

Registration and Execution of Amendments of Articles of Association

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1 Introduction

The constitutional document of a Swedish limited liability company is the articles of association. The Swedish Companies Act (1975:1385) (the “Companies Act”) requires certain provisions to be included in the articles (mandatory provisions), such as the name of the company and the share capital (or, normally, the minimum and maximum levels of the share capital). Furthermore, the Companies Act contains several rules that are applicable unless the articles of association provide for other rules. One such rule, that can be deviated from in the articles, is that the purpose of the company is to earn a profit to the shareholders, Chapter 12 section 1 paragraph 3 of the Companies Act.² There are also limits in the Companies Act relating to the contents of certain provisions in the articles of association. For example, a Swedish public limited liability company may not have a share capital below SEK 500,000, Chapter 1 section 3 paragraph 2 of the Companies Act.³

The articles of association are binding for the company’s bodies as well as the shareholders (who – on the other hand – are able to amend the articles of association at a general meeting, by a resolution passed with qualified majority).⁴

¹ This article has been written with help from Björn Winström, LL.M., Linklaters.

² The minority protection rules in the Companies Act may, by provisions in the articles of association, be made more favourable for the minority, but not reduce the minority shareholders’ rights.

³ The share capital may also be set to an equivalent amount in euro.

⁴ The majority requirements are found in Chapter 9 sections 30-34 of the Companies Act. It has been discussed whether the shareholders may set aside a non-mandatory provision in the articles of association, if the resolution to set aside the provision is supported by a majority that would have been sufficient for an amendment of the provision. However, the opinion in Sweden is that this is not the case. *See* the Supreme Court case NJA 1967 p. 313, and *e.g.* Johansson, S. *Nials Svensk Associationsrätt*, 8 ed., Stockholm 2001, at 63 with further

The effects of the articles of association not being adhered to vary depending on the situation. For example, if the board of directors decides to enter into an agreement to purchase a business that is outside the scope of the objects of the company, the agreement is binding for the company regardless of whether the third party was in good faith or not, Chapter 8 section 25 paragraph 2 of the Companies Act.⁵ If the company resolves on a new issue of shares without amending the share capital in the articles of association (or the minimum or maximum share capital, if needed), the resolution is null and void.⁶

This article discusses when an amendment of the articles of association of a Swedish limited liability company becomes effective.

2 The Companies Act

The general rule under the Companies Act is that an amendment of the articles of association may not be executed prior to the registration of the amended articles of association with the Swedish Patent and Registration Office. The rule is expressed in Chapter 9 section 35 paragraph 1 of the Companies Act, which states: “Resolutions regarding amendments of the articles of association shall immediately be submitted for registration and may not be executed prior to the registration, except under circumstances as set out in Chapter 18 section 6.”

The rule, that is now found in Chapter 9 section 35 paragraph 1, was first adopted in the Swedish Companies Act of 1910. The reason for adopting the rule was that, when a company is incorporated, registration of articles of association was (and is) a precondition to the creation of the company. As part of the registration process, it was verified that the proposed articles of association were in compliance with Swedish law. It was argued that if this was the case in relation to the creation of a company, the same rule should apply also if the articles are amended.⁷ Therefore, it was held that the amended articles could not be valid before the registration (which procedure includes the establishment that the articles of association was in compliance with Swedish law), since it would otherwise be possible for a company to apply a provision in a set of articles of association that was not in accordance with Swedish law. To elaborate further, it was held that during these circumstances, the old articles of association must be valid until the registration of the new articles. If the point in time when the resolution to amend the articles was passed, would be the relevant time for the amendment of the articles, the situation could arise where the company had no articles, namely if an amendment of the articles was resolved and later the new articles was not registered due to non compliance with Swedish law.

references. However, if all shareholders that are affected by the decisions to set aside the non-mandatory provision in the articles give their consent, it is the opinion in Sweden that the resolution is valid.

⁵ The board may be held liable, if the company, a shareholder or someone else, is damaged due to the board’s negligence, Chapter 15 section 1 of the Companies Act.

⁶ See, e.g., prop. 1975:103 at 329.

⁷ See prop. 1910 N:o 54 at 114.

