State Governance Through Shareholding

The State as Shareholder and its Obligation and Competence to Promote Sustainable Development

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1. Introduction

1.1. Background

The Norwegian state ("the State") is a significant shareholder in a vast portfolio of Norwegian companies, approximately fifty altogether.[1] Most of these are large enterprises of great societal significance. Several may be characterized as cornerstone companies.[2] Others are important because they meet basic societal needs that were previously fulfilled by public administration.[3] Hence, the State's private ownership includes a vital and extensive share of Norwegian business.

The topic of this article springs from a heated public debate on state-controlled companies and how the State exercises the competence given to it in the capacity of shareholder. The State is regularly identified with the overarching objectives of society and expected to do its utmost to achieve them. Consequently, it is difficult to distinguish between the various capacities of the State (public authority and private participant respectively).

In order to conduct a meaningful debate on how the State should exercise its ownership it is necessary to examine the legal framework that governs shareholders generally and the State in the capacity of shareholder specifically. Within this legal framework decisions will depend on political discretion that may be subject to democratic accountability.

The article endeavours to answer two questions related to the overarching societal objective of sustainable development. The first is whether the State in the capacity of shareholder has a legal obligation to integrate environmental considerations into company decision-making with a view to realizing the objective of sustainable development. The second is whether (and to what extent) the State in the capacity of shareholder has legal competence to do so.

1.2. State Governance

Torstein Eckhoff divides state governance into two main categories, direct and indirect governance respectively.[4] Direct governance is exercised when the State itself is in the position to make the decision it wants to govern. This form of governance is exemplified when the State exercises the competence given to it in the capacity of shareholder. Indirect governance is exercised when the State is resigned to attempt to influence the one who is in the position to make the decision it wants to govern. This form of governance is exemplified

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[1] See Meld. St. 13 (2010-2011) p. 7 for a recently updated overview.
[2] For example Statoil ASA and Norsk Hydro ASA.
[3] For example Telenor ASA and NSB AS.
[4] Eckhoff (1983) p. 14.

when the State exercises the competence it is given in the capacity of public authority, most notably through legislative and executive acts of government.

Eckhoff's distinction presupposes that the two categories of governance are essentially equal alternatives. The article will also assume that position. In my view there is no decisive reason to differentiate between the State in the capacity of private participant and the State in the capacity of public authority, all the while they are simply two equal platforms for exercising state governance (direct and indirect respectively). Hopefully, the article will reflect that point of view.

1.3. Scope

The article will concern the State's direct and active ownership (as opposed to indirect and passive through a fund) in public and private limited liability companies (as opposed to state limited liability companies and other types of corporations) where the State's shareholding allows it to exercise a decisive influence (either through a qualified majority, a simple majority or a negative majority). Examples of comprised companies are Statoil ASA, Norsk Hydro ASA, Yara International ASA, Kongsberg Gruppen ASA and Cermaq ASA.

1.4. Plan for this article

Section 1 has been concerned with giving a short introduction to the background, topic and scope of the article.

Section 2 will provide a short overview on the objective of sustainable development.

Section 3 will argue that the State has a legal obligation to integrate environmental considerations into its decision-making with a view to realizing the objective of sustainable development. This is preliminary to the discussion in section 4.

Section 4 will discuss whether the legal obligation demonstrated in section 3 applies to the State in the capacity of shareholder (private participant) or whether it is delimited to apply to the State in the capacity of state (public authority).

Section 5 will give a short overview of the legal competence of the State in the capacity of shareholder.

Section 6 will examine the legal barriers that apply to shareholders generally and how they may prevent the State in the capacity of shareholder from integrating and prioritizing environmental considerations in company decision-making with a view to realizing the objective of sustainable development. This section is mainly concerned with company law.

Section 7 will address the legal barriers that apply to the State in the capacity of shareholder specifically and how they may prevent it from integrating and prioritizing environmental considerations in company decision-making with a view to realizing the objective of sustainable development. This section concerns EU/EEA law.

Section 8 will be concerned with reflecting on the conclusions of the article and the way forward.

2. The Objective of Sustainable Development

Sustainable development has in essence been a conscious objective for as long as humankind has depended on natural resources to survive (i.e. more or less forever).[5] History credits the World Commission on Environment and Development (“the Brundtland Commission”) with having pronounced and defined the content of the objective in its groundbreaking report “Our Common Future” of 1987:

> “Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”[6]

The report asserts that the objective has mainly three aspects (economic, social and environmental respectively). The article will only concern the environmental aspect.

The definition does not put an end to uncertainties concerning the content of the objective but rather gives rise to new ones. What are the legitimate “needs” of the present and the future? When are they “met”? When is the ability of future generations “compromised”? Questions like these pave the way for an academic debate way beyond the scope of this article. Perhaps the precise content of the objective will never be subject to unanimous agreement. However, that should not stop us from seeking an answer to the stipulated questions or otherwise from seeking to realize the objective.

3. Legal Obligations of the State

3.1. Introduction

This section will be concerned with showing that the State has a legal obligation to integrate environmental considerations into its decision-making with a view to realizing the objective of sustainable development. It is necessary to demonstrate such an obligation in this section in order to consider whether it applies to the State in the capacity of shareholder in the next.

3.2. Public International Law

The United Nations Conference on Environment and Development in Rio de Janeiro 1992 and subsequent meetings of the parties have produced a number of treaties that oblige the parties to act as prescribed with a view to realizing the overarching objective of these co-operations, sustainable development.

United Nations Framework Convention on Climate Change (“the Climate Convention”) seeks to stabilize greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous interference with the climate system (art. 2). In the final words of the preamble the parties declare themselves “determined to protect the climate system for present and future generations,” a clear reference to the objective of sustainable development. Article

[5] Voigt (2009) p. 11-12.
[6] Our Common Future (1987) p. X.

4 sets out the general obligations of the parties. Paragraph 1 litra f determines that all parties "shall […] take climate change considerations into account, to the extent feasible, in their relevant social, economic and environmental policies and actions." Paragraph 2 litra a prescribes that all industrialized countries (including the State) "shall […] adopt national policies and take corresponding measures on the mitigation of climate change." The wording ("shall" as an auxiliary) clearly indicates a legal obligation.

Kyoto Protocol to the United Nations Framework Convention on Climate Change ("the Kyoto Protocol") seeks to establish further measures on the mitigation of climate change. Article 2 paragraph 1 litra a determines that all industrialized countries (including the State) "in order to promote sustainable development, shall […] implement and/or further elaborate policies and measures in accordance with its national circumstances."

United Nations Convention to Combat Desertification ("the Desertification Convention") identifies drought and desertification as significant threats to the global environment. At the end of the preamble the parties declare themselves "determined to take appropriate action in combating desertification and mitigating the effects of drought for the benefit of present and future generations," again an obvious reference to the objective of sustainable development. Article 2 states that the objective of the treaty is to combat drought and desertification "with a view to contributing to the achievement of sustainable development in affected areas." The treaty has over forty references to this objective. Article 4, 5 and 6 establishes a number of legal obligations that the parties accept in order to realize the objective of the treaty. Article 4 paragraph 2 litra a establishes that the parties "shall […] adopt an integrated approach addressing the physical, biological and socio-economic aspects of the process of desertification and drought." This is just one example of the many legal obligations that may be derived from the treaty.

United Nations Convention on Biological Diversity ("the Biodiversity Convention") focuses on the necessity of preserving biological diversity in order to achieve the objective of sustainable development. Again, at the end of the preamble the parties commit to "conserve and sustainably use biological diversity for the benefit of present and future generations." Article 1 determines the objective of the treaty to be "the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of benefits arising out of the utilization of generic resources." Article 6 litra b prescribes that the parties "shall […] integrate, as far as possible and as appropriate, the conservation and sustainable use of biological diversity into relevant sectoral or cross-sectoral plans, programmes and policies." Likewise, article 10 litra a establishes that the parties "shall, as far as possible and as appropriate […] integrate considerations of the conservation and sustainable use of biological resources into national decision-making."

Cartagena Protocol on Biosafety to the Convention on Biological Diversity ("the Cartagena Protocol") elaborates on the obligations derived from the Biodiversity Convention and establishes new ones. It has twenty references to the term sustainable.

As demonstrated, a number of treaties establish a legal obligation for the State to integrate environmental considerations into its decision-making with a view to realizing the objective of sustainable development. A particular question is whether an obligation of this sort has achieved such a level of international recognition and support that it constitutes customary international law (Statutes of the International Court of Justice art. 38 paragraph 1 litra b) or a general principle of law (Statutes of the International Court of Justice art. 38 paragraph 1 litra c). The answer is uncertain. It has been touched upon in case law[7] and debated thoroughly amongst legal scholars.[8] A proper consideration of these questions falls outside the scope of this article. At any rate, it would be of limited value for the purposes of this article, considering that the State is party to all of the aforementioned treaties (although a legal status independent of the treaties might have a certain complementary effect both inside and outside the scope of the treaties).

3.3. EU/EEA Law

EU law has always been based on the ultimate objective of a harmonious and successful society, even in its infancy in the post war years.[9] Because (the identified) challenges at that time were of a different sort, environmental protection was not among the overarching objectives in the beginning. This has gradually changed as public awareness of environmental challenges has increased. Sustainable Development is now among the overarching objectives of EU (and arguably EEA) law, cf. the Treaty on European Union (“TEU”) art. 3 paragraph 3:

> “The Union shall establish an internal market. It shall work for the *sustainable development* of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a *high level of protection and improvement of the quality of the environment.*”[10]

The objective is also integrated into several other provisions that underline the fundamental values of the union.[11]

EEA law has not articulated its adherence to the objective of sustainable development as clearly. However, the general environmental provision of the EEA Agreement (“EEA”) (art. 73) is equivalent to the general environmental provision of the EU Treaty at the time of the agreement. All the while EU law and EEA law are to be interpreted in a uniform manner (the homogeneity principle) and reforms in the EU treaties are not followed by reforms in the EEA

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[7] See Gabcíkovo-Nagymaros (Judge Weeramantry’s vote) and Iron Rhine (59).

