. The possibility for the injured party, i.e., the company, to take out insurance is of no relevance.[372] A related matter is the relationship between the provisions on adjustment in the CA and adjustment of damages under general civil liability. The application of general civil liability rules is uncertain.[373] In the preparatory works to the CA 1975, it is stated that the rules on adjustment shall be applied exclusively.[374] It is uncertain exactly how much of this statement can be upheld, and this view is not maintained as far as the external liability of the company bodies is concerned.

Under rules on general civil liability, it is possible to adjust damages due to *contributory negligence* on the part of the injured party.[375] This could be the case if a third party causes damage to the company and the company is negligent in connection with the occurrence of the damage. In general, contributory negligence can also arise from the conduct of a person other than the injured party, by identifying or attributing the party with the actions

[370] Cf. NJA 2019 p. 978 (*Benchmark II*), Sec. 24.

[371] Cf. NJA 2019 p. 978 (*Benchmark II*), Sec. 24.

[372] Cf. NJA 2019 p. 978 (*Benchmark II*), Sec. 25.

[373] As mentioned in the introduction to this chapter, limitations of an employee's liability under Ch. 4 § 1 of the Tort Liability Act are applicable only to the extent that it relates to work in the company that could have been entrusted to another employee of the company, whereas the liability of the board of directors is applicable to negligence that is related to the assignment of the board. The same applies if the provision is used as a ground for *adjustment* of liability.

[374] See prop. 1975:103, 542f.

[375] See Ch. 6 § 1 Tort Liability Act and NJA 2006 p. 136.

of that other person. This is sometimes called *passive identification*.[376] The question in this situation is whether contributory negligence can be applied to the internal liability situation, and, if so, which company body should then be assessed as contributorily negligent in a manner attributable to the company. Similar provisions on adjustment of damages exist in the other Nordic countries.[377]

In matters relating to third party liability towards the company, actions of the board may be attributed to the company.[378] However, it is uncertain if this principle is applicable and how it should be interpreted in the relationship between the company and the board of directors. In the case NJA 2006 p. 136, an auditor in a limited company caused damage to the company during the fulfilment of the auditing assignment. The question was raised whether the damages could be adjusted due to contributory negligence on the part of the company. According to the Supreme Court, no adjustment due to contributory negligence should be made. Hence, the contributory negligence is most likely not applicable in a situation where only the company and the board are involved and the damage to the company has been

[376] Sw. *passiv identifikation*. See Bengtsson (1982), *Om jämkning av skadestånd*, 280ff, and Lindell-Frantz (2022), *Aktiebolagets organansvar i utomobligatoriska sammanhang*, 206. The issue of passive identification is usually separated from the question concerning the company's liability in tort for conduct by 'company bodies' in general.

[377] See Danish DCA § 363, Norwegian § 17-2 NCA, and Finnish Ch. 22 § 5 FCA. In Danish legal literature, it has been put forward that it is possible to adjust damages because of the company's contributory negligence, see Werlauff & Søgaard (2023), *Selskabsret*, 613f. The Norwegian provision contains similar assessment criteria as in Swedish and Danish company rules on adjustment, but adds a possibility to take into account the degree of fault on both sides, corresponding to the Swedish rule on contributory negligence in Ch. 6 § 1 of the Swedish Tort Liability Act. However, it is uncertain how these general principles of contributory negligence should be interpreted if the matter relates to the liability towards the company, especially with regard to the principle of passive identification. The question is for example not addressed in Normann (1994), *Styremedlemmers erstatningsansvar i aksjeselskaper*. The issue has been discussed in connection with liability for auditors, see Aasland (2014), *Passiv identifikasjon ved revisors erstatningsansvar*, who argues that the fact that the company and its shareholders are different legal entities suggests that there can be no passive identification, see op. cit., 84. However, she concludes that application of passive identification is uncertain. The Finnish provision contains a reference to the Finnish Tort Liability Act and the regulations of adjustment according to both the general rule in Ch. 2 § 1 and the rules on adjustment of damages due to contributory negligence in Ch. 6 § 1.

[378] See for example NJA 1998 p. 734. The Supreme Court stated that the liability of an auditor of a company towards a bank can be adjusted because of contributory negligence of the bank, although the damages were not adjusted in the particular case because of the way in which the amount claimed was calculated by the claimant.

caused by the board or a member of the board.[379] In such situations, it does not make a difference if several members of the board or management are involved in the occurrence of the damage.[380] If two or more members of the board cause damage to the company in the fulfilment of their assignment, it is instead the rules on adjustment in Ch. 29 § 5 CA that are applicable. In assessment of this, it is possible to consider the duties of each individual board member towards the company because of his or her position in the company and the degree and nature of their involvement.[381]

The discussion in Section 7.2.4 on the company's consent to certain measures or decisions by the board shows that there are similarities to general civil liability rules on assumption of risk or contributory negligence. However, it is clear from the discussion concerning ratification that the consent from the shareholders at the general meeting must be concrete and relate to a specific measure. Further, to relieve the board from liability, consent is required from all shareholders. Not even consent from all shareholders can release the board for breaches of all duties. This also suggests that implied consent, indicating 'risk acceptance' from shareholders is not sufficient for liability to be adjusted according to Ch. 29 § 5 CA.

Another general civil liability rule that limits the scope of damages is the *duty to mitigate losses*. This means that the injured party has a duty to mitigate the effects or financial loss of any damage suffered, at least to a certain degree. Although there may be such an obligation for the company, the extent of such a duty is uncertain.

In conclusion, company law regulations on the adjustment of liability for damages in Sweden are based on the same basic conditions and contain a similar discretionary assessment as is prescribed in the general law of civil

379 Cf. Nerep, Adestam & Samuelsson (2021), *Aktiebolagslag (2005:551) 29 kap. 5 §*, Lexino, Section 2.2.

380 NJA 2006 p. 136.

381 Cf. NJA 2006 p. 136. In connection with this possibility to adjust the liability for each individual party in accordance with their individual duties, it should be highlighted that the Supreme Court case concerned the liability of an auditor towards the company. This issue is discussed in Diamant (2006), *Högsta domstolen om jämkning av revisors skadeståndsskyldighet*, 171ff. Diamant argues that the liability of *auditors* is based on having breached obligations towards the company, and that the breach involves not reviewing the board's conduct in a sufficiently careful manner. As this is the case, the negligent conduct of the board would absolve the auditor from liability, even though it is the conduct of the board and the management of the company's affairs that is being audited, op. cit., 173. However, it should be possible to adjust the damages, especially in relation to the degree of negligence of individual members of the board, according to Ch. 29 § 5 CA.

liability. However, the scope to further delimit liability in the internal relationship between the company and the board in the light of general rules on damages, including rules on contributory negligence, is uncertain. It can be concluded that there are fewer possibilities for adjusting the damages in the company context. This also means that the question of the company's possible own risk-taking, consent and obligations to limit the damage seems to be inappropriate in this context. There is a lack of guiding case law in these issues and it is difficult to assess the importance of the rules of adjustment of damages as a way of limiting the board's responsibility and protecting the board from liability, but it can be reiterated that the adjustment of liability is only used as a last resort.

7.5 Limitation Period

The liability of the board is subject to certain time limits under the CA. According to Ch. 29 § 10 CA, a claim for damages must be filed against the board within one year, starting from the time when the annual report and the auditor's report for the financial year were presented at the AGM. The rules on limitation periods are substantive, i.e., a time limit expiring is not a procedural hindrance in a legal proceeding. The discharge resolution and the limitation period in the CA thus constitute two separate forms of time limitations of liability, providing protection from liability either from the time of the resolution on discharge or one year from the presentation of the reports to the AGM.

The limitation period in the CA is similar to the one prescribed in Ch. 18 § 9 of the Swedish Commercial Code, which stipulates a one-year limitation period starting from the final accounting of the assignment.[382] This regulation deviates from the general limitation period in Swedish law, which is ten years from the origin of the claim.[383] The historical origins of the regulation of discharge in Swedish company law show that it is not based on the limitation rule in Ch. 18 § 9 Commercial Code. However, the two regulations are based on similar considerations. The justifications for the limitation rule are, *inter alia*, that the parties' dealings should be settled within a short period of time and that the assignee should be able to feel safe from

[382] Sw. *Handelsbalken* (HB).

[383] See § 2 Act on Statutes of Limitation (1981:130).

unexpected claims arising from the assignment.[384] Similar justifications for the need for time limits on liability have been put forward regarding discharge, including that the discharge rules bring the question of liability to a 'swift and clear decision'.[385]

The limitation period also has a legislative connection with discharge in Ch. 29 § 11 CA, which stipulates an exception in case of failure to provide materially correct and complete information. Furthermore, the same exception for criminal conduct in Ch. 29 § 12 CA applies to both the time limit in Ch. 29 § 10 and a discharge resolution. Hence, the two provisions share similar justifications, though discharge takes effect immediately when the decision is made. Another major difference is that discharge is a matter for the general meeting to decide, and the limitation period is only relevant in cases where the general meeting has decided not to grant discharge. Regardless of if the exceptions from the time limitation are applicable, there are absolute time limits in Ch. 29 § 13 CA. These vary depending on several factors, for example the legal basis of the claim and who a claim is directed at. For actions against the board or the CEO, the limitation period is five years from the end of the financial year in which the decision or measures on which the claim is based were made or taken, according to Ch. 29 § 13 item 3 CA.

In conclusion, discharge has an impact on the time limits for enforcing liability and is connected to the limitation period regulation in the CA. Similar effects of limiting liability could be achieved by prior limitations, but a contractual time limitation other than the statutory regulation is not possible in Sweden. The above also shows that if the discharge regulation were to be removed, the board would be protected from claims by the one-year limitation period, which is a significant deviation from general limitation rules.

7.6 Liability Insurance (D&O Insurance)

In Swedish law, D&O liability insurance can be taken out to provide cover for the liability that the management may incur, including liability towards the company.[386] There is no prohibition in Swedish law against taking out

[384] Svernlöv (2022), *Ansvarsfrihet*, 37 with reference to Bengtsson (1976), *Särskilda avtalstyper I*, 166.

[385] See Svernlöv (2022), *Ansvarsfrihet*, 37 with references to SOU 1971:15, 357 and prop. 1975:103, 545.

[386] D&O insurance can be distinguished from what is known in the industry as Professional Indemnity (PI) insurance, which is a consultancy liability insurance used if the insured

liability insurance for the board or CEO. The matter is not regulated in the CA.[387] D&O insurance is not mandatory for the board or CEO.[388] If insurance is taken out, the company is usually the policyholder, and the board and CEO are insured.[389] This means that the policyholder can in some cases make a claim against the insured party.

D&O liability insurance is possible in all the Nordic countries.[390] However, there are different opinions in Danish legal literature concerning if insurance can be taken out by the board of directors or if the general meeting has exclusive competence on the matter of taking out liability insurance on behalf of the board.[391]

In other European jurisdictions, as well as in the *US*, insurance is allowed and there are no specific rules relating to D&O insurance in most of these countries.[392] In some jurisdictions, insurance matters are regulated, at least

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sells services of various kinds, see van der Sluijs (2013), *Professionsansvarsförsäkring*, 146. Insurance for the CEO and board of directors is sparsely dealt with in Swedish legal literature. van der Sluijs (2013) to some extent deals with insurance for the CEO and board members, see, e.g., 62ff, 73ff, 146ff, 260ff. See further Bergström (1996), *Försäkringsskydd för VD, styrelse och rådgivare*, 265ff, and Dotevall (2017), *Bolagsledningens skadeståndsansvar*, 181f.

387 See, however, the discussion in legal literature, e.g., Dotevall (1989), *Bolagsledningens skadeståndsansvar*, 149 with further references.

388 Liability insurance is compulsory for auditors, estate agents and insurance intermediaries. For lawyers, an insurance obligation follows from membership of the Swedish Bar Association, see van der Sluijs (2013), *Professionsansvarsförsäkring*, 69. The compulsory insurance for members of the Bar Association covers the insured's liability for external board representation. In the report SOU 1995:44, the Swedish Limited Companies Committee discussed the introduction of an insurance obligation, but concluded that compulsory insurance should not be introduced, partly because it risked hampering the preventive effect of damages. Therefore, no such proposal was made, see SOU 1995:44, 243 and prop. 1997/98:99, 189f.

389 Cf. the definitions in 1:1 Insurance Contracts Act (Sw. *försäkringsavtalslagen*, FAL, 2005:104).

390 See, regarding these issues in Norway, Viga-Gerhardsen (2011), *Styreansvar og forsikring*, 19ff, and Denmark, Stubkjær Andersen (2001), *Forsikring af bestyrelsesansvar*, *passim*, Fode (2011), *Ledningsansvar og forsikring*, 19ff, Fode, (2022), *Ledelsesansvar og ansvarsbegrensninger*, *passim*, Stubkjær Andersen, & Werlauff (2020), *Ansvarsforsikring af bestyrelse og direktion*, *passim*, Birkemose & Sørensen (2021), *Ledelsesansvarsforsikringer – en undersøkelse af deres anvendelse og selskabsretlige implikationer*, ET.2021.173.

391 The former view is presented by Stubkjær Andersen & Werlauff (2020), *Ansvarsforsikring af bestyrelse og direktion*, 24, and Fode (2022), *Ledelsesansvar og ansvarsbegrænsninger*, 228, and the latter view is presented by Birkemose & Sørensen (2021), *Ledelsesansvarsforsikringer – en undersøkelse af deres anvendelse og selskabsretlige implikationer*, ET.2021.173.

