

## 12. Sustainability and the Company's Interest in Norway: Tensions Between Company Law and Shareholder Primacy

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### *A. Introduction*

The introduction of the company form, characterised by the limited liability of the shareholders and the legal distinction between the shareholders and the company, is recognised as one of the most ingenious legal inventions resulting from the industrial revolution. With 'limited liability' for shareholders and a threshold for piercing the corporate veil, the company form has provided the legal infrastructure for risk-taking business. Companies are crucial in most societies' economic development with creation of economic value through production of goods and services, by providing jobs, and by creating revenue, which contributes to the realisation of well-functioning welfare states. At the same time, awareness has been increasing over the last decades concerning the significance of business for sustainability. In globalised business, companies are building blocks in multinational corporate groups and contractual based value chains. In spite of much talk about sustainability, business in aggregate is still based on exploitation of people, degradation of the environment, and undermining of the economic and governance bases for well-functioning societies.

Finding a balance between maintaining the positive aspects of the limited liability company form, and mitigating negative impacts, is the challenge legislators now face. Indeed, business is increasingly called on to contribute actively to meeting global sustainability goals. Therefore, legislative reforms have been introduced both in Norway at the national level<sup>2</sup> and

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1 The authors gratefully acknowledge the excellent assistance in editing footnotes and bibliography of this chapter by research assistants Armita Sahafiha and Kristina Burkow Vollan, Faculty of Law, University of Oslo.

2 See e.g. Act of 18 June 2022 No. 99, Lov om virksomheters åpenhet og arbeid med grunnleggende menneskerettigheter og anstendige arbeidsforhold (Åpenhetsloven) [Act relating to enterprises' transparency and work on fundamental human rights and decent working conditions (Transparency Act)].

in the European Union (EU)<sup>3</sup> with the aim of facilitating more sustainable companies. While shareholders have interests in a company's adaptation for future existence, and to meet customers' and society's expectations, tension between shareholder interests and sustainability may arise. As we will show, this is very much the case in Norway.

The company is governed by a board, which is obligated to promote the interests of the company in its decision-making. The interests of the company, or the 'company's interest', as it often is referred to in Continental Europe and the Nordics, and which we will use throughout in this chapter, is a core company law concept. The concept is crucial to understanding the scope of action for the board and other corporate decision-makers. The company's interest as an abstract concept of company law should serve to promote the legislative purpose of company law, while the specific concept of company's interest in an individual company should serve to promote that specific company's purpose. In the context of sustainability, the debate on corporate purpose has been revitalised. In this chapter, we concentrate on the company's interest and do not engage in this discussion of corporate purpose.<sup>4</sup>

In this chapter, we analyse the company's interest based on Norwegian legal sources,<sup>5</sup> and, as Norwegian company law does not operate in a vacuum, we also draw on international and EU law and policy developments.

As we show, the company's interest in Norwegian company law is pluralistic and includes sustainability aspects. This gives the board plenty of room for integrating sustainability into corporate governance and decision making. Yet, this room is still undercommunicated and often misunderstood. This underlines the importance of this analysis, with renewed emphasis on the 'company's interest' having the potential to be a key company law element in the fundamental transformation of business towards sustainability. We understand sustainability as securing social foundations for humanity now and for the future while mitigating pressures on planetary boundaries, and 'sustainable business', or corporate sustainability, as being about the

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3 Sjøfjell/Cornell *European Law Open* Vol. 3, 2024, 529–60, provide in section 4.B an overview of key developments from the EU.

4 For a discussion of corporate purpose and sustainability, see Bowman/Mai/Sjøfjell/Mähönen, with further references.

5 Norwegian legal sources and literature that are cited in this chapter have been translated to English by the authors.

contribution of business to achieving these overarching societal sustainability goals.<sup>6</sup>

In this chapter, the concept of the company's interest under Norwegian company law is analysed in abstract, as a key concept in company law. Accordingly, this chapter does not aim to provide answers for specific decisions to be made by the board of a company. Rather, it elaborates on the content of the company's interest as the binding guideline that applies to boards in their decision-making.<sup>7</sup> In Norwegian company law, which has a very hierarchical corporate governance structure, shareholders through the general meeting 'exercise the supreme authority in the company'.<sup>8</sup> The general meeting can change the articles of association of the company, which can shape the board's scope of action in its decision-making, as can any direct instructions that the general meeting chooses to give to the board. The caveat is always that the articles of association and any direct instructions must comply with the law. The board (and the senior executive management) are not allowed to 'comply with any resolution by the general meeting or another company body if the resolution is contrary to law or the company's articles of association'.<sup>9</sup>

The authority of the general meeting also includes the right to replace the board or individual board members (with the caveat that any employee-elected board members cannot be replaced by the general meeting). Knowing that the board can be replaced at the next general meeting may influence the board's decision-making processes. However, as a matter of law, boards have a duty to follow the law and promote the company's interest according to the law, independently of the knowledge that they may be replaced if their decisions do not resonate with the opinions of the most active or controlling shareholders. For listed companies, the Norwegian Corporate Governance Code also emphasises the necessity of the board being independent of all groups, including shareholders, and notably the

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6 Elaborated on, with further sources, in Sjøfjell/Cornell European Law Open Vol. 3, 529.

7 See Section B.II in this chapter about this somewhat oxymoronic expression.

8 Act of 13 June 1997 No. 44, Lov om aksjeselskaper (Aksjeloven) Section 5–1(1) [Act on private limited liability companies (Private Companies Act)], and Act of 13 June 1997 No. 45, Lov om allmennaksjeselskaper (allmennaksjeloven) [Act on public limited liability companies (Public Companies Act)]. In this chapter we refer to both as the Companies Acts.

9 Companies Acts, Section 6–28(2).

majority shareholders.<sup>10</sup> We make this distinction upfront, as we are aware of the argument that often is made, namely that boards *in practice often will* follow what they perceive to be the shareholders' wishes because of the fear of being replaced. This argument does not negate a legal analysis of what boards have a duty to do – rather it underlines the need for such an analysis.

In practice, shareholders may often seek to exert influence outside of formal channels established through company law, including through so-called 'dialogue meetings' or 'ownership meetings'. These are promoted by the Norwegian corporate governance code,<sup>11</sup> and used by the Norwegian state as shareholder (Section C below). However, such meetings are not recognised by company law, and may in some cases also violate company law. Certainly, a board or an individual member of the board cannot lawfully accept 'instructions' through such channels. That this often may happen in practice does not make it lawful. To the contrary, it opens up the board or the individual member to liability, as it does for the shareholder. This is especially clear in Norwegian company law, where the legislation specifically mentions the shareholders as one group of actors that can be held liable for damage caused to the company or to other parties (see below in Section B.II). Of course, again in practice, what is said in these meetings is generally not public, and it is therefore difficult to identify channels of influence and follow up on this.

Ultimately, individual board members can be held liable for not promoting the company's interest, by the company itself,<sup>12</sup> or by others affected

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10 See Norsk utvalg for eierstyring og selskapsledelse (NUES), Norwegian Code of Practice for Corporate Governance, 14 October 2021, <https://nues.no/eierstyring-og-selskapsledelse-engelsk/>, and its comments to clause 8 concerning the Board of directors: composition and independence; '(...) Members of the board, whether elected by the general meeting or the corporate assembly or employees, must not operate as individual representatives for specific shareholders, shareholder groups or other stakeholders. In order to support the stock market's confidence in the independence of the board, at least two of its members should be independent of the company's main shareholder. This principle is particularly important for companies where one or more controlling shareholders could, in practice, decide the outcome of elections to the board'.

11 See Norwegian Code of Practice for Corporate Governance, 14 October 2021, and the comments to clause 13 regarding Information and communication.

12 For example in the Polish case, where the general meeting supported the current board's proposal to sue the previous board, Clark, Polish Energy Company Sues Former Directors for Backing Coal, 2024, <https://subscriber.politicopro.com/article/>

by the company's business.<sup>13</sup> However, the theme of our chapter is not liability for board members and the conditions for liability claims to be successful.<sup>14</sup> We will therefore not discuss the many obstacles to such claims or the emerging trends that indicate that such claims are increasingly likely to be made and to be successful. Rather, our aim is to discuss the content of the company's interest as core to the duties of the board, to show the possibilities and the direction that company law gives board members in their governance of the company, and the potential that this opens up for in changes in the governance of the company.

In Section B below, we introduce the legal doctrine of the company's interest as the core guideline for corporate decision-making. We present our analysis supporting the view that the company's interest is pluralistic and broad, with room – and arguably even a duty – for the board to integrate sustainability. We also show that the economic prosperity of the company, based on its own interest in its future existence as a legal entity, as a starting point, lies at the core of the board's decision-making. We show how the board's room for integrating sustainability has always been there, while the basis for stating its extent and for stipulating a duty in some cases is stronger now than it was just 10–15 years ago.

In Section C, we discuss the situation in practice, and the tensions between the broad, pluralistic company's interest and the hard-core reality of shareholder power. We illustrate this with the significant corporate governance role of the Norwegian state, which we find promotes the social norm of shareholder primacy in spite of its sustainability talk. This social

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eenews/2024/02/02/polish-energy-company-sues-former-directors-for-backing-coal-00139156.