[8] Voigt (2009) p. 145-186 concludes that an obligation of this sort constitutes a general principle of law. Bugge (2009) p. 69 seems to agree. *The Oxford Handbook of International Environmental Law* (2002) p. 626 disagrees. *Folkerettslige rammer for norsk miljøpolitikk* (2000) p. 8 and Sands (2003) p.254 assumes that it constitutes customary international law. Birnie (2009) p. 127, *Sustainable Development in International and National Law* (2008) p. 121-141 and *International Law and Sustainable Development* (1999) p. 19-37 all seem to dismiss the notion that such an obligation has legal grounds independent of the vast variety of treaties. Nyland (2009) p. 413 simply concludes that the answer is uncertain.

[9] *EØS-rett* (2004) p. 25 and Steiner (2009) p. 3.

[10] My highlighting.

[11] See TEU art. 3 paragraph 5 and TEU art. 21 paragraph 2 litra d and f.

one may argue that the objective of sustainable development should be considered to have the same legal significance in both.[12] That will be assumed hereinafter.

The overarching objectives of EU/EEA law have legal significance for the EU/EEA-institutions and also to the member states in the implementation, interpretation and enforcement of the treaties and secondary legislation.[13] However, the paramount importance that is afforded to the purpose when considering the range of EU/EEA law begs the question of whether the overarching objectives may also impose legal obligations on the member states more generally.

The Treaty on the Functioning of the European Union ("TFEU") art. 11 establishes a general rule of action for the achievement of sustainable development:

> "*Environmental protection* requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting *sustainable development*."[14]

The rule of action operationalizes the overarching objective of sustainable development and is of legal significance to both the EU/EEA-institutions and the member states.[15]

The member states have a duty of loyalty towards the EU/EEA and thereby towards the overarching objectives (TEU art. 4 paragraph 3 and EEA art. 3). The European Court of Justice ("the Court") has initially assumed that the overarching objectives alone do not impose legal obligations on the member states: It is true that they have a duty of loyalty towards the overarching objectives but that is adhered to by obediently complying with the more tangible obligations that are set out in the treaties and secondary legislation.[16] Thus, the position seems to be based on the assumption that the EU/EEA-institutions are capable of initiating sufficient measures in order to safeguard the overarching objectives.

Where this assumption fails, the Court has demonstrated that it on certain conditions may impose a more general legal obligation on the member states in order to achieve the objective in question.[17] The question is whether the overarching objective of sustainable development could fill the conditions for imposing an obligation of this sort.

The answer is obviously uncertain.[18] However, while EU/EEA environmental policy is supposed to be based on the precautionary principle[19] the dynamic nature of EU/EEA law in

[12] Sjåfjell (2011) p. 12-13.
[13] Sjåfjell (2011) p. 13-25.
[14] My highlighting.
[15] Sjåfjell (2009) p. 223.
[16] See for example *Fernando Roberto Giménez Zaera v Institut de la Seguridad Social and Tesorería General de la Seguridad Social* (C-126/86) (14), *Compagnie Commerciale de l'Ouest and others v Receveur Principal des Douanes de La Pallice-Port* (C-78/90, C-79/90, C-80/90, C-81/90, C-82/90 og C-83/90) (18), *Firma Sloman Neptun Schiffahrts AG v Seebetriebsrat Bodo Ziesmer der Sloman Neptun Shiffahrts AG* (C-72/91 og C-73/91) (26), *Echirolles Distribution SA mot Association du Dauphiné med flere* (C-9/99) (22) og *Gregori My v Office national des pensions (ONP)* (C-293/03) (29). See also Sjåfjell (2011a) p. 27.
[17] See *Fisheries I* (C-32/79) (15) and (25) and *Fisheries II* (325/85) (15). See also Temple Lang (2008) p. 1509 and Sjåfjell (2011a) p. 26-27.
[18] Sjåfjell (2011a) p. 27-28.
[19] TFEU art. 191 paragraph 2.

general[20] and the development of the duty of loyalty in particular[21] suggests that an obligation of this sort might be established (if not today, maybe tomorrow). Because EU/EEA law for the purposes of the article is only one of several legal grounds for establishing an obligation of this sort, the conclusion is not crucial.

3.4. The Constitution

The State is one out of approximately a hundred nations that have chosen to give protection of the environment legal status in the Constitution.[22] Section 110b was adopted in 1992 based on a draft by professor dr. juris Inge Lorange Backer. Paragraph 1 and 2 determine overarching guidelines for the actions that are to be taken by the State according to paragraph 3. For the purposes of this article, it is paragraph 2 period 2 that is of interest:

> "Natural resources should be managed on the basis of comprehensive long-term considerations whereby this right will be safeguarded for future generations as well."

The provision entails a clear reference to the objective of sustainable development.[23]

Preparatory works,[24] case law[25] and legal scholars[26] all suggest that the provision has legal significance in that it imposes a legal obligation on the State to integrate environmental considerations into its decision-making with a view to comply with the overarching guideline (sustainable development). That will be assumed hereinafter.

3.5. Summary

This section has demonstrated that there are grounds in both public international law, EU/EEA law and the Constitution for arguing that the State has a legal obligation to integrate environmental considerations into its decision-making with a view to realizing the objective of sustainable development. Whether an obligation of this sort can be based on each and every one of these foundations individually may be uncertain but whether one can be based on an aggregated foundation is not.

A legal obligation of this sort entails that environmental considerations are a mandatory concern in any decision-making process where the outcome may affect the environment. It does not, however, initially require that environmental considerations are to be given any amount of weight/impact in the face of conflicting concerns. Thus, the obligation is of a somewhat weak nature and it seems difficult to be able to overrule specific decisions as contrary to it. Nevertheless, it must be assumed that the obligation requires environmental considerations to be given a minimum amount of weight/impact (otherwise it wouldn't really have any leverage at all).

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[20] Arnesen 2009) p. X.
[21] See Temple Lang (2008) for a general overview.
[22] Bugge (2009) p. 79.
[23] Fauchald (2007) p. 7, Backer (1990) p. 37-38 and Bugge (2009) p. 79.
[24] Innst. nr. 163 (1991-1992) p. 6.
[25] Rt.1995.528 (*Lunner Pukkverk*) and LA.1994.52.
[26] Backer (1990) p. 30 and (2002) p. 54-56, Bugge (2009) p. 81-83, Fauchald (2007) p. 6, Boe (1993) p. 565 and Fleischer (1999) p. 58-61.

4. Legal Obligations of the State in the Capacity of Shareholder

4.1. Introduction

This section will be concerned with discussing whether the State in the capacity of shareholder has a legal obligation to integrate environmental considerations into company decision-making with a view to realizing the objective of sustainable development. In essence, this is a question of whether the legal obligation that was demonstrated in the previous section applies to the State in every capacity (and consequently also in the capacity of shareholder) or whether it is delimited to apply to the State in the capacity of State (public authority).

4.2. The Freedom That is Awarded Shareholders in General

Private autonomy awards shareholders in general a freedom to choose whether and how to exercise the competence that is given to them in the capacity of such. Company law restricts this freedom in certain ways, for example by obliging shareholders to consider the interests of each other and creditors. There is, however, no general legal obligation for shareholders to consider the interest of the environment in company decision-making.

4.3. The Obligation That is Imposed on the State in the Capacity of Shareholder in Particular

4.3.1. Introduction

A legal obligation to integrate environmental considerations into company decision-making with a view to realizing the objective of sustainable development that explicitly addresses the State in the capacity of shareholder does not exist. The question is rather if the legal obligation that was demonstrated in the previous section applies to the State in every capacity (and consequently also in the capacity of shareholder) or if it is delimited to apply to the State in the capacity of State (public authority).

4.3.2. The Content of the Obligation

The content of the obligation that was demonstrated in the previous section is that the State is legally obliged to integrate environmental considerations into its decision-making with a view to realizing the objective of sustainable development. Its wording is very general and there is nothing about the obligation itself that suggests it should not apply to the State in the capacity of shareholder.

On the contrary, one may argue that the content of the obligation suggests that it must apply to the State in any capacity. The rule of action that the obligation is based on is commonly known as the integration principle, the essence of which is that if we are to realize the objective of sustainable development environmental consideration must be integrated into *each and every* decision that may affect the environment.[27] Thus, it would be contrary to the

[27] *Our Common Future* (1987) p. 54, Backer (2002) p. 60-62 and Bugge (2009) p. 69-72.

very content of the obligation if it was to apply to only *some* of the decisions that are made by the State.

4.3.3. The State in Its Various Capacities and As a Whole

The legal grounds of the obligation that was demonstrated in the previous section were adopted by the State in the capacity of State based on public authority. Thus, one may argue that the obligation should only apply to the State in the capacity of State (public authority). Such a distinction has been argued in both public international law[28] and in EU/EEA law.[29]

However, the argument begs the question whether it is necessary to differentiate between the State in the capacity of State (public authority) and the State in the capacity of shareholder (private participant).

Where the State operates in the same market as both public authority and private participant it is obviously important to keep the two roles separated in order to ensure that they are not mixed in an unfortunate manner. A level playing field for all and the avoidance of any form of special treatment is imperative for maintaining trust towards the State in its various capacities.

However, that does not necessarily mean that the State in its various capacities should not seek to realize the same societal objectives (for example sustainable development) as a result of it being required by the same obligations. State governance is exercised through different channels and that the societal objectives are the same in every capacity does not automatically entail that roles are mixed in an unfortunate way. Rather it characterizes state governance that is coherent and whole. In relation to the obligation that was demonstrated in the previous section, one may argue that the work that has been laid down on both an international and national level would suffer from lack of credibility if the responsible parties (the states) in certain capacities were free to violate their own legal obligations, policies and ethics. State governance that is consistent and steady is a condition for maintaining trust towards the State as a whole.

