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the proxy voting agency

Directors' Liability Discharge Proposals

The Implications for Shareholders

June 2008

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Fund Management

Acknowledgements

Manifest would like to acknowledge the support of Morley Fund Management Ltd and RailPen Investments in the development and production of this report. Particular thanks are due to Morley for their sponsorship of the production.

"Over the last few years, the practice in some European markets of asking shareholders to discharge boards and management has been of increasing interest to us as an institutional shareholder. We have found, though, that the implications of discharges, in different markets, have often not been well understood.

While often billed as routine items of business, or as votes of confidence, our view on the potential significance of such discharges has been shaped by the appreciation that granting a discharge, in some markets, could encumber our clients' ultimate right to seek legal redress against those being discharged.

With institutional investors acting as fiduciary agents for their underlying clients, a proper understanding of the implications of approving a discharge is clearly important. We are grateful, therefore, to Manifest and to the other contributors for having made this document possible and for the assistance it will provide to shareholders, where issues have arisen or are ongoing, in making informed decisions about discharges."

Anita Skipper
Head of Corporate Governance
Morley Fund Management Ltd

"We at RAILPEN are very happy to be publicly associated with this report. We strongly feel that the discharge is a serious matter that should never be rubberstamped and this research paper has helped to concentrate attention by dispelling some of the myths with hard facts on the implications in each jurisdiction it reviews. We are grateful to Manifest for undertaking the detailed work and also to Morley for sponsoring the report and encouraging others to make a public endorsement."

Frank Curtiss
Head of Corporate Governance
RAILPEN Investments

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Executive Summary

Manifest’s research philosophy is that that governance issues in continental Europe cannot be addressed through a "one-size-fits-all" approach. Each market has its own rules, regulations and best practice guidelines against which informed decisions should be measured and carefully weighed. With this approach in mind, our research team has been looking at a number of issues, where we believe shareholders would benefit from better understanding of practical implications of their voting decisions. This paper addresses what for many investors has been a largely obscure issue, namely proposals to discharge directors of liabilities that routinely appear on shareholder meetings’ agendas in many European markets.

We looks at 13 European markets that have resolutions of this type – Austria, Belgium, Denmark, Finland, France, Germany, Greece, Luxembourg, the Netherlands, Portugal, Spain, Sweden and Switzerland; their legal basis and practical implications for shareholders in the voting context. It only deals with liabilities of directors of public companies under the company law, except in the event of insolvent liquidation.

It is important to remember that directors may be held liable for wilful misconduct or negligence, but **not** for damages caused by business decisions if these decisions have been taken with reasonable diligence, based on the information available at the time, and were believed to be in the interest of the company. The nature and scope of directors’ liabilities vary in different jurisdictions.

The following common provisions apply to most of the markets covered by the study:

- Shareholders’ decision to discharge directors from liabilities will be void if it is made in breach of the law or the company’s articles of association;

- Directors may be held liable for wilful misconduct, fraud or any criminal offences, notwithstanding any ‘discharge of liabilities’ granted by shareholders. (This statement does not fully apply to Sweden, where directors may be discharged of wilful misconduct; and Switzerland, where it only applies to the directors to the extent that they may become liable for such actions only vis-à-vis third parties under other bodies of law).

- The granted discharge of liabilities is only valid if there have been no relevant omissions or misstatements in the annual report and accounts and other documents provided to shareholders.

- Discharge of liabilities granted by shareholders can release directors from liability to the company, but does not release directors from liabilities towards third parties (including shareholders).

- Claims against directors usually become time-barred after a certain period, which varies considerably across markets.

The 13 markets covered by the study can be broadly divided into two groups on the basis of practical implications of the discharge granted to directors by shareholders:

1. Markets where approval of the discharge of liabilities proposal is **not binding and cannot shield directors from claims for damages**: Austria, Germany, France and Spain.
2. Markets where discharge from liabilities is **binding and can hinder legal claims against directors**: Belgium, Denmark, Finland, Greece, Luxembourg, the Netherlands, Portugal, Sweden and Switzerland.

In Austria and Germany, discharge of liabilities resolutions are routinely proposed to general meetings of public companies; however, a granted discharge does not preclude shareholders from bringing a claim for damages against directors; thus, ‘a discharge vote’ only constitutes an expression of trust and does not appear to have legal implications.

In France and Spain, directors cannot be exonerated from liability by the decision of the general meeting either, which means that any discharge granted by shareholders has no impact on the company’s ability to bring claims against directors. Nevertheless, many companies continue to seek discharge of liabilities for their directors at general meetings.

The constituents of the second group can be further divided into the following sub-groups:

- Markets where discharge of liabilities approved by the general meeting is **binding for all shareholders** in the company: Finland, Greece, Luxembourg, the Netherlands and Portugal;

- Markets where discharge from liabilities granted by the general meeting is only **binding for those shareholders, who voted in favour** of the proposal: Belgium and Switzerland; and

- Markets where the **binding nature of the discharge depends on the level of opposition** to the proposal, even if the resolution was passed by the majority vote: Denmark and Sweden.

In Finland, Greece, Luxembourg, the Netherlands and Portugal, a valid discharge granted by the general meeting would shield directors from claims for damages from the company. In Portugal, a waiver of the company's right to claim for damages requires the support of 90% of shareholders attending the meeting.

In Belgium, if a discharge has been approved by the general meeting, only those shareholders who have not voted in favour of the discharge may claim damages from directors. In Switzerland, a discharge approved by the general meeting is effective not only *vis-à-vis* the company and those shareholders who consented to the resolution, but also those shareholders who acquired shares subsequently with knowledge of the resolution.

Switzerland differs from other markets insofar as a valid discharge granted by shareholders shelters directors from liability claims arising from both intentional and negligent violation of their duties. It can hinder claims against directors notwithstanding the fact that such claims are based on wilful misconduct, fraud or any criminal offences (although directors may still become liable for such actions vis-à-vis third parties under other bodies of law). This is mitigated by the fact that voting privileges do not apply in the context of a discharge resolution. In addition, persons who participated in the management of the company (this may also apply to de facto directors) are excluded from voting their shares, which also applies to the extent that such a person acts as a proxy for another shareholder. Consequently, given the shareholding structure of Swiss companies, directors can often be discharged from liabilities by minority shareholders only.

In Denmark and Sweden, a valid discharge shields directors from claims for damages from the company; however, a claim may be brought, notwithstanding the discharge, if holders of at least 10% of the company's issued share capital vote against the resolution. In Denmark, any shareholder may bring such a claim, whereas in Sweden 10% shareholding is required. 'Discharge resolutions' are not mandatory under Danish company law.

A unique feature of the discharge mechanism in Sweden is the requirement for the auditor's report to contain recommendation on whether the directors should be granted discharge from liability vis-à-vis the company. Where the auditor becomes aware of any acts or omissions by directors, which may give rise to liability, such facts must be noted in the auditor's report. This also applies where the auditor, in the course of the audit, finds that a director has otherwise acted in contravention of the Companies Act, the applicable annual report legislation or the articles of association.

In all the markets covered by the study, a failure to grant a discharge from liability does not have an immediate effect on the liability of directors, but merely leaves the possibility open for the company to initiate an action for liability.

The action for damages against directors on behalf of the company can be initiated by either the board of directors or by minority shareholders (derivative action). A decision of the general meeting may be required for the company to initiate proceedings against directors or to ensure that the board/directors start such proceedings. In some markets, a special representative(s) may be appointed to enforce the claim.

Derivative actions are currently possible in all markets covered by the study except for Luxembourg and the Netherlands, where there are other legal instruments, which could allow shareholders to claim damages from directors if certain conditions are met. Minimum shareholding requirements for starting a minority action vary across markets and range from no minimum holding requirement (e.g. France and Switzerland) to 10% of the issued share capital (e.g. Austria, Finland, Greece and Sweden). It should be noted that in some markets derivative actions can be filed, notwithstanding the discharge, provided that certain conditions are met.

A discharge granted by the general meeting does not have effect on the rights of third parties and cannot preclude individual or collective actions (where permitted by law) against directors if shareholders can prove that they suffered direct damage caused by directors' actions. The sources of liability that could lead to an individual claim vary across markets (the typical example of this would be a decision to buy shares based on incorrect information provided in the prospectus or in the directors' statement to the market, etc).

Statute of limitations on bringing claims for damages against directors vary, both across markets and within each market, depending on the source of liability invoked, and range from 1 to 20 years from either the date on which the damage occurred or the discovery of the damage. Importantly, there is usually a time limitation on starting derivative actions, where such actions may be brought notwithstanding the discharge.

Limitation of liability by agreement is allowed in some form in seven markets covered by the study. Typically, such limitation cannot cover damage caused intentionally or through gross negligence and can only apply to damage caused to the company, but not third parties.

D&O liability insurance is allowed in all 13 markets. In some markets, however, the company cannot indemnify directors for breach of duties owed to the company; therefore, the insurance will only be valid for third-party claims. In Portugal, D&O liability insurance is compulsory and its cost, up to a certain level, must be covered by directors themselves. It is important to remember that D&O liability insurance only guarantees directors against the financial consequences of liabilities incurred, but not the liability itself. No such insurance guarantees directors against criminal fines or fraud.

Please see Appendix for a summary of practical implications of the discharge granted to directors by shareholders, and Table 1 for a snapshot of legal provisions in relation to directors’ liabilities, rights to start legal proceedings against directors, and possibilities for limitation of liability or indemnification of directors in each of the markets covered by this study.

1 Introduction

Recent years have seen significant legislative developments in many European markets encouraged by the European Commission's to modernise company law, enhance corporate governance and improve shareholder rights in the EU. Increasing cross-border share ownership, rising awareness of the benefits of responsible ownership within the investment community, as well as improved understanding of the problems of cross-border voting[1] and removal of some obstacles to voting in certain European markets have led to the rise in shareholder activism and voting turnout levels during the past proxy season in Europe[2].

Being a promoter and advocate of corporate governance best practice, responsible share ownership and informed voting, Manifest believes that governance issues in continental Europe cannot be addressed through a "one-size-fits-all" template, as each market has its own rules, regulations and best practice guidelines. Our research team has been looking at a number of issues where we believe shareholders would benefit from better understanding of practical implications of their voting decisions. This paper addresses a somewhat obscure subject of the so-called 'discharge of liabilities' resolutions.

Proposals to discharge directors of liability for their activities in the past financial year or to approve/ratify management acts routinely appear on general meetings' agendas in many European markets. These resolutions look very similar on the notices of meetings of European issuers incorporated in different markets, which has led to an erroneous perception that the implications of voting decisions on such proposals are the same across Europe. For many years 'discharge of liability' resolutions have been treated as routine proposals by many shareholders and proxy advisors.

In our meeting business reports Manifest has always warned its clients that approval of this resolution may hinder shareholders who wish to sue the directors. We have also advised that shareholders may retain their right to file suit if they can prove that the directors or auditors have committed a crime, withheld information, or provided misleading information.

The objective of this paper is to look at 13 European markets that have resolutions of this type – Austria, Belgium, Denmark, Finland, France, Germany, Greece, Luxembourg, the Netherlands, Portugal, Spain, Sweden and Switzerland; their legal basis and practical implications for shareholders in the voting context.

2 Directors' Liabilities

Proceedings against Directors and Limitation of Liability

This paper deals with liabilities of directors of public companies (i.e. companies that have offered their securities to the public) under the company law, except in the event of insolvent liquidation. In addition to liabilities imposed by the company law, directors of public companies may be liable under other bodies of law, including criminal law, civil law, insolvency and bankruptcy law, competition law, health and safety and environmental law, etc. The nature and scope of directors' liabilities vary in different jurisdictions.

It should be noted, however, that directors will only be held liable for wilful misconduct or negligence, but not for damages caused by business decisions if these decisions have been taken with reasonable diligence, based on the information available at the time and were believed to be in the interest of the company.

The term 'director' is used in this paper to describe both executive and non-executive directors or, in companies with dual board structure, supervisory and management board members. A special note will be made where directors' liabilities differ depending on their executive or non-executive status.

The table below contains a summary of legal provisions in relation to directors' liabilities, rights to start legal proceedings against directors, and possibilities for limitation of liability or indemnification of directors in each of the markets covered by this study. It should be noted that the information in the table is only correct to the extent that it is read in conjunction with the comments on each market.

While rules and regulations concerning directors' liabilities and shareholders' ability to bring legal actions against directors and claim damages vary across markets, there are several common provisions that are applicable to most markets covered by the study:

- In most markets, where general meeting's decision to discharge directors from liabilities can hinder legal claims against directors, directors may be held liable for wilful misconduct *(not applicable to Sweden)*, fraud or any criminal offences, notwithstanding any 'discharge of liabilities' granted by shareholders. *(Switzerland is an exception to this rule, as it only applies to the directors of Swiss companies to the extent that they may become liable for such actions (notwithstanding a discharge) only vis-à-vis third parties under other bodies of law).*

- In most markets, where general meeting's decision to discharge directors from liabilities can hinder legal claims against directors, shareholders' decision to discharge directors from liabilities will be void if it is made in breach of the law or the articles of association.

- In the markets, where general meeting's decision to discharge directors from liabilities can hinder legal claims against directors, the granted discharge is only valid if there have been no relevant omissions or misstatements in the annual report and accounts and other documents provided to shareholders, and, in the event of a breach of the company law or company' articles of association, if shareholders are duly informed of any such breach *(the latter is not applicable to Sweden)*.

- Discharge of liabilities granted by shareholders can, subject to certain terms and conditions, release directors from liability to the company, but does not release directors from liabilities towards third parties, including shareholders, creditors, etc.

- Directors and officers liability insurance (D&O liability insurance) only guarantees directors against the financial consequences of liabilities incurred, but not the liability itself. No such insurance guarantees directors against criminal fines or fraud.

- The resignation/dismissal of a director does not shield him/her from liability for actions taken during his/her office; however, claims against directors usually become time-barred after a certain period, which varies considerably across markets.

Table 1: Directors’ Liabilities, Proceedings against Directors and Limitation of Liability ***(please note that information in this table should be read in conjunction with the comments on each market below)***

	Austria	Belgium	Denmark	Finland	France	Germany	Greece	Luxembourg	Netherlands	Portugal	Spain	Sweden	Switzerland
Directors are liable towards the Company	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Directors are liable towards shareholders	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Directors are liable individually	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Directors are liable jointly and severally	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓[1]
Proceedings against directors can be started by the Company following the approval by the general meeting	✓	✓	✓	✓[1]	n/a[1]	✓	✓	✓	✓	✓	✓	✓	n/a[1]
Proceedings against directors can be started by minority shareholders on behalf of the Company (derivative action)	✓[1]	✓	✓	✓	✓	✓	✓[1]	-[2]	-	✓	✓	✓	✓
Minimum shareholding requirement for starting minority action against directors (% of issued share capital/voting rights and nominal capital value, where applicable)	10% or 5%[1]	1% or €1,250,000	10%	10% or None	None	1% or €100,000	10%, 5%[1] or None	n/a	n/a	5% or 2%[3]	5%	10%	None
Claims against directors for damages suffered directly by shareholders can be brought by individual shareholders (where damage suffered by shareholders is different from that suffered by the Company)	✓[1]	✓	✓	✓	✓	✓	✓	✓[1]	✓[1]	✓	✓	✓	✓
Time limitations on starting proceedings against directors	5y or 3y	5y	3y or 10y	5y	3y	5y or 3y	3y or 10y	5y	5y or 20y	5y or 3y	4y or 1y	1y or 5y	6m, 5y, or 10y

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[1] See comments under the country heading below.
[2] No minority lawsuits allowed at the moment; however, a bill has been proposed that provides for the introduction of such minority lawsuits (see comment under the country heading below).
[3] 2% applies to issuers, whose shares are admitted to trading on a regulated market.