- 13 Such as the external environment, e.g. represented by interest organizations. At the time of writing we do not find examples of such lawsuits in Norway, but they are expected to come. Elsewhere in Europe, there are already such examples, with one being ClientEarth's unsuccessful case against the board of the carbon major Shell, see e.g. Iglesias-Rodríguez, *Journal of Environmental Law* Vol. 35 no. 3 2023, 445–54. As more and more companies are being held liable for the unsustainabilities across their global value chains, the likelihood increases of companies turning against their previous board, see e.g. R. Carnwath, *ClientEarth v Shell: What future for derivative claims?* London: Grantham Research Institute on Climate Change and the Environment, London School of Economics and Political Science (February 2024), <https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2024/02/ClientEarth-v-Shell-what-future-for-derivative-claims.pdf>.
- 14 We briefly touch upon the legal basis for liability claims based on Norwegian company law towards the end of Section B.II in this chapter.

norm, informed by postulates from economic theories and financial markets' logic of maximising returns to shareholders, is a major barrier to more sustainable business.<sup>15</sup> We also briefly discuss the possible driver for change in the increasing recognition of risks of unsustainability.

In Section D, we present our concluding reflections.

## *B. The pluralistic company law concept of the company's interest*

### I. The legal sources for identifying the company's interest

Identifying the company's interest as a matter of law, entails canvassing a wide range of legal sources.

The starting point is the Private Limited Liability Companies Act and the Public Limited Liability Companies Act.<sup>16</sup> Both of these company forms, the private and the public company, are characterised by the limitation of liability of the shareholders. The main difference between these company forms is that public companies have less restrictions on sale or purchase of shares and only public companies can have their shares (or a class of their shares) listed on a stock exchange. In this chapter, when we refer to companies, and the Companies Acts, this comprises both the private and public companies and the Acts regulating them.

As the wording in the Norwegian company legislation often is kept rather short and general, preparatory works have great importance in the interpretation, in addition to case law, where the Supreme Court decisions have the greatest significance. Concerning case law, court decisions must, of course, always be read in light of the specific facts and legal questions raised in the case. At present, there is no Norwegian case law in modern times concerning the question of whether a board decision violates the company's interest because it favours sustainable value creation over shareholder interests, or challenging the board's prioritisation of environmental or societal interests more generally.<sup>17</sup>

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15 Sjøfjell/Bruner/Bruner/Sjøfjell, 713; Sjøfjell/Richardson/Sjøfjell/Johnston/Anker-Sørensen/Millon p. 79; Millon, *University of St. Thomas Law Journal* Vol. 10:4 2013, 1013.

16 See full reference to these Acts in footnote 9.

17 We discuss some seminal cases from the 1920s in B.III.5 in this chapter.

Company law does not operate in a vacuum, and neither can our company law analysis. Accounting law is historically considered a part of company law in the Nordics, which it still is in the EU, and it is therefore directly relevant to company law analyses. Financial market law, especially for listed companies, is also directly relevant. This then gives rise to the question of whether the company's interest can encompass interests regulated in other legislation. One view is that other interests than the shareholders' interests are taken care of by other areas of law, so that employee protection is fully covered by the Norwegian Working Environment Act and environmental protection is covered by the various legislative requirements of environmental law.<sup>18</sup> However, law is not – and should not – be divided up into separate silos, with hard divisions.

Legal compliance is, of course, a duty of the board. And the broader regulatory framework also influences the interpretations of the company law concept of the company's interest. The interests of the employees and societal interests in environmental protection are therefore not excluded from being a part of the company's interest. As we will show below, this is also reflected in company law – in the broad sense of the field – through what has been, for decades, and continues to be included in the reporting rules in Norwegian and gradually also EU accounting law. Another modern example is the Norwegian Transparency Act,<sup>19</sup> which integrates international human rights law and the internationally endorsed OECD Guidelines for Multinational Enterprises on Responsible Business Conduct into legislative requirements for due diligence across the global value chains of Norwegian companies.<sup>20</sup>

The legal sources for the analysis of the concept of the company's interest under Norwegian law also include EU law that is relevant for Norway under the European Economic Area Agreement (the EEA Agreement).<sup>21</sup> The EEA Agreement connects the EFTA states Norway, Liechtenstein and Ice-

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18 Aarbakke/Aarbakke/Knudsen/Ofstad/Skåre, comments to section 6–12, item 1.10.

19 For full reference, see fn 2.

20 On the relevance of corporate sustainability due diligence rules for the duties of the board, see e.g. Anton (et al.)/Sjåfjell, Chapter 2; Sjåfjell/Mähönen, Expert Essentials 2025, online edition.

21 Avtale om det europeiske økonomiske samarbeidsområde (EØS-avtalen), the European Economic Area Agreement (EEA Agreement) signed in Portugal in 1992 between the EU member states and the EFTA member states Iceland, Norway and Liechtenstein. Full text of the EEA Agreement can be found here: <https://www.efta.int/about-efta/legal-documents/eea-legal-texts>.

land, and the EU and its member states. The EEA Agreement encompasses, amongst other things, the freedom of movement of persons, services, goods and capital, and the freedom of establishment, in the EEA market (the EU and the three EFTA states).<sup>22</sup> EU company law, including accounting law, financial market law, and more broadly, EU sustainability law, is therefore directly relevant and implemented or on its way to being implemented in Norwegian law.<sup>23</sup> The EU has, since the beginning of the 2000s, adopted a range of secondary legislation aimed at facilitating sustainable development, and more recently, since 2019 onwards, it has adopted legislation with direct legal duties for both companies and board members, such as the EU Taxonomy<sup>24</sup> and the EU Corporate Sustainability Due Diligence Directive (CSDDD).<sup>25</sup>

International law has traditionally been seen as regulating states, which then, in turn, have the responsibility for regulating companies (as ‘non-state actors’) within their jurisdictions. Even within such an understanding, the Norwegian state’s international obligations may serve as interpretational sources in the analysis of Norwegian law. And further, the understanding that international law does not regulate companies, is now being challenged on several levels. This includes developments such as Advisory Opinions on climate change issued by the Inter-American Court of Human Rights,

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22 Taxation is one of the few relevant areas excluded from the EEA Agreement, Sejersted (et. al), chapter 15.1.

23 According to the EEA Agreement Article 7, Regulations and Directives which fall within the scope of the EEA Agreement shall be made a part of internal law also in the EFTA members of the EEA. Because of formal requirements, this process takes longer time for the EU legislation with EEA relevance to be implemented and to come in force in the EFTA countries in the EEA compared to the situation in the EU member states.

24 European Parliament and Council, ‘Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the Establishment of a Framework to Facilitate Sustainable Investment, and Amending Regulation (EU) 2019/2088 (Text with EEA Relevance)’ (2020) OJ L 198, 22.6.2020, pp. 13–43 <<http://data.europa.eu/eli/reg/2020/852/oj/eng>> accessed 4 January 2024 (Taxonomy Regulation).

25 European Parliament and the Council, ‘Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859 Text with EEA Relevance’ (2024) OJ L, 2024/1760, 5.7.2024 <<http://data.europa.eu/eli/dir/2024/1760/oj/eng>>. The Directive is marked as EEA relevant and the inclusion in the EEA Agreement is at present formally being considered by the three EFTA states in the EEA.

and the International Court of Justice,<sup>26</sup> and the discussion concerning the responsibilities of businesses and their investors for involvement in the genocide in Gaza.<sup>27</sup> This also concerns the direct inclusion of international human rights law in the Norwegian Transparency Act, and in the EU Taxonomy Regulation, the Sustainable Finance Disclosure Regulation, the Corporate Sustainability Reporting Directive and the European Sustainability Reporting Standards, as well as the inclusion of international and EU human rights and environmental law in the CSDDD.

These legislative instruments are not only contributing to breaking down the horizontal silo between international law and companies as creatures of national law. They are also breaking down the vertical silo between law and social norms (often denoted 'hard law' and 'soft law'), with the OECD Guidelines and the UN Guiding Principles for Business and Human Rights (UNGPs) being directly integrated into legislation. This means that the internationally endorsed sets of social norms, and, for example, the decisions from the National Contact Points under the OECD Guidelines, are relevant legal sources in our analysis. The OECD Guidelines and the UNGPs may be seen as representing generally accepted ethical norms of society, and thereby giving content to these norms, which historically have been regarded as accepted and relevant sources of Norwegian company law. Locally endorsed sets of social norms may also be relevant. A key example is the Norwegian corporate governance code (NUES),<sup>28</sup> which is directly

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26 Carrasco/Pamplona, *The Inter-American Court's Advisory Opinion on Climate Emergency and Human Rights: A Breakthrough for the Environment and Business & Human Rights*, 2025, [www.afronomicslaw.org/category/analysis/inter-american-courts-advisory-opinion-climate-emergency-and-human-rights](http://www.afronomicslaw.org/category/analysis/inter-american-courts-advisory-opinion-climate-emergency-and-human-rights); Tigre/Bönnemann/De Spiegeleir, *The ICJ's Advisory Opinion on Climate Change: An Introduction*, 2025, <https://blogs.law.columbia.edu/climatechange/2025/07/24/the-icjs-advisory-opinion-on-climate-change-an-introduction/>; Wadiwala, *Historic Climate Change Ruling from the International Court of Justice: What It Means for Africa*, 2025, <http://theconversation.com/historic-climate-change-ruling-from-the-international-court-of-justice-what-it-means-for-africa-262047>; Tommaso, *Profiting from Injustice in the Occupied Palestinian Territory: Reflections on the Report 'From Economy of Occupation to Economy of Genocide'*, 2025, <https://internationallaw.blog/2025/07/14/profitting-from-injustice-in-the-occupied-palestinian-territory-reflections-on-the-report-from-economy-of-occupation-to-economy-of-genocide/>.

