Chapter 8
Legal challenges of state ownership

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ABSTRACT  The State is not like any other owner. No other owner both owns firms and legislates. Notwithstanding great improvements in corporate governance and the Norwegian Parliament’s white papers over the years, substantial legal issues still remain unclear. Role overlap, financial liability, exercise of control over firm’s board, management, actions, and structure still remain unresolved.

KEYWORDS:  State ownership | law | corporate governance

*All translations are by the author.

8.1 THE DIFFERENT ROLES OF THE STATE

As a significant shareholder in six of the largest companies on Oslo Stock Exchange, the Norwegian state has the same rights and obligations as other shareholders in similar positions. However, there are several differences between the State and other shareholders in listed companies. The State’s primary responsibilities are policy development, legislation and supervision. However, the State’s extensive financial resources represent considerable market power, and the State as a whole is Norway’s largest supplier and pur purchaser of goods and services. The State thus plays a whole range of different roles in addition to that of owner.

Since the late 1990s in particular, there has been a strong focus on potential challenges linked to unclear delineation of the State’s ownership and other

1. The companies are DNB ASA, Kongsberg Gruppen ASA, Norsk Hydro ASA, Equinor ASA, Telenor ASA, and Yara International ASA.
roles. These challenges have been addressed by means of legal and organisational measures.

A guiding principle has been that performance of the State’s various roles should, wherever possible, be undertaken by bodies with high specialist expertise, and that the role of owner should thus be separated from the official bodies that formulate sectoral policy or are responsible for regulatory supervision of the area. Accordingly, ownership of companies with no sectoral policy responsibility has been gathered under the Ministry of Trade and Industry since the early 2000s. The “Ownership Department” was made a separate entity in 2001. It concentrates exclusively on ownership issues, although a number of other ministries also have some ownership responsibilities. For example, the State’s stake in Equinor ASA is administered by the Ministry of Petroleum and Energy. Even so, the Ownership Department plays a coordinating role. An important consideration underpinning this organisational structure was the desire to separate constitutional responsibility for performance of the ownership role from corresponding responsibility for official and supervisory functions. This approach counters the potential conflicts of interest that may arise from the State’s different roles, and facilitates improvement of the public sector’s expertise in the area of active ownership.

Potential undesirable features of this combination of roles can also be ameliorated through transparent exercise of ownership in accordance with established active ownership principles. One related measure is the government’s classification of state ownership into four categories based on the State’s reasons and objectives for direct state ownership. Category 1 contains companies for which the State has only commercial ownership objectives. With one exception, none of the companies in this category are listed. Category 2 includes companies for which

3. The origins of more recent legal regulation of state ownership can be traced to Official Norwegian Report NOU 1989:5 En bedre organisert stat (“On better organisation of the state”) (“Hermansenutvalget” [the “Hermansen Commission”]). This report was followed by, among others, NOU 1991:8 Om lov om statsforetak [“On the State-Owned Enterprises Act”], NOU 2003:34 Mellom stat og marked [“On independent organisational forms in the state sector”] and NOU 2004:7 Statens forretningsmessige eierskap [“On the state’s commercial ownership activities”].
4. The ministry has been called “Nærings- og fiskeridepartementet” [the “Ministry of Trade, Industry and Fisheries”] since 2013. See further sections 4.1 and 5.2 of St.meld. nr. 22 (2001–2002). Regarding the ministry’s internal organisational structure, see NOU 2004:7, pages 53–54.
7. See Lie, Myklebust and Norvik, Staten som kapitalist [The state as a capitalist] (2014), page 17.
8. Regarding this classification, see Meld. St. 27 (2013–2014), pages 55–56, see also page 2 of the State Ownership Report.
9. The exception is Entra ASA.
the State has commercial ownership objectives and the aim of ensuring that the company’s headquarters and related functions remain in Norway. Category 3 is defined as companies for which there are commercial objectives and other specifically defined aims, but where state ownership is based on societal considerations other than ensuring that the headquarters remain in Norway. A common feature of companies in categories 1, 2 and 3 is that they engage in commercial competition with other businesses. The key objective guiding the State’s commercial ownership of companies in categories 1 to 3 is to achieve the greatest possible return on invested capital over time. The State’s ownership of companies in category 4, on the other hand, is primarily motivated by sectoral policy goals.