Directors' Liability Discharge Proposals

	Austria	Belgium	Denmark	Finland	France	Germany	Greece	Luxembourg	Netherlands	Portugal	Spain	Sweden	Switzerland
Resolution to discharge directors from liabilities proposed to the general meeting	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Discharge of liabilities granted by the general meeting is binding for all shareholders of the company	-	-	✓ / -[4]	✓	-	-	✓	✓	✓	✓[5]	-	✓ / -[4]	-
Discharge of liabilities granted by the general meeting is only binding for those shareholders who voted in favour of the proposal	-	✓	-	-	-	-	-	-	-	-	-	-	✓[6]
Discharge of liabilities granted by the general meeting is not binding and cannot shield directors from claims for damages	✓	-	✓ / -[4]	-	✓	✓	-	-	-	-	✓	✓ / -[4]	-
Limitation of liability by agreement	-[6]	✓[6]	✓[6]	✓[6]	-[6]	-[6]	✓[6]	✓[6]	✓[6]	-[6]	-[6]	✓[6]	-[6]
D&O liability insurance allowed	✓	✓	✓	✓	✓	✓[6]	✓	✓	✓	✓	✓	✓	✓

[4] The discharge does shield directors for claims for damages from the company; however, under certain circumstances this rule is reversed (see comments under the country heading below).
[5] Provided that dissenting vote does not amount to or exceed 10% of the issued share capital (see comments under the country heading below).
[6] See comments under the country heading below.

3 Austria

'Under Austrian law, the legal basis of management liability is essentially statutory. The duties and responsibilities of managers of Austrian stock corporations (Aktiengesellschaft) are stipulated in specific sections of the Stock Corporation Act and have been further specified (and broadened) by case law of the Austrian Supreme Court. Moreover, a legal basis also arises under civil law, as managers will be liable towards third parties for consequences arising from an unlawful act violating statutory provisions of law, if the purpose of such provisions was specifically aimed at protecting those third parties (section 1311 Austrian General Civil Code). Such provisions are defined as protective laws under Austrian law.'[3]

According to the Austrian Stock Corporation Act, the members of the management board shall perform their duties in the management of the company with "the care and diligence of a prudent manager". This is a general, objective requirement, not subjective or aiming at the personal qualifications of the members of the board. Under the law, each member of the board must safeguard the interests of the company and protect it from prejudice and damages. If the management board or its member enters into a deal which involves high risk, however, they will not be held liable for any failure if a successful outcome was to be expected and the board complied with the necessary diligence. Therefore the board may get relief from liability for damages by presenting counterevidence that it applied the diligence of a prudent and conscientious manager.

'When fulfilling their duties, executives have to act in the best interest of the company... However, as far as executives conduct their business without reasonable diligence, damages arising thereof only directly affect the company and not the shareholders. A direct liability of managers towards shareholders may only arise under general principles of civil law, if managers infringe absolute rights of shareholders, if they violate provisions of statutory law, which aim at the specific protection of shareholders, or if they intentionally cause damages to the shareholders. Moreover, managers may be held directly liable towards shareholders for the infringement of fiduciary duties, if the damages caused are independent of damages of the company itself.'[4]

'Almost every area of Austrian law contains provisions on criminal or administrative offences that may be committed by executives when fulfilling their duties. As a general precondition for criminal liability, the person committing an offence must have acted or omitted an action intentionally. Only in exceptional cases, negligence is sufficient to cause liability.'[5]

No liability to the company will arise if the action of the board was based on a lawful resolution of the shareholders meeting. Such liability, however, will not be precluded by an approval of the supervisory board.[6]

Some of the sources of directors' liability under the Austrian Stock Corporation Law (AktG) are as follows:

- 'The directors incur liability if they took part in the damaging activity, but also if they do not enforce the company's claims.'[7]
- 'Corporate directors commit a criminal offence if they give a misleading picture of the company in their reports or if they make incorrect statements on matters to be included in the directors' reports or omit material circumstances from it.'[8]
- 'Any payment against the interest of the company will make the directors liable under the general provisions of the AktG §84.'[9]
- 'Takeovers and mergers bear a considerable potential for directors' liability. Unlawful defence tactics constitute only one source of liability among several.'[10] 'In connection with mergers, the statute provides for the liability of the managing directors and of the members of the supervisory board for damage caused to the companies, the shareholders and the creditors of the company. The most important grounds for liabilities are negligence in the assessment of the financial position of the companies involved and in the conclusion of a merger contract.'[11]

The discharge of the management board and the supervisory board members from liabilities for their acts or omissions in the past financial year is a regular item on the agenda of annual general meetings of Austrian corporations; however, such discharge 'constitutes only an expression of trust and does not release the board members from potential liability'[12].

Companies are alternatively represented by the management board in damage proceedings against executives or by the supervisory board, if it has been authorised by a resolution of the shareholders.[13]

'Shareholders may, in principle, not raise claims in the name of the company, but may only bring claims on payment to the company.'[14] However, 'shareholders holding 10% of the company's stated capital may require that damages claims are brought against members of the supervisory board or management board, unless their claim is obviously baseless. A minority of 5% will suffice if an auditor's report specifies facts that establish this claim.'[15]

'Shareholders may invoke the personal liability of managers [i.e. liability for damages directly incurred by shareholders, and not by the company] only in cases of tort, for the infringement of absolute rights, the violation of statutory laws specifically protecting the rights of shareholders, and also for pecuniary loss if inflicted intentionally.'[16]

AktG §84 stipulates that the company may waive or settle claims for damages only after five years from the date on which the cause of action has accrued, provided that the shareholders meeting gives its approval and no minority, whose total shareholdings comprise 20% of the nominal capital, objects.

'Claims in damages can be reinforced by the company within five years (liability resting on corporate law) and by third parties within three years (liability resting on general civil law) starting from the time where the damage and the person who caused it became known. If the shareholders have resolved to enforce a claim for damages against the directors, the claim must be filed within six months after the adoption of the resolution.'[17]

'According to settled practice of the Austrian Supreme Court, the indemnification under an agreement entered into between the manager and a third party prior to and for all or certain types of infringements is not allowed… A contractual mitigation of liability concluded between managers and the company (in advance) is also regarded as illegal.'[18]

D&O liability insurance is allowed in Austria.

Manifest would like to thank Mr. Albert Birkner, Managing Partner, CHSH Cerha Hempel Spiegelfeld Hlawati (Austria) who has helped us with information and advice.

We would also like to thank Dr. Martin Gelter, Assistant Professor at Vienna University of Economics and Business Administration, Department of Business Law, who has reviewed the commentary on Austria.

4 Belgium

In Belgian public companies (société anonyme ayant fait appel à l'épargne public), directors are 'individually liable to the company for management faults. Moreover, directors are jointly liable to the company, as well as to third parties, for breaches of the Belgian Commercial Companies Code or breaches of the articles of association.'[19] As a joint liability, this applies to all directors, unless they can demonstrate, 'that they did not in any way participate in the breach; and that they reported the breach to the general meeting of shareholders in due time'[20].

'Directors are also subject to the general principles of Belgian tort law, which are emanated in the articles 1382-1383 of the Civil Code. However, following a judgement of Belgium's highest civil court, the third party having contracted with a company is limited in holding liable in tort the company's director, as this third party must prove that: (a) the director has breached a general duty of care (and not just any contractual duties); and (b) the director has caused damage other than that caused by poor performance of the contract.'[21]

According to the Belgian Commercial Companies Code, liability suits against directors 'may be brought further to the decision of the shareholders at a members' meeting; or on behalf of the company, by minority shareholders owning securities representing: at least 1% of the voting rights of all the securities issued by the company or at least €1,250,000 of the total share capital.'[22]

Individual shareholders may only sue directors in the rare cases when they can demonstrate that they incurred damage that was different from the damage caused to the company as a whole. Claims for direct damages brought by individual shareholders are subject to test for claims by third parties.

The Belgian Commercial Companies Code provides that annual general meeting of shareholders should decide whether to discharge directors from liability for their actions or omissions in the past financial year. 'A discharge of responsibility validly given by the shareholders having approved the annual accounts will release the directors from liabilities they can incur as a result of their management during the previous year.'[23] Such discharge only results in a release of liability towards the company. 'If such discharge has been validly granted, only those shareholders who have not voted in favour of the discharge may claim damages from directors.'[24] 'In some circumstances, however, the validity of the discharge given can be challenged and the directors' responsibility revived retrospectively.'[25]

'All proceedings against directors become statute-barred after five years'[26], calculated as of the date on which the facts occurred or the fault was committed. In case of fraud - i.e. when certain facts have been fraudulently kept secret - five years are calculated as of the moment of discovery of those facts/faults.

Belgian law does not allow contractual exemption or limitation of liability. However, the company itself may, through a 'pacte de garantie' (guarantee arrangement) agree to guarantee the director against the financial consequences of liability incurred as a result of a successful liability lawsuit brought against the director. 'The guarantee arrangement can be provided for by a shareholder, a parent company or a third party.'[27]

D&O liability insurance is allowed in Belgium.

Manifest would like to thank the following persons who have reviewed the commentary on Belgium:

Ms. Isabelle Corbisier, Lecturer in Law at the University of Luxembourg

Mr. Paul Hermant, Partner and Ms. Setareh Pourjavan, Member of the Brussels Bar, Bird & Bird, Brussels

Mr. Jan Peeters, Partner, and Mr. Jan Bogaert, Associate, Brussels Office of Law Firm Stibbe (member of an Alliance with Herbert Smith and Gleiss Lutz)

5 Denmark

‘A liability rule with regard to directors and officers in public liability companies (*Aktieselskaber*) is set forth in section 140 of the Danish Public Companies Act.’[28]

Members of the board of directors and members of the management board who, in the performance of their duties, have caused damage to the company due to wilful misconduct or negligence are liable in damages.[29] (The investigation into the act of negligence by a board member will take into account whether such member was elected by the employees of the company, is a member of the controlling family in a family-owned company, holds a certain profession, e.g. a lawyer or an accountant, etc.)[30].This also applies where damage has been inflicted upon shareholders, creditors of the company or any third party by a violation of the provisions of the Danish Public Companies Act or the company’s articles of association.[31]

In addition to the Public Companies Act, ‘there are a number of requirements in legislation concerning tax, accounting and insider trading, etc. containing individual duties for directors, as well as rules in environment legislation and health & safety regulation providing for criminal liability of directors and officers. Furthermore, when promoting a corporation in a public offering there are numerous statutes to be observed and they may all, if disregarded, create civil liability. The basic requirement in a public offering, as well as in a private placing is accurate and adequate disclosure of all relevant facts.’[32]

Under Danish company law, ‘directors, officers and managers owe a duty of loyalty to the company and not to the majority or minority shareholders. Directors, officers and managers are bound by statute law, the articles of association and should at any time act in the best interest of the company.’[33] Similar to the US, the business judgement rule applies to the acts of directors in Denmark.

‘The assessment of liability is made for each individual member of the board or the management and liability for damages can only be imposed on the member of the board of directors or management against whom the basis of liability is established.’[34] If two or more people are deemed liable, they are liable jointly in accordance with section 143 of the Public Companies Act. ‘Liability for damages can also be imposed on a member of the management or the board if, for instance, he has remained passive in relation to transactions made by the board of directors or by the management and against whom liability for damages was charged. This, however, does not indicate joint and several liability for all members of the body, but merely joint and several liability among more persons on an individual basis.’[35]

According to the Public Companies Act, resolutions to the effect that the company shall sue members of the board of directors or members of the management board must be passed by the general meeting of shareholders.[36]

‘An action for damages may be brought by the shareholders in the name of the company if such a procedure has been decided for at a shareholder meeting. In the event that a minority of shareholders, representing at least 10% of the share capital wish to hold the responsible liable, each of these shareholders may institute proceedings claiming damages for the company.’[37]

The Public Companies Act stipulates that, if shareholders representing at least 10% of the share capital have opposed a resolution conferring exemption from liability or renouncing the right to institute proceedings, any shareholder may institute legal proceedings that the party or parties be ordered to pay the company damages for the loss sustained.[38] Legal proceedings by minority shareholders may not be instituted later than six months after the resolution conferring exemption from liability or renouncing the right to institute proceedings was passed by the company in general meeting, or if investigation has been implemented, not later than six months after the investigation has been concluded.[39] **The resolution proposing to discharge directors from liabilities is not mandatory under Danish company law.**

In addition, the Public Companies Act provides, that legal proceedings may be instituted even if the general meeting has previously passed resolutions conferring exemptions from liability or has refrained from instituting legal proceedings, if correct and complete information concerning the resolution or the matters on which the proceedings are based had not been given to the general meeting before the resolution was passed.[40]

A decision on discharge from liability is also not binding, if the company enters into insolvent liquidation and the date of notice occurs within 2 years from the holding of the general meeting which granted exemption from liability.[41]

An individual shareholder can only claim direct damages, if he/she has suffered an individual loss different from that suffered by the company (e.g. that may be the case if a shareholder subscribes to shares on the basis of misleading information from the company, etc.). The legal basis for such claims is Article 140 of the Danish Public Companies Act and the general rule on damages in common law.

In accordance with section 254(a-k) of the Danish Administration of Justice Act[42], it has now become possible, starting from 1 January 2008, to bring class action and collective claims in Denmark.

In Denmark, the universal limitation rule provides for a 3-year limitation period from the time when the claim is mature in accordance with section 3 of the Danish Act of Limitations, and a 10-year limitation period from the time when the wilful misconduct or negligence ceased to exist.[43]

'Indemnification agreements with the company are not prohibited. Actual waivers on the part of the company may not have effect against creditors and faith shareholders.'[44]

A company is permitted to take out D&O liability insurance on behalf of its directors.

Manifest would like to thank the following persons who have reviewed the commentary on Denmark:

Dr. Kim Østergaard, Law Department, Copenhagen Business School

Mr. Thorbjørn Sofsrud, Dr.jur., Partner in Law Firm Poul Schmith, Copenhagen

6 Finland

In Finland, directors of public companies may be held liable for damages under various laws, including the Companies Act, the Tort Liability Act (412/1974), the Securities Markets Act, the Act on Compensation for Environmental Damage, etc. or on the basis of a contract. Criminal liability may arise in case a provision, for which a penalty is stipulated, has been violated. According to Finnish case law, directors are not liable for breach of contract towards the company's contractual party.