27 United Nations Human Rights Council, *From Economy of Occupation to Economy of Genocide. Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied since 1967*, Francesca Albanese, 30 June 2025, A/HRC/59/23.

28 Reference included in footnote 11.

applicable (on a 'comply or explain' level) to companies listed on the Oslo Stock Exchange.

## II. Legal starting points – when the company's interest is relevant

Companies are by law required to have a board, which is responsible for the governance and supervision of the company, which means that it, by definition, has wide powers. Decisions and matters of extraordinary or high importance will fall within the powers of the board except where the decision falls under the general meeting (or another company organ) according to legislation, articles of association or instructions by the general meeting.<sup>29</sup> As examples, the board has the power to represent the company externally, approve decisions by senior executive management; the board can sell or purchase assets such as real estate and shares in subsidiaries, and decide restructuring of the company's business to the extent permitted by the articles of association of the company's determination of its business.

The board must act in the company's interest in its decisions. The duty for board members to act in the company's interest is deduced from the general provision in the Companies Acts section 6–12, providing the legal basis for the board's responsibility for managing the company.<sup>30</sup> The term '*company's interest*' can be found in the Companies Acts section 3–8, which specifies that the board shall declare that an agreement between the company and a shareholder, a holding company, a member of the board or the senior executive manager is entered into in the company's interest. Also, according to the Companies Acts section 8–10 relating to the company's financial assistance for the purchase of shares in the company, the board shall provide a statement which shall include an assessment of the company's interest in such financial assistance from the company.

The board's scope of action in promoting the company's interest is relevant within the following constraints:

1. Law, encompassing company law, and obligations under or in accordance with other areas of law,
2. The articles of association of the company,
3. Instructions and other decisions by the general meeting of the company,

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29 Aarbakke (et al.), comments to section 6–12, item 1.6.

30 Eg. Aarbakke (et al.), comments to section 6–12, item 1.9.

4. Contracts the company has entered into,
5. Generally accepted ethical norms in society.

The company's interest is the core guideline for company decision-making within these constraints (which we discuss further below in this section). We therefore refer to the company's interest as a 'binding guideline' for the board, as oxymoronic as that may sound, as it is *binding* in the sense that the board is obligated to follow it, and it is a *guideline* in the sense that it does not dictate the result of the board's specific decisions, but rather sets out the aspects that the board *must* encompass in its decision-making. We distinguish, therefore, between interests that are encompassed in the company's interest and other legitimate interests, which the board *may* include in its decision-making. The distinction between interests included in the company's interest and those that are legitimate interests has a greater practical significance for those who define the company's interest narrowly.

As regards law as a constraint, there is a dual relationship between the concept of the company's interest and relevant law. First, in the sense set out above, the company's interest is relevant only where the law does not dictate the outcome of the board's decision. For example, if the duties for the board to act in cases of loss of equity as set out in the Companies Acts are triggered,<sup>31</sup> the board cannot ignore these rules and decide to continue with business as usual because the members think that would be most beneficial for the shareholders, or because they wish to invest in an upgrade to more environmentally friendly production methods. Second, the regulatory framework provides sources for identifying what is included in the concept of the company's interest.

As regards the articles of association, instructions and other decisions by the general meeting, as well as contracts the company has entered into, these bind the board and constrain their scope of action to the extent that they are in compliance with the law and with generally accepted ethical norms of society.

Articles of association are a company-specific source. Companies comprise a vast variety of business endeavours, with individual purposes, composition of shareholders, geographical presence and financial situation. As the case law of the Norwegian Supreme Court has shown, the articles of association are important in the specific assessment of the company's

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31 The Limited Liability Companies Acts Section 3–5.

interest in the situation at hand.<sup>32</sup> This means that the general meeting through amending the articles of association, can contribute to shaping the scope of action for the board's decision-making, and also the understanding of the company's interest for that specific company. This gives rise to questions about the extent to which the abstract company law concept of the company's interest can be deviated from in the articles of association of a particular company. Certainly, the articles of association cannot violate law, so an attempt at codifying the social norm of shareholder primacy (setting out, for example, that the board is to have as its guideline the maximisation of returns to shareholders in all decisions) may collide with legal requirements, especially in light of the evolving regulatory framework. The board would need to interpret such a provision in the articles in light of the evolving regulatory framework and its duty to promote the company's interest, which stands in contrast to the short-term consideration of avenues to maximise returns for shareholders at any point.

As regards generally accepted ethical norms in society, these are of significance for the interpretation of the content of the legal norms and can directly influence how the boundaries of the board's scope of action are drawn up. This is, for example, evident in general clauses such as section 6–28 of the Companies Acts, which stipulates that the board may not give one interest an 'unfair advantage' at the expense of (other) shareholders or the company. Generally accepted ethical norms of society constrain the scope for the board's decision making.<sup>33</sup> The dynamic nature, especially of ethical norms, means that yesterday's answers are not necessarily decisive for tomorrow's questions. As we saw above, we can now draw on internationally endorsed sets of social norms to give content to the reference to generally accepted ethical norms of society, through the OECD Guidelines and the UNGPs.

If the general meeting has violated the law, or the company's articles of association, or, arguably, generally accepted ethical norms in society, in their instructions or other decisions, the board is obligated *not* to comply

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32 Eg. Judgment by the Norwegian Supreme Court, 11.11. 1999 – Rt. 1999 page 1682 'Østlendingen' concerning the question of the legality of a board decision denying consent to transfer of shares. The board's decision to deny consent was accepted by the Supreme Court because the board acted in line with the specific company's interest, identified in this concrete assessment. Conversely, in Judgment by the Norwegian Supreme Court, 05.03.2013 – Rt. 2013 page 241 'Stangeskovene', the board was found not to have acted in that company's interest after a concrete assessment.

33 See also Truyen, p. 111.

with these. Similarly, if the board realises that the contracts the company has entered into violate the law or generally accepted ethical norms in society, the contracts must be amended or cancelled. In the quickly evolving regulatory framework, this requires a higher level of vigilance from the board, especially in cross-jurisdictional business.

If a board decision is found to be contrary to the company's interest, this may potentially form the basis for liability claims against board members.<sup>34</sup> Board members could, at least theoretically, be sued for adopting a decision which allegedly violates the company's interest, for example, by promoting environmental protection while reducing the profits of the company and thereby the potential for shareholder returns. Conversely, civil society organisations could file lawsuits where the board has prioritised profits in ways that have led to negative environmental impacts, human rights violations or unsafe working conditions. Norwegian company law recognises claims against board members from the company itself, from shareholders and from the broad category of 'others',<sup>35</sup> with the requirement that damage has been caused to the claimant directly or indirectly by the board's actions or omissions. This means that under Norwegian law, not only damages caused to the company can be recognised, but also damages caused to any other party – including but not limited to shareholders and creditors; also damages caused to employees, workers or communities can be recognised. The prerequisite is that it can be calculated as economic damage. Further, not only members of the board but also other actors with a company law role can be sued, including shareholders and auditors. A successful claim requires that there has been a violation of a duty set out in company law, in the articles of association or in other areas of law. Violating the board's duty to promote the company's interest is a possible legal basis, although it would in most cases be a difficult one to argue before the courts, exactly because of the balancing of various interests that the board is required to do.

At the time of writing, there is no established series of Norwegian court cases concerning claims against board members for violating their duty to promote the company's interest, or for prioritising profit over corporate sustainability. This can partly be explained by Norwegian courts' reluctance

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34 See the Companies Acts sections 17–1.

35 Section 17–1 and 17–2 of the Companies Acts.

to overrule business decisions, which is not unique for Norway,<sup>36</sup> and is in comparative research generally recognised as the ‘business judgment rule’. Further, most Norwegian cases against board members concern small private companies in financial distress, and it may be presumed that cases regarding large companies are dealt with outside of the court system.<sup>37</sup> Considering the international trend of lawsuits against businesses for environmental and social harm, it seems to be just a question of time before such lawsuits also make their way to the Norwegian courts.<sup>38</sup>

### III. Pluralistic approach to the company's interest in Norway

In spite of its practical significance, there has been little research on the company law concept of the company's interest in Norway, especially as concerns the extent to which it encompasses various aspects of sustainability.<sup>39</sup> With the increasing emphasis on corporate sustainability in legislation, the topic has gained more interest also amongst Norwegian scholars.<sup>40</sup> The lack of interest historically may be explained by the dearth of case law on the topic. Also, the business case for corporate sustainability, entailing that at least in the long term, sustainability-oriented decisions are good for shareholders, too, has contributed to a perception that there is no conflict to be analysed. However, with the increasing recognition that contributing to a transformation to a safer and more just future requires major changes, the question of what the board can, should and must do is more topical than ever.

Company law scholarship presents two predominant views in Norway on what the company's interest is. The one view has been that shareholders'

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36 See e.g. Judgment by the Norwegian Supreme Court, 11.11.1999 -Rt. 1999 s. 1682 (1692) and Judgment by the Norwegian Supreme Court, 22.12.2022 -HR 2022-2484-A (54) stating that the threshold for board liability for ‘business misjudgments’ is high.