Some legal aspects of the State’s active ownership of listed “category 2 companies” are discussed below. Since the State’s interests may not be purely commercial, ownership of these companies may give rise to particularly complicated issues.

8.2 LEGAL CONSEQUENCES OF EXERCISING STATE OWNERSHIP THROUGH PUBLIC LIMITED LIABILITY COMPANIES

The State exercises its ownership of listed companies through companies that are structured as public limited liability companies and are thus subject to the general legislation applicable to entities of this type. Accordingly, the State holds shares in comprehensively regulated entities that can be traded in a thoroughly regulated market.

State ownership of listed public limited liability companies must be exercised within the framework established by applicable legislation. The primary regulatory provisions are found in the Public Limited Liability Companies Act, the Securities Trading Act, the Securities Trading Regulations, the Stock Exchange Act and the Stock Exchange Regulations, as well as the Norwegian Code of Practice for Corporate Governance (NUES). The individuals companies’ articles of

10. According to the State Ownership Report 2016, category 2 comprises the companies listed in footnote 1 above as well as Aerospace Industrial Maintenance Norway AS, Aker Kvaerner Holding AS and Nammo AS. See further https://www.regjeringen.no/contentassets/fdced06c8-da8492a8170a6f1519f5ede/eierberetning_2017_web.pdf for an overview of the current company classification.


association are also relevant. Neither the aforementioned laws nor the regulations contain special provisions for companies in which the State has a stake, or special rules defining how the State should exercise its ownership. The same applies to NUES. The articles of association of the listed category 2 companies contain no special provisions linked to state ownership.

Generally speaking, organising State activities through a company rather than a State administrative body entails pursuing those activities through a separate legal person outside the public administration. The company’s equity is not included in treasury funds, and the company’s transactions are not subject to the budgetary authority of the Storting (the Norwegian parliament) pursuant to Article 75(d) of the Constitution. Such companies are not subject to the traditional authority to issue instructions that otherwise applies in the public administration, and the companies’ status as independent legal persons or enterprises, etc. means that, in principle, they fall outside the scope of the Public Administration Act and Freedom of Information Act. Workers are employed by the individual companies, not the State.

In a public limited liability company, shareholders exercise their authority as owners through the general meeting. The general meeting is the company’s supreme authority, and may decide all matters not excluded from the general meeting’s jurisdiction by law or the articles of association. In addition, some tasks are expressly assigned to the general meeting, such as the appointment of a board majority, or corporate assembly majority if the company has such a body. Other important decisions to be made by the general meeting concern dividends, executive remuneration principles, amendment of the articles of association, changes in capital structure and mergers, demergers and liquidation of the company. Formally, the shareholders have considerable powers, although these have to be exercised in accordance with the procedural rules applicable to the general meeting, including rules on summoning and conducting general meetings. It is through the general meeting that the shareholders constitute the company’s supreme authority.

15. Public Limited Liability Companies Act, section 6-3.
16. Public Limited Liability Companies Act, section 8-1, section 6-16a, see also section 5-6 (3), section 5-18, section 10-1, section 12-1, section 13-3, section 14-6 and section 16-1.
The majority requirements applicable to general meeting resolutions vary according to matter type. In most cases, the general meeting makes decisions by ordinary majority vote.17 In the case of elections and appointments, however, the requirement is for the majority of votes cast. Most resolutions regarding amendment of the articles of association, mergers, demergers or liquidation require a two-thirds majority of votes cast and the represented share capital in order to pass.18 In a small number of cases, a 90 percent majority is required, while shareholder unanimity is required in exceptional cases.19