392 See Deakin & Riss (2018), *Comparative Report*, 954.

to some extent. In Germany, where insurance is possible, § 93(2)(3) AktG, prescribes a deductible on insurance compensation. If a company takes out insurance to cover a management board member against risks arising from the professional activities for the company, a deductible of at least ten percent of the loss up to at least one and a half times the fixed annual remuneration of the member must be provided. There is no legal obligation for a company to take out D&O insurance.[393] However, a board member is allowed to take out personal insurance in the amount of the deductible.[394]

Considering that insurance of board liability is allowed and commonly used in most jurisdictions, it can be concluded that this is viewed as a tool for limiting the liability for the board towards the company. However, it is uncertain what implications insurance – if viewed in that light – has in relation to corporate governance when the company is the policyholder. It can be noted that questions regarding the scope of D&O insurance are influenced by the fact that several parties are involved, and that this can create conflicts of interests of relevance to rights and obligations under the insurance contract. How these conflicts are resolved is a matter of insurance contract law and is primarily decided by the insurance policies. The details of these policies cannot be discussed further here.

7.7 Summary

This section has dealt with the possibilities for limiting the liability of the board, by means other than discharge, in Swedish law. These limitations have been compared to the possible limitations of liability in other legal systems. It has been shown that the rules governing the liability of the board of directors towards the company are often *mandatory* in the sense that it is not possible to change or modify the scope of the duties of the board in advance. This means that the company cannot reduce the directors' liability towards the company through a contract or provisions in the articles of association. The purpose of this is to protect both the company, its shareholders and other

[393] Wagner & Klein (2018), *Directors' and Officers' Liability in Germany*, 197. In contrast to the rules in Germany, the Austrian AktG does not require a deductible to be borne by the individual board member, see Karollus & Riedler (2018), *Directors' and Officers' Liability in Austria*, 67. In the UK, although indemnities are invalid, D&O insurance is often possible in respect of liability for breach of statutory duties, Cabrelli & McAlpine (2018), *Directors' and Officers' Liability in the United Kingdom*, 699, 716ff.

[394] Wagner & Klein (2018), *Directors' and Officers' Liability in Germany*, 197.

stakeholders from being deprived of the possibility to claim liability against the board. Restrictions on the ability of shareholders to make commitments refer to *ex-ante* limitations of the board's liability. In this respect, the rules are not uniform; there are differences also between the Nordic countries, whose corporate governance models are otherwise so similar that they are regarded as a common Nordic model. An example was presented in the differences between Swedish and Norwegian law.

Several jurisdictions provide a possibility for the company to agree to limit the liability of the board *ex-post*, e.g., by settling or waiving a claim. This may be provided in statutory regulations, which in that case often contain protection mechanisms for other parties, such as minority shareholders. As stated above, the mandatory nature of the liability for the directors towards the company is therefore also about protecting the company's counterparties and external parties, such as creditors and shareholders, from the company bearing too much the company's losses because of the board's risk-taking on behalf of the company. Thus, not all of the company's losses should be 'internalised' to the company. In Swedish law, the consent of all shareholders to a specific measure may lead to the dissolution of a claim for damages, at least for certain breaches against the CA. From the afore-mentioned principle of all shareholders' consent, it follows that decisions under company law that violate shareholder protection norms – i.e., norms that are exclusively intended to protect the shareholders – are permitted.

A further possibility is indemnification agreements, whereby the company undertakes to indemnify the board against any liability. This concept is not particularly developed in Swedish law, and the possibilities for such provisions are uncertain. The discussion in Danish law, where such provisions have been introduced with regard to claims from third parties, means that if such a possibility exists, it can hardly be considered to cover the company's claims for damages.

The analysis also shows that general civil liability rules can only to some extent be transferred to the company law setting. In Swedish law, rules on the adjustment of liability for damages are only relevant in exceptional cases. However, the prevailing practice in Swedish companies, which involves insurance protecting the board from liability also towards the company, seems to contradict the view that it is not possible to limit the liability of the board, as the effects of a liability insurance is normally that the injurer does not have to bear the cost of the damage. However, it is uncertain to what extent the

compensation for company losses through insurance is of importance for the board's incentives and whether it has any effect that is of significance in the governance of the company.

8 The Scope and Effects of Discharge Resolutions

8.1 Introduction

In this chapter the Swedish regulation of discharge is discussed in greater detail, with regard to its content, scope and the legal effects on the liability of the board of directors towards the company. The presentation begins with a brief discussion of the legal entities that can be exempted from liability through discharge and who is bound by a discharge resolution. It subsequently deals with the damaging acts against the company that the general meeting can decide on and the potential exceptions to the discharge granted. The regulation is compared with what has emerged above, on the conditions and limits of the directors' liability to the company. Suggestions are made regarding how to characterise the significance of the discharge resolution. This is done in light of the question of whether it is to be regarded as a 'complete discharge' from liability or merely a time limit on liability or if it is similar to limitations, exemptions and waivers.

The consequences of not granting discharge and the implications of discharge in practice are also discussed, as well as the possibilities of changing or revoking a discharge resolution. Comparisons are made with other jurisdictions that contain provisions on discharge by resolution of the general meeting, irrespective of whether or not the issue of discharge is a mandatory item on the agenda of the AGM. The purpose of the comparison is to highlight similarities and differences in the content of the discharge and, in the light of the comparison, identify any need for harmonisation in this area.

8.2 Subjects of Discharge Resolutions

In Swedish law, the mandatory item of discharge at the AGM concerns liability towards the company for the *board members* and the *CEO*.[395] Thus, the starting point is that only these persons are discharged from liability.[396] In jurisdictions where a dual board structure is used, the discharge relates to both the board of directors and the management board.[397] Discharge decisions are individual, i.e., they relate to each individual board member and CEO.[398] However, it is common to vote on discharge for all members of the board through a single resolution.[399]

As other persons may also be liable for damages to the company under the rules of the CA, as well as general civil liability rules, the question may arise whether discharge can be granted to, for example, resigned directors or incorrectly appointed directors.[400] In addition, the question may arise whether discharge can be granted to persons who have actual influence in a company without having been formally appointed as board members or similar.[401] A discharge decision is valid only as regards the persons expressly covered by the decision. However, the fact that other persons are not covered by such decisions does not mean that discharge can never be granted to them. The general meeting *may* decide to discharge them, but the question of their discharge is not mandatory at the general meeting.[402]

A resolution concerning discharge from liability is to be taken at the AGM in accordance with Ch. 7 § 11 para. 1 item 3 CA.[403] The resolution is

395 Ch. 7 § 11 CA.

396 Chapter 25 CA also contains special provisions on discharge from liability for company liquidators, which will not be dealt with in the following.

397 Unanyants-Jackson (2008), *Directors' Liability Discharge Proposals – The Implications for Shareholders*, 37.

398 See Svernlöv (2022), *Ansvarsfrihet*, 44.

399 Unger (2020), *Bolagsstämma i praktiken*, 79f.

400 On the issue of discharge from liability in relation to these, see Svernlöv (2022), *Ansvarsfrihet*, 46ff.

401 In literature and case law, the latter category is sometimes referred to as *shadow directors* or *de facto representatives*. The question of if these persons are affected by a discharge decision is not investigated further in the following. See, regarding the difference between these different actors and further on the design of a possible liability for damages, Dotevall (2017), *Bolagsledningens skadeståndsansvar*, 42, and regarding the issue of discharge from liability, Svernlöv (2022), *Ansvarsfrihet*, 53ff and 71ff.

402 See Svernlöv (2022), *Ansvarsfrihet*, 43.

403 Corresponding provisions exist for economic associations in Ch. 6 § 10 para. 1 item 3 AEA (Sw. *lagen om ekonomiska föreningar, LEK*).

binding for the company, but not for third parties. This means that *the company* cannot claim damages for losses that would otherwise be compensable under Ch. 29 § 1 CA. This is the case in all jurisdictions where discharge has the effect of approving the activities of the board and thus releasing the board from liability.[404] As stated above, discharge does not release board members from liability towards the company in *Germany*, *Austria*, *France* and *Spain*.

In all the Nordic countries, there are rules protecting shareholders that have opposed a discharge decision.[405] This is also the case in several other European jurisdiction, which means that discharge from liability has no effect on minority claims. However, there are differences regarding the possibilities of individual shareholders or a group of shareholders to make a claim for damages on behalf of the company in situations where the board has been granted discharge. This is related to rules protecting both individual shareholders and groups of shareholders. For example, in *Belgian* law, discharge means that the company and shareholders voting in favour can no longer claim damages. Shareholders voting against discharge, may still bring a claim.[406] In *Switzerland*, shareholders voting in favour of discharge and those buying shares with knowledge of approval of discharge are barred from bringing claims for negligent and intentional violation of directors' duties.[407] In other jurisdictions, there is no differentiation between the company's action and the effects on shareholders, i.e., a derivative suit. For example, in the *Netherlands* where no minority action is allowed, minority shareholders would only be protected by raising a claim on their own towards the company directors.

[404] This matter is separate from the requirements of a valid discharge decision, which can be construed in such a way that the minority shareholders are not only protected from a discharge decision, but in fact can oppose such a decision and thus affect the company's possibility to make a claim for damages. The majority requirements and minority protection rules are discussed below in Chapter 9.

[405] The relationship between the discharge resolution as a procedural hindrance of a claim from the company and the possibilities of a minority action in these situations is discussed above in Sections 5.3 and 5.4. In Swedish law, the discharge resolution is not binding if the company goes bankrupt, which is as exception that purports to protect the creditors of the company. This is discussed further in Section 8.4.4.

[406] Unanyants-Jackson (2008), *Directors' Liability Discharge Proposals – The Implications for Shareholders*, 13.

[407] Unanyants-Jackson (2008), *Directors' Liability Discharge Proposals – The Implications for Shareholders*, 35.

8.3 The Scope and Application of the Discharge Resolution

8.3.1 Introduction

As indicated above, the rules on discharge from liability in Swedish law have developed in parallel with the emergence of the limited company as a legal phenomenon. The question of liability for the management of the company has been linked to the submission of the annual reports to the general meeting and the general meeting's decision to approve this account. The discharge thus aims to close the past year and for the board to be informed of the general meeting's attitude to its management. It can therefore be assumed that the discharge originally had the effect of relieving the board from liability by providing a passing of risk from the board to the company regarding the management of the company. This ensured a particularly important component in the development of the limited company, namely a limited liability of the management for the business risks that should burden only the limited company as a legal entity.

Current Swedish company law has evolved with regard to the board's responsibility for the management of the company's affairs, obligations to accommodate interests other than those of the majority shareholders, and provisions aimed at other objectives than the protection of the majority of shareholders with a controlling interest in the company. Discharge regulation is also linked to the examination and approval of the accounts. A further explanation for the rules is that the requirement for a discharge decision implies that shareholders are obliged to scrutinise also the behaviour of the board in the context of its duties. The following section discusses the current legal situation regarding the potentially harmful conduct that can be covered by the discharge and its temporal scope. The aim is to show how liability in this respect can be limited and also to help clarify what discharge does *not* cover. The presentation is rather brief, as these issues have already been dealt with in detail in other literature.[408]

8.3.2 What Claims and Grounds are Covered by Discharge?

First, only claims for damages based on the rules in Ch. 29 § 1 CA are covered by a resolution on discharge from liability. If the obligations of the board have been performed in such a way that, for example, an agreed bonus

[408] See, most prominently, Svernlöv (2022), *Ansvarsfrihet*, 171ff.

is forfeited, a discharge decision does not affect this situation.[409] The starting point is that discharge decision covers all damaging acts that the person causes within the framework of their assignment for the company.[410] If the claim is based on another ground, e.g., liability for damages under a contract for the sale of goods between the company and a member of board, the claim is not covered by the discharge resolution, which means that the company can bring an action without prejudice to a discharge decision.[411]

Claims for compensation other than damages are not covered by a discharge resolution. Claims not covered are, for example, obligations concerning *refund of unlawful dividend*[412] and, in connection to this, the *deficiency liability*[413] in Ch. 17 §§ 6–7 CA. A decision to discharge the board from liability does not affect the company's ability to enforce such a liability for repayment or deficiency against the person discharged.[414] This is the case even though the assessment of the deficiency liability is to some extent similar to the assessment of damages under Ch. 29 § 1 CA. Furthermore, discharge does not affect liability due to legal acts performed before the company's registration under Ch. 2 § 26 CA.[415] Liability may also arise under Ch. 25 §

[409] See NJA 2009 p. 594 (*Snickeribolaget*) where the Supreme Court assessed the issue of liability for damages for a company liquidator and the procedural conditions for such an action. As a basis for the action, the company claimed that the fee charged by the liquidator was not reasonable and that part of the fee should be repaid through a *price reduction*. The company also claimed that the liquidator had intentionally or negligently damaged the company through the fees charged. The action was perceived in all instances as an action for *damages*, though it was alternatively formulated as an action for payment due to a right to price reduction. The Supreme Court stated that the company had not raised any objection to the action being classified as an action for damages, which indicates that the issue of discharge from liability had not been relevant if the claim was formulated as a right to price reduction. Hence, it can be assumed that the reduction of the directors' fees, corresponding to a price reduction, was not covered by the discharge.

[410] See Andersson, Johansson & Skog (2024), *Aktiebolagslagen – en kommentar*, Section 29:7.2 and Svernlöv, (2022), *Ansvarsfrihet*, 172f. This is referred to by Svernlöv as a *principle of congruence*, i.e., that there is conformity between the liability under Ch. 29 § 1 CA and the discharge from liability, see Svernlöv, (2022), *Ansvarsfrihet*, 172f and 194.

[411] In some situations, several different assignments of a board member or CEO can lead to difficulties in demarcating which liability is based on company law rules and which is based on other liability rules. This has implications for the scope of the discharge, see further Svernlöv (2022), Ansvarsfrihet, 173ff.

