

The Duty to Act in the Interest of the Company*

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§ 2.01 INTRODUCTION

In many jurisdictions, directors of a limited liability company have a duty of loyalty and a duty of care. The duties are often understood as implying a duty to act *in the interest of the company*.¹ Since the company is an artificial legal person, it is not fully clear how this duty should be understood. The meaning of the duty has accordingly been discussed extensively in recent decades, and the debate has intensified as a result of the increased focus on corporate sustainability.²

* Has previously been published in *Instruments of EU Corporate Governance – Effecting Changes in the Management of Companies in a Changing World*, p. 15–37, Wolters Kluwer 2023.

¹ See for a comparative overview of directors' duties, Carsten Gerner-Beuerle and Edmund-Philipp Schuster, *Mapping Directors' Duties: Strategies and Trends in the EU*, Boards of Directors in European Companies – Reshaping and Harmonising Their Organisation and Duties (Hanne Birkmose, et al. eds, Kluwer Law International B.V. 2013).

² See, e.g., Lucian A. Bebchuk and Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, Harvard Law School Program on Corporate Governance Working Paper 2020-1, 11 (December 2020); Colin Mayer, *Prosperity: Better Business Makes the Greater Good* (Oxford University Press 2018); Colin Mayer, *Ownership, Agency and Trusteeship*, ECGI Law Working Paper No 488/2020 (11 December 2019); Alex Edmans, *Grow the Pie: How Great Companies Deliver Both Purpose and Profit* (Cambridge University Press 2020); Beate Sjøfjell, *Sustainable Value Creation Within Planetary Boundaries – Reforming Corporate Purpose and Duties of the Corporate Board*, University of Oslo, Faculty of Law Legal Studies Research Paper Series No. 2020-20 (4 August 2020); Edward Rock, *For Whom Is the Corporation Managed in 2020?: The Debate Over Corporate Purpose*, 76, European Corporate Governance Institute – Law Working Paper No. 515/2020 (1 May 2020); David Kershaw and Edmund Schuster, *The Purposive Transformation of Company Law*, LSE Law, Society and Economy Working Papers 4/2019, 4–6; Michael C. Jensen, *Value Maximization, Stakeholder Theory, and the Corporate Objective Function*, Tuck Business School Working Paper No. 01-09; Harvard NOM Research Paper No. 01-01; Harvard Business School Working Paper No. 00-058, 8–21, 9 (October 2001) and Rolf

This chapter provides an analysis and discussion of certain topics and trends relating to the duty to act in the interest of the company, with the ultimate aim of concluding to which extent it may contribute to good corporate governance.

The chapter starts with a brief description of directors' duties. Thereafter the theoretical framework, above all the shareholder value theory and the stakeholder theory, is outlined. This section is followed by a comparative overview covering the United States (US), the United Kingdom (UK), and a few European Union (EU) countries. When discussing the meaning of the duty to act in the interest of the company, a distinction is in some jurisdictions made between solvent and insolvent companies, since the creditors (and not the shareholders) have the greatest outcome in the company's business in insolvent companies. Insolvent companies are therefore dealt with under a separate section following the comparative overview. The chapter concludes with a discussion and some final remarks.

There is some focus on listed companies. Accordingly, some rules discussed govern only listed companies, such as the corporate governance codes. In some jurisdictions, a special corporate form has been introduced in order to promote corporate sustainability, so-called *benefit corporations*. The regulation covering benefit corporations is not discussed in this chapter, mainly due to space restrictions.³

§ 2.02 DIRECTORS' DUTIES: THE BASICS

The corporate governance system consists of rules that create as well as provide solutions to the so-called principal-agency problem, which is inherent in the structure of a listed company.⁴ A well-functioning corporate gover-

Skog, *The Importance of Profit in Company Law – A Comment from a Swedish Perspective*, 12 (4) ECFR, 563–571 (2015).

³ The benefit corporation has been analysed by Jill Fisch and Steven Davidoff Solomon, *The "Value of a Public Benefit Corporation*, Research Handbook on Corporate Purpose and Personhood (Elizabeth Pollman and Robert B. Thompson, eds., 2021). See also Ofer Eldar, *Designing Business Forms to Pursue Social Goals*, 106 Va. L. Rev. 937, 964–968 (2020) and Leo Strine, Jr. *Wants Corporations to be Good Citizens* (22 September 2020) <https://www.clientsmart.net/blog/leo-strine-jr-wants-corporations-to-be-good-citizens>, visited on 14 April 2022.

⁴ See regarding the principal-agency problem Adolf Augustus Berle and Gardiner Colt Means, *The Modern Corporation and Private Property*, 71 (The Macmillan 1932), and Michael Cole Jensen and William H. Meckling, *The Theory of the Firm: Managerial Behavior, Agency costs and Ownership*, J. Financ. Econ. (1976). In companies with a con-

nance system aims at least at reducing the agency-costs by providing rules that make monitoring, deterrence, and compliance more effective.⁵ In recent years, sustainability has in some jurisdictions been added to the concept of corporate governance and the term *good corporate governance* has been introduced.⁶ The duty of loyalty and the duty of care form part of the corporate governance system; they restrict the discretion of the directors and aim at protecting the company and its shareholders from negligent, opportunistic, and disloyal behaviour by the directors.⁷ One function of the duties is accordingly to reduce agency costs.

In many jurisdictions, the duties are based on the contractual, agency-like relationship between the company and each of the directors, a relationship that is based on trust and confidence.⁸ The duties are consequently often owed to *the company* and not to individual shareholders, not even the majority, which means that the duties may be enforced primarily by the company, or by minority shareholders by way of derivative action.⁹

The exact inter-relationship between the duty of loyalty and the duty of care is not fully clear and varies to some extent between jurisdictions. Some basic features and differences may however be established.

The *duty of loyalty* implies that the directors must act in the interest of *the company*.¹⁰ This means, first of all, that a director may not act in his

trolling shareholder, the principal is the minority shareholders and the controlling shareholder the agent.

⁵ See Stephen M. Bainbridge, *Corporate Governance after the Financial Crisis*, 3 (Oxford University Press 2012).

⁶ See, e.g., OECD/G20 Principles of Corporate Governance (2015) para. 9: 'Corporate governance involves a set of relationships between a company's management, its board, its shareholders and other stakeholders. Corporate governance also provides the structure through which the objectives of the company are set, and the means of attaining those objectives and monitoring performance are determined.' See also the Swedish corporate governance code (2020) Section I, 1. Aims.

⁷ See, e.g., Jessica Östberg, *Styrelseledamöters lojalitetsplikt: särskilt om förbudet att utnyttja affärsmöjligheter* 143 (Jure Förlag 2016).

⁸ See, e.g., Mark Arnold, *General Duties of Directors*, Company Directors: Duties, Liabilities and Remedies (Simon Mortimore QC, ed., 2 ed Oxford University Press 2013) 223–228 and *Bristol and West Building Society v Mothew* [1998] Ch1, 18 A.

⁹ See, e.g., Section 170 (1) UK Companies Act 2006 (CA 2006); Paul L. Davies et al., *Gower Principles of Modern Company Law*, 251 (Sweet & Maxwell 2021); Arnold, *supra* n. 8, at 228–229; Gerner-Beuerle and Schuster, *supra* n. 1, at 21 and Östberg, *supra* n. 7, at 139 with further references.

¹⁰ See, e.g., Section 172 CA 2006; *Patient Care Services, S.C. v Segal* (1975), 32 111.App.3d 1021, 337 N.E.2d 471; *Guth v Loft*, 5 A.2d 503 (Del. 1939) and Östberg, *supra* n. 7, at 66.

or her own interest or in the interest of another party, for example, by the usurpation of corporate opportunities or unfair self-dealing.¹¹ This negative component of the duty has attracted much attention in case law, not least in the US, and in some countries it is regulated at least partly in the statutory company act.¹² It is of fundamental importance for the company considering the trustful relationship between the director and the company. A breach of this duty is a serious breach, and there is often a presumption that a director has acted negligently; it may even be a criminal offense.¹³

In many jurisdictions, the aforementioned applies also in corporate groups. This means that directors should observe the interest of the company to which the director has been appointed to, and consequently not the interest of the group or a group company.¹⁴ There are, however, jurisdictions in which the interests of the group or a group company may or must be considered. This is the case in, for example, Germany, France, and Italy. In France, the concept of the ‘interest of the group’ is recognized, and in Germany there is a *Konzernrecht* of a special nature.¹⁵

In many jurisdictions, the duty of loyalty also has a positive component, implying that the directors must act (in good faith) to *promote* the best interests of the company.¹⁶ This part of the duty is more complex, since it is not fully clear exactly how the concept ‘the interests of the company’ should be

¹¹ See, e.g., Gerner-Beuerle and Schuster, *supra* n. 1, at 11 and *Guth v. Loft*, 5 A.2d 503 (Del. 1939).

¹² See, e.g., Fletcher Cyclopedia of the Law of Corporations §§ 861 and 913; *Guth v. Loft*, 5 A.2d 503 (Del. 1939); Section 175 CA 2006, § 88 German Stock Corporation Act (Aktengesetz vom 6. September 1965 (BGBl. I S. 1089) (AktG) and Chapter 8 Section 23 Swedish Companies Act (2005:551) (SCA).