37 Dahlum.

38 Norwegian corporate actors, including board members, may also find themselves recipients of lawsuits in other countries, see e.g. European Coalition for Corporate Justice (ECCJ), *Suing Goliath: An Analysis of Civil Cases against EU Companies for Overseas Human Rights and Environmental Abuses*, 2021, <https://corporatejustice.org/publications/suing-goliath/>.

39 Early contributions include Sjøfjell, *International and Comparative Corporate Law Journal* Vol. 11 issue 1 2013, 1.

40 Recent publications include Christoffersen (et al.)/Reiersen, 157, *Bråten/Minde*, *Oslo Law Review* Vol. 10 no. 2 2024, 1.

return on investment is the central element of the company's interest, perhaps constituting the whole of the company's interest.<sup>41</sup> The question of whether other interests can be seen as included is left rather open, as is the question of prioritisation in case of conflict between shareholder interests and other interests, while a long-term shareholder interest is assumed as the guideline in the case of conflicting interests between the shareholders.<sup>42</sup>

The other view, which presents a more pluralistic approach, is that:

*Profit for shareholders, although it cannot legally be disregarded, may – depending on the concrete situation – be subordinated not only to legal requirements protecting creditors and other contractual parties, employees, the environment and broader society in general, but also to the promotion of such interests beyond the legal requirements.*<sup>43</sup>

In many practical situations, there is not necessarily a conflict between these two views of what the company's interest encompasses, as it is generally acknowledged by the authors representing the more narrow approach, that other interests than the shareholders interest are considered legitimate interests which can be taken into account.<sup>44</sup> However, as we show below in this Section, the pluralistic understanding is more in line with the legal sources than a simplistic approach to the company's interest as being equal to shareholders' interest. A pluralistic understanding also represents a more accurate picture of the complexity of board decision-making in practice.

For example, the Supreme Court of Norway stated in 2018 that:

*The company's interest is a less clear-cut concept. Naturally, a company must safeguard the interests of its shareholders, but it also has a responsibility to its employees, to its counterparties and creditors, and to fulfil any other obligations it may have to its surroundings and society at large.*

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41 Aarbakke (et al.), comments to section 6–12, item 1.9.

42 Aarbakke (et al.), comments to section 6–12, item 1.9.

43 Sjøfjell, *International and Comparative Corporate Law Journal* Vol. II issue 1 2013, 1 (15). See also Sjøfjell, *Jussens Venner* 2011 Vol. 46, 309. Bråten/Minde, *Oslo Law Review* Vol. 10 no. 2 2024, 1, state that: 'The company's interest therefore includes the interests of shareholders, employees, counterparties, creditors and society as a whole'. Andenæs (et. al.), p. 345: 'Although the board primarily shall promote the company interest, there is room for safeguarding of other interests, including those of shareholders, employees, or the general public'.

44 Highlighted by e.g. Christoffersen, *Tidsskrift for Forretningsjus* Vol. 30 no. 1 2024, 75 (84) with reference to Normann, p. 366.

*Ensuring the company's continued operation can therefore be part of the company's interests.*<sup>45</sup>

The case concerned the validity of a decision by the tax authorities regarding the tax assessment of a listed company after the shares had been sold to a new shareholder. The question was whether the company could claim a deduction for a facilitation fee paid to the company's financial advisor and a termination fee paid to a bidder. The decisive factor regarding the right to deduct the costs was whether there was a sufficient link between the costs and the company's income. The financial advisor's fee was considered by the Supreme Court to fulfil only the shareholders' interests and therefore there was no sufficient link between the cost the fee represented and the company's economic situation. The result was that such cost could not be deducted from the tax assessment. This is in our view a clear example of the company's interest and the shareholders interest being distinguished by the Supreme Court.

Preparatory works for the Companies Acts state that:

*board members are representatives who act on behalf of their client, i.e. the company*<sup>46</sup>

Newer preparatory works relating to proposed amendments of the Companies Acts also highlight that:

*The company's interest is often, but not always, corresponding to the shareholders' interests. That the shareholders' interests are a part of the company's interest is, inter alia, set out in the Supreme Court decision HR-2019–515.*<sup>47</sup>

The 2019 Supreme Court decision concerns a shareholder's right to appeal a decision on opening a bankruptcy estate. The Supreme Court stated that *'the shareholders' share in the company's interest and the significance the company's economic situation has for the shareholder, does not in itself pro-*

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45 Judgment by the Norwegian Supreme Court of 22. 03. 2018 -HR-2018–570-A, (41. Available at [www.lovdato.no](http://www.lovdato.no) (subscription necessary; in Norwegian only).

46 Ot.prp. Nr. 23 (1996–1997) Om lov om aksjeselskaper (aksjeloven) og lov om allmennaksjeselskaper (allmennaksjeloven) ([*Proposition to the Storting (the Norwegian Parliament) for the new Companies Acts*] p. 71.

47 Prop. 135 L (2018–2019) Endringer i aksjelovgivningen m.v. (langsiktig eierskap i noterte selskaper) ([*Proposition to the Storting (the Norwegian Parliament)*] Changes to the companies acts (long term ownership in listed companies) p. 94.

*vide a right to appeal*.<sup>48</sup> The decision shows that the shareholders' interests are a part of the company's interest, but does not represent the whole of the company's interest.

The newer preparatory works referred to above also highlight that:

*The company's interest covers more than the interests of the shareholders, creditors, employees, the market and the society. It is about what is best for the company as an independent legal entity in the short and long term. Even in cases where the company is a part of a group or through acquisition becomes part of a group, it is the company's interest, not the group's interest, which is decisive for whether the company should provide financial assistance for a third party's acquisition of shares. The board must conduct a specific assessment of the company's interest in becoming part of the group.*<sup>49</sup>

The preparatory works go on to state, concerning the situation where a company provides financial assistance for a third party's acquisition of shares:

*It is important that the board is aware of its role as the company's representative and its duty to act in line with the company's interest.*<sup>50</sup>

Authoritative legal sources clearly show that the company's interest is not equivalent to the shareholders' interests and encompasses a wide range of interests. As we show below, the company's interest in Norwegian company law includes shareholder and creditor interests, the interests of the employees and the local communities, and increasingly, broader environmental and societal interests, including those of workers across global value chains. We start out with presenting the core, the company's own economic interest, before we canvass the inclusion of these other interests.

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48 Judgment by the Norwegian Supreme Court of 1403.2019 – HR-2019–515-A, paragraph 58. Available at [www.lovdato.no](http://www.lovdato.no) (subscription necessary; in Norwegian only).

49 Prop. 135 L (2018–2019) Endringer i aksjelovgivningen m.v. (langsiktig eierskap i noterte selskaper) [Proposition to the Storting (the Norwegian Parliament)] Changes to the companies acts (long term ownership in listed companies)] on page 95.

50 Ibid. on page 98.

1. The core of the pluralistic concept; the company's own economic interest

In a pluralistic understanding of the company's interest, the business rationale sets the boundaries and gives direction to the board's assessment. The board's decisions must, as a starting point, always have a commercial justification. It is in the nature of the company that the company's financial result is central, as a minimum financial result is a prerequisite for the company's continued existence.

All interests involved, including the interests of employees in good working conditions, living wages, possible salary increases, bonuses and other welfare benefits, of creditors wanting punctual payment, of shareholders in returns, and the company's interest, for example, to invest in environmentally friendly solutions within the company's business, are dependent on the company's own financial situation. The starting point is therefore that the company needs to have a sound economic basis for the various interests to be safeguarded.<sup>51</sup> The company's own interest in securing its continued existence may therefore be perceived as an objective criterion in the board's decision making.

Support for the company's interest having a financial core can be found in section 3–4 of the Companies Acts. The provision requires the company to have sound equity and liquidity, which must be taken into account in all the board's decisions. If the equity is not adequate, the board has a duty to act under section 3–5 of the Companies Acts. These are key limits for the board's scope for action. Together with the Companies Act's restrictions on the ability to distribute funds from the company, this shows that the board must ensure that the company has a healthy and viable economy, which informs our understanding of this as a core aspect of the company's interest.

This is supported by the Supreme Court's decision in 2000, in a case concerning the question of whether the rules on company dividends were applicable for a claim for fees for financial advice which ended with the company's shares being sold to a new share owner:

*Although the persons behind the company also had an interest in what they could achieve for their shares, it is fully legitimate to try to take care of*

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51 This is also indicated in the preparatory works, see e.g. Ot.prp.nr.7 (1971–1972) Om lov om endringer i lov av 6. juli 1957 om aksjeselskaper bedriftsdemokrati [Proposition to the Storting (the Norwegian Parliament) Changes to the Companies Act regarding employee participation in companies] on page 43.

*the interests of the company as such to survive and keep existing as a legal entity – under the best conditions possible.*<sup>52</sup>

The Supreme Court concluded that the rules on dividends were not applicable to the financial advice in question since the central purpose of the advice was to continue the long-term company's interests.