[412] Sw. *återbäringsskyldighet*.

[413] Sw. *bristtäckningsansvar*.

[414] See Andersson, Johansson & Skog (2024), *Aktiebolagslagen – en kommentar*, Section 29:7.2.

[415] Svernlöv (2022), *Ansvarsfrihet*, 187f. However, Svernlöv adds that after registration, the liability is transferred to the company on the condition that the obligation follows from

18 CA, for failure to act in case of capital deficiency in the company. Such failure may result in personal liability for the company's debts.[416] There is also liability for prohibited loans under Ch. 21 CA.[417] Claims based on other legislation are not covered by discharge resolutions.[418]

However, it is uncertain whether there are possible exceptions from discharge with regard to breach of *specific duties* of the board that may give rise to damages towards the company. A particular issue is whether the discharge covers damage resulting from behaviour in breach of the principle of equal treatment of shareholders, the general clauses and the provisions prohibiting disguised transfers of value.[419] A breach of any of these may result in damage to both the company and external parties.

As regards the company's claims, there is probably no reason to distinguish between breaches of different obligations under company law, if they result in damage to the company.[420] However, breaches of the principle of equal treatment of shareholders, for instance, typically result in individual shareholders being disadvantaged at the expense of others, which may cause damage to the disadvantaged shareholder. In such cases, the discharge resolution does not affect the liability towards the shareholder, as it is only binding upon the company. In the case of a limitation of liability corresponding to the BJR, which then does not apply, a similar effect is achieved, as an action for damages is possible in both cases. However, as Swedish law restricts the possibility of claims from the individual shareholder or creditor, this means that a claim for damages is usually sought by the company. If this is the case, the valid discharge will be a procedural hindrance of such a claim. Therefore,

the certificate of incorporation or has arisen after the company has been formed. When obligations are transferred to the company, the company is obliged to answer for any damage that has occurred for the counterparty. In such cases, the company may have a right to recourse against the board, which according to Svernlöv should be treated in the same way as a claim for damages and therefore may be affected by discharge, op. cit., 188.

416 The proposal to replace co-liability with a rule on liability for damages would probably not change this, see SOU 2023:34, 494f.

417 For further references, see Svernlöv (2022), *Ansvarsfrihet*, 188ff.

418 Provisions on the personal liability of the board exist for example in Ch. 8 § 12 of the Annual Accounts Act, Ch. 59 §§ 12–13 of the Tax Procedure Act (2011:1244) and Ch. 6 § 23 of the Customs Act (2016:253).

419 See Andersson (2021), *Business judgement rule (BJR) och ansvarsfrihet i svensk rätt*, 52, who considers that the US BJR does not apply in such cases, and who argues that the BJR and discharge fulfil the same function, at least partly.

420 See Svernlöv (2022), *Ansvarsfrihet*, 186.

there are exceptions to the given discharge concerning both minority actions and in cases where the company goes bankrupt.

8.3.3 Recourse Claims

Another matter in relation to the scope and application of the discharge decision is whether the decision has effect on recourse claims between board members. As the board members are jointly and severally liable for damages, the board member that has compensated the company may bring a recourse claim against other board members.[421] If the company could dispose of the recourse claim it would mean that the creditor (the company) would, through its discharge decision, have the power to decide which of two jointly liable parties should ultimately bear the cost of the damages. The division of responsibility between jointly liable debtors would then depend on the creditor (the company).[422] If the discharge is considered in isolation as a procedural rule – meaning that the discharge affects the company's right of action – this cannot be perceived as a limitation of a possible recourse claim. The substantive law question, i.e., to what extent the discharge also limits the liability (and recourse) of any co-debtors, therefore remains. Such questions are settled with regard to the general rules of the law of obligations.[423] In this respect, it may be possible to interpret a discharge decision as also relieving someone other than the person directly covered from liability. However, the

[421] See Ch. 29 § 6 CA. As mentioned in the introduction to this Chapter, a discharge resolution is only binding for the company and the discharge from liability of one of the board members does not affect the possibility of recourse from another board member who has not been discharged from liability. The same principle applies to an auditor's claim of recourse towards the board member. If the auditor is liable for damages against the company, they can still make a recourse claim against the board members, even though board members have been discharged from liability. The right of recourse of an individual liable party is not affected by the discharge of another liable party, e.g., a member of the board, see NJA 2006 p. 136. As the right of recourse is personal, the general meeting should not be able to dispose of such a claim by means of a discharge decision, see Svernlöv (2022), *Ansvarsfrihet*, 171.

[422] Cf. Unnersjö (2017), *Makten över regressrätten*, 478ff.

[423] According to NJA 2016 p. 1176, a creditor that waives a claim against a debtor without the other debtors' consent as a starting point can no longer assert the co-debtors' responsibility for the debtor's share to the extent that the debtor is freed by the waiver. If the creditor's concession to one of the co-debtors can be interpreted as a waiver of the debt, this means that the liability of the other debtors ceases, whereby the right of recourse also ceases.

starting point is that it should not discharge anyone other than the person explicitly covered. Therefore, the right of recourse is not affected.

A different matter is whether the *company's recourse claim* against the board is covered by the discharge decision. A recourse claim may arise, for example, if the company has become liable for damages to a third party due to the behaviour of the board, i.e., through attribution of the conduct of the board. In this respect, a distinction can be made between cases where the board is independently liable to third parties and cases where the board is liable only to the company. If both the company and the board are jointly and severally liable to third parties, the apportionment of liability for the co-debtors is based on different standards, depending on the nature of the joint and several liability.[424] For example, under general civil liability (tort law), the apportionment may be based on a proportionate allocation (*pro rata*), the degree of culpability of each debtor or reasonableness. The internal distribution of liability can also be determined by contract between the co-debtors.[425]

An example can illustrate this. In NJA 2019 p. 94 (*Gamla vägen*), a tenant-owners' association was held liable to an acquirer of a tenant-owned apartment for damage caused by the association in providing incorrect information about pledging in an extract from the apartment list. In this case, the Supreme Court held that Ch. 9 § 8 of the Swedish Tenants-Owners' Rights Act[426] states that it is the association's board of directors that is responsible for the membership and apartment lists.[427] Although this responsibility lies with the board, the association as such was considered to have the ultimate responsibility for keeping the lists and ensuring that extracts were correct. Therefore, the Supreme Court held that the association was required to compensate for the damage caused by deficiencies in the extracts from the lists that could be attributed to the negligence of the association's representatives and employees.[428]

It would also be possible for the board to be liable to the tenant-owners' association for damages.[429] In addition, the Tenant-Owners' Rights Act

[424] See Unnersjö (2021), *Regress*, 206ff, 219ff and 235ff.
[425] See further Hellner & Radetzki (2023), *Skadeståndsrätt*, 234ff.
[426] Sw. *bostadsrättslagen*.
[427] See NJA 2019 p. 94 (*Gamla vägen*), Sec. 27.
[428] See NJA 2019 p. 94 (*Gamla vägen*), Sec. 27.
[429] See Ch. 21(1) of the Act on Economic Associations (Sw. *lagen om ekonomiska föreningar*) to which Ch. 10(1) of the Tenant-Owners' Rights Act refers.

contains criminal law provisions which mean that a person who, intentionally or negligently, does not keep a list of apartments or provides incorrect or misleading information in an extract must pay a fine.[430] The board may therefore be liable for damages towards both third parties, i.e., purchasers of an apartment, and the association, in the event of incorrect information on pledging in the list of apartments.

A similar liability may arise for the board of directors of a limited company for damage caused to third parties because of negligence in the performance of their duties. It can therefore be assumed that the company could have claimed 'recourse' against the board in such a situation. The question is if the company has a right to recourse even though discharge has been granted to the board, or some of its members. If the company's recourse claim against the board constitutes a claim for damages, i.e., it relates to compensation paid that is regarded as damage and falls within the scope of Ch. 29 § 1 CA, the discharge decision also affects this claim. If, however, the recourse claim relates to compensation aimed at the internal distribution in the case of joint and several liability towards third parties, the question is whether the discharge decision precludes an action against the board. As it is not strictly speaking a claim for damages, but a claim that arises without harmful behaviour towards the company, it could be argued that it falls outside the scope of the discharge decision. It would also be more consistent with other recourse claims, e.g., between several jointly liable board members, as discharge for one of them does not affect the right to recourse of the other party.

On the other hand, it can be argued that in situations where liability for damages exists at the same time as a recourse claim can be asserted, the company could avoid the effects of a discharge decision by formulating its action as a recourse claim. However, the existence of a right of recourse due to *joint and several liability* also presupposes that the board is directly liable towards the third party. If such a recourse claim were to be affected by the discharge decision, it would mean that the company is worse off in situations where the company's liability against third parties is also viewed as a *damage* for the company. If the company's own recourse claim is not covered by the discharge decision, it would mean that many situations where the board is responsible for the company's losses are not covered by the discharge decision, simply because of the wording ('damage') in Ch. 29 § 1 CA. Therefore, it is more expedient to consider that such a recourse claim, which can also

[430] See Ch. 11 § 3(6).

be understood as being based on the board having breached an obligation to the company by the company becoming liable for damages to a third party, is covered by a granted discharge.

8.3.4 Discharge for Future Events

The prevailing opinion in Swedish legal literature, as well as other jurisdictions containing discharge regulations, is that discharge cannot be granted for future events.[431] It is argued, among other things, that discharge may not be granted on any basis other than duly prepared annual accounts.[432] Hence, granting discharge for future events is considered to be in direct conflict with the information objective of the regulation, as granting discharge for the future entails a cessation of the board's incentive to provide information to the general meeting about decisions or measures covered by the decision that give rise to liability. This in turn raises 'serious doubts' to allowing *ex-ante* discharge.[433] However, the efficiency purpose of discharge would be realised if discharge were granted in advance, and economy of process would also be achieved if discharge could be granted for future events.[434]

Based on the above accounts of the development of discharge, and the corresponding regulations in other countries described in Chapters 3 and 4 of this study, it is clear that decisions on discharge from liability are not intended to being retroactive. However, as also presented above, there are certain possibilities to limit the board's liability to the company in advance. The advantages and disadvantages of such limitations are also analysed above, and the position of Swedish law is that such agreements or provisions in the articles of association are not possible.[435] It can therefore be said that the question of whether discharge can be granted for future events should obviously be answered in the negative. Admittedly, there may be questions of detail and certain aspects that may be of practical importance, e.g., with regard to the timing of the decision during the financial year and questions relating to how the matter should be dealt with at a continued general meet-

[431] See Andersson, Johansson & Skog (2024), *Aktiebolagslagen – en kommentar*, Section 29:7.2 and Svernlöv (2022), *Ansvarsfrihet*, 204ff, in particular 207.

[432] See Svernlöv (2007), *Ansvarsfrihet*, 330, who refers to the reasons for the CA 1944, where it is emphasised that granting discharge for the future would risk rendering minority protection ineffective.

[433] Svernlöv (2007), *Ansvarsfrihet*, 330.

[434] Svernlöv (2007), *Ansvarsfrihet*, 330.

[435] See Section 7.2.2.

ing.[436] However, in light of the above, it is clear that other tools for limiting the liability of the board of directors must be used if this is to be done *ex-ante*, i.e., before a harmful act.

Several components of the discharge regulation in Swedish company law contribute to this view. Examples include the protection of minority shareholders in connection with discharge and the previously mentioned information exception. Further, the same arguments apply concerning the possibilities for the board to avoid liability for damages under Ch. 29 § 1 CA for administrative measures on the ground that the general meeting has decided to approve the measures. In this regard, reference can be made to Ch. 8 § 41 CA, according to which the board of directors may not undertake a legal act or other measure that is unduly favourable to a shareholder or anyone else to the detriment of the company or any other shareholder. Nor may the board follow an instruction from the general meeting if it is contrary to the CA, the applicable law on annual accounts or the articles of association, i.e., the general clause.[437]

8.4 Exceptions from Granted Discharge

8.4.1 Introduction

In addition to the discharge being constrained to the directors' liability towards the company in certain respects, there are also explicit exceptions to the discharge granted under the CA. These exceptions are relevant if the conduct of the board during normal circumstances would be covered by the discharge decision. An action for damages can be brought under Ch. 29 § 11 CA if the general meeting has not been provided with essentially correct and complete information about the decision or measure on which the action is based. An action can also be brought if the claim for damages is based on a criminal offence, in accordance with Ch. 29 § 12 CA. In addition, the discharge does not affect the action for damages if the company has gone bankrupt, in accordance with Ch. 29 § 14 CA. These exceptions will be discussed in the following but given the scope of the study it will not be possible to go into every detail.

[436] See further Svernlöv (2007), *Ansvarsfrihet*, 129ff.

[437] Svernlöv (2007), *Ansvarsfrihet*, 330–331.

8.4.2 Materially Incorrect or Incomplete Information

According to Ch 29 § 11 CA, resolutions on discharge do not prevent the company from bringing actions against the board of directors if materially incorrect or incomplete information has been given to the general meeting. Hence, if the board gives a report that is based on 'in material respects' incorrect or incomplete information, a claim for damages is possible even if discharge granted, if the period for doing so has not passed.[438] There is thus an exception to the discharge, the 'information exception'.

Similar exceptions exist in the Nordic countries (Denmark, Norway and Finland)[439], as well as in other European jurisdictions where resolutions on discharge affect the liability of the board.[440] The exception relates to information that could have been provided to the general meeting through the annual report, the auditor's report or in any other way, concerning the decision or measure on which the action is based.[441] Although the auditor has access to all business documents and must make a recommendation on the matter of discharge based on the investigation of various business decisions, it is not sufficient that the information is provided to the auditor; information must be provided to the general meeting.[442]

[438] See Svernlöv (2022), *Ansvarsfrihet*, 229ff. This means that the one-year time limit under Ch. 29 § 10 does not apply. Instead, the limitation period is five years in accordance with Ch. 29 § 13. If the action is based on a criminal offense, longer limitation periods may apply.