4.3.4. The Teleological Approach

The teleological approach that is essential to the interpretation of EU/EEA law[30] but also has a significant function in the analysis of public international law[31] and the Constitution[32] will argue that the obligation should be interpreted as wide as possible in order to ensure that the objective (of sustainable development) is realized in an effective fashion. Allowing for circumventions on formal grounds can undermine the achievement of the purpose behind the obligation. The State conducts a great deal of state governance in order to safeguard public interests as is expected in a modern society such as police, health care, public transportation and infrastructure, certain major industries etc. Regarding the form of governance, the State is

[28] Ulfstein (2006) p. 18 and p. 73-74.
[29] *Wyatt and Dashwood's European Union Law* (2006) p. 860 and Ringe (2010) p. 24-25. This argument was also put forward by the member states in several of the *Golden Shares Cases*.
[30] Arnesen (2009) p. 24.
[31] Ulfstein (2006) p. 86 and Brownlie (2008) p. 635-636.
[32] Fliflet (2006) p. 49.

generally free to choose (as mentioned, mainly between indirect and direct governance[33]). It is increasingly common it chooses to exercise state governance through private entities in which itself owns a complete or significant share (privatization).[34] If the aforementioned obligation was delimited against applying to the State in the capacity of shareholder, it would be prone to circumvention and its effectiveness significantly impaired.

4.3.5. Duty of Loyalty

The duty of loyalty that is essential to agreements in both public international law[35] and EU/EEA law[36] similarly suggests that the obligation is given a wide interpretation in order to avoid circumventions and other acts of bad faith.

4.3.6. Equality and Fairness

If the obligation that was demonstrated in the previous section was interpreted to apply to the State in every capacity (and consequently also in the capacity of shareholder) one may argue that a small selection of companies alone would effectively carry the weight of the commitment the State has taken on and that such a situation would be contrary to basic considerations of equality and fairness. In order to evaluate such an argument we must determine how these values are to be defined.

Equality and fairness may entail that all companies operating in the same competitive market should be subject to the same terms and conditions, both directly (obligations imposed on the companies) and indirectly (obligations imposed on the companies through the shareholders). This notion immediately sounds reasonable but it is easy to object that such a state of things will never exist. Different shareholders will always have different selfish, ethical, political or legal obligations that they wish to impose on different companies. Consequently, the playing field will always be more or less uneven.

On a different approach, equality and fairness may entail that all companies are subject to the same mechanisms of organization and consequently the same conditions for influence from their respective shareholders. Company law subjects all limited liability companies to the will of the shareholder majority and in that sense to equal and fair terms. Under such a definition, it would not entail inequality to interpret the obligation to apply to State in every capacity (and consequently also in the capacity of shareholder). Rather would that be the result of the opposite interpretation.

4.3.7. Market Reaction

[33] Section 1.2.

[34] For example Statoil ASA (industry), Telenor ASA (telecommunication), NSB AS (public transportation), Flytoget AS (public transportation), Posten Norge AS (postal service), Statkraft SF (energy supply), Baneservice AS (infrastructure), Mesta AS (infrastructure) etc.

[35] Vienna Convention on the Law of Treaties (1969) art. 31 paragraph 1 determines that treaties are to be interpreted "in good faith." That entails a duty of loyalty, see Ulfstein (2006) p. 93.

[36] TEU art. 4 paragraph 3 and EEA art. 3. See section 3.3.

However, if the obligation that was demonstrated in the previous section was interpreted to apply to the State in every capacity (and consequently also in the capacity of shareholder) with the result that state-controlled companies effectively would carry the consequences of the environmental obligations of the State it is easy to assume that the market would react.

First, the affected companies might be considered less profitable.

The Business Case for Sustainable Development[37] will argue that environmental protection and private profits under certain circumstances and to a certain degree are compatible considerations for a company. Conversely, under different circumstances they might be conflicting. Some companies might blossom, others might have more or less success while many will probably experience that environmental protection compromises their profitability.

Reactions towards companies that prioritize environmental protection at the expense of private profits will probably also vary. It is common in macroeconomics to assume that the behaviour of private participants is based exclusively on considerations of profitability.[38] That is, however, hardly an accurate model and because reality is more complex than theory the assumption must be modified.[39] In my view it is natural to assume that the market consists of a variety of participants, all of whom want to turn profits, but to a greater or lesser degree also consider other values (for example protection of the environment). If one accepts this adjustment it must be assumed that the obligation would prove to discourage some market participants and attract others. In principle, the same would apply to any form of corporate governance.

Second, the affected companies might be considered less predictable. If market participants feel that the companies are controlled by mechanisms that are alien to and unaffected by the normal function of the market they might react in a negative manner.

However, one may argue that the State will probably always exercise its shareholder influence based on mechanisms that are alien to and unaffected by the normal function of the market. A legal obligation to do so simply adds a new dimension to an already established truth, namely that the State will probably never be an ordinary private participant. Furthermore, one could argue that the absence of a legal framework would leave the State more space for political discretion (which could prove to be all the more shifting).

Moreover, the uncertainty that would be connected to the State in the capacity of shareholder and the concerned companies could to a certain extent be remedied if the State would publicly disclose the overarching objectives and values that underlie the administration of its private ownership. The State’s indirect and passive ownership (through the Norwegian Pension Fund) is governed by legislation[40] and in my view there is no reason why the State’s direct and active ownership should not be subject to similar mechanisms.

[37] See Holiday (2002) for a general overview.
[38] Eide (2008) p. 54.
[39] Eide (2008) p. 53.
[40] See Lov 21. desember 2005 nr. 123 om Statens Pensjonsfond and Forskrift 8. november 2010 nr. 1414 / Forskrift 21. desember 2010 nr. 1790.

Finally, it should be noted that the State would in any case not be the only market participant that was associated with uncertainty. Private autonomy awards shareholders in general with a freedom to choose whether and how to exercise the competence that is given to them in the capacity of such. Uncertainty is an obvious consequence of that. For example, it is believed that the companies in which Norwegian entrepreneur Kjell Inge Røkke is a dominant shareholder are valued lower than they otherwise would be due to his history of inconsideration towards the other shareholders.[41]

4.3.8. Towards a Convergence Between Indirect and Direct State Governance?

If the obligation that was demonstrated in the previous section was interpreted to apply to the State in every capacity (and consequently also in the capacity of shareholder) a possible consequence would be the creation of a precedence that opened up to the invocation of other legal obligation that apply to the State (for example the obligation to safeguard human rights). The question is whether that would lead to a convergence between indirect and direct state governance (and whether that is a good or a bad thing). In my view the answer is yes to both. To the extent that legal obligation are interpreted to apply to the State in every capacity (and not just in the capacity of State / public authority) that will necessarily lead to a convergence between the various functions and roles of the State. In my view that will add coherence and integrity to the State as such.

4.3.9. Conclusion

As it appears from the discussion in this section there are good arguments to support both positions. Thus, the conclusion is uncertain. In my view, however, the most weighty points suggest that the obligation that was demonstrated in the previous section should apply to the State in every capacity (and consequently also in the capacity of shareholder). The alternative seems to me overly formalistic and contrary to the very content of the obligation.

4.3.10. Summary

This section has discussed whether the legal obligation that was demonstrated in the previous section applies to the State in every capacity (and consequently also in the capacity of shareholder) or whether it is delimited to apply to the State in the capacity of State (public authority), and concluded with the former.

As mentioned, the legal obligation entails that environmental considerations are a mandatory concern in every decision-making process of the company where the outcome may affect the environment, but does not require that they are to be given any amount of weight/impact in the face of conflicting interests. Decisions in private companies must regularly integrate and balance various and often conflicting interests, such as those of the shareholders, creditors and employees. Because of the somewhat weak nature of the obligation it seems difficult to be able to point out specific decisions in which it has not been adhered to. I maintain, however, that the obligation must require environmental considerations to be given a minimum amount

[41] See NA24 (2011).

of influence and that one under certain circumstances (where environmental protection is of overriding importance) may be able to overrule decisions that do not comply with it.

5. Legal Competence of the State in the Capacity of Shareholder

This section will be concerned with outlining the legal competence of the State in the capacity of shareholder. It will shortly cover the general rules and explain how the legal competence of the shareholder may be used to integrate and prioritize environmental concerns in company decision-making with a view to realizing the objective of sustainable development. The legal barriers of such governance will be examined closer in the following sections.

The shareholder exercises "the highest authority in the company" through the General Meeting according to the Norwegian (Public) Limited Liability Companies Act ("the Companies Acts") Section 5-1 paragraph 1. The Companies Acts assume that this is how the shareholder may influence the company[42] (outside of the General Meeting he has no formal competence[43]). This general rule entails that the shareholder may consider and decide any matter on behalf of the company[44] whether proactively (instructing on a future decision)[45] or retroactively (overruling a past decision).[46] A decision by the General Meeting is binding on the other company organs.

The General Meeting makes decisions by voting on explicit matters such as strategies, projects or transactions. The process is regulated by the Companies Acts Chapter 5.

A shareholder with a qualified majority (Companies Acts Section 5-18) may control the Articles of Association and thereby the framework within which the company must be run. For example, the State in the capacity of shareholder in companies like Statoil ASA, NSB AS, Store Norske Spitsbergen Kulkompani AS and Mesta Konsern AS may adopt a provision in the Articles of Association to determine that environmental concerns shall be integrated and to some extent prioritized in company decision-making with a view to achieving a certain level of environmental protection.

Furthermore, a shareholder with an ordinary majority (Companies Acts Section 5-17) may determine the outcome of any regular decision that is considered at the General Meeting. At a general level this means that the shareholder may determine the strategy and long-term plans of the company. For example, the State in the capacity of shareholder in companies like Kongsberg Gruppen ASA, Nammo ASA and Telenor ASA may decide that the company shall endeavour to reduce its energy consumption or impose green requirements on suppliers and customers. At a specific level it means that the shareholder may decide concrete issues related

[42] *Aksjeloven og allmennaksjeloven kommentarutgave* (2004) p. 321 and Werlauff (1983) p. 64.
[43] Andenæs (2006) p. 294, *Aksjeloven og allmennaksjeloven kommentarutgave* (2004) p. 311 and 493 and Werlauff (1983) p. 65.
[44] Andenæs (2006) p. 294, *Aksjeloven og allmennaksjeloven kommentarutgave* (2004) p. 310, Augdahl (1926) p. 409 and Werlauff (1983) p. 89.
[45] NOU 1996:3 p. 127. See also Andenæs (2006) p. 294, *Aksjeloven og allmennaksjeloven kommentarutgave* (2004) p. 310, Augdahl (1926) p. 409 and Werlauff (1983) p. 95.
[46] NOU 1996:3 p. 127. See also Andenæs (2006) p. 294 and *Aksjeloven og allmennaksjeloven kommentarutgave* (2004) p. 310.

to the running of the company. For example, the State in the capacity of shareholder may decide whether Kongsberg Gruppen ASA shall make a certain investment in eco-efficient technology and innovation or whether Statoil ASA shall abstain from participating in a very polluting investment project.