The State holds a sufficiently large stake in the listed category 2 companies that it always has at least negative control, i.e. power to block amendment of the articles of association, mergers, demergers and liquidation, as well as other resolutions requiring a majority of two-thirds or more.20 In two companies, the State’s influence is even greater thanks to its ownership of more than half the shares.21 In one instance, the State is in an even stronger position, as it owns more than two-thirds of the shares.22

Despite its dominant position, the State may not exercise its ownership of listed public limited liability companies without taking into account minority interests that are protected by law. The purpose of the minority-protection provisions of the Public Limited Liability Companies Act is to give minority shareholders the opportunity to safeguard their interests, and to protect minority rights against potential infringement by the majority. The primary provision on minority protection is section 5-21 of the Public Limited Liability Companies Act, which prohibits the general meeting from making any decision “that is likely to give certain shareholders or others an unreasonable advantage at the expense of other shareholders or the company”. One reason why this may be relevant to the State is that state ownership may be motivated by non-commercial objectives.23 The State may thus have different aims from other company shareholders, and may wish to exert its influence contrary to the interests of those shareholders. Such situations

17. Public Limited Liability Companies Act, section 5-17.
18. Public Limited Liability Companies Act, section 5-18, see also sections 13-3(2), 14-6(1) and 16-1(1).
20. According to the State Ownership Report 2016, the relevant ownership interests were DNB ASA (34%), Norsk Hydro ASA (34.26%) and Yara International ASA (36.21%).
21. According to the State Ownership Report 2016, the relevant ownership interests were Kongsberg Gruppen ASA (50.001%) and Telenor ASA (53.97%).
22. According to the State Ownership Report 2016, the ownership interest in Statoil ASA [now Equinor ASA] totalled 67%.
typically arise when the State uses its power as owner to turn the company into an instrument for pursuing political aims at the expense of the company’s profit objective.\textsuperscript{24}

Although the State, through the general meeting, in formal terms may play an active role in the governance of a company, the statutory company structure must still be respected. The State may not exercise its ownership powers in a way that effectively neutralises the board of directors.\textsuperscript{25} The Ministry of Trade and Industry has adopted instructions on the management of state ownership interests in limited liability companies which emphasise that the ministry shall not involve itself in decisions falling under the authority of the board and general manager, unless a matter must be considered by the general meeting as a matter of principle. Generally, the ministry’s involvement is likely to be restricted to overall strategic governance issues, rather than detailed management of the company’s affairs.

8.3 GENERAL COMMENTS ON THE STATE’S PRINCIPLES OF CORPORATE GOVERNANCE

The State launched 10 principles for good governance in 2002 (The State’s principles of corporate governance).\textsuperscript{26} The original principles were subsequently revised in the Solberg Government’s white paper Meld. St. 27 (2013–2014)—the “White Paper on Ownership”. The principles specify how the State will act in its capacity as owner, and the State’s expectations of companies.\textsuperscript{27} According to the White Paper on Ownership, the principles have “created foreseeability regarding

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\item It has been claimed that this issue arose when A-pressen, in which Telenor and the Norwegian Confederation of Trade Unions (LO) each held a 48% stake, sold TV2 to the Danish company Egmont contrary to the Minister of Trade and Industry’s wishes. The following is stated on page 119 of Lie, Myklebust and Norvik, \textit{Staten som kapitalist} [The state as a capitalist] in this regard: “In this case, the question of principle was again that an attempt was made to exercise the state’s influence indirectly, through pressure on the board of directors. It appears clear that, in reality, an attempt was made to use Telenor as a cultural policy instrument, to keep TV2 in the country. This was hardly in the interests of the minority shareholders.”
\item See Aarbakke et al., \textit{Aksjeloven og allmennaksjeloven} [“The Limited Liability Companies Act and the Public Limited Liability Companies Act”] (4th edition, Oslo 2017), page 448, see also page 329.
\item See St.meld. nr. 22 (2001–2002) on smaller and better state ownership, sections 5.4 and 5.5. See further the \textit{OECD Guidelines on Corporate Governance of State-Owned Enterprises} (2015).
\item See Meld. St. 27 (2013–2014), page 66, see further St.meld. nr. 22 (2001–2002), section 5.4. See also NOU 2004:7, page 51, which states that, “The principles may be regarded as strategies or instruments for achieving the objectives for the administration” of companies in which the state has an ownership interest.
\end{enumerate}
the State’s active ownership which has been positively received by stakeholders in the Norwegian capital market”.28

