Cecilie Kjelland (Dr.iur)
Dept of Private Law, University of Oslo

Paper for the 1st International Conference - Towards Sustainable Companies: Identifying New Avenues, August 30, 2011

Motivations and Decision-Structures in Companies[1]

1. Introduction

This paper is prepared for and will be presented at the 1st International Conference in the Project "Sustainable Companies" at the University of Oslo. The aim with the presentation is to give a first insight in and a tentative assessment of the results of the survey. The survey is still in progress; until now, approximately 60-70 % of the interviews have been conducted. The results are therefore to be regarded as preliminary only; with the consequence that the assessments and tentative conclusions must be regarded likewise.

The underlying survey is an empirical study of motivations and decision structures in boards and partly also by the senior management of companies on the field of environmental sustainability, from a legal and normative perspective.

In the following, I will first give a brief description of the objective of and aim of the survey which is the basis for this paper (part 2). In part 3, I will give an overview of the central types of legal requirements which may have direct impact on whether and to which extent the governing bodies of a Company will consider sustainability in their decision-making. An overview over central aspects in the method used in the survey follows in part 4. A preliminary presentation of the results of the interviews is given in part 5, and a short summary and tentative assessment follows in part 6.

2. The objective of the survey

The survey is initiated as an independent part of the project "Sustainable Companies" at the Department of Private Law, University of Oslo.[2] According to the project plan, the objective of the survey is to investigate the board members' self-perception of their role and to identify a basis for and the factors influencing their decision-making assessed in light of the company law definition of

[1] The Survey is divided in two parts; and is conducted by Inger Marie Hagen and undersigned, both in a post.doc-position at the Institute of Private Law, University of Oslo. One part of the survey deals with employee-elected board representatives (Inger Marie Hagen) and one part deals with shareholder elected board representatives (Cecilie Kjelland). The latter part of the survey is the basis for this paper. Inger Marie Hagen has, as partner in the survey, contributed to this paper in form of discussions and underlying material.

[2] Bærekraftige selskaper - Institutt for privatrett

the role of the Board.[3] By conducting the survey with this object as basis, we seek knowledge about what may be potential driving forces towards more sustainable decisions and thus, how to promote such decisions.

Knowledge of motivations behind sustainable decisions / non-sustainable decisions is necessary when elaborating if legal framework is a suitable way to increase focus on sustainability in companies and if yes, in which way such changes in the legal framework should be made to have the desired effect. Also, knowledge about other deciding factors for decision making would be of interest. For example if the ownership structure of a company is decisive for to which extent the Board considers sustainability as important by its decisions or if listed companies more often tend to regard sustainability as a decisive factor than non-listed companies.

One specific challenge in the survey, which also has to be taken into consideration by evaluating the results, is the difficulty of defining "sustainable decisions". The focus for the project is "environmental sustainability", with climate emissions as the case in point. Environmental sustainability is difficult to measure, as the content of this term may differ substantially depending on the kind of activity a company is conducting. One presumption is that companies that achieve well-functioning systems for corporate sustainability in general also will achieve better environmental results than companies with less achievements regarding sustainability in general. We will therefore generally use the term "sustainable decisions". When conducting the interviews, the focus on environmental sustainability is emphasized.

3. Legal framework – legal requirements which may impose upon sustainable decisions

a. General

The following brief presentation is based on Norwegian law and is meant to be an overview description of the different kinds of regulations that may put limits on the decision-making in companies. Such limits may, in theory, regard the competence to make a decision on behalf of the company, for example if the board leaves to the administration of the company to decide upon matters which are of major importance to the company such as a major acquisition or other major investment. The regulation could also regard the content of the decisions. This would be the case if the result of the decision is prohibited, for example decisions that opens for wider emissions than allowed, or also if the general assembly adopt resolutions that lead to unreasonable advantages for certain shareholders at expense of others[4]. A third way of limiting the decision-power would be to make it mandatory for the decision-makers to take certain factors into consideration when deciding.

[3] Project Plan, p. 18.

[4] Sect. 5-21. English translations of the Company Acts can be found at: http://www.revisorforeningen.no/a9356038/English/eBooks

In this study, the kind of regulations are for practical reasons divided into three types of regulations; framework-regulation, company law and non-legal requirements, such as codes and voluntary reporting standards. This is due to the different purpose (between frame-work legislation and company law) and different nature of those regulations (between framework-regulation and company law on one side and non-legal requirements on the other side). This difference is an important aspect when elaborating the effect of various kinds of regulations when it comes to sustainable decisions and thus a central part of the methodology, which will be described below in part 4.

b. Frame-work legislation

Norwegian law contains a wide number of regulations with the purpose of limiting the negative effects that a company can have on the environment by conducting their business. This is in particular the case within the field of manufacturing or production, where the risk of damaging effects is normally high. As example of a frame-work regulation as we use the term in the study, are the Pollution Control Act[5] which prohibits pollution on a general level. Exceptions can be made through legislation or in individual cases. A second example is the Biodiversity Act[6], which, among others, sets out an obligation in general not to work against the expressed aim to ensure biodiversity[7]. The definition of framework-legislation used in this survey also covers external regulations put on to the companies on a more specific level, such as regulations that are applicable to only a limited group of companies, for example producers that deals with chemical substances, as the REACH regulations[8]. REACH is the European Community Regulation on chemicals and their safe use and deals with the registration, evaluation, authorization and restriction of chemical substances. The regulation entered into force on 1 June 2007.

