

# Law, culture and sustainability: corporate governance in the Nordic countries

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## 1. Introduction

The Nordic area today, which has its origins in the two medieval empires of Denmark and Sweden, covers five independent countries, Denmark, Iceland, Finland, Norway and Sweden, plus the autonomous or semi-autonomous Faroe Islands, Greenland and the Åland Islands. The Sámi, the only indigenous people in Europe, are scattered across northern Finland, Norway, Sweden and Russia. Their cultural rights are restricted and their political rights to an autonomous economy are nearly non-existent.<sup>1</sup> The legal cultures and legal systems of the Nordic countries can, as a result of their shared historical background, be divided into the Atlantic ‘West Scandinavian’ (Denmark, Faroe Islands, Greenland, Iceland and Norway) and the Baltic ‘East Scandinavian’ (Finland, Sweden and Åland), Danish being the respective historical languages of the law of West Scandinavia and Swedish of East.<sup>2</sup>

The Nordic countries started to build a welfare state, after World War II, using a framework coined the Scandinavian model, emphasising aspects such as labour-employer cooperation.<sup>3</sup> The model reached peak prominence in the 1970s, its heavy emphasis on the business-to-consumer-relationship being based on new legislation in contracting, compensation of damages, and consumer protection. Competition law as a tool for consumer welfare gained dominance after three members of the European Free Trade Area (EFTA), Denmark, Finland and Sweden, joined the European Union (EU). Iceland and Norway remained members of EFTA and are connected to the other Scandinavian EU member countries through participation in the European Economic Area (EEA).<sup>4</sup>

Nordic corporate governance models have been comprehensively studied in the international literature, emphasising the high level of trust in Nordic societies. It also emphasises Nordic aspects

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<sup>1</sup> See Ø. Ravna, ‘Sámi Legal Culture – and its Place in Norwegian Law’ in J.Ø. Sunde and K.E. Skodvin (eds.) *Rendezvous of European Legal Cultures* (Bergen: Fagbokforlaget, 2010), p. 149. Other indigenous people jurisdictions are described in G. Christensen, ‘What does it mean to be sustainable? Regulating the relationship between corporations and indigenous peoples’, Ch. 30 in this volume.

<sup>2</sup> See also U. Bernitz, ‘What is Scandinavian Law?’ (2007) 50 *Scandinavian Studies in Law*, 50; R. Strand, R.E. Freeman and K. Hockerts, ‘Corporate Social Responsibility and Sustainability in Scandinavia: An Overview’ (2015) 127 *Journal of Business Ethics*, 1; N. Götz, ‘Structures That Do Not Make a Region’ (2003) 10 *European Review of History—Revue européenne d’Histoire*, 323. There is no clear definition of ‘Nordic’ or ‘Scandinavian’ and these adjectives are used interchangeably in this chapter, especially in legal and social contexts, see Götz, ‘Structures’.

<sup>3</sup> See Götz, ‘Structures’, 332.

<sup>4</sup> See M.J. Iversen and L. Thue, ‘Creating Nordic capitalism – the business history of a competitive periphery’, in S. Fellman, M.J. Iversen, H. Sjögren and L. Thue (eds.), *Creating Nordic Capitalism: The Development of a Competitive Periphery* (Basingstone: Palgrave Macmillan, 2008), p. 1; Bernitz, ‘What is Scandinavian Law?’

such as social liberalism, majority shareholder power, a concentrated state and the counterbalancing of family and foundation shareholdings by strong minority shareholder protection. This counterbalancing is based on a principle of equal treatment of shareholders, which also restricts the tunnelling of private benefits. A 'weak' two-tier governance model and nearly 100 per cent non-executive boards are also mentioned in the literature. There are also, in Nordic countries, an array of cooperatives of different sizes and small and medium sized family owned enterprises.<sup>5</sup>

The Nordic governance model has also been described as being 'outside-in', putting the non-shareholder 'stakeholder'<sup>6</sup> interests first. This is in contrast to the business model of 'inside-out', associated with neoclassical economics, in which corporations put shareholder interests first through maximising sales and distributable profits. Nordic corporations and their controlling shareholders allegedly first consider how the corporation can best meet stakeholders needs, based on the values shared by the corporation and its stakeholders (including the employees and the state).<sup>7</sup> Another label attached to the post-war Nordic model, at least until the 1990s, is 'implicit' corporate social responsibility (CSR).<sup>8</sup> This is based on 'a consensual political culture, a strong social-democratic welfare state, and well-functioning partnerships between business, government and labour organizations'. The changes that have taken place since the 1990s have not primarily been to content but to how CSR is expressed explicitly as an organizational target.<sup>9</sup>

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<sup>5</sup> See for example R.J. Gilson, 'Controlling Shareholders and Corporate Governance: Complicating the Comparative Taxonomy' (2006) 116 *Harvard Law Review*, 1641; P. Lekvall (ed.), *The Nordic Corporate Governance Model* (Stockholm: SNS Förlag, 2014); S.-E. Sjöstrand, T. Berglund, L. Grönberg, M. Kallifatides, F. Poulfelt, S. Pöyry and O. Sigurjonsson, *Nordic Corporate Governance: An Extensive In-Depth Study of Corporate Governance and Board Practices in 36 Large Companies* (Stockholm: Stockholm School of Economics Institute for Research, 2016); K.R. Ilmonen, 'A Political Narrative of Nordic Corporate Governance: Shareholders, Stakeholders and Change of Control' (2015) 12 *European Company and Financial Law Review*, 489; S. Thomsen, 'The Nordic Corporate Governance Model' (2016) 12 *Management and Organization Review*, 189.

<sup>6</sup> The standard definition of 'stakeholder' comes from R.E. Freeman, *Strategic Management: A Stakeholder Approach* (Boston: Pitman, 1984) p. 46: 'any group or individual who can affect or is affected by the achievement of the firm's objectives.' However, the 'stakeholder' concept is older in Scandinavia, deriving from E. Rhenman, *Företagsdemokrati och företagsorganisation* [Industrial democracy and industrial management] (Stockholm: Thule, 1964) ('*intressent*'); see J. Näsi, 'A Scandinavian approach to stakeholder thinking: An analysis of its theoretical and practical uses, 1964–1980' in J. Näsi (ed.), *Understanding Stakeholder Thinking* (Helsinki: LSR-Julkaisut Oy, 1995), pp. 97, 98; R. Strand and R.E. Freeman, 'Scandinavian Cooperative Advantage: The Theory and Practice of Stakeholder Engagement in Scandinavia' (2015) 27 *Journal of Business Ethics*, 65, 68. We recognise the concept, but we at the same time see it as being a highly problematic concept in a corporate law context, as it is not based on law.

<sup>7</sup> Strand, Freeman and Hockerts, 'Corporate Social Responsibility and Sustainability in Scandinavia', 8.

<sup>8</sup> S.G. Carson, Ø. Hagen and S.P. Sethi, 'From Implicit to Explicit CSR in a Scandinavian Context: The Cases of HÅG and Hydro' (2015) 127 *Journal of Business Ethics*, 17, 19.

