Oslo Law Review

SPECIAL ISSUE: CSR AND TRANSPARENCY ACT
SCIENTIFIC PUBLICATION

Universitetsforlaget

Volume 10, No. 2-2023, p. 1–15
ISSN online: 2387-3299
DOI: https://doi.org/10.18261/olr.10.2.8

To What Extent Must, and Can, the Boards of Norwegian Limited Liability Companies and Public Limited Liability Companies Consider Sustainability?

Tore Bråthen
Professor of business law, BI Norwegian Business School
tore.brathen@bi.no

Stine Winger Minde
Lecturer and PhD Candidate in company law, BI Norwegian Business School
stine.w.minde@bi.no

Abstract

The article discusses the Norwegian judicial framework for the work by boards of limited liability companies with sustainability. Sustainability regulation is no longer a result of more or less targeted political initiatives, it largely presents as a coherent system of rules and it has in many ways indisputably been integrated into the field of company law in Norway.

The starting point for the analysis is that the boards of Norwegian limited liability companies and public limited liability companies are expected to create value for their owners, but they are also expected to do this in a sustainable manner. Therefore, we firstly give a description of the 'company interest' and its central elements. The article seeks among other things to demonstrate the trade-off between profit seeking and the board's right and duty to integrate sustainability in the management of the company.

The board's work on sustainability in limited liability companies and public limited liability companies must be carried out within the framework stipulated by company law and other legislation, the company's articles of association, and the company's other governing bodies. Neither the Limited Liability Companies Act nor the Public Limited Liability Companies Act includes any specific statutory regulation of sustainability. A starting point is, therefore, that the company law framework for the board's work on sustainability is constituted by the general rules in the Companies Acts on the board's right and duty to manage the company in accordance with the company interest. Norwegian company law is stakeholder-oriented and takes into account both shareholder interests and stakeholder interests. Company interest includes the interests of shareholders, employees, counterparties, creditors and society as a whole. As pointed out in the article, these interests include what can be described as 'sustainability considerations'.

The boards of limited liability companies and public limited liability companies must exercise their management of the company within the statutory framework. This framework also includes mandatory legislation other than the Companies Acts, for example the legislation dealing with sustainability matters. For public limited companies listed on the stock exchange, the Norwegian Code of Practice for Corporate Governance includes a specific expectation that the board must integrate sustainability into its governance of the company's business activities. Another important question is to what extent the board can attach importance to sustainability considerations. It is a prerequisite for companies to be able to consider environmental and social considerations that they are financially sustainable. However, it is conceivable that the profit motive can come into conflict with social and environmental considerations. The article discusses the balance between the profit motive and social and environmental considerations. One question deals with the board's ability to attach weight to sustainability in the light of the company's advertising and reputation values ('goodwill'). The article discusses also the relationship between sustainability and the company's ability to make gifts.

Keywords
Sustainability, company law, boards, company interest, profit motive

1. Introduction

The boards of Norwegian limited liability companies and public limited liability companies are expected to create value for their owners, but they are also expected to do this in a sustainable manner.[1] An important aspect of the legal basis for this is that the duty to take into account sustainability has indisputably become part of the field of company law in Norway. More recently, political objectives on sustainability have been formulated in company law rules such that companies, including their boards, are legally obliged to integrate sustainability into their activities.[2] The development of these rules has progressed quickly and increased extensively in number.[3] The rules are no longer purely the result of political initiatives but are now seen to be well on the way to representing a coherent system that is to a large extent developed against the background of international developments in company law. The influence of EU legislation is considerable.[4] Important new legislative milestones include rules on accounting and reporting regulation, the Norwegian Transparency Act,[5] the EU Taxonomy[6] and the EU Commission's proposal for the Corporate Sustainability Due Diligence Directive (CS3D).[7] A common theme in the development of this area of company law is that shortcomings in compliance with the framework on sustainability shouldhave direct legal and financial consequences for both companies and for the members of their boards.

This article discusses the legal framework in the Norwegian Limited Liability Companies Act and Public Limited Liability Companies Act for the board's work on sustainability.[8] However, this company law framework must also be seen in the light of a number of other statutory provisions that expand on the board's rights and duties in this area. The main statutes in this respect are the Transparency Act, the Act on the public disclosure of sustainability information in the financial sector,[9] the Accounting Act,[10] the Working Envi-

1. For public limited liability companies listed on the stock exchange, this principle is emphasised by the Norwegian Corporate Governance Board (Norsk utvalg for eierstyring og selskapsledelse (NUES)), *Norwegian Code of Practice for Corporate Governance* (NUES 2021) <https://nues.no/english/>. See Section 4.2 of the Code in particular. All URLs referenced in this article were accessed on 10 November 2023.
2. See eg the discussions on what is addressed by the field of company law in Karsten Schmidt, *Gesellschaftsrecht* ['Company Law'] (Carl Heymanns Verlag 2002) 3-4. The juridification of sustainability has not led to the development of any unambiguous legal terminology to designate the field, on which see in particular Tore Bråthen and Stine Winger Minde, 'Styrets arbeid med bærekraft etter norsk rett' ['The Board of Directors' Work on Sustainability Under Norwegian Law'] (2022) 4 *Nordisk Tidsskrift for Selskabsret* 51. See also Karl Hofstetter, 'From "Corporate Social Responsibility" to "Corporate Social Liability"? *Oxford Business Law Blog* (22 December 2022) <https://blogs.law.ox.ac.uk/oblb/blog-post/2022/12/corporate-social-responsibility-corporate-social-liability>.
3. On the development of the rules, see Bråthen and Minde (n 2) 63-74.
4. According to the EEA Agreement, Norwegian legislation must be compliant with EU law in the areas covered by the Agreement.
5. Act relating to enterprises' transparency and work on fundamental human rights and decent working conditions (the Transparency Act) (LOV-2021-06-18-99 om virksomheters åpenhet og arbeid med grunnleggende menneskerettigheter og anstendige arbeidsforhold (åpenhetsloven)).
6. 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 [2020] OJ L 198/13.
7. See News European Parlament 'Corporate sustainability: firms to tackle impact on human rights and environment' (2023) <www.europarl.europa.eu/news/en/press-room/20230424IPR82008/corporate-sustainability-firms-to-tackle-impact-on-human-rights-and-environment>.
8. Limited Liability Companies Act (LOV-1997-06-13-44 om aksjeselskaper (aksjeloven)); Public Limited Liability Companies Act (LOV-1997-06-13-45 om allmennaksjeselskaper (allmennaksjeloven). When the Norwegian Limited Liability Companies Act and the Norwegian Public Limited Liability Companies Act are referred to jointly, they are referred to as the Companies Acts.
9. Act on the public disclosure of sustainability information in the financial sector and a framework for sustainable investments (LOV-2021-12-22-161 om offentliggjøring av bærekraftsinformasjon i finanssektoren og et rammeverk for bærekraftige investeringer).
10. Act relating to annual accounts etc (Accounting Act) (LOV-1998-07-17-56 om årsregnskap mv (regnskapsloven)).