By using the term "external" regulation, we want to make clear the difference to regulations within the company law, for which we will use the term "internal" regulation. The two different types of regulations are in their purpose originally meant to regulate different matters: Whereas the framework-regulations typically are created with the purpose to control concrete possible damaging effects a business or certain behavior in general may have to the environment in a wider sense, the company law is originally created with the purpose of controlling the relationship between the company organs, i.e. the owners, the managing and supervisory organs. In a somewhat wider perspective, company law may be said to, in addition to regulation of relationship between the company organs, also to have as purpose to secure free trade and thus economic development. This would be the case regarding the EEC-regulations to ensure a common market[9]. Several directives made to ensure this purpose are implemented in

[5] *Forurensningsloven*, 13. March 1981 no. 6.

[6] *Naturmangfoldsloven,* 19. June 2009 no. 100.

[7] Sect. 6.

[8] EC 1907/2006.

[9] The subject is elaborated in: Sjåfjell:"Towards a sustainable European Company Law: A normative analysis of the objectives of EU law, with the takeover directive as a test case. Sect. 8-11. Wolters Kluwer, 2009. Cit: "*The core role of E.U. corporate law is to promote economic development by acting as a vehicle for market*

Norwegian law and in the company law. Recent examples are the takeover directive[10] which regards take-over attempts in public limited companies.

Also when taking into account the possible extended purpose of company law as securing satisfactory conditions for a positive economic development in society, which implies a purpose found outside the company itself, it remains a fact that the company law mainly regulates the companies from within.

When defined in this way, framework legislation will also include different types of external incentives, i.e. here, regulations made with the objective to encourage sustainable behavior. This could be done in the way of "positive incentives, e.g. tax benefits for companies who manage to reduce their emissions, or "negative incentives", e.g. special taxes that are claimed from companies that do not reduce their emissions. Another example would be special permits or withdrawal of permits.

c. Norwegian Company Law, Companies Acts

i. Division of competence

According to the Norwegian Company Acts[11] the Board has responsibility for the management and organization of the Company's activities as well as supervisory responsibility for the day-to-day management. With the exception of certain concrete decisions which are to be taken by the Board, the Board's power is solely limited by the powers which are directly given to other company organs; such as the day-to-day management[12] or decision-making powers of the General Assembly in certain matters, such as decision upon dividends[13].

The Board shall, in any case, decide upon matters which are of extraordinary nature or of major importance to the company[14].

---

integration, facilitating and enabling cross-border business, promoting investment in the European financial market(s), and protecting the interests of the involved parties—the latter both to facilitate integration and to serve as an objective in its own right".

[10] 2004/25/EC.

[11] Sects. 6-12, 6-13.

[12] Which is given to the general manager, sect. 6-14. In Norwegian Company law, the general manager has status as a company organ.

[13] Sect. 8-2.

[14] Sect. 6.14 (2).

Within that framework, however, the company acts to a relatively great extent leave it to the judgment of the Board itself on which matter it has an obligation to decide upon, and even more so, which considerations that are to be taken by deciding the matter. It can therefore not be stated that, according to the Norwegian Company Acts, the decision makers are obliged, in general, to take environmental considerations when deciding upon a matter in their capacity as decision makers on behalf of the Company.

The definition of "possible decisive factors" on decision-making of the Board-members is defined broadly in the survey. Structures and formal/informal decision-systems generally in the Company must be regarded as factors that are possible decisive factors for the Board. Such possible factors must be defined as decisive also when they lead to no outspoken or clear decision or resolution by the Board, but also if they lead to a certain action or behavior by the company without the Board being directly involved. This could for example be done if one states a broad definition of "Board decisions", i.e. that all actions or passivity in the company are considered as results of the Board's decisions, as long as those belong to matters that can be defined as matters that requires Board attention, whether it be directly or indirectly (in form of control of routines).

There will, however, still be decisive factors within a company which cannot be defined as Board decisions. Such factors will, for example, be decisions which typically are considered to be outside of the area of matters that require board attention and/or approval and which can therefore not be regarded as board matters when the board is passive regarding them (typically matters that are defined as operation of the "day-to-day" part of the business). Those factors can nevertheless have strong impact on a company's contribution to a sustainable development.

Subsequently, the regulations in the Company acts regarding the division of competence between the Company organs does not give a wide guidance to where the concrete decisions are taken. The amount of detail the Board may relate to in its decisions will vary dependent, among others, of the size and activity of the Company.

ii. Purpose of the company

The term "Purpose of the Company" is often used describing to different issues: Firstly, the term is used to describe the overruling financial objective of the Company. In the Norwegian Company Acts, to generate financial return for its shareholders is set as a precondition or "default" purpose of the company[15]; if this is not the purpose (objective) of the Company, the articles of association must contain provisions on the allocation of profit and the distribution of assets upon dissolution of the Company. Secondly, the term "purpose" is used describing the business activities of the Company, which are to be set out in the Articles of Association[16]. In this connection, it is the content of the first understanding that will often lead to discussion.

[15] Sect. 2-2 (2).

[16] Sect. 2-2 (1) 4.

