

Liability of Members of the Board of Directors and the Managing Director

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1 Introduction

Questions concerning the company management's liability have attracted great interest in recent years. One of the reasons for this interest is that several, much-publicised financial scandals took place in the 1990s in Sweden as well as in the other Scandinavian countries. Another reason is that the Swedish Companies Act was extensively revised during that period, which process has now been completed in all its essential parts. The amendments made to the Swedish Companies Act involved certain modifications of the obligations of the company's management. Board members' and the managing director's liability was also adjudicated upon by different Scandinavian courts on several occasions during the past ten years. The objective of this paper is to consider certain questions regarding the board of directors' and the managing director's liability to the company in the light of the foregoing.

2 Functions of Corporate Bodies Under the Swedish Companies Act

2.1 Internal Relationships Between Corporate Bodies

Sweden has nowadays both private and public companies. The private form aims at regulating relationships in companies conducting business with few partners, in which the shares are not publicly traded. A public company is a company whose shares are or may be traded on the stock exchange. In Sweden the rules governing company organisation and its management stipulated in Chapter 8 of the Swedish Companies Act show only a few occasional differences regarding the two company types.

Under the Swedish Companies Act an important point of departure when determining the company management's liability to the company is that each company shall be hierarchically organised. Shareholders' meetings constitute the superior body of the company, to which both the board of directors and the

managing director are subordinate. Directives submitted by the highest organ of the company shall be followed, unless they are contrary to the law or the articles of association under the provisions of Chapter 8, section 34 of the Companies Act. This organisational structure entails that the managing director shall be exempted from liability if the measures undertaken by him have received the support of the board of directors or the shareholders' meeting.

There are two main ways of approach towards the regulations concerning the formal organisation of a company. The first way of approach, which can be called 'dualistic', means that one of the company's management's bodies shall have a monitoring function only, whereas another body shall lead the company's operations and represent the company externally. The other way of approach, which may be called 'monistic', stipulates that each company contains only one management body. The purest form of the dualistic system is constituted by the organisational rules of the German *Aktiengesetz*. Company organisation under American and English law constitutes an example of the monistic system.

The Swedish Companies Act perceives management of the company's affairs as a uniform complex of duties, in which the managing director shall be liable under the provisions of Chapter 8, section 25 of the Swedish Companies Act for the day-to-day management of the company. A characteristic feature of Swedish law is that the board of directors does not have a purely monitoring function, in contrast to what is applicable in German law with regard to public companies. For this reason the Swedish model is closer to the monistic system. The monitoring function of the board of directors is emphasised by means of the fact that the chairman of the board of directors of a public company may not be the managing director of that company at the same time under the provisions of Chapter 8 section 14 of the Swedish Companies Act. It is furthermore emphasised in Chapter 8 section 4 of the Companies Act that the board has a special obligation to monitor the company's operations, and in consequence of the hierarchical structure, to ensure that the managing director discharges his obligations, as well as that it must monitor the company's financial position in general, and where applicable, the group's financial position.

2.2 *The Board of Directors' Mandate*

The board of directors is a collegial organ. This means that a member of the board is not entitled to act on his own behalf and independently from the meeting of the board of directors. The only way for a member of the board to obtain information about any particular issue concerning the company is by raising the question about it at a board meeting. After that the board may decide to give the member an assignment to obtain information on this issue.

A member of the board is individually liable. Individual liability means that if a member has made reservations against a decision by having his opinion recorded in the report of the board proceedings, he shall be exempted from liability. A member of the board who has made reservations in the above-described manner may become liable all the same if he subsequently participates in the enforcement of the decision. Enforcement of a decision should be regarded in the majority of cases as a subsequent acceptance of the decision by

the member of the board. One of the consequences of this situation is that when a member of the board is appointed as the company signatory, for example, he may not enter into the agreement without risking liability to the company.

The board of directors' mandate is a personal commission. When a permanent member of the board cannot be present, a deputy-member shall be appointed. The personal character of the commission means that a member of the board cannot be granted authorisation to form a quorum, for example.¹ In what way can an absent member of the board be liable? If the member participated in making decisions of a more principal character at some earlier stage, he will hardly avoid liability if the board makes more concrete decisions in his absence in accordance with the guiding principles decided upon earlier on.² Repeated absence from the meetings of the board of directors may also mean that the member of the board has neglected his monitoring duty and that he may be held liable for damage sustained by the company.

A deputy-member shall not be liable for loss or damage unless he has participated in the meeting of the board of directors instead of an ordinary member, and made decisions in his place.³ A lot speaks in favour of the view that if a deputy-member participates in a board meeting on a separate occasion, he shall not be treated as strictly as the ordinary member who has been following the business activities regularly. Whether the deputy-member shall be held liable or not depends on the measure of his involvement in the work of the board. If he has been given an opportunity to participate in the meetings and received all the materials possessed by the remaining members of the board, he can hardly be treated differently than the permanent members of the board in respect of liability.

2.3 *Liability for Damages of a Member of the Board of Directors and of an Employee*

In some companies the company's management may be organised somewhat differently than as provided for in the Swedish Companies Act. A company may institute committees, for example, that will examine and prepare certain questions to be discussed afterwards by the board of directors. Members of such committees are not liable, however, under the Swedish Companies Act, unless they are also members of the board.

May the provisions of the Swedish Companies Act concerning liability in damages be applied analogously to other leading office-holders of the company? In my opinion this is not possible.⁴ The reason is that the differences concerning the prerequisites for liability under the provisions of the Swedish Companies Act relating to the company's members of the board of directors, on the one side,

¹ See UfR 1981.262 and Sofsrud, T., *Bestyrelsens beslutning og ansvar*, Köpenhamn 1999, p. 70.

² See Dotevall, R., *Bolagsledningens skadeståndsansvar*, Stockholm 1999, p. 62.

³ See Svernlöv, C., *Aktiebolagets suppleanter: suppleantinstitutet i svensk aktiebolagsrätt*. Stockholm 1998, pp. 62.

⁴ Cf. NJA 1997 p. 418.

and the rules concerning liability of employees under Chapter 4 section 1 of the Tort Liability Act, on the other hand, should be maintained. Extraordinary reasons are necessary for an employee to become liable under the provisions of the latter Act. The possibility of holding an employee liable should grow together with the employee's rise in the company's hierarchy, since it is this circumstance that shall be considered as important according to the Act when determining the nature of extraordinary reasons. Nevertheless, even here a distinction should be made between the employees' and the board members' liability with respect to the different premises on which liability is based. A deputy managing director who has not taken a permanent member's place will not be liable in this capacity under the provisions of the Swedish Companies Act, but under the provisions on employees of Chapter 4 section 1 of the Tort Liability Act.

