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To whom Polish directors owe their duties – between shareholder primacy and political agenda

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Key words:

Directors' duties; corporate objective; shareholder primacy; stakeholder value; company law in Eastern Europe; state-owned enterprises; sustainability; ESG; CSR; concentrated share ownership.

Abstract

Poland is traditionally portrayed as a shareholder primacy jurisdiction – the legislation is silent on this, but it is confirmed by the Polish legal academia and the case law. Interestingly, the focus on shareholder value in Poland is not "transplanted" from the common law jurisdictions, but it is rather derived from the liberal model of the economic transformation that started in 1989 and crucially, the traditionally concentrated share ownership structure. Furthermore, in Poland, just like in the other former Eastern Bloc countries, companies that are fully or partially state-owned are still influential. The interest of such companies is in practice defined in a specific way, as apart from the projects that pay off economically, they have often engaged in ventures that bring rather political than economic gains.

The aim of this article is to scrutinise the extent to which the perception of Poland as a shareholder primacy jurisdiction still stands; especially, in the context of recent sustainability-focused initiatives at the national and European level. This piece also suggests reform proposals as to how the current law on the corporate objective could be improved. This study concentrates on the public companies with shares listed on the Warsaw Stock Exchange, including the state-owned enterprises.

This article is based on our understanding of law and regulation as at 8 June 2022.

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Different jurisdictions view the corporation in distinctive ways. Two concepts of the corporate objective currently predominate.[1] The first treats the corporation as an economic entity whose purpose is to maximise shareholder value and the second perceives it as a social institution having the aim of furthering the interests of the corporation itself within the wider society in which it operates. These are referred to as the shareholder and the stakeholder value approaches, respectively. The former is traditionally identified with Anglo-American jurisdictions and these countries are often caricatured as shareholder primacy systems. On the other hand, one of the most notable representatives of the stakeholder value approach is Germany.[2]

Despite the various links with German law,[3] Poland – which began its transformation towards a market economy in 1989,[4] in 2018 its economy was the eighth largest in the European Union (and the largest among the former Eastern Bloc members of the EU)[5] – is traditionally perceived as a shareholder primacy jurisdiction. The aim of this article is, first, to scrutinise the extent to which this perception is accurate under the Polish law (especially, in the context of recent sustainability-focused initiatives at the national and European level) and secondly, to investigate whether non-financial factors play any role in corporate decision-making processes in Poland. Finally, reform proposals are suggested as to how the current law on the corporate objective could be improved. This study concentrates on the public companies with shares listed on the Warsaw Stock Exchange ("WSE")[6] – including the state-owned enterprises ("SOEs").

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[1] On the discussion about the two dominant theories see e.g. Sarah Kiarie, *At Crossroads: Shareholder Value, Stakeholder Value and Enlightened Shareholder Value: Which Road Should the United Kingdom Take?* 17(11) International Company and Commercial Law Review 329, 329-333 (2006); Andrew Keay, *The Corporate Objective* chapters 2-3 (Edward Elgar Publishing Limited 2011). There are also other concepts, e.g. Keay's entity maximisation and sustainability model. Ibid chapter 4.

[2] John Plender, *Giving People a Stake in the Future* 31 Long Range Planning 211 (1998); see also: Peer Fiss and Edward Zajac, *The Diffusion of Ideas over Contested Terrain: The (Non)adoption of a Shareholder Value Orientation among German Firms* 49 Administrative Science Quarterly 501, 503-506 (2004).

[3] Poland is a civil law, blockholder (i.e. where ownership exceeds 5%) jurisdiction as well, with a two-tier board structure. On the historical affinity of Polish company law with German law see Adam Opalski in Andrea Vicari and Alexander Schall (eds), *Company Laws of the EU: A Handbok* 661-664, nr. 1-6 (München; C H Beck, 2020). However, unlike many other systems with a two-tier board structure, the Polish system generally, with only some exceptions described in Section II below, does not provide for obligatory employees' participation in the supervisory board. Krzysztof Oplustil, in Andrea Vicari and Alexander Schall (eds), *Company Laws of the EU* 707-708, nr 87 (2020).

[4] After fifty years of being forced into the Eastern Bloc of centrally planned economies. For a more general background on Polish company law see Arkadiusz Radwan and Tomasz Regucki, *The Possibilities for and Barriers to Sustainable Companies in Polish Company Law* (2012) 10ff, available at <https://ssrn.com/abstract=2159217> accessed 25 March 2022.

[5] See International Monetary Fund, *Report for Selected Countries and Subjects* (2017) available at <www.imf.org> accessed 4 April 2022.

[6] Warsaw Stock Exchange (in Polish Giełda Papierów Wartościowych ("GPW")) was established in 1991 and is the largest stock exchange in the Central & Eastern Europe. See <https://www.gpw.pl/en-home> accessed 8 April 2022. The Polish capital market has been developing very successfully and Poland was recognised by FTSE Russell as an emerging market in 2004, and in 2018, as the first and, so far, only country from Central & Eastern Europe, to be upgraded into the group of 25 most developed markets in the world. Warsaw Stock Exchange, *ESG Reporting Guidelines Guide for Issuers* (2021) 3 <https://www.gpw.pl/pub/GPW/ESG/ESG_Reporting_Guidelines.pdf> accessed 29 March 2022.

This article is structured as follows. Section I provides a theoretical background on the shareholder primacy and stakeholder theory as the leading corporate objectives. Section II explains why Poland is commonly identified as a shareholder primacy jurisdiction. Section III scrutinises the recent trends in Poland where companies are going beyond shareholder primacy. Section IV suggests reform proposals as to how the concept of corporate objective could be improved. Finally, in Section V the conclusions are presented.

I. Shareholder primacy vs. stakeholder theory

This section offers a synopsis of the shareholder primacy and stakeholder theory – two leading approaches to the corporate objective – in order to investigate in the subsequent sections how Poland is placed within this discussion and whether there is any room for adjustment.

To start with, one of the main justifications for the shareholder value approach is the theory that maximising value for shareholders is the right social goal for corporations, because it is equivalent to maximising the overall wealth created by the corporation.[7] According to the nexus of contract theory of the firm, the corporation is perceived as an efficient means of contracting relationships and which is also characterised by the existence of divisible residual claims on the assets and cash flows of the organisation which can generally be sold without permission of the other contracting individuals.[8] Consequently, fiduciary duties should flow only to shareholders as residual claimants because the residual claimants have the greatest incentive to maximize the value of a corporation, and therefore place the highest value on the legal protection afforded by fiduciary duties.[9] Shareholders bear the risk of the success or failure of the company and hence they are entitled to control and run the company for their own benefit.[10] Friedman claims that the company's directors are merely the shareholders' agents, so their sole purpose should be to maximise the shareholders' wealth.[11]

[7] See a summary of this concept in: Margaret Blair, *In the Best Interest of the Corporation: Directors' Duties in the Wake of the Global Financial Crisis* in: Thomas Clarke, Douglas Branson (eds), *The SAGE Handbook of Corporate Governance* 63ff and the literature cited there (SAGE Publications Ltd, 2012). The idea that maximising share value is equivalent to maximising the total social value created by a firm has been criticised here by Blair.

[8] Michael Jensen and William Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure* 4 Journal of Financial Economics 305, 311 (1976).

[9] Jonathan Macey and Geoffrey Miller, *Corporate Stakeholders: A Contractual Perspective* 43 University of Toronto Law Journal 401, 402, 403 (1993).

[10] Friedrich Kübler, *Rules of Capital under Pressure of the Securities Markets* in Klaus Hopt and Eddy Wymeersch (eds.) *Capital Markets and Company Law* 103 (Oxford, New Yor; Oxford University Press, 2003).

[11] Milton Friedman, *A Friedman Doctrine: The Social Responsibility of Business is to Increase its Profits* (New York Times Magazine 13 September 1970) <https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html> accessed 8 April 2022. The famous quote from this article is: "there is one and only one social responsibility of business – to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception fraud."