The shareholder primacy idea – the idea that the shareholder's interest is to be given primacy to other possible interests has been the leading principle in Norwegian Company Law[17]. Recently this opinion has been challenged – the question has been raised if the shareholder primacy is really the governing priority of interests, or if one should consider the purpose of the Company in a wider societal context[18].

Even if shareholder primacy is the governing view in Norwegian legal theory, there exists a general acknowledge that the shareholder primacy is not without limits. Possible profit will not be the deciding factor in every case. Firstly, legislation and regulation which are applicable for the Company will set limits on which decisions that can be made, also if this reduces the possibility for profit. Secondly, it is acknowledged that ethical considerations may put limits on a Company's decisions. As example, several companies would refuse the use of child labor, also when they could have used children in their production processes in a legal way before this was legally forbidden or by keeping the actual plants in countries where child labor is accepted.

Another question that has been subject to recent discussion is the question if shareholder primacy – in the meaning of profit for the shareholders- is equivalent to profit maximization. In Norwegian legal literature, those two terms; profit and profit maximization, are often used interchangeably[19]. Following the arguments in the previous section; that the possibilities to seek profit for the shareholders will always be limited by certain factors, such as limits in form of legislation or ethical standards, this will lead to the same argumentation in the case of profit maximization. The possibilities to seek profit maximization will be subject to the same limits.

The deciding question will then be: Where are those limits? What is acceptable from a legal and from an ethical point of view?

One of the objectives with this survey is to obtain an impression of the thinking of business leaders on this subject:

- is shareholder primacy the governing view?
- If yes, to which extent? Is it possible to identify the "limits" for when other interests will prevail?
- If cases where other interests will prevail – what is the motivation?

[17] To support this opinion f.ex. *Truyen;* "Aksjonærenes myndighetsmisbruk" (Shareholder Abuse of Authority), Oslo, Cappelen Akademisk forlag 2005, *Andenæs; Augdahl; "*Aksjeselskapet efter norsk rett", 3. utg., Oslo 1959

[18] For a critical reflection on the view of shareholder primacy as the overruling view; see B. Sjåfjell: Mapping paper for Norway; The Possibilities and Barriers for Sustainable Companies in Norwegian Company Law. Draft paper, on file with current author.

[19] E.g. in *Truyen;* Aksjonærenes myndighetsmisbruk.

iii. Company interest

The company interest issue raises three questions which are relevant in the survey; firstly, if the term "company interest" may be said to be a part of the company law of today and thus has to be considered in decision making processes of the company organs, and secondly, if this is the case; what can be said to be the company interest?

The term "company interest" has been interpreted in different ways; from being seen as the interests of the owners as a whole[20], to a broader interpretation which, in addition to the shareholder's interests, also comprises the interests of the employees and public welfare[21]. The actual distance between the two theories has also been discussed in jurisdictions where the latter opinion has been the traditional view[22]. In Norwegian literature, which covers the subject sparely, the shareholder's interest in form of a long-term shareholder's perspective has been promoted as the ruling perspective[23].

The discussion about the "Company Interest" leads to the same basic question as we have regularly returned to above: How far may the decision-makers of a company go in letting other considerations than possibilities for profit (maximization) prevail? This leads us to the third question; to *what extent* shall such a company interest be considered; if it is possible to identify it clearly, will the decision makers in the companies (here Board) have to let the company interest prevail when in competition with other interests? Must, as example, a company's Board decide in coherence with the "company interest", also if this has no support by the shareholders?

The question is related to the question of minority protection / abuse of shareholder authority. As those issues primarily concerns decisions made by the shareholders, the question of which interest that may be imposed upon a minority may lead to similar considerations.
The problem can be seen from two angles: Firstly, may the minority claim protection against what they regard as non-sustainable decisions, also when the decisions lead to profit maximization? And secondly; may a major shareholder impose upon the minority shareholders a decision which minimizes the profit of a project, but is to be regarded as

[20] This has traditionally been regarded as the view in UK and in Anglo-American influenced jurisdictions.

[21] A view which is traditionally found in German Law, and was also included in the German Aktiengesetz from 1937. The term was later removed from the Act, apparently without seeking to change the law significantly (*Grünewald,* Gesellschaftsrecht, Mohr Siebeck 2005).

[22] See *K.Smith,* Gesellschaftsrecht, C. Heymann, Köln 2002; the traditional German view on Company Interest do not necessarily deviate from market value maximization for the shareholders.

[23] See *Aarbakke,* Aksjeloven og Almennaksjeloven Kommentarutgave, Universitetsforlaget 2004.

environmentally sustainable on the contrary to what would have been the case if the decision should increase profit?

iv. Non-legal requirements

With non-legal requirements we mean what is typically defines as "soft law". This covers normally different kinds of self-regulation activities; e.g. as Codes for Corporate Governance, voluntarily reporting schemes (such as Global Reporting Initiative, GRI), or internal steering documents of the Company, such as ethical guidelines or Codes of Conduct. In practice, the difference between legal requirements and non-legal requirements can partly be wiped out. This is due to the following reasons:

Firstly, Companies may be obliged to follow those schemes through institutes that will have a binding effect similar to a legal requirement. This is for example the case with issuer and member rules at Stock Exchanges; non-compliance with such rules may in worst case lead to exclusion. Secondly, the soft law often has a high level of detail and thus contains regulations that regards daily, practical issues the company has to deal with, to a higher degree than what is the case with legal requirements.