Directors' liability under the Companies Act concerns only situations in which a person has acted in the capacity of a member of the board of directors, a member of the supervisory board and the managing director.[45]

'The consequences of acts in violation of the Companies Act or the articles of association are normally civil…The Companies Act includes criminal sanctions for certain acts or omissions. Criminal sanctions for breaches of the Companies Act are only applicable to natural persons.' [46]

In Finnish companies, members of the board of directors, members of the supervisory board and the managing director are liable in damages for the loss that he/she deliberately or negligently caused to the company in violation of the duty of care; they are also liable in damages for the loss that he/she deliberately or negligently caused to the company, a shareholder or a third party in violation of the provisions of the Companies Act or the company's articles of association.[47]

'Liability is evaluated objectively for each individual.'[48] In practice, the evaluation of liability of the company's management is reduced through a rule comparable to the so-called business judgment rule. 'Actions causing damage do not give rise to liability if the decision was made honestly and correctly, taking the valid circumstances at the time into consideration, and based on sufficient knowledge.'[49]

Under the Tort Liability Act, where the injury or damage has been caused by two or more persons, or they otherwise are liable in the same damages, the liability is joint and several. However, the damages payable are allocated to those liable as is deemed reasonable in view of the guilt apparent in each person liable, the possible benefit accruing from the event and other circumstances.[50]

'The annual shareholders' meeting discharges the members of the board and the supervisory board, as well the CEO [or managing director] from liability. The legal effect of such a decision is that the company no longer can claim for damages.'[51] However, 'a decision of the general meeting on the discharge of directors from liability is not binding, if the general meeting has not been given essentially correct and adequate information about the decision or measure underlying the liability in damages. A decision on discharge from liability is not binding, if the company is declared bankrupt or if restructuring proceedings are begun upon an application filed within two years of the decision.'[52]

The board of directors has the right to make decisions on matters relating to the right of the company to damages. However, these matters may also be decided by the general meeting.[53]

One or several shareholders have the right to bring an action in their own name for the collection of damages to the company, if it is probable at the time of filing of the action that the company will not make a claim for damages and the plaintiffs hold at least 10% of all shares at that moment; or it is proven that the non-enforcement of the claim for damages would be contrary to the principle of equal treatment of shareholders.[54]

If the person liable in damages has been discharged from liability by a decision of the general meeting, the action against him/her must be brought within three months of the decision. A shareholder will not have the right to damages for loss caused to the company.[55]

An action against a member of the board of directors, a member of the supervisory board or the managing director must be brought within five years of the end of the financial period during which the decision underlying the action was made or the measure underlying the act was taken.[56] This only applies to situations where the act is not punishable by law.

The statute of limitations for claims for damages is stipulated in the Act on the Expiry of Debts (728/2003)[57] and is from three to a maximum of ten years. The Act on the Expiry of Debts is applied to breach of contract and tort damages but not in cases where there are specific provisions on statute of limitations (as in the Companies Act).

'The liability of the company's management in cases of damage caused to the company itself can be limited in the articles of association if all shareholders agree to this. These limitations cannot concern damage caused intentionally or through gross negligence, nor can they limit the rights of others, such as shareholders or external parties.'[58]

D&O liability insurance is allowed in Finland.

Manifest would like to thank Mr. Jukka Mähönen, Professor of Civil Law, University of Turku, who has reviewed the commentary on Finland.

7 France

In French public companies (sociétés anonymes or S.A.), 'the directors and managing director [chief executive officer] are individually or jointly and severally liable to the company or third parties either for infringements of the laws or regulations applicable to public limited companies, or for breaches of the memorandum and articles of association, or for tortuous or negligent acts of management.'[59] 'Directors are liable individually or jointly, depending on whether the fault was committed by a director individually or collectively by several directors.'[60]

In addition to the provisions of the French Code of Commerce, the French Civil Code (articles 1382-1383) provides possibilities to bring claims for damages against directors, although in practice it appears to be more effective against 'de facto directors'.

Articles L. 242-1 *sq.* of the Code of Commerce 'provide for a very detailed list of criminal offences, which may form the basis of a criminal action against a director. Such offences are classified by categories (e.g. offences relating to shareholders' meetings, to changes in the share capital of the company, to the dissolution of the company, to the misuse of the assets or credit of the company or to the misuse of powers as director, etc.) each with a specific penalty'[61].[‡‡]

In companies with a dual board structure, 'members of the supervisory board are liable for negligent or tortuous acts committed by them in a personal capacity in the performance of their duties. They incur no liability for acts of the management or the result thereof. They may be held liable in civil law for criminal offences committed by members of the management if, having been aware thereof, they did not report the said offences to the general meeting.'[62]

Liability suits against directors may be brought by the chief executive officer as the legal representative of the company or 'by one or more shareholders acting on behalf of the company, as well as by a shareholder or a third party suffering personal damage.'[63]

Thus, 'the company, acting through its chief executive officer, may sue one of its directors or several directors jointly, to claim damages on the basis of civil liability [such legal proceedings are more often initiated against former rather than incumbent directors]. In the event that the action is not brought by the chief executive officer it may be initiated by a shareholder, or a group of shareholders acting on behalf of the company'[64].

'A shareholder may act on his own irrespectively of the portion held by him in the share capital of the company. In the event that several shareholders decided to bring an action together, article L. 225-252 of the Code of Commerce provides, in the case of the S.A., that such shareholders must together own at least 5% of the shares of the company (such proportion being progressively reduced for companies with a share capital greater than EUR 750,000). In respect of quoted companies, the associations of shareholders regulated by article L. 225-120 of the Code of Commerce may also initiate an action on behalf of the company. The compensation granted by the court is allocated to the company itself.'[65] (When the action is brought by one or more shareholders on behalf of the company, it is a derivative action also called *action sociale ut singuli.*)

'A shareholder or group of shareholders may sue directors on their own behalf. In order to do so they must show evidence that they have personally suffered a damage resulting directly from the action of the director and which is different from the damage that the company may have suffered.'[66] Such type of action is called *action individuelle* and is very rare.

'Shareholders may also bring a criminal action against a director by lodging a complaint to this effect with the Criminal Court ('plainte avec constitution de partie civile'), provided they are able to show that they have suffered a prejudice which is directly the consequence of the director's criminal offence.' [67]

Civil actions by third parties against directors are rare because case law is very restrictive. The plaintiff needs to prove that the director acted in a way which was outside the scope of his/her functions (faute séparable des fonctions). Such standard is rarely met in court.

[‡‡] A recently published official report (Rapport Coulon, February 2008), produced at the request of the France's Minister of Justice, provides for "depenalisation" of corporate law and strengthening of civil measures.

'French law prohibits any limitation of directors' liability in the articles of association.'[68] The Code of Commerce explicitly provides that, 'any clause in the memorandum and articles of association the effect of which would be to make the exercise of any action subject to prior notice or to the consent of the general meeting, or to waive the right to any such action in advance, shall be deemed non-existent.'[69]

The same provision of the Code of Commerce adds that, 'no decision of the general meeting shall have the effect of extinguishing an action for liability against the directors or the managing director for a tortuous or negligent act committed in the performance of their duties.'[70] Therefore, a discharge (*quitus*) granted by shareholders has no impact on the liability of the company's directors, although many French companies request a *quitus* for their directors at the general meetings.

It should be noted, that the company may indemnify the director against the financial consequences of a liability suit only 'where the liability was incurred in the course of the director's general duties and if the condemnation to pay damages was imposed jointly to the director and the company'[71].

'Any action for liability against the directors or the managing director, either by an individual(s) or by the company, must be brought within three years of the act or event causing the loss or damage, or, if the same was concealed, the discovery thereof. Nevertheless, where the act is defined as a criminal offence, the said period is extended to ten years.'[72]

Actions against directors are extremely rare in France, because of the nonexistence of class action and thus the disproportionate cost of legal proceedings that the claimant would have to pay, as well as the practical difficulty to prove the effective role of a director in causing damage.

D&O liability insurance is allowed in France. In application of general principles of insurance law, such insurance cannot cover wilful or criminal acts.

Manifest would like to thank the following persons who have reviewed the commentary on France:

Mr. Pierre-Henri Conac, Professor of Law at the University of Luxembourg

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Mr. Faten Lakhal, PhD, Assistant Professor at ISG Sousse and Associate Researcher at IRG, Université Paris Est

Prof. Pierre-Yves Gomez, EM LYON, Director of the French Corporate Governance Institute (IFGE)

Mr. Alain Pietrancosta, Professor of Law, University of Paris Pantheon-Sorbonne.

8 Germany

‘The legal basis of management liability in Germany is essentially statutory (§93 Stock Corporation Act – Aktiengesetz).’[73]

‘Directors can potentially breach duties imposed by German law, the articles of association of the company, the provisions of a service agreement, if any, and shareholders’ resolutions. They can be liable in tort or in contract, for actions which are intentional or negligent. They can also be specifically liable for failure to supervise the activities of colleagues.’[74]

‘Both the Stock Corporation Act (AktG) and the Limited Liability Company Act (GmbHG) contain one key section setting out the generally phrased duties and requirements of managers. It is uncommon for contractual arrangements between the company and management or the articles of association to contain rules on liability.’[75]

According to AktG §93 (s.1), ‘a director has wide-ranging discretionary powers regarding the management of the company, including the power to take entrepreneurial decisions provided that the director carefully assesses the related risks. Only actions that are beyond the limits of reasonable entrepreneurial conduct or which constitute a violation of the director’s duties for some other reason may result in personal liability.’[76] ‘Furthermore, directors and officers of the German Stock Corporation are not liable when they act based on a valid resolution of the shareholders’ meeting’[77]; however, ‘the fact that the supervisory board has approved an action of the management board does not automatically eliminate potential liability for damages’[78].

‘AktG §93 (s.3) lists a number of specific situations where directors may be liable for breach of particular provisions of the law, for example, following the payment of unlawful dividends, the return to shareholders of their capital contributions, other than through a lawful dividend, the issuance of shares without full payment, and so on. The full list is as follows:

(3) The members of the management board shall be liable for damages if, contrary to this Act:

1. Contributions are repaid to shareholders;
2. Shareholders are paid interest or dividends;
3. Company shares or shares of another company are subscribed, acquired, taken as a pledge or redeemed;
4. Share certificates are issued before the par value or the higher issue price has been fully paid;
5. Assets of the company are distributed;
6. Payments are made after the company has been insolvent or overindebted;
7. Remuneration is paid to members of the supervisory board;
8. Credit is extended;
9. In connection with a conditional capital increase, new shares are issued other than for the specified purpose or prior to full payment of the consideration.’[79]

‘With respect to additional sources of civil liability, AktG §161, introduced in 2002, requires both the management board and the supervisory board of listed firms to annually issue a declaration whether the company complied with the German Code of Corporate Governance, and to state which of its provisions were not complied with.’[80] There is uncertainty as to whether the directors may be held liable if the company falsely declares that it has complied with particular provisions of the Corporate Governance Code. Some influential commentators hold that directors are liable for wrongfully declaring compliance with the code. The German Federal Supreme Court (BGH) has not yet considered cases in which this matter was material.

AktG also addresses the administrative liability of directors and contains some criminal provisions. However, the latter ‘do not concern simple breaches of directors’ duties, but concern only infringements of disclosure provisions… There can, however, be criminal sanctions for breach of securities law (e.g. insider dealing, securities fraud, etc.) based on the German Securities Trading Act (WpHG).’[81]

'In principle, only the company, not the individual director, can be liable to third parties. If a director deliberately or negligently breaches a duty resulting in damage to the company, it is generally the company's responsibility to take internal recourse against the director.'[82] 'Where the personal civil liability to the company is at stake, actions against members of the managing board of stock corporations are usually initiated by the supervisory board, and vice versa.'[83] 'The supervisory board is obligated to pursue claims for damages against members of the management board. It may only refrain from doing so in the exceptional event that important interests and concerns of the company indicate that the damage ought to be accepted without compensation.'[84]

'A simple majority at the annual general meeting can force the company to seek internal recourse against a director.'[85] 'Shareholders are also permitted to vote to appoint a special representative to enforce a claim. A court also has discretion to appoint such a representative upon request by a minority representing 10% or €1 million of the firm's stated capital.'[86]

'AktG §148 allows a minority representing either 1% or €100,000 of the firm's stated capital to request permission from a court to enforce a claim to damages owned by the company, but with payment still to be made to the company. Shareholders must meet a fourfold test by showing that:

- They became shareholders before learning (and without negligently remaining ignorant) about the damage incurred by the firm;

- They demanded that the firm itself brings the suit and set it an appropriate deadline, and the company either refused or did not meet the deadline;

- There are grounds for the court to believe that facts can be proved which indicate that the company incurred damage because of dishonesty (Unredlichkeit) or serious violations of the law or the charter;

- Enforcement would not be contrary to the company's interest.

These conditions must be met for the court to permit the suit to proceed past a preliminary stage. If the suit proceeds this fact must be publicized (AktG §149, s.1). Subsequently, plaintiff shareholders must again request that the company itself bring the suit and allow it an adequate time to respond. Assuming the company either does not respond or continues to refuse to bring the suit, the actual derivative suit must be brought in the same court, within three months after the decision on its admissibility.'[87]

'Vis-à-vis third parties, such as the shareholders and the creditors of the company, the management board is only liable in accordance with the general provisions stipulated under tort law. According to tort law, there may be liability vis-à-vis third parties if the management board violates legal provisions which are 'protective laws' in favour of certain group of people. For example, the criminal provisions concerning fraud and breaches of the fiduciary duty and the prohibition under stock corporation law of the false representation of the company's situation constitute 'protective laws'.'[88] Shareholders may invoke the personal liability of management, if, for example, a director intentionally causes the company to publish a false ad-hoc disclosure statement or to violate other publication requirements, including the publication of incorrect annual or half-yearly financial reports or interim management statements, or if the director causes the company to publish non-mandatory false information, etc. 'In this case, the injured party can assert claims for damages directly against the relevant member of the management board.'[89]

The discharge of the management board and the supervisory board members from liabilities for their acts or omissions in the past financial year is a regular item on the agenda of annual general meetings of German stock corporations; however, such discharge does not preclude shareholders from bringing a claim for damages against a director[90]. The discharge of liability vote is rather considered to be a vote of confidence in the company's directors.*

'Under AktG §93 (s.4), the company may only waive a claim against a director or settle it at least three years after the claim arose, following approval by shareholders, and if there is not a formal objection by shareholders holding shares representing 10% of the company's share capital.'[91]

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* The discharge of liability by shareholders of private limited companies (GmbH) will prevent the company from seeking damages caused by mismanagement with respect to unlawful conduct of which the shareholders are aware or, at least, could be aware at the time of the meeting voting on the discharge of directors.

'The period of limitation under German law always depends on the particular source of liability invoked. Corporation and shareholder actions within in the scope of AktG §93 become statute-barred after five years. Claims based on tort and on criminal liability of management for example in case of fraud are subject to a limitation period of three years (BGB §195)'[92]

'The company is never *permitted* to indemnify members of the management or supervisory board for breach of duty owed to the company under the joint stock company law.'[93] 'Where management has breached its duties to the company, it may not seek indemnification from the company.'[94] 'This liability, based on AktG §93 and §116, is mandatory, and cannot be limited in the charter or waived by either the supervisory or the management board.'[95]

'At the same time, the company is obliged to reimburse the directors for damages and expenses if a director is found liable to a third person as a result of carrying out his duties at the company, but has not breached duties owed to the company.'[96] 'In cases where management is held financially responsible to third parties or the government, it may seek indemnification if it acted in the company's best interests and did not breach its duties to the company.'[97]

D&O liability insurance is allowed in Germany.

Manifest would like to thank the following persons who have reviewed the commentary on Germany:

Prof. Peter O. Muelbert, Director of the Center for German and International Law of Financial Services, Fachbereich Rechts- und Wirtschaftswissenschaften, Johannes Gutenberg-Universitaet Mainz

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Mr. Dirk Zetzsche, Manager of the Center for Business & Corporate Law (CBC) and Assistant Professor at the Law Faculty of Heinrich Heine University Düsseldorf

9 Greece

The legal framework of directors’ liability in Greece is set out in the Law 2190/1920 for public companies (AE) as amended by Law 3604/2007. ‘Greek civil law recognises two principal bases for civil liability: contractual liability and tort liability.’[98]

Under Greek company law, every member of the board of directors is liable towards the company for any fault committed by him during the management of the company's affairs. He/she is particularly liable for any omissions or untrue statements in the balance sheet concealing the true position of the company.[99] The liability is joint and several in the case of public company statements.