A person working on assignment, who is not employed by the company, shall be liable under the general provisions of Chapter 18 of the Swedish Commercial Code concerning the manager's liability for loss or damage caused by negligence. A person working on assignment is therefore not protected in the same way as an employee.

As regards a member of the board of directors who is at the same time employed by the company it may sometimes be unclear in which capacity he has caused damage. As mentioned before, the premises for liability differ depending on the capacity in which the tortfeasor causes damage – whether as an employee or as a member of the board.

This delineation is quite straightforward regarding decisions made by the board of directors. In these cases the liability provisions of company law stipulated in Chapter 15 of the Swedish Companies Act will always apply. Even when a member of the board has been given a special assignment by the board to undertake certain measures regarding the company's operations, he shall be liable under the liability provisions of the Companies Act. In other cases it is the Tort Liability Act's provisions on the employee's liability that shall be applied instead. If a member of the board is more or less permanently active, performing assignments on behalf of the board, a problem may arise in relation to the managing director's liability. Under Chapter 8 section 25 of the Companies Act it is the managing director who is responsible for the day-to-day management of the company. If the company should decide to institute other positions that will affect this area of responsibility, the managing director may risk becoming liable for loss caused by the holder of that position. Chapter 8 section 3 of the Swedish Companies Act stipulates that in such situations the board of directors shall issue written instructions setting forth the allocation of duties of the managing director and any other bodies which the board of directors may establish. Such division of duties will diminish the managing director's liability in an equivalent degree.

Drawing a border line between the liability provisions of the Swedish Companies Act and of the Tort Liability Act is more complicated if the duty of loyalty has been neglected. The duty of loyalty covers also a board member's behaviour outside the meeting of the board of directors. The higher the position of an employee in the company's hierarchy, the more complicated it is to draw a border line between the two. In such cases liability should always be treated, in my opinion, according to the provisions of Chapter 15 of the Swedish

Companies Act if damage has been caused due to neglect of the duty of loyalty. This will apply, for example, if a member of the board disseminates confidential information about the company's affairs, or if he engages in competitive practices.

3 Determination of Culpability

3.1 What Criteria Shall be Used?

When determining liability the culpability requirements are usually divided in the Scandinavian legal systems into subjective and objective requirements.⁵ The objective requirements mean that a given act or omission shall be indefensible and contrary to law. The subjective requirements mean that circumstances pertaining to the wrongdoer shall be taken into consideration.

The objective criteria used for the determination of a board member's or the managing director's liability are constituted by the provisions of the Swedish Companies Act and the articles of association, as well as by the obligations usually connected with the managerial position of a person.⁶

Even Scandinavian law will tolerate, however, certain mistakes of the board of directors or the managing director in business decision-making, provided that these mistakes remain within the framework of the business operations' objectives and that they have not been made in order to, directly or indirectly, further the decision-makers' own interests.⁷ This tolerance can be justified by the fact that a company must often make business decisions in situations characterised by a lack of certainty. This, coupled with the fact that it is often necessary to take risks, means that it is not a simple task for the courts to determine *a posteriori* the suitability of the company management's decisions. This is the strongest argument for the *Business Judgement Rule*. It is only natural that this rule should exhibit some discretionary features. It is hardly possible to determine the exact level of risk or uncertainty that shall be tolerated.⁸ What is necessary, on the other hand, is for the board to have based its decisions on sufficiently comprehensive documentation. In a complicated merger it is thus not enough for the board of directors to be satisfied with a short oral report, without any further written documentation concerning the question.⁹ Furthermore, if a business deal which has miscarried is not to lead to liability, it is necessary that the authority of the company's bodies shall not have been overstepped, or that the members of the board shall not have undertaken measures which have directly or indirectly promoted their own interests.

⁵ Cf. Hellner, J. & Johansson, S., *Skadeståndsrätt*, 6 ed., Göteborg 2000, pp. 125.

⁶ See. Dotevall, pp. 46.

⁷ See, for example, Schans Christensen, J., *Ledelse & aktionærer*, Köpenhamn 1992, p. 52. Cf. NJA 2000, p. 404.

⁸ Cf. Sofsrud, pp. 143 for the opposite view.

⁹ See, Sofsrud, pp. 151. Cf. also *Smith v. Van Gorkom*, 488 A2d 858 (1985).

An omission may form the basis of liability in cases where there is an obligation to act. In recent years a view has been promoted in Scandinavian law, which has received support from American law, that omissions shall be deemed, at least in certain cases, more strictly than active conduct.¹⁰ An example of this kind of omission would be the board of directors' failure to phase out the operations of a slumping business area in order to reduce the losses of the company's creditors. Such an omission would not be covered by the Business Judgement Rule with regard to liability. In such cases the board members' knowledge concerning the company's financial situation shall be examined in great detail.

In my view the board's as well as the managing director's duty of supervision becomes more stringent when the company is in trouble. The preparatory materials for Chapter 13 section 2 of the Swedish Companies Act indicate that the company shall prepare the so called control balance sheet if there is reason to assume that the company's financial situation is so bad that the limitations on the amount of the company's equity stipulated by the provisions have been encroached upon. The ordinary level of tolerance for wrong business decisions which is normally applied in Scandinavian law decreases if the financial situation of the company is weak.¹¹

3.2 The Importance of the Circumstances Concerning the Person of the Tortfeasor

When determining culpability it is impossible to wholly disregard the circumstances concerning the persons of the member of the board or the managing director. In Chapter 8, section 9 of the Swedish Companies Act only formal requirements have been laid down as regards the board member's or the managing director's qualifications. They shall have attained their age of majority and they shall not have been declared bankrupt.

In view of the fact that boards of directors are usually quite heterogeneous it is probably impossible to find some common, lowest acceptable standard that would apply to the board of directors' mandate.¹² The fundamental requirement is that the member of the board shall have sought the mandate of his own free will, being therefore personally responsible for having sufficient experience and qualifications to succeed in his undertaking. If it can be shown later on that he has not met the requirements placed on him, it is reasonable to demand that he should resign.¹³

A member of the board is not required to possess specialist knowledge of the sector in which the company conducts its business. Such a requirement would promote one-sided composition of boards of directors, which would not enhance

¹⁰ See, Sofsrud, p. 131.