Other company law scholarship supports the view that the essential element of the company's interest is to actively promote the company's interest in an accountable and prudent manner.<sup>53</sup> The company's interest is regarded as entailing a general and mandatory duty for the board to govern and lead the company on the basis of the company's interest in creating value, and to emphasise the company's value creation when taking action and making decisions on behalf of the company.<sup>54</sup>

This requires the board to ensure the healthy and viable economy of the company, which we see addressed in the Report to the Parliament concerning the Norwegian state's shareholdings and investments in companies:

*Value creation over time requires that the company is sustainable. A sustainable company balances economic, social and environmental considerations in a way that contributes to long term value creation and that the needs of today are taken care of without destroying future generations' needs.*<sup>55</sup>

Taking the company's economic prosperity and its continued existence as the core of the company's interest and the starting point for the board's decision-making gives a better basis than trying to assume the interests of a hypothetical long-term shareholder.<sup>56</sup> And yet, complex questions still remain where the board needs to decide, based on the purpose and strategy

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52 Judgment by the Norwegian Supreme Court of 20.12.2000 – HR-2000–141/ Rt. 2000 p. 2033 (2039). Available at [www.lovdatab.no](http://www.lovdatab.no) (subscription necessary; in Norwegian only).

53 Andenæs (et. al.), p. 345. See also newer preparatory works to proposed amendments, Prop. 135 L (2018–2019) *Endringer i aksjelovgivning mv. (langsiktig eierskap i noterte selskaper mv.)* [Changes to the company legislation etc. (long-term ownership i listed companies etc.)], 21 June 2019, p. 95.

54 Christoffersen (et al.)/Reiersen, 157 (161) in the context of ensuring shareholders' and creditors' interests.

55 St. Meld nr. 8 (2019–2020) *Statens direkte eierskap i selskaper*, 22 November 2019, p. 76 (*Report from the Norwegian Government to the Norwegian Parliament on the state direct ownership in companies*) on page 76.

56 See further below section B.II.2 in this chapter.

of the company and in light of the evolving regulatory context, what kind of time perspective it will use. Growing recognition of the financial and corporate risks of continued unsustainability also entails that ensuring the basis for the company's continued existence entails considerations of the environmental, social and societal consequences of the business of the company.<sup>57</sup>

Taking the company's own economic interest as the starting point does not mean that it is an overriding priority in all contexts. The obvious legal point, which nevertheless requires reiteration, is that the economic interests of the company cannot be pursued through a lack of legal compliance. In globalised business, this entails careful consideration of what may be perceived as grey areas in cross-jurisdictional issues, with complicated choice of law issues. Further, even in cases that may at first assessment be considered within the law, other factors may be so strong that alternatives to continuing the company in its current form need to be considered. This can be, for example, if the business model of the company is based on the exploitation of workers in other countries, which is contrary to generally accepted ethical norms such as those set out in the OECD Guidelines (with their increasing legal significance).<sup>58</sup> Another example is where a company has based its business on permits to pollute, but where the state's giving of the permit turns out to be illegal.<sup>59</sup>

## 2. Shareholder interests are included in the company's interest

The interests of the shareholders are clearly a part of the company's interest, as we have already indicated above. According to the Companies Acts

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57 Alexander (et al.)/Sjøfjell, 22 (chapter 2); Anton (et al.)/Sjøfjell, chapter 2.

58 See Section B.I in this chapter, and see also for example Malaguti, *Oslo Law Review* Vol. 10 2024, 1.

59 After the EFTA Court had given its opinion, the Norwegian Appeals Court found the Norwegian permits to pollute illegal, see Christensen, *Full Celebration After Victory for Norwegian Fjord*, 2025, <https://fjordsoksmålet.no/2025/08/13/full-celebration-after-victory-for-norwegian-fjord/>. The Norwegian state has not withdrawn these permits, and the company, Nordic Mining, has declared that it will continue basing its business on these permits. At the time of writing, the latest news is that the environmental organisation now has requested that the courts issue an injunction to stop Nordic Mining's dumping of waste in the fjords, NRK, *Ber tingretten om å forby Nordic Mining dumping i Førdefjorden* [Asking the court to forbid Nordic Mining's dumping in the Førde fjord], 2025, <https://www.nrk.no/vestland/ber-tingretten-om-a-forby-nordic-mining-dumping-i-fordefjorden-1.17542932>.

section 2–2(2), the articles of association must contain clauses on use of profits and assets upon dissolution of the company if the company shall not have a purpose of achieving returns for the shareholders.

According to our analysis of the legal sources, this does not entail that shareholders' interests represent the core of the company's interest, or that it entails a duty to generally prioritise shareholder interests. The legal form of the company can also be used for a business that does not provide returns to shareholders, for example, channelling all profits into specifically designated societal activities (such as protecting rainforests or supporting the local hospital). In such cases, shareholders and potential shareholders must be made aware of this, as they do not, as a matter of company law, have a generally protected right to returns on their shares.

What shareholders do have, where the articles of association do not set out any different, is a legally protected expectation of returns if the company is profitable. It is, however, only in extreme situations that shareholders have any kind of legal claim to returns. This is typically where there is an abuse of power situation between shareholders. A 2016 Supreme Court decision gives us an example of this, in a case concerning a claim for dissolution of the company by a minority shareholder.<sup>60</sup> The Supreme Court found that persistent payment of low or no dividends and financing of dividends for one financial year by issuing shares at a discount with preferential rights to the shareholders represented an abuse of authority that could give the right to demand dissolution under sections 16–19 of the Companies Act. However, the minority shareholder did not succeed with its claim for dissolution because such dissolution requires significant grounds. The minority shareholders' interests could be taken into account in other ways than dissolution of the company, by employing the safety valve in section 8–4 of the Companies Act, which allows the court to set higher dividends in exceptional cases of abuse of power, typically by the majority shareholder.

Shareholders' legally protected expectation of returns is a part of the company's interest. However, as the above-mentioned case shows, breaches of this standard must be persistently low or no dividend at all in spite of the company's profitability. The statement by the Supreme Court quoted above shows that the breach of any lack of dividends must be determined over

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60 Judgment by the Norwegian Supreme Court of 29.06.2016 – HR-2016–1439-A. Available at [www.lovdato.no](http://www.lovdato.no) (subscription necessary; in Norwegian only).

time, and not related to a specific decision. The company's own economic interest is what the board must concentrate on. Indeed, a principle of Norwegian company law is that the assets of the company are protected against the shareholders, in the sense that shareholders lawfully only can receive any kind of distribution from the company when they are done 'in accordance with the rules regarding dividends, capital reduction, merger or demerger of companies, and repayment following liquidation'.<sup>61</sup> Any kind of transfer of value, which directly or indirectly benefits the shareholder, is covered by this prohibition,<sup>62</sup> and the Supreme Court has determined that it is a criminal offence for shareholders to treat the assets of the company as their own property, even where no other shareholders or creditors were harmed.<sup>63</sup>

In practice, the board's assessment of what is in the individual company's interest will be based on the specific conditions of the company and of the topic at hand. Each company is different in terms of its financial situation, its size, its purpose, possibly defined in the articles of association, the impact the business has on society, the composition and number of shareholders of the company, and whether the general meeting has provided instructions to the board. That shareholder interests are just one element of what needs to be considered is acknowledged as concerns the governance of larger companies, in the preparatory works for the Companies Acts:

*When a company reaches a certain size, the management of the company is not only a question that concerns its ownership interests, but also such other interests as legislation requires to be taken into account. This applies to considerations of creditors and other counterparties, employees and the broader interests of society.*<sup>64</sup>

The question remains, then, whether the shareholders' interest could be regarded as the core of the company's interest; in other words, encompassing other interests, while using the shareholders' interest as the starting point. As we have shown above, our analysis of the legal sources demonstrates

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61 Companies Acts, Section 3–6(1).

62 Companies Acts, Section 3–6(2).

63 Judgment by the Norwegian Supreme Court of 3. 09 2003 -HR-2003–511-A/ Rt. 2003 p. 1112. Available at [www.lovdato.no](http://www.lovdato.no) (subscription necessary; in Norwegian only).

64 Ot.prp. nr. 23 (1996–1997) Om lov om aksjeselskaper (aksjeloven) og lov om allmennaksjeselskaper (allmennaksjeloven), 20 December 1996, p. 64 [Proposition to the Storting (the Norwegian Parliament) for the new Companies Acts] on page 64.

that it is the economic interest of the company itself that is at the core.<sup>65</sup> Shareholders' legally protected expectation of returns is derived from the economic interest of the company, and cannot replace it. The company's economic interest is directly connected to its business, and the company has, if nothing else is set out in the articles of association or by law, an eternal timeline.

Shareholders are heterogeneous; they include short term, medium term and long term investors; they encompass the returns-focused investors (e.g. private equity funds, or parent companies), family shareholders interested in maintaining long-term stability for the cornerstone company in the local community, the company's employees, and even civil society organisations or funds investing in shares with the sole purpose of influencing the company through rights provided in the Companies Acts, for example by proposing changes at the general meeting and by voting for investments in more environmentally friendly production or higher pay to workers across global value chains. Although a shareholder typically invests in shares with the intention to receive returns through dividends or by sale of the shares at higher prices, shareholders may also be invested in several companies that may even be in competition with each other. Shareholders' interests may therefore be in contradiction to the company's interests.<sup>66</sup> Universal investors may be more oriented to the general profitability of the sector rather than the individual company. And so on. Governing a company from some kind of hypothetical long-term shareholders' interest is an unnecessarily complicated way of concentrating on the economic prosperity of the company.