<sup>9</sup> Carson, Hagen and Sethi, 'From Implicit to Explicit', 21.

One important reason for Nordic firms' outside-in perspective, which is often combined with a 'stakeholder' approach,<sup>10</sup> is that the Nordic corporate culture has been dominated by public market actors at the government level. The breakthrough of state-owned enterprises (SOEs) took place in the Nordic countries, as in many other places in Europe, after World War II. The Norwegian State has, after the discovery of oil in 1967, been an active global investor on stock exchanges, through the Norwegian sovereign wealth fund (SWF), the Norwegian Government Pension Fund Global. The banking sector is heavily regulated and centralised, especially in Finland, Iceland and Norway, due to the banking crises in Norway in 1988, Finland in 1991 and in particular in Iceland in 2008.

In this chapter, we discuss what elements within Nordic corporate law, governance and culture contribute to corporate sustainability<sup>11</sup> in the Nordic area. In section 2 we provide a general overview of Nordic corporate law and corporate governance; section 3 focuses on two important Nordic corporate cultural phenomena, the role of private investors and the banks in corporate sustainability; section 4 discusses the role of the Nordic states as active market actors and their contribution to corporate sustainability, particularly SOEs and SWFs, and Section 5 concludes the chapter.

This chapter concentrates on companies and listed companies in particular. This is not to diminish the role of other business forms such as foundations, associations, partnerships and particularly cooperatives, all of which are important in the Nordic context. Only the role of these business forms as institutional investors in non-financial companies are discussed in this chapter. The role of foundations and other non-company investor forms is a unique Nordic phenomenon.

## **2. Nordic corporate law and corporate governance**

Nordic company law, as for most Western company laws, was derived in the latter part of the nineteenth century. Denmark, Finland and Norway had a Swedish type of companies act by the early twentieth century, with full harmonization nearly being achieved through a harmonization project in the 1960s. Denmark, an EFTA founding member and through its membership of the European Economic Community (later the EU) in 1972 took a central European path. The other five EFTA countries followed in 1994, firstly through the EEA, and then through Finland and Sweden in 1995 becoming members of the EU. The company laws of these countries were therefore adapted to EU company law. Each did, however, have a slightly different approach.<sup>12</sup> Even so, there is still a high level

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<sup>10</sup> See R. Strand and R.E. Freeman, 'Scandinavian Cooperative Advantage: The Theory and Practice of Stakeholder Engagement in Scandinavia' (2015) 127 *Journal of Business Ethics*, 65.

<sup>11</sup> See B. Sjøfjell and C.M. Bruner, 'Corporations and sustainability', Ch. 1 in this volume.

<sup>12</sup> F. Westman, 'Nordic Company Law Regulation and Why Harmonisation Through Competition Is Necessary' (2014) 15 *European Business Organization Law Review*, 357, 357-375.

of conformity between them,<sup>13</sup> based on '(i) close relationships and similarities between the Nordic countries; (ii) company laws of other Nordic countries as inspiration for legislators; (iii) cooperation between Nordic countries; and (iv) the EU company law harmonisation programme'.<sup>14</sup>

Some general conclusions can be drawn based on this relative conformity. Firstly, Nordic Companies Acts are manifestations of what David Millon denotes 'traditional' shareholder primacy.<sup>15</sup> The Acts emphasise the board's and the senior management's broad law-based discretion and acknowledge the special place of boards within the governance structure in relation to other stakeholders.<sup>16</sup> The default 'purpose' of the company is to generate profits for shareholders. This, however, is broadly interpreted as being synonymous with the long-term value of the firm itself, shareholders' rights being derivative and secondary.<sup>17</sup> Shareholders do possess the ultimate decision-making power in a company through the general meeting, where they participate in the supervision and control of the company. The general meeting generally elects and dismisses board members, with the main exception being the employees' right to elect board members.<sup>18</sup> The annual general meeting approves the company's annual accounts, including any distribution of profits. The general meeting is not under ordinary circumstances, permitted to distribute more than that proposed by the board, which emphasises the board's duty of care to the company. Board member remuneration must be approved by the general meeting, which also appoints the company's statutory auditors. Mergers and divisions, amendments to the company's articles, and changes to the company's share capital must be decided by the general meeting.<sup>19</sup> Shareholder rights are exceptionally strong in Norway, even by Nordic standards, the law emphasizing the general meeting's role as the highest organ of the corporate hierarchy.<sup>20</sup> In Nordic

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<sup>13</sup> J.L. Hansen, *Nordic Company Law – The Regulation of Public Companies in Denmark, Finland, Iceland, Norway and Sweden* (Copenhagen: DJØF Publishing, 2003), pp. 9-10.

<sup>14</sup> Westman, 'Nordic Company Law', 375.

<sup>15</sup> D. Millon, 'Radical Shareholder Primacy' (2013) 10 *University of St. Thomas Law Journal*, 1013-4.

<sup>16</sup> B. Sjøfjell, A. Johnston, L. Anker-Sørensen and D. Millon, 'Shareholder Primacy: The Main Barrier to Sustainable Companies' in B. Sjøfjell and B.J. Richardson (eds.) *Company Law and Sustainability: Legal Barriers and Opportunities* (Cambridge: Cambridge University Press, 2015), pp. 79, 84.

<sup>17</sup> Sjøfjell et al., 'Shareholder primacy', p. 92.

<sup>18</sup> In companies in Denmark, Norway and Sweden with at least 35 (Denmark), 30 (Norway) and 25 (Sweden) employees, the employees have the right to elect members to the board. There is no such an absolute right in Finland; in Finnish companies with more than 150 employees they have the right to participate in management decisions. The mechanism for this can be agreed upon between the company and the employee representatives. If there is no agreement, it is up to the company to decide the level at which employees are represented, either in a single-tier board, in a supervisory board in a two-tier company or at operating ('factory') level. See for example [www.worker-participation.eu/National-Industrial-Relations/Countries](http://www.worker-participation.eu/National-Industrial-Relations/Countries). There might also be provisions on extraordinary appointment rights in articles of association.

<sup>19</sup> See Finnish Securities Market Association, Danish Corporate Governance Committee, Icelandic Committee on Corporate Governance, Norwegian Corporate Governance Board and Swedish Corporate Governance Board, *Corporate Governance in the Nordic Countries* (April 2009), p. 6, [www.cgfinland.fi/images/stories/pdf/nordic\\_cg\\_booklet\\_final\\_web\\_version.pdf](http://www.cgfinland.fi/images/stories/pdf/nordic_cg_booklet_final_web_version.pdf).

<sup>20</sup> B. Sjøfjell, 'Sustainable Companies: Possibilities and Barriers in Norwegian Company Law' (2013) 11 *International and Comparative Corporate Law Journal*, 1, 28, 30.

countries, only shareholders can bring derivative lawsuits against boards and general managers on behalf of the corporation, to redress harm done to the corporation.