The current ownership principles for good governance cover various matters: equal treatment of shareholders; transparency about both the State’s active ownership and company activities; that owner decisions and resolutions must be adopted at general meetings; that the board is responsible for the development of clear objectives and company strategies while the State has expectations as to company performance; capital structure; board composition; the board’s overall responsibility for company management; the board’s plan for its own work; skills development and evaluation; pay and incentive schemes; and that companies must make targeted efforts to meet their social responsibilities.29

The legal consequences of The State’s principles of corporate governance are not always entirely clear. The principles are directed partly at the State in its capacity as owner and partly at the affected companies.

The principle prescribing equal treatment of shareholders is problematic from a purely legal perspective. It is true that both the Public Limited Liability Companies Act and the Securities Trading Act are based on an equality principle, which appears to enjoy widespread support.30 However, given that the principle requiring equal treatment of shareholders has been made the first ownership principle, it can be questioned whether the State has thereby introduced particular restrictions on its exercise of ownership powers. A phrase in the first White Paper on Ownership may indicate this: “…The State shall also consider the interests of other shareholders where the State may adopt binding resolutions at a general meeting by virtue of its dominant ownership position…”31 The question is whether minority shareholders may expect even greater respect for the equal treatment principle than in other limited liability companies and public limited liability companies, with the consequence that the State’s ownership responsibility may be triggered more easily; see further section 8.4.

To the extent that The State’s principles of corporate governance are addressed to relevant companies, they have certain similarities with legally binding instructions to company boards. However, the companies have not adopted The State’s principles of corporate governance at a general meeting, and it is therefore difficult to see that board members can be held responsible for non-compliance. How-

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30. Public Limited Liability Companies Act, section 5-21; Securities Trading Act, section 5-14.
31. St.meld. nr. 22 (2001–2002), section 5.5.1. However, the phrase is not found in Meld. St. 27 (2013–2014), see particularly page 67.
ever, it does not appear entirely impossible that The State’s principles of corporate governance must nevertheless be regarded as a type of instruction to company boards, not least because the State emphasises that companies are expected to comply with them. This raises the question of whether breach of the principles could give rise to liability in damages on the part of the State.

8.4 POTENTIAL LIABILITY IN DAMAGES

The potential liability of the State vis-à-vis company creditors and the company itself is an issue that has played a surprisingly modest role in discussions of the organisation of state ownership. However, the White Paper on Ownership issued by the second Stoltenberg Government—*An Active and Long-Term State Ownership*—provides an example of a focus on liability in damages, in its discussion of liability in connection with instructions from an owner to the board of directors. The white paper states that if a shareholder goes “too far in controlling the company in commercial matters, this may result in creditors filing claims against the State by invoking law of tort or of corporate law concerning piercing of the corporate veil”.

This statement must be considered in conjunction with the fact that the statutory company structure must be respected; see section 8.2.

Gudmund Knudsen and Sven Ole Fagernæs’s 2017 report on ministerial administration of state ownership expands on this view, emphasising for example that both instructions and reversal of board decisions may in principle trigger liability on the part of a shareholder:

> “If the minister instructs the board through the general meeting or reverses a board resolution, the State assumes responsibility for the decision which, depending on the circumstances, may cause the State to incur liability in damages vis-à-vis the company or others who suffer a loss as a result of the instruction… If the ministry goes too far in controlling the company in commercial matters, this may result in creditors filing claims against the State by invoking law of tort or of corporate law concerning piercing of the corporate veil… State liability pursuant to the provision [in section 17-1(1) of the Limited Liability Companies Act] may be based on the fact that the State has issued instructions at a general meeting that are contrary to law or the company’s articles of