Despite the strengths of shareholder value maximisation, their undesirable consequences must also be emphasised: increased financial leverage in order to increase stock market value, alignment of management incentives with shareholder interests and an emphasis on short-term profits over the long-term performance of the company.[12] Clearly, Grant is correct in saying that these problems are not associated with shareholder value itself, but rather with its interpretation and application.[13]

Stakeholder theory, on the other hand, dictates that the interests of all the various stakeholders in a firm, including the shareholders, should be considered during the decision-making process.[14] The definition of the "stakeholder" is not entirely clear. According to Jensen: stakeholders include all individuals or groups who can substantially affect, or be affected by, the welfare of the firm – a category that includes not only the financial claimholders, but also employees, customers, communities, and government officials.[15] Freeman, one of the most active supporters of the stakeholder theory famously stated that a stakeholder should be understood as any group or individual who can affect or is affected by the achievement of an organization's purpose.[16] The term "stakeholder" underlines at the same time sustainability and inclusion.[17] Contrary to value maximisation, which has its roots in economics, the stakeholder theory is derived from sociology, organisational behaviour, the politics of special interests and, as Jensen argues, managerial self-interest.[18] Fisher believes that stakeholder value may directly enhance long-term success by encouraging social responsibility.[19]

Overall, the main criticism of the stakeholder theory is that it is not possible to define whose interests should be taken into consideration – it is too broad to be of much use. Hence, it is feared that directors use the stakeholder theory as an excuse for bad management. To illustrate that point, Easterbrook and Fischel famously stated that a manager told to serve two masters (a little for the equity holders, a little for the community) has been freed of both and is answerable to neither. Faced

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[12] Robert Grant, *Rescuing Shareholder Value Maximization* (Via Sarfatti 25 01/04/2009) <http://www.viasarfatti25.unibocconi.eu/notizia.php?idArt=2131> accessed 10 February 2022.What is more, Esser and du Plessis present further arguments against the shareholder value primacy. It is noted, for instance, that the classification of shareholders as "owners" of the company is flawed. Hence, it cannot be argued that the company should be run in the best interest of the shareholders, as the company's owners. See: Irene-marie Esser and Jean du Plessis, *The Stakeholder Debate and Directors' Fiduciary Duties* 19 South Africa Mercantile Law Journal 346, 358-359 (2007).
[13] Grant, supra n 12.
[14] Michael Jensen*, Value Maximization, Stakeholder Theory and the Corporate Objective Function* 22(1) Journal of Applied Corporate Finance 32 (2010).
[15] Ibid.
[16] R Edward Freeman, *Strategic Management: A Stakeholder Approach* 53 (London, New Yor; Pittman Books Limited, 1984).
[17] Kiarie, supra n 1.
[18] Jensen, supra n 14.
[19] Deryn Fisher, *The Enlightened Shareholder - Leaving Stakeholders in the Dark: Will Section 172 (1) of the Companies Act 2006 Make Directors Consider the Impact of their Decisions on Third Parties* International Company and Commercial Law Rreview 10, 14 (2009).

with a demand from either group, the manager can appeal to the interests of the other.[20] In contrast, the shareholder theory has an advantage in that it is clear whose interests have priority.[21] It is argued in the academic literature that the interests of other stakeholders are not neglected in shareholder-orientated jurisdictions; they are protected by other areas of law, for instance environmental, labour and tax law.[22] Fisch also argues that there is little research that demonstrates any correlation between the consideration of non-shareholders' interests and corporate performance. Importantly, she also notes that there is scant evidence that corporate decisions favouring the interests of workers, customers, or the community increase the size of the pie.[23]

Despite the gravity of the shareholder primacy theory, a shift away from it is currently the focus of a fundamental and heated debate. For instance, corporate governance in the Anglo-American jurisdictions has been widely criticised for narrowing down the purpose of the corporation to the maximisation of shareholder value and ignoring the interests of stakeholders other than shareholders, despite the critical importance of stakeholders to a corporation's long-term success.[24] A number of extraordinary pronouncements recently signalled that corporate governance had reached an inflection point. They all announced that they did not support shareholder primacy and advocate sustainable long-term investment and considering environmental, social and governance ("ESG") matters. To start with, the British Academy 'Principles for Purposeful Business'[25] project – led by Mayer – posits the purpose at the heart of the corporation and require directors to state their purposes and demonstrate commitment to them. This new corporate purpose should be the reason for a corporation's existence and its starting point and profit should then be a product of a corporation's purpose, but not the purpose of the corporation.[26]

[20] Frank Easterbrook and Daniel Fischel, *The Economic Structure of Corporate Law* (Harvard; Harvard University Press, 1996) 38.
[21] Christoph Teichmann, *ECLR Corporate Governance in Europa* Zeitschrift für Unternehmens- und Gesellschaftsrecht 645, 648 (2001).
[22] Klaus Hopt, *Comparative Corporate Governance: The State of the Art and International Regulation* in: Andreas Fleckner and Klaus Hopt (eds), *Comparative Corporate Governance: A Functional and International Analysis* 41 (Cambridge; Cambridge University Press, 2013).
[23] Jill Fisch, *Measuring Efficiency in Corporate Law: The Role of Shareholder Primacy* 31 Journal of Corporation Law 637, 645 and the literature cited there (2006).
[24] See e.g. Beate Sjåfjell, *When the Solution Becomes the Problem: The Triple Failure of Corporate Governance Codes* (2016) 1 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2828579> accessed 22 March 2022 and Purpose of the Corporation Project, *Corporate Governance for a Changing World: Final Report of a Global Roundtable Series* 16 (2016) <http://www.purposeofcorporation.org/corporate-governance-for-a-changing-world_report.pdf> accessed 3 April 2022. Further, Rock argues convincingly that the discussions over corporate purpose have an impact not only on the legal, but also finance, management and political debates. Edward Rock, *For Whom is the Corporation Managed in 2020?: The Debate over Corporate Purpose* (2020) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3589951> accessed 3 April 2022.
[25] British Academy, *Principles for Purposeful Business: How to Deliver the Framework for the Future of the Corporation. An Agenda for Business in the 2020s and Beyond* (2019) <https://www.thebritishacademy.ac.uk/sites/default/files/future-of-the-corporation-principles-purposeful-business.pdf> accessed 1 April 2022.
[26] Ibid, 8 and 10.

In the US, the Business Roundtable issued its 'Statement on the Purpose of a Corporation' in 2019, signed by 181 CEOs signatories sends a clear message that leaders of global companies think that putting shareholders' interests first and bending to the short-term pressures of capital markets is not a viable business strategy.[27] However, for instance, Enriques points out that the statement contains nothing new of substance: it either repeats concepts that the Business Roundtable itself had already espoused or reticulated – in the form of commitments – principles long considered to be requirements for any firm to survive.[28] Also, Bebchuk and Tallarita argue that stakeholderism would not benefit stakeholders and should be rejected (including by those who care deeply about the welfare of stakeholders)[29] and they criticise the Business Roundtable statement for being largely a rhetorical public relations move rather than the harbinger of meaningful change.[30]

Further, a group of academics pointed out in the 'Corporate Governance for Sustainability Statement' to the fact that shareholder primacy is at odds with corporate law.[31] Similar thinking is guiding the EC's 'Sustainable Corporate Governance' initiative which aims at enabling "companies to focus on long-term sustainable value creation rather than short-term benefits" and "better aligning the interests of companies, their shareholders, managers, stakeholders and society."[32] Finally, in January 2020 Fink, CEO of BlackRock, the largest U.S. institutional investor with assets under management of some nine trillion dollars, in his annual letter to corporate CEOs called upon corporations to provide "a clearer picture of how [they] are managing sustainability-related questions" and to explain how they serve their "full set of stakeholders."[33] In the same vein, Fink's 2022 letter argues that "a

[27] Business Roundtable, *Statement on the Purpose of a Corporation* (2019) <https://opportunity.businessroundtable.org/wp-content/uploads/2019/09/BRT-Statement-on-the-Purpose-of-a-Corporation-with-Signatures-1.pdf> accessed 1 April 2022.