Nordic traditional shareholder primacy, as set out in the corporate governance codes, resonates also with Bainbridge's 'director primacy' theory of corporate law. According to this theory, the board's job is to pursue shareholder wealth, the board possessing the broad discretion to select the means to that end. The board is also, in general, immune to direct shareholder control of management.<sup>21</sup> The shareholder governance powers in the Nordic countries are however, according to Bainbridge, beyond those provided by US corporate law. This is illustrated by the general meeting's right to appoint board members.<sup>22</sup> Nordic law allows, as a counterbalance, the dominant shareholders to be held solely or jointly liable with the board for negligent behaviour. A 'general clause' furthermore enables the courts to strike down any decision made by the general meeting that unfairly advantages one shareholder at the expense of the company or other shareholders.<sup>23</sup> The law has, furthermore, traditionally protected the economic interest of the enterprise through its capital maintenance rules.<sup>24</sup>

Nordic corporate law therefore creates a platform for 'shareholder activism', a platform that is predominantly for the protection of long-term investments, even where the investments' wider societal purpose is taken into consideration.<sup>25</sup> Nordic capital markets are, on the other hand, highly integrated both internally and externally. A number of cross-border mergers have taken place that have created large international 'pan-Nordic' companies, some of these companies being listed on more than one Nordic stock exchange. This is designed to attract non-Nordic international investors and to satisfy institutional shareholders' and their investment supply chains' demands for returns. The negative effect of these conflicting aims has been that it has led to market-driven 'radical' shareholder primacy inspired by Anglo-Saxon corporate governance codes.<sup>26</sup> These codes make, from the point of view of the law, doubtful financial economics based claims about the nature of the privileged position of shareholders within corporations, and legally inaccurate claims of an agency relationship between

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<sup>21</sup> S.M. Bainbridge, 'Director Primacy: The Means and Ends of Corporate Governance' (2003) 97 *Northwestern University Law Review*, 547; Millon, 'Radical Shareholder Primacy', 1017.

<sup>22</sup> J.L. Hansen, 'A Scandinavian Approach to Corporate Governance' (2007) 50 *Scandinavian Studies in Law*, 125, 131–132, 133.

<sup>23</sup> Hansen, 'A Scandinavian Approach', 133.

<sup>24</sup> Sjøfjell, 'Sustainable Companies', 19 (on Norway); Westman, 'Nordic Company Law', 360 (on Sweden).

<sup>25</sup> Sjøfjell, 'Sustainable Companies', 5, 19.

<sup>26</sup> Millon, 'Radical Shareholder Primacy'.

the board and senior management and the shareholders as ‘owners’ of the company,<sup>27</sup> a claim unknown to Nordic law.<sup>28</sup>

There is, however, a societal agenda within the Western Scandinavian corporate governance codes,<sup>29</sup> as we see in the Norwegian code. In the 2018 Norwegian code it has attempted to take a step further compared to the 2014 code; moving from speaking about ‘ethical guidelines’ to seeking to integrate societal values better into the role of the board,<sup>30</sup> with emphasis on the definition of ‘objectives, strategies and risk profiles’.<sup>31</sup> The code reflects the shareholder emphasis of the corporate governance movement, stating that the board is to do this ‘support value creation for shareholders’. Yet it goes on to add that the company should have ‘guidelines for how it integrates considerations related to its stakeholders into its value creation’.<sup>32</sup> The recommendation on internal control and risk management now specifies that they are to encompass the integration of ‘considerations related to stakeholders into its creation of value’.<sup>33</sup> This is also reflected in the Swedish code, which sees the board’s responsibility as defining appropriate guidelines to govern the company’s conduct in society, and ensuring its long-term value creation capability.<sup>34</sup>

The main obstacle facing sustainability is not law, but the social norm of ‘radical’ shareholder primacy, which is propagated in the Nordic countries by financial markets and professionals.<sup>35</sup> This view is reflected in Eastern Scandinavian corporate governance codes in particular,<sup>36</sup> and has also affected the interpretation of Western Scandinavian codes.<sup>37</sup> Good governance means, according to the Swedish code for example, ensuring that companies are run sustainably, responsibly, and as efficiently as

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<sup>27</sup> The Iceland Chamber of Commerce, SA Business Iceland and Nasdaq Iceland, *The Guidelines on Corporate Governance* (5th edn., Icelandic CGC: June 2015), p. 19; Securities Markets Association, Finnish Corporate Governance Code 2015 (Finnish CGC), 12, 15, 17; Swedish Corporate Governance Board, *The Swedish Corporate Governance Code* (Swedish CGC), p. 7, 20; Committee on Corporate Governance, *Recommendations on Corporate Governance* (November 2017, Danish CGC), 9; Norwegian Corporate Governance Board (NCGB), *The Norwegian Code of Practice for Corporate Governance* (17 October 2018, Norwegian CGC), 51.

<sup>28</sup> More generally, see Millon, ‘Radical Shareholder Primacy’, 1024.

<sup>29</sup> Sjøfjell, ‘Sustainable Companies’, 23.

<sup>30</sup> Norwegian Corporate Governance Board (NCGB), *The Norwegian Code of Practice for Corporate Governance* (17 October 2014, NCGB 2018), p. 10.

<sup>31</sup> *Ibid.*, Section 2.

<sup>32</sup> *Ibid.*, explanatory notes to Section 2, stating that the Code goes further than the Accounting Act’s implementation of the EU’s Non-Financial Reporting Directive.

<sup>33</sup> *Ibid.*, Section 10.

<sup>34</sup> Swedish CGC, p. 17.

<sup>35</sup> See for example F. Truyen, *Aksjonærenes myndighetsmisbruk* [Shareholder abuse of authority] (Oslo: Cappelen akademisk forlag, 2005); R. Skog, ‘The Importance of Profit in Company Law – a Comment from a Swedish Perspective’ (2015) 12 *European Company and Financial Law Review*, 563. Critically, see Sjøfjell, ‘Sustainable Companies’; Sjøfjell et al, ‘Shareholder primacy’, 82-86.

<sup>36</sup> Finnish CGC; Swedish CGC.

<sup>37</sup> Sjøfjell, ‘Shareholder primacy’, 106-7.

possible on behalf of the shareholders.<sup>38</sup> The code does not, however, cover ‘stakeholder’ issues, as this ‘is felt to be beyond the framework of an owner-orientated view of corporate governance’.<sup>39</sup> Sustainability is not seen to be the responsibility of companies, but to be the responsibility of the ‘owners’,<sup>40</sup> as reflected in section 3 below. There is no direct nor indirect reference to ‘stakeholders’, ‘CSR’, or sustainability in the Finnish code, which is solely targeted at shareholders.<sup>41</sup> It furthermore uses, when non-legal ‘ownership language’ typical for radical shareholder primacy.<sup>42</sup>

### **3. Private shareholdings and financial intermediaries**

#### *3.1. Nordic listed corporations: concentration of corporate control*

Shareholdings concentration is the most notable peculiarity of the Nordic governance model of listed corporations. Close to two thirds of all listed companies in the region have at least one shareholder controlling more than 20 per cent of total votes, and about one fifth of companies are under the absolute control of a single shareholder.<sup>43</sup> The Nordic countries, despite being partially coordinated and partially state-led,<sup>44</sup> are advanced, well-developed market economies and active participants in international capital markets. The countries, for their sizes, host a remarkable number of world-leading companies, both private and state controlled, larger foreign minority shareholders also being attracted in many cases. Foreign direct investments are mostly European, the top five origins being the UK, Germany, France, the Netherlands and Russia.<sup>45</sup> Foreign investor shareholdings in listed companies has increased significantly in recent decades and is now more than 40 per cent of the aggregate stock market value in the region, this varying from 35 per cent for Finland to 51 per cent for Denmark.<sup>46</sup> The majority of listed companies are, from an international perspective, ‘small cap companies’ with

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<sup>38</sup> Swedish CGC p. 2.