ronment Act,[11] the Internal Control Regulations,[12] the Equality and Anti-Discrimination Act,[13] the Environmental Information Act,[14] the Product Control Act,[15] the Public Procurement Act,[16] the Pollution Control Act,[17] the Nature Diversity Act etc.[18] This article does not address the details of all this legislation.[19] Similarly, the article does not address questions of liability in relation to the board's work on sustainability.

Section 2 below provides an overview of the basis in company law for the board's work on sustainability in Norwegian limited companies and public limited companies. Section 3 considers the relationship between the best interest of the company (hereinafter 'company interest') and sustainability pursuant to Norwegian law. Section 4 addresses the board's right and duty to integrate sustainability into the management of the company. Section 5 provides some concluding observations.

2. The Basis in Company Law for the Board's Work on Sustainability

The board's work on sustainability in limited liability companies and public limited liability companies must be carried out within the framework stipulated by company law and other legislation, the company's articles of association, and the company's other governing bodies.[20] Neither the Limited Liability Companies Act nor the Public Limited Liability Companies Act includes any specific statutory regulation of sustainability.[21] A starting point, therefore, is that the company law framework for the board's work on sustainability is constituted by the general rules in the Companies Acts on the board's right and duty to manage

11. Act relating to the working environment, working hours and employment protection, etc (Working Environment Act) (LOV-2005-06-17-62 om arbeidsmiljø, arbeidstid og stillingsvern mv (arbeidsmiljøloven)).
12. Regulations relating to systematic health, environmental and safety activities in enterprises (FOR-1996-12-06-1127 om om systematisk helse-, miljø- og sikkerhetsarbeid i virksomheter (Internkontrollforskriften)).
13. Act relating to equality and a prohibition against discrimination 2017 (LOV-2017-06-16-51 om likestilling og forbud mot diskriminering (likestillings- og diskrimineringsloven)).
14. Act relating to the right to environmental information and participation in decision-making processes relating to the environment (Environmental Information Act) (LOV-2003-05-09-31 om rett til miljøinformasjon og deltakelse i offentlige beslutningsprosesser av betydning for miljøet (miljøinformasjonsloven)).
15. Act Relating to the Control of Products and Consumer Services (LOV-1976-06-11-79 om kontroll med produkter og forbrukertjenester (produktkontrolloven)).
16. Act on Public Procurement (LOV-2016-06-17-73 om offentlige anskaffelser (anskaffelsesloven)).
17. Act Concerning Protection Against Pollution and Concerning Waste (LOV-1981-03-13-6 om vern mot forurensninger og om avfall (forurensningsloven)).
18. Act relating to the management of biological, geological and landscape diversity (LOV-2009-06-19-100 om forvaltning av naturens mangfold (naturmangfoldloven)).
19. See, however, Bråthen and Minde (n 2) 50-74.
20. See Magnus Aarbakke and others, *Aksjeloven og Allmennaksjeloven* (Universitetsforlaget 2017) commentary on §§ 5-1 and 6-12 on the division of competence between the corporate bodies; online version (in Norwegian) available at <https://juridika.no/no/lov/1997-06-13-44> (login required).
21. The fact that companies' responsibility for their surroundings is only regulated to a limited extent by Norwegian company law is based on a long-standing and traditional division of roles between the factors and tasks that company legislation and other legislation, particularly industry and administrative legislation, should address. See inter alia Proposition to the Parliament, Ot prp nr 19 (1974-1975) Lov om aksjeselskaper, 17ff. The primary task of company law is to ensure economic efficiency, while the framework legislation is intended to protect the interests of society, including in relation to sustainability considerations. The distinction between framework legislation and limited company legislation is not, however, always as clear, something which has become apparent inter alia in the work on the new proposed corporate sustainability due diligence directive CSDDD) (Proposal for a Directive on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (COM/2022/71 final). See Bråthen and Minde (n 2) 71-74. There have recently been examples of sustainability being closely linked to company law in different public documents. See eg Proposition to the Parliament, Prop S 136 LS (2020-2021) Endringer i aksjelovgivningen mv 5; Report to the Parliament, St meld 8 (2019-2020) Statens direkte eierskap i selskaper – Bærekraftig verdiskaping 76 ('White Paper on Ownership').

the company in accordance with the company interest (cf § 6-12 of the Companies Acts).[22] In addition, the board's duty to integrate sustainability into the management of the company must be seen in light of Companies Acts § 6-13. The statutory provision requires the board to supervise the day-to-day management of the company's business in general, which may include issuing instructions for the general manager of the company.[23]

3. General Comments on Company Interest and Considerations of Sustainability

3.1 The Norwegian Discussion on Company Interest

When the board exercises its authority, situations often arise where it must balance conflicting considerations. For the purposes of this balance, the company interest is an independent hurdle for the board's management of the company.