‘Directors’ liability is based on the ‘business judgement rule’ test.’[100] Such liability does not exist if the member of the board of directors proves that he has managed the company's affairs with the diligence of a prudent businessman. This diligence is judged taking into account the capacity of each member and the duties that have been assigned to him. This liability does not exist in respect of acts or omissions that are based on a lawful decision of the general meeting or constitute a reasonable business decision taken in good faith on the basis of sufficient information and exclusively in the corporate interest.[101]

‘The duties of the directors are set out in the resolutions of the board of directors, in the company’s statutes, in the law, and in their employment contracts (in case there are any). Directors’ liability towards the corporation derives from the breach of their above mentioned duties.’[102]

‘The directors of a public company are liable towards the company’s shareholders in case they cause direct damage to them. The legal basis of said liability is tort. In case of indirect damage suffered by the shareholders due to mismanagement, the shareholders’ damage is restituted through the restitution of the company’s damage.’[103]

Apart from the civil liability, Law 2190/1920 also provides for criminal liability of the directors and officers.[104]

According to Law 2190/1920 as amended by law 3604/2007, the claims of the company against the members of the board of directors arising from the management of the company's affairs must be mandatorily filed if:

- The general meeting decides so;
- After a request to the board of directors or the liquidators by shareholders representing 10% of the paid share capital. (The articles of association may reduce this percentage. The request of the minority will be taken into account only if it is verified that the applicants had become shareholders at least three months before such request was submitted.)[105]

According to the same article, the above conditions ‘are not required in case the damage is due to intent of the members of the board of directors’[106], which implies that any shareholder, regardless of the percentage of holding, can bring a claim against directors.

Action must be brought within six months from the date of the general meeting or the submission of the request.[107]

The law ‘provides for the appointment of special representatives of the company who will conduct the trial against the liable directors if the board of directors is delaying the filing of the suit (despite the relevant resolution of the general assembly or the request of the minority shareholders), then any shareholder may within one month from the elapse of the above mentioned six-month period file a petition before the One Member First Instance Court asking for the appointment of special representatives.’[108]

‘The minority shareholders of 1/20 [5%] are entitled to sue the directors in case they allege that certain acts of the above persons have infringed the provisions of the law, of the company’s statutes or the general assembly’s resolutions.’[109]

The law also provides that ‘by decision of the board of directors, the company may waive its claims for damages or settle two years after such claim was established, provided only that the general meeting consents and that no minority shareholders representing one fifth [20%] of the share capital represented at the meeting opposes’. [110]

‘Under Article 914 CC, a party, which has suffered pecuniary damage by an action of another party which is acting unlawfully and in fault, has standing to bring an action for damages against the party which caused the damage.’[111] ‘The shareholders may sue the directors in case of direct damage based on tort provisions.’[112]

In Greece, 'the company (through its general assembly) is legally empowered to release its directors from their liabilities.'[113] Discharge granted by the company's general meeting is binding for all shareholders of the company.

'In case of indirect damage… it is argued by legal authors and case law that the shareholders who suffered damage may also claim the restitution of their personal damage, based on the tort provisions, in case that the general assembly has released the directors from their liability or has decided to withdraw from its claims or compromise.'[114]

The claims against directors are subject to a three-year statute of limitations from the date the act was committed or to a ten-year statute of limitations if the damage was due to intent.[115]

'The company may insure its directors' liability, indemnify and hold them harmless against any claims under their capacity as directors of the company.'[116]

Manifest would like to thank Mr. T.G. Kommatas, Managing Partner, T.G. Kommatas & Associates Law Offices (Greece) who has helped us with information and advice.

We would also like to thank Mr. Stilpon Nestor, Managing Director, Nestor Advisors Ltd (UK) who has reviewed the commentary on Greece.

10 Luxembourg

'Directors' liabilities are determined by four areas of Luxembourg law:

- Law of mandate - Luxembourg jurisprudence views the relationship between the company and the directors as a relationship of "mandate" which brings with it a number of duties and responsibilities;
- Company law - the rules relating to mandate are supplemented by a series of statutory rules, principally in the form of Article 59 of the Law of 10 August 1915 on commercial companies, as amended;
- General principles of delict [tort law];
- Criminal law.'[117]

Under Article 59 of the Law on Commercial Companies, the directors are liable to the company for the execution of the mandate given to them and for any misconduct in the management of the company's affairs.[118] 'This means that, for management faults, the directors are answerable to the company alone.'[119]

Article 59 of the Law on Commercial Companies also provides that directors are jointly and severally liable both towards the company and any third parties for damages resulting from the violation of the company law or the articles of the company. The directors will be discharged from such liability in the case of a violation to which they were not a party, provided no misconduct is attributable to them and they have reported such violation to the first general meeting after they had acquired knowledge thereof.[120]

'The Law on Commercial Companies also contains numerous provisions imposing criminal liability (punishable by either a fine or, particularly where there is fraudulent intent, imprisonment) on directors.'[121]

'In addition to the above rules that apply specifically to directors, the normal rules of liability for wrongful acts that cause harm to others may also give rise to liability. In particular, directors could be liable under the principles of responsabilité quasi-délictuelle contained in articles 1382 and 1383 of the Civil Code whether or not they are liable under other headings. Liability in this area could be based simply on a negligent act or omission of the director.'[122]

'The rules applicable to liability proceedings may vary, depending on the kind of the alleged faults.'[123]

'Only the company has the capacity to introduce legal proceedings against the directors for management faults. Legal proceedings will, in this case, be started by a decision to be taken by the general meeting of shareholders.'[124] 'The shareholders are not entitled to sue the company individually "ut singuli" nor is it possible for the minority shareholders to do so.'[125] However, a bill was recently filed with the Chambre des Députés that, among many other reforms, provides for the introduction of such minority lawsuit based on just one criterion, namely 1% of the votes attached to securities bearing voting power.[126]

'Insofar as directors joint and several liability towards the company or any third party for violation of the Companies Act or the company's articles of association is concerned, the company itself, a third party as well as any individual shareholder whose rights have been affected by the action of the director may seek this liability.'[127] In addition, the 'tort liability may be sought by the company itself, by a third party (such as a creditor or a noteholder) as well as by an individual shareholder whose rights have been affected by the action of the directors.'[128]

The potential liability for breach of mandate and for management faults is 'extinguished by the discharge that is generally given to directors at the company's annual general meeting. However, such release is only valid if the financial statements presented to the meeting are fair and complete and, in respect of actions in breach of the articles of incorporation of the company, only if these were specifically mentioned in the notice of the meeting.'[129] 'The discharge given to the members of the board by the shareholders is without effect on the right of action of third parties.'[130]

All actions against managers and directors for action taken by them in that capacity are time-barred after five years as from the time of such action or, if they were fraudulently concealed, from the discovery thereof.[131] 'Criminal actions against directors are however submitted to specific limitation periods of one, three or even ten years depending on the seriousness of the criminal offence at stake.'[132]

Any indemnification arrangement which would cover the consequences of an action brought by the company itself against directors may be declared void by Luxembourg courts. The situation is different if the company only agrees to indemnify the directors in case of a third party action against the directors (including shareholders if and to the extent they have personally suffered a damage caused to the company). However, the indemnification arrangement can not cover a wilful act or gross negligence.[133]

It is possible for the directors to have their potential liability insured with an insurance company. The insurance will cover the liability of the directors towards the company and third parties as well as the liability resulting from a management fault, a violation of the law on commercial companies or the articles of incorporation, and from torts. No insurance is available regarding the payment of criminal, tax or administrative penalties incurred by the directors. In addition, there is no coverage for damages caused intentionally by the insured or resulting from his gross negligence.[134]

Manifest would like to thank the following persons who have reviewed the commentary on Luxembourg:

Mr. Pierre-Henri Conac, Professor of Law at the University of Luxembourg

Ms. Isabelle Corbisier, Lecturer in Law at the University of Luxembourg

11 The Netherlands

'The duties and obligations of directors essentially arise from statutory provisions, the articles of association (in particular the objects clause), board rules (if applicable) and the principle of corporate good faith that governs the actions of directors. In all of their actions and decisions directors need to act in the best interests of the company and its business. 'Best interests' include the interests of all interested parties, including shareholders, employees and, in some circumstances, creditors of the company.'[135]

'A distinction should be made between liability towards the Company and liability towards third parties.' [136]

'Each managing director is under a duty of care vis-à-vis the company to perform 'properly' his or her part of the management task as assigned to him or her. The managing director is under a duty to use all reasonable endeavours to achieve this, but he or she does not have to guarantee any results.'[137] 'In order for liability towards the company for mismanagement to arise there must, as a rule, be serious negligence by the managing director(s).'[138] 'Although the directors may divide tasks between them, they are in principle jointly liable for the entire management of the company.'[139]

Directors may also be held liable in relation to certain tax and bankruptcy matters, as well as failure to keep proper financial records or to file the company's annual accounts with the Trade Register in a timely manner. 'Managing directors may also incur (personal) liability for example in case of environmental pollution, fraudulent transfer of assets, unjustified inequality in the treatment of creditors, erroneous or misleading financial statements or a misleading prospectus.'[140]

'An important legal basis for liability of the managing directors towards third parties is tort.'[141]

'Under Dutch criminal law a company can commit a crime. The individual, who is directly responsible for the criminal behaviour of the company, may commit a crime as well. In view thereof the members of the management board may, in the event of (personal) liability for mismanagement under civil law, sometimes also face criminal sanctions.'[142]

'As a general rule, a breach of contract or a commission of tort towards a company results in liability towards the company, but not to the shareholders. The damage suffered by the shareholders as a result of such breach of contract or tort [towards the company] is derived from and coincides with the damage suffered by the company. A shareholder only has a cause of action if the breach of contract or the tort of, for instance, a director is tortuous towards the shareholder personally, i.e. where the director intentionally causes damage to that shareholder.'[143]

'Actions against directors based on tort may be brought by any damaged party. The same is true for actions based on the publication of misleading prospectuses and financial figures.'[144]

Derivative suits are not possible under Dutch law. In addition, there is no class action procedure comparable to the one in the United States; however, other legal instruments can lead to the same result.

'Collective actions can be initiated by associations representing the interests of injured parties seeking a judicial declaration that the defendant is liable for the damage caused (such actions can only be initiated by associations that state in their articles of association that they represent the interests of the injured parties). Damages [in money] cannot be claimed in a collective action. Once a declaration has been obtained that the defendant has acted unlawfully, damages may be claimed in subsequent proceedings by the injured parties represented in the collective action. It should be noted that an association will not be able to bring its claim if the court considers that the association has not tried sufficiently to reach a settlement with the defendant.'[145]

Importantly, the Collective Settlements of Mass Damages Act was introduced in July 2005, 'which provides for the court approval of collective settlements on an opt-out basis.'[146] 'It states that associations representing injured parties may negotiate a settlement with a defendant for the payment of damages, that may be approved and declared binding by the Amsterdam court of appeal. Although injured parties are not allowed to sue collectively under the act, the benefit of the court approved settlement mechanism is that all injured parties will be bound by it [on an opt-out basis].'[147]

'If one or more shareholders have valid reasons to doubt the policy of the company, they can file an application for an *enquête (*inquiry) at the Enterprise Section of the Amsterdam Court of Appeal. To file such an application, the shareholder(s) solely or jointly has to represent at least 10% of the issued capital of the company or has to be entitled to an amount in shares/depository receipts with a nominal value of €225,000. If the Enterprise Section acknowledges the doubts, it will allow the application and appoint one or more investigators who will make an inquiry into the policy of the company. In case of misconduct, the second stage of the inquiry proceedings becomes relevant. In this stage, the applicant in the first stage as well as other parties to whom the investigator's report is available, can ask the Enterprise Section to take appropriate measures, such as suspension of a decision of the Board of Directors, dismissal of one or more directors and/or Supervisory Board members, and the temporary appointment of directors/supervisors.’[148]

A director may be discharged of any internal liability in respect of his position as a director of the company. A discharge is generally based on a resolution by the general meeting of shareholders.[149] As from 2000, the Dutch Civil Code prescribes that adoption of the annual accounts does not imply a discharge for the board members from liability for their management. Adoption of annual accounts and discharge of liabilities resolutions have to be separate items on the general meeting’s agenda.

‘By granting a discharge, the company renounces any actual or potential claims against the directors.’[150] However, the discharge does not extend to actions taken outside the scope of each director's duties as a supervisory or management board member. The discharge does not release directors from liability for acts or failures to act that are not clearly disclosed in or apparent from the statutory annual accounts. Neither does the discharge release directors from liability to parties other than the company (including individual shareholders) nor limits any liability that directors may have to individual shareholders under statutory anti-fraud or tort laws. Moreover, notwithstanding the discharge, directors may be held liable for gross negligence or wilful misconduct in the execution of their duties and, in certain circumstances, the discharge may be limited or overturned where a court finds that upholding the discharge would be inconsistent with the Dutch legal principle of good faith.

The authority to annul a resolution on discharge by the general meeting expires one year after the resolution was made public or one year after informing the interested party. The resolution can, however, be annulled after this period as one of the measures the Enterprise Section can take.

‘According to article 3:310 Section 1 of the Dutch Civil Code, the time limit for initiating proceedings for damages is five years from the day following that on which the plaintiff becomes aware of both the damage and the identity of the person responsible therefore, and, in any event, on the expiry of twenty years following the event which caused the damage.’[151] This time limit is applicable to proceedings in which both the company and shareholders claim damages from the company's directors.

If the limitation period for making a claim for damages against a director has expired while the director involved still holds a directorship with the company or less than six months after his/her resignation, the period for initiating proceedings for damages will be extended to six months after the director’s resignation (articles 3:320 and 3:321 of the Dutch Civil Code). This only applies to a claim from the company against the company's directors.

‘No statutory provision or case law exists which relates directly to the validity and enforceability of indemnities by the company.’[152] Indemnification clauses may be included in the articles of association and in contractual arrangements with directors, and are more common in public companies.

A company is permitted to take out D&O liability insurance on behalf of its directors.

Manifest would like to thank Ms. Daniella A.M.H.W. Strik, Partner at NautaDutilh N.V. (Amsterdam) who has helped us with information and advice.

We would also like to thank the following persons who have reviewed the commentary on the Netherlands:

Mr. Erik Breen, Head of Corporate Governance & Sustainability, Robeco (Netherlands)

Prof. Dr. Maarten J. Kroeze, Erasmus University Rotterdam

12 Portugal

'The legal framework regarding the directors' liability is reasonably complex and comprises different statutes depending on the subject. The main rules, as established in the Portuguese Companies Act and in the Securities Code, have to be, in each case, observed along with the contractual dispositions of the company's by-laws [which may be more restrictive than the law].'[153] It should be noted that the regime on directors' duties and liabilities in Portugal has been recently subject to important changes, which means that the interpretation of the legal provisions is still under discussion and there have not been significant court decisions that would indicate how the courts would interpret and apply these provisions.