<sup>39</sup> Swedish CGC, p. 4.

<sup>40</sup> Swedish CGC, p. 7.

<sup>41</sup> Finnish CGC, p. 9.

<sup>42</sup> Finnish CGC, p. 12.

<sup>43</sup> Lekvall (ed.), *The Nordic Corporate Governance Model*, p. 23.

<sup>44</sup> Market economies can be divided into coordinated, liberal and state-led economies. Denmark, Finland, Norway and Sweden (and Austria, Germany and Japan) are typical coordinated market economies with strategic interactions with firms, with non-market institutions such as business associations and with trade unions that play a dominant role in coordinating the economy. In state-led market economies, including France and South Korea and partially Norway, Finland and Sweden, the state plays a dominant role in markets. See P.A. Hall and D. Soskice, ‘An Introduction to Varieties of Capitalism’ in P.A. Hall and D. Soskice (eds.) *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (Oxford: Oxford University Press, 2001), p. 1; see also N. Kang and J. Moon, ‘Institutional complementarity between corporate governance and Corporate Social Responsibility: a comparative institutional analysis of three capitalisms’ (2012) 10 *Socio-Economic Review*, 85.

<sup>45</sup> EY, ‘Onward and upward: EY Attractiveness Program’, *Nordics*, August 2018, p. 9.

<sup>46</sup> Lekvall (ed.) *The Nordic Corporate Governance Model*, pp. 47, 112, 117, 170–171, 202, 250.

predominantly domestic shareholders.<sup>47</sup> International institutional investors represent a small but growing proportion of shareholders. Retail shareholding is, however, low except for Sweden.<sup>48</sup>

Norwegian domestic investors have long been interested in investor activism.<sup>49</sup> Investor engagement in Sweden, due to shareholder friendly corporate governance, has led lately to both domestic activism, primarily the Swedish activist Christell Gardell and his hedge fund Cevian, and foreign activism towards management. This activism can be 'softer' and more long term oriented than in, for example, the United States, due to this being based on dialogue with boards rather than confrontation.<sup>50</sup>

Long-termism (rather than short-term gains) has been a trademark of the 'Nordic model'. The potential drivers of sustainability include long-term activist shareholders such as Cevian, the strong position of Nordic states as shareholders and the Nordic corporate peculiarity of direct 'super-long-term' shareholdings held by influential families and civil law foundations.<sup>51</sup> Examples of influential families include the Herlin family, which controls Kone, the Bonnier family which controls the Bonnier Group, and the Wallenberg family which, through their foundation and investments, holds substantial stakes in a number of leading Swedish and Finnish listed companies including AstraZeneca, Electrolux, Ericsson, Saab, Skandinaviska Enskilda Banken, and Wärtsilä. These companies are corner stones of the 'Swedish model', which is based on a strong belief in social engineering, a corporatist state, economic growth, and political stability.<sup>52</sup>

The development of leading Swedish international companies has been closely related to a specific type of governance system, one distinguished by corporate groups and dynastic families. Family shareholdings are notably not limited to small or medium sized enterprises or traditionally strong family industries such as shipping and trade. Dynastic families have been and continue to be vital within large industries such as engineering, forestry and pharmaceuticals.<sup>53</sup> The leading industrial families have,

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<sup>47</sup> Corporate Governance in the Nordic Countries.

<sup>48</sup> Sjøfjell, 'Sustainable Companies', p. 4.

<sup>49</sup> B. Scholtens and R. Sievänen, 'Drivers of Socially Responsible Investing: A Case Study of Four Nordic Countries' (2013) 115 *Journal of Business Ethics*, 605.

<sup>50</sup> 'A Swedish activist speaks softly and carries a big stick: Cevian is Europe's largest activist fund', *The Economist*, 15 June 2017, [www.economist.com/business/2017/06/15/a-swedish-activist-speaks-softly-and-carries-a-big-stick](http://www.economist.com/business/2017/06/15/a-swedish-activist-speaks-softly-and-carries-a-big-stick); E. Guzun, 'U.S. Activist Funds Increasingly Setting Sights on European Companies', *HedgeNordic* 22 September 2017, [www.hedgenordic.com/2017/09/u-s-activist-funds-increasingly-setting-sights-on-european-companies/](http://www.hedgenordic.com/2017/09/u-s-activist-funds-increasingly-setting-sights-on-european-companies/); R. Milne, 'Christer Gardell, Cevian Capital founder, on clearing out boards: Europe's biggest activist investor shakes up management teams to unlock hidden value', *Financial Times*, 10 September 2017, [ft.com/content/1fdd0a6c-92ed-11e7-a9e6-11d2f0ebb7f0](http://ft.com/content/1fdd0a6c-92ed-11e7-a9e6-11d2f0ebb7f0).

<sup>51</sup> Lekvall (ed.), *The Nordic Corporate Governance Model*, p. 57.

<sup>52</sup> M. Larsson, H. Lindgren and D. Nyberg, 'Entrepreneurship and ownership: the long-term viability of the Swedish Bonnier and Wallenberg family business groups' in S. Fellman, M.J. Iversen, H. Sjögren and L. Thue (eds.), *Creating Nordic Capitalism: The Development of a Competitive Periphery* (Basingstone: Palgrave Macmillan, 2008), p. 75.