[439] See § 364(2) DCA, § 17-5 NCA and Ch. 22 § 6(2) FCA.

[440] See Unanyants-Jackson (2008), *Directors' Liability Discharge Proposals*, 38. For example, in *Switzerland*, the discharge only covers claims based on facts that were disclosed to the shareholders, see Krauskopf, Sommer & Märki (2018), *Directors' & Officers' Liability in Switzerland*, 598. The same is the case in *Portugal*, where discharge is not valid if facts constituting the liability were not specifically made known to shareholders prior to approval of discharge. However, the assessment of information obtained and the requirements of shareholder knowledge regarding the omitted information vary. In the *Netherlands*, the scope of discharge only concerns *information known* to the company and its shareholders, but knowledge is presumed to be more than just the annual report. According to the Dutch Supreme Court, the information must have been 'traceably expressed' for the conduct to fall within the scope of the discharge, see Krauskopf, Sommer & Märki (2018), *Directors' & Officers' Liability in Switzerland*, 598.

[441] See further on how the information can be provided to the general meeting, Svernlöv (2022), *Ansvarsfrihet*, 231ff.

[442] Nor is it sufficient that the board of directors and the auditor have agreed not to disclose the information to the general meeting, cf. the Norwegian case Rt 1930 p. 533, where the court did not consider that the circumstances were covered by a discharge decision, when the board and the auditors, but not the general meeting, had access to the required information.

It does not matter if the decision or conduct in question would normally be presented in the annual report or audit report.[443] Nor does it matter if the incorrect information was due to intent, negligence, or circumstances for which the board of directors or the CEO cannot be held responsible.[444] The provision in Ch. 29 § 11 ABL is not an independent basis for liability, but merely an exception to discharge from liability.[445]

Due to the information exception, it has been said that a decision of discharge is *a gesture without decisive legal meaning*.[446] However, this critique depends on the interpretation of the exception, meaning that if there is a more extensive duty of disclosure, the exception will more often be applicable, and the company may sue the board despite the discharge.[447] Crucial to this question is the meaning of the *materiality* of the information and the *level of detail* of the information required in connection with the board's harmful measures.

In Swedish law, there is a lack of legal precedents relating to these matters. However, there are some lower court cases that can illustrate how this exception is interpreted.[448] Comparisons can also be made with other Nordic countries, although the extent of the exception may vary due to differences in the wording of the legislation.[449] For example, in the Danish Supreme Court case U 2019.1907 (Capinordic Bank), it was held that the discharge decision concerned those particular business decisions mentioned in the annual reports. In the case, there were no grounds for assuming that other circumstances had been presented at the general meeting. The annual reports did not entail information about single business events and the resolutions on discharge were made on a general basis. Therefore, the general resolutions

[443] Skog (2023), *Rodhes aktiebolagsrätt*, 221.

[444] In the earlier legislation, the CA 1944, exception from discharge required an intentional or reckless omission of information. This was changed in the CA 1975, see SOU 1971:15, 360f and prop. 1975:103, 546f.

[445] Svernlöv (2022), *Ansvarsfrihet*, 253. It cannot be excluded that the information provided to the general meeting, such as the annual report, could give rise to liability, but this would be based on the same rules as ordinary board liability.

[446] Cf. Skog (2023), *Rodhes aktiebolagsrätt*, 221.

[447] Cf. Bugge Reiersen (2007), *Ansvarsbegrensning og ansvarsfrihet i aksjeselskaper*, 112.

[448] For example, the matter was assessed in the case HQ Bank, see *Stockholms tingsrätts dom 2017-12-14, T 9311-11*. See further Svernlöv (2022), *Ansvarsfrihet*, 253.

[449] See regarding the differences in the Nordic countries in this matter, Svernlöv (2022), *Ansvarsfrihet*, 252ff.

on discharge could not be invoked concerning damages caused by single business events.[450]

In the Norwegian Act, the wording differs only slightly from that in the Swedish regulation, but 'materiality' is interpreted as relating to the materiality of the harmful conduct of the board, not the materiality of the information provided.[451] The conclusion of the Norwegian scholar Reiersen is that the exception does not undermine the resolution of discharge.[452] She argues that the rule implies that a decision on discharge does not entail a loss of rights for damages other than those over which the general meeting had oversight. She also states that the legal situation reflects a compromise solution between the company's and the board's need to clarify the matter of liability and the protection of the shareholders' interests in being able to take a position on the issue of liability with full information.[453] Therefore, she argues, resolutions on discharge will have a role to play in Norwegian company law in the future. First, the duty of disclosure will give the general meeting certainty for making the resolution on a fully informed basis, and second, the disclosure will have a positive effect on the information provided to the AGM, and hence be an incentive to openness between the board and the shareholders.[454]

Concerning the Swedish regulation, Svernlöv has drawn the conclusion that the disclosure requirement is quite strict. In principle, an action may be brought despite discharge being granted, in respect of any decision or action about which the general meeting has not received substantially accurate and complete information, 'however small or insignificant it may appear'.[455] However, the information exception is also criticised by Svernlöv due to the fact that the management of larger companies cannot possibly account

[450] See also the Danish Supreme Court case U 2015.2075 H (Memory Card), where the court concluded that the board members did not know that the financial reports were misleading due to overvaluations of the stock-in-trade, and that parts of the turnover were fictive. The general meeting therefore did not make the resolution on discharge based on substantially true and fully disclosed circumstances. Hence, the board could not be relieved from responsibility (discharged) by the resolution. It did not affect the discharge decision that one of the shareholders had knowledge about the manipulation of the accounts, and therefore was fully informed about the circumstances. See further Fode (2022), *Ledelsesansvar og ansvarsbegrænsninger*, 169.

[451] Cf Svernlöv (2022), *Ansvarsfrihet*, 252.

[452] Bugge Reiersen (2007), *Ansvarsbegrensning og ansvarsfrihet i aksjeselskaper*, 125.

[453] Bugge Reiersen (2007), *Ansvarsbegrensning og ansvarsfrihet i aksjeselskaper*, 125.

[454] Bugge Reiersen (2007), *Ansvarsbegrensning og ansvarsfrihet i aksjeselskaper*, 125.

[455] See Svernlöv (2022), *Ansvarsfrihet*, 260.

in sufficient detail for every single decision and action that could give rise to a claim for damages. It would also be difficult to assess what information should be provided to the general meeting and the costs for producing this information could be very high.[456] The information exception can be difficult to deal with in practice due to the board's duties of confidentiality. Further, it cannot be assumed that the board will in general act more diligently towards the company due to the information exception.

The information exception is justified by reasoning that it should not be possible to give consent to an action if the consenting party is unaware of the circumstances and consequences of the consent, i.e., 'informed consent' is needed. As discussed above, in Section 7.2.4, in order for the shareholders to be considered to have informed consent in relieving the board from liability, the consent must be expressed and linked to a specific measure taken by the board or a specific board decision. Unlike the consent cases, the discharge resolution does not require the explicit acceptance of individual board measures. Hence, in terms of the resolution, discharge is granted more easily than consent pertaining to specific measures, where the board wants to avoid liability. However, if the information was not sufficiently clear, the information exception applies. The objective criterion of information therefore constitutes a significant exception to the discharge granted. Although this is the case, failure to provide information only means that the company is not bound by the resolution on *discharge* from liability – it may still be possible to release the board from liability according to other rules. For example, the same measure, i.e., the same facts on which the action for damages is based, may lead to the exclusion of liability based on the principle of all shareholders consent.[457]

[456] Svernlöv (2022), *Ansvarsfrihet*, 259.

[457] It can be noted that it is possible for the information exception to be applied – meaning that the shareholders have not received enough information and that the company because of the lack of information is not bound by the discharge decision – but at the same time the general meeting has given its consent to certain measures or decisions taken by the board. Cf. the case NJA 2013 (*Kamelian*), where the consent of all members meant that the association could not claim damages. In the intermediate judgment from the district court, the court concluded that the information exception was applicable, and granted discharge did not hinder a claim, see *Borås tingsrätts dom* 2011-08-25, T 2159-10.

8.4.3 Criminal Conduct

If a member of the board has committed a crime, the company can make a claim for damages based on the criminal offence regardless of a resolution to grant discharge in accordance with Ch. 29 § 12 CA.[458] Furthermore, criminal conduct leads to a different time limitation for claims.[459] This is the case in many other jurisdictions, but the scope of the exception may vary. For example, there may be differences in determining the scope for certain wrongful acts, such as wilful misconduct or gross negligence that are not necessarily criminal conduct. These situations may sometimes coincide with the application of the information exception. In the CA, exceptions due to wilful misconduct are not expressly prescribed. The demarcation between liability due to acts during the fulfilment of the assignment and liability based on the CA or other regulations may create difficulties in drawing a clear line on what conduct is not covered. As it can be assumed that the information exception will often apply in these cases, it is likely that an action can be brought already on that basis. However, since the granted discharge is a procedural hindrance and an action is to be dismissed by the court, it can be argued that its scope should be interpreted restrictively. In other words, it would imply a broader application of the exception in the case of criminal offences and would perhaps also include wilful misconduct.

8.4.4 Bankruptcy

Another exception is related to the protection of creditors. According to Ch. 29 § 14 CA, the *bankruptcy estate* can sue the board of directors regardless of a decision of discharge from liability. The bankruptcy estate therefore is not bound by the discharge decision and the estate can claim damages on behalf of the creditor group.[460] Though this is the case, the legal basis for a claim for damages rests on the damages caused to the company. The bankruptcy estate can use the 'internal norms' of liability to claim damages for the company, i.e., liability towards the company.[461]

[458] See Svernlöv (2022), *Ansvarsfrihet*, 261ff. In CA 1944, a discharge resolution apparently including a criminal offence meant that the directors concerned were also discharged from liability to the company for that offence, see § 128 para. 4 CA 1944.

[459] Svernlöv (2022), *Ansvarsfrihet*, 271.

[460] Dotevall, (2017), *Bolagsledningens skadeståndsansvar*, 110.

[461] See Sandström (2023), *Svensk aktiebolagsrätt*, 411.

This exception shows that creditors are protected from damage caused by directors to the company, although creditor protection is accomplished indirectly through the liability norms towards the company. However, in the legal literature, it has been argued that rules aimed at protecting the company's creditors are less relevant in connection with discharge than rules protecting minority shareholders because the rules on discharge mainly concern the relationship between the board and the company.[462] Although discharge resolutions are irrelevant for creditors – in the sense that granted discharge does not affect creditors in the case of bankruptcy – this exception also shows that the regulation takes into account the interest of the company's creditors, as the general meeting cannot at all times dispose of the company's claim to the detriment of creditors.

Therefore, a more accurate description of discharge considers the fact that these rules include protective measures in the interest of creditors and minority shareholders. Difficulties may lie in other areas of assessing liability, for example if shareholders consent to preclude a right for the bankruptcy estate to make a claim for damages.[463] Nonetheless, the 'creditor interest' is considered, providing an opportunity for creditors to make claims for damages (through the estate). Hence, the interest of creditor protection is not satisfied by the discharge regulation as such, in the same way as the protection of minority shareholders, but is expressed in the discharge regulation and constitutes an important exception to the possibilities of limiting the liability of the board.[464]

If discharge is viewed as a matter of competence, it also becomes clear that the regulation does not fit well with the perception of the bankruptcy estate as a separate legal entity. The same applies in general to bankruptcy estates and the legal effects of discharge. If the bankruptcy estate is an independent legal entity, it should not be bound by the discharge decision – on that basis alone. It is difficult to reconcile the 'internal' competence requirements in liability matters with the fact that the bankruptcy estate is an independent legal entity. If we assume that this is a substantive (competence) issue, then

[462] For example, Svernlöv has put forward that the discharge resolution is 'in principle irrelevant in relation to creditors and other third parties', see Svernlöv (2022), *Ansvarsfrihet*, 28f.

[463] This will not be discussed in the following, but it should be noted that there are different opinions on the matter.

[464] It should be noted that there are difficulties in connection with assessment of negligence in relation to creditors, should the bankruptcy estate make a claim for damages towards the board of directors, as it is commonly perceived as a claim based on the duties for the board towards the company.

the 'bankruptcy exception' means that the interests of creditors are relevant to the extent that they affect the discharge.

8.5 Effects of Not Granting Discharge

If discharge from liability is denied, it means only that the company retains its ability to claim damages against the board, which is a procedural prerequisite in an action for damages. Denial of discharge does not automatically mean that the members of the board are considered liable for damages or that an action for damages will be brought. The question of liability for damages is instead determined through subsequent legal proceedings. Hence, denial of discharge is sometimes viewed as merely an expression of mistrust or as a way of showing disapproval of the board's conduct.[465]

Even though the refusal of discharge does not have any direct legal effects regarding the company's claims for damages – other than keeping the question of damages open – such a decision may have other consequences for the members of the board. In companies that are subject to the supervision of the Swedish FSA, a management review is done prior to the appointment of members of the executive management and an ownership assessment in connection with certain acquisitions in financial companies.[466] This assessment also considers whether the person has been denied discharge from liability in the past five years.[467]

Hence, the discharge resolution lacks a direct legal consequence for the board other than the retained opportunity for the company to make a claim for damages against the board. However, non-discharge puts the reputation of board members at risk and has an impact on the suitability assessment of the board members, if such an assessment is to be made. Therefore, the

[465] Cf. prop. 1975:103, 779.