¹¹ See Dotevall, *Skadeståndsansvar för styrelseledamot och verkställande direktör*, Malmö 1989, p. 197.

¹² See, e.g., Knepper, W. & Bailey, D.A., *Liability of Corporate Officers and Directors*, 5 ed., Charlottesville, Vol. 1, 1993, p. 117; and Taxell, L.E. *Ansvar och ansvarsfördelning i aktiebolag*, Åbo 1963, p. 57.

¹³ See Taxell, p. 56-57.

the quality of the work of such boards. On the other hand it is necessary that a member of the board shall possess a general ability to learn about the business of the company.

The question is whether the board member's liability may be treated as so called professional liability. This means that when determining culpability greater consideration is given to the question of whether the objective criterion for what is considered as acceptable conduct has been upheld, whereas circumstances concerning the person of the tortfeasor and other issues of the individual case are of lesser importance. In my opinion professional liability does not apply in this sense to a member of the board. Instead, subjective circumstances should be considered when determining culpability in order not to prevent inexperienced persons from seeking board mandates. Danish case law shows that in cases when the term of office of a board member was short, and loss was sustained because a prospectus had been issued containing wrong information about the company's financial situation, the member has been exempted for liability.¹⁴ In UfR 1961.515 it has been confirmed that board members who had recently assumed their duties were not liable for the agreement concluded by the managing director. The board members in question had assumed their duties five months prior to the conclusion of the contract.¹⁵ The members could not be expected to become properly acquainted with the company until a certain time of office has passed. This view of liability should be applied even to persons who hold several board of directors' mandates. Since each company has a character of its own, it is difficult to talk about a specific board of directors profession.

The question of liability is treated in a different way regarding the managing director. The managing director is supposed to be active on a full-time basis, and under the provisions of Chapter 8 section 25 of the Swedish Companies Act he is responsible for the day-o-day management of the company. It is in view of this function that it is reasonable to place higher demands on the managing director than on an individual board member.

Board members' responsibility varies depending on, *inter alia*, their working tasks and the amount of remuneration received by them. It may be necessary, for example, to involve an expert in a certain area in the work of the board. Such a person will carry greater responsibility than the other members of the board with regard to damage or loss which has been sustained by the company within his field of expertise.¹⁶ This view may be disputed, however, on the grounds that a board of directors is a collegial body. This means that an individual member of the board shall not bear the primary responsibility for decisions made within a certain area. In my opinion the allocation of working tasks which arises in practice when an expert has been engaged by the board should reflect the distribution of responsibility. If the shareholders appoint an expert in a certain field, they expect that person to contribute with his specialist knowledge to the work of the board. Likewise, if a certain member of the board receives higher

¹⁴ See, Dotevall, R., *Några frågor om prospektansvar*, Nordisk tidsskrift for selskabsret, 2000, pp. 331.

¹⁵ Cf., however, Sofsrud, p. 394.

¹⁶ See Taxell, p. 56.

remuneration than the other members, this can be regarded as the allocation of working tasks in which the member has a greater responsibility than the remaining members for the supervision of the company's operations, for example.

A specialist who is also a member of the board bears greater responsibility than if he acted as an external adviser only. A lawyer's liability who works on a special assignment for a company is well-demarcated in that he has a duty entailing that he must carry out his assignment in the best possible way. For example, it may be that the external adviser has not been given full information concerning all the circumstances of importance for the board's decision, and his advice will hence be treated as only one of the components of the decision arrived at later on. A lawyer being also a member of the board has much more extensive responsibility on the other hand. Similarly to the other members of the board he enjoys access to all information, and it is also his duty to obtain any additional information which may be necessary for him to make well-grounded decisions. In addition, he owes a duty of loyalty to the company, which means that he shall show regard to the company's interests at all times.

4 Determination of Loss

It is hardly possible, or even necessary, to try to define a universally applicable concept of loss. This means that the concept of loss must be formulated normatively for each situation.¹⁷ At the same time a normative concept of loss appears somehow insufficient, which is why a few general premises ought to be formulated.

Loss means in the present context a financially measurable financial loss which the plaintiff has suffered unwillingly or against his will. For a company such loss may consist of costs, loss of income or depreciation in the value of the company's property. This means that it is not only the factual depreciation in the value of the company's property which is counted as loss, but also an occurrence which entails that the company has been deprived of earnings or income. This can be the case, for example, when a board member, disregarding his duty of loyalty towards the company, engages in competitive practices.

In order to determine the amount of loss a method can be used in which the total assets of the injured party are compared with the hypothetical situation that would exist if the damage-causing act had not occurred.¹⁸ According to the above, the loss constitutes the difference between the hypothetical and the actual course of events. One difficulty here is that it may not be easy to reconstruct the hypothetical course of events when applying this method.

The hypothetical course of events may not go on for ever. The company's insolvency constitutes such a natural, final point in the hypothetical course of events. A company which has been placed into insolvent liquidation cannot be

¹⁷ See Andersson, H., *Skyddsändamål och adekvans, Om skadeståndsansvarets gränser*, Uppsala 1993, pp. 298.

¹⁸ See Hellner, J., *Speciell avtalsrätt II*, 2nd Booklet. *Allmänna ämnen*. 3rd ed., Stockholm 1996, pp. 207.

re-established in its original form, but shall be dissolved under the provisions of Chapter 13 section 19 of the Swedish Companies Act if the liquidation of the company is completed without any surplus. Under the provisions of the same section, in the event of a surplus the company shall be placed in liquidation after the completion of the liquidation proceedings.

Where no loss has been sustained the board members will not be liable even if they have neglected their duties. A board member may be regarded to have acted negligently by voting for a salary to the managing director, exceeding considerably the amount that he deserves, when he has hardly done any work for the company. Nevertheless, if the money has not been paid out, the board member cannot be made liable, since the company has not sustained any loss.

Shareholders and creditors of a company may suffer loss in two ways: indirectly, by the fact that the company's assets have decreased in value, and directly, without the company suffering any loss. The difference between direct and indirect damage has importance only for third parties. No clear dividing line may be drawn between direct and indirect loss.¹⁹ Even though the term 'indirect loss' suggests that this type of loss is less worthy of protection, since it is more distant from the cause of the loss, this does not always have to be the case.