Finally, a shareholder with an ordinary majority may also to a considerable extent influence the election of representatives to the other company organs (see Companies Acts Section 6-35 paragraph 3 on the election of the Corporate Assembly, Section 6-3 or Section 6-37 paragraph 1 on the election of the Board and Section 6-2 paragraph 2 on the election of the General Manager). Conversely may the shareholder also dismiss the representatives that have been elected by the General Meeting (see Companies Acts Section 6-7 paragraph 2 and Section 6-36 paragraph 1). Neither election nor dismissal requires any justification. Thus, a controlling shareholder may to a considerable extent also influence the conduct of the other company organs.

On all of these levels the State in the capacity of shareholder may integrate and to a varying extent prioritize environmental concerns in company decision-making with a view to realizing the objective of sustainable development. Whether these basics must be modified by various legal barriers is the topic of the following sections.

6. Legal Barriers That Restrict the Actions of Shareholders Generally

6.1. Introduction

This section will be concerned with discussing the legal barriers that restrict the actions of shareholders generally and how they may prevent the State in the capacity of shareholder from integrating and prioritizing environmental considerations in company decision-making with a view to realizing the objective of sustainable development. The shareholder must adhere to a number of such barriers in the interest of other stakeholders.

6.2. The State as Shareholder and the Other Company Organs

Company law in general and the Companies Acts in particular are based on the assumption that competence is to be divided between the various company organs. Therefore, even though the general rule is that the shareholder in the General Meeting may decide any matter on behalf of the company he is not really supposed to do so.

The general division of competence follows implicitly from the Companies Acts and suggests that the shareholder cannot exercise his competence in the General Meeting to such an extent that he in reality assumes the general competence that is conferred on another organ.[47] The Board and the General Manager together conduct what we might describe as the running of the company.[48]

[47] See Companies Acts Sections 6-12 to 6-14. See also Andenæs (2006) p. 379, *Aksjeloven og allmennaksjeloven kommentarutgave* (2004) p. 320, Werlauff (2008) p. 382 and Schans Christensen (2009) p. 513.
[48] See Companies Acts Sections 6-12 to 6-14.

It is undisputed that a shareholder on a general level may determine the overarching values, strategies and priorities that the Board and the General Manager must adhere to.[49] For example, the State in the capacity of shareholder in Statoil ASA or Kongsberg Gruppen ASA may on an aggregated level decide that environmental considerations shall be integrated and to a certain extent prioritized in company decision-making.

Furthermore, a shareholder may as a general rule also make the decision on specific matters.[50] For example, the State in the capacity of shareholder in Store Norske Spitsbergen Kulkompani AS may decide whether the company is to acquire new and green production equipment or whether it is to participate in a joint venture with considerable environmental impact.

However, if a shareholder goes too far in deciding specific matters that are encompassed by the general competence of the Board or the General Manager he may violate the general division of competence. The Supreme Court has occasionally reacted to such situations by imposing financial liability on the relevant shareholder.[51] Nevertheless, the existing case law suggests a high threshold for such reactions and seems to assume that the shareholder must have governed the corporation completely independent of the other organs.[52] Generally, it seems that it is mostly frequent exercising of the shareholders competence in matters that are of less importance that will constitute a breach of the general division of competence. The shareholder cannot decide every detail in the running of the company. Thus, a lot of minor issues that together may have a major impact on the environment are beyond the competence of the State in the capacity of shareholder. However, a shareholder may indirectly influence these decisions through the overarching guidelines and through electing and dismissing the representatives of the other company organs. Consequently, it seems that the general division of competence does not represent a significant barrier for the purposes of the article.

The specific division of competence follows explicitly from the Companies Acts and provides that certain matters shall be decided by other company organs than the General Meeting. Where this is the case the decision itself must be made by the relevant company organ, but a shareholder may still indirectly influence it through the Articles of Association (which every company organ must adhere to) and through electing and dismissing the representatives of the relevant organ. After this, it does not seem that the specific division of competence represents a significant barrier for the purposes of this article.

6.3. The State as Shareholder and the Other Shareholders

6.3.1. Introduction

The Companies Acts are based on the main rule that decisions in the General Meeting are made by an ordinary majority (Companies Acts Section 5-17) in order to ensure effectiveness.

[49] Andenæs (2006) p. 294 and *Aksjeloven og allmennaksjeloven kommentarutgave* (2004) p. 319.
[50] Andenæs (2006) p. 294 and *Aksjeloven og allmennaksjeloven kommentarutgave* (2004) p. 319.
[51] See Rt.1932.1015 and Rt.1937.600. See also Hagstrøm (1993) p. 270-271 and (2003) p. 97-98 and *Aksjeloven og allmennaksjeloven kommentarutgave* (2004) p. 39.
[52] See Hagstrøm (1993) p. 270 and (2003) p. 97-98.

This means that minority shareholders are exposed to the will of the majority shareholder(s). In order to protect minority shareholders the Companies Acts provide rules that require some decisions to be made by a qualified majority (Companies Acts Sections 5-18 to 5-21).

6.3.2. Articles of Association

Changes to the Articles of Association must be adopted by a qualified majority of two thirds (Companies Acts Section 5-18). This entails a protection for the minority shareholders and a barrier for the majority shareholder(s).

The Articles of Association shall provide a specification of the business of the company (Companies Acts Section 2-2 paragraph 1 nr. 3 and 4). The provision entails a framework within which the activities of the company must be kept. It can be expressed in broad or narrow terms[53] and shall generally be given a wide interpretation.[54] There are limits, however, and activities that are only similar to the specified business of the company are not allowed.[55] Under certain circumstances integrating and prioritizing environmental considerations in company decision-making may entail that the specification of the business of the company should be changed. For example, that may be case for corporations that are engaged in heavy industries or the extraction of non-renewable resources such as petroleum. As of today this is relevant for some of the companies in which the State is a shareholder.[56] Generally, however, the provisions are expressed in sufficiently broad terms to allow for necessary changes[57] while the State in any case has a qualified majority in the most relevant companies.[58]

Otherwise, the Articles of Association may provide regulations on more or less any matter relating to the company.[59] If the Articles of Association provide that the company shall seek to generate as much financial profit as possible it is clear that they may represent at barrier to the State in integrating and prioritizing environmental considerations in company decision-making. Conversely, if the Articles of Association determine that the company in every way shall endeavour to contribute to the objective of sustainable development they don't seem to do so. In between these opposite poles one can imagine a variety of possible regulations that might prove to be more or less significant barriers for the purposes of the article. Regulations of this sort are necessarily specific to every company and for that reason a closer examination is not practical. They do not seem to be common in state-controlled companies in any case.

6.3.3. Abuse of Authority

[53] Andenæs (2006) p. 48 and *Aksjeloven og allmennaksjeloven kommentarutgave* (2004) p. 112.
[54] Rygh (1919) p. 594.
[55] Andenæs (2006) p. 53.
[56] See Meld. St. 13 (2010-2011) p. 7 for a recently updated overview of the companies that are part of the State's portfolio.
[57] See for example the Articles of Association in Statoil ASA, Norsk Hydro ASA, Yara International ASA and Store Norske Spitsbergen Kulkompani AS.
[58] The State has a share of 67 % in Statoil ASA and 99,9 % in Store Norske Spitsbergen Kulkompani AS.
[59] See implicitly Companies Acts Section 2-2. See also *Aksjeloven og allmennaksjeloven kommentarutgave* (2004) p. 110, Augdahl (1926) p. 155, Werlauff (1987) p. 49 and *Gower and Davies' Principles of Modern Company Law* (2003) p. 54-55.

Decisions that constitute abuse of authority according to the Companies Acts must be agreed to unanimously by the shareholders. This also provides protection for minority shareholders and a barrier for majority shareholder(s).

The rules on abuse of authority aim to safeguard two basic principles of limited liability company law, namely the principle of equality and the purpose of profit.[60] These two maxims are presumed to be the most fundamental preconditions for participation as a shareholder and they are consequently given special protection. The principle of equality requires that all shares are given the same legal rights within the company (Companies Acts Section 4-1). The purpose of profit entails that the company shall have as its objective to generate financial gain and to a certain extent distribute it to the shareholders (Companies Acts Sections 2-2 paragraph 2).[61]

The general clause (Companies Acts Section 5-21) provides a common prohibition against abuse of authority. It is supplied by some more specific provisions (Companies Acts Sections 5-19 and 5-20)[62] as well as unwritten principles on abuse of authority.[63] In the following these legal grounds will be commonly referred to as the prohibition (against abuse of authority).

The prohibition applies to decisions that may constitute an unfair violation of the principle of equality or the purpose of profit.[64] If the State is obliged to (or wishes to) integrate and prioritize environmental considerations in company decision-making with a view to realizing the objective of sustainable development one may argue that would constitute a breach of the latter.[65] In order to discuss whether that is the case one must be aware of the precise content of the purpose of profit.

First, it is undisputed that that the purpose of profit must be pursued in a long-term perspective.[66] The Business Case for Sustainable Development[67] will suggest that integrating and prioritizing environmental considerations in company decision-making under certain circumstances and to a certain extent can be consistent with the purpose of profit (in particular in a long-tem perspective). The courts will most likely be reluctant to overrule a decision that is both friendly to the environment and justified by financial considerations ("the business judgment rule").[68] For example, the State may decide that Nammo AS shall invest in a system for recycling old and outdated ammunition products or that Telenor ASA shall do likewise with their telecommunication products (if such decisions are commercially justifiable).