[466] FSA's management review and FSA's regulation on marketplace activities (*Sw. FI:s föreskrifter om verksamhet på marknadsplatser*, FFFS 2007:17 (consolidated version), Appendix 1a (*'Ansökan ägarprövning'*), Appendix 1c (*'Ansökan/anmälan för ledningspersoner i ett ägarbolag till ett finansiellt företag'*) and Appendix 2 (*'Ansökan/anmälan ledningsprövning'*).

[467] In the original provision (FFFS 2007:17), the application forms were designed in a different way and no time limit was specified for decisions on denial of discharge, see Annex 1 c, question 3, Annex 2a, question 5, and Annex 2b, question 6. After an amendment in 2009 (FFFS 2009:5), which mainly concerned the appendices relating to the information to be provided in connection with the ownership and management assessment, the FSA set a time limit of five years.

refusal to discharge the board from liability may in some cases have relevant social and economic consequences for individual board members.

Another question is whether the company (through the board) has a duty to act, for example by making further investigations in relation to harmful conduct of members of the board if discharge is denied. If a majority of shareholders has voted against discharge, it is most likely that the board at the same time has been replaced by a new board, or at least that one or more new board members are appointed. Following the instructions of the general meeting, the board would then be obliged to further investigate the conduct of the (former) board or individual board members. In these situations, the duties of the board follow from instructions issued by the general meeting. If a minority of shareholders has denied discharge, the interpretation of the minority protection rule is crucial to determining the duties of the board. Hence, the answer depends on the majority requirement in connection to discharge resolution, i.e., whether a qualified minority (holding over ten percent the shares) can refuse discharge or if the instructions from the majority of shareholders are to be obeyed.[468]

8.6 Possibility to Change or Revoke Discharge Resolutions

In Swedish law, it is not possible to change or revoke granted discharge from liability. This means that the AGM cannot decide to make a claim for damages relating to matters that are covered by granted discharge. Nor is it possible for a later general meeting to revoke the discharge granted.[469] In comparison, this issue has been discussed in *Norway*, where it has been debated whether it is possible to revoke the discharge resolution. The question put forward is if the resolution should be interpreted as a *promise* to the board, meaning that the board members have a right in relation to the company that the company cannot revoke.[470] Similarly, in *the Netherlands*, there are different opinions in the matter of revocation of a discharge decision. Some believe that discharge decisions cannot be revoked due to their direct external effect on directors' liability, but others regard it as possible for the discharging body (the general meeting) to revoke such a resolution.[471] Reasons of expedi-

[468] This matter is discussed further in Section 9.5.

[469] Svernlöv (2022), *Ansvarsfrihet*, 143 ff.

[470] Reiersen (2007), *Ansvarsbegrensning og ansvarsfrihet i aksjeselskaper*, 70.

[471] Bulten & Kreileman (2017), *De dans ontspringen door decharge?*, 443.

ency indicate that the board of directors should be able to rely on a discharge decision if it has come to their knowledge, and that it should not be possible for the general meeting to revoke such a decision.

8.7 Summary

In the above, the scope of resolutions on discharge has been examined, with regard to the subjects of the discharge, what claims and grounds for liability that are covered and the exceptions to the discharge provided for in the Swedish regulation. In summary, the discharge primarily concerns the members of the board and the CEO, but to a certain extent it may also be possible to decide on discharge relating to other persons. Granted discharge releases the persons subject to the resolution only from liability towards the company, and the starting point is that it has no bearing on the allocation of liability between several liable parties. In Swedish law, the discharge only relates to liability based on company law rules on damages and does not apply to other legal remedies. Several of the remedies against acts of the board, including unauthorised transfer of assets, prohibited loans and deficiency liability, are not covered by the rules and it is not possible for the general meeting to relieve the board of directors from liability for such acts.

As regards the exceptions, the rules on discharge are similar to those in other Nordic countries as well as those European jurisdictions studied that contain regulations on discharge. Most jurisdictions base their regulation on the premise that an effective decision requires that the general meeting has received complete and correct information from the board on the circumstances that may give rise to liability. This regime is based on the view that the general meeting should only be able to grant discharge in respect of what is known to the shareholders, so the decision is made by those fully informed. Although it is not clear from the drafting of the legislation, it could also be based on the assumption that the board will in general act more diligently towards the company if there is a duty to disclose measures taken by the board that may give rise to a claim for damages.

In other jurisdictions, where discharge does not have a similar effect or where decisions of this kind are not allowed at all, other types of limitations of liability are present instead. The reasons underlying these different rules limiting the liability of the board are often similar. However, the discharge does not affect the content of the directors' duties towards the company, except that it provides the directors with an incentive to disclose all necessary

information about actions that could give rise to liability. Thus, the assessment of negligence is not affected, although the discharge constitutes a total disclaimer of liability. The effect is similar to a time limit on liability but can also be seen as a way of passing the risk of potentially damaging management by the board during the past year to the company, to the extent that the management is fully disclosed to the general meeting.

In comparison to the other ways of protecting the board from liability, for example through the American BJR mentioned in Chapter 7 above, the discharge means that the board's specific conduct, for example a breach of the duty to act in the company's interest, is not examined by the courts. Instead, the action is to be dismissed if there is a valid decision to grant discharge. This differs from in the BJR, which provides protection from liability in connection with the assessment of negligence. The assessment of the validity of discharge is more binary, although as stated earlier in this Chapter, there are several exceptions in its application.

Considering the American BJR and the Swedish discharge regulation, these tools fulfil slightly different functions due to the differences in the company law frameworks. In Swedish law, the corporate governance model is to a greater extent based on shareholders having direct influence over the company's affairs, including the matter of liability of the board. The US model is based on the duty of loyalty to the company, where the shareholders' influence is exercised by bringing a liability action for breach of this duty. This means that discharge, which brings the issue of liability to the AGM, creates opportunities for shareholders to decide on the issue of liability and guides the board's behaviour in a different way than the BJR. The focal point of discharge is for shareholders to gain knowledge about the management and be able to decide on the matter of liability themselves – with some limitations regarding other interests, such as minority or creditor protection. What characterises the American BJR is that it is a rule of conduct directed at the board of directors, which is relevant in any subsequent assessment of the board's liability towards the company.

Discharge from liability is sometimes perceived as a complete release from liability. This is not accurate. It has also been criticised for being too weak a protection for the board against liability claims, mainly due to the information exception. The above has shown that the discharge, due to this exception, has the function of ensuring that shareholders are aware of the board's behaviour, rather than limiting the liability of the board, as the information provided by the board to the general meeting does not confer a *right* for

the board to be discharged from liability. Although the regulation therefore may affect the conduct of the board, making them act more diligently by being aware that the facts related to liability must be disclosed in order for discharge to be granted, it is uncertain whether it has any actual effect in preventing harm.

Given that denial of discharge may also have consequences for the board of directors, e.g., by affecting the fit and proper assessment carried out for certain financial companies and the social effects that denial of discharge may have for an individual director, it cannot be said that discharge is 'of no significance'. However, in the absence of relevant case law on many of these issues, not all uncertainties regarding its effects can be fully clarified. As there are no other possibilities in Swedish law for limiting liability, such as through contractual solutions, it also seems necessary to retain the discharge regulation or to meet the need for the board's protection from liability in some other way, for example through a more lenient assessment of liability.

In the next chapter, the specific issue of the discharge resolution and minority protection will be elucidated in greater detail. Thus, the historical anchoring of the discharge regulation in Swedish law will become even clearer.

9 Majority Requirements and Minority Protection

9.1 Introduction

The CA does not explicitly state the majority requirements for a resolution on discharge from liability. According to Ch. 29 § 7 CA, an 'action for damages against the company according to §§ 1–3 may be brought, if the majority or a minority consisting of owners of at least one tenth of all shares in the company, at the general meeting, has supported a proposal to bring an action for damages or, in the case of a board member or the managing director, has voted against a proposal for discharge'. The majority requirement for discharge can thus be interpreted in different ways. Generally, resolutions at the general meeting require simple majority if no special quorum requirements apply, see Ch. 7 § 40.[472] The wording of Ch. 29 § 7 CA has therefore given rise to a debate among legal scholars concerning the majority requirement for resolutions on discharge in Swedish company law.[473]

There are mainly two different views on this. According to the *first* view, discharge is denied if the minority shareholders having at least ten percent of the shares in the company vote against it. As discharge is not granted, the company (through the board) can make a claim of damages against the board. Thus, shareholders with *at least 10 percent of the shares in the company may prevent discharge from liability being granted* for the board of directors or the CEO by the AGM. This interpretation implies that Ch. 29 § 7 of the

[472] Some resolutions explicitly require qualified majority, which will not be dealt with in the following.

[473] Though this might seem odd, it is illustrated in the debate in *Dagens Industri* which followed the discharge of liability decision regarding the CEO and the Chairman of the Board of Directors in the Swedish bank Swedbank in 2016, where several prominent lawyers, as well as Swedbank, voiced different opinions. Cf. the discussions in Båvestam (2016), *Om bolagsstämmans ansvarsfrihetsbeslut*, 63–84, and Svernlöv (2022), *Ansvarsfrihet*, 118–129.

CA is not only a procedural rule that gives a minority of shareholders a right to bring actions for damages in their own name but on behalf of the company. The interpretation also suggests that discharge from liability should *be referred to only as the situation in which the board of directors and/or the CEO are not at risk of being sued*, unless exceptions from discharge are applicable according to Ch. 29 §§ 11 and 12 of the CA.

The *second* view is that discharge is granted *if more than half of the votes cast are in favour of discharge* (with the chairman's vote being decisive in the event of a tie). If shareholders with at least 10 percent of the shares in the company have voted against discharge, the right to bring action against the board of directors or CEO remains (according to Ch. 29 § 7 CA), but the majority ruling is to be interpreted as an instruction to the board not to make a claim for damages, and thus means that discharge is to be regarded as granted. According to the second interpretation, discharge is granted by simple majority, though the minority can make a minority claim (*actio pro socio*) in their own name but on behalf of the company.

The CA does not contain clear provisions regarding the interpretation of the majority requirements in connection with resolutions of discharge from liability. A textual analysis of the specific provisions shows that the wording of the legislation supports both views. The rules are discussed in the preparatory works for the current legislation, but the statements are not entirely clear on the matter.[474] There are only a few examples of cases relating to the issue and no Supreme Court precedents that clarify it.

In the legal literature, both views are represented, but most legal scholars are of the opinion that a minority of ten percent of the shareholders voting against discharge means that the board is denied discharge from liability.[475] This means that the minority can prevent discharge from being granted.[476] Another, similar view is that the minority by its refusal at least prevents a

[474] See SOU 1971:15 357, prop. 1975:103 545f, 778f and prop. 1997/98:99 195.

[475] See Karlström (2016), *Till frågan om majoritetskrav vid bolagsstämmobeslut*, 181–186. The issue has been the subject of discussion of a practical nature, above all regarding decision-making and record-keeping at general meetings, see Beyer (1996), *Om beslut på bolagsstämma*, 704–705.

[476] See, for example, Svernlöv (2022), *Ansvarsfrihet*, 116ff who argues that no decision on discharge from liability exists as long as owners of at least one tenth of the shares vote against the proposal. Svernlöv also states that this view has strong historical support, from the wording of the 1910 CA onwards, and that there is nothing to indicate that the legislator intended to change the meaning of the regulation in the CA 1975, see Svernlöv (2022), *Ansvarsfrihet*, 120–122. I will discuss these historical arguments in the following section.

'fully effective' discharge decision, by allowing owners of at least one tenth of all shares in the company to bring an action for damages.[477]

9.2 Historical Background

As stated above, discharge resolutions as a way of limiting the liability of the board towards the company have a firm anchoring in Swedish legal history. This is also the case concerning rules on protection of minority shareholders. These rules in connection with discharge resolutions was first introduced in the Companies Act of 1910.[478] In the CA 1910, it was stated that discharge was not granted if a minority of shareholders voted against discharge.[479] Hence, the meaning in the earlier legislation becomes an argument of relevance to the interpretation of current legislation, especially as it forms a subjective teleological interpretation.

In the Swedish Companies Law Committee's proposal for a new Companies Act in 1908, the provision on voting on discharge from liability stated that discharge from liability was refused to the board of directors, even if only a minority of shareholders with a total shareholding amounting to at least one tenth of the entire share capital had voted against granting discharge from liability.[480] The Companies Law Committee's proposal also contained a provision stating that if discharge was refused, the minority shareholders could sue the board of directors on behalf of the company.[481] According to the proposal, the minority shareholders would thus receive significantly increased minority protection in comparison with the earlier legislation in the CA 1895 – replacing the ability to request a *postponement* of a resolution concerning discharge with the possibility to *refuse* discharge.

One of the members of the Companies Law Committee was professor of procedural law Ernst Kallenberg. In a separate opinion by Kallenberg, the

[477] Andersson, Johansson & Skog (2024), *Aktiebolagslagen – en kommentar*, Section 29:7.2.

[478] SFS 1910:65.

[479] CA 1910 § 86 stated that 'discharge may not be considered to have been granted by the board, as long as shareholders with a total amount of shares, constituting at least one fifth of the entire share capital, have voted against it'. (Sw. '*Ansvarsfrihet må ej anses vara styrelsen beviljad, såframt aktieägare med ett sammanlagdt aktiebelopp, utgörande minst en femtedel af hela aktiekapitalet, röstat däremot*.')

[480] See § 83 in the Law Committee Proposal 1908, 29–30. The same would apply in the draft Insurance Business Act (§ 71) and the Mutual Insurance Companies Act (§ 165).