The confusion this may lead to may represent a problem for the total compliance towards requirements in company law and "soft company law". It is also a question worth asking if the increase in requirements of soft law shifts the "normative power" from legislative bodies towards non-legislative bodies to a wider extent than desirable.

4. Analytical framework and methodological approach

a. General

The empirical base for the work is a number of qualitative interviews with present and former Board members and senior executives in major[24] Norwegian[25] companies. Per today, the number of interviewees together represents present or former board-members/board-leaders from approximately 30 companies and senior executives from approximately 20 companies. Most of the companies are listed. This is due to the search criteria of size and not regarded as criteria as such. In line with the preconditions behind a qualitative approach, we do not search for a complete picture, but seek to grasp different conceptions of division of power, notions of sustainability and present opinions of the most efficient way to secure sustainable operations in the industry.

Individual criteria when searching for interviewees have, firstly, been board experience, preferably as board chairpersons. Secondly, we have searched for board members with operational experience,

[24] Based on yearly turn-over and number of employees. The choice of companies is randomly sought.

[25] Two of those companies are situated and registered with main office abroad. The survey will altogether also comprise companies in Germany and the UK, but per today the number of companies covered has not reached the number necessary to be included in this paper.

preferably as Chief Executive Officers (CEO's). The reason for this is the aim to be able to compare the operational and controlling aspect[26] . There will, however, still be decisive factors within a company which cannot be defined as Board decisions. Such factors will, for example, be decisions which typically are considered to be outside of the area of matters that require board attention and/or approval and which can therefore not be regarded as board matters when the board is passive regarding them (typically matters that are defined as performance of the "day-to-day" part of the business). Those factors can still have strong impact on a company's contribution to a "sustainable development". This must be taken into consideration and concluded on.

Thirdly, we have prioritized interviewees with extensive and preferably former experience. This is reasoned in the fact that the questions may regard, or be in a borderline position to, confidential information from the companies. We have emphasized the importance of outspokenness in the interviews and have on beforehand identified the confidentiality issue as a possible challenge to outspokenness, in spite of us presenting the results of the surveys on an anonymous basis. For the same reason, the interviewees have answered out from their personal experiences on a general basis, and not as present or former representatives of selected companies. All of the interviewees are in this group and all of them have currently at least one board position.

b. Core questions

The interviews are semi-structured. This means that the interviewer generally has a framework of themes to be explored. Unlike a quantitative survey, where the interviewer has a detailed questionnaire framework decided on beforehand, semi-structured interviews starts with more general questions or topics. Relevant follow-up questions will often be identified during the interview, allowing new questions to be brought up during the interview as a result of the response. A possible relationship between the more general introductory topics and the responses will be elaborated during the interview.

We have defined certain core questions which we aim at being able to have responses to and material for discussion as result of the interviews:

- How to define company interest[27] – understanding of the term. Is this a term which may have a useful function in the approach of sustainability in companies?
- May possible changes in (inter)national framework regulation[28] lead to more sustainable decisions?
- May changes within company law, hereunder distribution of competence inside the company, be an efficient way to achieve changes in company (sustainable) behavior?

[26] Based on Norwegian Company Law; that CEO's have an executive role, whereas the role of the Board is also a supervisory function, Public Limited Liability Companies act, Sections 6-13, 6-14.

[27] See above part 3.

[28] See above part 3.

- Is sustainable behavior better achieved when regarded as a business case or as result of high moral values?
- What is the major role of the Board and the board members – and how strong is their independence in their relationship to the owners?

c. Selection of variables

In the survey, we regard variables as certain (fixed) factors which could have a decisive effect. Those factors are not individual, i.e. based on the interviewees in person, but may be regarded as fixed underlying elements.

The core questions mentioned above will have to be extended and adapted in coherence with the variables listed in the following.

Structures and formal/informal decision-systems generally in the Company must be regarded as factors that are possible decisive factors for the Board. Such possible factors should be defined as decisive also when they lead to no outspoken or clear decision or resolution by the Board, but also if they lead to a certain action or behavior by the company without the Board being directly involved. This could for example be done if one states a broad definition of "Board decisions", i.e. that all actions or passivity in the company are considered as results of the Board's decisions, as long as those belong to matters that can be defined as matters that requires Board attention, whether it be directly or indirectly (in form of control of routines).

The major selected variables are the following:

- *Ownership:* The interviewees have experience from listed companies with a fragmented and partly institutionalized ownership, from larger companies with family ownership and also non-listed companies. State ownership is also an important variable as, firstly, the ownership structure in Norway implies that, when focusing on the largest companies, it is hardly possible to avoid state ownership (the Norwegian state controls approx 1/3 of Oslo Stock Exchange; represented in value). Secondly; the Corporate Governance debate in Norway is heavily marked by the large state engagement. Furthermore, the role of the state as a shareholder pinpoints a number of important ownership issues, e.g. the role of the owner versus management, board composition and independent directors and inevitable, the state as a regulator and the state as a shareholder. 100 % state owned companies are not a part of the survey, as this ownership structure differs from the object to a major extent.
- *Supervision vs direct involvement*: The typical border between what is regarded as "board matters" or not is the border between what is regarded as sufficient "organization" and sufficient "supervision" on one side, and the operation of the "day-to-day" business on the other side. How do the board members (and management) understand this role?