33. Gudmund Knudsen and Sven Ole Fagernæs, *Statsrådens forvaltning av statens eierskap i selskaper som staten eier alene eller er deleier i*, Forholdet til Stortinget og selskapets ledelse [“Ministerial administration of state ownership of companies in which the state is the sole or a co-owner. Relationship with the Storting and company management”] (2017), pages 38–39.
association, for example due to infringing the equality principle or the interests of the community of shareholders … but the board implements these nonetheless.”

In principle, informal governance signals outside the general meeting may also give rise to liability on the part of a shareholder. In such cases, the legal basis is so-called contributory liability. According to the preparatory works to the act, liability-inducing contribution will typically be deemed to exist “if a shareholder or other person has directly and specifically influenced the particular tortious act of the general manager or relevant person in a position of trust. Relevant influence may include incitement—typically an instruction—which the general manager or person in a position of trust has followed or at least given material weight in his or her deliberations. Relevant contribution may also constitute other specific assistance in undertaking the tortious act”. Contributory liability may arise, for example, when a minister makes statements that must in reality be regarded as instructions or incitement. It is an open question whether the combination of specific acts in connection with the appointment of board members (see section 8.5), ownership dialogue (see section 8.6), thorough knowledge of the company’s circumstances and specialist expertise in the area may render the State particularly vulnerable in terms of incurring contributory liability.

A further question is whether The State’s principles of corporate governance may provide grounds for liability in damages on the part of the State based on the expectations they have created (“justified expectations”). For example, may the State incur liability in damages vis-à-vis shareholders if it exercises its ownership contrary to the principle that shareholders should be treated equally? The answer is uncertain.

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34. Gudmund Knudsen and Sven Ole Fagernæs, Statsrådens forvaltning av statens eierskap i selskaper som staten eier alene eller er delt i [Ministerial administration of state ownership of companies in which the state is the sole or a co-owner], page 48.
35. Public Limited Liability Companies Act, section 17-1(2).
37. See Aarbakke et al., Aksjeloven og allmennaksjeloven [“The Limited Liability Companies Act and the Public Limited Liability Companies Act’], page 1281, see also 952, stating that both orders and incitement may trigger liability under section 17-1(2) of the Public Limited Liability Companies Act.
38. Regarding liability based on legitimate expectations, see for example Thorson, Erstatningsrettslig vern for rene formuestap [“Protection of purely economic losses under the law of torts”] (Oslo 2011), particularly page 91 onwards, and Wilhelmsen and Hagland, Om erstatningsrett [“About the law of torts”] (Oslo 2017), pages 125–128.
8.5 STATE GOVERNANCE THROUGH THE APPOINTMENT OF BOARD MEMBERS

The State does not have its “own” board members in the listed public limited liability companies in which it has a stake, and no special rules apply to board members elected at the suggestion or request of the State. The board members of such companies must be appointed in compliance with the same formal framework as applies to board elections in other public limited liability companies.39

State governance of listed public limited liability companies in which the State has an ownership interest has traditionally been effected through the appointment of board members.40 Over the years, the boards of state-owned companies have been impacted by different roles and role patterns.41 Emphasis is regularly given to the need for specialist expertise on company boards. Particularly in listed public limited liability companies, where the State must exercise its ownership powers with the interests of other shareholders in mind, there are limits on how much account may be taken of non-commercial considerations.42 Somewhat varying emphasis has been given to the need for qualifications other than specialist expertise and the ability and willingness to comply with political signals that may challenge purely commercial considerations.43 The State’s principles of corporate governance paragraph 6 states: “Board composition shall be characterised by expertise, capacity and diversity in view of the distinctive characteristics of each individual company.”44