[481] See § 84 of the Law Committee Proposal 1908, 30. A similar provision was also included in the final proposal, see § 87 in prop. 1910:54, 34.

draft law's minority protection rules were criticised in regard to the minority's ability to refuse the board discharge. Kallenberg stated that the majority should be able to decide on discharge, but that the minority should be protected by a provision that at least one tenth of the minority could bring an *action on behalf of the company* during a period of two months after the discharge decision.[482] However, in this respect, the final proposal for the regulation followed the wording of the Law Committee's proposal. Thus, as drafted, the minority could refuse to discharge the board from liability. The final proposal was only changed regarding the way in which minority rights in the discharge issue were expressed, stating that discharge was *not considered to have been granted* if shareholders with a total share amount of at least one tenth of the share capital voted against discharge.[483] In other words, if a qualified minority of shareholders voted against a discharge proposal, they could ensure that discharge was not granted.[484]

In comparison with the earlier CA 1895, the possibility for minority shareholders to refuse discharge was one of several ways in which the protection of minority shareholders was strengthened through the CA 1910. In the preparatory works, the minority shareholders' influence in the discharge decision is justified by the fact that the legislation introduced a possibility to appoint a minority auditor. If the majority principle had been applicable to resolutions of discharge, the protection of the minority through the review conducted by the minority auditor would not provide a sufficiently effective legal remedy to safeguard the rights of the minority.[485]

At the same time, the prescribed requirements of shareholders needed to refuse discharge were changed. Under the 1895 Act, one tenth was required for a postponement of discharge resolutions at the AGM, whereas under the 1910 Act, one fifth was required for a decision on refusal of discharge and a special minority action. Thus, there was a major change in the possibility of refusing discharge, but at the same time the quota for the minority increased, which made it more difficult to exercise minority rights. Later, in the CA

[482] See Law Committee Proposal 1908, explanatory memorandum, 153ff with Kallenberg's proposal for the text of § 84 on 156.

[483] The wording of the proposal on this matter was: 'Discharge from liability shall not be deemed to have been granted to the board of directors if shareholders holding a total amount of shares representing at least one tenth of the entire share capital have voted against it. [.]', see prop. 1910:54, 34.

[484] This is also shown in the commentary to the regulation in the preparatory works, see prop. 1910:54, 107–108.

[485] See Law Committee Proposal 1908, 63.

1944, the minority quota was changed to one tenth. Still, the prevailing view among legal scholars was that the minority could refuse discharge from liability.[486]

The corresponding provision in § 128 of the 1944 CA clearly stated that: 'Discharge shall not be deemed to have been granted to a member of the board of directors or to the managing director provided that shareholders holding a total amount of shares representing at least one tenth of the total share capital have voted against it.' In the preparatory works for the CA 1944, the rule was explained as follows: 'Discharge is granted by a majority decision, unless shareholders with a total shareholding amounting to at least one tenth of the entire share capital vote against it.'[487] The statement is unclear, because a majority decision cannot be sufficient for the discharge to be granted while at the same time at least a tenth can refuse discharge. Presumably the statement should be interpreted as explaining that a majority of shareholders present at the AGM is generally sufficient to decide to grant discharge, but that refusal requires the minority to represent one tenth of the total share capital, not just those present at the meeting.

In the preparatory works for the CA 1975, the same interpretation of the former CA 1944 was expressed. It was noted that '[a]s in [CA 1944], even a minority representing one tenth of the entire share capital at the general meeting may prevent a decision being taken to grant discharge or to refrain from instituting proceedings'.[488] The preparatory works of the proposal to the CA 1975, also stated the following: 'As the rules on damages are of great importance to the minority as part of the protection against abuse of power by the majority, it follows that the minority must also be able to prevent decisions on discharge from liability. Accordingly, it is provided […] that an action for damages against the company may be brought if, at a general meet-

486 See for example the statements concerning the Law Committee Proposal for the CA 1944 in Nial (1941), *Minoritetsskydd i aktiebolag*, 711 and 719. In his review of Kobbernagel's book 'Ledelse og Ansvar' in SvJT, Nial states that '[i]n Danish law, the minority is strangely not entitled to prevent discharge and to bring an action against the management for actions which have harmed the company', see Nial (1945), SvJT 1945, 630. This statement was made because Kobbernagel, in his study of the liability of company management in Danish law, expressed the opinion that company management were free from liability for culpable behaviour by prior consent from a majority of shareholders at the general meeting, provided that the company management had made the general meeting aware of the risk associated with the disposition.

487 See SOU 1941:9, 523.

488 SOU 1971:15, 358. See further the statements in connection with the historical overview of the Swedish company regulation, SOU 1971:15, 84–85.

ing, the holders of at least one tenth of all the shares vote against a proposal to discharge the company from liability or support a proposal to bring an action for damages. The provision means that shareholders representing 10 percent of the share capital have the possibility to prevent a decision on discharge.'[489]

The Council on Legislation (Sw. *Lagrådet*) commented on the proposed provision in the CA 1975, stating the following: 'It may be considered to be in the nature of things that, if discharge is granted, this decision is final in so far as a new general meeting cannot decide that the company shall bring an action for damages. On the other hand, a minority of shareholders, as referred to in the provision, is of course always free to bring an action, provided that such a minority voted against discharge.'[490] This could thus be interpreted that discharge is granted by majority decision. However, it is also possible to interpret it as an expression of the assumption that even though the discharge resolution is final, it is possible for a minority of the required size to retain its rights to bring an action if discharge is denied because the majority voted against discharge.[491] Hence, the latter interpretation would imply only that the Council was referring to the matter of revocation, not the majority requirement, and that the Council wanted to emphasise that revocation would not be necessary because there were minority protection rules leading to the same result.

The provision on denial of discharge is the same in the current CA from 2005. Hence, there are strong legal historical arguments that the possibility to deny discharge from being granted is to be viewed as a certain majority requirement in Swedish Law.[492] More specifically, it refers to a *minority requirement*, i.e., that minority shareholders must hold a certain proportion of the total share capital in order to exercise their specific minority right, namely to refuse discharge.

9.3 Comparative Analysis

A comparison between the provisions in other Nordic countries, shows that the minority protection rules in connection with discharge from liability

[489] See prop. 1975:103, 545. Compare further regarding the postponement of the resolution on discharge, which was understood as a complement to the minority's possibility to '*prevent* the general meeting from deciding on discharge', op. cit., 396f (emphasis added).

[490] See prop. 1975:103, 779.

[491] See Svernlöv (2022), *Ansvarsfrihet*, 121–122.

[492] See further Svernlöv (2022), *Ansvarsfrihet*, 122.

have differed since the introduction of legislation concerning limited companies. In *Norway*, the NCA 1910 did not contain specific provisions on discharge resolutions. According to the Norwegian rule § 69 NCA 1910, a minority could not prevent a decision that an action for damages should not be brought against the board, but minority shareholder amounting to a certain proportion had a possibility of pursuing a claim on behalf of the company under certain circumstances. Similar provisions existed in § 122 NCA 1957. According to both these provisions, such a claim was possible if damage was caused intentionally or with gross negligence. In *Denmark*, the DCA 1917 did not contain specific rules on minority protection in connection with discharge. This was only introduced in the Danish Companies Act from 1973.

In *Finland*, the earlier ordinance from 1864 (FCA 1864) and the FCA 1895 did not contain provisions on minority protection in the regulation of discharge from liability. However, rules on discharge from liability were added to the legislation in the 1930s and the FCA 1978 contained provisions regarding resolutions on discharge and minority protection. According to Ch. 15 § 6 of the FCA 1978, the minority could not prevent discharge from being granted but had a possibility to bring a minority action on behalf of the company.

In the current legislation, the differences between Sweden and the other Nordic countries on minority protection remain. In both Norway and Denmark, discharge is not a mandatory item on the agenda at the AGM. However, a resolution on discharge is possible if this is stipulated in the articles of association or otherwise proposed at the general meeting. In Norwegian law, Ch. 17 § 4 (1) of the NCA states that minority shareholders may bring an action on behalf of the company even though a decision on discharge from liability has been made by the general meeting. There are no specific rules as to the majority requirements for a resolution to grant discharge, but the general view is that discharge resolutions require simple majority.

In Danish law, a resolution on discharge is made by a simple majority.[493] Resolutions by the general meeting to bring an action against the board under § 364 DCA 2006 are also made by a simple majority. If a minority representing at least ten percent of the shares has opposed a discharge decision,

[493] See Werlauff & Søgaard (2023), *Selskabsret*, 508.

any shareholder may bring an action for damages on behalf of the company within six months after the discharge resolution.[494]

In Finnish law, resolutions on discharge from liability or on bringing compensation claims are made by the general meeting with a simple majority.[495] In Finnish law, the minority's refusal of discharge only means that a minority action is still possible, see Ch. 22 § 7 FCA 2006.[496] There is no provision in the FCA prescribing a minority protection in relation to qualified majority or a possibility for the minority (or a qualified minority) to deny discharge.

In conclusion, the regulations on discharge in other Nordic countries mean that a minority of shareholders cannot refuse discharge from liability and thus maintain the company's right to bring an action. Instead, the minority protection rules in connection with discharge mean that the minority can bring a minority action if various prerequisites are met. Hence, the Swedish view on majority requirements and minority protection concerning a discharge resolution has differed from that in other Nordic countries since the legislation was introduced in 1910. Changes in the Swedish regulation would contribute to increased harmonisation in this matter. However, there is no evidence that the perception under current law is the same due to uniform Nordic rules, as the rules were created on separate occasions without prior Nordic legislative collaboration.

In other legal systems that allow resolutions of discharge from liability, the majority requirements vary. In jurisdictions where discharge from liability does not have legal effects on the liability of the board, the majority requirements are of less relevance for comparative purposes. Although this is the case in *Germany*, it can be noted that the German regulation on discharge in § 120 AktG means that the AGM may decide on discharge, by a simple majority resolution, but the members of the management board are prevented from discharging themselves.[497] Hence, there are some rules on the decision-making concerning discharge although the decision lacks legal consequences for the board. There is also no possibility for minority shareholders

[494] See § 364 para. 3 and § 365 DCA 2006.

[495] The provision is the same as in the earlier FCA 1978, see Taxell (2001), *Bolagsledningens ansvar*, 47.

[496] Cf. Taxell (2001), *Bolagsledningens ansvar*, 48.

[497] See § 136 AktG, which may be relevant with regard to the question of whether to grant full or individual discharge.

to refuse a discharge decision, but a certain proportion of shareholders can request separate decisions on discharge for each member.[498]

In some jurisdictions, discharge resolutions are only binding for the shareholders voting in favour of discharge. This is the case in *Switzerland*.[499] The only jurisdiction covered by this study that contains majority requirements similar to the Swedish rules is *Portugal*, where discharge is not granted if there is a dissenting vote from a minority representing ten percent or more of the share capital.[500]

Hence, the protection of minority shareholders in connection with discharge resolutions varies in the jurisdictions studied. Even though most jurisdictions include some form of minority protection, the minority has a veto right only in Sweden and Portugal, where the proportion requirements are the same. Thus, minority shareholders have a stronger position with regard to the question of discharge in Sweden than in many other jurisdictions.

9.4 Developments in Case Law

There are several cases from lower instance courts dealing with the majority requirements of resolutions on discharge. Many of these cases concern economic associations, which are regulated by the Act on Economic Associations (AEA).[501] The interpretation of a judgment from the Land and Environment Court of Appeal[502] in 2013, has been much discussed among legal scholars.[503] This case concerned the interpretation of Ch. 13 § 5 in the earlier AEA from 1987, which was applicable to the decision-making at the general meeting of a joint property unit association.

According to § 54 of the Joint Property Units Management Act[504], provisions in Ch. 21 of the AEA are applicable to questions concerning the liability of the board. This also includes the regulations on discharge from liability. In the case from 2013, the Land and Environment Court of Appeal concluded that neither the wording nor the preparatory works of the AEA 1987 or the Joint Property Units Management Act could be interpreted in

[498] See 143(2) AktG.

[499] Unanyants-Jackson (2008), *Directors' Liability Discharge Proposals – The Implications for Shareholders*, 35.

[500] See Art. 74(2) of the Portuguese Commercial Companies Code.

[501] Sw. *lagen* (2018:672) *om ekonomiska föreningar*.

[502] Sw. *Mark- och miljööverdomstolen*.

[503] *MMÖD 2013-03-20, F 8784-12*.

[504] Sw. *lagen* (1973:1150) *om förvaltning av samfälligheter*.

such a way that there was right for the minority of one tenth of the members to refuse discharge from liability. Instead, the court referred to statements in the preparatory works of the AEA 1987, which stated that discharge from liability is granted by a majority of members and means that a claim for damages cannot be made towards the board. However, the minority's vote against discharge means that a minority of members amounting to one tenth of the votes at the general meeting may make a claim for damages in their own name, on behalf of the association.[505]

Thus, the court's conclusion was that Ch. 13 § 5 AEA only regulates the procedural conditions for a claim for damages to be brought against the board or one of the members of the board. In the absence of a special rule regulating the majority requirement in connection with the issue of discharge from liability, § 49 para. 2 of the Joint Property Units Management Act was applied, which stipulates that the decision of the general meeting is the opinion that receives the most votes. Discharge from liability was therefore considered granted.

This view has since been applied by several lower instance courts, especially considering the majority requirements for discharge decisions in economic associations.[506] The wording of Ch. 21 § 6 AEA is essentially the same as that in Ch. 29 § 7 CA and the regulation is based on the provisions of the CA.[507] Thus, it would be consistent to make the same interpretation of the provisions of the CA and the AEA in this respect.

As already stated, the majority requirements have not been subject to a Supreme Court decision. However, in the case NJA 2019 p. 587 (*Korsviken*), the Supreme Court made statements in connection with the issue of majority requirements for discharge decisions. This case also concerned a joint property unit association, where a resolution on discharge from liability at the

[505] See prop. 1986/87:7, 254.