- *Contradiction between strong boards and strong managements?* Assumption: Companies with strong managements will have Boards that are decisive to a less extent than in companies with a weaker management.

- *Operational ly-orientated companies vs "bureaucratic" companies*. Some companies may be said to have an overweight on "operational" focus, i.e. that arguments in favor of operational thinking will overrule arguments from a procedural perspective. Do Board members (and management)

in typical operational orientated companies tend to weight arguments and decisions from operational line-management stronger than arguments and decisions from support functions? Does responsibility for typical "soft" issues more often belong to support functions[29] and subsequently have less weight in operational orientated companies?

- Board members background
- Kind of activity: Is there a difference in the understanding of role of board members and in the weighting of issues in the board depending on the kind of activity of the company? For example between mainly industrial orientated vs. mainly commercial orientated companies or between companies with chemical production and companies with technical production.
- Size of Company / Listing
- National / multi-national companies
- Corporate Structure

The level in the corporate structure may have major impact on the Board's agenda and focus according to on which level in company-structure. An important question regarding corporate structures, is the possible changes in the provided decision structure in subsidiaries. This will especially be the case in 100% owned subsidiaries. Norwegian company law has few regulations regarding corporations and the relationship between the different companies within a corporation. Norwegian law does not have a "group aw" (Konzern-Recht) as in Germany. The fact that the Board of a parent company makes decisions that has direct consequences for a subsidiary, is an underlying presumption in the Company Acts §§ 6-16, which prescribes information and in certain cases right for the subsidiary board to comment before decisions are made at parent company level in cases that concerns the subsidiary. The presumption is still that Boards at subsidiary level makes the decisions which, on mandatory basis, are left to the board of the company to decide.

The Company acts furthermore sets out that decisions of an extraordinary nature or major importance to a company shall be taken by the Board[30]. Which issues that shall be regarded as of major importance will depend from company to company, the same will "extraordinary nature". One presumption is that, seen away from the corporate structure, e.g. an investment will need Board approval in a smaller company for a sum that will not be regarded as "major" in the parent company on a corporate level. According to the Acts, one must presume that the evaluation of which issues qualifies as "major" or "extraordinary" will have to be judged according to the single company, and not to the corporate group the company may belong to. If this is the case in "real life" may, amongst other factors, vary depending on the company structure, the relatedness between the business of the parent and the business of the subsidiary.

In the survey, an important question is in which way the company's place in a corporate structure has influence on if the board is decisive when it comes to sustainability – or if the decision-power

[29] For example: Human resource department, compliance department, communication

[30] Sect. 6-14 (2).

regarding sustainability normally lies with the board in the parent company or in the corporate management.

It is important to note that in an empirical study like this, one will not be able to achieve detailed results taking all those variables into account for every question asked, like one would be able to in a quantitative survey where the number of respondents are of a significantly higher number. The aim will be to cover a broad specter of variables to secure to greatest possible extent a representative selection of interviewees, and also to be able to identify obvious deviations in the answers depending of the variables.

d. Results and concluding discussion

The results will form the basis for a concluding discussion in the form of an article. The responses will be together with statistical data found in related surveys and assessed in relation to the variables described above.

The final articles will be divided in two independent surveys; one study of decision-structures among shareholder-elected board members (Kjelland), and one study of decision-structures among employee-elected board representatives (Hagen).

A more detailed assessment by using the variables listed above will be made.

By the finalization of the survey, we hope to be able to give tentative answers to the following questions:

- Where are the important decisions made?
- Why do the actors want to make decisions that may contribute to a more "sustainable company"?
- What would be the preferable tool; internal regulations that might require changes in company law or external regulations made by either national government or at EU/UN-level?

5. Preliminary results of the survey

In order to answer the three questions above, the questions directed to the interviewees were made with basis in the following:

- How to define company interest - understanding of the term. Is this a term which may have a useful function in the approach of sustainability in companies?
- May possible changes in (inter)national framework regulation lead to an increase in sustainable decisions? And:
- May changes within company law, hereunder distribution of competence inside the company, be an efficient way to achieve changes in company (sustainable) behavior?
- Is sustainable behavior better achieved when regarded as a business case or as result of high moral values?
- What is the major role of the Board and the board members – and how strong is their independence in their relationship to the owners?

- Role of soft law

In this paper, we will try to identify the main trends in the answers, as far as possible at this stage of the survey.

a. <u>How to define company interest - understanding of the term. Is this a term which may have a useful function in the approach of sustainability in companies?</u>

The term "Company Interest" – defined as "the interest of the Company, which could differ from the interest of the shareholders in certain cases", seems unfamiliar to the interviewees. Furthermore, the term seems to be regarded as a theoretical construction as, as several of the interviewees pointed out, the shareholders may through the General Assembly dismiss the board members. A traditional attitude in favor of shareholder primacy is clearly identified.

On the other hand, most of the interviewees admitted a clear responsibility as board members to secure a long-term sustainability of the company – which were often defined as "long-term profit maximization". A clear majority of the interviewees stressed what they regarded as a connection between sustainable decision making and long term profit maximization and in this way rejected the delineation between sustainability and profit, when regarded as long-term. If forced to choose between a decision that would secure long-term profit or a decision that would secure short-term profit, the interviewees claimed to choose the first alternative, although not altogether willing to accept the implied conflict. As some interviewees pointed out: "Short term profit is necessary to secure long term profit".