39. See chapter 6 of the Public Limited Liability Companies Act. Like other listed public limited liability companies, companies in which the state owns a stake must additionally comply with the Norwegian Code of Practice for Corporate Governance (NUES) or explain any non-conformances.
40. See Gronlie in Grøndahl and Gronlie (eds.), Fristillingens grenser [“The limits of deregulation”] (Bergen 1995), page 105 onwards, see also Gronlie, page 118, who writes that, “The state enterprise system was to be “governed without governance”.
41. See Gronlie in Grøndahl and Gronlie (eds.): Fristillingens grenser [“The limits of deregulation”] (Bergen 1995), pages 108–120.
42. See St.meld. nr. 61 (1996–97) Om eierskap i næringslivet [on ownership in the business sector], section 1.2.4: “Our state investments, which are and will remain considerable, must be administered professionally and through elected boards so that no doubt may arise that Norway treats its own and foreign enterprises equally and in accordance with international provisions.”
43. St.meld. nr. 13 (2006–2007), page 20, went relatively far in this direction, stating, “Through its representatives on nomination committees, the state will ensure that boards represent a range of expertise and possess sufficient capacity to perform their roles, including that the boards of larger companies include representatives with social understanding and insight.” Further, page 47 states that, “The boards shall also lead the companies’ strategic efforts. A sound understanding of the company’s roles in society and the importance of each individual company for overall industrial development is therefore important”.
44. Meld. St. 27 (2013–2014); see the State’s ownership principles, paragraph 6.
The appointment of members of parliament and public officials as board members of state-owned companies and other companies in which the State has an ownership interest was long a controversial issue.\textsuperscript{45} According to the current guidelines in the Personnel Handbook for State Employees, public officials may not be appointed or nominated if they are employed by a ministry or other central administrative body that regularly deals with matters of material significance to the company, business or industry in question.\textsuperscript{46}

The King in Council may make exceptions to the guidelines, but this does not happen in practice.\textsuperscript{47} Current practice is that ministers and state secretaries are not elected to the boards or corporate assemblies of companies in which the State is the sole or a co-owner, and that they resign from such positions when they are appointed as a minister or state secretary.

Moreover, since the parliamentary resolution adopted in connection with consideration of Recommendation to the Storting No. 277 (1976–77), members of parliament may not be appointed as members of boards and councils that are subject to the supervisory authority of the Storting.\textsuperscript{48} The primary reason for this decision was a fear of mixed roles and protection of the office of board member.\textsuperscript{49}

The White Paper on Ownership and the State Ownership Report state that one of the State’s most important tasks in its capacity as owner is to help ensure that boards of directors are well-composed and skilled.\textsuperscript{50} According to the State Ownership Report, work on board appointments is “a structured process that is ongoing

\textsuperscript{45} The legal basis for the current rules and practice related to public officials is found in the Storting’s consideration of St.meld. nr. 9 (1969–70), see Gudmund Knudsen and Sven Ole Fagernes, Statsrådets forvaltning av statens eierskap i selskaper som staten eier alene eller er deleier i ["Ministerial administration of state ownership of companies in which the state is the sole or a co-owner"], page 41. The guidelines were primarily a response to fears of mixed roles and partiality. St.meld. nr. 9 (1969–70) was followed up by means of Innst.S. nr. 91 (1969–70) on the appointment of public officials to boards and councils, etc. At present, guidelines on the appointment of public officials to boards are found in the Personnel Handbook for State Employees. See also the former guidelines in St.meld. nr. 40 (1963–64), page 6.


\textsuperscript{47} See Gudmund Knudsen and Sven Ole Fagernes, Statsrådets forvaltning av statens eierskap i selskaper som staten eier alene eller er deleier i [Ministerial administration of state ownership of companies in which the state is the sole or a co-owner], page 41.

\textsuperscript{48} Innst.S. nr. 277 (1976–77), Recommendation of the Standing Committee on Foreign Policy and Constitutional Affairs regarding the Storting’s control of the public administration, page 15 onwards, see also the parliamentary debates at St.forh. 1976–77 Tid.S., page 4074.