[506] See *MMD, 2021-02-22, F 1099-20*, where the court writes: 'Decisions taken by the general meeting are subject to a majority vote […]. This means that even if some, less than half of the votes, make reservations or vote against the discharge of liability being granted, the general meeting's decision is that discharge is granted if the majority of the votes are in favour of such a decision.' In a ruling from the *Nyköping* District Court, a member challenged a discharge resolution at an AGM and argued that discharge had not been granted because one tenth of those voting had voted against discharge. The claim was dismissed as manifestly unfounded. In this case, the court stated that the fact that a decision on discharge was made did not prevent a minority action, see *Nyköpings tingsrätt, 2023-06-28, T 1612-23*.

[507] See SOU 1984:9 293 and prop. 1986/87:7, 253f.

general meeting was repealed due to deficiencies in the notice procedure.[508] The main question was whether the conditions to repeal a resolution at a general meeting were met as there were alleged deficiencies in the notice procedure. Several members of the association claimed that they had not received the notice to the meeting and claimed that the resolution on discharge was to be repealed due to these defects. In Swedish law, a repeal of a resolution would during these circumstances require that the deficiencies affected the outcome of the resolution at the meeting.

According to the judgment, the auditor had opposed granting discharge to the board at an earlier meeting, and the decision was made to postpone the matter of discharge until a later meeting. The claimant members argued that they had not received notice for the later meeting. The Supreme Court stated the following: 'According to the minutes of the meeting, twelve members voted in favour of discharge and two against. The voting figures certainly indicate that the formal error had no effect on the decision to discharge. However, the circumstances taken together are not such that it can be considered clear that the error did not affect the content of the decision.'[509] The decision of the meeting was therefore cancelled due to the deficiencies in the notice procedure. The same provisions as in the afore-mentioned lower instance court cases were applicable in the case, but it is difficult to comprehend the statement from the Supreme Court. If the majority principle were applied, the presence of an additional member would not have influenced the decision. However, if the minority had a right of veto on the matter, the presence of the member would not have been significant either, as 2/12 of the members voted against discharge.[510] But in that case, one might ask why the member wanted to challenge the decision. The member's perception was that discharge had been granted by a majority decision (and this was also written in the protocol from the meeting), but this does not provide an answer to the underlying question. Hence, the most logical interpretation of the statements might be that the majority principle was considered applicable to the discharge decision. However, as stated above, this was only a minor part of the reasoning in the judgment, which is focused on the consequences of deficiencies in a notice procedure, not the majority requirements of the

[508] See further Arvidsson & Samuelsson (2019), *Stämmobeslut med formella fel*, 291ff.

[509] See NJA 2019 p. 587, Sec. 24.

[510] As 2/12 of the members had voted against discharge, it would have reached the threshold of a minority action, and thus the member could still have a possibility to make a claim for damages.

decision on discharge as such.[511] To summarise, the cases from the lower instance courts give the impression that the majority principle applies to discharge decisions. There is also some indication of this in the Supreme Court's judgement reported above. However, in the light of the thorough review of the legal history, this view must be considered incorrect as far as limited companies are concerned. In fact, it is clear that the applicable law has not changed with regard to the minority rights in this respect.

9.5 The Minority's Discharge Refusal and Consequences for the Board

The majority requirement for granting discharge is relevant to the question of whether the company retains the possibility to bring an action against the board if a minority has voted against discharge, or whether the discharge decision should be understood as an *instruction* to the board not to bring such an action.[512] The latter would imply that a discharge resolution where over ten percent of the shareholders vote against discharge is merely a procedural rule allowing a claim for damages. Further, it means that a claim will not be dismissed (if filed by the board of directors or minority shareholders on behalf of the company) – the substantive meaning of the discharge is decided by simple majority.[513]

However, according to this interpretation, it remains unclear if the majority's instruction affects liability at all as a matter of substantive law. As the majority resolution at the AGM would be interpreted as an instruction to the board not to pursue a claim, this interpretation of the discharge regulation also suggests that a majority of the shareholders cannot materially alter the claim for compensation. That means that the claim for damages is not waived (it still exists) and the right to damages is not affected. The company's

[511] It may also be added that the issue in the case was whether the lack of notice affected the decision of the meeting. In the case, it was not only a question of the extent to which the attendance of one individual member would have affected the decision on discharge, but it may be assumed that the attendance of that member may also have had an impact on how other members would have voted on the matter.

[512] Regarding this discussion, see, e.g., Östberg (2019), *Svensk rättspraxis i associationsrätt 2001–2010*, 1143ff. See further Svernlöv (2022), *Ansvarsfrihet*, 118ff, and Karlström (2016), *Till frågan om majoritetskrav vid bolagsstämmobeslut om ansvarsfrihet*, 181ff, and – with a different view than Svernlöv and Karlström – Båvestam (2016), *Om bolagsstämmans ansvarsfrihetsbeslut*, 63ff.

[513] Cf. Båvestam (2016), *Om bolagsstämmans ansvarsfrihetsbeslut*, 68.

claim would be determined by a court as a matter of substance, not procedure, and the instruction from the majority would not alter the substantive basis for the claim.

The view that the majority shareholders voting in favour of discharge should be interpreted as an instruction from the general meeting would be a fitting explanation for the fact that the board usually will not proceed with a claim for damages in cases where only the minority of shareholders has voted against discharge. However, the interpretation leads to the question of the effects of the discharge decision if the board violates the instructions of the general meeting and brings an action for damages. A violation of an instruction usually means that the board of directors would pursue a claim for damages at its own risk. If the claim is pursued, and damages are awarded to the company, the company is not worse off. However, if it fails, the question is if the board should be responsible for damages, for example court costs. Presumably, the board members would be liable for damages if they violated the instructions from the company's majority shareholders.[514] Although the claim is made at the board's risk, the board would only be liable according to Ch. 29 § 1 CA if the board had negligently violated the instructions from the general meeting.[515]

The board has a duty to follow instructions from the general meeting, unless they are contrary to the CA, the articles of association or the interests of the company.[516] If the majority vote in favour of discharge is regarded as an instruction not to bring an action, the board must consider whether it would clearly be contrary to the interests of the company not to bring such an action. Thus, the duty of obedience means that it would be difficult for the board to avoid responsibility if the claim should fail.

One argument against this interpretation of the majority's vote in favour of discharge, is the fact that the discharge resolution is often made based only on the presented annual report and the auditor's report. Detailed considerations are not necessarily made by owners regarding the commercial aspects of possible claims for damages in connection with the decision-making at the AGM. Hence, it is not certain that the resolution should be perceived as an

[514] Cf. Båvestam (2016), *Om bolagsstämmans ansvarsfrihetsbeslut*, 81.

[515] Hence, this does not lead to an *actio pro socio* for the board similar to the minority action, as the board would not bear the costs of process directly, but only be held liable towards the company for negligently bringing an action (and if the claim fails).

[516] See Section 7.2.4.

instruction with the stated meaning.[517] However, this argument could be put forward for many resolutions at the AGM, where the information is based on the reports presented at the AGM, which do not necessarily contain detailed information regarding the underlying assessments on which the board based those reports. Complete knowledge of all the board's activities of importance for the AGM's decision-making cannot be required for a decision to be perceived as an instruction. As there is an exception from granted discharge in relation to materially incorrect or incomplete information, there is also a mechanism to deal with the AGM's lack of information about certain conditions of importance for the discharge resolution.

Another argument against the interpretation of the majority resolution as an instruction not to make a claim is related to other rules on minority protection in connection with a claim for damages against the board. For example, the provision in Ch. 29 § 8 CA gives the minority the right to prevent a settlement of damages to the company, regardless of what the majority of shareholders at the general meeting may consider in the matter. This seems to be more in line with the view that if the required minority has refused discharge from liability, an action for damages can and may be brought either by a minority on behalf of the company or by the company itself.[518] Furthermore, the majority's decision to refuse discharge is not necessarily considered as an instruction from the general meeting that the board *should* bring an action for damages.[519] It is for the board to decide whether such action should be taken or if any measures should be taken at all. If the board brings an action for damages and it turns out to be unfounded, the general meeting can later scrutinise the board's management (and claim damages for the negligent decision to initiate proceedings).

The view that the majority's resolution in favour of discharge should be seen as an instruction not to make a claim for damages therefore contradicts the view that a majority resolution *against* discharge is not seen as an instruction (to make a claim for damages). It can therefore be argued that it would be more consistent if the board could independently decide to take measures

[517] Östberg (2019), *Svensk rättspraxis i associationsrätt 2001–2010*, 1143. It can be added that the discharge decision should be interpreted in accordance with how the addressees, in this context, primarily the board of directors and the CEO, perceive it, cf. Åhman (1997), *Behörighet och befogenhet i aktiebolagsrätten*, 727.

[518] Östberg (2019), *Svensk rättspraxis i associationsrätt 2001–2010*, 1144.

[519] See prop. 1975:103 s. 779. Cf. Taxell (1983), *Aktiebolagets organisation*, 35, who states that '[r]efusal of discharge does not mean that an action for damages has to be brought, but a decision to do so is nevertheless closely linked to the discharge'.

or not concerning the liability of (the former) board, and thus the same should apply to all majority resolutions, i.e., both for and against discharge. In both instances, the board can be held liable for pursuing such a claim if the board has acted negligently by doing so.

This leads to the conclusion that if discharge has been refused by a minority, the board should examine to what extent it is possible to follow the instructions of the general meeting in this respect. There may for example be situations where a director has been denied discharge after having acted in breach of the CA or the articles of association. This in turn leads to the conclusion that the board should be considered to have an obligation to investigate the possibilities of bringing an action for damages if a minority of shareholders has denied discharge. The conflicting interests of different shareholders, which are expressed by the minority's refusal of discharge, are then subject to a balancing of interests by the board. The fact that the minority in this way enables the board to examine the question of damages more closely and that the minority's refusal of discharge also constitutes a procedural prerequisite for an action for damages brought by the company, thus leads to the company (as well as its majority shareholders) being able to benefit from the minority right. The difficulty lies in the fact that the board must take measures and investigate potential liability for damages, which could be costly and time-consuming.

Among other things, this will lead to investigation costs for company. It also leads to uncertainty for the board on how to deal with any investigations that show that wrongful acts have been committed, notably because the board cannot decide to bring a claim against itself. This is also likely to disturb the peace of mind within the board. In addition, the board can hardly be said to act solely in the interest of the minority shareholders in this matter. Furthermore, the interpretation of the regulation is not only a matter of conflicting interests among shareholders, but also creates difficulties for the board. It is in the interest of the board that the question of liability and potential claims for damages is not open for too long and there is a need for clear instructions from the general meeting to avoid the board having to make decisions that involve difficult trade-offs between the interests of different shareholders. In essence, there is a need for clarifications concerning the scope of the duties of the board in this respect. In my opinion, standards on which interests should take precedence should be clearly prescribed by law, not be determined by the board.

9.6 Summary

As presented above, there are two different interpretations of the majority requirement in discharge resolutions. According to one view, the rules should be interpreted as meaning that there is a valid discharge decision only if the votes against discharge are from shareholders representing less than ten percent of the votes in total. Another interpretation is that the rules imply that discharge is granted when more than half of the votes cast are in favour of discharge, which follows from the main rule for general meeting resolutions under Ch. 7 § 40 CA. A minority consisting of owners of more than ten percent of the shares cannot, according to this latter interpretation, deny discharge from liability but can, however, bring an action in its own name on behalf of the company in accordance with Ch. 29 § 9 CA. This interpretation also includes the possibility to consider the majority decision to discharge as an instruction to the board of directors not to bring such an action.

The legal background to the minority protection rules in connection with discharge resolutions shows that the intention of the lawmaker was to give the minority power to decide the question of discharge, providing a possibility for both the company and the minority (through *actio pro socio*) to make a claim for damages. The introduction of a minority action (*actio pro socio*) was probably the reason the company, through a majority decision, could not alter the liability of the board towards the company in substance. As the right to damages remains unaffected, it leads to the difficult question of whether the company can make a claim for damages against the board or if the majority's vote in favour of discharge, should be viewed as an instruction to the board not to make such a claim, as is shown by recent debate.

The interpretation of the majority's vote in favour of discharge as an instruction may serve as an explanation for the board's decision not to further investigate potential claims. However, this interpretation does not have strong support in the legal sources. The interpretation contradicts the other rules on minority protection, for example possibilities of settlements, and is also contrary to the view that the board may decide not to investigate further liability even in situations when a majority has voted *against* discharge. However, from the board's perspective, this would probably be the most expedient solution, as it would lower the investigative burden of the board in cases of the minority's refusal of discharge. The minority would still be protected through the possibility of minority action (*actio pro socio*), but the

possibility of the minority to use refusal of discharge as a means of pressure would decrease.

In line with this view, it should be noted that if the consequences of the majority's discharge resolution means that the board would violate instructions by making a claim, the board is only liable for negligently bringing an action for damages if the claim fails. In my opinion, changes in the legislation would be needed to adjust the consequences of such a majority decision further, so that any an action brought by the company (through the board) would be *dismissed* from the court.

10 Summary and Conclusions

The questions posed at the outset of this study aim to seek explanations as to why Swedish company law contains the regulation of discharge from liability for the members of the board of directors and CEO and how the discharge regulation should be understood within the framework of Swedish company law as a tool for limiting the board's liability towards the company in comparison to other legal systems and, if necessary, to make proposals for amendments to this regulation. The following summarises the results of the study. The summary highlights how the discharge concept has developed in Swedish law and presents its functions in corporate governance, its scope and application, as well as the preconditions for a valid discharge resolution, i.e., the decision-making at the general meeting. Ultimately, suggestions are made for possible changes to the regulation that could contribute to greater harmonisation.