<sup>53</sup> Larsson, Lindgren and Nyberg, 'Entrepreneurship', p. 75.

within the Swedish model, been referred to as the backbone of Swedish corporate shareholders and often have long traditions of investing in stocks and are claimed to control 70 percent of the Stockholm Stock Exchange.<sup>54</sup>

The second identifying phenomenon is private foundations as institutional investors.<sup>55</sup> In Denmark for example, more than 60 per cent of total stock market capitalization is held by foundations such as Carlsberg, Novo Nordisk, Lundbeckfonden and A.P. Møller. In Sweden, two leading business groups (Industrivärden and Wallenberg) are based on foundations. IKEA is also controlled by the more recently established Kamprad family foundation. The prevalence of this structure is most directly explained by high wealth taxes making foundations an attractive way for founding families to maintain control. The charitable nature of foundation share ownership may, however and in turn, have also fostered social legitimacy for large companies, an aspect that is essential to corporate sustainability.<sup>56</sup>

### 3.2. *Banks and sustainability*

Banks and institutional investors are according to empirical research a major motor of ESG performance. Regulatory and legal constraints furthermore mean that banks in the Nordics are not permitted to hold long-term equity stakes in non-financial firms. There are in the Nordic countries, two counterforces to the positive impact of bank influence upon company sustainability. Firstly, Finland has the peculiarity of public-private-hybrid pension insurance companies as institutional investors, that play a larger role. They operate more in line with the traditionally Anglo-American shareholder primacy, more strongly characterized by 'institutional investor activism' than their counterparts in other Nordic countries. They are guided by short-termism rather than long-termism. The 'Nordic active investor model' has been weakened in Finland by the state simultaneously and systematically reducing its direct and indirect shareholdings in listed companies.<sup>57</sup>

Secondly, the banks' impact upon promoting ESG principles has been counter-productive due to a series of banking crises in the Nordic countries. All the Nordic countries have, after their banking sectors were liberalized, experienced a rapid growth in credit, this resulting in banking crises of varying degrees of severity.<sup>58</sup> The lessons learned during these periods of crisis served Norwegian, Finnish,

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<sup>54</sup> Lie, 'Context', 924.

<sup>55</sup> See H. Hansmann and S. Thomsen, 'The Governance of Foundation-Owned Firms' (July 14, 2017), [www.ssrn.com/abstract=3112766](http://www.ssrn.com/abstract=3112766).

<sup>56</sup> Thomsen, 'The Nordic Corporate Governance Model', 198.

<sup>57</sup> Lekvall (ed.), *The Nordic Corporate Governance Model*, p. 171.

<sup>58</sup> T.G. Moe, J.A. Solheim and B. Vale (eds.), *The Norwegian Banking Crisis*, (Oslo: Norges Bank, Occasional Papers No. 33, 2004); K. Abildgren and J. Thomsen, *A Tale of Two Danish Banking Crises, Monetary Review 1<sup>st</sup> Quarter* (Danmarks Nationalbanken, 2011); S. Honkapohja, 'Financial Crises: Lessons from the Nordic Experience' (2014) 13 *Journal of Financial Stability*, 193; G. Johnsen, *Bringing Down the Banking Sector: Lessons from Iceland* (New York: Palgrave Macmillan, 2014).

Faroese and Swedish bankers and policy makers well. All these countries therefore came relatively unscathed out of the global financial crisis. The European Economic Area Agreement entered into force in 1994 soon after the first Nordic crisis, this requiring the mandatory implementation of EU legislation on financial oversight.

Repeated banking crises in the Nordics feed into the discussion on the merits of bank-based versus market-based financial systems. The Nordics, with the exception of Denmark, are generally identified as being bank-based systems.<sup>59</sup> Post-crisis literature, however, favours market-based systems, as the financial crisis<sup>60</sup> and the housing crisis<sup>61</sup> was more severe in bank-based financial systems than in market-based ones.<sup>62</sup> Banks, to a much greater extent than markets, overextend credit during financial upturns and ration it during financial downturns.<sup>63</sup> The question of why this is the case remains. Official investigations looking into the causes of banking crises in different jurisdictions point to incentives embedded in bankers' pay and the contribution this made to excessive credit growth in the period running up to the crisis.<sup>64</sup> Regulators in Europe have responded to these findings by capping the incentive pay of bankers to 50 per cent of total pay.<sup>65</sup>

The Icelandic public gained a rare inside look into bankers' allocation of credit, through the exceptional data privileges provided by a Parliamentary Special Investigation Commission into the causes of the total banking collapse in Iceland in 2008.<sup>66</sup> Iceland, operating under the European Economic Area legislation and the Basel Accord, experienced exceptional credit growth. Credit to the private sector

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<sup>59</sup> J. Bats and A. Houben, 'Bank-based versus Market-based Financing: Implications for Systemic Risk' (2017) *DNB Working Paper, De Nederlandsche Bank*.

<sup>60</sup> L. Gambacorta, J. Yang and K. Tsatsaronis, 'Financial Structure and Growth' (2014) *BIS Quarterly Review*, 21.

<sup>61</sup> S. Langfield and M. Pagano, 'Bank bias in Europe: effects on systemic risk and growth' (2016) *31 Economic Policy*, 51.

<sup>62</sup> Bats and Houben, *Bank-based versus Market-based Financing*.

<sup>63</sup> M. Pagano, S. Langfield, V. Acharya, A. Boot, M. Brunnermeier, C. Buch, M. Hellwig, A. Sapir and I. van den Burg, *Is Europe overbanked?* (The European Systemic Risk Board's Advisory Scientific Committee report No 4, 2014).

<sup>64</sup> Special Investigation Commission (SIC), P. Hreinsson et. al. (eds.), *The Causes and Events Leading up to the fall of the Icelandic Banks* [original title: *Rannsóknarnefnd Alþingis, Aðdragandi og orsakir falls íslensku bankanna og tengdir atburðir*] (Reykjavik, 2010), vol. 7, pp. 222-227; Ministry of Industry, Business and Financial Affairs, Jesper Rangvid (ed.); 'The Financial Crisis in Denmark – Causes, Consequences and Lessons' in , (Copenhagen: Ministry of Industry, Business and Financial Affairs, 2013) p. 32, [www.em.dk/english/publications/2013/13-09-18-financial-crisis](http://www.em.dk/english/publications/2013/13-09-18-financial-crisis); The Financial Crisis Inquiry Commission, P. Angelides et al. (eds.) *The Financial Crisis Inquiry Report* (Washington, DC: U.S. Government Printing, 2011) p. 61; Report of the Commission of the Investigation into the Banking Sector in Ireland, Nyberg, Peter, *Misjudging Risk: Causes of the Systemic Banking Crisis in Ireland* (Dublin: The Minister for Finance, 2011), p. 31.

<sup>65</sup> J. Cullen and G. Johnsen, 'Promoting Bank Stability through Compensation Reforms' (2015) 11(2) *Icelandic Review of Politics and Administration*.

<sup>66</sup> E. Gunnarsson, 'The Icelandic Regulatory Responses to the Financial Crisis' (2011) 12 *European Business Organization Law Review*, 1. The co-author of this chapter, Guðrún Johnsen, is a former Senior Investigator at this Parliamentary Special Investigation Commission.

grew from 45 per cent of Gross Domestic Product (GDP) in 1996 to 312 per cent in 2006.<sup>67</sup> A complex cross-holding structure of firms that were initiated by bankers who needed to allocate credit during the credit boom, was uncovered. This included large corporate entities tied together through share-ownership of banks and their controlling shareholders, mainly funded with borrowed money from the banks and often with insignificant amount of shareholders equity.<sup>68</sup> Incentive pay helped create the excessive credit risk exposure. The banks themselves were, however, engaged in misreporting of their own equity and the general managers and key employees of all three banks, Glitnir, Landsbanki and Kaupthing were found guilty of market manipulation of banks' stock prices.<sup>69</sup> Equity ratios were misreported due to staff being permitted to inappropriately hedge stock options, and due to banks funding acquisitions of their own shares for related parties and favoured customers without deducting those loans from the banks' equity bases. Research carried out, for example, by Talley and Johnsen<sup>70</sup> and Peng and Roell<sup>71</sup> indicates banks' incentive systems fuelled risk taking and prompted the misreporting of financial results at the end of the boom period, when targets were unlikely to be met.<sup>72</sup>

The incentive pay of bankers emphasised the bottom line of banking operations. This is likely to encourage credit bubbles through project finance, which ultimately leads to the instability of the banking system itself. ESG considerations are therefore left to equity holders such as pension funds, industrial foundations, and other long-term shareholders, as banks have only recently turned their focus towards green bond issues and other such instruments promoting responsible environmental policy.