Direct loss for a shareholder arises when the principle of equal treatment or some other provision of the Swedish Companies Act whose purpose it is to protect the shareholders has been disregarded. A shareholder may further sustain direct loss due to such shortcomings in the annual report that he sells his shares at too low a price, or else he may suffer loss because of a violation of some provision whose primary objective is to protect shareholders' interests. A creditor may sustain direct loss by, for example, extending a credit to the company on the basis of incorrect information concerning the company's financial position. As mentioned above, direct loss suffered by a company occasions indirect loss to the shareholders and creditors.

Shareholders will suffer indirect loss when the material value of the shares decreases. A creditor may also suffer financial loss if the company cannot discharge its obligations. If the company suffers loss but continues to be solvent, the creditor will not have suffered any loss either.²⁰

The distinction between direct and indirect loss plays an important role as regards shareholders and creditors, since the possibilities of receiving compensation for the respective types of loss vary. A company may receive compensation for direct loss under the provisions on damages of Chapter 15 section 1 of the Swedish Companies Act. Proceedings in respect of such loss incurred by the company may be brought by a minority of shareholders consisting of the owners of not less than one-tenth of all the shares in the company under the provisions of Chapter 15 section 7 of the Swedish Companies Act. Where a company has been placed in insolvent liquidation, the official receiver may commence an action for damages on behalf of the company under the provisions of Chapter 15 section 14 of the Swedish Companies Act. One problem which is considered below is the question of whether shareholders

¹⁹ Cf. NJA 1996 p. 224.

²⁰ See NJA 1979 p. 157.

and creditors shall be given an opportunity to commence an action for damages regarding indirect loss, and if so, what requirements will have to be satisfied in such a case.

5 The Requirement of Adequate Causal Connection

Regarding the company management's liability for damages there applies the general principle of the law of damages stipulating that there shall be a causal connection between the sustained damage and the culpable act or omission. Where several members of the board are liable for damage the causal connection must be determined individually. Each member of the board shall be liable only for that part of the damage that he has personally caused.

Causality does not arise in conjunction with the neglect of duties by a member of the board or the managing director if the damage would have occurred even if the negligent act had not been committed. This means, for example, that if the managing director is liable owing to the neglect of his supervisory duties concerning his subordinates, he will avoid liability if it can be proved that the damage would have occurred even if he had applied more meticulous supervision.

Traditionally, it is required for liability to apply that the causal connection is adequate. The requirement of adequacy makes that too remote consequences of an act or omission are sorted out, and so are not too remote, but too unexpected, effects.²¹ The adequacy criterion makes it therefore possible to pick up the legally relevant causes out of a complex of causes leading to damage. The object of an adequacy text is the causal connection itself. Adequacy does not therefore refer so much to the determination of a causal connection, but rather to the evaluation of the latter.²² Determination of adequacy aims at deciding whether the causal connection is strong enough.

In order to evade the most unexpected or remote consequences of an act or omission the doctrine of normative protection may be applied.²³ By investigating the objective of a given norm and the interests that it was meant to protect in the first place, the problem of determining the causes of recoverable loss may be solved. The normative protection doctrine is based on the notion that the risk of the incurred damage has increased owing to the fact that the existing norms have been violated.²⁴ Several points in common can be found between this mode of procedure and determination of liability in negligence. The function of the normative protection doctrine is to show which kinds of resulting loss shall be compensated for. It is natural to wish to mitigate the requirement of foreseeability when some rule of the Companies Act or of the company's articles

²¹ See Hellner & Johansson, pp. 195.

²² See Andersson, p. 95.

²³ See Andersson, pp. 365. Cf. Dufwa, B., *Flera skadeståndsskyldiga*, Vol. II, Stockholm 1993, pp. 1017.

²⁴ See Andersson, pp. 39.

of association has been violated, but at the same time liability should not arise for loss or damage of an extraordinary character.²⁵

Under the normative protection doctrine liability arises even in connection with loss or damage which can be described as remote, or which is close, but unexpected. This view of the requirement of adequacy is based on the conditions applicable to a person exercising control over some property which does not belong to him. In these cases a strict view of liability is applied to the person in control of the property if the property is damaged or its value decreases. Based on the principle of *casus mixtus* liability may be imposed even for loss or damage which may be denoted as inadequate.²⁶ This principle plays probably some role in the determination of adequacy in relation to the managing director's or a board member's liability to the company.

The rules concerning the company's financial accounting, whose primary purpose is to protect share purchasers, may play an important role in the determination of liability to the company. Under the provisions of Chapter 2 section 3 of the Annual Reports Act one of the fundamental requirements concerning annual reporting is that the annual report shall provide a true picture of the company's financial position. It is especially important that a company shall appear as trustworthy if it is in a period of vigorous expansion or if it has recently been listed at the stock exchange. If the company reports a much better profit than that which should rightfully be reported, due to the fact that the book-keeping is incorrect, and if this is discovered, the company's credibility will suffer. If, in the course of time, the company is declared insolvent, and the drop in the company's earnings cannot be explained by a general decline in the economy, this may indicate that there is an adequate causal connection between the incorrect accounting and the loss sustained by the company through its insolvency. In my view, if the estate in liquidation commences an action for damages on behalf of the company against a member of the board, pursuant to Chapter 15 section 14 of the Swedish Companies Act, the concept of the company's interests should be interpreted more widely, and should cover even the company's creditors. In this way, the shareholders, as well as the company's creditors, will receive compensation for the indirect damage they have suffered, following the company's insolvency.

6 The Supervisory Duty

Under the provisions of Chapter 8 section 3 of the Swedish Companies Act the board of directors shall be charged with the organisation of the business activities. The provisions of Chapter 8 section 25 of the Act do not state explicitly, however, that the managing director has an equivalent obligation. This obligation ensues, however, from the fact that the managing director shall

²⁵ Cf. Taxell, p. 32.

²⁶ See Hellner, p. 207.

be responsible for the day-to-day management of the company, and it is therefore his duty to monitor the company's everyday operations.²⁷

The board of directors' obligation to organise the company's business activities has been made more concrete by the requirement set forth in Chapter 8 section 3 of the Companies Act, stipulating that the board of directors shall issue written instructions concerning the allocation of duties to the company's management and other organs that may be instituted. The provisions of Chapter 8 section 4 stipulate that the board of directors shall issue written instructions setting forth the rules for the reporting of information concerning the company's business activities, which shall form the basis of the board of directors' assessment of the company's financial position.