The question of which considerations and stakeholders the boards of limited liability companies and public limited companies must or can take into account for the management of the company, is broad in nature and forms part of the continuing global debate on corporate governance.[24] There has been a great deal of discussion in the EU, the USA and elsewhere on which role shareholders and other stakeholders should play in limited liability companies.[25] International literature on this theme can be overwhelming and is sometimes both strident and polarised. However, in the case of Norwegian law, there has been relatively little attention paid to the question of what importance should be attached to various considerations and interests in determining the 'company interest'.[26]

---

22. See Aarbakke and others (n 20) commentary on the Companies Acts § 6-12; Mads Henry Andenæs (with Ole Andenæs, Stig Berge and Margrethe Buskerud Christoffersen), *Aksjeselskaper og allmennaksjeselskaper* ['Limited Liability Companies and Public Limited Liability Companies'] (3rd edn, Calax 2016) 364-367; Olav Fr Perland, 'Styreansvar etter de nye aksjelovene – har ansvaret blitt skjerpet?' (1999) 2 *Tidsskrift for forretningsjus* 125 <https://doi.org/10.18261/ISSN0809-9510-1999-02-01>.
23. See Aarbakke and others (n 20) commentary on the Companies Acts § 6-13.
24. See Tore Bråthen, *Selskapsrett* (Fagbokforlaget 2022) 87-95, regarding the Norwegian corporate governance debate.
25. See inter alia Commission Proposal for a Directive on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (COM/2022/71 final); Marcel Kahan and Edward Rock, 'Shareholder Primacy: The Emergence of Welfarist Corporate Governance' (2023) <https://corpgov.law.harvard.edu/tag/shareholder-primacy/>; Marcel Kahan and Edward Rock, 'Stakeholders: The Emergence of Welfarist Corporate Governance' (2023) <https://corpgov.law.harvard.edu/tag/stakeholders/>. See also eg Lucian Bebchuck and Roberto Tallarita, 'The Illusory Promise of Stakeholder Governance' (2020) 106 *Cornell Law Review* 91; Mathieu Pellerin, 'The Economics of Stakeholder Governance' (2022) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4165764>, regarding shareholder and stakeholder value; and Oliver D Hart and Luigi Zingales, 'The New Corporate Governance' (2022) 1/1 *University of Chicago Business Law Review* 195. On the relationship between shareholder and enlightened shareholder value, see eg Lucian Bebchuk, Kobi Kastiel and Roberto Tallarita, 'Does Enlightened Shareholder Value Add Value?' (2022) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4065731>. See also Daniel Stattin, *Aktiebolagets funktion* (Iustus 2021) 354-361.
26. In the mid-1990s, this was the case because, under Norwegian law, the idea that a limited company's management was entitled to emphasise employees' conditions (beyond the requirements of legislation) and the social consequences of such a decision was hardly controversial: see Clement Endresen, '"Selskapets interesse" som retningsgivende for den nærmere forståelse av plikten til "likebehandling av aksjonærene". Særlig om objektselskapets medvirkning til spredningssalg' (1996) 2(3) *Tidsskrift for Forretningsjus* 45 <https://doi.org/10.18261/ISSN0809-9510-1996-03-04>. Another probable explanation is that developments have taken place gradually over a long period of time, such that they have kept up with changing attitudes in society. More recently, the 'Sustainability Law' research group (<www.jus.uio.no/english/research/areas/sustainabilitylaw/>), previously called 'Companies, Markets and Sustainability' (or 'the Company Law Group') has published an extensive range of works related to limited companies and sustainability. See eg Beate Sjåfjell, 'Sustainable Companies: Possibilities and Barriers in Norwegian Company Law, Nordic & European Company Law' (2013) *LSN Research Paper* Series No 10-42, and Beate Sjåfjell, Andrew Johnston, Linn Anker-Sørensen and David Millon, 'Shareholder primacy: the main barrier to sustainable companies' in Beate Sjåfjell and Benjamin J Richardson (eds), *Company Law and Sus-*

Discussions on which considerations limited liability companies and public limited companies should take into account are often linked up with theories that are described with reference to 'shareholder value' and 'stakeholder value'.[27] There can be no doubt that Norwegian company law takes into account both shareholder interests and stakeholder interests.[28] Stattin contends that Norwegian company law is significantly more stakeholder-oriented than Swedish company law, and is also more stakeholder-oriented than Danish and Finnish company law.[29] Yet, how Norwegian companies balance the considerations relevant to the different stakeholder groups cannot be described using a simple formula based on either 'shareholder value theory' or 'stakeholder value theory', or on any compromise solutions or opinions on companies' responsibility for sustainability.[30] It relates in part to the fact that rules and practices that are based on a company's wish to promote sustainability may make it attractive to business counterparties, to current or future employees and to society as a whole—and overall these factors have positive financial consequences for the company. This means that the company's work to promote sustainability may also safeguard shareholders' interests as represented by 'shareholder value'.[31]

The question of how far Norwegian company law extends in respect of which stakeholder interests should be protected, and, where this is the case, how the company should carry out such protection, is not always clear. In many areas, however, Norwegian company law has taken a position on which considerations limited companies should take into account, and it can be said that in some areas Norwegian law goes a relatively long way to facilitate the board's work on promoting sustainability. Discussions in Norwegian company law on which considerations limited liability companies and public limited companies should take into account are to a large extent linked to the concepts of 'the company's interest', 'company interest' etc.[32]

---

tainability: Legal Barriers and Opportunities (Cambridge University Press 2015) 79-147 <https://doi.org/10.1017/CBO9781107337978.005>.