Since the adoption of the rule in the Companies Act of 1910, it has only been amended due to editorial changes and has, to this date, been left materially unchanged. Furthermore, up until 1997, the rule has not been further commented in the preparatory works of the Companies Act.⁸ In the preparatory works to one of the most recent editorial changes of the rule, the reasoning behind the rule is to some extent different from the reasoning that led to the adoption of the rule in 1910. It is now held that the fact that the new articles of association may not be executed prior to the registration, shall not be interpreted to mean that all measures that are based on the resolved, but not registered, articles of association are prohibited. Furthermore, it is said that the prohibition covers measures that in principle are final, such as finalising – or omit to finalise – annual accounts with respect to the financial year as it is stated in the articles of association before the amendment.⁹

The difference in the two approaches mentioned above, is that the older approach seems to support the view that the older version of the articles of association is valid until the registration of the new version of the articles of association, while the more recent approach can be interpreted to accept the new articles of association as valid from the decision to amend them, but with certain restrictions regarding certain measures that are characterised as execution of the articles of association. Section 3 and 4 below discusses the arguments for that the articles of association are not amended prior to the registration, and the arguments for that the articles of association are amended by the decision but that certain measures (execution measures) may not be taken prior to the registration.

3 Registration – a Requirement for Execution

Prior to the statement in the preparatory works from 1997, the better view among legal scholars in Sweden was that it was not allowed (with the minor exception mentioned above) to apply any part of the new articles of association prior to registration.¹⁰

Indeed, the view of the registration as constituent for the amendment of the articles of association, gains support also from the case law on the subject.

In the Supreme Court case NJA 1931 p. 667, W had transferred real estate to a Swedish limited liability company. Back in 1931, a Swedish limited liability company was not allowed to acquire real estate, unless the articles of association of the company contained a provision to the effect that companies, other legal persons or non-Swedish residents was not allowed to acquire shares in the company (a so called foreigner restriction clause) without the consent of the King. At the time of W's transfer, the articles of association of the purchasing

⁸ *SOU* 1941:9 at 546, *SOU* 1942:47 at 53, *SOU* 1971:15 at 239 ff., prop. 1944 nr 5 at 366 and prop. 1975:103 at 408.

⁹ See prop. 1997/98:99 at 259 and *SOU* 2001:1 at 322. Compare RÅ 1993 ref. 17.

¹⁰ See Nial, H. *Om handelsbolag och enkla bolag*, 3 ed., Stockholm 1992, at 117 ff., Johansson, S. *Bolagsstämma*, Stockholm 1990, at 475 and Åhman, O. *Behörighet och befogenhet i aktiebolagsrätten*, Uppsala 1997, at 661.

company did not include a foreigner restriction clause. After the transfer of the real estate, the company's articles of association was amended to the effect that a foreigner restriction clause was included. Later, W was declared bankrupt and W's bankruptcy estate claimed that the transfer of the real estate was invalid. One of the arguments for invalidity was that the company was not able to purchase real estate since the articles of association did not include a foreigner restriction clause at the time of the transfer. The Supreme Court held that the registration of the amended articles of association was the relevant point in time when the articles was amended, but accepted W's transfer as valid, since it had been confirmed by the parties after the registration of the articles of association containing the foreigner restriction clause.

In NJA 1983 p. 229, a shareholders' meeting had resolved to amend the name of the company (in a Swedish limited liability company, a change of the company's name requires an amendment of the articles of association) and to appoint B as the sole director of the board. At the constituent board meeting, B was appointed sole signatory of the company. After the shareholders' meeting and the board meeting, but prior to the registration of the resolutions and the amended articles of association, B entered into an agreement on behalf of the company under its new name. The Svea Court of Appeal stated that, since registration of the amended articles of association had not taken place, the old articles of association was applicable. The court held that, regardless of the fact that registration of the amended articles of association had not taken place, B was the sole signatory of the company. He had, however, signed the agreement using the wrong company name. He should rightfully have signed it on behalf of the company under its old name, since registration of the amended articles of association had not taken place prior to B entering into the agreement on behalf of the company. However, since it was evident that the old and the new name referred to the same company, given the fact that B had used the corporate identity number when signing the agreement, the agreement's validity was upheld. The Supreme Court confirmed the judgement by the Svea Court of Appeal.