¹³ For example, under Swedish law an intentional breach of the duty of loyalty may be punished as ‘disloyalty to principal,’ (Sw. *trolöshet mot huvudman*), Chapter 10 Section 5 Swedish Criminal Code (1962:700).

¹⁴ This is, for example, the case under UK, Finnish, and Swedish law, see regarding groups, e.g., Klaus J. Hopt, *Groups of Companies: A Comparative Study of the Economics, Law, and Regulation of Corporate Groups*, The Oxford Handbook of Corporate Law and Governance (Jeffrey N. Gordon and Wolf-Georg Ringe eds, Oxford University Press 2018) 603–633, 611. For Finnish law, see the Supreme court cases HD 2004:69 and 2004:115 and for Swedish law Östberg, *supra* n. 7, at 84 with further references.

¹⁵ See for corporate groups, e.g., Hopt, *supra* n. 14, at 612 et seq. and John Armour et al., *Report on the Recognition of the Interest of the Group* (2016), available at <https://papers.ssrn.com/abstract=2888863>.

¹⁶ See, e.g., Section 172 CA 2006; Davies et al., *supra* n. 9, at 286 and Chris Brummer and Leo E. Strine Jr., *Duty and Diversity*, 75(1) Vand. L. Rev. (2022). For Swedish law, see the Supreme court case NJA 2013 p. 117.

understood and since it involves business judgment. It is sometimes considered part of the duty of care.¹⁷ Some scholars have argued that the company has an interest of its own¹⁸ and others that the interest of the company must correspond with physical persons actually having an interest in the company.¹⁹ Some argue that primarily the interest of the shareholders is relevant. Others argue, however, that it covers all (or some) of the company's stakeholders' interests.²⁰ The debate regarding the interest of the company is consequently strongly related to the law and economics theory of shareholder value versus stakeholder theory, theories which is outlined in the subsequent section. The duty is furthermore closely related to the corporate purpose, as discussed further in § 2.03 [C].

The *duty of care* is above all related to *how* the duty is performed, and it relates to both the decision-making process and the monitoring and oversight of the management.²¹ In many jurisdictions it implies, *inter alia*, that decisions must be duly prepared and evaluated,²² and that the management must be monitored with a certain standard of care.²³

The (positive) duty to promote the interest of the company is related to the business judgment rule, which is applicable in one way or another in many jurisdictions. This rule protects the directors from liability, if the decision was duly prepared and evaluated and was taken in the honest belief that it was in line with the best interests of the company.²⁴

¹⁷ See, e.g., Art. 25 of the Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (COM(2022) 71 (final) (CSDD).

¹⁸ See regarding this question, e.g., Günther Teubner, *Unternehmensinteresse – das gesellschaftliche Interesse des Unternehmens "an sich"?*, ZHR 148, 470–488 (1984). See also the Finnish scholar Lars-Erik Taxell, *Aktiebolagets organisation*, 13 (Åbo Akademi 1983), who claimed that the company has its own interest which includes financial stability and development opportunities. This view has been expressly rejected by the Swedish supreme court in NJA 2013 p. 117, para. 21.

¹⁹ See further § 2.03 [A] *infra*.

²⁰ See further § 2.03 [B] *infra*.

²¹ See, e.g., David Kershaw, *The Foundations of Anglo-American Corporate Fiduciary Law*, 200 (Cambridge University Press 2018); *Fletcher Cyclopedia of the Law of Corporations* § 1011 and Gerner-Beuerle and Schuster, *supra* n. 1, at 3. In English law, the duty of care is regulated in Section 174 CA 2006 and in German law, in § 93 AktG.

²² See Kershaw, *supra* n. 21, at 200–217. See also Östberg, *supra* n. 7, at 322–323.

²³ See Kershaw, *supra* n. 21, at 217–228 and 229 et seq.

²⁴ See § 93 German Stock Corporation Act; Gerner-Beuerle and Schuster, *supra* n. 1, at 8–10. See also *Regentcrest plc v. Cohen* [2001] 2 BCLC 80 and Kershaw, *supra* n. 21, at 47–58.

§ 2.03 THE THEORETICAL FRAMEWORK²⁵

[A] The Theory of Shareholder Value

The theory of shareholder value, or sometimes shareholder primacy, was established in case law in the US already in the beginning of the 20th century.²⁶ It was later confirmed, *inter alia*, in the widely cited case *Dodge v. Ford Motor Co.*²⁷ One of its strongest supporters was Milton Friedman, who published a famous article in New York Times in 1970 with the title ‘The Social Responsibility of Business Is to Increase Its Profits’.²⁸ Friedman claimed that the only responsibility of businessmen is to conduct the business in accordance with the desires of the shareholders, in other words to make as much money as possible, while conforming to law as well as ethical custom.²⁹ In his view, different stakeholders’ interests should mainly be protected by legislation.³⁰

According to the shareholder value theory, the company should consequently be managed with a view of maximizing the value for its shareholders.³¹ At least some of those who support the theory argue that the shareholders’ interests should have primacy, since the shareholders are those who have

²⁵ The text under this section is partly based on a revised version of section 3 of my draft article Corporate Sustainability and Profit Maximisation in the Land of Unicorns (7 December 2020) available at https://papers.ssrn.com/abstract_id=3731281.

²⁶ See *Luther v. Luther Co.*, 118 West. 112, 123, 94 N. W. 69 (1903).

²⁷ *Dodge v. Ford Motor Co.*, 204 Mich. 459, 170 N. W. 668 (1919).

²⁸ See Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, The New York Times Magazine (13 September 1970), available at <https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html>.

²⁹ *Ibid.*, 1.

³⁰ *Ibid.*, 2–3. It should be noted that Friedman never promoted a short-term focus on the investment. On the contrary he stated: ‘it may well be in the long-run interest of a corporation that is a major employer in a small community to devote resources to providing amenities to that community or to improving its government. That may make it easier to attract desirable employees.’ (*Ibid.*, 5). See also Brian Cheffins, *Stop Blaming Milton Friedman*, ECGI Law Working Paper No 523/2020 (4 June 2020) available at <https://ssrn.com/abstract=3552950>.

³¹ See, e.g., Frank H. Easterbrook and Daniel R. Fischel, *The Economic Structure of Corporate Law*, 38 (Harvard University Press 1991); Richard Posner, *Economic Analysis of Law*, 576–583 (Aspen Law & Business 9th ed 2014); Bebchuk and Tallarita, *supra* n. 2, at 16 and Henry Hansmann and Reinier Kraakman, *The End of History of Corporate Law*, 89 Geo. L. J. 745 (2001). Jonathan Macey has recently described the shareholder value principle as a myth and concluded that due to the business judgment rule, it is nothing more than a non-binding norm, not a legally binding principle, see *The Central Role of Myth in Corporate Law*, ECGI Law Working Paper No 519/2020, 22–32 (May 2020).

formed and own shares in the company.³² The shareholders' compensation for the provision of risk capital is restricted to the profit distributed, if any, or any return received upon a sale of the shares. Accordingly, their risk is high, typically much higher than bondholders' risk, since bondholders have an agreed, fixed return. At least as long as the company is solvent, the shareholders are furthermore the *residual claimants*. As residual claimants, they have the greatest interest in the outcome of the company's business; if the company is successful, their fortune will increase and if it experiences financial difficulties, they will be the biggest losers.³³ They will consequently have the greatest interest in controlling the management of the company and to decide upon issues that are typically of importance for them, such as the issuance of new shares, amendments of the articles of association, liquidation, merger, and appointment of directors of the company.³⁴ One important argument supporting the theory is accordingly that it promotes investments.³⁵

Even strong supporters of the shareholder value theory, such as Milton Friedman, admit however that not only shareholders' interests but also other stakeholders' interests should be observed to the extent that the value for

³² See, e.g., Friedman, *supra* n. 28. The question of *ownership* has been challenged by some scholars, who claim that the company is not *owned* by the shareholders. Instead the shareholders merely own the shares and hold a right to vote on certain issues and a right to obtain dividends. They argue that the assets of the company are owned by the company and not by the shareholders, see, e.g., Margaret M. Blair, *Ownership and Control, Rethinking Corporate Governance for the Twenty-First Century*, 5 and 223–225 (Brookings Institute 1995) and Macey, *supra* n. 31, at 9–22. This issue has, as far as I have noted, never been discussed in the Swedish doctrine. The shareholders are normally referred to as the 'owners' and in Swedish they are also called *aktieägare* (Eng. 'shareowners'). In Norway, the Supreme Court has clarified that shareholders are owners in a ruling from 2019 (HR-2019-515-A (Gardemoen Residence), see also for Norwegian law Tore Bråthen, *The Myth of Shareholder Ownership – the Norwegian Legal Perspective*, Festschrift in honour of Rolf Skog (Ronald J. Gilson et al. eds, Norstedts Juridisk 2021) 231–258, especially at 251.

³³ See, e.g., Easterbrook and Fischel, *supra* n. 31, at 36–37. Critical, Blair, *supra* n. 32, Ch. 6 and 7 and Andrew Keay, *Ascertaining the Corporate purpose: An Entity Maximisation and Sustainability Model*, 71 Mod. L. Rev. 663, 668 (2008). See also Leo Strine, Jr., *Toward Fair and Sustainable Capitalism*, University of Pennsylvania, Institute for Law and Economy, Research Paper No. 19-39, Harvard John M. Olin Discussion Paper No. 1018 (August 2020).