Icelandic policy-makers took decisive steps, post-crisis, to reign in the destabilizing incentives of bankers' pay, by capping this to 25 per cent of total pay. The pan-European ceiling was 50 per cent.<sup>73</sup> Legal reforms in Iceland were geared to allowing the financial surveillance authorities to better intervene in banking operations through adding more stringent requirements to the equity funding of

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<sup>67</sup> World Bank, Global Financial Development Database, 2017, Line GFDD.DI.12, Private credit by deposit money banks and other financial institutions to GDP (%).

<sup>68</sup> M.V. Bjarnadóttir, G.A. Hansen, *Report of the Special Investigation Commission* (Reykjavik: Icelandic Parliament Special Investigation Commission, 2010) Appendix 2, Volume 9, p. 23.

<sup>69</sup> Johnsen, *Bringing Down*, p. 141; Icelandic Supreme Court Rulings nr. 498/2015, no. 842/2014, no. 145/2014, Reykjavik District Court ruling no. S-193/2016.

<sup>70</sup> E. Talley and G. Johnsen, 'Corporate Governance, Executive Compensation and Securities Litigation' (2005) No. 04-7 *USC Law School, Olin Research Paper*.

<sup>71</sup> A.A. Röell and L. Peng, 'Executive Pay, Earnings Manipulation and Shareholder Litigation', AFA 2005 Philadelphia Meetings ((August 2006), [www.ssrn.com/abstract=488148](http://www.ssrn.com/abstract=488148)).

<sup>72</sup> Special Investigation Commission (SIC), P. Hreinsson et. al. (eds.), *The Causes and Events Leading up to the fall of the Icelandic Banks* [original title: *Rannsóknarnefnd Alþingis, Aðdragandi og orsakir falls íslensku bankanna og tengdir atburðir*] (Reykjavik: Icelandic Parliament Special Investigation Commission, 2010), vol. 3, pp. 23, 70, 99, [www.rna.is/](http://www.rna.is/).

<sup>73</sup> Cullen and Johnsen, 'Promoting'

systemically important institutions.<sup>74</sup> The Icelandic legislature furthermore, in an attempt to alter the ‘DNA’ of financial institutions, indirectly redefined the purpose of financial institutions by specifically stipulating that the purpose of the law on financial undertakings (that regulates the banking sector), is to ensure that banks’ operations are conducted in a healthy and sustainable way, whilst taking the interests of customers, shareholders, and the rest of society into account.<sup>75</sup>

It is too early to tell whether this attempt imbues the spirit of the law into its interpretation on financial undertakings or whether it can counter the otherwise Romanesque tradition in Iceland, in which the letter of the law rather than the spirit prevails in the interpretation of the law. The legislature’s aim of the amendment was, however, clear. It was to promote the sustainability of the banking sector and encourage responsible credit allocation that takes into consideration environmental factors, other stakeholders, customers, shareholders and society at large.<sup>76</sup> Attributing the good standing of the Icelandic banks post-crisis to this change in the law is, however, problematic. Financial oversight has also been strengthened significantly. The Icelandic State has taken over the shareholdings of two of the three largest banks in the country, and regulatory equity requirements have increased to 20 per cent capital adequacy ratios, from 8 per cent in 2008. Management has also introduced more sustainable business models. These are in line with the shareholder policy of the Icelandic Financial State Holding Company, and in line with a focus on local business.

Nordic Financial Surveillance Authorities have introduced more stringent bank management requirements that are in line with EU regulations such as the Capital Requirement Directive IV. The requirements include stricter eligibility and integrity requirements (‘fit & proper’). These make it easier for the authorities to step in to remove the executive management and boards of irresponsibly operated financial institutions.<sup>77</sup> A self-assessment process has, furthermore, been established for determining the competency of financial institution boards. Variable pay of management and employees whose activities have a significant impact on the undertaking’s risk profile, has also been capped at 50 per cent of total compensation, including pensions.<sup>78</sup>

The rapid expansion in credit to the private sector, which exceeded 300 per cent of GDP in the run up to the Icelandic banking collapse, clearly shows how great the country’s sovereign exposure to universal banking became. Bank credit to the private sector in other Nordic countries relative to GDP

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<sup>74</sup> Icelandic Law on Financial Undertakings no. 161/2002.

<sup>75</sup> Article 1 of the Law on Financial Undertakings no. 161/2002.

<sup>76</sup> E. Harðardóttir, Opposition Member of Parliament and member of the Parliamentary Standing Committee on Business Affairs, 1114<sup>th</sup> Parliamentary Document at the 138th Legislative Assembly, Case no. 343.

<sup>77</sup> Article 351 (1)-(5) of the Danish Financial Business Act no. 174/2017.

<sup>78</sup> Section 16, subsection 1, EO no. 1583 of 13/12/2016, journal no. 1910-0014, Danish Ministry of Industry, Business and Financial Affairs (2017).

was, in 2006, between 73 and 170 per cent. In 2016, however, credit in Iceland had fallen significantly to 86 per cent of GDP. It has, however, risen in Sweden and Norway to 120 and 144 percent respectively. Denmark still had the most indebted private sector of the Nordics at 170 per cent of GDP. Finland maintained its private debt stock at a modest 97 per cent of GDP in the same period.<sup>79</sup>

#### 4. The role of the State as shareholder

Nordic economies, with the exception of Denmark, are typical examples of 'mixed ownership'.<sup>80</sup> Public entities such as states and municipalities play important roles as shareholders in both private and listed companies. Governments and public pension funds have, for some time, been seen as being major socially responsible investors in Europe.<sup>81</sup>

Public pension funds have, in particular, become important institutional shareholders. The largest pension fund in Norway, the Norwegian municipalities' pension fund (Kommunal Landspensjonskasse), which to start with followed the Norwegian Government Pension Fund Global's (GPF) ethical guidelines for an exclusion policy,<sup>82</sup> has turned towards active investments in sustainable infrastructure.<sup>83</sup> The Danish public pension funds and the Finnish pension insurance companies are quasi-public institutional investors, which have been set up as part of industrial sector agreements on pensions and are regulated by acts of parliament.<sup>84</sup> Finnish pension insurance companies have become active investors, increasing their shareholding in Finnish listed companies since 2000.<sup>85</sup> Responsible investment is, furthermore, emphasized at a regulatory level, especially in Denmark and Sweden. The National Swedish Pension Funds (Ap-fonderna) are, for example, required to consider ethical and environmental aspects. This is not, however, permitted to impair long-term returns.<sup>86</sup> On the other hand, the private impact of investors in Sweden is greater than that of public investors.<sup>87</sup>

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<sup>79</sup> World Bank Database, available at: <https://data.worldbank.org/indicator/FS.AST.PRVT.GD.ZS>.