In NJA 1999 p. 171 the Supreme Court held that the registration of a tenant-owners' association's amended statutes was a requirement for the effectuation of the new statutes.¹¹

In the case RH 1991:49, the Skåne and Blekinge Court of Appeal held that the current financial year of a company should be deemed to be the financial year that is registered with the Patent and Registration Office. Under Swedish law a limited liability company may be compulsory wound up by the Patent and Registration Office (at the time of the case, that power was vested in the District Court, which was to act on application by the Patent and Registration Office) if it fails to file its annual accounts within certain stipulated timeframes after the end of the fiscal year. In this case, a company had resolved to extend its financial year (which must be made by way of an amendment of the articles of association) in order to get more time to file the annual accounts. When the Patent and Registration Office applied to the District Court for compulsory

¹¹ There is a rule corresponding to Chapter 9 section 35 paragraph 1 of the Companies Act, in Chapter 9 section 25 of the Act (1991:614) on Tenant-owners' Rights.

liquidation of the company, the amendment had not yet been registered.¹² Given that the registration had not been made when the Patent and Registration Office decided to apply to the District Court for the compulsory liquidation of the company, the court held that it was correct to initiate compulsory winding up proceedings regarding the company.

4 A non-execution Requirement

In the early 1990's, the National Tax Board circulated a pamphlet with guidelines stating, among other things¹³, that a change of a company's financial year¹⁴ had to be registered before the end of the current financial year in order to be applicable for that financial year. If the registration had not taken place prior to the end of the financial year, the National Tax Board was of the opinion that the application of the new financial year had to be postponed to the next financial year. This statement was heavily criticised by Stefan Lindskog.¹⁵

Lindskog's criticism of the Tax Board's statement was based on the opinion that the registration of the amended articles of association does not have a constituent effect, but that the new articles may be executed prior to the registration provided that they are lawful. In the case of a change of the financial year, he argued that, with respect to the adoption of the annual accounts of a company, the adoption would always be valid eventually, provided that the amendment of the financial year as such may lawfully be made. The reasons for this line of arguing being that the rule in chapter 9 section 35 paragraph 1 of the Companies Act should be regarded as a rule of conduct in this respect and, as such, it may be set aside. If the decision to adopt the annual accounts is challenged by a shareholder, the court shall investigate whether the amendment of the articles of association is lawful and, if so, the court shall dismiss the challenge. However, if the amendment is deemed by the court to be unlawful, the decision to set aside chapter 9 section 35 paragraph 1 is invalid. A third party, Lindskog continues, that challenges a dividend distribution that is based on a set of annual accounts that has been prepared in accordance with an amended, but not yet registered, financial year, will only succeed if the amendment of the

¹² It is not evident from the judgement that the amendment of the articles of association was not registered at the time of the Patent and Registration Office's application to the District Court, but this must surely have been the case since the judgement includes the following sentence: "According to the registration certificate that is attached to the application from the Patent and Registration Office, the company's financial year is the calendar year", i.e. the provision regarding the financial year in the articles of association was not amended. The Patent and registration Office would surely not have used an old registration certificate.

¹³ The other subjects addressed by the Tax Board are of less interest in this context.

¹⁴ A limited liability company may chose between four different financial years: Calendar year, 1 May to 30 April, 1 July to 30 June and 1 September to 31 August, Chapter 3 section 1 paragraph 3 of the (1999:1078) Act on Accounting. An amendment of the financial year may, in principle, be made in two different ways. The company can either prolong the current financial year, but to a maximum of 18 months, or shorten the current financial year.

¹⁵ Lindskog, S. *En rättskandal, RSV?*, in *Advokaten* 1991 at 390 f. and *Rättskandalen fullföljs*, in *Advokaten* 1992 at 152 ff.

articles of association is found unlawful by the court, or if the adoption of the annual accounts is successfully challenged by a shareholder.

The main reason for Lindskog's second article was that a case regarding amendment of the financial year was to be tried by the Swedish Supreme Administrative Court and that, in that case, the National Tax Board maintained its position, as it was described in the pamphlet, in the appeal against the judgement of the Gothenburg Administrative Court of Appeals.

In the case, RÅ 1993 ref. 17, the Supreme Administrative Court held that neither the law nor the preparatory works stated anything about the interpretation of the word "execute" and that it would not be possible to interpret it in the same way with respect to all matters that are dealt with in the articles of association. Where the company law does not give sufficient clarity, the court continues, the effects of registration must be interpreted in view of the purpose of the rules, namely, in addition to establishing whether the new articles of association are lawful, enabling the general public to have insight and the ability to examine the articles of association.