27. In simple terms, 'shareholder value' is based on the idea that the company exists for its owners, and its purpose is to serve its owners' interests. This theory, and variants of it, are also often discussed using terms such as shareholder primacy, shareholder wealth maximisation, enlightened shareholder value and pluralistic stakeholderism. Theories of 'stakeholder value', in contrast, are based on the idea that a company has more stakeholder groups than just its shareholders, including its employees, its creditors and society, and the idea that companies exist to serve broader societal interests and that this must form the basis for the way in which the company is run. Other and similar theories are discussions related to corporate purpose and the 'grow-the-pie' theory. However, these concepts have not played any prominent role in Norwegian discussions. This is partly because international discussions are to a large extent linked to considerations that often do not correspond with the considerations for the regulation of limited liability companies and public limited companies under Norwegian company law. Common to the various terms and theories, including the term 'company interest' is that they are different approaches to the considerations that limited liability companies have to address. The discussions and the topics must, nevertheless, be overlapping to a large degree.
28. See section 3.2 regarding 'company interest'.
29. Stattin (n 25) 392.
30. Bråthen (n 24) 81.
31. Ibid 83. Compare eg Stattin (n 25) 304-309. See also sections 4.1 and 4.3.4.
32. On the company interest in Norwegian legal literature, see eg Aarbakke and others (n 20) notes 1.9 and 1.10; Kristin Normann Aarum, *Styremedlemmers erstatningsansvar i aksjeselskaper* [*Board Members' Liability for Compensation in Limited Liability Companies*] (Gyldendal 1994) 363-374; Andenæs (n 22) 344-346; Bråthen (n 24) 79-85; Jacob Bjønness-Jacobsen, *Granskning etter aksjelovene* [*The Investigation of Companies Pursuant to the Companies Acts*] (Universitetsforlaget 2022) 45-60; Gina Bråthen, *Kapitalforhøyelse i henhold til styrefullmakt* ['*Capital Increases in Accordance with Board Authorisation*'] (Gyldendal akademisk 2014) 172-175; Remi Christoffer Dramstad, 'M & A Break Fee-klausuler i et norsk perspektiv' ['Break Fee Clauses from a Norwegian Perspective'] (2011) 17(3) *Tidsskrift for Forretningsjus* 165-168; Endresen (n 26); Lisa Charlotte Jakobsen, 'Vinningsformålet i norsk aksjeselskapsrett' ['The Profit Motive in Norwegian Law'] (2018) *Munin UiT* <https://munin.uit.no/bitstream/handle/10037/13431/thesis.pdf?sequence=2&isAllowed> 19-21; Hedvig Bugge Reiersen, *Aksjelovenes utdelingsbegrep* (Universitetsforlaget 2015) 268-269; Beate Sjåfjell, 'Kan aksjeselskaper sette miljøet foran gevinstkravet?'

3.2 Further Details on the Concept of Company Interest in Norwegian Law

The starting point for determining company interest in Norwegian law is what is in the best interest of the company as an independent legal person in the short and long term.[33] However, neither the Limited Liability Companies Act nor the Public Limited Liability Companies Act stipulates what is meant by the concept of company interest. On the other hand, both the preparatory work on the Companies Acts and legal precedent help to clarify the concept.[34] On a general basis, it can be asserted that the company interest is not a single unambiguous concept, but is used to refer to the various interests that may arise in the company, and which when taken as a whole establish the guidelines for how the company should operate.[35] Company interest therefore includes the interests of shareholders, employees, counterparties, creditors and society as a whole. As pointed out in this article, these interests include what can be described as 'sustainability considerations'.

The most central element in company interest is the profit motive.[36] The profit motive must be seen in connection with the overall objective of company law, which is to contribute to value creation by making optimal use of society's resources.[37] The profit motive means that the company shall carry out activities that are intended to generate a financial surplus, and that the surplus shall go to the shareholders.[38] It is fundamental in a market-driven society that in order for companies to be able to exist in both the short and long term they must work towards generating profits.[39] The profit motive represents an important pre-requisite for both limited liability companies and public limited companies to be able to attract equity capital and loan capital.[40] Limited liability companies and public limited companies are normally established in order to provide financial profit for shareholders, and the shareholders' interest in receiving a financial return on their investment is closely related to this objective.[41] In addition, it is in the interests of the company's creditors that the company pursues a profit motive, in part on the basis of the disciplining effect of operating with such a motive.[42] The profit motive is therefore an overall objective for the company's activities, and sets hurdles for how both the board and the majority of shareholders can act without incurring liability.[43]

However, the profit motive must be subject to a number of modifications.[44] This arises because, under Norwegian law, limited liability companies and public limited companies

['Can Limited Liability Companies Put the Environment Above the Requirement for Profit?'] (2011) 46(6) *Jussens Venner* 309-324; Sjåfjell and others (n 26) 79, 105; Filip Truyen, *Aksjonærenes myndighetsmisbruk* ['*Shareholders' Misuse of Their Authority*'] (Cappelen Damm Akademisk 2005) 176-193; Lucy Smith, *Kampen på aksjemarkedet* [*The Struggle on the Stock Market*] (Universitetsforlaget 1988) 45-61; and Geir Woxholth, *Selskapsrett* [*Company Law*] (Gyldendal 2021) 124-132.

33. Proposition to the Parliament, Prop 135 L (2018–2019) Endringer i aksjelovgivningen mv (langsiktig eierskap i noterte selskaper mv) 95.
34. See eg ibid 95 and 99; NOU [Norwegian Official Report] 1993:3 Strafferettslige regler i terroristbekjempelsen 38; HR-2017-2375-A, Ulvesund case (Supreme Court of Norway) para 37; HR-2018-570-A, Tandberg case (Supreme Court of Norway) para 41. Preparatory works can play an important in interpretation of the Norwegian Acts.
35. See note 32 for references to legal literature on the company interest.
36. Jakobsen (n 32) 11-36; Truyen (n 32) 107-112. Cf eg Stattin (n 25) 245ff.
37. See eg Reinier Kraakman and others, *The Anatomy of Corporate Law* (Oxford University Press 2017) 22-24.
38. The term 'profit motive' is also often discussed as the 'principle of return maximisation' or the 'principle of profit maximisation'. The profit motive is not explicitly present in the Limited Liability Companies Act or in the Public Limited Liability Companies Act but is read into these Acts at § 1-1(3) no 2 and § 2-2(2).
39. Rolf Skog, 'Om betydelsen av vinstsyftet i aktiebolagslagen' (2015) *Svensk Jurist Tidning* 11, 17.
40. ibid.
41. HR-2016-1439-A, *Bergshav Holding* case (Supreme Court of Norway) para 97; Jakobsen (n 32) 11-36.
42. Jakobsen (n 32) 16-17.
43. Normann Aarum (n 32) 364; Truyen (n 32) 106.
44. Recommendations of the Protocol Committee 1970:1 123; Normann Aarum (n 32) 364; Bråthen (n 24) 81-85; Jakobsen (n 32) 21ff.; Truyen (n 32) 111-112.

must also take into account other considerations.[45] It is not the case that any decision which reduces the financial profit for the benefit of the owners is in conflict with the company's interests.[46]

3.3 Initial Comments on the Balance between Profit Motive and Companies' Responsibility for Sustainability

There can be some disagreement over how companies should balance the profit motive and their responsibility for sustainability. In connection with the board's fulfilment of its duties in relation to managing the company's interests in accordance with § 6-12 of the Companies Act, the board has considerable freedom in its actions, including working to promote sustainability. The preparatory work for the Companies Acts included the statement that:

> 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 in respect of creditors and other counterparties, employees, and the broader interests of society.[47]

In addition to confirming that considering wider societal interests is relevant, this statement can be interpreted as meaning that the larger the company, the more weight it should give to the protection of the broader interests of society as a whole.