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[60] Truyen (2005) p. 97 and Sandbekk (2002) p. 440-442.
[61] Truyen (2005) p. 105-106.
[62] Truyen (2005) p. 125.
[63] Truyen (2005) p. 210, Andenæs (2006) p. 320 and *Aksjeloven og allmennaksjeloven kommentarutgave* (2004) p. 401-402.
[64] Truyen (2005) p. 211.
[65] Truyen (2005) p. 116.
[66] Rt.1922.272 (*Freia*), later confirmed in Rt.1927.588, Rt.1929.857, Rt.1931.160 and Rt.1936.950. See also Truyen (2005) p. 109 and Schans Christensen (1991) p. 291.
[67] See Holliday (2002) for a general overview.
[68] Rt.1922.272, Rt.1927.588, Rt.1929.857, Rt.1931.160, Rt.1936.950, Rt.1999.1682, RG.1999.1395, RG.2001.841 and LA.2002.00084. See also Truyen (2005) p. 231-322.

Second, it is also obvious that the purpose of profit must be pursued within the framework of legal regulations (most notably criminal law and business regulations).[69] For example, it would be in accordance with the purpose of profit for the State to decide that companies like Cermaq ASA and Yara International ASA (as well as other companies) shall comply with the Norwegian Pollution Control Act (even though that would impose extra costs on the company).

Third, the purpose of profit must be pursued within the framework of ethical standards. This interpretation of the maxim has explicit support among legal scholars[70] and in case law[71] as well as implicit support in preparatory works.[72] It is not clear, however, what the framework of ethical standards consists of. In order to avoid disagreements as to what ethical standards apply to modern companies it is probably wise to require a certain level of general acceptance. Environmental considerations in general and the objective of sustainable development in particular arguably satisfy such a requirement. As demonstrated in section 3 and 4, there is a broad variety of legal grounds for a legal obligation to safeguard both. That reflects the significance given to environmental protection and the objective of sustainable development by our elected representatives who in a democracy shall represent the values of the people.[73] Good practice also suggests that the activities of a company should be consistent with and help to realize the objective of sustainable development.[74] However, this cannot entail that any measure that is consistent with and helps to realize the objective of sustainable development are required by the framework of ethical standards (such an interpretation would completely undermine the purpose of profit). Rather it must mean that some businesses, operations and activities involve such a significant, gross or cynical exploitation of the environment that it would not be contrary to the purpose of profit to abstain from them or seek to reduce the environmental impact that they cause. For example, it could be consistent with the purpose of profit if the State in the capacity of shareholder in companies like Statoil ASA and Norsk Hydro ASA decided that they shall abstain from participating in certain activities (even though that would mean reduced income and/or increased costs due to restructuring).

However, if a shareholder integrates and prioritizes environmental considerations in company decision-making in a way that is not encompassed by the aforementioned modifications he is in breach of the purpose of profit. The prohibition against abuse of authority requires that the violation is qualified – unfair – to merely establish a violation is not sufficient.[75]

A shareholder cannot make a general decision that entails that environmental considerations shall be integrated and prioritized to such an extent in company decision-making that the company no longer has a purpose of profit. Such decisions imply permanent and significant violations of the purpose of profit and will typically be determined unfair (they are also

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[69] NUT 1970:1 p. 123. See also Truyen (2005) p. 111.
[70] Truyen (2005) p. 111 and Augdahl (1926) p. 451.
[71] Rt.1922.272 (*Freia*), later confirmed in Rt.1927.588, Rt.1929.857, Rt.1931.160 and Rt.1936.950.
[72] NUT 1970:1 p. 123.
[73] Fliflet (2006) p. 139.
[74] OECD (2008) p. 14, 19 and 39.
[75] Truyen (2005) p. 294-295, Sandbekk (2002) p. 451 and *Aksjeloven og allmennaksjeloven kommentarutgave* (2004) p. 404.

explicitly encompassed by Companies Acts Section 5-20 paragraph 1 nr. 5). First, this covers decisions that entail such a green policy that the company is no longer able to generate profits at all.[76] For example, the prohibition might apply if the State in the capacity of shareholder in Statoil ASA and Norsk Hydro ASA decided that they shall immediately alter their operations to encompass only energy from renewable resources (a more gradual reformation might be considered differently). Second, it covers decisions that the generated profit permanently shall be channelled into measures to protect the environment.[77] For example, the prohibition would apply if the State in the capacity of shareholder decided that all of the generated profit in the aforementioned companies shall be spent reducing their impact on the environment.

Further, a shareholder may not make a general decision that in any other way reduces the other shareholders' right to dividend. Such decisions are explicitly encompassed by Companies Acts Section 5-19 paragraph 1 which supplies Section 5-20 paragraph 1 nr. 5.[78]

Decisions that do not completely undermine the purpose of profit in any way like the aforementioned must be subject to a concrete assessment.[79]

The assessment should consider the nature of the specific company and the features that affect the minority's need for protection as opposed to the majority's need for effective decision-making, such as its size, turnover, number of shareholders, number of employees and connection between shareholding and employment.[80] The companies that are part of the ownership of the State are generally big and impersonal (for example SAS AB or Norsk Hydro ASA) which implies that the need for effective decision-making is bigger and the need for loyalty between the shareholders smaller.[81] This suggests that the shareholder is afforded a wide competence.

Furthermore, the assessment should consider how the decision is justified.[82] Corporate Social Responsibility is a popular term for the growing recognition that companies should behave in order to best serve society as a whole.[83] This suggests that decisions that are based on concern for the environment must constitute a significant violation of the purpose of profit in order to be considered abuse of authority.

Finally, the assessment must consider the scope of the violation.[84] Overarching and general decisions are permanent and will typically be considered unfair if they over time will impair the company's ability to generate profits or to distribute it (even if the purpose of profit is not completely undermined, cf. Companies Acts Sections 5-19 paragraph 1 and 5-20 paragraph 1 nr. 5). For example, it may constitute abuse of authority if the State in the capacity of shareholder in Statoil ASA decided that the company under any circumstances shall conduct

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[76] *Aksjeloven og allmennaksjeloven kommentarutgave* (2004) p. 400.
[77] *Aksjeloven og allmennaksjeloven kommentarutgave* (2004) p. 400.
[78] Andenæs (2006) p. 312 and *Aksjeloven og allmennaksjeloven kommentarutgave* (2004) p. 393.
[79] Andenæs (2006) p. 320.
[80] Truyen (2005) p. 306-209.
[81] Truyen (2005) p. 307-308.
[82] Truyen (2005) p. 263.
[83] Truyen (2005) p. 335. See also Augdahl (1926) p. 451 and Smith (1988) p. 61.
[84] Truyen (2005) p. 263.

its operations and activities within the objective of sustainable development. Concrete decisions are singular and will typically not be considered unfair (see Rt.1922.272 (*Freia*). For example, it may not constitute abuse of authority if the State in the capacity of shareholder in Kongsberg Gruppen ASA decided that the company shall invest in production equipment that would reduce its impact on the environment. However, concrete decisions of this type could also constitute abuse of authority if they become part of a permanent practice.

Thus, it seems that the prohibition against abuse of authority represents a significant barrier for the purposes of the article. Nevertheless, the State in the capacity of shareholder still has competence to integrate and to a certain extent prioritize environmental considerations in company decision-making with a view to realizing the objective of sustainable development.

6.4. The State as Shareholder and the Creditors

Creditors depend on the company to maintain a private economy that is sound in terms of balance between equity and debts. They are (usually) not afforded the competence to influence the running of the company but their interests are protected through various provisions in the Companies Acts. These represent barriers to the (majority) shareholder(s).

The general capital adequacy rule in the Companies Acts Section 3-4 provides a basic safety. It entails that the company must at all times hold an equity that is sound according to the risk and size of its business. Case law suggests that the shareholders may be held personally liable if the creditors suffer losses due to violation of the provision.[85]

As mentioned, the Business Case for Sustainable Development[86] will suggest that integrating and prioritizing environmental considerations in company decision-making under certain circumstances and to a certain extent can be consistent with the purpose of profit and consequently beneficial for the creditors. Conversely, under different circumstances may persistent governance of this sort be incompatible with commercial considerations and accordingly detrimental to the equity capital of the company. For example, one can imagine that the State in the capacity of shareholder in Store Norske Spitsbergen Kulkompani AS decided on an environmental protection framework that would repeatedly inflict losses on the company and over time eat away at its equity capital. Whether the general capital adequacy rule is violated in a certain case must be determined by a concrete overall assessment of the company.[87] The courts will probably be reluctant to overrule considerations of the company's capital requirements.[88]

It seems that the general capital adequacy rule does not represent a significant barrier for the purposes of this article. A shareholder that wants to integrate and prioritize environmental considerations in company decision-making at the expense of the financial welfare of the company will probably conflict with the other shareholders and the prohibition against abuse

[85] See Rt.1996.672 (*Kongeparken*).
[86] See Holliday (2002) for a general overview.
[87] NOU 1996:3 s. 102. See also Andenæs (2006) p. 419 og *Aksjeloven og allmennaksjeloven kommentarutgave* (2004) p. 182.
[88] Andenæs (2006) p. 419-420.

of authority before he violates the interests of the creditors. What is more, if the company cannot handle environmental protection measures without its equity capital deteriorating one may argue that it would never be sustainable and that other alternatives should be considered.

6.5. The State as Shareholder and the Employees

The employees depend on the company to maintain a steady level of activity and employment in an ongoing business. They are protected by labour law regulations that entail a barrier for the (majority) shareholder(s).