<sup>80</sup> See C.J. Milhaupt and M. Pargendler, 'Governance Challenges of Listed State-Owned Enterprises Around the World: National Experiences and a Framework for Reform' (2017) 50 *Cornell International Law Journal* (forthcoming).

<sup>81</sup> E. Bengtsson, 'Socially Responsible Investing in Scandinavia – a Comparative Analysis' (2009) 16 *Sustainable Development*, 155, 164.

<sup>82</sup> For the Norwegian Fund's exclusion policies and impact investment reluctance, see B. Sjøfjell, H.R. Nilsen and B.J. Richardson, 'Investing in Sustainability or Feeding on Stranded Assets? The Norwegian Government Pension Fund Global' (2017) 52 *Wake Forest Law Review*, 949, 956-7, 975, 976-7.

<sup>83</sup> R. Fixsen, 'Danish, Norwegian pension funds target developing countries' *AMWatch*, 28 August 2017, [www.amwatch.dk/AMNews/Pension/article9814595.ece](http://www.amwatch.dk/AMNews/Pension/article9814595.ece); R. Fixsen, 'Norway: Ahead of its Time' *IPE*, June 2017, [ipe.com/pensions/country-reports/nordic-region/norway-ahead-of-its-time/10019227.article](http://ipe.com/pensions/country-reports/nordic-region/norway-ahead-of-its-time/10019227.article).

<sup>84</sup> Lekvall (ed.), *Nordic Corporate Governance Model*, p. 117.

<sup>85</sup> Lekvall (ed.) *Nordic Corporate Governance Model*, p. 171.

<sup>86</sup> Bengtsson, 'Socially Responsible Investing', 158; Scholtens and Sievänen, 'Drivers', 613.

<sup>87</sup> Bengtsson, 'Socially Responsible Investing', 165.

Secondly, the governments of Denmark and Norway have had a specific 'CSR' agenda. This was reflected, for example, in the 'sustainability reporting' regulation.<sup>88</sup> This is now history in Norway, abolishing from 2018 sustainability reporting requirements for all but the very largest firms.<sup>89</sup> The Nordic states, especially Norway and Sweden, are seen to be the 'current driving force in European SOEs ... guided by principles of profitability and exemplary responsibility', described as the 'Nordic SOE model'.<sup>90</sup> The Finnish State has been a significant shareholder in Finnish non-listed and listed companies since World War II and even prior to this. It has, however, systematically reduced and decentralised its direct and indirect shareholdings in Finnish listed companies from 2007.<sup>91</sup> Nordic indirect state shareholdings, especially those held by the Norwegian GPF, are also of great interest due to it investing globally, as has been analysed elsewhere.<sup>92</sup>

Norway, as a state-controlled market economy,<sup>93</sup> is in a class of its own. It relies heavily on directly controlled SOEs, notably in the energy and oil sector. The Norwegian state corporate involvement as a shareholder is, in general, significantly more prevalent than in any other OECD country and comparable to that of emerging economies.<sup>94</sup> The Norwegian transition to a state-led market economy, however, began after World War II, when the weakness of local capital markets prevented private firms from financing industrial development. The preservation of state share ownership has been explained by Lie using three characteristics of the Norwegian national political, social, and economic context: a high level of trust in the state as a protector of common interests, a persistent lack of robust private investors (unlike Denmark and Sweden), and a strong inclination to avoid a powerful foreign influence in the domestic economy.<sup>95</sup>

A major change took place in the 1990s, when SOEs were converted to listed companies in which the state held majority control.<sup>96</sup> Norwegian company law, the equal treatment of shareholders (minority protection) and the exceptionally large powers of the general meeting even by Nordic standards,<sup>97</sup> give

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<sup>88</sup> S. Vallentin, 'Governmentalities of CSR: Danish Government Policy as a Reflection of Political Difference' (2015) 127 *Journal of Business Ethics*, 33; Ø. Ihlen and H. von Weltzien Hoivik, 'Ye Olde CSR: The Historic Roots of Corporate Social Responsibility in Norway' (2015) 127 *Journal of Business Ethics*, 109.

<sup>89</sup> Law of 15 December 2017 No. 105 amending the Accounting Act.

<sup>90</sup> L.C. Backer, 'The Human Rights Obligations of State-Owned Enterprises: Emerging Conceptual Structures and Principles in National and International Law and Policy' (2017) 50 *Vanderbilt Journal of Transnational Law*, 827, 836, 849.

<sup>91</sup> Lekvall (ed.) *Nordic Corporate Governance Model*, p. 171.

<sup>92</sup> Notably, Sjøfjell et al, 'Investing in Sustainability'.

<sup>93</sup> See section 3.1 above.

<sup>94</sup> T. Dowling, B. Mircheva, S. Nowak and K. Shirono, *Norway: Selected Issues, IMF Country Report No. 14/260* (2014), [imf.org/external/pubs/ft/scr/2014/cr14260.pdf](http://imf.org/external/pubs/ft/scr/2014/cr14260.pdf).

<sup>95</sup> E. Lie, 'Context and Contingency: Explaining State Ownership in Norway' (2016) 17 *Enterprise & Society*, 904, 905.

<sup>96</sup> Lie, 'Context', 918.

<sup>97</sup> See section 2 above.

the state's large shareholdings in listed companies predominant power in the companies it invests in. The government has continuously strived to strengthen the corporate governance of SOEs, as defined by international models. This has been touted as being 'of vital importance to the market's confidence in the companies and therefore to companies' capital costs'.<sup>98</sup> The government had formulated, as early as 2002, ten principles of corporate governance for SOEs to increase predictability in the exercise of state share ownership. Their 2014 amendments were to underscore the role of the boards as well as commitment to 'CSR'. The Government emphasizes that the principles, in essence, correspond with the OECD Guidelines on the Corporate Governance of State-Owned Enterprises.<sup>99</sup> The State also emphasises sustainability and responsibility in the conduct of its businesses.<sup>100</sup>

Also the Swedish state is still a significant company shareholder.<sup>101</sup> The Swedish government has for more than a decade systematically built a sustainability agenda.<sup>102</sup> In 2012 the government set a number of sustainability goals for SOEs.<sup>103</sup> The Swedish state, however, sees its primary responsibility, at a policy level, to be an active and professional shareholder. The Government's current overall objective is that the companies generate long-term value,<sup>104</sup> increase their competitiveness, and develop value and capital efficiency.