According to the Portuguese Companies Act, directors must perform their duties in a diligent and cautious way, they must be available, as well as have the necessary technical competence and adequate knowledge to comply with their duties. In addition, directors must be loyal to the company's interests, considering the long term interests of shareholders, as well as other interests of importance to the company like, for instance, those of workers, clients and creditors.[154]

Under the Companies Act, the managers or directors are responsible towards the company for damages caused by acts or omissions resulting from dereliction of their legal or contractual duties as well as for disrespect towards the general obligations of diligence and loyalty, unless the managers or directors can prove that they did not act wilfully, maliciously or negligently. In the cases, where the law does not prescribe a specific conduct by a director, 'this liability may be waived if a director is able to prove that he or she acted in an informed manner, free of any personal interest and using the criteria of corporate rationality'[155]. Managers or directors shall not be answerable towards the company if the act or omission is part of a resolution adopted by the shareholders, even if this resolution is voidable.[156]

The managers or directors are generally answerable to the shareholders and third parties for direct damages resulting from the exercise of their duties.[157]

Under Portuguese law, managers and directors are liable jointly and severally.[158] Managers or directors 'may have to answer for the act in question to the company, as well as to the shareholders and to the creditors. Internally, redress may legitimately be sought from one or more of them up to the extent of their culpability.'[159]

The members of supervisory bodies are jointly and severally liable with the company's managers or directors, for acts or omissions resulting from the performance of their duties in situations where the damages would not have occurred had the supervisory body properly executed its supervision duties.[160]

The criminal liability of directors and managers is regulated by different laws, including but not limited to the Portuguese Companies Act, the Securities Code and, as subsidiary legislation, the Criminal Code, all of which stipulate penalties in the event of an illegal action of the directors and managers of the companies.[161]

Any liability suit proposed by the company depends on a resolution of the shareholders adopted by a simple majority, and must be brought no later than six months following said resolution.[162] If the company resolves to exercise its right to indemnification, the court, at the request of one or more shareholders owning at least 5% of the share capital, may appoint a person or persons to represent the company.[163]

The company may only relinquish its right to indemnification or effect a compromise in relation to it by means of an express resolution by the shareholders, as long as a dissenting vote does not amount to 10% or more of the share capital.[164]

Under Portuguese law, individual shareholders may file actions against directors in order to be indemnified for the direct damages caused to them by the directors' conduct.[165]

Also, one or more shareholders who jointly own 5% of the share capital or 2% in the case of a company with shares admitted to trading on a regulated market, may bring a liability suit against the managers or directors to claim reparation for damages caused to the company if such a suit has not been filed.[166]

The resolution adopted by the general meeting to approve the accounts or the management of the managers or directors does not imply a waiver of the company's right to indemnification by them, unless the facts that constitute the liability were specifically made known to the shareholders prior to approval and, in any case, as long as there is a dissenting vote from a minority representing 10% or more of the share capital.[167]

Article 174 of the Portuguese Companies Act contains a number of provisions regulating the expiration of rights of the company against its directors and manages, some of which are mentioned in this paragraph. Thus, the rights of the company against its directors and managers as well as the rights of shareholders and third parties relative to the company's directors and managers will expire after five years following the cessation of the wilful, fraudulent or negligent misconduct on the part of directors and managers, or the discovery of such misconduct, if it had been covered-up.[168] The five-year limitation period may also start once the damage is suffered by the company. If the illegal act that results in liability is a crime for which the law defines a longer statute of limitations, the longer term shall apply.[169]

In addition, 'there is a three-year period of prescription that applies to actions for liability in tort (Article 498 of the Civil Code). The time limit begins when the plaintiff becomes aware of his/her alleged right to claim.'[170]

According to the Companies Act, a paragraph, whether or not inserted in the articles of association, shall be considered null and void if it waives or limits the liability of the managers or directors, or subjects the exercise of a liability suit [promoted by shareholders] to a prior statement of opinion or resolution adopted by shareholders or renders such action subject to a court ruling regarding the existence of cause of liability or subject to the removal from office of the person responsible.[171]

The Companies Act also provides that the liability of each director must be guaranteed by one or other of the means permitted by law, to the value fixed in the articles of association. For the companies that issue securities admitted to trading on a regulated market, this value must never fall below €250,000; moreover, such companies cannot waive this surety.[172]

The surety may be substituted by an insurance contract, in favour of those entitled to the indemnity, the costs of which must not be met by the company, except for the part of the indemnity which is in excess of the minimum value (as mentioned in the previous paragraph).[173]

Manifest would like to thank the following persons who have reviewed the commentary on Portugal:

Ms. Margarida Azevedo, invited Professor in the field of Commercial Law at the Institute of Accounting and Administration, Porto

Mr. Paulo Fernando Bandeira, Lawyer, Simmons & Simmons (Portugal)

Ms. Rita Maltez, Partner, Abreu Advogados (Portugal)

Mr. Vítor Pereira Neves, Lawyer and Professor or Law, and Ms. Clara Parreira, Lawyer, LAAA Advogados (Portugal)

Mr. João Martins Pereira, Head of Group Compliance, Banco Espirito Santo (Portugal)

13 Spain

The duties, obligations and liabilities of legally appointed or de facto directors of Spanish companies mainly arise from the provisions of the Spanish Companies Act (Ley de Sociedades Anonimas)[174], the company's articles of association and resolutions of the general meeting.

'Article 127 of the Companies Act outlines and regulates the duties of directors, which it summarises as the duty of care, obliging directors to inform themselves and to be diligent in their stewardship of the company; the duty of fidelity, requiring them to act in furtherance of the corporate interest; the duty of loyalty, with special reference to conflicts of interest and related-party transactions, and the duty of secrecy.'[175]

Under Spanish company law, directors' duties are owed to the company. If directors' actions cause damage to the company, claims can be brought by a general meeting resolution, minority shareholders or creditors; where directors' actions cause direct damage to individual shareholders or creditors, either of them can initiate liability proceedings against directors. 'Directors are liable for any damages they cause, which may arise from acts or omissions that contravene the law or the articles, or from any breach of duty.'[176]

'Directors are jointly and severally liable, unless they can prove that they were not aware of the decision or act causing the damage, or that despite being aware of it, they did everything in their power to avoid the damage or expressly opposed such unlawful decision or act.'[177] 'This regime applies to executive and non-executive directors, since the Companies Act does not provide for any exceptions to the general liability of directors.'[178] **Directors cannot be exonerated from liability even when a damaging act or agreement has been authorised or ratified by the general meeting.**[179]

In addition to civil liability, 'the Criminal Code incriminates certain behaviours in order to protect minority shareholders. This means that, if a director prevents a shareholder from exercising any of his rights or enters into abusive agreements or takes advantage of a majority position on the board of directors, it may amount to a criminal offence… The Criminal Code provides that anyone who legally or de facto acts as a director or manager of a corporate entity is personally responsible for the criminal offences committed by that corporate entity. The Spanish Criminal Code lists a large number of criminal offences, such as falsification of documents, fraud, etc.'[180]

'There are two main legal claims in relation to a director's liability for unlawful actions: corporate legal action and individual legal action. A corporate legal action is appropriate when damage is suffered by the company, whilst an individual action is relevant in the event of damage suffered by shareholders or third parties... Corporate legal actions and individual legal actions may be brought simultaneously.'[181]

'Corporate legal actions aim to recover damage suffered directly by the company as a consequence of a director's actions or decisions. Such actions can be brought by the company itself, by the shareholders or by the company's creditors. Exercise of legal claims by the company need to be approved at a general meeting. Public companies require a simple majority of votes of the attendees at the meeting in favour of the action.'[182]

The shareholders' action is secondary and can be initiated under certain circumstances. 'It requires that those who bring the action hold at least 5% of the share capital of the company, whereby the action will be a joint action. An action can be brought if one month has elapsed since the general meeting at which it was agreed to bring about the action and such action has not yet been filed; or if the general meeting has not approved the proposal to bring about the claim.'[183] If neither the company nor the shareholders have started proceedings against directors, creditors can start a corporate legal action, providing the assets of the company are not enough to satisfy their claims.

The Companies Act provides that the general meeting can reach settlement on or abandon the proceedings (i.e. corporate legal action) at any time provided that shareholders representing 5% of the share capital or more do not object.[184]

Where Spanish companies propose to discharge directors from liability for their acts during the past financial year, such resolutions are often bundled with proposals to approve annual report and accounts. The Companies Act explicitly states that the act of approving the annual accounts will not prevent or hinder the implementation of liability proceedings against directors. Nor shall it annul any proceedings that may already have been agreed or implemented.[185]

Separately from a corporate legal action, ‘any shareholder or third party may bring a personal indemnity action (individual legal action) where they have suffered direct damage.’[186] These actions ‘aim to re-establish the individual assets of those shareholders or third parties who have suffered damage in respect of their own assets as a consequence of a director’s act. In the event of illegal behaviour by a director while exercising his post, shareholders or a third party affected will be able to exercise a right of individual action against the directors themselves, separate from any action against the company.’[187]

In addition, directors’ failure to take appropriate action when the company’s circumstances require its dissolution will make them jointly and severally liable for all company obligations entered into after the occurrence of the cause for dissolution. Although this kind of claims against directors is outside the scope of this paper, since their introduction in 1989, they have become the most common type of legal action taken against directors in Spain and the greatest liability risk for directors in Spanish companies.

‘The Companies Act does not provide any limitation period in respect of actions against directors. The Mercantile Code provides that any action against a director will be time barred four years from the date on which the director leaves office. The Spanish courts have not reached a uniform and clear conclusion in this respect. In some cases, the Spanish courts apply a one-year limitation period, as provided in the Civil Code for liability in tort, and in other cases, they apply the four-year period.’[188] ‘The limitation period for criminal offences depends on the sentence stipulated for a particular offence, e.g. the maximum limitation period for fraud is ten years.’[189]

‘A director’s liability cannot be limited by agreement. Notwithstanding, directors may enter into insurance contracts which cover liability in relation to the company and third parties. This insurance cannot cover wilful misconduct.’[190]

Manifest would like to thank the following persons who have reviewed the commentary on Spain:

Dr. Elena F Pérez Carrillo, Profesor Asociado Derecho Mercantil, Universidad de Santiago de Compostela

Mr. Alejandro Fernández de Araoz, Partner, ARAOZ & RUEDA, Madrid

14 Sweden

‘The legal basis for the liability of directors, officers and managers, in that capacity, is found in the Companies Act, the Tort Liability Act and general legal principles on tort.’[191]

‘Members of the board of directors and the managing director may be liable for damages to the company as well as to the shareholders and other parties.’[192]

The Swedish Companies Act states that, a member of a board of directors or a managing director who, in the performance of his or her duties, intentionally or negligently causes damage to the company must compensate such damage.[193] ‘This applies not only to a director actively ignoring the best interests of the company but also a director who is passive or does not take sufficient action.’[194] In addition, Swedish case law stipulates that a de facto director or a shadow director may be liable under similar circumstances.[195]

A director is liable to shareholders or other persons, but only for damage caused as a consequence of a violation of the Companies Act, the applicable annual reports legislation or the articles of association.[196] In addition, the Companies Act provides, that liability to shareholders and other persons may also arise where the company has prepared a prospectus, offer documents as referred to in Chapter 2a, section 3 of the Financial Instruments Trading Act (SFS 1991:980) or such a document as referred to in Chapter 2a, section 1 or Chapter 2b, section 2 of the same Act, with respect to damage caused through violation of Chapters 2, 2a or 2b of the aforesaid Act or Commission Regulation (EC) No 809/ 2004 of 29 April 2004 implementing Directive 2003/71/EC of the European Parliament and of the Council as regards information contained in prospectuses, as well as the format, incorporation by reference and publication of such prospectuses and dissemination of advertisements.[197] ‘Non-contractual liability for purely financial loss… arises only in the event of criminal acts’[198] or if a legal duty to act has been ignored.

‘According to Swedish law, a legal entity as such can not commit a crime. Thus, a member of the board of directors or a managing director may be held liable for crimes committed by the company.’[199]

‘Directors and officers committing fraud may be held personally liable for the full damage suffered by the company, shareholders and third parties.’[200]

If several persons are liable for the same damage, they will be jointly and severally liable.[201] The damages may be adjusted in accordance with what is reasonable taking into consideration the nature of the act, the extent of the damage and the circumstances in general.[202]

Claims for damages to the company may be brought by the board of directors or shareholders:[203]

- **A claim for damages against directors may be brought if the majority of shareholders or holders of at least 10% of all company shares have, at a general meeting, supported a resolution to bring such a claim in damages or have voted against a resolution regarding discharge from liability.[204]**

- Owners of not less than 10% of all shares in the company may, in their own name, commence an action regarding damage to the company.[205]

A settlement in respect of liability in damages to the company may be entered into only by the general meeting and only on condition that holders of 10% (or more) of all company shares do not vote against the proposal. Where a claim in damages is brought by a shareholder on behalf of the company, a settlement may not be reached without his or her consent.[206]

Discharge from liability for members of the board of directors and the managing director is specified by the Companies Act as one of the mandatory matters to be dealt with at each annual general meeting.[207] The Act further provides that the auditor’s report must contain a statement concerning whether the members of the board of directors and the managing director should be granted discharge from liability vis-à-vis the company.[208] Where the auditor becomes aware of any acts or omissions by any member of the board of directors or the managing director, which may give rise to liability, such facts must be noted in the auditor’s report. The aforesaid also applies where the auditor, in the course of the audit, finds that a member of the board of directors or the managing director has otherwise acted in contravention of the Companies Act, the applicable annual report legislation or the articles of association.[209]

‘The principal effect of a decision to grant discharge from liability is to bar any action (with some exceptions) by the company against the board members and the managing director in relation to the financial year covered by the annual accounts presented at the shareholders’ meeting where the discharge resolution is passed.’[210]

‘A failure to grant discharge from liability has no immediate effect on the liability of the board members and the managing director. It merely leaves the possibility open for the company (through the board or by way of a derivative lawsuit by a minority shareholder) to initiate an action for liability. Consequently, a resolution not to grant discharge from liability does not necessarily mean that an action will be brought against the person subject to such resolution, and sometimes a refusal to grant discharge is merely used to express shareholders’ disapproval with one or more functionaries of the company.’[211]

‘A decision by the general meeting to grant discharge only concerns liability towards the company. Liability towards the shareholders and others is not affected. Discharge from liability does not always prevent the company from initiating an action for damages:’[212]

- Where the general meeting has adopted a resolution to grant discharge from liability or not to commence an action in damages without 10% minority voting against it, or where the period of time for the commencement of an action has expired, an action may nevertheless be brought where, in the annual report or auditor’s report or otherwise, materially correct and complete information was not provided to the general meeting regarding the resolution or the measure on which the proceedings are based.[213]

- The board of directors may in any case commence an action in damages where the damage was incurred as a result of a crime.[214]

Proceedings on behalf of the company against a member of the board of directors or the managing director for damages as a consequence of decisions or measures taken during a financial year must be brought not later than one year from the date on which the annual report and the auditor’s report for such financial year were presented to the general meeting.[215]

In addition, proceedings on behalf of the company, which are not based on criminal acts, may not be brought against a member of the board of directors or the managing director, where five years have elapsed since the expiry of the financial year in which the resolutions or measures on which the action is based were adopted or taken.[216]

The company can indemnify its directors and officers under Swedish law for damages to third parties, but not for damages to the company itself.

A company is permitted to take out D&O liability insurance on behalf of its directors.