The Swedish Companies Act is based on the premise that the company's business activities shall be managed by the board of directors and the managing director respectively. In order to achieve effective organisation of a company it is frequently necessary to delegate various tasks. The possibility of delegation has certain limitations, however. One of such limitations is the requirement that any delegation of tasks must be done in an efficient way, so that the different office-holders are able to co-ordinate their functions and working tasks. Since the management of a company has been charged with the organisation of the company, negligence in this respect may result in liability for damages.

The Swedish Companies Act does not impose any explicit limitations on the company management's powers of delegation of administrative tasks. This great freedom of organisation provided for by the Act shall not be interpreted, however, in the way which suggests that the possibility of delegation is unlimited. Delegation of powers which entails that the board of directors and the managing director renounce thereby all responsibility is impossible. In a similar manner, the board of directors or the managing director may not delegate authority which they do not possess in the first place.

Where then goes the boundary permitting the delegation of administrative and management tasks? Each administrative and management task which has been specifically indicated in the Swedish Companies Act or the articles of association may be delegated in one way or another. The limitations on the possibility of delegation follow from the supervisory duty of the board members and the managing director. This is then the only duty which cannot be delegated.²⁸ The scope of the supervisory duty depends on the scope of delegation. Extensive rights to delegate tasks, which the management has received by means of the Swedish Companies Act, for example, increase at the same time the management's supervisory duty so that the tasks shall really be performed in a correct way. Even after the delegation a hierarchical relationship between the delegator and the person entrusted with the performance of the tasks is maintained. The duty of the delegator is reduced to the supervision of the performance of the tasks, and ensuring that they will be discharged in the intended way. This authority cannot be further delegated.

²⁷ See SOU 1941:9, p. 324 and Bill 1975:103, pp. 374 .

²⁸ In Andersson, S., Johansson S., and Skog, R. *Aktiebolagslagen: en kommentar*, D.1, section 8:3.2, 2000 it is claimed, however, that even supervisory authority can be delegated.

Even after the delegation of tasks it is in principle the members of the board of directors and the managing director who are formally liable for any damage caused by the person entrusted with the performance of the tasks. For liability to arise it is required, however, that there has been negligence on the part of the board or the managing director due to (i) selection of the task performer, (ii) inadequate instructions to the latter, or (iii) flaws in the supervision of the performance of the task. The fact that liability arises only on these grounds expresses the fundamental principle of the law of damages stipulating that liability arises only through one's own fault.

The requirement of Chapter 8 section 3 of the Swedish Companies Act, stipulating that the allocation of duties be done in writing makes that it is easier to prove the extent of the managing director's authority, for example. If the board of directors did not issue written instructions concerning the allocation of duties, there are strong reasons to believe that responsibility has not been delegated, and that it rests with the members of the board of directors. Written instructions regarding the allocation of duties show clearly that certain tasks have been delegated to an individual employee, entailing that the latter runs a greater risk of becoming personally liable under Chapter 4 section 1 of the Tort Liability Act.

If the task has been given to a person who is not an employee but a person working on assignment, he shall be liable for his negligence under the provisions of Chapter 18 of the Swedish Commercial Code. In contrast to an employee, no extraordinary reasons are necessary in this case for liability to arise. If the board of directors appoints a person who possesses sufficient competence to discharge the task, providing him with clear instructions regarding his assignment, he may become liable to the company for his negligence. Liability of a person working on assignment is therefore more stringent than liability of an employee.

Supervision of the company's operations is not something static, but must be continuously adjusted to occurring changes. Chapter 8 section 4 of the Swedish Companies Act clearly stipulates that the board of directors shall regularly assess the company's financial position, making the supervisory duty the fundamental obligation of each member of the board.

A member of the board has an obligation to regularly check the company's financial position, irrespective of the degree of his actual involvement in the company's business. This requirement is consistent with the current situation and practice, showing that the board of directors in larger companies has a supervisory function.²⁹

Following the hierarchical organisational company structure the basic principle stipulates that the supervisory duty of the managing director includes the monitoring of the daily business activities of the company, in which fulfilment of the obligations by the company's employees is of primary importance, whereas the primary task of the board of directors is to monitor the company's operations in general, ensuring that the managing director fulfils his duties. Such delineation of responsibilities follows from the structure of the Swedish Companies Act. This entails that the managing director is primarily

²⁹ Cf. Sofsurd, p. 162 with further references.

liable for damage caused by his employees. Only in exceptional cases, perhaps primarily in smaller companies, may the members of the board become liable.³⁰

Regarding the scope of the supervisory duty it can be said that a member of the board does not normally have to investigate each and every aspect of the managing director's administration. It is not the duty of a board member to go so far in his supervisory activity as to review each decision made by the managing director. If there are reasons to suspect that the managing director mismanages his work, the members of the board should get more information, with the help of, for example, the company's auditor. Distribution of functions is otherwise such that the board of directors shall devote itself to the central problems of the company's business operations, with the emphasis placed on the company's or its subsidiaries' financial position, whereas the managing director shall attend to the daily operations of the company. It is therefore not required that a member of the board shall have the knowledge of or that he must involve himself in each detail of the company's business.³¹ A person cannot avoid liability if he has been formally appointed as a managing director, but, believing that some else is in charge of the tasks which are associated with this position, has completely neglected his supervisory duty, concerning, for example, the company's accounting.

What is then the required scope of supervision? The Swedish Companies Act does not provide details regarding the limitations concerning the supervisory duty. The exact scope of the supervisory duty depends on the organisation and the business activities of each particular company: it is ultimately a question of a purely pragmatic judgement. Nevertheless, even though the scope of supervision must be decided primarily on the basis of the circumstances in each particular case, certain general guiding principles may be noted.

The provisions of Chapter 8 section 4 of the Swedish Companies Act indicate that supervision shall be carried out through a reporting system. In the exercise of the supervisory duty the degree of confidence which may be placed in the information supplied by the subordinate employer is therefore of great importance. One starts from the premise that members of the board shall be able to rely on the information provided by the employees, concerning the conditions prevalent in the company until something arises which gives them reason to suspect that something is wrong.³²

A company must follow the rules of law in the same way as a natural person. It is primarily the managing director who is responsible for the company following the specific statutes applying to its sphere of activities. When administrative sanctions are imposed on the company in connection with a violation of a statute, it is the company as a legal entity which becomes liable. The company may request afterwards the repayment of the damages paid by it according to Chapter 15 section 1 of the Swedish Companies Act. In these cases it is the managing director who shall be responsible.