[28] See Luca Enriques, *The Business Roundtable CEOs' Statement: Same Old, Same Old* (2019) <https://www.law.ox.ac.uk/business-law-blog/blog/2019/09/business-roundtable-ceos-statement-same-old-same-old> accessed 3 April 2022.

[29] The authors empirically document that corporate leaders have strong incentives to enhance shareholder value, but little incentive to treat stakeholder interests as an independent end. Lucian Bebchuk and Roberto Tallarita, *The Illusory Promise of Stakeholder Governance* (2020), <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3544978> accessed 8 April 2022. For a critique of this assessment see Colin Mayer, *Shareholderism Versus Stakeholderism – a Misconceived Contradiction. A Comment on "The Illusory Promise of Stakeholder Governance" by Lucian Bebchuk and Roberto Tallarita* European Corporate Governance Institute – Law Working Paper No. 522/2020 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3617847> accessed 8 April 2022. In another empirical paper, Bebchuk et al. study how corporate leaders used the power awarded to them by constituency statutes by more than thirty states in the past two decades and found that corporate leaders have used their bargaining power to obtain gains for shareholders, executives, and directors and they made very little use of their power to negotiate for stakeholder protections. Lucian Bebchuk et al., *For Whom Corporate Leaders Bargain* (2020) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3677155> accessed 8 April 2022.

[30] Bebchuk and Roberto Tallarita, supra n 29, 3-4.

[31] Andrew Johnston et al, *Corporate Governance for Sustainability Statement* 1 (2020) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3502101> accessed 1 April 2022.

[32] See: <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance_en> accessed 5 April 2022.

[33] Larry Fink, *A Fundamental Reshaping of Finance* (January 2020) <https://www.blackrock.com/us/individual/larry-fink-ceo-letter> accessed 1 April 2022.

company must create value for and be valued by its full range of stakeholders in order to deliver long-term value for its shareholders" and advocates an idea of "stakeholder capitalism" – i.e. a capitalism "driven by mutually beneficial relationships between you and the employees, customers, suppliers, and communities your company relies on to prosper."[34]

To sum up the current debates, it is far from clear whether the shareholder or stakeholder theory in a pure form is the optimal corporate objective. However, the widespread loss of trust in a short-term shareholder value and calls for a move to a more stakeholder-oriented model are undeniable. In the current world the interests of other stakeholders cannot be ignored anymore, due to the critical importance of stakeholders to a corporation's long-term success and a growing scholarship that a corporation should have a broader purpose than simply maximising shareholder value. In light of this brief discussion on the shareholder primacy v. stakeholder value theory, the approach to the corporate objective adopted in Poland will now be outlined.

II. Shareholder primacy in Poland: law and academic opinion

The aim of this section is to introduce Polish corporate governance system (with a focus on share ownership structure and directors' duties in public companies, including the role of employees on the supervisory board) in order to explain why Poland is traditionally perceived as a shareholder primacy jurisdiction. The analysis will concentrate on the non-state controlled public companies; however, the position in SOEs will be presented as well.

Shareholder primacy in non-state-controlled enterprises

Poland is traditionally portrayed as a shareholder primacy jurisdiction – the legislation is silent on this, but it is confirmed by the academic opinion and case law. Interestingly, the focus on shareholder value in Poland is not "transplanted" from the common law jurisdictions, but it is rather derived from the liberal model of the economic transformation that started in 1989 and crucially, the traditionally concentrated share ownership structure.

To start with, some introduction on the nature of share ownership of public corporations is required. Publicly traded corporations traditionally have either concentrated or dispersed patterns of share ownership.[35] The common law jurisdictions of the UK and the US are characterised as predominantly dispersed shareholding jurisdictions, which are sometimes also referred to as "outsider" or "arm's length systems."[36] On the other hand, Germany – one of the leading continental European civil law jurisdictions – is described as concentrated (blockholding) shareholding or

[34] *Larry Fink's 2022 Letter to CEOs: The Power of Capitalism* (January 2022) <https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter> accessed 5 April 2022.

[35] Rafael La Porta et al., *Corporate Ownership around the World* 54(2) Journal of Finance 471, 471-472 (1999).

[36] Brian Cheffins, *Putting Britain on the Roe Map: The Emergence of the Berle – Means Corporation in the United Kingdom*, in Joseph McCahery et al., *Corporate Governance Regimes, Convergence and Diversity,* 148-149, 151 (Oxford; Oxford University Press, 2002).

"insider" system, with a lesser role for the stock market in funding companies.[37] In Poland listed companies have concentrated ownership structure as well (although some features differentiate it from the German bank and stakeholder-oriented system) and almost all of the listed companies have a controlling shareholder:[38] foreign enterprises, financial investors (frequently investment and pension funds) and private companies. Also, the Polish state remains a significant shareholder in a number of companies, particularly those regarded as crucial for national security or economy (energy business, mining industry, some banks and insurance companies).[39] There are a number of problems stemming from the concentrated ownership structure in Poland. For instance, a primary line of agent-principal conflict lies between controlling blockholders and minority shareholders. Therefore, since the shareholders as a class tend to be a heterogeneous group, the biggest practical challenge is to curb dominant shareholder temptation to engage in rent-seeking behaviour and ensure that the interests of minority shareholders are taken into consideration as well. Moreover, shareholder activism is rare, and apathy rather than activism characterises shareholders' attitude.[40]

As mentioned above, Poland adopted a two-tier board structure and the management board is liable for managing company's affairs and representing the company vis-à-vis third parties whereas the supervisory board has a controlling function. Although rarely enforced, in Poland a duty of loyalty and a duty of care and diligence can be distinguished. Based on art. 483 Commercial Companies Code ("CCC"), members of the management board of the public limited company are obliged to act with the highest level of diligence required of a professional. Duty of loyalty is not clearly specified in CCC now. Nevertheless, such duty can be implied from the following provisions: art. 377 (conflict of interest), art. 379§ 1 (company shall be represented by the supervisory board or an attorney, in the case of a contract between the management board and the company or on a dispute) and art. 380 CCC (member of management board competing with the company). One should mention, though, that on 13 October 2022 the extensive amendments to the CCC will enter into force, and the duty of loyalty

[37] Mark Roe, *Some Differences in the Corporation Structure in Germany, Japan, and the United States* 102 Yale Law Journal 1927, 1936 (1993). A recent study that scrutinised corporate control tracing controlling shareholders for thousands of listed companies over 2004 to 2012 shows that Germany has still a concentrated shareholding structure – out of 722 companies under review, there was 28.5% of widely held blockholder companies and the percentage of voting rights held by largest shareholder in all companies under review was 45.3% and by the three largest shareholders – 56.8%. By comparison, in the UK (1347 companies under review) the percentage of voting rights held by largest shareholder was 19.5% and by the three largest shareholders – 31.9%. See Gur Aminadav, Elias Papaiouannou *Corporate Control around the World* 75(3) Journal of Finance 1191 (2020).

[38] See Aminadav, Papaiouannou supra n 37. The study revealed that in Poland out of 713 companies under review there was 34.9% of widely held blockholder companies and the percentage of voting rights held by largest shareholder was 44.7% and by the three largest shareholders – 62.8%.

[39] Opalski in Vicari and Schall (eds), supra n 3, 670, nr. 25. Usually, unless special corporate hurdles exist, blockholders owing approx. 40 % of the total number of votes at the company's general meeting are able to retain full operational and structural control (including the capability to amend the articles of association where ¾ of votes present at the general meeting are required) because of dispersed ownership of the remaining shareholders and apathy of small owners.