### 3. Creditor protection is central to company law

Creditor protection is central to company law, partly because the legal entity of the company is separate from the shareholders, with the shareholders' limited liability for the company's obligations. The Companies Acts contains a number of rules aimed at safeguarding creditors' interests. The Supreme Court has also, in its 1993 decision, distinguished the share-

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65 Aksjelovutvalget, NOU 1996:3 Ny aksjelovgivning, 1 March 1996, p. 133 [Norwegian Official report to the Ministry with proposals for new companies legislation] also clearly differentiate between the company's interest and the shareholders' interest, e.g. on page 133.

66 Anker-Sørensen.

holders' interests from the company's interest in relation to the creditors' interests.<sup>67</sup> The Supreme Court ruled that a bankruptcy estate could sue a board member and claim compensation even if this would not benefit the shareholders.<sup>68</sup>

Companies are not exclusively financed through shareholder contributions (their investments in shares). In most cases, external financing will make the shareholders' contributions a minority in terms of amount. The constant development of new forms of financial instruments, such as hybrids between equity and debt capital, also shows that the share capital itself can play a subordinate role. Since shareholders are not liable for the company's obligations, it has also been argued that trust in the limited liability company form necessitates that creditors' interests are taken into account.<sup>69</sup> Creditors' interests are therefore an independent part of the company's interest.

#### 4. Employees and local communities are also included

Our analysis of the legal sources supports the inclusion of the employee's interest in the company's interest. In Norway, employees in companies with more than 30 employees are entitled to elect one or several members of the board among the employees.<sup>70</sup> A board member elected by the employees does not, as a matter of law, represent employee interests,<sup>71</sup> any more than board members elected by the general meeting as a matter of law represent shareholder interests.<sup>72</sup> All board members have a company law duty to promote the interests of the company. And yet, it is clear that the legislative purpose of the employees' right to elect members of the board is to ensure

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67 Judgment by the Norwegian Supreme Court of 30. 11.1993 – HR-1993–130-B Rt. 1993 p. 1399 (known as the Ytternes case). Available at [www.lovdata.no](http://www.lovdata.no) (subscription necessary; in Norwegian only).

68 Ibid. on page 1404.

69 Solem, *Tidsskrift for Forretningsjus* Vol. 7 no. 4 2001, 451 (470).

70 The Companies Acts sections 6–4.

71 Ot. prp. nr. 7 (1971–1972) Om lov om endringer i lov av 6. juli 1957 om aksjeselskaper bedriftsdemokrati, 22 October 1971, p. 43–44 [Proposition to the Storting (the Norwegian Parliament) Changes to the former companies act regarding employee participation in companies].

72 See concerning board members elected by the general meeting, NOU 1992:29 Lov om aksjeselskaper, September 1992, p. 161–162 (Norwegian Official report to the Ministry with revision and proposed changes to the Companies Act).

a broader basis for the board's decision-making to the benefit of both the employees and the company.<sup>73</sup>

In the context of amendments made in the Companies Acts in 2006,<sup>74</sup> it was discussed whether a statutory definition of board members' liability to shareholders and others should be included. The question was raised whether this could entail liability for decisions aimed at preserving jobs, even if the closure and possible dissolution of the company would have given the shareholders greater financial gain. The question was raised specifically related to a case where it was considered to close down the wood processing company Union, which was a cornerstone company in the small town of Skien, in 2005. To this, the Ministry stated, in the preparatory works:

*In the Ministry's opinion, it will not normally trigger liability for damages if a board member in a private or public limited liability company makes (...) decisions aimed at maintaining operations and jobs, even if a possible closure and dissolution would have given the shareholders a greater financial gain. The situation may be different where the decision in reality means that a loss-making business is maintained at the creditors' expense.<sup>75</sup>*

The statement shows that the interests of the employees and the local community constitute considerations that can be emphasised to a considerable extent, also at the expense of the shareholders' interests, and accordingly constitute an independent part of the company's interest. Employee interests are not only relevant within the scope of the Norwegian Working Environment Act.

The inclusion of local communities, which we return to below,<sup>76</sup> gives an indication of how broad and pluralistic the Norwegian company's interest

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73 NOU 1985:1 Videreutvikling av bedriftsdemokrati, 23 January 1985, section 4.8.2 (Norwegian Official report to the Ministry with proposals for further development of the employee participation within companies).

74 Broadening the scope of those who could make liability claims against boards to include 'shareholders' and 'others' in addition to the company itself, see Companies Acts Section 17-1(1), briefly discussed in Section B.II.

75 Ot.prp. Nr. 55 (2005–2006) Om lov om endringer i aksjelovgivningen mv., 7 April 2006, p. 114 ([Proposition to the Storting (the Norwegian Parliament)] Changes to the Companies Act etc.).

76 And which we can find reflected also in EU law, for example in the otherwise very shareholder-oriented Takeover Directive, see e.g. Sjøfjell, Yearbook of European Law Vol. 27, 2008, 387.

also traditionally has been. In the next section, we discuss the aspects of sustainability more broadly and their inclusion in the company's interest in Norwegian company law.

## 5. The inclusion of broader societal interests historically and now

As highlighted above, the legal sources in Norway support a broad understanding of the company's interest, which also comprises societal interests.

Consideration of broader societal interests was a topic all the way back in the 1920s. In a Supreme Court case, known as the 'Freia' judgement,<sup>77</sup> the question was whether the general meeting of a limited company, with a majority vote, could decide to use NOK 250,000 (which at the time had considerable value) of the profits for the establishment of a fund for medical research (as a gift donation). A minority of the shareholders had challenged this decision. The Supreme Court found that the decision was valid. The Supreme Court emphasised that the donation in the long run also would be in the company's pecuniary interest, and that:

*The company's purpose is economic activity, but this cannot be understood by the participants of a company to mean that the company shall isolate itself from the society within which it is established and limit itself to only comply with legislation which is applicable when the company's economy is best off in that way.*<sup>78</sup>

Although the judgement relates to a decision of the general meeting, the judgement can in a modern context be used to legitimate decisions from other company organs, notably the board, which are grounded in societal interests.

Two other Supreme Court cases from the 1920s also point in the same direction.

In the first case, the Supreme Court accepted that the board of an insurance company has the authority to provide a considerable guarantee for a local bank as security for loans that the bank provided.<sup>79</sup> Although the

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77 Judgment by the Norwegian Supreme Court of 11. 03.1922, – Rt. 1922 p. 272 (known as the Freia Chocolate Factory case). Available at [www.lovdato.no](http://www.lovdato.no) (subscription necessary; in Norwegian only).

78 Judgment by the Norwegian Supreme Court of 11.03.1922 – Rt. 1922 p. 272, 274.

79 Judgment by the Norwegian Supreme Court of 03.09.1927 – Rt. 1927 p. 588. Available at [www.lovdato.no](http://www.lovdato.no) (subscription necessary; in Norwegian only).

guarantee was considered on the face of it to fall outside of the scope of the company's articles of association, the Court stated that:

*A board of a company is not entitled to go beyond the purpose of the company and what belongs to the operation of its business, but the purpose of the company and the operation of the business require that a board must, by virtue of the nature of the circumstances, have the authority to make dispositions that are not only directly, but also indirectly, necessary or appropriate to promote the purpose of the company.<sup>80</sup>*

The context was that a general request had been made to the local business community in order to provide assistance to two of the city's commercial banks for the common good and to avoid the very difficult consequences that a collapse of these banks would entail for the city. The Supreme Court stated that the insurance company had an immediate and strong interest in ensuring that business in the city where the company operated could avoid the disruption that a bank collapse would cause and that the lack of financial assistance could have direct, detrimental consequences for the company in its future operations and for the company's reputation.

The other case also related to a guarantee, which the board of company A had provided to company B (a local bank) relating to the refinancing of company B. The bankruptcy of company B would have significant consequences in the local community.<sup>81</sup> The question was whether the board had the authority to provide such a guarantee, which the Supreme Court found that the board had, based on the potentially damaging effect a bankruptcy of company B would have on the local community.<sup>82</sup>

Accounting law's reporting requirements concerning broader societal interests also show that the board is meant to take an active approach concerning the company's impact on society. Norway was among the first countries in Europe to have specific reporting requirements concerning the working environment, gender equality, anti-discrimination, and the company's impact on the external environment.<sup>83</sup> The latter was especially

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80 Judgment by the Norwegian Supreme Court of 03.09.1927 – Rt. 1927 p. 588, 589.

81 Judgment by the Norwegian Supreme Court of 15.10.1929 – Rt. 1929 p. 857. Available at [www.lovdatab.no](http://www.lovdatab.no) (subscription necessary; in Norwegian only).