³⁴ See Leo E. Strine, Jr, *The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*, University of Pennsylvania Law School, Institute for Law and Economics, Research Paper no. 15-08, 6–7 (2016).

³⁵ See, e.g., Stephen M. Bainbridge, *In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green*, 50 Wash. & Lee L. Rev. 1423, 1442 (1993).

the shareholders is increased.³⁶ Furthermore, it is argued that a profitable company will be able to employ more people, pay them a higher salary, and make further investments, including investments in research and development. Therefore, shareholder value is important not only for the shareholders but also for the company's other stakeholders.³⁷ An important aspect of the shareholder value principle is that it limits the discretion of the directors at least to some extent and provides a single purpose against which the directors' decisions can be evaluated.³⁸

The theory of shareholder value has been criticized and accused of promoting short-termism.³⁹ It has indeed been widely recognized that a short-term focus on the maximum increase of the profit or the share price may be negative for the company's stakeholders and the business. There is however also evidence that short-termism is not necessarily caused by the theory of shareholder value but rather related to other factors such as the imperfectly informed and imperfectly functioning financial markets, the takeover-regime, and the directors' remuneration and compensation packages.⁴⁰

³⁶ See Friedman, *supra* n. 28, at 5, and Irene L. Fannon, *The Corporate Social Responsibility Movement and Law's Empire: Is There a Conflict?* 58(1) Northern Ireland Legal Quarterly 12 (2007).

³⁷ See Easterbrook and Fischel, *supra* n. 31, at 38.

³⁸ See Jensen, *supra* n. 2, at 8–21.

³⁹ The problem of short-termism and the imperfectly informed markets are described by, for example, Kent Greenfield, *The Puzzle of Short-Termism*, Boston College Law School Legal Studies Research Paper Series (3 October 2011). See also Cheffins, *supra* n. 30; Leo E. Strine, Jr., *Toward Fair and Sustainable Capitalism*, University of Pennsylvania, Inst for Law & Econ Research Paper No. 19-39, Harvard John M. Olin Discussion Paper No. 1018 (3 October 2019); David K. Millon, *Why Is Corporate Management Obsessed With Quarterly Earnings and What Should be Done About It?*, 70 Geo. Wash. L. Rev. 890 (2002); Lawrence E. Mitchell, *Corporate Irresponsibility: America's Newest Export 4-5* (2001); Joseph Fuller and Michael C. Jensen, *Just Say No to Wall Street*, 14(4) J. Appl. Corp. Finance 41–46 (2002) and Beate Sjäffell, *Capitalism, the Sustainability Crisis, and the Limitations of Current Business Governance*, Company Law and Sustainability: Legal Barriers and Opportunities (Beate Sjäffell and Benjamin J. Richardson eds, Cambridge University Press 2015) 1–13, 2. The problem of short-termism has however been questioned by some scholars, see, e.g., Georg W. Dent, Jr., *Stakeholder Governance: A Bad Idea Getting Worse*, 58 Case W. Res. L. Rev., 1109–1111 (2008) and Mark J. Roe, et al., *The European Commission's Sustainable Corporate Governance Report* (14 October 2020) available at https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance/feedback?p_id=8270916.

⁴⁰ See, e.g., Millon, *supra* n. 39, at 905–912 and Cheffins highlighting executive pay as a driving factor for short-termism, see *supra* n. 30, at 33–36.

In recent decades, a slightly modified version of shareholder value has been promoted by some scholars and business leaders in reaction to the short-termism, the theory of *enlightened shareholder value*.

The theory of enlightened shareholder value was, *inter alia*, promoted by Michael C. Jensen in 2002,⁴¹ and it was subsequently adopted by the legislator in Section 172 of the UK Companies Act 2006 (CA 2006), which states:

- A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to –
- (a) the likely consequences of any decision in the long term,
 - (b) the interests of the company's employees,
 - (c) the need to foster the company's business relationships with suppliers, customers and others,
 - (d) the impact of the company's operations on the community and the environment,
 - (e) the desirability of the company maintaining a reputation for high standards of business conduct, and
 - (f) the need to act fairly as between members of the company.

The theory is based on the recognition that the relationship between a company and its stakeholders is to a large extent mutually beneficial. According to the theory, directors should consequently promote the interests of the shareholders, but in doing so have regard to different stakeholders' interests, ethics, and the long-term effects of the decision.⁴² From a theoretical point of view, the difference between shareholder value and enlightened shareholder value is that the latter explicitly *requires* consideration of different stakeholders' interests and the long-term effects of a decision. Considering, however, that there is a business case for corporate sustainability today,⁴³ which

⁴¹ See Jensen, *supra* n. 2, at 8–21. See also, e.g., Andrew Keay, *The Enlightened Shareholder Value Principle and Corporate Governance* (Routledge 2012).

⁴² See Jensen, *supra* n. 2, at 9.

⁴³ See, e.g., Bebchuk and Tallarita, *supra* n. 2, at 11; Ioannis Ioannou and George Serafeim, *Corporate Sustainability: A Strategy?*, Harvard Business School Accounting and Management Unit, Working Paper 19-065 (1 January 2019); Michael Eugene Porter and Mark R. Kramer, *Strategy and Society: The Link Between Competitive Advantage and Corporate Social Responsibility*, 84(12) Harv. Bus. Rev., 78 (2006) and Gunnar Friede, et al., *ESG and Financial Performance: Aggregated Evidence from More than 2000 Empirical Studies*, J. Sustain. Finance Invest., 5(4), 210–233 (15 December 2015). The article combines findings of more than 2,000 academic studies concerning financial performance and ESG. The results show that about 90% of the studies find a non-negative relation between financial

means that such considerations, including the long-term effects of a decision, should in practice be taken into account also when applying the theory of shareholder value, the difference between the theories is in practice limited.⁴⁴

[B] The Stakeholder Theory

In recent years, the debate regarding shareholder value has intensified.⁴⁵ A theory that has been promoted by some scholars and practitioners mainly to increase the protection of stakeholders, including the environment, is the *stakeholder theory*. Stakeholder theorists recognize that companies play an important role not only for the shareholders and the economy but also for all stakeholders involved with the company's business.⁴⁶ It has been described as being 'an ethical theory about the values of management in relationships with those parties [i.e., the stakeholders], and also a management theory about how to create and manage successful companies'.⁴⁷ The stakeholder theorists assert that the company should be operated, not primarily in the interests of the shareholders, but in the interests of all of its stakeholders, without prefer-

performance and ESG and that the large majority of the studies reports a positive correlation. A report from OECD shows however no clear positive link between sustainable finance and performance, see OECD Business and Finance Outlook 2020: Sustainable and Resilient Finance, Section 1. Cynthia Williams presents empirical findings relating to corporate sustainability as a business case and provides a number of references, see Cynthia A. Williams, *Corporate Social Responsibility and Corporate Governance*, The Oxford Handbook of Corporate Law and Governance (Jeffrey N. Gordon and Wolf-Georg Ringe eds, Oxford University Press 2018) 634–678, 647–650. See also Gordon L. Clark, et al., *From the Stockholder to the Stakeholder, How Sustainability Can Drive Financial Outperformance* (5 March 2015), available at https://papers.ssrn.com/abstract_id=2508281.

⁴⁴ See, e.g., Bebchuk and Tallarita, *supra* n. 2, at 16.

⁴⁵ The debate originates out of two articles published in Harv. L. Rev. in the beginning of the 1930s. The first article, which promoted the principle of shareholder value, *Corporate Powers as Powers in Trust*, was published in 1931 by Adolf A. Berle, Professor at Columbia Law School and the second, which promoted the stakeholder theory, was published by a professor at the Harvard Law School, Merrick Dodd Jr., see *Corporate Powers as Powers in Trust*, Harv. L. Rev. 1049–1074 (1931). See for a critique of shareholder value also e.g., Edward Freeman, *Managing for Stakeholders*, 9–12 (January 2007), available at <http://ssrn.com/abstract=1186402>; Sjøfjell, *supra* n. 2 and Jaap Winter, *Addressing the Crisis of the Modern Corporation: The Duty of Societal Responsibility of the Board* (13 April 2020), available at https://papers.ssrn.com/abstract_id=3574681.

⁴⁶ See, e.g., Freeman, *supra* n. 45, at 9–12.

⁴⁷ Williams, *supra* n. 43, at 667.

ence for the shareholders. In practice, this means that the management must 'balance' the interests of all stakeholders when taking business decisions.⁴⁸

The stakeholder theory seems at first glance to be perfect when considering how to best promote corporate sustainability, since it allows and in fact requires the directors to take different stakeholders' interests into consideration, even if it will negatively influence the profits of the company. The theory, at least in its more extreme form, requiring the directors to *balance all stakeholders' interests*, raises however some concern.⁴⁹ The first problem is that the term *stakeholder* is not clear. The question is who is a stakeholder in the company apart from the apparent ones; shareholders, employees, and creditors?⁵⁰ Depending on how the term is defined, the number of stakeholders can be huge in large, global companies. It should also be very hard, if possible, to identify which (hypothetical) interests the different stakeholders have, and there is in addition no guidance on how this balancing, including necessary trade-offs, should be done. The question is how in practice the situation should be handled where several different stakeholders, and even stakeholders within the same group, have conflicting interests. Trade-offs must always be made in conducting business. When applying the theory of shareholder value, this problem with balancing different, conflicting interests does not exist, since the theory clarifies that the shareholders' interest is profit (or value) maximization.⁵¹ In practice, the stakeholder theory also gives the management a lot more discretion than the theory of shareholder value, since there is no single purpose to guide the directors when taking decisions.⁵²

⁴⁸ See on this, e.g., Freeman, *supra* n. 45, at 13–15. For a critique of the theory, see Bebchuk and Tallarita, *supra* n. 2.