The Norwegian Working Environment Act Section 15-7 provides a general protection against unfair dismissal by requiring it to be "objectively justified on the basis of circumstances relating to the undertaking, the employer or the employee." The provision constitutes a legal standard and must be interpreted in light of the common moral view prevailing in society.[89] It entails a concrete balancing of the conflicting interests.[90]

A shareholder integrating og prioritizing environmental considerations in company decision-making with a view to realizing the objective of sustainable development may want to shut down part of the business in order to protect the environment (for example if the activities concerned are highly polluting). For example, that might be the case for the State in the capacity of shareholder in Store Norske Spitsbergen Kulkompani AS (coal mining) or in Statoil ASA (petroleum recovery). Case law has determined that a dismissal does not have to be an economic necessity in order to be "objectively justified."[91] It can also be based on other considerations.[92]

Thus, a present-day interpretation of the provision should clearly be open to dismissals based on environmental considerations. The assessment shall be based on the common moral view of society and as demonstrated earlier, environmental considerations in general and the objective of sustainable development in particular have wide-ranging support both nationally, regionally and globally. The framework set up by case law seem to be more than wide enough to accept such decisions as lawful.[93] It must be maintained that the assessment is individual in each and every case but it nevertheless seems that the protection against unfair dismissal does not represent a significant barrier for the purposes of this article.

6.6. The State as Shareholders and Other Stakeholders

Other stakeholders may hold privileges towards the shareholders based on special legal grounds (most commonly a shareholders' agreement). These may provide a more or less

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[89] Jakhelln (2006) p. 428-429, Fougner (2006) p. 788 and Dege (1997 II) p. 221.

[90] Jakhelln (2006) p. 429 and Fougner (2006) p. 781.

[91] See Rt.1988.508 (*Christiania Spigerverk*). The state-controlled company Christiania Spigerverk decided to shut down part of its activities in Oslo and move to a more remote location in Mo i Rana (due to the regional policy of the Norwegian Labour Party). The consequent dismissals were determined objectively justified by the Supreme Court.

[92] Jakhelln (2006) p. 443-444 and Dege (1997 III) p. 10-11.

[93] In Rt.1988.508 (*Christiania Spigerverk*) the decision was based on the objective of maintaining a viable local community in a remote part of Norway. Arguably, the objective of sustainable development has a more common support.

significant barrier for the purposes of this article. However, they are individual by nature and consequently unfit for a general assessment.

6.7. Summary

This section has discussed the legal barriers that restrict the actions of shareholders generally and how they may prevent the State in the capacity of shareholder from integrating and prioritizing environmental considerations in company decision-making with a view to realizing the objective of sustainable development. It has revealed one significant barrier in particular, namely the interests of the other shareholders and the prohibition against abuse of authority. The State in the capacity of shareholder cannot prioritize environmental protection to such an extent that its governance constitutes an unfair violation of the purpose of profit. However, as demonstrated, that still affords the State considerable competence to work towards realizing the objective of sustainable development.

7. Legal Barriers That Restrict the Actions of the State in the Capacity of Shareholder Specifically

7.1. Introduction

This section will be concerned with discussing the legal barriers that restrict the actions of the State in the capacity of shareholder specifically and how they may prevent it from integrating and prioritizing environmental concerns in company decision-making with a view to realizing the objective of sustainable development. The State is subject to a variety of requirements under EU/EEA law that don't apply to other private participants.

7.2. State Ownership and EU/EEA Law

State ownership *per se* is not incompatible with EU/EEA law. This follows explicitly from the neutrality principle[94] and implicitly from other parts of the treaties.[95] However, the specific content and range of this starting point is uncertain (which was duly demonstrated during the *Golden Shares Cases*). This casts doubt on whether the exercising of state ownership can be inconsistent with EU/EEA law. The question here is whether that is the case if the State was to integrate and prioritize environmental considerations in company decision-making with a view to realizing the objective of sustainable development ("direct governance" or "active state ownership"). It will be considered in relation to both the four freedoms and the state aid rules.

7.3. The Four Freedoms

7.3.1. Introduction

[94] TFEU art. 345 and EEA art. 125.
[95] TFEU art. 106 and EEA art. 59.

Free movement of goods, persons, services and capital (the four freedoms), the internal market, is a fundamental objective in EU/EEA law.[96] Thus, the general rules provide a prohibition against state measures that create a restriction to cross border movement. The question here is whether direct governance can entail such a restriction.

7.3.2. Free Movement of Capital and Freedom of Establishment

Direct governance may arguably deter private participants from investing in the company concerned.[97] It is not obvious if this should be considered as a possible restriction to the freedom of establishment or to the free movement of capital. The former safeguards the right to participate in the economic life of the member state in a stable and lasting manner[98] including investments that aim at establishing a controlling/decisive share in a company.[99] However, direct governance presupposes that the State maintains a decisive share in the company. The latter encompasses both investments that aim at establishing a direct and active shareholding in which effective participation in company decision-making is facilitated and portfolio investments that are purely financially motivated.[100] Thus, the two freedoms clearly overlap each other but the latter seems to have an area of application that is more practical for the purposes of the article. The following assessment will therefore be based on the free movement of capital.

State measures that entail a restriction on the free movement of capital between member states are as a main rule prohibited (TFEU art. 63 and EEA art. 40).

7.3.3. State Measure

What measures are to be considered state measures for the purposes of TFEU art. 63 and EEA art. 40 is not obvious. As demonstrated the State can exercise governance in mainly two ways, namely indirectly and directly.

Indirect governance is considered a state measure for the purposes of TFEU art. 63 and EEA art. 40 whether conducted through public authority[101] or actions.[102]

Direct governance based on so-called *Golden Shares* is also considered a state measure for the purposes of TFEU art. 63 and EEA art. 40.[103]

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[96] TFEU art. 26. See also *EØS-rett* (2004) p. 253 and Steiner (2009) p. 345.

[97] See section 7.3.3.

[98] See *Gebhard* (C-55/94) (25). See also *EØS-rett* (2004) p. 380, Barnard (2010) p. 296, *The Law of the European Union and the European Communities* (2008) p. 720 and *Wyatt and Dashwood's European Union Law* (2006) p. 751.

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[100] See Directive 88/361/EEA art. 1.

[101] Both legislative and administrative authority encompassed, see *Brugnoni and Ruffinego* (C-157/85). See also Steiner (2009) p. 387 and Flynn (2002) p. 778.

[102] See *Buy Irish* (C-249/81). See also *EØS-rett* (2004) p. 297.

[103] See *Italian Golden Shares I* (C-58/99), *Portuguese Golden Shares I* (C-367/98), *French Golden Shares* (C-483/99), *Belgian Golden Shares* (C-503/99), *Spanish Golden Shares I* (C-463/00), *UK Golden Shares* (C-98/01), *Italian Golden Shares II* (C-174/04), *Dutch Golden Shares* (C-282/04 og C-283/04), *Comune di Milano Golden Shares* (C-463/04 og C-464/04), *German Golden Shares* (C-112/05), *Spanish Golden Shares II* (C-274/06), *Italian*

The question is whether the same applies to the form of direct governance concerned in this article, namely direct governance based simply on shareholding and ordinary company law. It has been customary to answer in the negative as the State here would act as a participant and not as a regulator.[104]

However, the question arose in *Dutch Golden Shares*. In this case the member state (the Netherlands) had created their *Golden Share* with competence based exclusively on shareholding and ordinary company law.[105] Advocate General Maduro approached the question explicitly and suggested that it is irrelevant on what basis the member state exercises competence as it is bound by the four freedoms not in the capacity of public authority but in the capacity of signatory to the treaties.[106] The Court did not address the question as openly but simply determined that the form of governance concerned was to be considered a state measure.[107] In my opinion, the Court essentially accepts the position of Advocate General Maduro although it did not wish to express it as clearly.

In *Comune di Milano Golden Shares* and *Portuguese Golden Shares II* the question was not crucial but Advocate General Maduro[108] and Advocate General Mengozzi[109] nevertheless decided to voice the same position.

The legal status that can be derived from *Dutch Golden Shares* and the Advocate Generals is that EU/EEA law apply to the member states in their capacity of signatories to the treaties. Consequently it also applies to direct governance (active state ownership) for the purposes of this article. However, the Court will not always comply with the logical consequence of its previous judgments. If it finds that it has gone too far in either direction it may be inclined to adjust its position. In order to anticipate such a correction, however, the arguments must be persuasive.

One may argue that the application of the four freedoms (and EU/EEA law in general) would be too extensive if it was to encompass the member states in each and every capacity. The neutrality principle is supposed to safeguard the right of the member states to participate in private markets and a wide application of the four freedoms could undermine this starting point completely.

Furthermore, if the members states can create restrictions to the four freedoms by the simple exercising of shareholding and ordinary company law one may argue that it would be more appropriate to approach these legal systems than the participants utilizing them.[110]

Golden Shares III (C-326/07), *Portuguese Golden Shares II* (C-171/08) og *Portuguese Golden Shares III* (C-543/08).

[104] *Wyatt and Dashwood's European Union Law* (2006) p. 860 and Ringe (2008) p. 24-25.

[105] See *Dutch Golden Shares* (2)-(3). See also Looijestijn-Clearie (2007) p. 440-442.

[106] See Opinion of Advocate General Maduro in *Dutch Golden Shares* (22). See also Ringe (2008) p. 25.

[107] See *Dutch Golden Shares* (22).

[108] See Opinion of Advocate General Maduro in *Comune di Milano Golden Shares* (22).

[109] See Opinion of Advocate General Mengozzi in *Portuguese Golden Shares II* (65).

[110] See in the same vein Opinion of Advocate General Maduro in *Dutch Golden Shares* (24).

On the other hand, one may argue that the application of the treaties should be restricted by interpretation of the term restriction rather than the term state measure.[111] This approach would allow for a more balanced delimitation than the somewhat formalistic distinction between the member states in their various capacities.[112]

The teleological approach that is essential to the interpretation of EU/EEA law[113] would also suggest that the four freedoms should be given a wide application in order to ensure effective compliance.[114] Indirect and direct governance are only two equal alternatives for exercising state governance and they are in principle equally harmful to the objective of free movement.

The duty of loyalty[115] would similarly suggest that the member states shall comply with the four freedoms in a faithful manner, regardless of what capacity they are acting in.

It could also be argued that member states in the capacity of private participants are already subject to special barriers that are alien to other private actors (for example related to public procurement and state aid).[116]

In sum, my conclusion is that direct governance based on shareholding and ordinary company law should be and is considered a state measure (and consequently subject to the free movement of capital). The next question is whether the state measure of integrating and prioritizing environmental concerns in company decision-making with a view to realizing the objective of sustainable development would create a restriction.