82 See also Solem, *Tidsskrift for Forretningsjus* Vol. 7 no. 42001, 451 (Section 4.4).

83 Act of 17 July 1998 No. 56, *Lov om Årsregnskap mv.* (regnskapsloven) [the Norwegian Accounting Act]. Today chapter 2 of the Accounting Act has detailed reporting requirements concerning sustainability which shall be included in a company's annual report, as an implementation of EU rules.

progressive in that it originally required that all companies report on their negative impacts on the environment and how these were removed or mitigated.<sup>84</sup> The preparatory works underline that the aim was to enhance the efficiency of compliance with environmental protection rules, and – in line with reflexive theory thinking – to ensure that the board gave attention to the environmental impacts of the company, with the aim of these being reduced year by year, beyond compliance with environmental law.<sup>85</sup>

A reporting mechanism in the annual report relating to the company's corporate social responsibilities<sup>86</sup> was introduced in 2013, and the preparatory works highlight that:

*Businesses who operate in a socially and environmentally responsible manner will be able to strengthen their competitive advantages nationally and internationally.*<sup>87</sup>

In addition, the preparatory works highlight that the reporting mechanism is intended to contribute to raising the companies' awareness and provide incentives to integrate social responsibility in their daily business and to present the value of such work for investors, shareholders, and society at large.<sup>88</sup>

Today, the reporting mechanisms cover a number of topics such as the external environment, social matters, compliance with human rights and combating corruption and bribery. These mechanisms clearly legitimise the companies' societal responsibilities and serve to justify board decisions which prioritise such responsibilities, also where this could be contrary to the shareholders' (short-term) interests. While the scope of companies has

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84 Sjøfjell, *International and Comparative Corporate Law Journal* Vol. 11 issue 1 2013, 1. See also Ikdahl (et. al)/Sjøfjell, Ch. 7. Preprint at SSRN: <https://ssrn.com/abstract=4028365>.

85 Innst. O. nr. 61 (1997–1998) Innstilling fra finanskomiteen om lov om årsregnskap m.v. en formell innstilling lovforslag [*Recommendation from the Finance Committee in the Storting (Norwegian Parliament) on the Annual Accounts Act, etc.*] Section 10.

86 The Norwegian Accounting Act section 3–3 c.

87 Prop. 48 L (2012–2013) *Endringer i regnskapsloven og enkelte andre lover (rapportering om samfunnsansvar mv.)* [*Proposition to the Storting (the Norwegian Parliament) Changes to the Accounting Act and certain other acts (reporting on corporate social responsibility, etc.)*] on page 11.

88 Prop. 48 L (2012–2013) *Endringer i regnskapsloven og enkelte andre lover (rapportering om samfunnsansvar mv.)*, 7 December 2012 [*Proposition to the Storting (the Norwegian Parliament) Changes to the Accounting Act and certain other Acts (reporting on corporate social responsibility, etc.)*] on page 11.

been reduced, the Norwegian reporting rules have been strengthened in substance through the implementation of the EU Corporate Sustainability Reporting Directive (CSRD), responding to 'the importance of reliable, comparable and relevant information on sustainability risks, opportunities and impacts',<sup>89</sup> and setting out reporting rules considering both the significance for the performance of the company and 'on information necessary for an understanding of the impact of the undertaking's activities on environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters' ('double materiality').<sup>90</sup> The inclusion of the OECD Guidelines and the UNGPs in the CSRD and the European Sustainability Reporting Standards (ESRS) under the CSRD, as already mentioned earlier, strengthens their legal relevance as generally accepted ethical norms of society.

The Norwegian Transparency Act, which came into force in July 2022, introduces due diligence, reporting and information requirements for larger companies<sup>91</sup> to promote their respect for fundamental human rights and to ensure decent working conditions across the global value chains of Norwegian companies. This Act has, since its adoption, enhanced the awareness of companies' responsibilities for social matters and brought international human rights law directly into the scope of board decision-making. This Act also arguably broadens the inclusion of employee interests, as a part of the company's interest,<sup>92</sup> to encompass workers across global value chains. The Transparency Act is a part of an international trend towards corporate sustainability due diligence as an evolving horizontal norm, supported also by the adoption of the Corporate Sustainability Due Diligence Directive in 2024. As Sjøfjell discusses elsewhere, possible changes through the Omnibus proposals will not be able to reverse the changes made in the perception of what is relevant and necessary for boards to encompass in their decision-making, including the way in which international law and

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89 European Parliament and Council, 'Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 Amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as Regards Corporate Sustainability Reporting (Text with EEA Relevance)' (2022) OJ L 322, 16.12.2022, pp. 15–80 <<http://data.europa.eu/eli/dir/2022/2464/oj/eng>> accessed 20 March 2023, Recital 4, see also Recital 5.

90 *ibid.*, Recital 29, referencing Articles 19a and 29a.

91 See the definition of 'larger enterprises' included in the Transparency Act section 3 letter a).

92 See Section B.III.4 in this chapter.

internationally endorsed social norms are integrated into hardcore EU law and national law.<sup>93</sup>

Finally, the Norwegian Corporate Governance Code's inclusion of sustainable value creation in its recommendations also supports a broader and modern approach to what the board of the company should include in its decision-making.<sup>94</sup>

### *C. A pluralistic company interest clashes with shareholder primacy*

The Norwegian company law concept of the company's interest is pluralistic and broad, without any predetermined prioritisation of the interests. Yet, there is strong tension between this pluralistic concept of the company's interest as a matter of company law, and the social norm of shareholder primacy, with its drive for maximisation of returns to shareholders. We see this tension reflected in the context of one of the most powerful shareholders in Norway, the Norwegian state. The state expects corporate sustainability in the governance of Norwegian companies, and, yet, in its own governance of state shareholdings, it does not use – or even appear to recognise – the room there is for more sustainable corporate governance. The state as shareholder promotes shareholder primacy through its emphasis on maximisation of returns. This contributes to explaining the chasm between a company law analysis of the company's interest and corporate governance in practice in Norway.

The state is a particularly significant shareholder in Norway, because of its size and its influence. The state has shareholdings in 69 companies, encompassing listed companies and non-listed ones,<sup>95</sup> and it is one of the largest shareholders on the Oslo Stock Exchange, second in size after the heterogeneous group of 'foreign investors'.<sup>96</sup> It is also a particularly

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93 Sjøfjell, *Transnational Legal Theory* Vol. 16, 2025, 281.

94 The board 'should define clear objectives, strategies and risk profiles for the company's business activities such that the company creates value for shareholders in a sustainable manner'. The board should 'therefore take into account financial, social and environmental considerations', NUES, 2. Business (Section 2).

95 Updated numbers from 'Statens eier rapport 2024 – Statens direkte eierskap i selskaper' ['The state's ownership report 2024 – the State's direct ownership of companies'], 15 June 2023, available at [www.regjeringen.no/no/dokumenter/statens-eierberetning-2022/id2984565/](https://www.regjeringen.no/no/dokumenter/statens-eierberetning-2022/id2984565/) (only in Norwegian).

96 The State's 'direct ownership is substantial when concerning both the number of companies and their value, and, when viewed in relative terms, it is more exten-

influential one, and a crucial actor in setting the tone for good corporate governance in Norway – with knock-on effects also outside of Norway, as it is regarded as a role model for state investments.<sup>97</sup>

Through the Norwegian Government Pension Fund Global, the world's largest Sovereign Wealth Fund, Norway is also invested in approximately 8500 companies around the world. The 'Oil Fund', as it is colloquially known in Norway (because of the source of its funding being revenues from petroleum activity), has been regarded as a leading star for responsible investments. In spite of a number of good initiatives by the Oil Fund, it is also under criticism for its unsustainable investments. At the time of writing, many voices, internationally and nationally, have criticised the Fund's investments in companies contributing to Israel's violations of international law in Gaza.<sup>98</sup> In this chapter, we concentrate on the Norwegian state's role as a shareholder in Norwegian companies and its influence on corporate governance in Norway in practice.<sup>99</sup>

The Norwegian state regards itself as a frontrunner in the transformation to sustainability, including mitigating climate change and protecting human rights. Yet, the state's governance of the companies in which it has direct shareholdings may be characterised as a missed opportunity for demonstrating and promoting sustainable corporate governance. Indeed, the state appears 'to act as an idealised version of a private owner that does not really exist in reality',<sup>100</sup> promoting maximisation of returns to investors in the belief that this protects the state as shareholder from accusations of being 'political'.<sup>101</sup>

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sive than many other Western countries', Meld. St. 6 (2022–2023, A greener and more active state ownership – The State's direct ownership of companies, available in English at [ww.regjeringen.no/no/dokumenter/meld.-st.-6-20222023/id2937164/](http://ww.regjeringen.no/no/dokumenter/meld.-st.-6-20222023/id2937164/) (hereafter '2022–2023 white paper'); Section 6, figure 6.1.

97 The Norwegian state prides itself on being 'far ahead internationally in terms of the exercise of state ownership', with reference to a 2018 OECD survey, 2022–2023 white paper, Section 8.

98 United Nations Human Rights Council, From Economy of Occupation to Economy of Genocide. Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied since 1967, Francesca Albanese, 30 June 2025, A/HRC/59/23.

99 The Oil Fund's international influence on corporate governance is discussed *inter alia* in Sjøfjell/Nilsen/ Richardson, *Wake Forest Law Review* (2017) 52, 949–79; Sjøfjell/Mähönen/Sjøfjell, 241, (Section 4).

100 Innset, *Business History* 2025, 496 (511).

101 Innset, *Business History* 2025, 496 (497) on the 'new paradox of depoliticisation in which the state tries to reach political goals by not having any'.