The court held that it is not necessary to uphold a strict interpretation to the effect that all measures based on an amended, but not yet registered, set of articles of association are prohibited. With respect to the amendment of a company's financial year, the court continues, the prohibition to execute the articles of association prior to the registration shall be construed to the effect that it only prohibits measures that have a definitive effect, such as omitting to complete the annual accounts or to complete a set of annual accounts.

In the appealed judgement of the Administrative Court of Appeal, it is referred to an article by Professor Peter Melz in which it is stated that, if the new financial year (in this example the amendment of the financial year is made by prolonging the current financial year) has been registered prior to the date where the annual accounts (for the current financial year) should have been finalised, it is not prohibited to prepare the annual accounts in accordance with the new financial year, meaning that the company may omit to prepare the annual accounts based on the current (shorter) financial year and instead prepare them for the prolonged financial year.¹⁶

According to Chapter 9 section 7 of the Companies Act, the annual accounts should be adopted at an annual general meeting of shareholders that is to be held no later than six months after the end of the company's financial year. In Chapter 8 section 2 of the Annual Accounts Act (1995:1554) it is stated that the annual accounts must be submitted to the auditors at least six weeks before the annual general meeting.

The wording of the judgement from the Administrative Court of Appeal could be interpreted, to the effect that omitting to prepare the annual accounts based on the current (shorter) financial year is not prohibited (and, consequently, not an execution in the meaning of the Companies Act) if the amendment of the financial year is registered prior to the neglecting being definitive.¹⁷ It is, therefore, likely that the Supreme Administrative Court has made the same

¹⁶ Melz, P. *Omläggning av räkenskapsår i aktieföretag – ett aktuellt problem*, in *Skattenytt* 1989 at 214.

¹⁷ Cf. the Supreme Administrative Court in RÅ 1993 ref. 17.

analysis as the Administrative Court of Appeals, but this is not evident from the wording of the judgement.

Today, the National Tax Board's guidelines state that if a company wants to amend the financial year (here, the example of a prolongation of the current financial year is used), the general meeting must resolve to amend the financial year prior to the end of the current financial year and registration of the amended articles of association shall take place within 4,5 months from the end of the current financial year. The National Tax Board has, therefore, adhered to the Administrative Court of Appeal's and the Supreme Administrative Court's judgements in RÅ 1993 ref. 17. The 4,5 months corresponds to the fact that the auditors shall receive the annual accounts at the latest 4,5 months from the end of the relevant financial year, corresponding to six weeks before the latest day to hold the annual general meeting.¹⁸

5 Common Ground?

Above, different views have been presented. The question in this section is whether the differences really are that big.

According to Åhman, the execution prohibition serves to prevent the shareholders (who, as mentioned above, normally may momentarily divert from the articles of association with the consent of all shareholders) from executing the new articles of association even with the consent of all the shareholders in the company.¹⁹ Lindskog on the other hand considers it to be a rule of conduct.²⁰

Except for Lindskog and Åhman, it appears possible to reconcile the different views into the following view: The registration is a constituent requirement for the *execution* of the amended articles of association. However, execution shall not be interpreted to the effect that all measures based on the amended articles of association are prohibited.²¹ Instead, the rule should be interpreted to the effect

¹⁸ Cf. above.

¹⁹ See, Åhman, O. *Behörighet och befogenhet i aktiebolagsrätten*, Uppsala 1997, at 261. It is, however, difficult to see the rationale for a rule with the effect that adherence to the articles of association are more important when the articles are changing than otherwise, Cf. footnote 3 above concerning the shareholders right to divert from non-mandatory provisions of the articles of association if all shareholders consent. Reasonably, the shareholders should (provided that Åhman is right about the constituent effect of the registration), between the resolution to amend the articles of association and the registration of new the articles of association, have the same right to deviate from the articles of association as they have when there is no ongoing process of changing the articles of association.

²⁰ It should, however, be noted that Lindskog opinion was presented prior to RÅ 1993 ref. 17, in which case the Supreme Administrative Court held that the provision was adopted to enable the Patent and Registration Office to establish whether the new articles of association are lawful and further to enable the general public to have insight and the ability to examine the articles of association.