\textsuperscript{49} See Andenæs, Stortingets kontroll med regjering og forvaltning: Stortingets eget syn ["Parliamentary control of the government and public administration: the Storting’s own view"], Jussens Venner volume 1/2 1978, page 1 onwards, particularly pages 15–16.

\textsuperscript{50} Meld. St. 27 (2013–2014), page 70; State Ownership Report 2016, pages 26 and 28.
throughout the year.\textsuperscript{51} In this context, the State evaluates, in its capacity as owner, factors such as board composition, form of working, expertise, efforts, performance, and contribution to value creation. The State also assesses each company’s activities and opportunities, the challenges it faces and what expertise the board therefore requires.

The State primarily makes its contribution to the composition of the boards of listed category 2 companies through a nomination committee appointed by the general meeting of each company.\textsuperscript{52} One of the nomination committee members is normally an employee of the ministry that administers the State’s ownership interest in the company.

Formally, the purpose of the nomination committee is to assist the general meeting and/or corporate assembly. In practice, it plays an important role in evaluation of the board’s composition and work by reference to the company’s needs, and in making proposals to the general meeting, or in relevant cases the corporate assembly, in connection with election/re-election of board members and board remuneration. The comments on the Norwegian Code of Practice for Corporate Governance (NUES), paragraph 7 state, among other things, that the nomination committee should “consult relevant shareholders to secure candidate nominations and support for the recommendation”.\textsuperscript{53} It is also common practice for the nomination committee to engage in dialogue with the board or board chair regarding the committee’s proposed board candidates.

The members of the nomination committee are representatives of the company. This also applies to members of the nomination committee employed by the relevant ministry. In purely formal terms, therefore, the ministry may not instruct nomination committee members with regard to proposed board candidates, or on other issues related to the performance of their function. In practice, however, members of nomination committees who are employed by ministries charged with administering state ownership have contact with and inform the ministries of committee proposals and ensure that proposals have the support of

\textsuperscript{52} The Public Limited Liability Companies Act contains no rules on nomination committees, but such rules do exist for financial undertakings whose “total capital under management has exceeded NOK 20 billion for a period of more than 12 months” and which are not subsidiaries in a financial group; see the Financial Institutions Act, section 8-4, see also the Financial Institutions Regulations (FOR-2016-12-09-1502), section 8-5. The Norwegian Code of Practice for Corporate Governance (NUES) (2014), paragraph 7 recommends that a company should have a nomination committee. The procedures of nomination committees are dealt with to some degree in the comments on NUES, see NUES pages 25–26.
\textsuperscript{53} The Norwegian Code of Practice for Corporate Governance (NUES), page 26.
The Office of the Auditor General of Norway has pointed out that ministry representatives on nomination committees have in some cases followed instructions issued by political leaders despite personally holding the opinion that the action was inadvisable in view of the company’s best interests. In this connection, the Office of the Auditor General has questioned whether the ministry has given adequate consideration to the principle of equal treatment of shareholders.

In 2013, the majority of the Parliament’s Standing Committee on Scrutiny and Constitutional Affairs strongly criticised the Minister of Trade and Industry for failing to respect the formal rules in two cases concerning the appointment of board members of listed public limited liability companies involving state ownership. First, the Minister of Trade and Industry was criticised for proposing two new board members for Telenor ASA after the nomination committee had held 23 meetings and settled on seven skilled candidates. Second, the Minister of Trade and Industry was criticised for proposing one new board member (later redesignated as a deputy board member) for Kongsberg Gruppen ASA on the same day as the nomination committee’s proposal deadline expired and in a situation where none of the board members was up for re-election. However, the minority of the standing committee found that “not even one breach of The State’s principles of corporate governance has emerged. The only negative comment that remains is that on two occasions the Ministry of Trade and Industry gave input on candidates somewhat late, but these members find that this also does not constitute a breach of the guidelines”.

