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Les éléments à prendre en compte pour la traditionnelle décharge accordée par l'assemblée générale au conseil d'administration



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Factors to be taken into account in the traditional discharge granted by the annual shareholders' meeting to the Board of Directors

With the vast majority of Annual shareholders' meetings being held in June in accordance with the requirements of art. 699 para. 2 of the Swiss Code of Obligations (CO), the question arises whether the traditional discharge should be granted to the members of the Board of Directors.

In fact, according to [art. 698 para. 2 no. 7 CO](#), the shareholders' meeting has the non-transferable right to grant discharge to members of the Board of Directors.

But (1) what exactly is meant by discharge, (2) what are the concrete effects of a discharge, and (3) can a discharge also be granted in part? In this article, I will attempt to answer these three questions in a concise manner, focusing on the example of [the public limited company](#), however without claiming to be exhaustive.

■ (1) Definition of discharge

Discharge is a decision by the shareholders' meeting whereby the shareholders waive their right to take legal action against the company's governing bodies. It therefore has the effect of extinguishing any claims for damages the company might have against the persons or bodies to whom the discharge has been granted.

Contrary to the wording of [Art. 698 para. 2 no. 7 CO](#), a discharge may be granted not only to members of the Board of Directors, but also to the company's directors and other corporate bodies.

It should be pointed out that the discharge only concerns damage caused to the company, and not damage caused directly to shareholders. Pursuant to [Art. 758 para. 1 CO](#), shareholders who have accepted a discharge lose their right to take legal action against the company as soon as the decision has been taken. The discharge is therefore often described as a negative acknowledgement of debt ("*negative Schuldanerkennung*").

Discharge is normally granted at the ordinary shareholders' meeting, but it may also be granted at an extraordinary or universal shareholders' meeting. In practice, discharge is generally granted by shareholders to the Board of Directors as a whole. However, it is preferable to name the directors to whom discharge is granted individually in the minutes of the shareholders' meeting.

It should also be noted that the persons who have been involved in the management of the affairs to which the decision to grant discharge relates to must refrain from taking part in the deliberations and voting procedure. Failure to do so will not automatically render the decision null and void, but will render it voidable, particularly insofar as the participation of such persons in the vote would have influenced the outcome of the vote. Lastly, all the formal rules concerning the convening and holding of the shareholders' meeting must be complied with.

■ (2) The legal scope of the discharge

In practice, the discharge has only a limited scope, as it only impacts the rights of the company and shareholders who have suffered indirect damage. However, the company's external creditors and shareholders who have suffered direct damage retain their rights to take action against the company. In short, the discharge has no external effect.

Finally, it is important to specify that the discharge only concerns "disclosed facts" under [art. 758 para. 1 CO](#). In other words, the discharge applies only to facts that have been brought to the attention of the shareholders' meeting in a clear and complete manner, or to facts that are notorious.

It should therefore be noted that a discharge in no way releases the Board of Directors from all liability. In the case of a general discharge, it is often difficult to know what is actually covered by the discharge.

■ (3) The possibility of granting a partial discharge

The shareholders' meeting may limit the scope of the discharge to a specific period. It can also grant a partial discharge, by explicitly excluding the occurrence of certain events or business transactions. The discharge may vice versa also be granted for specific events or incidents.

For example, at the 2019 annual shareholders' meeting of [Swiss Post Ltd](#) – of which the Swiss Confederation is a shareholder – a partial discharge was granted to the Board of Directors of the company for the 2018 financial year on the basis of Art. 698 para. 2 no. 7 CO, excluding facts relating to possible irregularities in the context of the *PostAuto* affair. Indeed, the Federal Council, as spokesman for the Confederation as a shareholder, had explicitly reserved the right to take legal action depending on the outcome of the criminal

investigation into this affair.

Source :

<https://www.wg-avocats.ch/en/news/company-law/factors-to-be-taken-into-account-in-the-traditional-discharge-granted-by-the-annual-shareholders-meeting-to-the-board-of-directors/>