²¹ See, prop. 1997/98:99 at 253, RÅ 1993 ref. 17, S. Lindskog, *Rättsskandalen fullföljs*, in *Advokaten* 1992 at 152 ff., Melz, P. *Omläggning av räkenskapsår i aktiebolag – ett aktuellt problem*, in *Skattenytt* 1989 at 214, Andersson, S., Johansson S. & R. Skog, *Aktiebolagslagen - En kommentar del 1*, Stockholm 2002, 9:35:1 and Nilsson, U. & Malmström, A. *Verkställighet av ändring i bolagsordning*, in *Svensk Juristtidning* 2000, at

that measures that create rights and obligations or that are final or irreversible (or that would incur liabilities for the company if reversed) may not be taken prior to registration. A few examples may make things clearer.

A resolution to pay dividends, that is based on a set of annual accounts prepared in accordance with an amended, but not yet registered, financial year, must surely be an execution of the unregistered articles of association unless, of course, the resolution is or can be interpreted to be conditioned upon registration of the amended articles of association. Indeed, even the finalisation by the board of the annual accounts must be deemed to be an execution.

Negotiations between the board and a potential share subscriber may be initiated regardless of the fact that the new share issue would require an amendment of the articles of association. The board can also enter into a subscription agreement²² with the potential share subscriber.

A resolution to purchase a business that is within the scope of the objects of the company according to the amended - but not yet registered - articles of association would probably be deemed to be an execution of the new articles of association. However, if the resolution is or can be interpreted to be conditional upon the registration of the amendment of the articles of association, the resolution will probably not be regarded as an execution.²³

The introduction of a pre-emption right over the shares in a company requires an amendment of the articles of association. The resolution whereby the articles are amended requires, under certain circumstances, a majority of 90 per cent. of all shareholders, and the consent of all the shareholders that are represented at the general meeting.²⁴ A pre-emption right means a requirement for a purchaser of a share to offer it to the persons named by the articles of association (usually the other shareholders). Removing pre-emption rights over the shares requires a lower qualified majority.

What happens if a shareholder disposes of his shares after a resolution to remove a pre-emption right over the company's shares, but before the registration of the amended articles? If a purchaser of shares does not offer the shares to the other shareholders (or the other persons appointed by the pre-emption clause), that omission would probably not be regarded as an execution of the new articles, because, if the articles of association are not registered, the shareholder could always offer the shares at a later stage. It shall also be observed that the purchaser of the shares may not vote for the shares until he has offered the shares to the other shareholders (or the other persons appointed by the pre-emption clause) or as the case may be, the amended articles of association has been registered, Chapter 3 section 3 paragraph 4 of the Companies Act. The fact that the purchaser of the shares abstains from offering

695 ff. In this respect Åhman seems to have a different view. *See, Åhman, O. Behörighet och befogenhet i aktiebolagsrätten*, Uppsala 1997, at 262.

²² The validity or invalidity of such an agreement is not discussed in this context.

²³ *See* Andersson, S., Johansson S. & Skog, R. *Aktiebolagslagen - En kommentar del 1*, Stockholm 2002, 9:35:1, where it is said that when a decision by the general meeting to amend the articles of association with respect to the objects of the company is followed by a decision to purchase a business that is within the new objects of the company (but not in the old) the purchase might be deemed to be conditional.

²⁴ *See* Chapter 9 section 31 of the Companies Act. *Cf.* also Chapter 9 section 33.

it to the other shareholder's does not give rise to any irreversible rights or obligations.

If a shareholder disposes of his shares after a resolution to include a pre-emption right over the company's shares, but before the registration of the amended articles takes place, it seems likely that a purchaser would not be obliged to offer the shares to the other shareholders (or the other persons appointed by the pre-emption clause). The reason for this conclusion is that the purchaser should be able to rely on the registered articles of association, without having to investigate whether the company's general meeting has resolved to include a pre-emption right over the companies' shares or not.

The amendment of the number of directors on the board is, perhaps, a more complicated situation since, as discussed below, the application of the suggested interpretation of chapter 9 section 35 paragraph 1 leads to very impractical effects. Lindskog²⁵ has elaborated on this situation and argues that in most circumstances when the general meeting decides to amend the number of directors in the articles of association from, lets say, 5 to 7, the general meeting resolves to appoint 7 directors and not 5, regardless of the fact that the amended articles of association have not been registered. Furthermore, the board usually holds the constituent board meeting in connection with the general meeting, and at the constituent board meeting, the chairman of the board and the managing director of the company are appointed.