³⁰ Cf. the opposite view, Sofsrud, p. 167.

³¹ See NRt 1979, p. 46.

³² See Dotevall, *Skadeståndsansvar för styrelseledamot och verkställande direktör*, p. 229. Cf. § 8.30 [b] Model Business Corporation Act.

Several foreign legal systems contain express requirements stipulating that the supervisory duty of the company's management shall be more strict in certain cases. In American law this duty becomes more stringent, for example, if the company's operating capital is insufficient with regard to the scope and risk of the operations conducted by the company, if the company is dependent on a small number of customers or business transactions in progress, if the company's turnover decreases, if the company's most important customers experience financial difficulties, or if the company's management comes to be dominated by one person.³³

In German law the supervisory duty of *Aufsichtsrat* becomes more stringent if there has been a sharp decline in the company's profits. When the business operations show normal profits, *Aufsichtsrat* may generally limit its supervision to a *post-factum* analysis of the operations. If the financial position of the company deteriorates, the members of the *Aufsichtsrat* ought to obtain more information and monitor the operations more closely, as well as examine the adopted measures more earnestly. If the company faces a financial crisis, *Aufsichtsrat* may have to intervene directly in the administration of the company.³⁴

A member of the board is not obliged to further monitor the company's business activities if the reports from the managing director are in good order. More extensive supervision is required, however, in certain cases.³⁵ The situations I have in mind are equivalent to those in which American and German law require more stringent supervision by the board members with regard to *Aufsichtsrat*. The fact that the supervisory duty becomes automatically more stringent when the company shows poor profit follows from the provisions of Chapter 13 section 2 of the Swedish Companies Act.

7 What Interests Should be Considered by a Board Member and the Managing Director?

The term 'company's interests' usually means the interests of all the shareholders of the company.³⁶ The term 'shareholders of a company' refers in this context also to future shareholders. When a company has been founded in order to finance the purchase of a certain business, for example, and the company approaches thereafter the persons to whom shares in the company have been issued, indicating that the purchase price of the shares is equivalent to the company's value, the managing director may become liable in his capacity as

³³ Cf. Knepper & Bailey, Vol. 1, pp. 103. and pp. 572-573.

³⁴ See Semler, J., *Aufgaben und Funktionen des aktienrechtlichen Aufsichtsrat in der Unternehmenskrise Die AG 1983*, pp. 87.

³⁵ See Bill 1975:103, p. 375.

³⁶ See, Dotevall, *Bolagsledningens ansvar*, pp. 112, Normann Aarum, K., *Styrelsemedlemmers erstatningsansvar i aksjeselskaper*, Oslo 1994, pp. 363, and Werlauff, E., *Selskabsmasken – loyalitetspligt og generalklausul i selskabsretten*, Köpenhamn, 1991, p. 72.

member of the board if it can be shown that this was not the case and that the assets had a lower value.³⁷

May the board of directors actively oppose the delegation of control over the company? Selling the whole business with all the company's assets and liabilities falls outside the board of directors' competence.³⁸ Similar rules shall apply, in my opinion, when control of a company is taken over by means of a share purchase. It is outside the board's administrative jurisdiction to be concerned about who the shareholders are. This follows from the fact that different bodies of the company have different functions under the Swedish Companies Act. The administrative jurisdiction of the board of directors is limited by the business objectives stipulated in the company's articles of association, and the exclusive prerogatives of the Annual General Meeting, as provided for in the Companies Act.

Are there any special interests that have to be considered with regard to subsidiaries? Under the Swedish Companies Act there are various special legal effects which are associated with subsidiary companies. This applies, for example, to consolidated annual reports as well as to certain rules regarding information exchange between the parent company and its subsidiaries. Nevertheless, subsidiaries do not constitute separate juristic entities, which means that a member of the board or the managing director shall only take account of the interests embraced by his mandate.

When a subsidiary of a group company enters into a contract, the subsidiaries of the group company may be perceived by a third party as one entity. The bond which arises with regard to the parent company is based on the legal rules of authorisation. The fact that a subsidiary shall not be regarded as an entity from the point of view of company law entails that the board of directors of that subsidiary cannot give consideration to the interests of other subsidiaries at the expense of the subsidiary's own interests.³⁹ This entails that the general clause of Chapter 8 section 34 of the Swedish Companies Acts means that transactions between subsidiaries shall be conducted preferably on strictly business lines, unless it is the question of the distribution of profits.

If the parent company is in actual charge of the management of the subsidiary, it can become liable in accordance with the provisions concerning liability of shareholders as provided in Chapter 15 section 3 of the Companies Act.⁴⁰ The parent company may avoid such liability if formal decisions are made at the Annual General Meeting instead.⁴¹ If the members of the board of directors or the managing director enforces a given decision despite the fact that it contravenes, for example, a provision of the Swedish Companies Act, the company's management will become liable. Under Chapter 8 section 34 of the Swedish Companies Act the company's management must always ascertain that

³⁷ Cf. UfR 1961.74.

³⁸ See NJA 2000 p.? Cf. the opposite view, Sofsrud.

³⁹ See Friis Hansen, S., *Europeisk koncernret*, Köpenhamn 1996, p. 315; Sofsrud, p. 263; and Werlauff, E., *Koncernret. Juridiske grundprincipper for danske och internationale koncerner*, Köbenhamn 1996, pp. 55-56.

⁴⁰ Cf., however, Sofsrud, p. 269.

⁴¹ See Krüger Andersen, P., *Studier i dansk koncernret*, Randers 1997, p. 631-632.

directives received from superior bodies of the company are consistent with the articles of association of the company and the Swedish Companies Act.

Vicarious business liability cannot be applied in such a way that a parent company can be held liable for any damage caused by the employees of the parent company, holding a mandate in a subsidiary company's board of directors in the exercise of that mandate.⁴² The reasons why the provisions of Chapter 3 section 1 of the Swedish Tort Liability Act are not applicable here is that a member of the board or the managing director of a subsidiary company is formally involved in the aforesaid capacity in a different legal entity. They have been appointed as such by the annual general meeting of the subsidiary. The fact that they are also employees of the parent company cannot lead to vicarious liability.