[40] Radwan and Regucki, supra n 4, 21 and 24.

will be specified *expressis verbis* in the CCC. New art. 377[1] §1 CCC will directly stipulate that a member of the management board should perform his or her duties with due diligence resulting from the professional nature of his or her activity and be loyal to the company. This provision will be correlated with the content of art. 483 CCC, establishing the liability of members of the management board, supervisory board and liquidators who will be covered by the newly added business judgment rule.[41]

The Polish system generally does not provide for obligatory employees' participation in the supervisory board; however, some exceptions (discussed later in this Section) apply to SOEs (and companies with the shareholding of local government units). These exceptions were created as a result of the so-called "commercialisation"[42] and they also apply to companies created as a result of the cross-border mergers.[43]

Moving now to the liability of directors, under art. 483 sub-sections 1 and 2 of the CCC, the directors are liable to a company, which confirms that a director owes his or her duties to the company. However, the question arises as to how the management board should perform their duties and how the concept of "interests of the company" should be understood. In Poland, even though the company's interest is a statutory term used as a general clause across CCC[44] and to act in the interests of the company is seen as a core duty of the boards of directors,[45] there is no legal definition of this notion.

[41] These changes will be introduced to the CCC under the Act of 9 February 2022 amending the CCC and certain other acts (Journal of Laws of 2022, item 807), referred to as the largest amendment to the CCC in recent years. In passing it should be noted that, among other things, this Act will significantly change the rules of corporate governance (by strengthening the position of the supervisory board) and will introduce new holding regulations. According to them companies will be able to decide on the so-called participation in a group of companies. This will enable a parent company and its subsidiaries to be guided, in addition to the company's interest, by the interest of the group of companies, if it does not harm creditors or minority shareholders of the subsidiary. Also, the parent company will be able to give binding instructions to its subsidiaries, without being liable for damages caused by the execution of such instructions. These changes were hotly discussed because the purpose of their introduction was seen by many not in improving the functioning of the groups of companies, but rather in making it easier for the government to use groups of state-owned companies to achieve their political goals.

[42] I.e. a process of transformation of the state enterprises in Poland.

[43] See art. 38-42 of the Act of 25 April 2008 on Employees' Participation in Company Created as a Result of Cross Border Mergers of Companies (OJ 2019.2384).

[44] See for instance: arts. 209, 377, 249, 422 and 433 CCC. For a more in-depth analysis see Jędrzej Jerzmanowski, *Finansowanie przez Spółkę Akcyjną Nabycia lub Objęcia Emitowanych przez nią Akcji w Procesie Wykupu Menedżerskiego* 182, footnote 70 (Warsaw; C.H. Beck, 2016); Adam Opalski, *Prawo zgrupowań spółek* 151 (Warsaw; C.H. Beck, 2012).

[45] Krzysztof Oplustil and Arkadiusz Radwan, 'Company law in Poland: Between Autonomous Development and Legal Transplants', in Christa Jessel-Holst et al.(eds.), *Private Law in Eastern Europe: Autonomous Developments or Legal Transplants?* 482-4 (Tübingen; Mohr Siebeck, 2011).

The interest of the company is explicitly mentioned in the 2021 Code of Good Practice for the Stock Exchange Listed Companies.[46] Unfortunately, the content of this term is not explained. Provision II of the 2021 Code only states that:

> Members of the management board are acting in the interest of the company and are responsible for its activity. The management board is responsible among others for the company's leadership, engagement in setting and implementing its strategic objectives, and ensuring the company's efficiency and safety.
> Supervisory Board members act in the interest of the company and follow their independent opinions and judgement. (...) The supervisory board in particular issues opinions on the company's strategy, verifies the work of the management board in pursuit of defined strategic objectives, and monitors the company's performance.

This notion is clarified by the scholars and discussed to some extent by the courts though. The starting point for the discussion of the "interest of the company" in Polish legal literature involves the interpretation of its nature as either a secondary (derivative of the interests of persons concerned, i.e. shareholders or stakeholders) or a distinct and autonomous concept. The proponents of the fully autonomous perception of company interest argue that the company has an interest of its own, independent from any shareholders' interest, allegedly resulting primarily from the company's separate legal personality.[47] The dominant view in Poland is that this approach should be rejected straightaway – if a company had indeed its own interest completely independent from its shareholders, it could not be wounded up (even against the intent of the shareholders), no profits could ever be distributed etc.[48] The artificiality of the concept of corporate interest as completely separate from shareholders' interest is particularly evident in sole-shareholder companies, whose purpose and interests are determined by the sole shareholder, and in subsidiaries in a larger corporate groups, whose purpose and interest are set by the parent company.[49]

Company's interest is always derivative of the interests of other persons. The truly contentious issue among Polish legal scholars, though, is whether it should be limited to shareholders' interests or rather inclusive of stakeholders' interest (and if so, to what extent). The most far-reaching proponent of the stakeholder value approach is Stanisław Sołtysiński, for whom shareholders and

[46] The history of the Corporate Governance Codes ("Codes of Good Practices") in Poland began in 2002 and the current Code is from 2021. The Code is a soft law instrument – it operates on a "comply or explain" basis (i.e. a company is required either to comply with the provisions of the Code or explain why they fail to do so, see §28-29 WSE Listing Rules and §70(6)(5) of the Regulation of the Minister of Finance of 29 March 2018 on current and periodical reports disclosed by the issuers of securities and conditions for recognising the equivalence of disclosures required by non-member states).

[47] Andrzej Szumański, *Spór wokół roli interesu grupy spółek i jego relacji w szczególności do interesu własnego spółki uczestniczącej w grupie*, Przegląd Prawa Handlowego, No. 5, 12 (2010); and Przemysław Bryłowski, Andrzej Kidyba, *Kategoria interesu w kodeksie spółek handlowych*, Przegląd Prawa Handlowego, No. 10, 8–9 (2010).

[48] Opalski, supra n 44, 153; Adam Opalski, *O pojęciu interesu spółki kapitałowej*, Przegląd Prawa Handlowego, No. 11, 17 (2008); Dominika Opalska, *Obowiązek lojalności w spółkach kapitałowych* 79 (Warsaw; C.H. Beck, 2015); Anne-Marie Weber-Elżanowska, *Wpływ instytucji prawnych rynku kapitałowego na efektywność spółek Skarbu Państwa* 132 (Warsaw; C. H. Beck, 2017).

[49] Paweł Błaszczyk, *Ochrona wspólnika mniejszościowego spółki zależnej* 313 (Warsaw; C.H. Beck, 2013).

stakeholders have nearly equal bearing in defining the interest of the company. Sołtysiński does acknowledge the prevailing importance of shareholders in defining the interest of the company, yet his fundamental thesis is that the company's interest is the product of interests of both shareholders and stakeholders, rather than solely the former.[50]

The prevailing view is, though, that the interest of the company is defined by the interests of shareholders themselves.[51] This viewpoint was raised as early as the first Code of Good Practice was developed in 2002 by the Polish Corporate Governance Forum. Section I of the Code provided that:

> the basic objective of company's operations should be to act in the joint interests of all shareholders construed as the value creation for the shareholders.

An analogous view can be also found in the case law, where the shareholder value approach prevails. The Supreme Court judgement of 5 November 2009[52] plays a special role in this context, as the Court clearly rooted company's interest in the interests of its shareholders, rather than stakeholders.[53] When defining company's interest on the basis of the interests of its shareholders, one needs to weigh them appropriately. As declared by the Supreme Court in the above-mentioned judgement issued in case I CSK 158/09, the interest of the company is a "resultant" ("derivative") of the interests of all groups of shareholders. This means that members of the management board cannot give priority to the interest of a certain group of shareholders (in particular, majority shareholders), at the expense of legitimate interests of other shareholders (minority shareholders).[54]

Irrespectively of the foregoing, in practice, due to the widespread existing ownership structure dominated by concentrated shareholding, majority shareholders are obviously the key actors in setting the company's interests to be later pursued by the directors. Members of the management board are *de facto* strongly dependent on the majority shareholder (usually another legal entity, mostly controlling company or a "head" of a corporate group). Ultimately the directors' role tends to be reduced to the implementation of the group's strategy defined at the parent company level. Although art. 375(1) CCC provides that the general meeting and supervisory board cannot bind the management board with any instructions on how to run the company, in practice this prohibition is watered down by relevant provisions in the articles of association, in particular by extending the list of board's

[50] Stanislaw Sołtysiński, in Stanisław Sołtysiński, *System Prawa Prywatnego. Prawo Spółek kapitałowych* 17-A, 35 (Warsaw; C.H. Beck, 2010); see also Kamil Szmid, *Natura spółki akcyjnej jako delimitacja zasady swobody umów w prawie polskim i amerykańskim* 19 (Warsaw; C.H. Beck, 2015).