7.3.4. Restriction

Restriction is a term that has been given a wide interpretation for the purposes of TFEU art. 63 and EEA art. 40. It encompasses any state measure that dissuade/discourage/deter private participants from investing in the company concerned.[117]

The Court has on several occasions given statements to suggest that direct governance that seeks to safeguard public interests may conflict with the purpose of profit and consequently dissuade private participant from investing in the company concerned:

> ”Thus, the risk that the Netherlands State might exercise its special rights in order to pursue interests which do not coincide with the economic interests of the company concerned might discourage direct or portfolio investments in that company.”[118]

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[111] See also Ringe (2008) p. 27.
[112] See also Ringe (2008) p. 27.
[113] Arnesen (2009) p. 24.
[114] See also Ringe (2008) p. 27.
[115] TEU art. 4 paragraph 3 and EEA art. 3.
[116] Ringe (2008) p. 25-26.
[117] See *Portuguese Golden Shares I* (45), *French Golden Shares* (41), *Spanish Golden Shares I* (61), *UK Golden Shares* (47), *Italian Golden Shares II* (30), *Dutch Golden Shares* (28), *German Golden Shares* (52), *Comune di Milano Golden Shares* (29), *Portuguese Golden Shares II* (60) og *Portuguese Golden Shares III* (56).
[118] See *Dutch Golden Shares* (28). See also *German Golden Shares* (79), *Portuguese Golden Shares II* (61) and *Portuguese Golden Shares III* (57). See also Opinion of Advocate General Colomer in *German Golden Shares* (48), Opinion of Advocate General Maduro in *Comune di Milano Golden Shares* (25) and Opinion of Advocate General Mengozzi in *Portuguese Golden Shares II* (69).

The statement suggests that a member state cannot have decisive influence on a company because it may exercise it with a view to safeguarding public interests that conflict with the purpose of profit. Where the decisive influence is based on a *Golden Share* the statement is directly relevant and must be applied. Conversely, where the decisive influence is based on shareholding and ordinary company law the statement is only indirectly relevant and its application must be modified by the neutrality principle.

The fact that a member state has decisive influence on a company cannot in itself constitute a restriction on free movement of capital if the influence is based on shareholding and ordinary company law. The neutrality principle ensures the right of the member states to hold a bigger or smaller amount of shares in private companies. This interpretation is supported by TFEU art. 106 and EEA art. 59 which presuppose the existence of public undertakings (i.e. companies in which the member state has a decisive influence[119]).

Conversely, if a member state exercises its decisive influence in order to safeguard public interests (for example environmental protection) at the expense of the purpose of profit it must be assumed to create a restriction to the free movement of capital. Here the member state behaves in a manner that (in the opinion of the Court) differs from common market behavior and which is better characterized as state governance. As has been repeated several times throughout this article, it is my opinion that indirect and direct governance should be subject to the same obligations and barriers. In the event that either form of governance entails a restriction to the four freedoms the measure should be justified by reference to the public interests that are thereby safeguarded. Thus, the neutrality principle cannot protect direct governance of such sort.

Consequently, I assume that the State does not create a restriction to the free movement of capital by having a decisive influence on the company based on shareholding and ordinary company law as long as it exercises its ownership in a way that is consistent with the purpose of profit.[120]

As mentioned, the Business Case for Sustainable Development[121] will suggest that integrating and prioritizing environmental considerations in company decision-making under certain circumstances and to a certain extent can be consistent with the purpose of profit and consequently not entail a restriction to the free movement of capital. For example, a decision to make Telenor ASA more eco-efficient could reduce operating costs both short-term and long-term. Conversely, under different circumstances may a direct governance of this sort be detrimental to the economic interest of the company. For example, the State may decide that Kongsberg Gruppen ASA shall decline on a profitable offer to design system solutions for a devastating petroleum recovery project. In between these examples of governance consistent with common market behaviour and governance that without compromise safeguards public interests there is a variety of examples that differs from the former to greater or lesser extent. It is uncertain how significant the difference must be in order to constitute a restriction to the

[119] Directive 80/723/EEC art. 2.
[120] See in the same vein Opinion of Advocate General Maduro in *Comune di Milano Golden Shares* (25).
[121] See Holliday (2002) for a general overview.

free movement of capital (the threshold must be determined by case law). For the purposes of the article it is nevertheless interesting to examine whether a potential restriction could be justified by reference to overriding public interests.

7.3.5. Compatibility

A restriction to the free movement of capital can be determined compatible if it serves a legitimate public interest and is consistent with the proportionality principle.[122]

Environmental protection is a legitimate public interest for the purposes of the four freedoms in general[123] and the free movement of capital in particular.[124] As demonstrated, the objective of sustainable development is one of the overarching objectives of the EU and the EEA and one may argue that the Court has given environmental protection special significance in case law.[125]

The proportionality principle entails that the measure (the direct governance) must be suitable, necessary and proportional *strictu sensu*.[126]

Suitability entails that the direct governance must contribute to realizing the determined objective.[127] The test is usually light on this condition[128] and must be considered satisfied. Direct governance through state ownership involves a hands on-approach that ensures that environmental considerations are integrated and prioritized in company decision-making with a view to realizing the objective of sustainable development. There is little doubt that it would contribute to protecting the environment.

Necessity requires that there is no alternative measure that would be equally effective in terms of realizing the determined objective and less restrictive to the free movement of capital.[129] It leads to the distinction between indirect and direct governance and asks whether the former would be a better alternative than the latter.

Indirect governance usually has the advantage of general application (as opposed to direct governance which only applies to a select number of companies). However, indirect governance is by nature limited in the sense that the State is resigned to attempt to influence the decision made by someone else (external governance). Scholars within both sociology of law[130] and law and economics[131] suggest that this form of governance has obvious limitations.

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[122] The Court has confirmed this in all of the *Golden Shares Cases*. See also *EØS-rett* (2004) p. 465, Steiner (2009) p. 393 and Flynn (2002) p. 999.
[123] See *Commission v Denmark* (C-302/86).
[124] See Reisch (C-515/99 to C-527/99 and C-540/99). See also Steiner (2009) p. 393 and Barnard (2010) p. 581.
[125] Sjåfjell (2009) p. 204-215 with further references.
[126] See generally Opinion of Advocate General Maduro in *Ahokainen* (C-434/04) (23)-(27), Mathisen (2007), Jans (2000) and *EØS-rett* (2004) p. 268-269.
[127] Opinion of Advocate General Maduro in *Ahokainen* (24), Mathisen (2007) p. 83-84 and Jans (2000) 240.
[128] Mathisen (2007) p. 83-84 and Jans (2000) 240.
[129] Opinion of Advocate General Maduro in *Ahokainen* (25), Mathisen (2007) p. 84-85 and Jans (2000) 240 and *EØS-rett* (2004) p. 269.
[130] Mathiesen (2011) p. 73-75.
[131] Eide (2008) p. 54.

Similarly, Eckhoff famously asserts that there is an excessive optimism with regard to what can be accomplished through indirect governance.[132] Furthermore, indirect governance encounters a variety of difficulties specific to environmental protection because of the complexity of the challenges.[133] Finally, state governance in the area of environmental protection is already based on a considerable amount of direct governance[134] and it seems reasonable to assume that additional governance of the same sort would be less effective.

Direct governance has an advantage in the sense that the State gets to make the decisions concerned itself (internal governance). This type of governance is, however, limited by the scope of its application (as opposed to indirect governance which has general application). Nevertheless, one may argue that the state ownership encompasses a considerable number of major and influential corporations and that the effect would be significant both in terms of the changes to their own sizeable activities and in terms of leading the way for other companies.

Thus, it seems that the two forms of governance each have their strengths and weaknesses and consequently that they complement each other in a way in which one adds value to the other. The conclusion is consistent with the acknowledgement that environmental challenges are so complex and comprehensive that they can only be overcome by the interplay of a variety of measures where each plays its part.[135] As a result, direct governance through state ownership is a necessary measure in order to achieve the objective of sustainable development.

Proportionality *strictu sensu* requires that there must be a proportional relationship between the importance of achieving the determined objective and the detriment to the free movement of capital,[136] in other words striking a balance between the positive and negative aspects of the measure in question.

The positive aspects have been examined under the conditions of suitability and necessity.

The negative aspects have been explained under the assessment of whether direct governance (an active state ownership) would create a restriction. The extent of this restriction must be determined in order to balance it against the public interest of achieving the objective of sustainable development. The restriction does not differentiate between nationalities. It both applies to and affects private participants throughout Europe to the same extent. Furthermore, the restriction does not prohibit or complicate cross border investments. Neither does it put quantitative or qualitative conditions on such investments. It simply makes them less attractive. Thus, the restriction is indirect at worst. It could be argued that it is even speculative. First, the Court seems quick to make assumptions about what motivates private participants without justifying them.[137] As explained earlier, the common notion that the behaviour of private participants is based exclusively on profitability must be modified in

[132] Eckhoff (1983) p. 35.
[133] See Bugge (2009) p. 28-43.
[134] See generally Backer (2002) and Bugge (2009).
[135] Bugge (2009) p. 13.
[136] See *Stoke-On-Trent* (C-169/91) (15). See also Opinion of Advocate General Maduro in *Ahokainen* (26), Mathisen (2007) s. 87, Jans (2000) s. 241, *EØS-rett* (2004) s. 269.
[137] Looijestijn-Clearie (2007) p. 447 and Sanders (2008) p. 367.

order to better reflect that the market in reality consist of a variety of actors who each have their own preferences (for example companies that promote environmental protection). Thus, all forms of governance will attract some investors and discourage others. Second, conditions that discourage investment would be reflected in the price of the share and consequently not lead to less investment. In sum, the negative effect on the free movement of capital seems limited.

Consequently, it seems reasonable to conclude that direct governance with a view to realizing the objective of sustainable development would generally satisfy the requirement of proportionality *strictu sensu* as well.

7.4. State Aid

7.4.1. Introduction

The state aid rules are an integral part of the EU/EEA competition law regulations and have an overarching objective of creating a level playing field in the internal market according to the ideals of a healthy market economy. [138] State ownership is also subject to these rules and the question is whether direct governance (an active state ownership) for the purposes of this article may constitute state aid.