⁴⁹ See, e.g., Bebchuk and Tallarita, *supra* n. 2 and Beate Sjøfjell and Jukka Mähönen, *Corporate Purpose and the Misleading Shareholder vs Stakeholder Dichotomy*, University of Oslo Faculty of Law Legal Studies Research Paper Series No. 2022-43, 13 (21 February 2022).

⁵⁰ See for an illustration of the problem Bebchuk and Tallarita, *supra* n. 2, at 18–21.

⁵¹ The board of directors are accordingly not obliged to balance different shareholders' interests when applying the theory of shareholder value, but should instead promote long-term profit (or value) maximization. Difficulties may however arise if a controlling shareholder instructs the board to manage the company with a short-term focus.

⁵² An additional problem that has been highlighted is that it might reduce the pressure on the governments to take action and propose 'external' legislation protecting stakeholders. See regarding this problem, e.g., Bebchuk and Tallarita, *supra* n. 2, at 52–53 and Strine, Jr, *supra* n. 34, at 8.

[C] The Corporate Purpose

In recent years, some scholars promoting a broader responsibility for companies towards its stakeholders have focused not on this ‘balancing-of-stakeholders’ interests view, but instead on formulating the *corporate purpose*.⁵³ As recently outlined by Holger Fleischer, this idea is not new but has early predecessors.⁵⁴ As the concept of the corporate purpose is not used in a uniform way, a few words should be mentioned about the concept and its use.

First, there is at least in some jurisdictions⁵⁵ a clear difference between the objective of the company, or the company’s business field, which might be, for example, to produce and market beverages, and the (ultimate) purpose, which might be, for example, to make profit for distribution to the shareholders.⁵⁶ Under Swedish law, the objective (i.e., the business field) of the company must be stipulated in the articles of association, whereas the purpose is regulated in Chapter 3 Section 3 of the Swedish Companies Act (2005:551) (SCA). According to this provision, the purpose is to give profit for distribution to the shareholders, unless another purpose is specified in the articles of association. A similar distinction between the concepts is made under German law.⁵⁷

Second, it should be noted that a discussion regarding the corporate purpose may concern a non-binding *mission statement* or purpose mainly used as a *strategic marketing tool*.⁵⁸ One example of such mission statement is

⁵³ See, e.g., Mayer, *supra* n. 2 and *Corporate Purpose: A Concept in Search of Clarification, Data and Evidence*, The ECGI Blog (July 2022), available at <https://ecgi.global/blog/corporate-purpose-concept-search-clarification-data-and-evidence>; Edmans, *supra* n. 2; Sjäkfjell, *supra* n. 2; Guido Ferranini, *Corporate Purpose and Sustainability*, ECGI Working Paper, Working Paper No 559/2020 (7 December 2020) available at <https://ssrn.com/abstract=3753594>; Holger Fleischer, *Corporate Purpose: A Management Concept and Its Implications for Company Law*, ECGI Law Working Paper No 561/2021, 7–8 (January 2021). Critical Jill E. Fisch and Steven Davidoff Solomon, *Should Corporations Have a Purpose?*, ECGI Working Paper No 510/2020 (September 2021) available at <https://ssrn.com/abstract=3561164>. See also Rock, *supra* n. 2, at 76; Mark J. Roe, *Corporate Purpose and Corporate Competition*, ECGI Law Working Paper No 601/2021 (13 July 2021), available at http://ssrn.com/abstract_id=3817788; Jill E. Fisch, *Purpose Proposals*, ECGI Law Working Paper No. 638/2022 (4 April 2022) available at https://papers.ssrn.com/abstract_id=4079135 and Kershaw and Schuster, *supra* n. 2, at 4–6.

⁵⁴ See Fleischer, *supra* n. 53, at 7–8.

⁵⁵ Inter alia, in Sweden, Norway, and Finland (see § 2.04 [C] *infra*), whereas, for example, Delaware General Corporation Law (DGCL) does not make this distinction.

⁵⁶ See, e.g., Kershaw and Schuster, *supra* n. 2, at 4–6.

⁵⁷ See for German law, Fleischer, *supra* n. 53, at 16.

⁵⁸ See, e.g., Kershaw and Schuster, *supra* n. 2, at 8–11.

Vodafone's purpose: 'Our Purpose is to connect for a better future and our expertise and scale gives us a unique opportunity to drive positive change for society.'⁵⁹ Another is Nestlé's purpose: 'Nestlé's purpose is enhancing quality of life and contributing to a healthier future'.⁶⁰ Such purposes, or rather mission statements, are not legally binding and enforceable, and they are strictly speaking not related to the duty to act in the company's interest.⁶¹

Third, the relationship between the corporate purpose and the concept of 'the company's interest' should be clarified since they are inter-related and to some extent overlapping. At least in those jurisdictions where the purpose is regulated by law,⁶² the corporate purpose may be viewed as a broader concept than the duty to act in the interest of the company insofar as it often binds *the decision-making corporate bodies*, whereas the duty to act in the interest of the company binds primarily *the individual directors*, including the managing director.⁶³ The function of the corporate purpose is mainly to act as a standard of conduct, or a *guiding star* for the decision-making corporate bodies, and the aim of it is mainly to protect the shareholders' interests of getting a return on the investment and in the end to encourage investments for the benefit of the economy as a whole.⁶⁴

If a company has adopted a legally binding corporate purpose in the articles of association or if the company is bound by a statutory corporate purpose, systematic and teleological aspects suggest that the duty to act in the interest of the company should be interpreted in line with the corporate purpose. Otherwise, the directors would encounter difficulties in applying contravening legal rules in specific situations.

⁵⁹ <https://www.vodafone.com/about-vodafone>, visited on 14 April 2022.

⁶⁰ <https://www.nestle-esar.com/aboutus>, visited on 14 April 2022.

⁶¹ It is consequently possible also for a Swedish company bound by the statutory profit purpose in Chapter 3 Section 3 SCA to adopt a broad mission statement of the kind outlined above. See regarding this question Rock, *supra* n. 2, at 6. See also regarding the purpose as a management concept Fleischer, *supra* n. 53, at 3–9.

⁶² For example, Chapter 3 Section 3 SCA, Chapter 1 Section 5 of the Finnish Companies Act (624/2006) and § 2-2 (2) the Norwegian lov om allmennaksjeselskaper (LOV-1997-06-13-45).

⁶³ See, e.g., Chapter 1 Section 5 and 8 of the Finnish Companies Act and Skog, *supra* n. 2, at 565.

⁶⁴ See, e.g., Skog, *supra* n. 2, at 570.

§ 2.04 ‘THE INTEREST OF THE COMPANY’: A COMPARATIVE OVERVIEW

There has been a strong focus on corporate sustainability and stakeholders’ interests within the EU, mainly as a response to the United Nations (UN) Agenda 2030. Accordingly, in 2019 the European Commission adopted the European Green Deal, an ambitious growth agenda that aims to: ‘transform the EU into a fair and prosperous society, with a modern, resource-efficient and competitive economy where there are no net emissions of greenhouse gases in 2050 and where economic growth is decoupled from resource use’.⁶⁵

In line with the European Green Deal, the European Commission communicated an initiative in 2020 related to sustainable corporate governance.⁶⁶ Based on this initiative, the Commission adopted the proposal for a Directive on Corporate Sustainability Due Diligence (CSDD), the aim of which is to ‘foster sustainable and responsible corporate behaviour and to anchor human rights and environmental considerations in companies’ operations and corporate governance’.⁶⁷ The proposal contains, *inter alia*, a provision regulating directors’ duty of care in Article 25. According to this provision directors must, when acting in the interest of the company consider the interest of climate, the environment, and human rights, including in the short, medium, and long term. The provision is formulated so that it avoids some of the problems with the stakeholder theory, since it limits the number of stakeholders whose interests must be considered.

There has in recent years also been some focus on the duty to act in the interest of the company on a country-specific level in the EU and in Anglo-American jurisdictions, mainly in order to increase the focus on stakeholders’ interests, as illustrated in the subsequent section.⁶⁸ The section starts with a

⁶⁵ The European Green Deal, Brussels, 11.12.2019 COM (2019) 640 final, 2.

⁶⁶ European Commission Inception Impact Assessment, Ref. Ares (2020)4034032 (30 July 2020). For a summary of the Inception Impact Assessment and the extensive critique see, e.g., Therese Strand, *EU and Sustainable Corporate Governance*, Nordisk Tidsskrift for Selskabsret NTS:3, 1–18 (2021). See on the subject also Paul L. Davies et al., *The European Parliament’s Draft Directive on Corporate Due Diligence and Corporate Accountability*, Nordisk Tidsskrift for Selskabsret NTS:2, 30–45 (2021).