We turn to the topic of the balance between profit motive and other interests in greater detail in section 4.

4. The Board's Right and Duty to Integrate Sustainability into the Management of the Company

4.1 General Comments on the Board's Management of the Company and its Work on Sustainability

The boards of limited liability companies and public limited liability companies must exercise their management of the company within the statutory framework (see provisions such as § 6-28(2) of the Companies Acts).[48] This framework also includes mandatory legislation other than the Companies Acts, for example the Pollution Control Act and the Nature Diversity Act, which regulate the protection of the environment with the objective of reducing adverse external effects.[49] The board must, for as long as the company is subject to the legislation in question, comply with the statutory requirements relating to sustainability report-

45. Aarbakke and others (n 20) notes 1.9 and 1.10; Andenæs (n 22) 344-345; Bråthen (n 24) 79ff; Jakobsen (n 32) 19ff; Beate Sjåfjell, 'Kan aksjeselskaper sette miljøet foran gevinstkravet?' ['Can Limited Liability Companies Put the Environment Above the Requirement for Profit?' (2011) 46(6) *Jussens Venner* 309, 320.
46. Jakobsen (n 32) 29-36 regarding restrictions on the profit motive. One question that falls outside the scope of this article is whether it is the profit motive that can be made subject to restrictions (accordingly, the profit motive is in itself 'elastic') or whether there are other aspects of company interest that are given greater weight at the expense of the profit motive.
47. Ot prp nr 23 (1996-1997) Om lov om aksjeselskaper (aksjeloven) og lov om allmennaksjeselskaper (allmennaksjeloven) 64.
48. The question of whether the profit motive can be deviated from ethical standards/considerations/principles has been discussed in legal literature. See eg Jakobsen (n 32) 32-36; Sjåfjell (n 45) 309, 320-323; Truyen (n 32) 111. This discussion falls outside the scope of this article.
49. See eg the Pollution Control Act (n 17) § 7 and the Nature Diversity Act (n 18) § 6.

ing and operate the company in accordance with the framework of the Transparency Act.[50] Even though companies could achieve greater earnings by breaking the law, this is obviously not acceptable.[51] For example, the board undoubtedly cannot make use of corruption even though this in isolation could contribute to the company winning new contracts or could make it easier to carry out its obligations, and therefore achieve financial benefit to the advantage of the company. A decision that is in breach of the requirement in Companies Acts § 3-4 that the company must have adequate equity and liquidity is similarly illegal even if it is anchored in 'sustainability considerations'. However, in deciding whether the decision was indefensible, the reasons for the decision may be relevant.[52]

The board's right and duty to integrate sustainability into the management of the company can, however, also be of significance to the board's work in various other ways. In the first instance, the board must evaluate its normal activities and prioritise the challenges related to these in the light of sustainability considerations. For companies that are subject to the Transparency Act, this duty is explicitly required, including by the provisions of § 4 of the Act.[53] However, the board must in any case integrate sustainability considerations into the activities of the company as part of its management of the company in accordance with the general rules in the Companies Acts on the board's responsibility for the management of the company (see Companies Acts § 6-12). The board also has an overriding and independent responsibility to ensure that the company's activities are carried out in accordance with provisions of other legislation etc.[54] For example, the board must keep itself informed on whether and to what extent the company complies with standards for working conditions, what requirements in respect of human rights and environmental standards the company imposes on its suppliers etc., and how the company affects the local society. The extent to which the company takes into account sustainability considerations may also be significant for the board's monitoring of financial and operational risks related to the company's activities and value creation. The board's duties in this area naturally depend in part on the nature of the company's business, its scale, geographic location etc.[55] However, the fact that the board may have a duty to integrate sustainability as part of risk management is in principle no different from the duty to manage all risks that may be relevant to the company's value creation.[56]

In the second instance, the board may have a duty pursuant to Companies Acts § 6-12(2) to set targets and lay down guidelines for the company's work on sustainability, including the question of whether the company should have an overall strategy for sustainability. Such a duty also applies indirectly pursuant to the Transparency Act §§ 4 to 7.[57] Depending on factors such as the type of company, its activities, requirements imposed by shareholders

50. Bråthen and Minde (n 2) 63-71. Compare the overview by PwC, 'Standarder for bærekraftsrapportering' <www.pwc.no/no/pwc-aktuelt/baerekraftsrapportering/standarder-for-baerekraftsrapportering.html>.
51. Bråthen (n 24) 83.
52. Ot prp nr 55 (2005-2006) Om lov om endringer i aksjelovgivningen mv 114.
53. Bråthen and Minde (n 2) 68-70.
54. Duties of this type are imposed inter alia by framework legislation such as the aforementioned Working Environment Act, the Internal Control Regulations, the Equality and Anti-Discrimination Act, the Environmental Information Act, the Product Control Act, the Procurement Act, the Pollution Control Act, the Nature Diversity Act etc. See section 2 on the limited consideration of these Acts in this article.
55. See section 3.3.
56. See Alex Edmans, 'The End of ESG' [2023] *ECGI* Finance Working Paper No 857/2002, which contains similar considerations, such as 'ESG is nothing special. It shouldn't be put on a pedestal compared to other intangible assets that affect both shareholder and stakeholder value'.
57. Bråthen and Minde (n 2) 68-70.

through the general meeting etc, it may moreover be deemed to be inadequate management of the company if the board fails to integrate more specific work on sustainability into the company's business activities. This is related to the increasing awareness and expectations in society as a whole in relation to matters of sustainability. A company that does not adapt its business to market expectations risks loss of reputation and consequently financial loss.[58]

One consequence of the duty to set targets and lay down guidelines for the company's business activities, including for its work on sustainability, may be that the board should set specific targets in relation to the company's energy consumption, CO2 emissions etc, how the company prevents corruption, child labour, work-related injuries etc by its suppliers, and how the company will ensure fundamental human rights and decent working conditions throughout its supplier chains etc.