Manifest would like to thank the following persons who have reviewed the commentary on Sweden:

Mr. Urban Båvestam and Mr. Sven Unger, Mannheimer Swartling Advokatbyrå, Sweden

Dr Daniel Stattin, Head of Corporate Law, Uppsala University

Mr. Carl Svernlöv, LL.D., Partner, Baker & McKenzie Stockholm

15 Switzerland

Under the Swiss Company Law, the members of the board of directors as well as third parties engaged with the management must carry out their duties with due care and must duly safeguard the interests of the company. They must also give equal treatment to shareholders under equal circumstances.[217]

The members of the board of directors or all persons engaged in the management are liable not only to the company, but also to each shareholder and to the company's creditors for the damage caused by an intentional or negligent violation of their duties. In addition, whoever rightfully delegates the fulfilment of a duty to another corporate body is liable for any damage caused by it unless he/she proves that he/she applied the necessary care in selection, instruction and supervision under the circumstances.[218]

The company law further stipulates that, if upon the founding of the company or upon the issue of shares, bonds or other securities, statements have been made or disseminated which are incorrect, misleading or not complying with the legal requirements in issue prospectuses or similar instruments, anyone having intentionally or negligently contributed thereto is liable to the acquirers of the security for any damage caused thereby.[219]

Directors may also be liable vis-à-vis the third party 'for the direct damages caused by their tortuous acts even if the act is committed within the scope of company's business or in the company's best interest. In such cases, liability to the damaged party is joint and several with the company, which is vicariously liable if the act was committed within the course and scope of employment.'[220]

The directors may be liable for breaches under the Swiss Criminal Code; some of the breaches may also constitute an act that entails civil liability.

If several directors are liable for damages, any one of them is liable jointly and severally with the others to the extent the damage is attributable to such person based on his own fault and the circumstances. The plaintiff may sue several participants jointly for the total damage and request that the judge set the liability of each individual defendant in the same proceeding.[221]

'The company may claim against directors or officers through the board or directors. If the board refuses to do so, the shareholders can resolve to appoint a special representative to pursue the claim.'[222]

In addition to the company, each shareholder is entitled to file an action for damage caused to the company.[223] 'An award of damages in such cases would be payable to the company.'[224]

'Shareholders may also claim against directors for their "direct damage", where an individual shareholder sustained damage himself (e.g. a direct purchaser of shares can make a claim under prospectus liability for direct damage).'[225]

'Under Swiss law, the general shareholders' meeting can release the members of the board of directors from liability either for a specific period of time, such as the previous business year, or for a particular business transaction.'[226] In fact, the release of the members of the board of directors is one of the inalienable powers of the general meeting of shareholders under the Swiss company law.[227]

'The importance of the release results from its effect on potential claims against the board of directors for administration, management or liquidation. The release shelters the board members from liability claims by the company arising from the intentional or negligent violation of their duties.'[228] This means that, unlike in other markets, a discharge of liabilities rightfully granted by shareholders in Switzerland can hinder claims against directors notwithstanding the fact that such claims are based on wilful misconduct, fraud or any criminal offences *(it should be noted, however, that, notwithstanding a discharge, directors may become liable for such actions vis-à-vis third parties under other bodies of law (e.g. criminal law)).*

Importantly, the discharge of liabilities resolution passed by the general meeting is effective:

- **only for facts that have been disclosed; and**
- **only vis-à-vis the company and those shareholders who consented to the resolution or who acquired shares subsequently with knowledge of the resolution.[229]**

The rights of those shareholders, who did not approve the discharge of liabilities resolution, to file an action are extinguished six months after the resolution was adopted.[230]

It should be noted that the adoption of the 'discharge of liabilities' resolution requires a simple majority of votes; however, voting privileges (i.e. shares with higher voting power) do not apply in the context of such a resolution. Also, persons who participated in the management of the company are excluded from voting their shares when it comes to a resolution on the discharge[231], which also applies to the extent that such a person acts as proxy for another shareholder.

The claim to compensation for damages against company directors and officers is barred after five years calculated from the day the injured party received knowledge of the damage and of the persons liable, but in any case after expiration of ten years calculated from the day of the act causing the damage.[232]

The statute of limitations for torts is one year from the day the injured party received knowledge of the damage and of the persons liable, but the claim is barred in any case after expiration of ten years calculated from the day of the act causing the damage.

If the claim stems from a criminal act for which the criminal law provides for a longer statute of limitations, the latter is also valid for a civil claim.[233]

'A director cannot limit his or her liability beyond the general possibilities to limit the board's liability by means of delegation of certain duties or by means of shareholder ratification of certain acts of the board of directors.'[234]

'A corporation is permitted to purchase D&O liability insurance.'[235]

Manifest would like to thank Mr. Karim Maizar, lic. iur, Attorney-at-law, Baer & Karrer Ltd (Zurich, Switzerland) who has reviewed the commentary on Switzerland.

Appendix

Discharge of Board and Management

What is a discharge?	Discharge is a practice in civil law jurisdictions whereby shareholders are asked in a general meeting to approve the activities ("discharge of liabilities") of the board and/or management during the fiscal year in review. Discharge is practised in many continental European countries, and it also exists in some civil law countries outside of Europe. Importantly, granted discharge will not release directors from liabilities to third parties or under other bodies of law (e.g. criminal law, insolvency and bankruptcy law, etc.).

Country	Parties Eligible for Discharge	Consequences of Approval of Discharge	Preconditions	Miscellaneous
		Summary		
13 Western European countries maintain some form of discharge (this is not an exhaustive list of countries that have discharge proposals)	Board of Directors (Management and Supervisory Board members, where dual Board structure is used)	Varies - from a complete release of liability to the Company to no legal effect. Failure to discharge has no immediate effect on the liability of the directors - it merely leaves the possibility open for the Company (via the board or a derivative lawsuit by shareholders) to initiate action.	Varies - common conditions include: ▪ provision of accurate and complete information (e.g., annual accounts, auditor's report); ▪ valid decision on discharge made in accordance with law and by-laws; ▪ any breaches of articles reported to the general meeting; ▪ no facts of wilful misconduct, intent or gross negligence.	See individual country analysis below.

Manifest would like to thank Simon Wong of BGI UK, whose proposal to create a tabular overview of board discharge is amplified below.

Country by Country Summary

Country	Parties Eligible for Discharge	Consequences of Approval of Discharge	Preconditions	Miscellaneous
Austria	Management Board & Supervisory Board	Only an expression of trust and **does not release Board members of potential liability.**		
Belgium	Board of Directors	Releases directors of liability stemming from their activities during the year in question - **company and shareholders who voted in favour can no longer claim for damages from discharged parties.**	Release of liability not valid if common conditions as above not fulfilled.	

Country	Parties Eligible for Discharge	Consequences of Approval of Discharge	Preconditions	Miscellaneous
Denmark	Board of Directors (or, where applicable, Supervisory Board & Management Board)	Releases discharged parties of liability stemming from their activities during the year in question - **company can no longer claim for damages from discharged parties.**	Release of liability not valid if: ▪ common conditions as above not fulfilled; ▪ company enters into bankruptcy within 2 years of the passage of the discharge resolution; ▪ **shareholders holding at least 10% of share capital opposed the discharge.**	Discharge of liabilities not mandatory under Danish law. Minority action must be brought within six months of discharge.
Finland	CEO/ Managing Director, Board of Directors, Supervisory Board	Releases discharged parties of liability stemming from their activities during the year in question - **company can no longer claim for damages from discharged parties.**	Release of liability not valid if: ▪ common conditions as above not fulfilled; ▪ company enters into bankruptcy within 2 years of the passage of the discharge resolution.	Legal action against a discharged party must be brought within three months of discharge.
France	Board of Directors (or Supervisory Board & Management Board)	**No legal effect on the liability of the discharged parties.**		
Germany	Management Board & Supervisory Board	Merely a vote of confidence - **does not preclude shareholders from bringing a claim** against discharged parties.		Discharge of directors can be effected by slate or individually. Individual discharge can be requested by shareholders representing 10% or €1,000,000 of the company's share capital.
Greece	Board of Directors	Releases discharged parties of liability stemming from their activities during the year in question - **company can no longer claim for damages from discharged parties.**	Release of liability not valid if common conditions as above not fulfilled.	
Luxembourg	Board of Directors	Releases discharged parties of liability stemming from their activities during the year in question - **company can no longer claim for damages from discharged parties.**	Release of liability not valid if common conditions as above not fulfilled.	

Country	Parties Eligible for Discharge	Consequences of Approval of Discharge	Preconditions	Miscellaneous
Netherlands	Management Board & Supervisory Board	Releases discharged parties of liability stemming from their activities during the year in question - **company can no longer claim for damages from discharged parties.**	Release of liability not valid if common conditions as above not fulfilled.	Discharge does not extend to actions taken outside the scope of each director's duties as a supervisory or management board member. Discharge may be limited or overturned where a court finds that upholding the discharge would be inconsistent with the Dutch legal principle of good faith. Authority to annul a resolution on discharge by the general meeting expires one year after the resolution was made public or one year after informing the interested party.
Portugal	Board of Directors	Releases discharged parties of liability stemming from their activities during the year in question - **company can no longer claim for damages from discharged parties.**	Release of liability not valid if: ▪ **facts constituting the liability were not specifically made known to shareholders prior to approval of discharge;** ▪ **shareholders holding at least 10% of share capital opposed the discharge.**	Directors are not answerable towards the Company if the act or omission is part of a resolution adopted by the shareholders, even if this resolution is voidable.
Spain	Board of Directors	**No legal effect on the liability of the discharged parties.** Directors cannot be exonerated from liability even when a damaging act or agreement has been authorised or ratified by the general meeting.		Discharge resolution is often bundled with proposal to approve the annual accounts. However, approval of annual accounts does not prevent suits against directors.
Sweden	Board of Directors & Managing Director/CEO	Releases discharged parties of liability stemming from their activities during the year in question - **company can no longer claim for damages from discharged parties.**	Release of liability not valid if: ▪ materially correct and complete information was not provided in the annual report or auditor's report; ▪ **shareholders holding at least 10% of share capital opposed the discharge;** ▪ damage incurred as a result of wilful misconduct or crime.	Auditor's report must recommend whether Managing Director/CEO and Board of Directors should be discharged.

Country	Parties Eligible for Discharge	Consequences of Approval of Discharge	Preconditions	Miscellaneous
Switzerland	Board of Directors	Releases directors of liability stemming from their activities during the year in question - **company, shareholders who voted in favour of discharge and those who bought shares with knowledge of approval of discharge are barred from bringing claims** for negligent and **intentional** violation of directors' duties.	Discharge of liabilities valid only for facts that have been disclosed. Discharge rightfully granted by shareholders can hinder claims against directors even if they are based on wilful misconduct, fraud or any criminal offences (directors may nevertheless become liable for such actions vis-à-vis third parties under other bodies of law).	Shareholders who voted against discharge must file any action within 6 months of the shareholders meeting where discharge was granted.

Endnotes

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1 See 'Cross Border Voting in Europe –A Manifest Investigation into the Practical Problems of Informed Voting Across EU Borders', ISBN: 978-0-9552864-2-1, Manifest Information Services, May 2007.

2 See 2007 proxy season review by Manifest: 'Proxy Voting 2007 - A Pan-European Perspective', ISBN: 0-9552864-3-3, Manifest Information Services, November 2007.

3 'Directors and Officers Liability in Austria' by Dr. Thomas Kustor, Freshfields Bruckhaus Deringer, July 2002 (available from www.aiu.com).

4 'Directors and Officers Liability in Austria' by Dr. Thomas Kustor, Freshfields Bruckhaus Deringer, July 2002 (available from www.aiu.com).

5 'Directors and Officers Liability in Austria' by Dr. Thomas Kustor, Freshfields Bruckhaus Deringer, July 2002 (available from www.aiu.com).

6 See article 84 (4), Austrian Stock Corporation Act.

7 p.71, Austria, Volume I, Inernational Liability of Corporate Directors by Christian T. Campbell, 2006. Article 40 of the Austrian Stock Corporation Act.

8 p.72, Austria, Volume I, International Liability of Corporate Directors by Christian T. Campbell, 2006. Article 255 of the Austrian Stock Corporation Act.

9 p.72, Austria, Volume I, International Liability of Corporate Directors by Christian T. Campbell, 2006. Article 255 of the Austrian Stock Corporation Act.

10 p.73, Austria, Volume I, International Liability of Corporate Directors by Christian T. Campbell, 2006.

11 p.74, Austria, Volume I, International Liability of Corporate Directors by Christian T. Campbell, 2006.

12 Annex 2, Brief Overview of the Austrian Corporation Act, Austrian Code of Corporate Governance, January 2006.

13 'Directors and Officers Liability in Austria' by Dr. Thomas Kustor, Freshfields Bruckhaus Deringer, July 2002 (available from www.aiu.com).

14 'Directors and Officers Liability in Austria' by Dr. Thomas Kustor, Freshfields Bruckhaus Deringer, July 2002 (available from www.aiu.com).

15 'Comparative Analysis on Legal Regulation of the Liability of Members of the Management organs of Companies', Report to Russian Center for Capital Market Development, December 2006. Article 122 (1) of the Austrian Stock Corporation Act

16 'Directors and Officers Liability in Austria' by Dr. Thomas Kustor, Freshfields Bruckhaus Deringer, July 2002 (available from www.aiu.com).

17 Based on p.82, Austria, Volume I, International Liability of Corporate Directors by Christian T. Campbell, 2006.

18 'Directors and Officers Liability in Austria' by Dr. Thomas Kustor, Freshfields Bruckhaus Deringer, July 2002 (available from www.aiu.com).

19 Chapter on Belgium by Cedric Guyot and Jean-Francois Goffin, 'Duties and Responsibilities of Directors in Europe', CMS, 2007. Also see Articles 527-528 of the Belgian Commercial Companies Code.

20 Chapter on Belgium by Cedric Guyot and Jean-Francois Goffin, 'Duties and Responsibilities of Directors in Europe', CMS, 2007.

21 The Practical Guide to International Corporate Governance - 2005/06 Edition: Belgium chapter, Jan Bogaert & Jan Peeters, FIR Publications Ltd. See www.stibbe.be.

22 'Directors' liability in case of insolvency and fraud: recent developments in Belgium' by Paul Hermant, Bird & Bird, September 2007.

23 3.9 Directors' Rights and Liabilities, Business Organisations, Belgium, Belgium & Luxembourg: Practical Commercial Law by Nicole Van Crombrugghe, Guy Arendt and Alexis Maitland Hudson.

24 'Directors' liability in case of insolvency and fraud: recent developments in Belgium' by Paul Hermant, Bird & Bird, September 2007.

25 3.9 Directors' Rights and Liabilities, Business Organisations, Belgium, Belgium & Luxembourg: Practical Commercial Law by Nicole Van Crombrugghe, Guy Arendt and Alexis Maitland Hudson.

26 Chapter on Belgium by Cedric Guyot and Jean-Francois Goffin, 'Duties and Responsibilities of Directors in Europe', CMS, 2007. Article 198 of the Belgian Companies Code.

27 Chapter on Belgium by Cedric Guyot and Jean-Francois Goffin, 'Duties and Responsibilities of Directors in Europe', CMS, 2007.

28 'Directors, Officers and Managers Personal Liability: The Legal Position in Denmark', Samuelsson Neugebauer Law Firm (available from www.aiu.com).

29 Art. 140, Part 16. The Danish Public Companies Act (Consolidation Act No. 324 of 7 May 2000).

30 See for instance U.2001.873H, where Højesteret (the Danish Supreme Court) reduced the damages since the member of the board was a family member.