All interviewees stressed that efforts to increase sustainability must take place within the limits of a "sound business". This concept of "sound business" is closely connected with the way the interviewees define "Company Interest". Emphasizing long term profit and rejecting the focus on short term shareholder value in the narrow sense is as close as we get the interviewees to define "Company interest".

b. <u>May possible changes in (inter)national framework regulations lead to an increase in sustainable decisions?</u>

A majority of the interviewees expressed disappointment towards what they regarded as restraint behavior by the politicians when it comes to adoption of stricter framework regulations regarding the environment and climate emissions. They claimed they would welcome stricter framework regulations on this field. The arguments for this were the following:

Several of the interviewees stressed, firstly, that the responsibility for setting the criteria which the industry has to relate to, is the responsibility of the legislator, and not the responsibility of the industry itself. The arguments for this were, among others, that it is the role of the legislator to evaluate and assess as well the different aspects which may influence on this decision, as to take the final decision, as the decision will be of political nature. There exists, still, a certain uncertainty, also among politicians, when it comes to which way that will be the most successful to reduce climate emissions and how to balance the effect strict regulations will have on the industry with other considerations. Several of the respondents expressed a need for predictability also in this field.

Secondly; under the condition that legislators succeed in adopting trans-national legislation for climate emissions, only politicians through their respective legislative organs may achieve the same conditions for all competitors within one business field. Regulations will have to ensure just competition for all actors within the same market. One of the interviewees made the following declaration: "The politicians need to make regulation to increase the bottom-line for acceptable emissions with the aim to weed out the bad ones, but not with the aim to increase the burden on the best ones". If regulations would be national only, the latter alternative could turn out as the result.

c. <u>May changes within company law, hereunder distribution of competence inside the company, be an efficient way to achieve changes in company (sustainable) behavior</u>?

A majority of the interviewees expressed a difficulty to understand the content of this question. As examples of measures that theoretically could be made to increase sustainable decisions with help of company law, the following examples were given:

- A mandatory duty to have "sustainability" on the environmental field as a part of the Purpose of the Company, stated in the Articles of Association, in other steering documents with legal effect or as a general obligation stated in company law.
- A mandatory duty to have "environmental questions" on the Board's agenda on a regularly basis.
- A mandatory duty to have at least one Board member with suitable competence, dedicated to seek to achieve that decisions made by the Board are sustainable, possibly a sub-committee to the Board.
- Increased legal responsibility for Board members for ensuring that Board decisions that promotes sustainability, with legal consequences by non-fulfillment of those requirements.

There seem to be a clear tendency to regard none of the alternatives above for sufficiently motivating for turning possible non-sustainable decisions into sustainable ones.

A clear majority of the interviewees were negative in their belief if such measures would have the desired effect (to achieve more sustainable decisions within the companies). Their arguments were, among others that such changes in company law would not to a necessary extent touch upon the factors which are decisive for making sustainable decisions. As the examples mentioned above all would concern the Board in a direct way, but not the Management (except possibly, the first alternative), such changes would not sufficiently affect the organization as a whole.

A small minority of the interviewees were of the opinion that such changes in company law as mentioned in the examples above would lead to an increase in sustainable decisions in companies. Those interviewees stated that such changes in company law could have an effect if combined with increased framework legislation – and that changes in company law could only have effect in combination with the latter. Interviewees with experience from companies which per today have strong focus on environmental issues - and which are typically regarded as "polluters" tended slightly more to be of this opinion than interviewees with experience from companies with little environmental focus.

The interviewees in general expressed problems to see the practical functionality of such measures.

d. <u>Where is the more important motivation for making decisions that will lead to sustainability – a good business case or in high moral values?</u>

Several of the interviewees stated that their customers showed a certain environmental awareness, and that this would necessarily lead to a certain strain to make sustainable decisions within the company. However, expected forthcoming political / legislative regulations were more often brought up as explanation for why increased efforts to become more sustainable would be profitable in the future and thus regarded as a good business case. Several of the interviewees pointed out that Norwegian industry are leading in the environmental field and that stronger framework regulations thus will make increased sustainability an interesting business case for the majority of major Norwegian companies.

Because of the strong expectation of stronger framework regulations regarding emissions in the future, the interviewees showed unwillingness to differ between the "moral values" and "business case" as motivating factors for sustainable decisions – as the latter was regarded as inevitable. The question about "moral values" as motivating factor seemed to be regarded as slightly irrelevant, as making a business case will always be the focus for the senior executives or the Board of a company – within certain ethical limits.

There seems to be a slight deviation between industry where emissions or "pollution" are a typical and integrated part of the production process or by use of the product (e.g. automotive, process- or chemical industry)and industries which are normally not regarded as having major environmental challenges (traditional trade, publishing). In the first case, the actors seem to a less extent to be able to see a conflict between "business case" and "moral" (normative arguments) as in the latter case. This is also illustrated by the fact that companies within fields that are typically regarded as having major environmental challenges to a larger extent have sustainability on the environmental field as part of their expressed company strategy.

e. <u>What is the major role of the Board and the board members – and how strong is their independence in their relationship to the owners?</u>

The majority of the interviewees stated, as a clear basis, that the role of the board members is to serve the company – and not to represent the interests of one or more specific shareholders. A few interviewees stated that the board members will, nevertheless, have a special look to the interests of the shareholder who they would represent "unofficially".