The model under the Companies Act would be that the general meeting of shareholders resolves to amend the articles. When the amended articles have been registered, the general meeting resolves to appoint the directors, the constituent board meeting may be held and the chairman and the managing director may be appointed. This model, therefore, requires two general meetings to be held, which in companies with many shareholders can be very impractical. Furthermore, the first general meeting might, in some situations, have to deal with the composition of the board during the transition period, which period can be as short as a few days.

Another way to solve the problem would be that the decision to appoint the directors is conditional upon the registration of the amended articles of association.²⁶ However, this alternative can create other problems. The conditional appointment becomes effective when the amended articles of association are registered, which means, given that the most common directors' mandate is to the end of the next annual general meeting, that there will be no board of directors until the new articles of association are registered, unless the general meeting explicitly has made the election or, as the case might be, removal of certain directors conditional upon registration of the amended articles of association. Neither this alternative, nor the alternative discussed in the immediately preceding section, are satisfactory from a practical perspective.

Another alternative would be to stipulate that the board of directors' mandates does not expire until the registration of the new board of directors after the next annual general meeting. In this situation, the appointment of the new directors

²⁵ Lindskog, S. *Rättsskandalen fullföljs*, in *Advokaten* 1992 at 152-157.

²⁶ Andersson, S., Johansson S. & R. Skog, *Aktiebolagslagen - En kommentar del 1*, Stockholm 2002, 9:35:1.

can be made conditional upon the registration of the amended articles of association or, if no such amendment is made, the registration of the new board of directors.²⁷ However, also this solution will be somewhat impractical, for instance, when a company acquires another company. A change of the board of directors in the acquired company may in this situation take several weeks, since it will not become effective until the registration.

It is obvious that Lindskog is right in stating that a practical way to solve the above-mentioned problem is to accept that the new board of directors are appointed and that they may appoint the chairman and the managing director. If the articles of association are not registered (which can only occur if the articles are unlawful), Lindskog's view is that one should "look away" from the decisions taken by the new board of directors. However, there is hardly any support for this procedure in the Companies Act, the preparatory works or the case law. Furthermore, this practical approach does not answer the question what happens if the board enters into an agreement that cannot be reversed. The purchaser of some goods can, for example, have consumed it or used it for his or hers own production purposes. What will happen if the third party has sold acquired goods at a profit? Will the board of directors be liable towards the third party since they have entered into agreements with a third party on behalf of the company without the right to represent the company? A lot of questions remain unanswered. Provided that Lindskog is right regarding the appointment of the directors, it will be the directors who, at their own risk, must take the decision whether the amendment of the articles of association are lawful or not. If the articles are lawful, the board shall be deemed to have done the right thing to execute them and if they are unlawful, the board of directors potentially becomes liable for damages in accordance with Chapter 15 section 1 of the Companies Act. However, as mentioned above, although practical, the solution discussed here does not appear as a correct description of Swedish law *de lege lata*.

6 Effects of non-adherence

Non-adherence to Chapter 9 section 35 paragraph 1 of the Companies Act is to be regarded as if the board of directors or the general meeting of shareholders, if that is the case, had resolved or acted in conflict with the registered articles of association.²⁸ The effects of non-adherence would, therefore, be different depending on what provision the board or the general meeting disregarded. Some examples are given below.

²⁷ This alternative is in line with the proposal Ds 2003:24, *Åtgärder mot missbruk inom associationsrätten*, where appointment of new (and retirement of old) directors, alternates and signatories is proposed to become effective as of registration. This proposal is quite remarkable. In the context of someone acquiring the majority of the votes in a company, the purchaser will, if the proposed rules are enacted, face the risk of having his company run by the old, maybe hostile, board for a considerable time.

²⁸ Cf. Lindskog, S. *En rättskandal, RSV?*, in *Advokaten* 1991 at 390 f. and *Rättskandalen fullföljs*, in *Advokaten* 1992 at 152 ff. and Åhman, O. *Behörighet och befogenhet i aktiebolagsrätten*, Uppsala 1997, at 268.