31 Art. 140, The Danish Public Companies Act (Consolidation Act No. 649 of 15 June 2006).

32 Based on 'Directors, Officers and Managers Personal Liability: The Legal Position in Denmark', Samuelsson Neugebauer Law Firm (available from www.aiu.com).

33 'Directors, Officers and Managers Personal Liability: The Legal Position in Denmark', Samuelsson Neugebauer Law Firm (available from www.aiu.com).

34 p.185, Denmark, Volume I, International Liability of Corporate Directors by Christian T. Campbell, 2006.

35 Based on p.185, Denmark, Volume I, International Liability of Corporate Directors by Christian T. Campbell, 2006.

36 Art. 144 (1), The Danish Public Companies Act (Consolidation Act No. 649 of 15 June 2006).

37 National Report for Denmark by Henrik Peytz, Michael S. Wiisbye, Helene Bang Schmidt, Frederik André Bork from Nielsen & Nørager, Study on the conditions of claims for damages in case of infringement of EC competition rules (2004) carried out by Ashurst for the European Commission.

38 Art. 144 (3), The Danish Public Companies Act (Consolidation Act No. 649 of 15 June 2006).

39 Art. 145 (1), The Danish Public Companies Act (Consolidation Act No. 649 of 15 June 2006).

[40] Art. 144 (2), The Danish Public Companies Act (Consolidation Act No. 649 of 15 June 2006).
[41] Art. 144 (4), The Danish Public Companies Act (Consolidation Act No. 649 of 15 June 2006).
[42] Consolidation Act no. 1261 of 23 October 2007.
[43] The Danish Act of Limitations (Act. No. 522 of 6 June 2007) which came into force on January 1st 2008.
[44] 'Directors, Officers and Managers Personal Liability: The Legal Position in Denmark', Samuelsson Neugebauer Law Firm (available from www.aiu.com).
[45] Section 1, Chapter 22, The Finnish Limited Liability Companies Act 2006.
[46] 'Directors, Officers and Managers Personal Liability: The Legal Position in Finland', Hannes Snellman, Attorneys at Law (available from www.aiu.com).
[47] Section 1, Chapter 22, The Finnish Limited Liability Companies Act 2006.
[48] "Finland's New Companies Act – Any Changes in Management Liabilities?" by Matti Sjögren, Liability Newsletter 2/2007, If News.
[49] "Finland's New Companies Act – Any Changes in Management Liabilities?" by Matti Sjögren, Liability Newsletter 2/2007, If News.
[50] Section 2 and 3 (1), Chapter 6, The Finnish Tort Liability Act (412/1974).
[51] 'Directors, Officers and Managers Personal Liability: The Legal Position in Finland', Hannes Snellman, Attorneys at Law (available from www.aiu.com).
[52] Section 6 (2), Chapter 22, The Finnish Limited Liability Companies Act 2006.
[53] Section 6 (1), Chapter 22, The Finnish Limited Liability Companies Act 2006.
[54] Section 7 (1), Chapter 22, The Finnish Limited Liability Companies Act 2006.
[55] Section 7 (3, 4), Chapter 22, The Finnish Limited Liability Companies Act 2006.
[56] Section 8 (1), Chapter 22, The Finnish Limited Liability Companies Act 2006.
[57] Section 7, The Act on the Expiry of Debts (728/2003).
[58] "Finland's New Companies Act – Any Changes in Management Liabilities?" by Matti Sjögren, Liability Newsletter 2/2007, If News. Section 9, Chapter 22, The Finnish Limited Liability Companies Act 2006.
[59] Article L225-251, Book II, Title II, The French Commercial Code.
[60] Chapter on France by Jacques Isnard, 'Duties and Responsibilities of Directors in Europe', CMS, 2007.
[61] 'Directors' and Officers' Liability in France', Clifford Chance (available from www.aiu.com).
[62] Article L225-257, Book II, Title II, The French Commercial Code.
[63] Based on Chapter on France by Jacques Isnard, 'Duties and Responsibilities of Directors in Europe', CMS, 2007.
[64] 'Directors' and Officers' Liability in France', Clifford Chance (available from www.aiu.com).
[65] 'Directors' and Officers' Liability in France', Clifford Chance (available from www.aiu.com).
[66] 'Directors' and Officers' Liability in France', Clifford Chance (available from www.aiu.com).
[67] 'Directors' and Officers' Liability in France', Clifford Chance (available from www.aiu.com).
[68] Chapter on France by Jacques Isnard, 'Duties and Responsibilities of Directors in Europe', CMS, 2007.
[69] Article L225-253, Book II, Title II, The French Commercial Code.
[70] Article L225-253, Book II, Title II, The French Commercial Code.
[71] Based on 'Directors' and Officers' Liability in France', Clifford Chance (available from www.aiu.com).
[72] Article L225-254, Book II, Title II, The French Commercial Code.
[73] 'Directors and Officers Liability in Germany' by Dr. Burkhard Bastuck and Corinna Hufnagel, Freshfields Bruckhaus Deringer (available from www.aiu.com).
[74] 'The European Panorama: Directors' Economic and Social Responsibilities', Charles Russel, 16 June 2006.
[75] 'Directors and Officers Liability in Germany' by Dr. Burkhard Bastuck and Corinna Hufnagel, Freshfields Bruckhaus Deringer (available from www.aiu.com).
[76] Chapter on Germany, 'European Litigation Trends', Freshfields Bruckhaus Deringer, March 2007.
[77] § 93, s. 4, sentence 1, AktG
[78] p.100, 'Corporate Law in Germany' by Gerhard Wirth and Michael Arnold in cooperation with Mark Greene, Verlag C.H. Beck München, 2004.
[79] 'Comparative Analysis on Legal Regulation of the Liability of Members of the Management organs of Companies', Report to Russian Center for Capital Market Development, December 2006.
[80] 'Comparative Analysis on Legal Regulation of the Liability of Members of the Management organs of Companies', Report to Russian Center for Capital Market Development, December 2006.
[81] 'Comparative Analysis on Legal Regulation of the Liability of Members of the Management organs of Companies', Report to Russian Center for Capital Market Development, December 2006.
[82] Chapter on Germany, 'European Litigation Trends', Freshfields Bruckhaus Deringer, March 2007.
[83] § 78 and §112, AktG. 'Directors and Officers Liability in Germany' by Dr. Burkhard Bastuck and Corinna Hufnagel, Freshfields Bruckhaus Deringer (available from www.aiu.com).
[84] p.100, 'Corporate Law in Germany' by Gerhard Wirth and Michael Arnold in cooperation with Mark Greene, Verlag C.H. Beck München, 2004.
[85] § 147, s.1, AktG. Chapter on Germany, 'European Litigation Trends', Freshfields Bruckhaus Deringer, March 2007.
[86] § 147, s.2 AktG. 'Comparative Analysis on Legal Regulation of the Liability of Members of the Management organs of Companies', Report to Russian Center for Capital Market Development, December 2006.
[87] 'Comparative Analysis on Legal Regulation of the Liability of Members of the Management organs of Companies', Report to Russian Center for Capital Market Development, December 2006.
[88] p.101, 'Corporate Law in Germany' by Gerhard Wirth and Michael Arnold in cooperation with Mark Greene, Verlag C.H. Beck München, 2004.

---

[89] p.101, 'Corporate Law in Germany' by Gerhard Wirth and Michael Arnold in cooperation with Mark Greene, Verlag C.H. Beck München, 2004.
[90] § 120, s.2, AktG.
[91] 'Comparative Analysis on Legal Regulation of the Liability of Members of the Management organs of Companies', Report to Russian Center for Capital Market Development, December 2006.
[92] 'Directors and Officers Liability in Germany' by Dr. Burkhard Bastuck and Corinna Hufnagel, Freshfields Bruckhaus Deringer (available from www.aiu.com).
[93] 'Comparative Analysis on Legal Regulation of the Liability of Members of the Management organs of Companies', Report to Russian Center for Capital Market Development, December 2006.
[94] 'Directors and Officers Liability in Germany' by Dr. Burkhard Bastuck and Corinna Hufnagel, Freshfields Bruckhaus Deringer (available from www.aiu.com).
[95] 'Comparative Analysis on Legal Regulation of the Liability of Members of the Management organs of Companies', Report to Russian Center for Capital Market Development, December 2006.
[96] 'Comparative Analysis on Legal Regulation of the Liability of Members of the Management organs of Companies', Report to Russian Center for Capital Market Development, December 2006.
[97] 'Directors and Officers Liability in Germany' by Dr. Burkhard Bastuck and Corinna Hufnagel, Freshfields Bruckhaus Deringer (available from www.aiu.com).
[98] National Report: Greece, Dr. Aida Economou from Law Offices Panagopoulos, Vainanidis, Schina, Economou and Efthymios Bourtzalas from Ashurst Brussels, Study on the conditions of claims for damages in case of infringement of EC competition rules (2004) carried out by Ashurst for the European Commission.
[99] Article 22a (1), Greek Law 2190/1920 as amended by Law 3604/2007.
[100] 'Greek Company Law Reform' by Theodore N. Rakintzis from KGDI Law Firm, the European Lawyer, November 2007.
[101] Article 22a (2), Greek Law 2190/1920 as amended by Law 3604/2007.
[102] 'Directors, Officers and Managers Liability: The Legal Position in Greece' by T.G.Kommatas & Associates (available from www.aiu.com).
[103] 'Directors, Officers and Managers Liability: The Legal Position in Greece' by T.G.Kommatas & Associates (available from www.aiu.com).
[104] Based on 'Directors, Officers and Managers Liability: The Legal Position in Greece' by T.G.Kommatas & Associates (available from www.aiu.com).
[105] Article 22b (1), Greek Law 2190/1920 as amended by Law 3604/2007.
[106] Article 22b (1), Greek Law 2190/1920 as amended by Law 3604/2007.
[107] Article 22b (2), Greek Law 2190/1920 as amended by Law 3604/2007.
[108] 'Directors, Officers and Managers Liability: The Legal Position in Greece' by T.G.Kommatas & Associates (available from www.aiu.com).
[109] Based on 'Directors, Officers and Managers Liability: The Legal Position in Greece' by T.G.Kommatas & Associates (available from www.aiu.com).
[110] Article 22a (4), Greek Law 2190/1920 as amended by Law 3604/2007.
[111] National Report: Greece, Dr. Aida Economou from Law Offices Panagopoulos, Vainanidis, Schina, Economou and Efthymios Bourtzalas from Ashurst Brussels, Study on the conditions of claims for damages in case of infringement of EC competition rules (2004) carried out by Ashurst for the European Commission.
[112] 'Directors, Officers and Managers Liability: The Legal Position in Greece' by T.G.Kommatas & Associates (available from www.aiu.com).
[113] 'Directors, Officers and Managers Liability: The Legal Position in Greece' by T.G.Kommatas & Associates (available from www.aiu.com).
[114] 'Directors, Officers and Managers Liability: The Legal Position in Greece' by T.G.Kommatas & Associates (available from www.aiu.com).
[115] Article 22a (5), Greek Law 2190/1920 as amended by Law 3604/2007.
[116] 'Directors, Officers and Managers Liability: The Legal Position in Greece' by T.G.Kommatas & Associates (available from www.aiu.com).
[117] Based on 'Company Directors & Luxembourg Law' by Herman Troskie (available from www.maitlandgroup.com/pdfs/publications/HT_article_0604.pdf).
[118] Article 59, Consolidated Version of the Law of 10th August, 1915 on commercial companies and of the amending laws in force as at 1st June, 2003 translated from the French with selected notes and references to EU directive sources by Philippe Hoss, Avocat, Elvinger, Hoss & Prussen.
[119] 'Directors', Officers' and Managers' Personal Liability: The Legal Position in Luxembourg' by Bonn & Schmitt & Steichen (available from www.aiu.com).
[120] Article 59, Consolidated Version of the Law of 10th August, 1915 on commercial companies and of the amending laws in force as at 1st June, 2003 translated from the French with selected notes and references to EU directive sources by Philippe Hoss, Avocat, Elvinger, Hoss & Prussen.
[121] 'Company Directors & Luxembourg Law' by Herman Troskie (available from www.maitlandgroup.com/pdfs/publications/HT_article_0604.pdf).
[122] 'Company Directors & Luxembourg Law' by Herman Troskie (available from www.maitlandgroup.com/pdfs/publications/HT_article_0604.pdf).
[123] 'Directors', Officers' and Managers' Personal Liability: The Legal Position in Luxembourg' by Bonn & Schmitt & Steichen (available from www.aiu.com).
[124] 'Directors', Officers' and Managers' Personal Liability: The Legal Position in Luxembourg' by Bonn & Schmitt & Steichen (available from www.aiu.com).