In the third instance, the board may have a duty to monitor and follow up measures related to the company's work on sustainability (see Companies Acts § 6-13). This may mean that the board must focus on matters including the company's energy consumption, the amount of packaging the company uses, its CO2 emissions, complaints about noise from neighbours/other parties etc. In addition to this, the boards of companies that are subject to the Transparency Act may have a duty to track the implementation and results of measures to cease, prevent or mitigate adverse impacts on fundamental human rights and decent working conditions based on the businesses' priorities and assessments.[59]

In the fourth instance, the boards of certain specific large companies may have a duty to report on the board's work on sustainability to affected stakeholders and holders of rights among others.[60] However, the requirement to publicly disclose sustainability information in accordance with the Taxonomy Regulation and the Disclosure Regulation may also apply to small and medium-sized companies.[61] Accordingly, legal requirements that in the first instance apply to a small number of companies may have an effect on the governance of many other companies. The boards of companies that have counterparties which have a duty to publish sustainability information pursuant to the Taxonomy Regulation and the Disclosure Regulation will be required to arrange the management of their activities in accordance with the framework dictated by the relevant counterparties, including requirements to comply with the Taxonomy Regulation and the Disclosure Regulation.

In the fifth instance, the boards of companies that are subject to the Transparency Act may have a duty to provide for or cooperate in remediation and compensation if the company has been complicit in breaches of fundamental human rights or decent working conditions (see Transparency Act § 4 first paragraph, items e and f).[62]

4.2 NUES Code of Practice in Relation to the Board's Responsibility for Sustainability

For public limited companies listed on the stock exchange, the NUES Code of Practice includes a specific expectation at Section 2, second paragraph, that the board must integrate sustainability into its governance of the company's business activities.[63]

---

58. See eg Caroline D Ditlev-Simonsen, *A Guide to Sustainable Corporate Responsibility: From Theory to Action* (Palgrave Macmillan 2022) 168; cf Bråthen (n 24) 83.
59. Bråthen and Minde (n 2) 68-70.
60. ibid 63-68, 70.
61. ibid 67-68.
62. ibid 68-70.
63. The Norwegian Code of Practice for Corporate Governance (NUES Code of Practice) is issued by the Norwegian Corporate Governance Board (NUES), which comprises eight major business organisations: see <www.nues.no/english/>. The Code is aimed directly at companies listed on the Oslo stock exchange and Euronext Expand.

At all times since the first NUES Code of Practice in 2004, NUES has emphasised the importance of good relationships with society as a whole and with the stakeholder groups that are affected by the company's activities.[64] Listed companies, which NUES targets directly, manage a significant proportion of the country's assets and generate a major part of value creation. It is therefore in the interests of these companies and of society as a whole that they are directed and controlled in an appropriate and satisfactory manner. However, there have been changes over the years to the formulation of the recommendations in respect of how the interests of society as a whole and stakeholders should be taken into account.

Section 2 of the current NUES Code of Practice states that the board should take into account sustainability in the company's objectives, strategies and risk profiles such that the company creates value for shareholders in a sustainable manner.[65] According to the NUES commentary to Section 2, the objective is that considerations of sustainability shall be closely linked to the company's activities and value creation. This is accordingly a recommendation on *how* the company should create value. This represents a difference from previous editions of the recommendations. Earlier recommendations in respect of corporate social responsibility have expressed the view that companies should produce guidelines but that it was a matter for the companies themselves to decide whether they wished to exercise social corporate responsibility/sustainability. However, it is a central point in the new recommendation on sustainability that value creation should continue to take place with a view to creating value for shareholders.

The recommendation does not define the concept of sustainability other than that value creation should take into account financial, social and environmental considerations. It is for the board to identify and assess which aspects of sustainability are relevant to the company. NUES accordingly anticipates that the board must have an active involvement in how the company creates value and affects society.

4.3 To What Extent can the Board attach Importance to Sustainability Considerations?

4.3.1 Introduction

The boards of limited liability companies and public limited liability companies can consider sustainability within the framework of company interest. The company interest includes the profit motive which plays a key role. The profit motive must be pursued within the framework imposed by the company's objective as defined in its articles of association.[66]

Similar corporate governance codes exist in numerous countries: see European corporate governance institute, 'Codes' (ECGI) <https://ecgi.global/content/codes>. A general feature of corporate governance codes is that they are 'soft law', in contrast to company legislation (ie 'hard law'). On the difference between soft and hard law in general, see eg Jan Klabbers, 'The Redundancy of Soft Law' (1969) 65 *Nordic Journal of International Law* 167; Arnold N Pronto, 'Understanding the Hard/Soft Distinction in International Law' (2015) 48(4) *Vanderbilt Journal of Transnational Law* 941; Gregory Shaffer and Mark A Pollack, 'Hard vs. Soft Law: Alternatives, Complements and Antagonists in International Governance' (2009) *Minnesota Legal Studies* Research Paper Series No 09-23. On soft law in company law, see eg Per Lekvall, *The Nordic Corporate Governance Model* (SNS Förlag 2014) 36ff; Daniel Stattin, 'Soft Law och Hard Law – Om sambandet mellan Svensk kod for bolagsstyrning och aktiebolagsrätten' (2006) 1 *Nordisk Tidsskrift for Selskabsret* 107.

64. Stine Winger Minde, 'Ny anbefaling om god selskapsledelse og eierstyring' ['The New Norwegian Code of Practice for Corporate Governance'] (2021) 8 *Revisjon og Regnskap* 28, 30.
65. ibid 29-31 on the background to the Code.
66. A company's stated objective determines the limits on the type of activity it can undertake, but it does not specifically regulate the actions that can be undertaken on the company's behalf in order for it to meet its objective. See Aarbakke and others (n 20) commentary on the Limited Liability Companies Acts § 2-2 note 1.3; Bråthen (n 32) 176-179, regarding the significance of a company's stated objective in its articles of association.