⁶⁷ See further https://ec.europa.eu/info/business-economy-euro/doing-business-eu/corporate-sustainability-due-diligence_en, visited on 14 April 2022.

⁶⁸ More than fifty countries worldwide have adopted a stakeholder-oriented governance statute, including Italy, Colombia, France, Peru, Rwanda, Uruguay, Ecuador, British Columbia, and Canada, see <https://www.bcorporation.net/en-us/movement/stakeholder-governance> (visited on 14 April 2022).

brief description of Anglo-American law. Thereafter, some jurisdictions in continental Europe are outlined, and finally a brief account is given of the Nordic jurisdictions, with a focus on Swedish law.

[A] Anglo-American Law

The US and UK governance systems are of a one-tier model with relatively strong boards and shareholders that are more dispersed than in continental Europe, with a large proportion of institutional shareholders.⁶⁹

In the US, the principle of shareholder value, as illustrated by the famous case *Dodge v. Ford*, prevailed for many decades.⁷⁰ In some later cases a more nuanced approach has, however, been taken. In *Union Pacific Railroad Co. v. Trustees*, the court accepted a donation to a non-profit association on the grounds that the donation would give the company goodwill and thereby benefit the owners in a long-term perspective.⁷¹ Another case that demonstrates a more nuanced approach is *A.P. Smith Manufacturing Co. v. Barlow*, where a contribution to Princeton University was maintained with the explicit justification that the companies have a responsibility to society.⁷²

Today forty-four states in the US have adopted so-called constituency statutes, enabling the consideration of different stakeholders' interests.⁷³

Until the adoption of CA 2006, the theory of shareholder value prevailed in the UK.⁷⁴ The enlightened shareholder value, which has been outlined in § 2.03 [A] above, is however now well established and regulated in Section 172 CA 2006. It has been accompanied by the UK Stewardship Code of 2020 and the UK Corporate Governance Code 2018, which commit not only companies but also asset managers and asset owners to sustainable long-term investment. The introductory comments in the UK Corporate

⁶⁹ See Brian R. Cheffins, *Does Law Matter? The Separation of Ownership and Control in The United Kingdom*, ESRC Centre for Business Research, University of Cambridge Working Paper No. 172, 2–3 (2000) and Paul Davies, *Shareholders in the United Kingdom*, ECGI Working Paper in Law, Working Paper No 280/2015 (2015).

⁷⁰ *Dodge v. Ford Motor Company*, 204 Mich. 459 (MI 1919). See also *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 8 (Del. Ch. 2010).

⁷¹ *Union Pacific Railroad Co. v. Trustees*, 8 Utah 2d 101, 329 P.2d 398 (1958).

⁷² *A.P. Smith Manufacturing Co. v. Barlow*, 13 N.J. 145, 98 A2d 581.

⁷³ See <https://www.bcorporation.net/en-us/movement/stakeholder-governance>. Critical Bebchuk and Tallarita, *supra* n. 2 and Lucian A. Bebchuk et al., *For Whom Corporate Leaders Bargain*, South. Calif. Law Rev., 94(6), 1467–1560 (2021).

⁷⁴ See *Gaiman v. National Association for Mental Health* [1971] Ch. 317 and Davies et al., *supra* n. 9, at 275.

Governance Code 2018 emphasizes stakeholders' interests and the long-term perspective. Long-term value creation is also emphasized in the first Principle under 1, A.: 'A successful company is led by an effective and entrepreneurial board, whose role is to promote the long-term sustainable success of the company, generating value for shareholders and contributing to wider society'. It is followed by Principle B, which states: 'The board should establish the company's purpose, values and strategy, and satisfy itself that these and its culture are aligned.'⁷⁵ Kershaw and Schuster suggest that the purpose referred to concerns a non-binding *mission statement*.⁷⁶

[B] Continental Europe

In continental Europe, the governance structure differs between a one-tier and a two-tier model, with a relatively large number of controlling shareholders.⁷⁷

France adopted the so-called PACTE Law⁷⁸ in May 2019, the aim of which is, *inter alia*, to encourage French companies to grow, taking social and environmental aspects into consideration.⁷⁹ The reform included a revision of Article 1833 of the Civil Code, which now stipulates: 'The partnership shall be managed in view of its corporate interest taking into consideration the social and environmental stakes of its activity.' This should be compared to the previous wording of Article 1833, where the interest of the partners was clearly emphasized: 'All partnerships shall have a lawful object and shall be created in the common interest of [their] partners'.

⁷⁵ David Kershaw and Edmund-Philipp Schuster have in a recent paper discussed this regulation in relation to UK company law, see Kershaw and Schuster, *supra* n. 2, at 5 et seq.

⁷⁶ *Ibid.*

⁷⁷ See, e.g., Luca Enriques and Paolo F. Volpin, *Corporate Governance Reforms in Continental Europe* *J. Econ. Perspect.*, 21(1), 117–140 (Winter 2007) and María Gutiérrez-Urtiaga and Maria Isabel Sáez-Lacave, *Europe Faces Problem of Strong Shareholders and Weak Outside Investors*, 7 February 2018, available at <https://clsbluesky.law.columbia.edu/2018/02/07/europe-faces-problem-of-strong-shareholders-and-weak-outside-investors/>.

⁷⁸ Law No. 019-486 of 22 May 2019 concerning the growth and transformation of enterprises, known as *Loi PACTE*.

⁷⁹ See <https://www.gouvernement.fr/en/pacte-the-action-plan-for-business-growth-and-transformation>, visited on 14 April 2022. See regarding the French reform Alain Pietrancosta, *Codification in Company Law of General CSR Requirements: Pioneering Recent French Reforms and EU Perspectives*, ECGI Law Working Paper No. 639/2022 (6 June 2022), available at https://papers.ssrn.com/abstract_id=4083398. Pietrancosta analyses the French reform and compares it with the CSDD.

One innovation of the French reform, which has gained much attention not least in Europe, is the introduction of a voluntary *raison d'être*, a corporate purpose.⁸⁰ A special regulation has also been adopted for French stock corporations, *société anonyme* in Article L 225-35 paragraph 1 and Article L 225-64 paragraph 1 sentence 4 of the Commercial Code. Article L 225-35 paragraph 1 sentence 1 reads:

The board of directors determines the orientations of the company's activity and supervises the implementation, in accordance with its social interest, by considering the social, environmental, cultural and sporting issues of its activity. It also takes into consideration, if applicable, the purpose of the company defined pursuant to Article 1835 of the Civil Code. (Freely translated.)

In addition to the statutory regulation, there are also specific rules governing the duty to act in the interest of the company in the AFEP-MEDEF Code of Corporate Governance for Listed Companies (2020). Section 1, 1.1 stipulates:

The board of directors performs the tasks conferred by the law and acts at all times in the corporate interest. It endeavours to promote long-term value creation by the company by considering the social and environmental aspects of its activities. If applicable, it proposes any statutory change that it considers appropriate.

Under Italian law, directors have a duty of care pursuant to Articles 2392 and 2476 of the Civil Code and a duty of loyalty, i.e., a duty to promote the interests of the company, avoiding conflicts of interest as specified in Articles 2391 and 2475 of the Civil Code. The corporate purpose is regulated in the Italian Corporate Governance Code 2020. Article 1, Principles I stipulates that: '[t]he board of directors leads the company by pursuing its sustainable success'. Principles IV stipulates that the board shall promote a relevant dialogue with shareholders and other stakeholders. The long-term value creation and sustainable success is also emphasized under Article 1, Recommendations, Item 1.

Under German law, the management board (*Vorstand*) of a public limited liability company (*Aktiengesellschaft*) manages the company under its own responsibility as set forth in Section 76 (1) of the German Stock Corporation

⁸⁰ Art. 1835 of the Civil Code.

Act.⁸¹ The directors are consequently not subordinated to the shareholders. The prevailing view is that the management board as well as the supervisory body (*Aufsichtsrat*) are obliged to act in line with the interest of the enterprise (*Unternehmensinteresse*).⁸² The interest of the enterprise is aimed at ensuring the continued existence and the success of the company, which allows consideration of stakeholders' interest to a large extent.⁸³ Within this framework, it is the task of the management bodies to define the interest of the enterprise.⁸⁴ In line with this, the regulation in the German Corporate Governance Code (2019), Principle 1 stipulates: 'The Management Board is responsible for managing the enterprise in its own best interests.' The obligation to act in line with the interest of the enterprise is emphasized in the foreword to the German Corporate Governance Code:

The Code highlights the obligation of Management Boards and Supervisory Boards – in line with the principles of the social market economy – to take into account the interests of the shareholders, the enterprise's workforce and the other groups related to the enterprise (stakeholders) to ensure the continued existence of the enterprise and its sustainable value creation (the enterprise's best interests).⁸⁵

Under Dutch law, the directors must primarily be guided by the interests of the company and the enterprise, which is understood to mean a duty to act in the interest of all stakeholders without preference for the shareholders' interests.⁸⁶ The duty is specified in Principle 1.1 Dutch Corporate Governance Code (2016), which states:

The management board is responsible for the continuity of the company and its affiliated enterprise. The management board focuses on long-term value creation

⁸¹ AktG, *supra* n. 12.