Formally, nomination committee proposals related to general meeting/corporate assembly board elections are not binding, and the State’s representative at the general meeting is therefore free to vote for board members other than those proposed by the nomination committee, and to vote against the nomination committee’s board remuneration proposal. The same applies to the other shareholders. In practice, however, nomination committee proposals are usually followed.

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8.6 STATE GOVERNANCE THROUGH “OWNERSHIP DIALOGUE”

Section 5-1(1) of the Public Limited Liability Companies Act reads:

“The shareholders exercise supreme authority within the company through the general meeting.” Neither the State nor other shareholders have any authority over the company other than through the general meeting mechanism. The principle that shareholder decisions and resolutions must be adopted by the general meeting is emphasised in The State’s principles of corporate governance paragraph 3.

Neither the Public Limited Liability Companies Act nor the Norwegian Code of Practice for Corporate Governance (NUES) are considered to prohibit contact between shareholders and a company outside the general meeting context.

The White Paper on Ownership discusses how the State, in its capacity as owner, structures its contact with companies.58 It is stated that a company and its shareholders may exchange information through a variety of channels. In addition to information provided in quarterly and annual reports, other publicly available information and general meetings, regular contact meetings are held with company executives. This is termed the “ownership dialogue”, and is regarded as a key aspect of most ministries’ company follow-up.59

The ownership dialogue allows the State, in its capacity as owner, to gather information about a given company.60 This is considered to be a key aspect of normal performance of an owner’s monitoring and control function. In some more significant matters, such as mergers and demergers, it may additionally be necessary for the owner and company to liaise prior to the related general meeting resolution. The White Paper on Ownership also assumes that the Limited Liability Companies Act and The State’s principles of corporate governance do not prohibit the State from raising, in meetings with companies, “matters the companies should consider in connection with their operations and development”.61 Such instances probably come sufficiently close to attempted exertion of control outside the general meeting context that there may be some risk of a misstep. However, in the White Paper on Ownership, the above statement is followed by the

58. Meld. St. 27 (2013–2014), pages 85–86. See also Riksrevisjonens kontroll med forvaltningen av statlige selskaper for 2012 [the Office of the Auditor General of Norway’s control report on the administration of state companies in 2012], Dokument 3:2 (2013–2014), page 33, in which the Office of the Auditor General of Norway stated that it had discovered approximately 160 meetings and approximately 160 logged telephone conversations between the Ministry of Trade and Industry and the six companies (Cermaq, DNB, Hydro, Kongsberg Gruppen, Telenor and Yara) for which the ministry was responsible in the period 2010–2012.
60. St.meld. nr. 22 (2001–2002), section 5.5.3; Meld. St. 27 (2013–2014), page 68.
clarification that, “Any view communicated by the State in such a meeting must be regarded as input to the company’s administration and board. Matters that require shareholder support must be dealt with at a general meeting.” It can be difficult to distinguish between acceptable shareholder contact and governance outside the general meeting context. In a 2015 survey examining shareholder follow-up of social responsibility in companies in which the State has an ownership interest, the Office of the Auditor General of Norway found that ministries “make varying use of the ownership dialogue to challenge companies”. The Office of the Auditor General recommended that ministries should “evaluate how they can use the social responsibility-related ownership dialogue to make an even greater contribution to companies’ efforts to prevent undesirable incidents”. If the State makes statements during such meetings that must be interpreted as governance signals that are difficult for the companies to ignore, there may be grounds for questioning whether the State, in its capacity as owner, can be held liable in damages if the company causes loss to another party through its acts or omissions (see section 8.4).

8.7 CONCLUSION

State ownership of listed public limited liability companies has been a success in many respects. One important reason for this is the gradual development of the legal framework for the exercise of state ownership. There remains, however, several unresolved legal issues, some of which have been discussed in this article. Undoubtedly, more legal research of state ownership of listed public limited liability companies is required.

65. See generally Lie, Myklebust and Norvik, Staten som kapitalist [The state as a capitalist] (2014).