[51] See Błaszczyk, supra n 49, 315, footnote 1; Opalski, supra n 48, 18; Krzysztof Oplustil, *Instrumenty nadzoru korporacyjnego (corporate governance) w spółce akcyjnej* 175 (Warsaw; C.H. Beck, 2010); Opalski, supra n 44, 167; Opalska, supra n 48, 74, 80, 93, 95; Weber-Elżanowska, supra n 48, 133, 135-136.

[52] *I CSK 158/09, OSNC 4 (2010), item 63.*

[53] Cf also the Constitutional Court judgement of 21 June 2005 *P 25/02, OTK-A 2005, no 6 item 65* and the following Supreme Court judgements: of 15 March 2002, *II CKN 677/00, unpublished*; of 13 May 2004, *V CK 452/03, OSNC 5 (2005), item 89*; and SCJ Resolution of 22nd October 2009, *III CZP 63/09, OSNC 4 (2010), item 55*. See also Opalski, supra n 44, 161-163 and 174 and Oplustil, supra n 51, 179, footnote 1.

[54] In the same vein see: Opalski, supra n 48, 17-18; Oplustil, supra n 51, 178-179; Opalski, supra n 44, 180-183; Błaszczyk, supra n 49, 329; Opalska, supra n 48, 80, 91; Weber-Elżanowska, supra n 48, 133-134; Oplustil, in Vicari and Schall (eds), supra n 3, 710, nr 94.

management activities defined by the Code as requiring approval (art. 393 CCC). This is how, in practice, we end up with a situation where the entities that appoint members of corporate authorities *de facto* determine the interests that the company will pursue. The factual dependence of the management board is fostered also by the liberal rules on directors' removal (art. 370 (1) CCC).[55]

However, even though the shareholder value approach predominates in Poland and the majority shareholder is believed to play a crucial role in defining the interest of the company, the need to take account of stakeholders' interests is not being completely left out. To the contrary, increasingly it is acknowledged that the management board should consider the interests of other stakeholder groups (e.g. creditors, employees, suppliers, customers), apart from shareholders, as these are crucial for the long-term success of the company and shareholders themselves.[56] According to the prevalent approach, the interests of other stakeholders should be allowed only in as much as they align with shareholders' interests, and thus not as an independent factor, but only to the extent this is beneficial for shareholders.[57] In fact, this approach is very similar to the enlightened shareholder value ("ESV") approach adopted in the UK in s. 172 Companies Act ("CA") 2006. According to this provision, a director in promoting the success of the company for the benefit of its members as a whole – whose interests are paramount – is also encouraged to consider the interests of other stakeholders (such as employees, customers, suppliers, the impact of the company's operations on the community and the environment). It is crucial to note that under s. 172 the non-shareholder interests do not have an independent value in the directors' decision-making and it seems wrong in principle to regard this section as requiring the directors to "balance" the interests of the members with those of the stakeholders.[58]

State-owned enterprises: shareholder primacy redefined by political aims

[55] Opalski, supra n 48, 18, Opalski; supra n 44, 168; Oplustil, in Vicari and Schall (eds), supra n 3, 710-711, nr 96-97.

[56] In this context, it should be noted that in Poland directors have a broad discretion under a *de facto* business judgment rule (see e.g. the judgment of Supreme Court of 26 January 2000, *I PKN 482/99*) to consider stakeholder interests, making challenge to decision-making unusual, provided that directors observe proper standards of care and loyalty towards the company. See Oplustil and Radwan, supra n 45, 482–4.

[57] Opalski, supra n 48, 18-19; Oplustil, supra n 51, 175-178; Opalski, supra n 44, 165-174; Błaszczyk, supra n 49, 318-330; Opalska, supra n 48, 93-96; Weber-Elżanowska, supra n 48, 135-138; Oplustil, in Vicari and Schall (eds), supra n 3, 710, nr 94.

[58] Paul Davies et al., *Gower's Principles of Modern Company Law* para. 10-027 (London; Sweet and Maxwell, 2021). The main criticism of the ESV approach is that it cannot be distinguished from shareholder primacy and the approach adopted in s. 172 CA 2006 is simply another version of the shareholder primacy. Elaine Lynch, *Section 172: A Ground-breaking Reform of Director's Duties, or the Emperor's New Clothes?* 33(7) Company Lawyer 196, 201-203 (2012). Furthermore, opponents of the current regulation argue that the fundamental problem with the practical effectiveness of s. 172 CA 2006 would seem to be that its terms are not enforceable by non-shareholding stakeholders. Andrew Keay, *Moving Towards Stakeholderism? Enlightened Shareholder Value, Constituency Statutes and More: Much Ado About Little?* 22 (1) European Business Law Review 1, 33-36 (2011); Fraser Dobbie, *Codification of Directors' Duties: An Act to Follow?* 11 Trinity College Law Review 1, 18-19 (2008).

Having scrutinised the position in the non-state controlled public companies, in this sub-section attention will be paid to companies that are fully or partially state-owned. In Poland, just like in the other former Eastern Bloc countries, they form a fairly numerous group.[59] They are highly relevant to the discussion on company's interest in Poland as in many cases their capital position is very strong and they have major impact on their respective sectors of the economy. They are often referred to as national champions and as such cannot be disregarded in a debate on company's interest.

Nevertheless, the interest of such companies is in practice defined in a specific way, as apart from the projects that pay off economically, they have often engaged in ventures that bring rather political than economic gains.[60] Pursuing political agenda by SOEs is usually wrapped up by public officials in a narrative about serving broader societal goals by those companies. As those political goals are often highly controversial and they usually do not serve well the economic interests of those companies, this situation is not beneficial for a valuable shareholder/stakeholder debate in corporate law.

First, it creates an impression that the only approach compatible with a free-market economy is a strict shareholder value approach. Hence many scholars opposing the strong political entanglement of SOEs adhere to the shareholder value approach.[61] Secondly, some other scholars engage in creating rather sophisticated but totally unconvincing arguments claiming that political engagement of SEOs is in fact fully compatible with shareholder value approach. It is claimed for example that the interest of companies with a large State Treasury[62] shareholding is largely derivative from the public interest. If the State Treasury holds a dominant position in a company, then obviously the interest of that company will mostly derive from the interest of that shareholder or the public interest.[63] This approach may easily lead to the conflict of two interests: the interest of minority shareholders in the company co-owned by the State Treasury and the interest of the state itself.[64] A classic case of such conflict is a situation where a representative of the State Treasury insists that the

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[59] As of 30 September 2021, the Polish Treasury had interest in four hundred seven companies <https://dane.gov.pl/pl/dataset/1198/resource/34885/table> accessed 13 February 2022.

[60] Anne-Marie Weber, *Interes spółki Skarbu Państwa – Między Interesem Publicznym a Interesem Prywatnym* in: Andrzej Kidyba (ed.), *Spółki z Udziałem Skarbu Państwa a Skarb Państwa* 184 (Warsaw; Wolters Kluwer, 2015).

[61] See for example: Opalski, supra n 44, 169-170.