The East Scandinavian shareholder primacy drive is, in terms of state shareholdings, even more dominant in *Finland* than in Norway and Sweden. The Finnish state relies on *Solidium Oy* to manage its USD 11 billion of assets. *Solidium Oy* is the holding company for government shares in listed companies of national interest.<sup>105</sup> The main philosophy of Solidium is to grow and secure shareholder value. Other objectives are seen as being secondary. According to Solidium, 'proper management of corporate responsibility is a key requirement for creating successful businesses and long-term financial value'.<sup>106</sup> Sustainability is not expressly recognized by Solidium to any degree.

There is a striking similarity between the profit-seeking policies of Norwegian and Finnish SOEs. The Norwegian government, following the path of other Nordic countries', recently vowed to reduce state

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<sup>98</sup> Norwegian Ministry of Trade, Industry and Fisheries, An active and Long-Term State Ownership, Meld. St. 13 (2006-2007) Report to the Storting (2006-2007 White Paper), p. 22.

<sup>99</sup> 2013-2014 White Paper, p. 65.

<sup>100</sup> See Norwegian Ministry of Trade, Industry and Fisheries, The State Ownership Report (2018).

<sup>101</sup> Government Office of Sweden, State-owned enterprises (2019), [government.se/government-policy/state-owned-enterprises/](https://www.government.se/government-policy/state-owned-enterprises/).

<sup>102</sup> Corporate social responsibility in Sweden (2018), [www.sweden.se/business/csr-in-sweden/](https://www.sweden.se/business/csr-in-sweden/); Backer, 'The Human Rights', 849.

<sup>103</sup> Corporate social responsibility in Sweden.

<sup>104</sup> Government Offices of Sweden, Annual report for state-owned enterprises 2017 (2018), p. 96.

<sup>105</sup> D. Detter and S. Fölster, *The Public Wealth of Nations: How Management of Public Assets Can Boost or Bust Economic Growth* (Basingstoke: Palgrave Macmillan, 2015), p. 42.

<sup>106</sup> <https://www.solidium.fi/en/corporate-responsibility/solidiums-way-of-working/>.

shareholdings in the economy.<sup>107</sup> According to the government, the mixed roles of shareholder, public procurer and regulator weaken the state's legitimacy, and also the profitability and effectiveness of its undertakings. The current government has formulated a clear policy of state share ownership, the primary responsibility of the state for business and industry being 'to facilitate high levels of value creation in the economy through stable, well-designed framework conditions, rather than managing or owning business activities on its own account, in areas where there are political objectives'.<sup>108</sup>

The Nordic states' struggle with their SOEs show that there is no automatic correlation between state shareholdings and sustainability. SOEs are vulnerable to changes in political trends, as shown in particular by Finland and Norway. Profit maximisation is set as a priority goal for public investments, although the Swedish state still emphasises sustainability goals. There is, furthermore, no intrinsic sustainability in this investment model. Investments are sustainable only if the government and its authorities are committed to sustainability. The Icelandic public does not have much confidence or trust in the post-crisis banking sector (only 16% considers it trustworthy), but does consider (61% of the public) the Icelandic state to be a trustworthy and responsible controlling shareholder in two of the three largest re-established banks.<sup>109</sup>

## **5. Conclusion: the way forward**

Nordic black letter corporate law is neutral to corporate purpose and corporate interest. Business-driven legal literature and corporate governance codes are, however, not. The Nordic codes have been prepared by law firms, stock exchanges, the companies themselves, and institutional investors such as pension funds, without stakeholder participation and reference to real sustainability.

The strength of the 'Nordic model' is, however, not found in law or in codes. This is particularly prevalent in East Scandinavia, where radical shareholder primacy dominates, which is in contrast to a typical Nordic form of 'active ownership'<sup>110</sup> by non-institutional direct shareholders such as families and foundations, public pension funds and companies. Yet, this insufficient and a broader participation of active investors is required for sustainability to be achieved. Profit maximisation has, from around 2007, dominated Finnish and Norwegian state share ownership, preventing a bold move to sustainable investments and shareholder activism in the Nordic countries, despite these being more long-term oriented than the Anglo-American world. The shareholder-friendly Nordic company law, strengthens the role of active shareholders, but does not set a direction for their activism.

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<sup>107</sup> 2013-2014 White Paper, p. 10.

<sup>108</sup> 2013-2014 White Paper, p. 41.

<sup>109</sup> Icelandic Finance Ministry, White Paper on the Future of the Icelandic Financial System, 2018, p. 44 & p. 237.

<sup>110</sup> Lekvall (ed.) *The Nordic Corporate Governance Model*.

The answer might be found in the activity of the board. ‘Soft’ shareholder activism, based on a dialogue between investors and the board, gives room for the boards to convince investors of the advantages of being long-term sustainable. Nordic company law provides ample opportunities for boards to promote sustainability independently of, but in a constructive dialogue with, the shareholders. The most important barrier is not in the law but it is shareholder primacy as a social norm,<sup>111</sup> supported by corporate governance codes particularly in Sweden and Finland, blurring what the board’s competence is and what its responsibilities to the company entity really are.<sup>112</sup>

A special concern should be expressed with regards to banks. The recurring banking crises in the Nordic countries show that bankers’ motives for profit maximisation should be particularly constrained, so that it is ensured that banks act as a sustainable factor in the markets. This is, however, a global phenomenon. The tools for banks’ contribution to strong sustainability are found at the operational and institutional level and are based on robust stress-testing, capital requirements and central bank monetary policies.<sup>113</sup>

The crucial issue is how radical shareholder primacy can be combated in a way that gives companies that push to pursue sustainable value a competitive advantage. One possible way forward could be through a corporate law reform.<sup>114</sup> The Nordic countries could, based on the flexibility of their corporate law, the commitment of the Nordic countries’ important private long-term investors and the sustainability concerns of public market actors, be a good place to start this process. If the Nordic region was committed to jointly instigating a sustainable company law reform, then one would hope the EU would follow suit, as it has done with Norway’s lead on setting gender equality as a guideline for corporate boards.<sup>115</sup>

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<sup>111</sup> Sjøfjell, ‘Shareholder Primacy’, 84–84, 92.

<sup>112</sup> See Sjøfjell, ‘Directors’ Duties’, 158.

<sup>113</sup> See J. Cullen and J. Mähönen, ‘Taming Unsustainable Finance: The Perils of Modern Risk Management’, Ch. 8 in this volume.

<sup>114</sup> B. Sjøfjell and J. Mähönen, ‘Upgrading the Nordic Corporate Governance Model for Sustainable Companies’ (2014) 12 *European Company Law*, 58, developed further at the EU level inter alia in Sjøfjell, ‘Corporate Governance’, and in the EU-funded project Sustainable Market Actors for Responsible Trade (SMART), 2016-2020, see [www.smart.uio.no](http://www.smart.uio.no).

<sup>115</sup> See B. Sjøfjell, ‘Gender Diversity in the Board Room & Its Impacts: Is the Example of Norway a Way Forward?’ (2015) 20 (1) *Deakin Law Review*, 25.