It is a prerequisite for companies to be able to consider environmental and social considerations that they are financially sustainable.[67] However, it is conceivable that the profit motive can come into conflict with social and environmental considerations.

Other than the duties stipulated by legislation, explicit provisions in the articles of association or instructions given by the general meeting, the board has no duty to choose the most environmentally friendly alternatives. However, in connection with performing its tasks in respect of the management of the company interest in accordance with Companies Acts § 6-12, the board does have a great deal of freedom to act, including to work to promote sustainability even though this may in the short term reduce the opportunity for shareholder dividends. The concept of company interest does create some room for manoeuvre in that the board does not necessarily have to choose the alternative which will give the greatest profit in the short term, but it can also take into account long-term positive effects.[68]

The following sections consider more closely the specific types of case where the relationship between the profit motive and the board's work on sustainability can come to the forefront.

4.3.2 The Role of Shareholders and Their Significance for the Board's Scope for Attaching Importance to Sustainability Considerations

By passing a resolution at the general meeting, which in accordance with Companies Acts § 5-1 is the company's highest authority, shareholders can give the board instructions on whether and to what extent sustainability considerations should be taken into account.[69] The ability of the general meeting to give the board instructions on all types of matters applies as a general rule and is not limited to instructions on sustainability matters. In addition, shareholders can act through the general meeting to elect persons as members of the board who they are confident will act in accordance with the shareholders' wishes on questions concerning sustainability, and the general meeting can in the normal way remove board members who do not act in accordance with the wishes of the majority at a general meeting (see Companies Acts § 6-3(1) and § 6-7(2)).

Shareholders can also give the board more informal guidance on how the board should prioritise sustainability. This can, for example, take place through statements that express the owners' views.[70] An illustration of this can be found in the general meeting of Equinor ASA in May 2022 at which KLP voted against Equinor's proposal for an Energy Transition Plan, while at the same time KLP published on its website an explanation of its voting decision and asked Equinor to clarify major elements of the proposed plan before it would consider supporting the proposal.[71] Such norms are used both nationally and internationally to

67. See eg Proposition to the Parliament (n 21) 5 ('The Government wants company legislation to be designed such that it stimulates value creation by business and industry within the limits of sustainability') and Report to the Parliament Meld St 8 (2019-2020) 76 ('Value creation over time requires a company to be sustainable. A sustainable company balances financial, social and environmental factors in a way that contributes to long-term value creation, while ensuring that today's needs are met without compromising the ability of future generations to meet their own needs').
68. Norwegian company law requires a long-term perspective: see eg Aarbakke and others (n 20) commentary on the Limited Liability Companies Act § 6-12 note 1.10; Andenæs (n 22) 345-346; Jakobsen (n 32) 27; Truyen (n 32) 109 and 135L (2018-2019) (n 32) 93. See also Stattin (n 25) 288-292.
69. See section 4.3.1.
70. Bråthen (n 24) 83.
71. KLP, 'KLP ber om videreutvikling av Equinors energiomstillingsplan' (KLP 2022) <www.klp.no/sparing-og-fond/artikler/klp-ber-om-videreutvikling-av-equinors-energiomstillingsplan>. Shareholders are not entitled to receive a minuted explanation of how shareholders voted etc. in the minutes to a General Meeting, cf Bråthen (n 24) 209.

an increasing extent by owners who want to encourage companies in the direction of sustainability.[72] With effect from 2022, the current Norwegian Government's White Paper on state ownership sets out ten principles for good corporate governance that apply directly to the state's exercise of its ownership in companies in which it has a shareholder interest, and the white paper also sets out the state's expectations for these companies. One premise for the most recent white paper on state ownership is that the state will exercise its ownership more actively than previously to promote public interests related inter alia to climate and sustainability.[73] In the 2022 White Paper, the government provides a clear expression of the state's expectations in respect of sustainability and social responsibility.[74]

A further example is KLP's expectations as an owner for companies in which KLP and KLP's mutual funds invest.[75] KLP states that:

> The purpose of this document is to describe how KLP and KLP Mutual funds (KLP), as a responsible investor, expects companies to work with respect to responsible business practice and sustainable value creation. This means profitable business models that are not harmful to people or the environment, and that contribute towards the achievement of globally adopted goals for a sustainable future.

Another example is the Climate Action Plan published by NBIM (Norges Bank Investment Management), which states inter alia:

> It is the goal of our responsible investment management for our portfolio companies to align their activities with global net zero emissions in line with the Paris Agreement.[76]

In principle, the board is not bound by informal guidance that is not in the form of a resolution approved by the general meeting. However, this type of guidance on expectations can nonetheless be of indirect significance by giving the board an incentive to attach importance to sustainability. Nonetheless, the board cannot 'hide behind' a decision to attach weight to sustainability just because the decision corresponds with guidance from shareholders. The board still has an independent responsibility to take into account the company interest and for its decisions to be within the framework of legislation and the articles of association.[77] This means that the board cannot pursue an objective that is of particular interest to only one part of its shareholders (see Companies Acts § 6-28).[78] This continues to apply even if the view of the shareholders in question is anchored in sustainability considerations. Norms that express shareholders' expectations for the board in respect of sustainability must be assessed on the basis that they do not necessarily represent the views of all shareholders and/or the majority of shareholders.

---

72. See eg BlackRock, 'BlackRock Investment Stewardship' <www.blackrock.com/corporate/about-us/investment-stewardship>.
73. The Royal Ministry of Trade, Industry and Fisheries, Meld St 6 (2022-2023) *Report to the Storting Greener and more active state ownership. The State's direct ownership of companies* (White paper 2022) 5.
74. ibid 80-81.
75. KLP, *KLP's expectations as an investor* (2020) <www.klp.no/en/english-pdf/KLPs%20expectations%20as%20an%20investor.pdf>.
76. Norges Bank Investment Management, *2025 Climate action plan* (2022) <www.nbim.no/contentassets/2a7c78b9185b4a21986b09f85b854e81/2025-climate-action-plan_web.pdf>.
77. See section 3.2.
78. Truyen (n 32); Bråthen (n 32).