[62] The notion of State Treasury is closely tied to the functioning of the state outside of the *imperium* sphere, and in the so-called *dominium* sphere. According to the Constitution, and Article 1 in particular, "the Republic of Poland is the common good of all citizens," and thus the State Treasury must always act (also through its companies) in public interest. See Weber-Elżanowska, supra n 48, 140.

[63] Weber-Elżanowska, supra n 48, 152-153.

[64] See e.g. Aleksander Kappes, Wiktor Matysiak, *Interes Państwa a Interes Spółki Skarbu Państwa* in: Andrzej Kidyba (ed.), *Spółki z Udziałem SkarbuPaństwa a SkarbPaństwa* 61-62 (Warsaw; Wolters Kluwer, 2015), though one should note that the authors are in favour of defining company interest as completely independent from shareholders' interest (see p. 65). See also Filip Grzegorczyk, *Przedsiębiorstwo Publiczne Kontrolowane przez Państwo* 416-418 (Warsaw; LexisNexis, 2012). The interest of a company and public interests are presented in clear opposition to each other also by Iwona Gębusia, *Interes Spółki w Prawie Polskim i Europejskim* 361-365 (Warsaw; C. H. Beck, 2017).

company provides surety for a specific obligation, without any obvious interest for the company in doing so, or provides a service to the dominant shareholder below the profitability threshold.[65]

As a result of such situation the opinion of the Polish scholars remains mostly on the sidelines of the European shareholder/stakeholder debate as it is mostly concerned with balancing the interest of the state and minority shareholders in SOEs. Given that this problem mostly concerns the biggest Polish companies (national champions) which make part of the WIG20 index[66] on the Warsaw Stock Exchange, this undoubtedly sets the standard for the entire Polish capital market and influences the perception of the company's interests in the private sector as well. Overall, this hardly makes the debate on the interest of the company any easier.

Before wrapping up the discussion on the corporate objective in SOEs, the role of the workforce in such companies must be clarified. As mentioned above, in general in Poland there is no obligatory employee participation in the supervisory board of SOEs. However, such participation is guaranteed to employees of SOEs created as a result of the so-called commercialisation – understood as the transformation of a former state-owned enterprise into a company. The Act of 30 August 1996 on Commercialisation and Certain Rights of Employees,[67] in its art. 11 provides that a supervisory board is an obligatory body in a company resulting from commercialisation. As long as the State remains the sole shareholder of such company, members of the supervisory board are appointed and dismissed by the general meeting, however, two-fifths should be elected by employees. From the moment when the State ceases to be the sole shareholder, the provisions of the company's statute regarding the appointment and dismissal of members of the supervisory board may be amended. Nevertheless, employees retain the right to elect a specific number of their representatives to the supervisory board, as indicated in art. 14 of the Act (depending on the total number of members of the supervisory board and the subject of activity of the transformed state enterprise).

To sum up, the idea of employee participation in the supervisory boards of SOEs created as a result of commercialisation is a continuation of the employee self-government in state-owned enterprises since 1981. Its aim was to protect the collective interests of employees, in the absence of other mechanisms.[68] This involvement was also supposed to ensure a positive attitude of the workforce and trade unions towards the commercialisation of state-owned enterprises. Although in most cases a lot of time has passed since commercialisation of these enterprises, the idea of employee participation in SOEs – as historically rooted – survived,[69] albeit has a little practical impact and it is rarely discussed in the literature.

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[65] Kappes and Matysiak, supra n 64, 68.
[66] A capitalisation-weighted index of twenty largest companies listed on the WSE.
[67] OJ 2022.318.
[68] Justyna Dąbrowska, *Spółki Skarbu Państwa* in: Andrzej Kidyba (ed.), *Szczególne formy spółek* 422 (Warsaw; Wolters Kluwer, 2017).
[69] Similar regulations apply to municipal companies (see art. 18 of the Act of 20 December 1996 on Municipal Economy, OJ 2021.679).

Having scrutinised the reasoning behind Poland being portrayed as a shareholder primacy jurisdiction, we now move on to analyse the recent sustainability-related developments (which are providing tangible evidence that the approach to the corporate objective is changing slowly).

III. Beyond shareholder primacy

Despite the focus of the law and the Polish legal academia on the interests of shareholders and in addition the political agenda in SOEs, there are also signs that companies are trying to go beyond the shareholder primacy and to keep up with the international developments regarding sustainability, ESG matters and corporate social responsibility ("CSR").[70] Poland is at the beginning of its path towards sustainability though. For instance, the attitude towards CSR in Poland is seen as ambiguous by some scholars and in practice, this concept is still understood by many as sponsorship and philanthropy.[71]

As the main barriers to CSR development, the lack of qualified staff, inability to see the direct effects for business, poor incentives from the state administration, insufficient time, and limited financial resources are listed.[72] Further, the government – although apparently in favour of CSR – argues that strong regulations regarding the CSR disclosure can cause excessive administrative burdens in the area of reporting.[73] Also, Polish economy relies heavily on coal, which results in high carbon dioxide emissions.[74]

On the other hand, sustainability is becoming an important topic of the academic studies and companies achieve a certain amount of progress in this context. The following developments are of importance in Poland: sustainability-related indices, non-financial disclosure obligations and the ESG reporting requirements[75] and they will be discussed in turn.

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[70] In this article these terms are interpreted as follows. Sustainability – a current key topic in corporate and financial law – is a broad term, but one of its key overarching themes is a focus on how corporate governance and financial regulation might contribute to resolving or mitigating externalities. Sustainability is the overarching concept, with CSR and ESG as sub-sets. CSR is more focused on ethical dimension of corporate behaviour and operational decision-making within a company, whilst ESG factors are associated with portfolio investment and are focused on financial risk and return. See Iain MacNeil and Irene-marie Esser, *From a Financial to an Entity Model of ESG* 23(1) European Business Organization Law Review 9 (2022).

[71] Joanna Dyczkowska et al., *CSR in Poland: Institutional Context, Legal Framework and Voluntary Initiatives* 15(2) Journal of Accounting and Management Information Systems 206 (2016).

[72] Madalina Dumitru et al., *Corporate Reporting Practices in Poland and Romania—An Ex-ante Study to the New Non-Financial Reporting European Directive* 14(3) Accounting in Europe 279 (2017).

[73] Małgorzta Szewc and Agnieszka Abec, *CSR Stanie się Obowiązkowym Elementem Sprawozdawczości Spółek* in Raport Odpowiedzialny Biznes w Polsce Dobre Praktyki (2014) <http://odpowiedzialnybiznes.pl/wp-content/uploads/2015/04/Raport-Odpowiedzialny-biznes-w-Polsce-2014.-Dobre-praktyki_Forum_Odpowiedzialnego_Biznesu.pdf> accessed 29 March 2022 and Justyna Dyduch and Joanna Krasodomska, *Determinants of Corporate Social Responsibility Disclosure: An Empirical Study of Polish Listed Companies* 9(11) Sustainability 1934 (2017).

[74] Dyduch and Krasodomska, supra, n 73. For the carbon dioxide emissions data in Poland (2000-2020) see <https://www.statista.com/statistics/449809/co2-emissions-poland/> accessed 28 April 2022.