⁸² See, e.g., Holger Fleischer, *Zum Inhalt des « Unternehmensintresses » im GmbH-Recht*, GmbHHR, 1307–1312, 1309 (2010); Fleischer, *supra* n. 53, at 7–8 and Teubner, *supra* n. 18, at 470–488. Critical Gerard Spindler, *Münchener Kommentar zum Aktiengesetz*, AktG § 76 Rn 67–70 (5th ed. 2019).

⁸³ See Jens Koch, *Aktiengesetz*, § 76, Rn 35-35c (16th ed. 2022), and Spindler, *supra* n. 82, at Rn 67–70.

⁸⁴ See Mathias Habersack et al., *GmbHG Großkommentar*, § 52, Rn 260–262 (3d ed 2020) and Koch, *supra* n. 83, at Rn 35a.

⁸⁵ German Corporate Governance Code 2019, Foreword, item 2.

⁸⁶ See, e.g., Jaron van Bekkum et al., *Corporate Governance in the Netherlands*, International Congress on Comparative Law, Washington (2010), 7, available at <https://papers.ssrn.com/abstract=1507633>; ABN AMRO, Supreme Court 13 July 2007, JOR 2007, 178.

for the company and its affiliated enterprise, and takes into account the stakeholder interests that are relevant in this context.

Asset owners and asset managers holding shares in Dutch listed companies are in addition, since 2019, required to comply (or explain) with the provisions in the Dutch Stewardship Code, the aim of which is to promote, *inter alia*, long-term value creation and corporate culture.⁸⁷

[C] A Nordic Overview with a Focus on Swedish Law

The Swedish corporate governance system is strictly hierarchical with the shareholders at the top, deciding on several important matters such as the election, dismissal and remuneration of directors, instructions to the board of directors, capital increases, distribution of profits, and winding-up.⁸⁸ In addition, Chapter 3 Section 3 of the SCA sets forth that the purpose of the company is to make profits for distribution to its members, unless another purpose is stipulated in the articles of association. The theory of shareholder value is also clearly reflected in the Swedish corporate governance code (2020), even though there are some provisions where the aim is to promote sustainability and a long-term focus.⁸⁹

The directors of a Swedish limited liability company are subject to a duty of loyalty and a duty of care.⁹⁰ These duties imply, *inter alia*, that the directors must act in line with the interest of the company.⁹¹ Under Swedish law, the interest of the company means the hypothetical interest of all of the shareholders,⁹² which under the prevailing view is understood as profit maxi-

⁸⁷ <https://www.eumedion.nl/en/public/knowledgenetwork/best-practices/2018-07-dutch-stewardship-code-final-version.pdf>, visited on 14 April 2022.

⁸⁸ The governance structure in the other Nordic countries is of a similar nature in many aspects *see further* Jesper Lau Hansen, *A Scandinavian Approach to Corporate Governance*, 50 Sc. St. L. 125–142 (2007) and *The Nordic Corporate Governance Model*, Nordic & European Company Law Working Paper No. 14-12 (Per Lekvall, et al. eds, SNS Förlag 2014).

⁸⁹ *See* regarding shareholder value the foreword, p. 1 and Section I, 1. Sustainability is mainly regulated in Sections 3.1, 9.4 and 10.4.

⁹⁰ *See, e.g.*, the preparatory works prop. 1975:103, 376 et seq.; the Supreme court ruling NJA 2013 p. 117 and Östberg, *supra* n. 7, at 150 et seq. and 319 et seq.

⁹¹ *See* the Supreme court cases NJA 1981 p. 1117; NJA 2013 p. 117 and Östberg, *supra* n. 7, at 153.

⁹² *See* NJA 1981 p. 1117; NJA 2013 p. 117 and the preparatory works prop. 1997/98:99, 97.

mization.⁹³ There is consequently a logic and systematic connection between the duty of loyalty and care and the corporate purpose.

The profit purpose, which has a long history in Sweden,⁹⁴ works as a kind of guarantee for the shareholders that they will get a return on their investment, and consequently get paid for their risk-taking, or at least that the governance bodies will work for that.⁹⁵ It is a guiding principle for all decision-making bodies, also the general meeting.⁹⁶ The governance bodies are consequently not allowed to take decisions that contravene the profit purpose.⁹⁷ There is however consensus in the Swedish doctrine and there is case law supporting the opinion that any deviation from the profit purpose must be apparent to be relevant.⁹⁸

There is comprehensive agreement in the Swedish doctrine that the profit purpose does not imply that a short-term perspective must or should be applied. Instead, the focus is rather on the profitable management of the company's business with a long-term perspective.⁹⁹ The board of directors' discretion when taking decisions regarding the management of the company

⁹³ See, e.g., Rolf Dotevall, *Aktiebolagsrätt: fördjupning och komparativ belysning*, at 281 (Norstedts Juridik 2015) and Skog, *supra* n. 2, at 567 et seq. In recent years, there has been a debate concerning the interest of the company and the company's purpose among Swedish scholars, see, e.g., Per Lekvall, *On Company Purpose, Directors' Duties and Corporate Sustainability*, Festschrift in honour of Rolf Skog (Ronald J. Gilson et al. eds, Norstedts Juridik 2021), 763–774; Erik Lidman, *The Purpose of the Corporations a Contractarian Perspective*, Festschrift in honour of Rolf Skog (Ronald J. Gilson et al. eds, Norstedts Juridik 2021) 775–792; Sophie Nachemson-Ekwall, *Gör om gör rätt: Synpunkter på Kollegiets vinstfokus i den nya koden för bolagsstyrning 2020*, *Tidningen Balans* (24 January 2020); Robert Sevenius, *Är ABL redo för ett paradigmskifte?*, 29 September 2015, <https://sevenius.se/2015/09/29/ar-abl-redo-for-ett-paradigmskifte/> and Skog, *supra* n. 2 at 563–571.

⁹⁴ It was introduced as a statutory rule in the Swedish Companies Act 1944, but its importance as a fundamental principle was emphasized already in the preparatory works to the Swedish Companies Act 1895, see the preparatory works prop. 1895:6, 117.

⁹⁵ See the preparatory works prop. 2004/05:85, 219; Skog, *supra* n. 2, at 564 and the same author in *Talet om "bolagets intresse" som något mer än aktieägarnas intresse – i vems intresse?* Festschrift till Jan Kleineman (Stefan Lindskog, et al. eds, Jure Förlag 2021) 803–810; Jessica Östberg, *Några tankar kring aktiebolagslagens vinstsyfte*, *Vänbok till Anders Lagerstedt* (Jan Andersson et al. eds, Jure Förlag 2020) 209–230, 217 and Niklas Arvidsson and Per Samuelsson, *Ett och annat om vinstsyftet, generalklausulen, företagsvärdering och likhetsprincipen*, Festschrift in honour of Rolf Skog (Ronald J. Gilson et al. eds, Norstedts Juridik 2021) 123–136, 124.

⁹⁶ See Skog, *supra* n. 2, at 564 and Östberg, *supra* n. 95, at 217.

⁹⁷ See Skog, *supra* n. 2, at 564 et seq.

⁹⁸ See, e.g., the Supreme court case NJA 1987 p. 394 and Göran Ohlson, *Vikten av vinst: en studie om syftets betydelse i bolagsstyrning*, 65, 116 (Iustus 2012).

⁹⁹ See, e.g., Östberg, *supra* n. 95, at 209–230, 220 with further references.

is wide. It is accordingly up to the board of directors to decide, as a matter of business judgment, on the strategy of the company and on matters concerning the business. When doing so it must make an overall assessment whether a strategy, or a specific business proposal, is in line with the profit purpose, considering factors, such as the business potential, business risks, and the financial position of the company. Sustainability and stakeholders' interests may and should be promoted to the extent that it is in line with the profit purpose. Should, on the contrary, such activities apparently contravene it, they must not be promoted.¹⁰⁰ If the shareholders disagree with the board, they may practice either 'exit or voice', i.e., either sell their shares, or vote for an instruction to the board or a replacement of the directors.¹⁰¹

Under Danish law, it seems to be clear that the board of directors may manage the company with the aim of creating sustainable value, thereby taking different stakeholders' interests into account in order to increase the value of the company. However, they are not obliged to manage the company with a stakeholder-oriented approach.¹⁰² Stakeholders' interests and long-term value creation are emphasized in the Danish Recommendations on Corporate Governance (2020).¹⁰³ Section 1, *Principles* stipulates that the management 'must ensure that the company in the short as well as the long term develops in an expedient manner' and that 'the interaction between management and shareholders, as well as with the company's investors and other stakeholders, including society, is well-functioning'. Recommendations relating to the duties of directors are regulated in Section 2. Under *Principles*, it is emphasized that the board of directors shall 'safeguard the company's

¹⁰⁰ One exemption from this rule is the provision in Chapter 17 Section 5 SCA regarding gifts for public-benefit purposes.

¹⁰¹ See for exit or voice strategies Eleonora Broccardo, et al., *Exit vs. Voice*, Harvard Law School John M. Olin Center Discussion Paper # 1061 (22 April 2022), available at <https://ssrn.com/abstract=3671918>.