4.3.3 The Board's Ability to Attach Weight to Sustainability in the Light of the Company's Advertising and Reputation Values ('Goodwill')

It can also form part of the profit motive to act in such a way that the company does not incur damage.[79] By way of example, if a company has a bad reputation as a result of not taking sustainability into account to a sufficient degree this may represent a hindrance to achieving its profit motive. In many cases, there will consequently be accordance between shareholders' interests in the company achieving the highest possible return and taking into account sustainability considerations. Shareholders' interests can be served by the company maintaining a good reputation through positive interaction with the outside world.

The ability of the board to attach weight to sustainability in the light of its advertising and reputation value was confirmed by a Norwegian court decision in the Freia case (Rt-1922-272) where a majority of the general meeting of A/S Freia Chokolade Fabrik had approved a gift of NOK 250,000 to establish a fund for medical research. A minority of shareholders asserted that the gift was in conflict with their financial interests as shareholders and brought an annulment action. However, the Supreme Court ruled that the gift was lawful. One basis for this, according to the Supreme Court, was that the

> general meeting as the company's highest organ must have comprehensive authority sufficient to also approve a gift which it considers, even if only indirectly or in the long term, that the gift will serve to promote the company's interests within the framework for the company's objective, even if a minority at the general meeting has a different view of the matter.

In this case, the Supreme Court expressed directly that the profit motive does not rule out actions that 'only indirectly or in the long term' can serve to satisfy the profit motive within the framework of the company's objective. In addition, the ruling must be seen in the context that it dealt with a general meeting decision. The Supreme Court pointed out that the 'management had identified that the donation would have major significance as advertising for the company and its future activities, namely because it would result in awareness of the company and attract interest in a way that would be very favourable for the company'. A 'gift' that has such an effect is not a 'gift' in the sense of the company law, but it represents marketing that forms part the board's general right and duty to manage the company (see Companies Acts § 6-12).[80] In such a case, it is more a question of how the company carries out its marketing and a question of finding a balance between the profit motive and the board's work on sustainability.

4.3.4 Relationship Between Sustainability and the Ability to Make Gifts

Another question that arises is whether the board can attach weight to sustainability considerations when it is a question of a disposition that will neither directly, indirectly or in the long term be of financial benefit to the company. The board's scope of action in such cases is regulated by the Companies Acts § 8-6(2) on gifts, which addresses the question of balancing different interests when considering the question of whether the company's assets can be used to make a gift.[81] The board can decide to grant 'occasional gifts, and moreover gifts

79. Bråthen (n 24) 83.
80. NUT 1970:1 Innstilling til lov om aksjeselskaper 174, which hardly suggests otherwise.
81. Tore Bråthen, 'Samfunnsansvar – selskapers adgang til å gi gaver til allmennyttige formål' ['Companies' Right to Make Gifts for the Purpose of the Public Good'] (2006) 22(4) *Praktisk økonomi & finans* 27 <https://doi.org/10.18261/ISSN1504-2871-2006-04-05>.

for public benefit or similar purposes which must be deemed to be reasonable in view of the purpose of the gift, the company's position and the circumstances in general', so long as any such gifts 'by the standard of the company are of minor importance' (Companies Acts § 8-6(2)). This in principle also includes gifts that are justified by the objective of promoting sustainability. In the Freia case (Rt-1922-272), the Supreme Court commented as follows on gifts approved by the general meeting:

> The objective of the company must no doubt be to carry on an economic activity; but participants in the company cannot have the right to understand this to mean that the company must otherwise isolate itself from the society in which it operates and confine itself in relation to society to doing only what it legally has to do in the company's best financial interest. A social understanding which has become commonplace is the view that it is increasingly natural and correct for companies in business to make voluntary contributions to public purposes to a reasonable extent, according to the company's situation and circumstances, and any person who participates in such a company must, unless otherwise agreed, accept that the general meeting of the company should sensibly take into account and act in accordance with this view, even if a minority of the company's participants object.

Even though this statement directly deals with gifts approved by the general meeting, the same principle applies to gifts approved by the board (see Companies Acts § 8-6(2)). However, as mentioned, the board's competence is restricted to gifts that are of minor importance in relation to the company's situation. The expression 'minor importance' refers to the company's financial situation.[82] In assessing whether a gift can be deemed to be reasonable on the basis of the purpose of the gift, the company's position and the circumstances in general, the question of closeness to the company interest should also be considered. When taking a view on whether a gift is reasonable on the basis of circumstances in general, the increased level of interest in companies' responsibility for sustainability must be a relevant consideration.[83]

However, gifts that are based on considerations of sustainability also require the board to ensure that the company has established a satisfactory framework for such a donation.[84] This also forms part of the board's work on sustainability. Gifts have an in-built risk of corruption, and they must be closely monitored in relation to anti-corruption legislation. Regardless of whether a gift is decided by the general meeting or the board, the board must ensure in connection both with the disbursement of the gift and the subsequent follow-up that the payment is purely a gift without any form of commission in return ('kickback') and that there is nothing to suggest that the gift is intended to create an unfair advantage for anyone involved (cf Norwegian Criminal Code §§ 387 and 388). The board's follow-up must be carried out in accordance with the normal rules for its work, including keeping minutes. In this connection, the minutes of the board meeting should clearly state the purpose of the gift, the content and value of the gift and whether the payment has been evaluated in terms of the risk of corruption where this is relevant.

82. ibid 32.
83. Perhaps similar is Aarbakke and others (n 20) commentary on the Limited Liability Companies Act § 8-6 note 02; cf note 1.1.
84. See section 4.1.

5. Conclusion

This review has demonstrated that sustainability has become a legal obligation that must be high on the agenda of the boards of Norwegian limited liability companies and public limited liability companies. This applies in particular to large and listed companies. Also the boards of companies that in general are not directly affected by one or more of the rules set out above must nonetheless prepare themselves to anticipate requirements for sustainability to be integrated into their management of the company's business. In extreme circumstances, a lack of understanding of sustainability can have major legal and financial consequences.