If the general meeting of shareholders have adopted annual accounts with respect to another financial year than stated in the company's articles of association, the general meeting's decision would surely be invalid and the Patent and Registration Office would not register the accounts. Consequently, the accounts could not form the base for taxation or payment of dividends. Furthermore, if no annual accounts are filed with and registered by the Patent and Registration Office, the company can, eventually, become subject to compulsory winding up.

If the board of directors enters into an agreement to sell certain assets, and the sale, according to the articles of association, requires the consent of the general meeting, the agreement would still be binding for the company, regardless of whether the third party was in good faith or not, Chapter 8 section 35 paragraph 2 of the Companies Act.²⁹ The company and its shareholders would be able to make a claim for damages against the directors in accordance with the rules in Chapter 15 of the Companies Act. The effects will be the same if the board of directors acquires a business outside the scope of the company's objects.

If the general meeting of shareholders passes a resolution on dividends, based on annual accounts for another financial year than the company's fiscal year as stated in the articles of association, and the board of directors pays out the dividends, the effects will be the same as for any unlawful payment of dividends.³⁰ This means that, in a worst-case scenario,³¹ the receiver of the dividend will be obliged to repay any amount received and the directors will have to cover any deficit in such repayment, Chapter 12 section 5 of the Companies Act.

7 Conclusion

From a *de lege lata* perspective, the execution prohibition cannot be regarded as only a rule of conduct, but has direct material effect. On the other hand, the rule only prohibits execution measures that are final or irreversible. Therefore, it is possible for a board of directors or a general meeting of shareholders to resolve or act based on amended, but not registered, articles of association, as long as the resolution or action can be altered or reversed or is conditional upon registration. Should a resolution or act be final or irreversible, the effects will be the same as any resolution or act that contravenes the articles of association.

A resolution by the general meeting of shareholders to amend the articles of association's clause on the number of directors on the board, followed by a decision to appoint directors according to the amended articles, has rarely been

²⁹ There are, of course, limits found outside the Companies Act, for example in the general clause in section 36 of the (1915:218) Act on Contracts. Furthermore, it is assumed that the company will not be bound by an agreement where the board of directors and the company's contractual party have acted jointly with the intent to harm the company.

³⁰ See on unlawful dividends Andersson, J. *Om vinstutdelning från aktiebolag*, Uppsala 1995 at 489 ff.

³¹ In many situations, the worst-case scenario will, of course, not occur, but these questions are not discussed here.

regarded as a practical problem among Swedish limited liability companies (most companies appoint the new board members prior to the registration of the amended articles of association). However, this practice is not in accordance with Chapter 9 section 35 paragraph 1 of the Companies Act. The effect of this non-adherence of the registered articles of association is one of the most difficult problems arising from Chapter 9 section 35 paragraph 1 of the Companies Act. If the new board (which, for example, has more members than allowed under the registered articles of association), that is appointed by the general meeting, makes decisions and the amended articles of association (that forms the base for the appointment of the directors) are not registered, all decisions taken by the board will be an execution of the new articles of association (i.e. an execution of the decision by the shareholders' meeting to appoint the directors in accordance with the new articles of association) that has not yet been registered. Consequently, a cautious director should not accept to take any final or irreversible decisions prior to the registration of the amended articles of association. The director could be held liable for damage caused by the execution of decisions that are contrary to, for instance, the Companies Act.³²

In practice, a way to circumvent the rules is to, in the articles of association, allow a very wide range of the number of directors. Articles can be found that states that the board shall consist of 3 - 20 directors. Under such a clause, the appointment of directors of the board (within these limits) will be effective from the resolution by the general meeting of shareholders. Therefore, the legislator ought to make an exception to Chapter 9 section 35 paragraph 1 of the Companies Act as regards the appointment of board members, to the effect that appointment of board members could be made in accordance with resolved but not yet registered articles of association and that the new board may act immediately.³³ Possibly, there would also need to be an exception to the exception stating, for instance, that the number of directors may never be fewer than three in a public limited company (which is the statutory requirement).

³² See Chapter 8 section 34 paragraph 2 and Chapter 15 section 1 of the Companies Act.

³³ As mentioned above, it is in Ds 2003:24 proposed to change this rule. The proposal made here would, of course, not be possible to make if the rules in Ds 2003:24 are enacted.