10.1 The Origin of Discharge and Path Dependence

The regulation on discharge has a firm anchoring in Swedish legal history, as a tool for limiting liability of the board and providing closure concerning the management of the company for the preceding financial year. The introduction of discharge was probably influenced by French public law and the international trading companies introducing limited liability for the management, thus placing it at the core of the development of one of the key features of modern capital associations, namely the limited personal liability for the company's debts.

The notion that shareholders should be able to release management from liability was a simple solution for shareholders to be able to control the conduct of the board. A purely contractual solution would be based on the fact that these legal entities could agree, and the general meeting was not considered an independent legal entity. Although this was (and still is) the case, the

relationship between the shareholders and the board is similar to that of an assignee, acting on behalf of the shareholders as a group, which also explains the similarities of the rules on board liability to the contractual rules in the Swedish Commercial Code. Neither do the general rules on civil liability and exemption from liability provide an appropriate tool for dealing with the joint shareholders' interests. The corresponding grounds for exemption from liability can only with great difficulty be based on the shareholders' collective knowledge of the tortious acts or an aggregate of their behaviour, as it would be difficult to balance the interests and risk awareness of different shareholders in the relationship between the shareholders and the board.

The long history of discharge from liability and the fact that discharge regulations exist for many different company forms in Swedish law indicates that it is still perceived as a fundamental part of the law of associations. Due to this path dependence, where past regulation constrains the development of law, discharge has not been replaced with other regulation with the aim to limit the liability of the board.

10.2 Legal Tools Limiting Liability of the Board

In the light of the Swedish corporate governance model, where shareholders as owners of the company have a major influence over its activities, the discharge provision helps to raise the issue of board liability to the level of the general meeting. It also means that the general meeting has an influence on the question of the liability of the board of directors, and that their decision to discharge the board from liability means that the management of the company is not subject to judicial review. If discharge is granted, it has the effect of a procedural hindrance in the event of a claim for damages, which also contributes to a rapid resolution of a judicial process.

Discharge is considered as part of the regulation of the liability of the board of directors towards the company, or as a limitation of the liability of the board of directors. It can be reiterated that the discharge is binding only towards the company, not towards external third parties. In this respect, the discharge only relates to the internal relationship between the company and the board of directors. However, the wording of the liability rules in company law makes it more difficult to establish the liability of the board towards third parties, such as shareholders of the company.

According to the prevailing opinion in Swedish law, there are few possibilities – other than discharge – for a company to protect the board of

directors against liability. This is particularly true regarding the possibility of disclaimers or *ex-ante* limitations of liability. This has been the case in Swedish law for a long time, and it is considered a more adequate protection for the shareholders to release the board of directors from any breach of duty only *after the event*. The matter has not been the subject of any extensive discussions in recent years.

The possibilities of *ex-ante* limitations of the liability of the board in the Swedish regulation differ from those in other Nordic regulations, in particular Norwegian law where liability may be limited by a contract between the board of directors and the company or by provisions in the articles of association. The structure of liability in general also differs, at least regarding the possibilities for external parties to claim compensation.

Regarding the basic conditions for liability, there is a lack of Supreme Court precedents contributing to the understanding of the prerequisites of board liability. The possibilities of a Swedish equivalent to the American BJR have been discussed among legal scholars, and it has been argued that such a rule exists in Swedish law. The BJR is implemented in legislation in some other European legal systems. In my opinion, the assessment of liability in connection to business decisions – and thus the details of a Swedish equivalent to the BJR – show great similarity with the assessment of liability regarding decision-making in general. Although it would be clarifying to characterise the liability as an expression of a BJR, it is uncertain to what extent the business nature of the decision-making is relevant as an argument in support of mitigating the board's liability for these decisions.

As mentioned, there are differences in the possibilities to limit the liability of the board in other ways, independent of the possibilities to decide on discharge. The study thus reveals a diversity in the outlines of board liability. Removing the concept of discharge would not necessarily contribute to greater harmonisation in this respect. On the other hand, liability insurance is allowed and often used in practice, providing the board protection against claims. Liability insurance also cover claims from the company itself. Rules on the adjustment of the liability of the board of directors can only help protect the board against claims from the company in exceptional cases. They are also likely to be of limited relevance in practice, given the existence of liability insurance.

Resolutions or instructions by the general meeting, other than discharge, may affect the liability of the board of directors. This is the case in Sweden and some other legal systems. For example, if the general meeting approves

a specific measure or decision of the board, even if it is to the detriment of the company, the board may be released from liability. One of the differences between shareholder ratification of certain decisions and discharge is that discharge is given for the board's management in general. The specific consent of shareholders may in Swedish law have greater significance for board liability, as it means that liability does not arise at all. In such situations, however, consent is needed from all shareholders.

Discharge is to some extent similar to time limits for liability and may also be compared to the rules on limitation periods for making a claim for damages. Although this analogy is correct in the sense that a discharge decision means that a claim for damages cannot be made, there are some important differences vis-à-vis time limits. These include the fact that a discharge resolution made by the general meeting of shareholders can be *challenged*, which is not the case with limitation periods. However, the effects of time limitation and discharge are similar and the exceptions to their application are interconnected, for example regarding the information exception, see Ch. 29 § 11 CA. On the other hand, the limited legal effects of discharge in these situations means that the explanation of the provision as a time limitation rule not entirely accurate.

It should be reiterated that the fact that the board is not discharged from liability only means the general meeting should not bear the risk of the management. It does not mean that the company will claim damages. The discharge functions more as a final statement of account that bars the company from claiming certain legal consequences in connection with the fulfilment of the assignment. In light of the above, discharge can be understood as a resolution essentially relating to the passing of management risk to the company. The rule limits liability for the board only to a certain extent, the purpose of which is also to encourage the general meeting, considering the information provided by the board, to take a position on the management and put the past financial year behind it. Section 10.4 further presents how the discharge from liability should be viewed as a passing of risk concerning what is disclosed to the general meeting, and that this should not be viewed as an exception from discharge, but rather a prerequisite aimed at promoting disclosure of information.

10.3 Protection of Minority Shareholders or Abuse of Minority Rights?

A particular aspect in connection with the protection of minority shareholders in the discharge regulation is the extent to which the rules give rise to possible abuse of minority rights. Basically, the question is if the minority shareholders have too much influence on the matter. Regarding the protection rules that belong to the minority *ex officio*, i.e., rules of behaviour for the majority, there is little scope for such abuse. On the other hand, abuse can occur regarding rules referring to what is above presented as the minority rights in a strict sense, as the application of these rules is initiated by the minority.

In relation to the specific minority rights in connection with discharge resolutions, different options to prevent abuse of minority rights can be presented. If the minority has a veto on discharge, it is a strong right. Removing the minority's ability to refuse discharge could prevent abuse. In this way, the Swedish regulation would become more similar to the other Nordic countries but provide protection of the minority shareholders by keeping a right to make a claim in the interest of the company (*actio pro socio*). Another option would be to provide a proportion of minority shareholders with a right to refuse discharge only if the reasons for refusal are stated by the minority and it is likely that the board has caused harm to the company. Such an obligation would discourage a categorical refusal of discharge but would probably be difficult to implement in practice as it would require more detailed record-keeping and raise problems of interpretation.

Hence, the preferred option is probably to remove the possibility to refuse discharge but to make available the option to bring action against the board in the minority's own name for damages towards the company. This would mean that if a majority has voted in favour of discharge, it would be a procedural hindrance for the company to bring an action, and not only be considered an instruction from the majority to the board not to do so. This would to a greater extent provide a swift resolution of the judicial proceeding.

Another solution could be to remove the minority protection rules altogether. Instead, minority protection could be based solely on the possibility to challenge a resolution on discharge, if the resolution has been made in violation of the CA or the articles of association. For example, a resolution on discharge can be challenged on the grounds that it violates the general clause or the principle of equality.

These matters largely relate to the risk of abuse of minority rights and the potential conflict between different shareholders. It should be emphasised that the uncertainties in connection with discharge resolutions and the refusal of the minority shareholders have significant consequences for the board. This is shown above in connection with the matters of shareholder instructions and the duties of the board to investigate potentially harmful conduct, if discharge is refused.

In jurisdictions where discharge is decided by simple majority vote, there are often other rules on minority protection. This may be, for example, that there are greater possibilities for minority actions (e.g., direct action for damages under non-contractual rules if a measure by the board harms shareholders and is in breach of a norm aimed at protecting shareholders) or that it is possible to challenge the discharge decision if it is 'unfair'. The possibility for the minority to refuse discharge in Swedish law can thus, in comparison with other legal systems, be considered an excessive level of protection for the minority. It aims to resolve conflicts between shareholders, i.e., majority and minority, but probably has negative effects for the board as it does not provide a clear instruction on how to proceed (or not proceed) with the liability issue.

As the minority's veto is to the detriment of the board of directors, the interest in clarity on the issue of liability would increase if a simple majority were required for approval of discharge. This would also entail that the board would be released from its obligation to investigate the minority's reasons for refusal to grant discharge.

10.4 Rules Promoting Disclosure of Information

The comparative analysis shows that the legal systems that have rules on discharge from liability often contain exceptions if the general meeting has not been informed by the board of the acts constituting the potential liability of the board. This is sometimes referred to as the information exception. In both Sweden and other Nordic countries, it is clear from the wording of the regulations that this is an exception to granted discharge (cf. Ch. 29 § 11 CA). The aim of this rule is clearly to promote disclosure of information to the shareholders on the management of the board. A similar rule on disclosure of information is provided in connection with the time limitation, as the starting point for the limitation period is from the presentation of the annual reports under Ch. 29 § 10 CA.

In the earlier legislation, the exception related only to wrongful or omitted information, if the board acted wilfully or negligent. Today, the board will bear the risk for all such information, which means that the criteria are objective and the passing of management risk only relates to facts that are presented to the general meeting. Thus, the discharge regulation contains a component that favours disclosure of information from the board to the general meeting, as this is in the interest of the board. However, if the board provides information to the general meeting about potentially damaging conduct, this may lead to the general meeting acting on the information provided. It can be argued that the board is then entirely in the hands of the general meeting, and the question of liability is determined by the conscience of the general meeting. A very extensive duty to disclose circumstances that may give rise to liability leaves the liability question open even in cases where the board was not at all aware of its mistakes. Another, less imminent, risk of a strict disclosure rule is that it could lead to less scrupulous board members deviously trying to sneak in information.

Therefore, further legal clarification is needed in order to promote the predictability of the law from the board's perspective, particularly in regarding the implications for the board of making a mistaken assessment of the materiality of information. Although the disclosure obligation is a necessary condition for discharge, it risks having the opposite effect on the incentives for the board to enable the company to make an informed decision on discharge.

This is not to say that a change in this respect would contribute to greater harmonisation, as the 'information exception' exists in most jurisdictions where discharge is considered to relieve the board from liability. The criticism levelled at the extensive information exception also means that discharge is more similar to the social pressure created in jurisdictions where granted discharge has no legally binding effect, such as Germany. The alternative of removing the discharge regulation altogether would thus have the same effect on the issue of liability itself, as the granting of discharge has no 'real' impact on liability, and the board would be protected against claims by the one-year time limit, which in comparison with general limitation rules in Sweden is rather short.

10.5 Final Remarks

To summarise the discussion, in light of the historical anchoring of discharge in Swedish law, the prevalence of the rules in general law of associations and the fact that other possibilities to limit the liability of the board of directors have not been subject to detailed consideration in Swedish law, it would not be recommended to remove the possibility to decide on discharge. The alternative of removing the provision completely and stating that a decision on the matter of discharge is not mandatory at the AGM, might be preferable from an international perspective as the meaning of the regulation often appears unclear to foreign investors. However, considering what has been said above about other ways of protecting the board of directors against liability, as well as the increased costs of directors' liability insurance, in many companies this is likely to lead to the matter of discharge being maintained at the AGM by means of provisions in the articles of association.

With regard to procedural aspects, in particular minority protection and the significance of the discharge decision for the right of a minority of shareholders to bring an action, it is clear that the Swedish regulation is not consistent with the regulations in the other Nordic countries. From a Nordic perspective, legal harmonisation would be preferable, which means that the Swedish provision should be changed, making it possible for a majority of shareholders to decide to grant discharge. If discharge is granted, the company should not be able to bring an action for damages. If a minority of shareholders has voted against such a decision, it should be possible for them to bring an action in their own name on behalf of the company. Lastly, the 'information exception' is in line with the discharge regulations in other jurisdictions. In order to ensure that information is provided to the general meeting, it is therefore necessary to retain this exception, not least for harmonisation purposes.

If discharge can be granted by a simple majority, but minority protection is maintained through *actio pro socio*, this would provide protection of the interests of the minority shareholders. Other possibilities to challenge such a decision would still apply. As regards other stakeholders, such as the company's creditors, their interests are also catered for by the exception from discharge in the event of the company's bankruptcy under specific provisions. Although this situation raises a different problem, namely the liability of the board in the event of imminent insolvency, the special rules on deficiency liability and co-liability apply in such cases.

If the specific provision on co-liability is removed in the future in favour of liability rules, the extent to which the company or individual creditors may claim damages should be stated clearly. This issue deserves to be further analysed in future research. Other aspects addressed in this study have been 'shareholder consent', where further research is necessary to shed light on the protection of, *inter alia*, creditors' interests as reflected in the CA as a whole. Further related issues are the assessment of liability, and whether there should be a clear definition in the legislation establishing a Swedish BJR. The possibilities of insurance as an alternative means of protecting the board against liability should also be explored.

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