¹⁰² See regarding Danish law, e.g., Paul Krüger Andersen, *Aktie- og anpartsselskabsret*, 61 et seq. (15th ed. Djøf Forlag 2021) and the same author in *Nye Anbefalinger for god selskabsledelse i Danmark, 2020*, Nordisk Tidsskrift for Selskabsret NTS:1, 95–100, 98 (2021). See also Thorbjørn Sofsrud, who means that the interest of the company equals to the interest of the shareholders as residual claimants (*Bestyrelsens beslutning og ansvar – Spørgsmål til bedømmelse af bestyrelsesmedlemmers erstatningsansvar*, 233, *Greens Jura* 1999) and Henrik Lando, *Shareholder eller stakeholder value? En retsøkonomisk analyse af loyalitetspligten i aktieselskaber*, NTS 2001:1, 76 et seq. See however also Erik Werlauff, *Selskabsret*, 30 et seq. (11th ed. Karnov Group Denmark 2019), who seems to promote a more stakeholder-oriented approach.

¹⁰³ Paul Krüger Andersen has commented upon the recommendations, see *supra* n. 102, NTS:1 at 95–100.

and the shareholders' interests with care and with due consideration for the investors and other stakeholders.' Recommendation 2.1.1 further stipulates:

The Committee recommends that the board of directors in support of the company's statutory objects according to its articles of association and the long-term value creation considers the company's purpose and ensures and promotes a good culture and sound values in the company.

Under Norwegian law, the duty to act in the interest of the company has been discussed extensively in recent years, and the trend seems to be towards a more multifaceted, stakeholder-oriented approach, even though there is still some emphasis on the interest of the shareholders.¹⁰⁴ There is a statutory profit purpose – almost identical to the Swedish regulation – in § 2-2 (2) Lov om allmennaksjeselskaper.¹⁰⁵ The duties of directors for listed companies are specified under Section 2 in the Norwegian Code of Practice for Corporate Governance (2021):

The board of directors should define clear objectives, strategies and risk profiles for the company's business activities such that the company creates value for shareholders in a sustainable manner. When carrying out this work, the board of directors should therefore take into account financial, social and environmental considerations.

Chapter 1 Section 8 of the Finnish Companies Act states that the management must carefully promote the company's interests. According to the preparatory works, this entails a duty of loyalty implying that the management must act in a way that is in line with the company's purpose. The company's purpose, a profit purpose like the Swedish one unless another purpose is stipulated in the articles of association, is regulated in Chapter 1 Section 5 of the Finnish Companies Act.¹⁰⁶ Consequently, the interest of the company is normally understood

¹⁰⁴ See, e.g., the Supreme court rulings Rt-1922-272 (Freja), where the Supreme court accepted a donation to a non-profit organisation and HR-2018-570-A (Ericsson). In the latter ruling, the Supreme court not only stated that a company must observe the interest of the shareholders but also confirmed that it has responsibilities towards its employees, contractors, creditors, and the community and society in general and that securing the company's continuing operations may form part of the company's interest. See also the preparatory works Ot.prp. nr. 55 (2005–2006) 114; Rt 2000 p. 2033; Bråthen, *supra* n. 32, at 254–257; Beate Sjäfjell, *Sustainable Companies: Possibilities and Barriers in Norwegian Company Law*, ICCLJ vol. 11, Issue 1, 1 et seq. and Lisa Charlotte Jakobsen, *Vinningsformålet i norsk aksjeselskapsrett*, Nordisk tidsskrift for Selskapsret NTS:2 29–36, 11 et seq. (2018).

¹⁰⁵ See also § 2-2 (2) Lov om aksjeselskaper LOV-1997-06-13-44.

¹⁰⁶ See the preparatory works RP 109/2005 rd, 41 et seq.

as the shareholders' interest in (long-term) profit maximization.¹⁰⁷ The duty to act in the shareholders' interest and the profit purpose is further emphasized in the Finnish Corporate Governance Code 2020.¹⁰⁸

To summarize the Nordic overview, Sweden and Finland have to a large extent maintained a similar, shareholder-oriented view relating to directors' duties and the corporate purpose, whereas Norway and Denmark seem to be moving in the direction of a more stakeholder-oriented approach. It should however be noted that all Nordic jurisdictions provide extensive stakeholder protection via specific statutory rules, such as rules governing employee representation in the boards, employee protection, environmental protection, etc.,¹⁰⁹ and they are also all in the forefront with respect to sustainability, with Sweden in a leading position according to RobecoSAM.¹¹⁰

§ 2.05 INSOLVENT COMPANIES

There are two situations in which the duty to act in the interest of the company requires special considerations: (i) in case of insolvency and (ii) when a takeover is imminent. In this chapter, only the duty under (i) is dealt with.¹¹¹

A company in financial difficulties which is insolvent or close to insolvency is in a complicated situation in terms of business decisions. There may be a hope among the directors and the shareholders that they will be able to turn the loss-making business into a profitable one and a willingness to act

¹⁰⁷ See Jukka Mähönen and Seppo Villa, *Aktiebolag I: Allmänna läror*, 404–405 (Alma Talent 2016); Tomas Lindholm and Jakob Storå, *Begreppet corporate benefit i finsk aktiebolags- och insolvensrätt*, 4 JFT, 405–421, 412 (2010).

¹⁰⁸ See the Finnish Corporate Governance Code 2020, Introduction, item 15 and Section II, Board of Directors.

¹⁰⁹ See further Per Lekvall (ed.), *The Nordic Corporate Governance Model*, Nordic & European Company Law Working Paper No. 14-12 (2014) https://papers.ssrn.com/abstract_id=2534331.

¹¹⁰ See, e.g., RobecoSAM Country Sustainability Ranking, Update Summer 2021, 5, available at https://www.robeco.com/media/3/2/5/325dd63882d778324dd13ad2122d8ecb_202108-country-sustainability-ranking_tcm17-31263.pdf.

¹¹¹ With respect to takeovers, see, e.g., for Delaware law *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.* 506 A.2d 173 (Del. 1986) and *Paramount Communications, Inc. v. Time Inc.*, 571 A.2d 1140 (Del. 1989). Also under English law, the directors are to some extent obliged to observe the shareholders' interest of getting the best price in the event of a takeover offer, *Heron International Ltd v. Lord Grade*, [1986] BCLC 382. See however *Re A Company* [1986] B.C.L.C. 382, which notably concerned a small private company, and Davies et al., *supra* n. 9, at 1017–1018.

accordingly. Conversely, there is a risk that the company, by continuing its operations, will suffer further losses.

In a profitable company, the interests of the company's various stakeholders often coincide, as illustrated in § 2.03 [A] above. Thus, all stakeholders usually have an interest in running the business in a way that maintains or preferably increases the company's profit. The shareholders in profitable companies are, as noted earlier, residual claimants.¹¹² In insolvent companies, however, the situation is different. In many cases, only the creditors are residual claimants, since there is often no equity left and the creditors are the ones who are entitled to payment in front of shareholders from any remaining assets upon liquidation. In that situation, the shareholders may have an interest in taking significantly greater risks than the creditors, as they still have nothing to lose, while the creditors often have an interest in saving what is left. Hence, there is often a conflict of interest between the interests of the shareholders and the creditors.¹¹³

In line with this, it is accepted in several jurisdictions that in the event of insolvency (or likelihood of insolvency), the duty to act in the company's interest should be understood as a duty to promote primarily the creditors' interests, which would normally require a more risk-averse management of the business. This is, e.g., the case under Norwegian,¹¹⁴ Danish,¹¹⁵ and Anglo-American Law.¹¹⁶ It should be noted that this understanding of the

¹¹² See § 2.03 [A] *supra*.

¹¹³ See, e.g., Davies et al., *supra* n. 9, at 287; Mark Arnold and Marcus Haywood, *Duty to Promote the Success of the Company*, Company Directors: Duties, Liabilities and Remedies (Simon Mortimore QC, ed., 2 ed 2013), 277–285 and Jessica Östberg, *Något om skyldigheten att iaktta bolagets intresse vid insolvens*, Festskrift till Lars Pehrson (Ulf Bernitz et al. eds, Jure Förlag 2016), 455–476.

¹¹⁴ In a high-profile Norwegian court case from 1993 (Rt 1993 s. 1399 'Ytternes'), the Norwegian Supreme Court ruled that the creditors' interest must be observed when the company is insolvent. In a later case, HR-2017-2375-A 'Ulvesund', the Supreme Court imposed on a managing director a duty to inform a supplier about the fact that the company was insolvent.

¹¹⁵ See, e.g., Sofsrud, *supra* n. 102, at 253 et seq.; Werlauff, *supra* n. 102, at 696 et seq.; U. 1998.1137 H, and U. 2010.190 H.

¹¹⁶ See *North American Catholic Educational Programming Foundation, Inc. v. Gheewalla* 930 A.2d 92, 99 (Del. 2007) and *In re Tropicana Entertainment, LLC*, 520 B.R. 455 (Bankr. D. Del 2014).

Under English law, reference is made to the creditors' interest in the regulation in Section 172 (3) CA 2006. That directors have a duty to observe the creditors' interest in insolvency was also confirmed in the case of *Winkworth v. Edward Baron Development Co Ltd*, [1986] 1 WLR 1512, in the relatively recent cases *Bilta (UK) Ltd (In Liquidation) v*

duty is normally in line with the insolvency regulation and in some countries also with provisions in the criminal act protecting the creditors.