Sjøfjell has previously undertaken an analysis of the state's corporate governance of Equinor ASA, one of the world's largest energy companies and a carbon major,<sup>102</sup> in which the state owns 67 per cent of the shares.<sup>103</sup> Her analysis shows that there are multiple references to sustainability and to mitigating the climate crisis in the state's documents, yet the state's governance is characterised by a multilayered problematic approach. Generally, the state is satisfied by expressing 'expectations' to companies, rather than using legislation to facilitate sustainable corporate governance generally, or using its corporate governance powers as a majority shareholder specifically. This is especially clear in Equinor, where the state has considerable control through company law. The state prefers 'ownership dialogue', an opaque avenue of influence of the company, which is not recognised by Norwegian company law, rather than using the general meeting. And finally, the state pursues maximum returns on its shareholding. This means that the state is not using its corporate governance to ensure true leadership in the transformation to sustainability, and it is not basing its governance on sustainability research. Ultimately, the corporate governance signal that the Norwegian state, as controlling shareholder in important companies, is sending to shareholders and companies generally in Norway (and beyond) is highly detrimental: no major changes are necessary; maximising returns for shareholders remains the priority.<sup>104</sup>

An emerging recognition of the risks of unsustainability, which started out with the financial risks of climate change, has the potential to mitigate the pressure of shareholder primacy. A specific business-driven understanding of 'sustainability risks' is now an established legal concept in EU legislation, which is being implemented in Norwegian law.<sup>105</sup> The EU's concept of sustainability risks has its weaknesses, but it does represent a powerful push for a more modern and research-based approach to corporate governance.

A full understanding of the financial and corporate risks of continued unsustainability includes risks caused by business contributing to climate change and environmental degradation, to human rights violations and

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102 Equinor, Emissions (MtCO<sub>2</sub>e), <https://carbonmajors.org/Entity/Equinor-54>.

103 Sjøfjell/Mähönen/Sjøfjell, p. 241.

104 Sjøfjell/Mähönen/Sjøfjell, p. 241 (Section 3).

105 These include the Sustainable Finance Disclosure Regulation, the Taxonomy Regulation, the CSRD, the ESRS, and the CSDDD; see Section B.I in this chapter. For a discussion of the sustainability risks approach in EU legislation, see Sjøfjell/Cornell European Law Open Vol. 3, 529–60.

other exploitation of people, to tax evasion and other undermining of the economic and governance bases for well-functioning societies.<sup>106</sup> Such a recognition would bring these aspects fully into the heart of corporate governance and of the duties of the board to promote the company's interest, whether one's view of what the company's interest entails is narrow, limited to shareholder returns, or broad and pluralistic, with the economic prosperity of the company at the core. Although the business case for sustainability has its limitations, much would be achieved if such a research-based understanding of risks was employed.<sup>107</sup>

However, the Norwegian state's follow-up as a powerful and influential shareholder aligns more with a greenwashing approach than with recognising that what historically seemed good is neither sufficient in light of the current situation nor for the future.<sup>108</sup> The state may find itself confronted with this through lawsuits. Litigation is a realisation of the liability risks of unsustainability. The Norwegian state, in its capacity as state, has been sued for facilitating unsustainable business activities, including violation of the rights of the Indigenous Sámi population in Norway,<sup>109</sup> and several rounds concerning its handing out of licences for further petroleum exploitation, thereby contributing to global climate change,<sup>110</sup> and its handing out of pollution permits for dumping of mining waste in Norwegian fjords.<sup>111</sup> There has not yet been a lawsuit against the Norwegian state as shareholder, or against NBIM as the fund manager of the Oil Fund.<sup>112</sup> When that happens

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106 Alexander (et. al)/Sjåfjell, 22; Patrick W Keys and others, *Nature Sustainability* 2019, 2, 667.

107 Alexander (et. al)/Sjåfjell, 22.

108 Sjåfjell/Mähönen/Sjåfjell, p. 241 (Section 3).

109 See e.g. Eide, *About the Wind Farms on Fosen and the Supreme Court Judgment*, 2023, <https://www.nhri.no/en/2023/about-the-wind-farms-on-fosen-and-the-supreme-court-judgment/>. The Norwegian Supreme Court decision of 2021 has still not been complied with by the Norwegian state.

110 With the at time of writing latest round involving also an Advisory Opinion from the EFTA Court, see Eide, *New EFTA Court Judgment: Combustion Emissions Must Be Assessed and Unlawful Production Licences Must Be Remedied*, 2025, <https://www.nhri.no/en/2025/new-efta-court-judgment-combustion-emissions-must-be-assessed-and-unlawful-production-licences-must-be-remedied/>.

111 See Christensen, *Full Celebration After Victory for Norwegian Fjord*, 2025, <https://fjordsoksmålet.no/2025/08/13/full-celebration-after-victory-for-norwegian-fjord> further in fn 59 above.

112 Although NBIM has had several complaints against it before the OECD National Contact Point in Norway, including in the seminal Posco case, see the Norwegian National Contact Point, *Norwegian Bank Investment Management Violates OECD*

– and it seems to be only a question of time – that may be the game changer. The critical attention to the unsustainable activities that Norway’s Oil Fund,<sup>113</sup> and the Norwegian state as a direct shareholder,<sup>114</sup> are involved in, is increasing.

#### *D. Concluding reflections: Towards sustainable corporate governance?*

The EU’s Sustainable Corporate Governance initiative of 2020 aimed to reform company law and corporate governance to promote long-term sustainable value creation.<sup>115</sup> Because of extensive pushback from shareholder primacy proponents and vested interests, this aim is not expressly included in the CSDDD, which was adopted in 2024. Rather, the CSDDD regulates the key tool of corporate sustainability due diligence. Corporate sustainability due diligence, which the CSRD and the ESRS give reporting rules on, and which the Norwegian Transparency Act regulates aspects of, is evolving as a horizontal norm.<sup>116</sup> Both the EU legislation and the Transparency Act contribute to breaking down silos between international law, on the one hand, and EU and national law on the other, as well as between law and social norms (notably, the OECD Guidelines). With this, and the international trend of lawsuits, the regulatory framework for corporate governance and the duties of the board are rapidly evolving, in spite of pushback and the Omnibus process.

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Guidelines, 2013, <https://www.responsiblebusiness.no/news/norwegian-bank-investment-management-violates-oecd-guidelines/>. See also Malaguti, Maria Chiara, *Oslo Law Review*, 1 (10).

113 Concerning Gaza, see United Nations Human Rights Council,, *From Economy of Occupation to Economy of Genocide. Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied since 1967*, Francesca Albanese, 30 June 2025, A/HRC/59/23’.

114 Concerning Brazil, see Palazzo/Bisschop/Hendlin *International Journal of Crime Justice and Social Democracy*, 2025, 1.

115 European Commission, *Sustainable Corporate Governance. Inception Impact Assessment*, 30 July 2020, Ref. Ares(2020)4034032 <[https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance\\_en](https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance_en)>. See further European Commission, *Commission Staff Working Document. Impact Assessment Report. Accompanying the Document Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937*, 24 February 2022, SWD(2022) 42 final <<https://data.consilium.europa.eu/doc/document/ST-6533-2022-ADD-5/en/pdf>>, Section 4.1.

116 Sjøfjell, *Transnational Legal Theory*, 2025, Section 3.2.3.

The Norwegian state, in its corporate governance, sets out that it wishes to work towards sustainable value creation, which is also supported by the Norwegian corporate governance code for listed companies. And yet, the Norwegian state as shareholder seems to base its corporate governance on a misleading dichotomy between political goals and business goals, and between returns on investment and sustainability. We see a mirror image of this reflected in the Omnibus discussions at the time of writing, where major legislative corporate sustainability reform is suggested 'simplified' for the sake of competitiveness of European business.<sup>117</sup> What is missing is the recognition that competitiveness, economic development, and indeed, the prosperity of all business, all people and our societies, requires working towards a safer and more just world.<sup>118</sup> In an increasingly unstable, unequal and unsafe world, steady returns are not likely in the long run for any actor.

As we have shown in this chapter, there are two opposing viewpoints in Norwegian academic literature of what the company's interest encompasses. One is that the company's interest is equivalent to the shareholders' interests, and the other is that the company's interest is pluralistic, with the economic interest of the company at the core. Those promoting the former understanding typically also claim that shareholder interests need to be understood in the long term (which gives us a hypothetical shareholder interest, rather than an actual one at any time), and that there also are other legitimate interests to be considered (close to the UK enlightened shareholder value). This conceptually reduces the distance between the two understandings. Together with the business case for more sustainable corporate governance, we could envisage that boards following either starting point could end up with the same decision. Boards that wish to do so can, as a matter of company law, integrate sustainable value creation into the aims, strategies and business operations of the company. Increasingly, they will find that law is moving towards requiring that they do so, whether in the form of legislation or in the form of court decisions. However, this

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117 Amongst the many reactions and support for existing legislation, IDVO – Initiative for Sustainable & Responsible Business Conduct, Broad Support for the CSDDD, [www.we-support-the-csddd.eu/](http://www.we-support-the-csddd.eu/).

118 See e.g. Wester van Gaal, EU-Funded Researchers Urge Rethink of 'Competitiveness' Agenda, 2025, <https://euobserver.com/eu-political/ar93b1f197>; European Coalition for Corporate Justice, Joint Press Release: Prominent Economists across the EU Warn of the Deep Costs of Weakening Sustainability Regulations, 2025, <https://corporatejustice.org/news/joint-press-release-prominent-economists-across-the-eu-warn-of-the-deep-costs-of-weakening-sustainability-regulations/>.

space for sustainable value creation is often not used, because there is a vast chasm between the pluralistic understanding of the company's interest and the social norm of shareholder primacy, which dictates, contrary to company law, that returns for shareholders are to be maximised at all costs. Clarifying what Norwegian company law actually allows, expects and requires is, we hope, a step in pushing back against this social norm.

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