When the question was worded as "whether to represent the interests of the shareholders as a whole (and not specific shareholder (s)) or the interests of the company", the answers were less clear. As most of the interviewees still stated that the interest of the company or the "company's best" must be the leading factor, there seemed to be a certain difficulty and/or unwillingness to differ between the interest of the company and the interest of the shareholders.

Although several interviewees stated that in a clear conflict between the interests of the company and the interest of the shareholders, board members will have to represent the interests of the company, most interviewees emphasized the practical connection between board members and the shareholders as the ones electing the board, and thus tended to regard such a conflict as a theoretical problem.

As described above under "Company Interest", a clear majority of the interviewees tended to define "long term profit maximization" for the shareholders very close to or similar to the "Company Interest". Also by answering the question regarding the role of Board members, this view was brought forward on a general basis. As most of the interviewees were reluctant to see a theoretical conflict between long-term profit maximization and their duty as Board member to serve the interest of the Company as such ("Company's best"), they were more willing to see a theoretical conflict between their duty to serve the interest of the Company and shareholder's possible wish for short-

term profit maximization. Several of the interviewees expressed willingness / a feeling of obligation towards the long-term profit maximization if such a conflict should occur.

However, again the interviewees connected this theoretical conflict with the dependence of the Seat at the Board and the shareholder's as the electing organ in the form of a General Assembly. Referring to this dependence, some of the interviewees turned this question into a question of accepting only Board positions in Company's where they expect to be coherent with the majority of the shareholders – and not accepting a Board position in Companies where they could expect to face a conflict like described above.

The same point of view was maintained regarding the question of company interest, see above.

Not surprising, the interviewees with experience from companies with one or few owners with a clear major ownership were more likely to express dependence as Board member to the shareholders, than the interviewees with experience from companies with a more diverse ownership. Also, interviewees with experience from non-listed companies to a larger extent than interviewees with experience from listed companies expressed dependence as Board member to the owners.

f. <u>The Role of soft law</u>

As soft law we define codes for corporate governance, voluntary reporting schemes (such as GRI-standards) and other self-regulation mechanisms. On this point, the interviewees seem to have different views of the effect of such mechanisms. The majority of the interviewed stated that extensive reporting schemes requires high resources if the reporting shall be accurate. It may be questioned if all companies are in possession of such resources.

A slight majority of the interviewees were of the opinion that reporting, voluntary as well as mandatory (for example through legislative requirements) may lead to more sustainable decisions in a company. It is, however, important to note that most of the interviewees who were of this opinion, meant that the positive effect is created due to the increased *focus* such reporting may lead to *within* the company and in the company culture, and not from the effect that could possibly arise due to forced openness and focus from stake-holders and media.

A minority of the interviewees were of the opinion that increased reporting will have minor effect on the number of sustainable decisions and merely lead to use of resources for the companies. Their arguments were mostly that external reporting requirements for reporting cannot "hit the spot" and force the company to concentrate on the environmental issues which are relevant to the specific company. Furthermore, those respondents also were of the opinion that the reporting itself are mostly conducted in the support-functions of the company[31] and will not achieve a strong focus from its operational functions.

It is important to note that none of the interviewed were of the opinion that increased reporting would have an effect beyond the increased focus on sustainability within the company.

[31] See reference 29.

As suggested above, the interviewees with experience from larger companies (based on number of employees and yearly turnover) were more positive to a positive effect of reporting than interviewees with experience from smaller companies. The same group of interviewees was on the other hand critical to a possible "over-eagerness" when it comes to production of soft law and thus a complicating effect due to a high number of codes, reporting systems etc.

6. Evaluation of the results – the way forward

In this chapter a first, brief evaluation of the results will be made followed by a short description of the way forward of the project.

It is important to stress the fact that the results and therefore also the following evaluation are to be regarded as preliminary as the article is based on a survey which is still in progress. The end-results may look different than the results presented in this article; among others due to the following reasons:

- All interviews are still not conducted. As per today, approximately 30 % of the interviews remain.
- Among the interviews that are conducted until today, and thus forms the base for this article, a major amount of the interviewees represent companies with the following factors in common: Norwegian, listed, large companies depending on employees and yearly turnover, representing industry, representing industry that are typically regarded as having challenges on the environmental field. When adding more companies which deviates from this picture (higher number of foreign companies and higher number of non-listed companies) the results may change.
- There will be a possible source of error in the results due to deviations in the interpretation of "sustainable decisions". We have sought to limit this possibility by defining "sustainable decisions" in a clear way. Nevertheless, a 100% clear definition will not be possible. This is due to the fact that several of the questions themselves are based on the condition that the content of the term "sustainable decision" will vary – dependent on several factors, such as kind of industry, the possibilities for the actual company, the kind of challenges that the actual company faces regarding environmental protection. More to this discussion, please see section 1 above; "Introduction".

By returning to the three summary questions above, we will try to make an assessment of the (preliminary) results held up against those questions:

- Where are the sustainable (non-sustainable) decisions made?
- Why do the actors want to make decisions that may contribute to a more "sustainable company"?
- What would be the preferable tool; internal regulations that might require changes in company law or external regulations made by either national government or at EU/UN-level?