7.4.2. The Prohibition

State aid is as a general rule prohibited, cf. TFEU art. 107 paragraph 1 and EEA art. 61 paragraph 1:

> "Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market."

If the aid condition is satisfied through state ownership it can for the purposes of this article be assumed that it is favouring certain undertakings by transferring state resources and that it will distort competition and affect trade.[139]

7.4.3. The Aid Condition

The aid condition requires that the company has been afforded an economic advantage that it would not have been granted under normal market conditions.[140] The *Market Investor Principle* has been developed as a tool to help considered whether that is the case.[141] The content of this norm is that the member states must exercise their ownership with an exclusive view to the purpose of profit.[142]

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[138] *Statsstøtte* (2008) p. 18.
[139] See *Statsstøtte* (2008) chapter 5 about these conditions.
[140] *Statsstøtte* (2008) p. 30.
[141] See generally *Statsstøtte* (2008) p. 92-109, Hancher (2006) p. 73-88 and *EØS-rett* (2004) p. 585-590.
[142] *Belgium v Commission* (C-40/85) (13) and *Italy v Commission* (C-305/89) (20). See also *Statsstøtte* (2008) p. 93-94 and *EØS-rett* (2004) p. 586-587.

The aid condition is given a wide interpretation[143] and one of its aspects is that a member state in the capacity of shareholder must request normal market return on its investment.[144] Whether it has done so must be considered in a long-term perspective[145] and under a considerable freedom of business judgment.[146] Member states are rarely instructed to request more dividends.[147]

Again, the Business Case for Sustainable Development[148] will suggest that integrating and prioritizing environmental considerations in company decision-making under certain circumstances and to a certain extent can be consistent with the purpose of profit and consequently not entail state aid. For example, a decision to make Kongsberg Gruppen ASA more eco-efficient could reduce operating costs both short-term and long-term. Conversely, under different circumstances, direct governance with a view to realizing the objective of sustainable development may be incompatible with the purpose of profit. If that is the case, the State would not obtain normal market dividends from the company concerned because it wants the company to spend those funds on environmental protection and that constitutes state aid. For example, a decision to make Statoil ASA invest in a carbon capture facility that was not commercially justifiable in neither short-term nor long-term would satisfy the criteria.

It seems evident that state aid in this form would be difficult to expose and that a member state probably could go a long way in providing selected companies with aid without facing charges from the Commission or the EFTA Surveillance Authority. However, for the purposes of this article it is interesting to consider whether it could be justified under state aid law.

7.4.4. Compatibility

State aid can be determined compatible with EU/EEA law if it satisfies the conditions of one of the exemptions provided for in the treaties.

State aid that is provided for the purposes of environmental protection can be determined compatible under two alternative exemptions. TFEU art. 107 paragraph 3 litra c and EEA art. 61 paragraph 3 litra c requires a balancing test that entails a very accurate mathematical assessment of the pros and cons of the measure.[149] This alternative requires that the aid is notified in advance.[150] The Group Exemption Regulation entails a similar set of conditions but

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143 *Statsstøtte* (2008) p. 30.
144 See Commision Guidelines on the Market Investor Principle (43). See also *Statsstøtte* (2008) p. 99 and Vesterdorf (2008) p. 308.
145 *Italy v Commission* (20). See also Commission Guidelines on the Market Investor Principle (30). See also *EØS-rett* (2004) p. 589 and Vesterdorf (2008) p. 307-308.
146 Commission Guidelines on the Market Investor Principle (27). See also *Statsstøtte* (2008) p. 95 and Vesterdorf (2008) p. 309.
147 *Statsstøtte* (2008) p. 99.
148 See Holliday (2002) for a general overview.
149 Community Guidelines on State Aid for Environmental Protection (16). See also *Statsstøtte* (2008) p. 184.
150 See Regulation 1999/659/EC art. 2 and 3.

the test is even more rigid.[151] This alternative requires only a retrospective notification.[152] The following assessment will be concerned with the former alternative.

The exemptions have in common that the aid must be considered in advance to comply with a balancing test that is very accurate and detailed. It seems evident that direct governance as such cannot be assessed more generally under these exemptions (because the review is too precise). However, all of the minor and major measures that are a product of such governance can be. Whenever a possible measure (in a long-term perspective and under the protection of a considerable freedom of business judgment) does not seem to be commercially justifiable the State must conduct a thorough assessment in order to be able to argue why it should be considered compatible under one of the exemptions.

What measures can be considered compatible under TFEU art. 107 paragraph 3 litra c and EEA art. 61 paragraph 3 litra c is elaborated on in Community Guidelines on State Aid for Environmental Protection. Examples are measures that go beyond community standards for environmental protection (typically investments in production equipment and processes),[153] measures to achieve energy savings,[154] promotion of energy from renewable sources,[155] research, development and innovation in the area of environmental protection[156] and a variety of others. TFEU art. 107 paragraph 3 litra c and EEA art. 61 paragraph 3 litra c may also be invoked independently (without reference to the guidelines).[157]

In sum, it seems that a lot of the measures that would follow from integrating and prioritizing environmental concerns with a view to realizing the objective of sustainable development can be considered compatible with state aid law if they are subjected to the balancing test.

7.5. Summary

This section has discussed the legal barriers that restrict the actions of the State in the capacity of shareholder specifically and how they may prevent it from integrating and prioritizing environmental concerns in company decision-making with a view to realizing the objective of sustainable development. The general approach of EU/EEA law seems to be that state ownership *per se* is safeguarded by the neutrality principle (TFEU art. 345 and EEA art. 125) as long as it is exercised in accordance with (what the Court assumes to be) common market behaviour, namely with an exclusive view to the purpose of profit. Direct governance that deviates from this norm conflicts with both the four freedoms and the state aid rules. It is my opinion, however, that direct governance with a view to realizing the objective of sustainable development to a great extent can be considered compatible with EU/EEA by reference to the public interests thus safeguarded.

8. Reflections and the Way Forward

[151] See Regulation 2008/800/EC.
[152] Regulation 2008/800/EC art. 9 paragraph 1.
[153] Community Guidelines on State Aid for Environmental Protection (73). See also *Statsstøtte* (2008) p. 186.
[154] Community Guidelines on State Aid for Environmental Protection (94). See also *Statsstøtte* (2008) p. 192.
[155] Community Guidelines on State Aid for Environmental Protection (101). See also *Statsstøtte* (2008) p. 188.
[156] Community Guidelines on State Aid for Research, Development and Innovation.
[157] *Statsstøtte* (2008) p. 81.

This section will be concerned with reflecting on the answers the article has given to the two main questions that were presented initially and on the way forward.

It is my opinion that the State has a legal obligation to integrate environmental considerations into its decision-making with a view to realizing the objective of sustainable development. This has legal basis in both public international law, EU/EEA law and the Constitution. That the obligation applies to the State in the capacity of state is perhaps not controversial (section 3). Conversely, that it applies equally to the State in the capacity of shareholder is probably not widely recognized (section 4).

A first question is whether the latter position will gain recognition in the future. It has been a common exercise to make a clear distinction between the various functions of the State and to keep them separated. As demonstrated in this article, it is my opinion that such a distinction is overly formalistic and that it gets in the way of acknowledging that the State may exercise governance through either one of them. Consequently, the State should be subject to the same obligations and barriers whatever the capacity it inhabits. Today, however, we are far away from that being a common point of view.

A second question is whether the obligation may be enforced and sanctioned. Here several challenges arise. First, the obligation has a weak design. It does not initially entail that environmental considerations must be given any amount of impact and company decision-making must always integrate and balance a variety of (often) conflicting interests. However, I maintain that the obligation must require environmental protection to be given a minimum amount of weight (otherwise it would be completely without leverage) so that one may enforce it in situations where the environmental concern is paramount. Second, it seems uncertain who would be entitled to bring action against the State for violating the obligation. Norwegian procedural law recognizes the right of non-governmental organizations to represent the environment in legal actions[158] and one can imagine them doing so here. That would allow for a fairly effective enforcement of the obligation.

EU/EEA law assumes, in my opinion correctly, that the State is subject to community law in the capacity of signatory to the treaties (not in the capacity of one function or another).Thus, indirect and direct governance are restricted by the same barriers.

Furthermore, the common position of EU/EEA law seems to be that state ownership *per se* is safeguarded by the neutrality principle (TFEU art. 345 and EEA art. 125) as long as it is exercised in accordance with (what the Court assumes to be) common market behaviour, namely with an exclusive view to the purpose of profit. In my opinion, this is also a correct point of view. Deviations from ordinary market behaviour are better characterized as state governance and to the extent that they conflict with community law they should be justified by reference to the public interests that are safeguarded thereby.

However, one may argue that the Court has been overly simplistic in defining the features of common market behaviour. It seems to assume that private participants' behaviour is based on

[158] See Rt.1981.569 (*Alta*), Rt.1992.1618 (*Framtiden i våre hender*) and Rt.2003.833 (*Folkeaksjonen Stopp Regionfelt Østlandet*).

the purpose of profit exclusively. A similar position is common to a traditional view of private markets and may also be explained by the fact that it creates a standard that is easy to apply. Whether it provides an accurate depiction of reality has, however, been discussed several times in this article. In my opinion, the norm is too narrow and should be more open to the reality that a variety of investors appreciate a variety of values (such as the value of profit or the value of a sustainable development) and consequently invest in a variety of different companies. Perhaps that is a fact that will help refine the norm in the future but it does not seem imminent as of today.

Finally, a question that instantly presents itself is whether the obligation to integrate and prioritize environmental considerations into company decision-making with a view to realizing the objective of sustainable development (section 4) under certain circumstances may conflict with the barriers that apply to the State in the capacity of shareholder (sections 6 and 7). It must be assumed that the courts will go a long way in trying to avoid such conflicts through interpretation and that even where it is inescapable the conflict may be overcome by way of exemptions. Perhaps, however, a situation may come about where the conflict cannot be resolved via such tools of application. It is of course difficult to forecast how the courts would handle such inconsistencies. The conclusion would probably rely on more or less conscious choice of values.