[75] Another initiative that should be mentioned, at least in passing, is the Responsible Business Forum – the largest NGO in Poland addressing the concept of CSR and operating since 2000. The Forum is an expert organisation that initiates and partners in key activities for the Polish CSR. The 'Responsible Business in Poland. Good Practices' report – running since 2002 – is a cyclical publication prepared by the Forum. It is a

The sustainability indices

To start with, the sustainability indices[76] exist in Poland since 2009 when the WSE created its first index called RESPECT – also the first sustainability index in Central and Eastern Europe – which was in operation until the end of 2019.[77] This non-mandatory index had an educational role and its purpose was to identify companies which pursue policies of responsibility and sustainability and are attractive to investors i.e. produce transparent information and good investor relations.[78] The name of the RESPECT index – an income-based index considering incomes from dividends and pre-emptive rights – derived from the values which determine ESG maturity level. The said values covered: (R)esponsibility, (E)cology, (S)ustainability, (P)articipation, (E)nvironment, (C)ommunity and (T)ransparency where the first letters constructed the name of the index.[79] In 2019, the Warsaw Stock Exchange started publishing a new WIG-ESG index and its ultimate aim is to draw the attention of companies and potential investors to ESG criteria in the investment decision-making process. This index includes stocks participating in WIG20 and mWIG40.[80] Their weights will depend on the number and value of free-float shares, and these will be adjusted for ESG ratings and an assessment of compliance with the principles laid down in the Code of Good Practice.[81]

The indices that refer to the ESG factors, ethical investment and sustainable development receive a mixed treatment in the academic literature though. On the one hand, it goes without saying that creating such indices encourages companies to act in accordance with principles of sustainable development and promotes awareness of environmental and social issues by drawing investors' attention to those matters.[82] On the other hand, the empirical evidence suggests that continuation, or deletion in a major sustainability index has little impact on stock market reactions[83] and do not

collection of companies' CSR activities undertaken in a particular year. In this way, the Forum helps to create the largest overview of CSR activities in Poland. See <https://odpowiedzialnybiznes.pl/english/> accessed 28 March 2022.

[76] The Dow Jones Sustainability Index was created in the United States in 1999 and it was the first index evaluating the sustainability performance of companies. See <https://www.spglobal.com/en/who-we-are/our-history> accessed 19 April 2022.

[77] See <http://www.respectindex.pl/aktualnosci?ph_main_content_start=show&ph_main_content_cmn_id=1140> accessed 19 April 2022.

[78] Radwan and Regucki, supra n 4, 39.

[79] Dyczkowska et al., supra n 71, 213.

[80] This index 40 medium size companies listed on the WSE Main List. The mWIG40 index excludes WIG20 and sWIG80 index participants and foreign companies listed on the WSE.

[81] See <http://www.respectindex.pl/news?ph_main_content_start=show&ph_main_content_cmn_id=1142> accessed 19 April 2022.

[82] Radwan and Regucki, supra n 4, 37-39 and the literature cited there.

[83] Nonetheless, there is some evidence that global assessments of sustainability are converging and that investors may increasingly be valuing continuation on the Dow Jones Sustainability Index (suggesting that firms may gain at least limited benefits from reliable sustainability activities). Olga Hawn et al., *Do Investors Actually Value Sustainability? New Evidence from Investor Reactions to the Dow Jones Sustainability Index (DJSI)* 39 Strategic Management Journal 949 (2018).

significantly impact stock price and trading volumes.[84] Therefore, to conclude, it seems that although the introduction of the sustainability indices in Poland is a positive development, on its own and due to its limitations it will not be able to change the tide of shareholder primacy.

Non-financial reporting

Moving now to the non-financial reporting, the periods before and after the Non-financial Reporting Directive ("NFRD")[85] came into force must be discussed separately. As for the former period, the inclusion of the non-financial issues into reporting or any type of sustainability reporting was not particularly widespread and was to a large extent voluntary. In fact, there was no specific legislation to promote the adoption of CSR/sustainability good practices among Polish companies.[86] However, non-financial reporting was not completely novel in Poland and some companies were publishing sustainability reports for many years on a voluntary basis. As far as the international reporting standards are concerned, the Global Reporting Initiative (GRI) Guidelines were and still are the most popular tool,[87] but the research suggests that the total number of reports prepared in accordance with them before the NFRD came into force in 2017 was still very low.[88]

The literature also suggests that sustainability reporting is a relatively new topic for Polish companies and customers.[89] The results of the 2016 analysis show that the reports were published in different forms and under different titles (e.g. CSR report, corporate responsibility report) which makes the comparison between companies challenging. Moreover, only few companies have recently started to publish integrated reports (i.e. the reports that combine the content of financial statements, management board reports on the company's activities and non-financial statements) and the quality

[84] At the same time though sustainability events attract more attention from financial analysts and lead to an increase in the percentage of shares held by long-term investors indicative of a trend that professional investors pay more attention to CSR-visible firms over time. Rodolphe Durand et al., *Do Investors Actually Value Sustainability Indices? Replication, Development, and New Evidence on CSR Visibility* 40 Strategic Management Journal 1471 (2019).
[85] Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU, as regards disclosure of non-financial and diversity information by certain large undertakings and groups.
[86] Before the NFRD was implemented, according to the art. 49(3) of the Accounting Act, companies were encouraged (but not obliged) to disclose the non-financial information (including, the information on the environmental matters and workforce), only if this was essential for the assessment of the activities of the whole entity.
[87] Dyczkowska et al., supra n 71, 209-210. In a similar vein, Przemysław Wołczek, *Development of the CSR concept in Poland- Progress or Stagnation?* Research Papers of Wrocław University of Economics, No 387 (2015).
[88] In August 2017, 251 out of 42,624 CSR reports included in the GRI Database were published by companies operating in Poland. In comparison, the result for France was 1095 according to the GRI's Sustainability Disclosure Database from 2017. See <http://database.globalreporting.org/search> accessed 15 August 2017 and Dyduch and Krasodomska, supra, n 73.
[89] D. Astupan and Avo Schönbohm, *Sustainability Reporting Performance in Poland: Empirical Studies from the WIG 20 and MWIG 40 Companies* 6 Polish Journal of Management Studies 68 (2012).

of the disclosed data has been considered to be rather poor (e.g. the companies very often publish scanned and illegible reports).[90]

As stated above, in 2017 the NFRD came into force and it requires certain large companies[91] operating in the EU to issue a non-financial statement. The non-financial information statement must contain information, relating to, as a minimum: environmental matters, the company's employees, social matters, respect for human rights and anti-corruption and anti-bribery matters. The Directive was implemented in Poland mostly through the Accounting Act of 29 September 1994[92] (see arts. 49(3) and 49b of that Act).[93] According to this Act, the relevant companies are asked to disclose the non-financial information stipulated by the NFRD on the "comply or explain" basis. Companies have the option to disclose the information either as part of the Management Report (in this case called "Oświadczenie na temat informacji niefinansowych") or as a stand-alone non-financial information statement ("Sprawozdanie na temat informacji niefinansowych"). In the latter case, the statement can also be in the form of a sustainability report. Companies required by the Directive to prepare a non-financial information statement are obliged to disclose information on their business model, principal risks and KPIs even in the absence of relevant policies.

In Poland the impact of the NFRD is rather limited as *de facto* it only applies to the largest corporations – the Directive applies to about 150 companies listed on the WSE and the research suggests that the issue of non-financial reporting was a new requirement for probably over 100 of these companies.[94] It is also difficult to assess at this stage the breadth, depth and consistency of the disclosed non-financial information as the empirical data is lacking. However, it is fair to say, it seems, that the implementation of the NFRD in Poland is not entirely successful. In some more developed jurisdictions, the implementation of the new reporting provisions was only the confirmation of national non-financial reporting practices. In countries such as Poland though, the Directive introduced completely new reporting requirements which might have been perceived by many as administrative burdens. That is also why Poland was one of the member states blocking the EU legislation process. Poland – as the only EU country – maintained that companies should be encouraged to report their CSR policy, e.g. by guidelines or recommendations,[95] rather than being

[90] Polish Association of Listed Companies (SEG), GES and EY, *Non-financial Data Reporting Value for Companies and Investors* (2017) 9 and 27 <https://www.seg.org.pl/storage/uploads/1626256984_seg_esg-2016_eng_210x297_www.pdf> accessed 29 March 2022.
[91] Certain large companies (a traded company, a banking company and a company carrying on insurance market activity) and groups which are not small or medium-sized and which exceed on their balance sheet dates the criterion of the average number of 500 employees, are required to issue a non-financial statement.
[92] OJ 2021.217.
[93] See also the disclosure duties with regard to diversity policy laid down in §70(6)(5) of the Regulation of the Minister of Finance of 29 March 2018, supra n 46.
[94] Polish Association of Listed Companies (SEG), GES and EY, supra n 90, 10.
[95] According to the government, soft regulations regarding CSR disclosure like recommendations or guidelines are more appropriate, whereas Directive regulations on reporting practices are burdens rather than appropriate instruments for popularisation of the CSR concept. See Dyduch and Krasodomska, supra, n 73.