Insolvency and restructuring have in the EU recently been regulated by the Insolvency and Restructuring Directive.¹¹⁷ Under Chapter 5 Article 19, there is a regulation governing the duties of directors, implying, *inter alia*, that Member States shall ensure that directors have due regard to the interests of creditors, equity holders, and other stakeholders' interests in case of a likelihood of insolvency. Under preamble (70) of the directive, it is emphasized that it is important to ensure that directors may take reasonable business judgment or take reasonable commercial risks, particularly when it would improve the chances of a restructuring of the company. In case of financial difficulties, however, directors should 'take steps to minimize losses and to avoid insolvency.'¹¹⁸ The preamble (71) clarifies that there is no intention to establish any hierarchy among the different parties whose interests should be considered and that the member states should be able to decide on establishing such a hierarchy.

It should be stressed that the fact that creditors' interests have preference in many jurisdictions in case of likelihood of insolvency, does not mean that the duty is *owed to the creditors* and that creditors may enforce breaches themselves. The duty is instead often *owed to the company*, which means that breaches must be enforced by the company, in case of insolvency normally by the insolvency practitioner. The fact that creditors' interests have preference implies only that the directors must act primarily in their interest, which normally suggests a more risk-averse management of the business.¹¹⁹

Nazir [2015] UKSC 23 and in *Vivendi SA v Richards* [2013] EWHC 3006 (Ch). See also Brian R. Cheffins, *Company Law: Theory, Structure and Operation*, 538 et seq. (Oxford University Press 1997).

¹¹⁷ Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency, and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency).

¹¹⁸ A further clarification of the rule is made in the preamble (71).

¹¹⁹ See further Arnold and Haywood, *supra* n. 113, at 281–285.

§ 2.06 DISCUSSION AND CONCLUSIONS

As discussed earlier, the directors of a limited liability company have a duty to act in the interest of the company, a duty which is related to the duty of loyalty and the duty of care.

The duty implies first that the directors must act in the interest of the *company* and consequently not in, for example, the director's own interest or in the interest of a related party. This negative component of the duty, which is mainly related to the duty of loyalty, is in many jurisdictions well established by statutory law or by case law. It aims at protecting the company and its shareholders from disloyal and damaging behaviour, with the ultimate aim of promoting investments to the benefit of the economy as a whole. This part of the duty is consequently a fundamental part of good corporate governance.

The positive component of the duty, implying that the directors must act (in good faith) to promote the best interests of the company, is not equally straightforward. The question arises how the concept 'the interest of the company' should be understood.

In case of a likelihood of insolvency, when there is often no equity left, the creditors' interests have preference in many jurisdictions. This seems reasonable considering that the board of directors then in reality manages the funds of the creditors. Such an understanding of the duty is also supported by systematic aspects since it is consistent with the insolvency regulation and often also with provisions protecting creditors in the criminal act. A preference for the creditors' interests implies a more risk-averse management of the business. In this respect, the duty may promote good corporate governance at least to some extent.

In other respects, i.e., when the company is solvent, the duty to act in the interest of the company is in some jurisdictions, such as Sweden and Finland, understood as the (hypothetical) interest of all shareholders, which is normally long-term profit (or value) maximization, whereas other jurisdictions, such as Germany and the Netherlands, apply an explicit stakeholder-oriented approach. In case the company is governed by a legally binding purpose, by statute or by a regulation in the articles of association, convincing arguments suggest that the duty should be interpreted in line with such purpose.

Irrespective of the approach taken, *inter alia* the flexibility of the concept, which leaves room for interpretation, in combination with the business judg-

ment rule and the enforcement rules¹²⁰ suggest that the function and effect of the duty should not be over-estimated. Furthermore, it should be noted that a broad stakeholder orientation may reduce the governing function and efficiency of the duty, since it gives the board of directors a lot more discretion. A stakeholder-oriented approach should also be more difficult to apply, considering that trade-offs between stakeholders' interests will often be necessary.¹²¹ A shareholder-oriented approach limits the discretion of the board of directors to some extent and is easier to apply, since the shareholders' interest is presumed to be profit maximization. However, there is a risk that it is misinterpreted and that the board of directors focuses on short-term profit (or value) maximization to an extent which is detrimental to the company and its stakeholders (in the long-term).

The debate concerning the duty to promote the interest of the company has intensified in the wake of the increased focus on sustainability and stakeholders' interests worldwide. As the comparative overview has shown, there is a clear trend towards a more stakeholder-oriented regulation in many European and Anglo-American jurisdictions. Some countries, like France and Italy, have adopted statutory, stakeholder-oriented provisions, but in many European jurisdictions a stakeholder-oriented duty has been implemented through regulation in the corporate governance code, i.e., through self-regulation. One advantage with a regulation of the duty in the corporate governance code is that it is normally of a comply or explain nature, which provides flexibility and leaves room for a company to deviate from the rule if the deviation is explained. On the other hand, one disadvantage is that such rules only apply to listed companies, i.e., a minor part of all companies, and another that there are shortcomings with respect to enforcement, which should limit its impact somewhat.¹²²

There is one obvious advantage with a specific (soft or hard law) regulation of the duty; it becomes clear that the duty exists, and its meaning may also be clarified. An explicit regulation has consequently an informative and possibly preventive function. The interpretation and application of the duty will be facilitated and misinterpretations of the duty, for example, that it implies a short-term profit maximization, may be reduced.

¹²⁰ As stated in § 2.02, the duty may in many jurisdictions be enforced only by the company, or by shareholders by way of derivative action.

¹²¹ Considering this, it seems positive that the number of stakeholders to be considered under Art. 25 of the CSDD have been limited to three.

¹²² See regarding self-regulation Cheffins, *supra* n. 116, at 364 et seq.

Considering the convergence in the EU and the trend towards a stakeholder-oriented approach, it should be stressed that even though there are some common principles and similarities between at least the Western corporate governance systems, there are also important differences.¹²³ The differences are partly a result of differences in, for example, the shareholder and voting structures, the capital markets, the political economy, and social norms.¹²⁴ Such differences should be considered when discussing the duty to act in the interest of the company. Any regulation of the duty should be consistent with, *inter alia*, the shareholder structure, the specific governance system (which might, for example, be shareholder-oriented or more board-centric), executive remuneration and the enforcement rules in order for it to be effective and promote good corporate governance.¹²⁵ A duty that fits well into one system may consequently not be effective in another legal system, due to differences in any of the above-mentioned aspects.¹²⁶ Caution should therefore be taken when discussing and promoting convergence and changes with respect to rules governing directors' duties.¹²⁷

Moreover, even if the (positive) duty to act in the interest of the company is specified so that it is consistent with the corporate governance system, it should be kept in mind that the duty works mainly as a guiding principle.

¹²³ See, e.g., Rafael La Porta, et al., *The Economic Consequences of Legal Origins* (November 2007), available at <https://ssrn.com/abstract=1028081>; Hao Liang and Luc Renneboog, *On the Foundations of Corporate Social Responsibility*, ECGI Finance Working Paper, No. 394/2013, available at <https://ssrn.com/abstract=2360633>; Jesper Lau Hansen, *A Scandinavian Approach to Corporate Governance*, 125–142, 126–128 (2010) available at <https://scandinavianlaw.se/pdf/50-8.pdf> and Williams, *supra* n. 43, at 662–664. A different categorization is made by Hansmann and Kraakman, *supra* n. 31.

¹²⁴ See, e.g., Liang and Renneboog, *supra* n. 123; Mark J. Roe and Massimiliano Vatiello, *Corporate Governance and Its Political Economy*, *The Oxford Handbook of Corporate Law and Governance* (Jeffrey N. Gordon and Wolf-Georg Ringe eds., Oxford University Press 2018) 56–83 and Ronald J. Gilson, *From Corporate Law to Corporate Governance*, *The Oxford Handbook of Corporate Law and Governance* (Jeffrey N. Gordon and Wolf-Georg Ringe eds., Oxford University Press 2018), 3–27, 9–14.

¹²⁵ See, e.g., Strine, *supra* n. 34.

¹²⁶ See for an analysis of especially the Swedish corporate governance system Jessica Östberg, *supra* n. 25, at 28–40.

¹²⁷ See Jeffrey N. Gordon, *Convergence and Persistence in Corporate Law and Governance*, *The Oxford Handbook of Corporate Law and Governance* (Jeffrey N. Gordon and Wolf-Georg Ringe eds., Oxford University Press 2018), 28–55. Lucian A. Bebchuk and Mark J. Roe, *A Theory of Path Dependence in Corporate Ownership and Governance*, 52 *Stan. L. Rev.* 127 (1999). Henry Hansmann and Reinier Kraakman are of another opinion and assert that the shareholder value principle should prevail in general, see *supra* n. 31.

It may indeed to some extent promote good corporate governance in this capacity, since it guides the board of directors when taking business decisions, but the business judgment rule and the enforcement rules will, as stated above, often limit its effect in practice. It is therefore important that governments and international organizations, including the EU, consider this when drafting rules to promote good corporate governance.