Where are the sustainable (non-sustainable) decisions made?

As described above under part 3 (Company Law), the Norwegian Company Acts within certain limits, to a great extent leave it upon the judgment of the Board itself on which matters it shall decide upon and even more so, which considerations that shall be taken by deciding upon a matter. It can also relatively widely be decided in the articles of association deviations from the company law in this matter, e.g. is there a certain flexibility to give competence to the General Manager and also to the General Assembly on behalf of the Board.

Important factors in this assessment seem to be the relation and division of power between Board and management - companies with a strong management will probably have aberrant answers to this question than companies where the Board is relatively strong. Likewise, there seem to be a deviation between companies with a complicated technological activity and companies where the activity is less complicated.

There seem, however, to be a general willingness to accept the responsibility for the general sustainability of the Company amongst Board members.

Why do the actors want to make decisions that may contribute to a more "sustainable company"?

A significant finding in the survey is the reluctance by the interviewees to make a deviation between what they regard as a "business case" and "moral values" as a motivating factor behind sustainable decisions. The interviewees show a clear understanding of their task as business leaders to maximize profit - mainly on a long term basis. They are reluctant to set deviations or see theoretical conflicts between this task and what they see as sustainable behavior. One major task as a business leader is to make the company sustainable – also – and most important – in a financial sense. A possible choice between financial sustainability and environmental sustainability is regarded as not practical. The "business case" theory is overruling. Decisions which contradict financial sustainability for the company are not within the "mandate" for the business leader and therefore not regarded as practical.

We may consequently encounter the problem with the definition of "sustainable decisions". A decision, that may be regarded as "sustainable" by a business leader through its contribution to financial sustainability as well as less emissions, and therefore making it possible to the business leader to reject the conflict between sustainability and profit maximization in the survey, may be regarded as "non – sustainable" by an environmental activist because the emission reduction is not satisfying.

If, theoretically, one should be tempted to claim that business leaders make decisions in companies which go beyond what the business leader would regard as responsible when it comes to financial sustainability and/or profit maximization, this could raise questions such as the board members obligations towards the shareholders (the "Purpose of the company" and the obligation to act to "Company's best") and minority protection[32].

There will, according to the difficulties in setting accurate values for the preferable measures for reducing emissions, regularly by such decisions be diverse opinions on when a decision is to be regarded as sufficient or not. This must be seen in connection with the positive attitude to stricter framework-regulation. Business leaders seeing their own task primarily to ensure such financial

[32] E.g. if the State as majority shareholder claimed a certain politically desired decision which the business leaders would regard as contradictory to the company's financial sustainability.

sustainability – within certain frames – somebody else has to set those frames. Framework legislation set by the politicians in form of legislation secures a fixed and, hopefully, predictable environment for their business, as well as, when the framework-regulation is transnational, the same conditions for competitors.

Internal regulations that might require changes in company law or external regulation?

The demarcation between "internal regulation" and "external regulation" gave itself during the interviews as the interviewees showed little understanding for changes in company law as an effective tool to promote sustainable decisions.

Several of the interviewees pointed out that they already take environmental concerns in their decisions of today – without requirements in company legislation regarding environmental sustainability. They seemed to have difficulty to imagine that such changes could lead to a different behavior – as long as the clear major task for the Board and Management is to ensure profit (maximization) in a long-term – which again is regarded as coherent with sustainability – and thus has become a business case. Individual measures which go beyond the profitable business case cannot be expected – and must therefore be adopted generally by legislation – which again would turn the such measures into a business case – due to the general nature of legislation.

The problem with the definition of sustainability – which measures would be sufficient, and who is to decide this – came to the surface regularly.

If we construct a case where, e.g. the company is obliged to have environmental sustainability as a part of its purpose, who should decide when the Company has fulfilled its obligations or not? One argument behind such mandatory obligations regarding the purpose of the Company is that such a requirement would turn the requirements from general (in frame work legislation) into specific for the Company, as the expected measures to be taken would be regarded in relation to the Company's art of business and possibilities. The same argument, however, may be used against such a mandatory rule – the diversity in measures prevent an useful assessment of the measures taken by the Company.

There seems a tendency to regard legal requirements regarding "purpose of the Company" as a sort of "legal statements" without the necessary detail or enforcement power and thus irrelevant to the daily business. Irrelevance is also the impression of several responses regarding stricter reporting systems or Board members/sub committees with special dedication to environmental issues; such measures may lead to a generally increased environmental focus in the Company, but will mainly lead to more work for support functions or the dedicated Board member and not influence the operational business of a Company directly. This is not necessarily where the relevant decisions are taken.

There seem to be a tendency to believe that clear, concise requirements (fixed limits and numbers) have more impact on sustainable decisions than what is regarded as "statements" without clear measures.

A clear majority of the interviewees so far subscribe to the opinion that the Industry plays an important role in society and in some sort of way has certain obligations towards the society in the way the Companies conducts this role.

At this point of the survey, several issues seem to emerge into the same question: What is the bottom line for other considerations than profit (maximization) by decision making of a company's governing organs? This seem to be the result whether we, as examples, talk about Company Interest, to construct a possible "business case" of sustainability, ethical values or the "purpose of the company". Subsequently, further research should elaborate if it is possible and/or desirable to set a general, legal bottom line. And if yes; who should define this bottom line?