[125] 'Directors', Officers' and Managers' Personal Liability: The Legal Position in Luxembourg' by Bonn & Schmitt & Steichen (available from www.aiu.com).
[126] The bill named projet 5730 is available on www.chd.lu The relevant provision forms art. II, 41 (introduction of an article 63bis in L. 10 août 1915, namely la loi du 10 août 1915 concernant les sociétés commerciales that forms the relevant company law statute in Luxembourg).
[127] 'Directors', Officers' and Managers' Personal Liability: The Legal Position in Luxembourg' by Bonn & Schmitt & Steichen (available from www.aiu.com).
[128] 'Directors', Officers' and Managers' Personal Liability: The Legal Position in Luxembourg' by Bonn & Schmitt & Steichen (available from www.aiu.com).
[129] 'Company Directors & Luxembourg Law' by Herman Troskie (available from www.maitlandgroup.com/pdfs/publications/HT_article_0604.pdf).
[130] 'Directors', Officers' and Managers' Personal Liability: The Legal Position in Luxembourg' by Bonn & Schmitt & Steichen (available from www.aiu.com).
[131] Article 157, Consolidated Version of the Law of 10th August, 1915 on commercial companies and of the amending laws in force as at 1st June, 2003 translated from the French with selected notes and references to EU directive sources by Philippe Hoss, Avocat, Elvinger, Hoss & Prussen.
[132] 'Directors', Officers' and Managers' Personal Liability: The Legal Position in Luxembourg' by Bonn & Schmitt & Steichen (available from www.aiu.com).
[133] Based on 'Directors', Officers' and Managers' Personal Liability: The Legal Position in Luxembourg' by Bonn & Schmitt & Steichen (available from www.aiu.com).
[134] Based on 'Directors', Officers' and Managers' Personal Liability: The Legal Position in Luxembourg' by Bonn & Schmitt & Steichen (available from www.aiu.com).
[135] Chapter on the Netherlands, 'European Litigation Trends', Freshfields Bruckhaus Deringer, March 2007.
[136] Chapter on the Netherlands by Richard Montijn, 'Duties and Responsibilities of Directors in Europe', CMS, 2007.
[137] Chapter on the Netherlands by Richard Montijn, 'Duties and Responsibilities of Directors in Europe', CMS, 2007.
[138] Chapter on the Netherlands by Richard Montijn, 'Duties and Responsibilities of Directors in Europe', CMS, 2007.
[139] 'Directors and Officers Liability in the Netherlands' by NautaDutilh (available from www.aiu.com).
[140] Chapter on the Netherlands by Richard Montijn, 'Duties and Responsibilities of Directors in Europe', CMS, 2007.
[141] Chapter on the Netherlands by Richard Montijn, 'Duties and Responsibilities of Directors in Europe', CMS, 2007.
[142] Chapter on the Netherlands by Richard Montijn, 'Duties and Responsibilities of Directors in Europe', CMS, 2007.
[143] 'Directors and Officers Liability in the Netherlands' by NautaDutilh (available from www.aiu.com).
[144] Chapter on the Netherlands, Jurisdictional Ssurvey 1: Directors' Liabilities, Eurofenix, spring 2004 edition.
[145] Based on Chapter on the Netherlands, 'European Litigation Trends', Freshfields Bruckhaus Deringer, March 2007.
[146] 'Oiling the wheels' by Daan Lunsing Scheurleer and Ianika Tzankova, NautaDutilh, 15 October 2007 (available at www.thelawyer.com).
[147] Based on Chapter on the Netherlands, 'European Litigation Trends', Freshfields Bruckhaus Deringer, March 2007.
[148] 'Dealing with the Dutch' by Russell Advocaten, June 2007, available at www.legal500.com
[149] Based on 'Directors and Officers Liability in the Netherlands' by NautaDutilh (available from www.aiu.com).
[150] 'Directors and Officers Liability in the Netherlands' by NautaDutilh (available from www.aiu.com).
[151] National Report for Netherlands by Weyer VerLoren van Themaat and Johannes Hettema from Houthoff Buruma, Study on the conditions of claims for damages in case of infringement of EC competition rules (2004) carried out by Ashurst for the European Commission.
[152] Chapter on the Netherlands by Richard Montijn, 'Duties and Responsibilities of Directors in Europe', CMS, 2007.
[153] Based on 'Directors, Officers and Managers Personal Liability: The Legal Position in Portugal' by Maria Clara Lopes and Bruno Pina, Oliveira, Martins, Moura, Esteves E Associados (available from www.aiu.com).
[154] Article 64 (1), The Portuguese Commercial Company Act (Republished by Decree-Law no. 76-A/2006, of 29 March).
[155] Article 72 (1 and 2), The Portuguese Commercial Company Act (Republished by Decree-Law no. 76-A/2006, of 29 March).
[156] Article 72 (5), The Portuguese Commercial Company Act (Republished by Decree-Law no. 76-A/2006, of 29 March).
[157] Article 79 (1), The Portuguese Commercial Company Act (Republished by Decree-Law no. 76-A/2006, of 29 March).
[158] Article 73, The Portuguese Commercial Company Act (Republished by Decree-Law no. 76-A/2006, of 29 March).
[159] 'Directors, Officers and Managers Personal Liability: The Legal Position in Portugal' by Maria Clara Lopes and Bruno Pina, Oliveira, Martins, Moura, Esteves E Associados (available from www.aiu.com).
[160] Article 81, The Portuguese Commercial Company Act (Republished by Decree-Law no. 76-A/2006, of 29 March).
[161] Based on 'Directors, Officers and Managers Personal Liability: The Legal Position in Portugal' by Maria Clara Lopes and Bruno Pina, Oliveira, Martins, Moura, Esteves E Associados (available from www.aiu.com).
[162] Article 75 (1), The Portuguese Commercial Company Act (Republished by Decree-Law no. 76-A/2006, of 29 March).
[163] Article 76 (1), The Portuguese Commercial Company Act (Republished by Decree-Law no. 76-A/2006, of 29 March).
[164] Article 74 (2), The Portuguese Commercial Company Act (Republished by Decree-Law no. 76-A/2006, of 29 March).
[165] Based on 'Directors, Officers and Managers Personal Liability: The Legal Position in Portugal' by Maria Clara Lopes and Bruno Pina, Oliveira, Martins, Moura, Esteves E Associados (available from www.aiu.com).
[166] Article 77 (1), The Portuguese Commercial Company Act (Republished by Decree-Law no. 76-A/2006, of 29 March).
[167] Article 74 (3), The Portuguese Commercial Company Act (Republished by Decree-Law no. 76-A/2006, of 29 March).
[168] Article 174 (1b, 2), The Portuguese Commercial Company Act (Republished by Decree-Law no. 76-A/2006, of 29 March).
[169] Article 174 (5), The Portuguese Commercial Company Act (Republished by Decree-Law no. 76-A/2006, of 29 March).
[170] National Report for Portugal by José Luís da Cruz Vilaça, Pedro Metello de Nápoles and Dorothée Choussy from AM Pereira, Sáragga Leal, Oliveira Martins Júdice & Associados, Study on the conditions of claims for damages in case of infringement of EC competition rules (2004) carried out by Ashurst for the European Commission.
[171] Article 74 (1), The Portuguese Commercial Company Act (Republished by Decree-Law no. 76-A/2006, of 29 March).

[172] Article 396 (1, 3), The Portuguese Commercial Company Act (Republished by Decree-Law no. 76-A/2006, of 29 March).
[173] Article 396 (2), The Portuguese Commercial Company Act (Republished by Decree-Law no. 76-A/2006, of 29 March).
[174] Articles 127, 133, 134 and 135 of The Spanish Companies Act (Ley de Sociedades Anonimas available from http://noticias.juridicas.com/base_datos/Privado/rdleg1564-1989.html)
[175] Based on Appendix 1, Legal provisions relating to the Unified Code Recommendations, Report of the Special Working Group on the Good Governance of Listed Companies, May 2006.
[176] Article 133 (1), The Spanish Companies Act.
[177] Chapter on Spain by Carlos Peña, 'Duties and Responsibilities of Directors in Europe', CMS, 2007. Article 133 (3), The Spanish Companies Act.
[178] 'Directors' and Officers' Liability in Spain' by Davies Arnold Cooper Lawyers (available from www.aiu.com).
[179] Article 133 (5), The Spanish Companies Act.
[180] 'Directors' and Officers' Liability in Spain' by Davies Arnold Cooper Lawyers (available from www.aiu.com).
[181] Chapter on Spain by Carlos Peña, 'Duties and Responsibilities of Directors in Europe', CMS, 2007.
[182] Chapter on Spain by Carlos Peña, 'Duties and Responsibilities of Directors in Europe', CMS, 2007.
[183] Chapter on Spain by Carlos Peña, 'Duties and Responsibilities of Directors in Europe', CMS, 2007. Article 134 (4), The Spanish Companies Act.
[184] Article 134 (2), The Spanish Companies Act.
[185] Article 134 (3), The Spanish Companies Act.
[186] Based on Chapter on Spain, 'European Litigation Trends', Freshfields Bruckhaus Deringer, March 2007.
[187] Chapter on Spain by Carlos Peña, 'Duties and Responsibilities of Directors in Europe', CMS, 2007.
[188] 'Directors' and Officers' Liability in Spain' by Davies Arnold Cooper Lawyers (available from www.aiu.com).
[189] Based on 'Directors' and Officers' Liability in Spain' by Davies Arnold Cooper Lawyers (available from www.aiu.com).
[190] Chapter on Spain by Carlos Peña, 'Duties and Responsibilities of Directors in Europe', CMS, 2007.
[191] 'Directors' and Officers' Liability in Sweden' by Delphi & Co (available from www.aiu.com).
[192] 'Directors' and Officers' Liability in Sweden' by Delphi & Co (available from www.aiu.com).
[193] Section 1, Chapter 29, The Swedish Companies Act 2005 in translation, © 2006 Norstedts Juridik AB.
[194] 'Directors' duties in Sweden' by Sara Ulfsdotter, Bird & Bird, September 2007
[195] Supreme Court case NJA 1948 s. 651 and NJA 1997 s. 418.
[196] Section 1, Chapter 29, The Swedish Companies Act 2005 in translation, © 2006 Norstedts Juridik AB.
[197] Section 1, Chapter 29, The Swedish Companies Act 2005 in translation, © 2006 Norstedts Juridik AB.
[198] Based on 'Directors' and Officers' Liability in Sweden' by Delphi & Co (available from www.aiu.com).
[199] Based on 'Directors' and Officers' Liability in Sweden' by Delphi & Co (available from www.aiu.com).
[200] 'Directors' and Officers' Liability in Sweden' by Delphi & Co (available from www.aiu.com).
[201] Section 6, Chapter 29, The Swedish Companies Act 2005 in translation, © 2006 Norstedts Juridik AB.
[202] Section 5, Chapter 29, The Swedish Companies Act 2005 in translation, © 2006 Norstedts Juridik AB.
[203] 'Discharge from Liability in the Swedish listed company' by Carl Svernlöv, 2007 (available from http://www.bolagsstyrning.se/en/).
[204] Section 7, Chapter 29, The Swedish Companies Act 2005 in translation, © 2006 Norstedts Juridik AB.
[205] Section 9, Chapter 29, The Swedish Companies Act 2005 in translation, © 2006 Norstedts Juridik AB.
[206] Section 8, Chapter 29, The Swedish Companies Act 2005 in translation, © 2006 Norstedts Juridik AB.
[207] Section 11, Chapter 7, The Swedish Companies Act 2005 in translation, © 2006 Norstedts Juridik AB.
[208] Section 33, Chapter 9, The Swedish Companies Act 2005 in translation, © 2006 Norstedts Juridik AB.
[209] Section 33, Chapter 9, The Swedish Companies Act 2005 in translation, © 2006 Norstedts Juridik AB.
[210] Abstract from 'Ansvarsfrihet: Dechargeinstitutet i svensk aktiebolagsrätt' by Carl Svernlöv, Theses from Stockholm University, Norstedts Juridik/Institutet för Rättsvetenskaplig Forskning, 2007.
[211] Abstract from 'Ansvarsfrihet: Dechargeinstitutet i svensk aktiebolagsrätt' by Carl Svernlöv, Theses from Stockholm University, Norstedts Juridik/Institutet för Rättsvetenskaplig Forskning, 2007.
[212] 'Special Features of Swedish Corporate Governance' by Sven Unger, advokat; The Swedish Corporate Governance Board, December 2006.
[213] Section 11, Chapter 29, The Swedish Companies Act 2005 in translation, © 2006 Norstedts Juridik AB.
[214] Section 12, Chapter 29, The Swedish Companies Act 2005 in translation, © 2006 Norstedts Juridik AB.
[215] Section 10, Chapter 29, The Swedish Companies Act 2005 in translation, © 2006 Norstedts Juridik AB.
[216] Section 13(2), Chapter 29, The Swedish Companies Act 2005 in translation, © 2006 Norstedts Juridik AB.
[217] Article 717, Volume II – Company Law, Swiss Code of Obligations (English Translation of Official Text, as of January 2005), Swiss-American Chamber of Commerce.
[218] Article 754, Volume II – Company Law, Swiss Code of Obligations (English Translation of Official Text, as of January 2005), Swiss-American Chamber of Commerce.
[219] Article 752, Volume II – Company Law, Swiss Code of Obligations (English Translation of Official Text, as of January 2005), Swiss-American Chamber of Commerce.
[220] 'Directors, Officers and Managers Liability: The Legal Position in Switzerland' by Sedgwick Detert Moran & Arnold (available from www.aiu.com).
[221] Article 759, Volume II – Company Law, Swiss Code of Obligations (English Translation of Official Text, as of January 2005), Swiss-American Chamber of Commerce.
[222] 'Directors, Officers and Managers Liability: The Legal Position in Switzerland' by Sedgwick Detert Moran & Arnold (available from www.aiu.com).
[223] Article 756, Volume II – Company Law, Swiss Code of Obligations (English Translation of Official Text, as of January 2005), Swiss-American Chamber of Commerce.

[224] Based on ‘Directors, Officers and Managers Liability: The Legal Position in Switzerland’ by Sedgwick Detert Moran & Arnold (available from www.aiu.com).
[225] Based on ‘Directors, Officers and Managers Liability: The Legal Position in Switzerland’ by Sedgwick Detert Moran & Arnold (available from www.aiu.com).
[226] ‘Scope of Release of the Board of Directors Clarified’ by Badertscher Dörig Poledna, July 2007.
[227] Article 698(5), Volume II – Company Law, Swiss Code of Obligations (English Translation of Official Text, as of January 2005), Swiss-American Chamber of Commerce.
[228] ‘Scope of Release of the Board of Directors Clarified’ by Badertscher Dörig Poledna, July 2007.
[229] Article 758, Volume II – Company Law, Swiss Code of Obligations (English Translation of Official Text, as of January 2005), Swiss-American Chamber of Commerce.
[230] Article 758, Volume II – Company Law, Swiss Code of Obligations (English Translation of Official Text, as of January 2005), Swiss-American Chamber of Commerce.
[231] Article 695, Volume II – Company Law, Swiss Code of Obligations (English Translation of Official Text, as of January 2005), Swiss-American Chamber of Commerce.
[232] Article 760, Volume II – Company Law, Swiss Code of Obligations (English Translation of Official Text, as of January 2005), Swiss-American Chamber of Commerce.
[233] Article 760, Volume II – Company Law, Swiss Code of Obligations (English Translation of Official Text, as of January 2005), Swiss-American Chamber of Commerce.
[234] Based on Chapter on Switzerland by Max Albers and Hans Wille, ‘Duties and Responsibilities of Directors in Europe’, CMS, 2007.
[235] Chapter on Switzerland by Max Albers and Hans Wille, ‘Duties and Responsibilities of Directors in Europe’, CMS, 2007.

About Manifest

Manifest is a European-based provider of global corporate governance research and proxy voting services for the institutional investor, academic and advisory market.

Our mission is in our name – Manifest - which Wiktionary (www.wiktionary.org) defines as follows:

Adjective

Evident to the senses, esp. to the sight; apparent; distinctly perceived; hence,

obvious to the understanding; apparent to the mind; easily apprehensible; plain;

not obscure or hidden.

Verb

To show plainly; to make to appear distinctly, — usually to the mind; to put

beyond question or doubt; to display; to exhibit.

For over a decade we have pursued a commitment to excellence in governance support services. Since our formation we have grown from covering the UK's top 350 companies to our global coverage which today encompasses over 60 countries.

At the end of 2007 Manifest was recognized by Real Business magazine and Microsoft as one of the nation's most intelligent users of software. The firms under scrutiny were deemed to be harnessing software to radically improve performance, transforming their sector in the process. The winners were decided by a panel of four judges including two entrepreneurs, Charles Orton-Jones from Real Business and Simon Hughes of Microsoft.

Entrants were judged on three criteria:

- Excellence in execution of IT project
- Support from the board of IT projects that drive growth and place technology at the heart of the business
- Recognition of that IT as a driver for growth – and success in driving this growth

Here's what the Judges said about Manifest:

" This firm is changing the face of electronic proxy voting at general meetings of listed companies worldwide. Currently, getting approval for a resolution at an AGM can be time consuming and with a very low voter turnout. Manifest's voting system puts the voter in direct contact with the issuer, making the chain of intermediaries system redundant. Manifest's system is particularly relevant at EGMs, where takeovers need to be rapidly authorised.

"It's easy to get carried away by flash ideas and blue sky thinking but where these businesses really excel is through execution. These businesses have demonstrated excellence in not only what they provide, but innovation in the way they provide it." Simon Hughes, Director for Small and Medium-Sized Business at Microsoft UK

"Manifest's voting systems puts the voter in direct contact with the issuer, making the chain of intermediaries system redundant." Chareles Orton -Jones, Editor, Real Business.

"Manifest's system looks terrific," says Digital Elite awards judge Jay Bregman."

For more information on Britain's Digital Elite please go to www.realbusiness.co.uk/elite

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Title:	Directors Liability Discharge Proposals: The Implications for Shareholders
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Please note that this report is not intended as a substitute for legal advice.

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