It must finally be noted that Scandinavian legal practice shows that the parent company may sometimes become liable for the undertakings of its subsidiary company despite the lack of legislative support. This may take place if the subsidiary company engages in similar business activities as those pursued by the parent company, having, in addition, the same board of directors.

8 The Meaning of the Duty of Loyalty

8.1 The Duty of Loyalty Under the Swedish Companies Act and Articles of Association

Not all of the duties of the managing director and the board of directors can be determined on the basis of the Swedish Companies Act. The mandate of a member of the board of directors as well as obligations usually connected with the managerial position of a board member and the managing director are accompanied by a duty of loyalty towards the principal, i.e. the company. The duty of loyalty is described in more specific terms in the general clause and the provisions on the conflict of interests in Chapter 8 of the Swedish Companies Act.

The so called general clause set forth in Chapter 8 section 34 of the Swedish Companies Act demonstrates that the board of directors and the managing director may not undertake measures which might provide an undue advantage to a shareholder or other person to the disadvantage of the company or another shareholder. All the shareholders shall be treated alike. Nobody shall profit at the cost of the company or any individual shareholder if the special treatment has no support in the Companies Act or the articles of association. The general clause means that any measures undertaken by the management shall comply with the provisions concerning the objects of the company's operations, as stipulated in the articles of association, and that they shall be in line with the provisions of Chapter 12 section 1 of the Companies Act as regards the stipulated objects of the company's operations. Taking into consideration how difficult it is to legally concretise these objects, which is chiefly due to the

⁴² See Sofsrud, pp. 277.

uncertainty regarding the time perspective that should be applied, only obvious deviations from the conventional terms applicable when buying or selling property will be considered as negligent.⁴³ If the company launches, for example, a non-cash issue of shares to a specific person who is supposed to supply in exchange some property which is indisputably over-valued, a member of the board may become liable.

A conflict of interests may be of a more subtle character than that property has been wrongly evaluated. Even an agreement concluded on strictly business lines may be disadvantageous to the company. It may be the question of property which is very difficult to sell, so that the company has a small chance to sell it, if it should wish to do that, without loss. An acquisition of property is compatible with the object of business operations under the provisions of Chapter 12 section 1 of the Swedish Companies Code only if the company can sell the property within a reasonable period of time without loss.

As regards business objectives as provided for in the articles of association the Supreme Court established in NJA 2000 p. 404 that members of the board had neglected their duties by undertaking measures which were not encompassed by the business objectives of the company. Earlier on it was necessary that the measures should have constituted a serious deviation from the business objectives.⁴⁴

In my opinion it is not very suitable to scrap the requirement of a serious deviation from the business objectives. Business objectives are frequently formulated in such a way that it can be difficult to draw a clear borderline. Imposing on the board of directors the obligation to gain support for a planned measure is hardly suitable, taking into consideration the delays that may be caused by it and the risk that sensitive information about the company's business operations may leak out. The decision of the Supreme Court in NJA 2000 p. 404 may be suitable for companies with a small number of shareholders, but not regarding public companies with extended shareholdings, in which cases the requirement of a serious deviation should be applicable.

The provisions of Chapter 8 sections 20 and 28 of the Companies Act concerning conflicts of interest of members of the board of directors and the managing director respectively entail that a member of the board or the managing director may not take part in matters regarding agreements between himself and the company. In such cases there will be a conflict of interests irrespective of the content of the contract. Regarding an agreement between the company and third parties the member of the board or the managing director shall have a material interest in the matter which may conflict with the interests of the company.

What are the criteria that should be used for the determination of how serious a given deviation from the business objectives is? A normal view in Swedish law is that such a deviation occurs when it is a question of a large shareholders' percentage in the legal entity being constituted by the opposing party.⁴⁵

⁴³ See Dotevall, *Bolagsledningens ansvar*, pp. 115.

⁴⁴ See NJA 1987, p. 394 and Nial, H. & Johansson, S., *Svensk associationsrätt i huvuddrag*, 7 ed., 1998, p. 146.

⁴⁵ See Dotevall, *Bolagsledningens ansvar*, pp. 129.

Conflicting interests of a serious character also arise with respect to contracts between the company and a spouse or other relatives of the member of the board or the managing director.⁴⁶

The expression ‘take part in matters regarding...’ appearing in the provisions concerning conflicts of interest means that a member of the board or the managing director may not participate in any stage of the decision process. In Danish law the conflict of interests rule does not preclude that a member of the board to whom the rule applies may provide information of a factual character to the remaining members of the board.⁴⁷

The provisions on the conflict of interest may hardly prevent a member of the board from exercising pressure on the remaining members of the board who are to make a decision which may become influenced by it without the member being regarded as having acted against the interest of the company under the provisions of the Swedish Companies Act. This is applicable particularly in situations in which a member of the board is a party to an agreement. One way of reducing this risk is to discard the formal rule on the conflicts of interest in agreements between the company and board members or the managing director in favour of a substantive rule entailing that the factual character of the decision shall be examined. In order to show that a given member of the board or the managing director shall be regarded as partial, the company must show that the agreement has been disadvantageous to the company.

8.2 *Competitive Practices*

When speaking of competitive practices a member of the board or the managing director must have an interest which is in conflict with the company’s interests. Practices are to be regarded as competitive if they are encompassed by the business objectives stipulated in the articles of association. The involvement of a member of the board or the managing director in the competitive practices must be strong enough to be regarded as a breach of the duty of loyalty.

It is of no importance whether the company is financially capable of conducting the business activities in question or not. The objective of the duty of loyalty is namely to prevail upon the members of the board and the company’s management to devote all their strength to the business operations of the company. The provisions on the conflicts of interest of the Swedish Companies Act show that competitive practices must be quite extensive to be regarded as representing a breach of the duty of loyalty.

The question arises as to whether members of the board involved on a full-time basis in the work of the company should be treated differently from members who only hold the board of directors’ mandate, but who are not actively involved in the work of the company. In American law such parties are

⁴⁶ See NJA 1982, p. 1

⁴⁷ See Sofsrud, p. 364 with references.

treated differently.⁴⁸ The duty of loyalty of a member of the board who is not simultaneously employed by the company is not equally strong.

No difference is made by the Swedish Companies Act as regards the obligations of board members who are employed by the company and those who only hold mandates in the board of directors. This means that even board members who are not employed by the company may not engage in competitive practices. A more extensive financial involvement in the competitive practices of a board member not employed by the company would be necessary, however, if such conduct were to constitute a breach of the duty of loyalty.

One problem which is connected with the question of the degree to which a board member may be involved in competitive practices may be the member's opportunities to enter into business transactions that he knows about for personal gain. The theory of corporate opportunities developed in American law has strongly influenced German law.⁴⁹ This theory entails that it is a board member's duty to let the company profit by the business opportunities falling within the company's sphere of business activities.

The question is whether any difference should be made between companies depending on their size. In such a case a more general outlook should be applied to public companies. In these companies board members who were not employed by the company would have certain possibilities of using business opportunities falling within the company's sphere of activities for their own sake. In contrast, this sort of thing would be totally prohibited in the case of board members employed by the company. In smaller companies each case would have to be tried separately, instead, in order to establish whether the company has economic possibilities to make use of a given business opportunity. If a business opportunity is directed at a subsidiary of a group of companies, whose business activities are different from those of the parent company, the duty of loyalty of a board member towards the parent company's management does not cover the business activities of the subsidiary.

The aforesaid indicates that there is reason to call into question the decision in NJA 1994, p. 236. In cases when a person chooses to conduct business activities in a company owned by only a few shareholders, the advantages of the business operations shall accrue to all the shareholders. Only in cases when the company has obviously a phoney organisational structure, and the business activities bear a very strong personal stamp, may this main rule be circumvented.

9 Right to Institute Proceedings

As mentioned earlier, under Chapter 15 section 7 of the Swedish Companies Act proceedings in respect of damage incurred by the company may be brought not only by the majority of the shareholders, but also by a minority consisting of the owners of not less than one-tenth of all the shares in the company. Chapter 15

⁴⁸ See, for example, the American Law Institute: *Principles of Corporate Governance and Structure: Analysis and Recommendations*, St Paul, Minn. 1994, Vol. 1, p. 287.

⁴⁹ See Dotevall, *Skadeståndsansvar för styrelseledamot och verkställande direktör*, p. 271-272.

section 14 of the Act shows that even an estate in liquidation may institute proceedings for damages.

The issue which has recently been discussed concerns the question of whether the limitation of ten percent of share ownership may be set aside, so that also share holders with a lower percentage of shares may be permitted to bring a claim for compensation for indirect damage. In American law the so called 'derivative claim' is possible in respect of shareholders who possess one share only.⁵⁰

In American law neglect of obligations by the management of the company, resulting in the diminishment of the company's assets and therefore causing damage to the shareholder, may result indirectly in derivative proceedings. This term refers to proceedings which derive from the company's right to institute proceedings. The compensation that is awarded in derivative proceedings goes to the company. As mentioned before, neglect of obligations by the company's management consisting in a breach of the business objectives may lead to indirect damage for the company as well as an individual shareholder. In such cases a shareholder may institute parallel proceedings in the form of a derivative action and an action for his own sake.⁵¹ The compensation paid to the company reduces the shareholder's indirect damage correspondingly.

In order to restrict litigation it is not uncommon that American companies institute litigation committees. Instituting a litigation committee means that several independent directors perform an investigation of whether given derivative proceedings are in the interests of the company. According to the ALI Principles of corporate governance when an action has been commenced by an individual shareholder against a director and officer, the court shall accept the decision of the litigation committee when considering the question of whether the shareholder's action is in conflict with the company's interest.⁵²

In Swedish law the possibility of shareholders to institute proceedings for damages for indirect damage is restricted to what follows from the provisions of Chapter 15 section 7 of the Swedish Companies Act.⁵³ A view which has been advanced in recent years stipulates that the possibility of shareholders to institute proceedings for compensation for indirect damage should be subsidiary, and that it should apply to both public and private companies.⁵⁴ Despite the disadvantages that may be connected with the shareholder's possibility to institute derivative proceedings against a member of the board, due to the fact that the number of cases of this kind may strongly increase, it plays an important role as a safety measure for the shareholders' minority. This is testified by the changes in German law where derivative proceedings of shareholders in GmbH have been regarded as acceptable. The same course of development may be

⁵⁰ See ALI Principles, § 7.02.

⁵¹ See ALI Principles § 7.01 [c].

⁵² See ALI Principles § 7.08.

⁵³ See Bill 1997/98:99, p. 189-190, and Nial & Johansson, p. 347. In SOU 1941:9, p. 642, a view is expressed that such an action is possible even with regard to Swedish companies.

⁵⁴ Andersson, J., *Medlebar skada och aktieägares skadeståndsanspråk*, Nordisk tidsskrift for selskabsret, 1999:3, pp. 81.

observed in English law.⁵⁵ There is therefore a lot of support for the view that such proceedings shall be allowed with regard to companies with a small number of shareholders, but not in public companies.

10 Concluding Remarks

Regarding liability of the board members and the managing director to the company a clear pattern has been discerned in recent years, indicating that there is a limit to the degree of failure that can be tolerated with regard to the company's business activities. It means that a member of the board may not be disloyal to the company by promoting his own interests, either directly or indirectly. The term 'company' does not refer only to the existing shareholders, but even to future shareholders of the company. Further, the company's management ought to show caution when the company's financial position is weak. In these cases the supervisory duty becomes more strict.

As regards the company management's obligations the recent amendments to the Swedish Companies Act and the division into public and private companies entail that the supervisory duty of a board member has become especially important. The supervisory duty entails not only that attention should be paid to the financial circumstances of the company, but also to the question of whether the company's business activities fall within its business objectives, and whether they are in line with the object of the company's operations. Adjudication of the courts shows more stringency in that a measure is regarded as contrary to the obligations if it is at variance with the business objectives stipulated by the articles of association. The earlier requirement of a serious neglect of obligations has not been maintained, which is rather unfortunate. In my opinion a more subtle distinction should be made between companies with few shareholders, in which a stricter line should be drawn, whereas greater tolerance against violations of business objectives in public companies can be shown.

With regard to the duty of loyalty of a board member and the managing director it has been established that their involvement shall be considerable. This implies that a higher degree of proprietary interests shall be required. It is possible that greater involvement is required from a board member employed by the company, as compared to a member who is not employed by the company. Further, attention should be paid as to whether the company is a public or a private company. In public companies a more general outlook can be applied regarding the assessment of whether a business opportunity shall accrue to the company or whether it may freely be used by the board member. A board member who is not employed by the company would be able to use such an opportunity. .

⁵⁵ See, for example, Dotevall, *Bolagsledningens skadeståndsansvar*, pp. 178.