forced to do so by law. During the legislative works Poland achieved its intended negotiating goal, i.e. obtained significant concessions, such as markedly reduced group of businesses to whom the obligation to report non-financial information applies.[96]

Polish academia is largely in favour of the above changes in accounting regulations though – underlining for instance that – the only way to accelerate the CSR development in Poland is to introduce minimum legal requirements that would regulate corporate responsibility practices.[97] However, the attitude of the Polish government towards the Directive and the quality of the implementation is largely disappointing. There has been hardly any encouragement from the government to disclose the non-financial information. Further, it is surprising that the legislation does not at least encourages companies to adopt a standardised non-financial reporting approach – which would promote transparency and comparability – but it allows companies "to adopt any reporting style, including the company's own approach, domestic, European or international standards."[98] Following the introduction of the NFRD, a local reporting standard – the Non-financial Information Standard (SIN) was developed to help companies fulfil reporting obligations instituted by the Directive.[99] This initiative was coordinated by the Fundacja Standardów Raportowania and Polish Association of Listed Companies[100] and hence, these authors suggest this standard should be indicated in the legislation as the default reporting standard to encourage consistency. All in all, the non-financial reporting in the current form is unlikely to be perceived as an effective tool.

ESG Reporting

Finally, the ESG reporting requirements will be analysed. ESG reporting which aims at promoting responsible investment has recently been introduced in Poland and the Warsaw Stock Exchange stands behind these developments. First, the 2021 Code of Good Practice introduced for the first time a requirement to disclose the ESG information. Sections 1.3 and 1.4 of the Code recommend companies to consider ESG issues as part of the business strategy and planning and provide disclosure especially on climate-related risks and related KPIs. Companies should also disclose the employee pay gap ratio and inform whether actions have been taken to eliminate gender inequalities. This is an important step forward towards sustainability in Poland. The scope of application of these new provisions on ESG reporting and the quality of compliance are uncertain though, since in general a comprehensive empirical data on the quality of compliance with the Code's provisions is lacking and the non-compliance explanations tend to very short and superficial. Until recently companies were

[96] Anna Krzysztofek, *Dyrektywa 2014/95/UE oraz Wynikające z Niej Zmiany* Prace Naukowe Uniwersytetu Ekonomicznego we Wrocławiu, No. 450, 342 (2016).
[97] Dyczkowska et al., supra n 71, 211-213.
[98] Art. 49b (8) Accounting Act.
[99] Non-financial Information Standard consists of the main document and five supplementary annexes. See <https://standardy.org.pl/sin/> accessed 22 April 2022.
[100] Warsaw Stock Exchange, *ESG Reporting Guidelines Guide for Issuers*, supra n 6, 8-9.

only obliged to report when they do not follow the Code of Good Practice. Currently, a listed company is required to supply a comprehensive statement indicating whether and how they applied the Code's provisions and detailing the cases where they failed to comply.[101] It is hoped that this recent amendment will help to raise the Code's profile and will improve its status.

Apart from amending the Code, in 2021 the Warsaw Stock Exchange also published its first set of ESG reporting guidelines for investors and listed companies, together with an ESG reporting manual.[102] These guidelines were produced in collaboration with the European Bank for Reconstruction and Development and Steward Redqueen (a consultancy advising organisations on impact and sustainability). They are intended to be a practical tool supporting issuers with ESG disclosure, according to the latest global (the Task Force on Climate-related Financial Disclosure ("TCFD") recommendations[103]), European Union (NFRD, the Sustainable Finance Disclosure Regulation ("SFDR")[104] and the EU Taxonomy Regulation[105]) and the local regulations (the Code of Good Practice).[106]

The guidelines explain why ESG disclosures are important, what they really are, and how to start reporting. The document is comprised of two sections: firstly, the "what and why" of ESG reporting, and secondly, how companies should be reporting ESG. The guidelines were consulted with a broad group of stakeholders including listed issuers, local and international investors, and public administration bodies.[107] Moreover, chapter 5 presents a step-by-step guide to help companies decide which information to disclose and it introduces the concept of materiality, minimum safeguards and minimum disclosure metrics.[108] Key helpful characteristics of a "decision-useful ESG disclosure" are presented as well – it should be: material; objective; strategic & forward-looking; comparable & reliable; and verifiable.[109] The reporting takes place on a "comply or explain" basis – if the material information is not reported, it should be explained why this is the case.[110]

The publication of the ESG reporting guidelines is clearly a positive development. The WSE joined a group of now 59 stock exchanges around the world that have written guidance on ESG

[101] §29(3) WSE Listing Rules (the current Rules are in force from 29 April 2022).
[102] Warsaw Stock Exchange, *ESG Reporting Guidelines Guide for Issuers,* supra n 6.
[103] See <https://www.fsb-tcfd.org/> accessed 25 April 2022.
[104] Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector.
[105] Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment and amending Regulation (EU) 2019/2088.
[106] Warsaw Stock Exchange, *ESG Reporting Guidelines Guide for Issuers*, supra n 6, 3-4, 8.
[107] Ibid, 3.
[108] Ibid, 22.
[109] Ibid 21.
[110] Ibid, 22.

reporting.[111] This should strengthen the position of the Polish capital market internationally. However, the downside is that the guidelines are entirely voluntary. This document provides:

> These Guidelines are not a new standard, they do not replace legal obligations, nor do they introduce new indicators. Rather the Guidelines as presented in this document aim to help companies listed on the Polish stock exchange enhance their ESG reporting practices. [112]

Therefore, as it stands now, the application of the ESG reporting guidelines is unlikely to have a widespread character or contribute to standardising the reporting requirements. Moreover, the ESG reporting guidelines are not well linked with the Code's of Good Practice provisions on ESG. The latter are mentioned in the guidelines only once, through a broad statement pointing out that "[t]he indicators outlined in Part 2 of the Guidelines are aligned with the amended corporate governance principles for diversity and broader sustainability issues" mentioned in sections 1.3 and 1.4 of the 2021 Code of Good Practice.[113] Arguably, more could have been done to interlink both documents in the process of encouraging ESG reporting. After identifying the sustainability related developments in Poland and their shortcomings, we now move on to consider how the corporate objective in Poland could be improved.

IV. A way forward

As per the above analysis, the sustainability agenda is slowly gaining momentum in Poland, but a coherent approach facilitating bypassing a simple rhetoric is lacking. Arguably, the developments discussed in section III will have a very little impact since they concentrate on gentle encouragement or nudging listed companies to first, consider the CSR issues during the decision-making processes (as per the non-financial reporting requirements introduced by the NFRD) or secondly, ESG disclosure requirements tailored towards investors (all introduced by the WSE and currently the most popular sustainability-related initiatives, it seems). The bottom line is that the interests of shareholders (and also the political considerations in SOEs) have the paramount importance in Polish companies and there is no legal duty for the board to consider the interests of any other stakeholders.

Therefore, to move towards more sustainable companies, it is crucial to concentrate on revisiting and refining the notion of the interest of the company, which does not necessarily imply reforming it, but rather making all market participants aware of what this notion actually entails under the Polish law. This would also make the non-financial reporting disclosure obligations and the ESG-focused initiatives more effective.

To start with, Poland is a shareholder value primacy legislation and as a matter of fact, it is not realistic to anticipate that this will change overnight – directors' duties are vague, rarely enforced and company directors will generally prioritise the interests of the controlling shareholders who have

[111] See <https://sseinitiative.org/all-news/exchange-in-focus-gpw-publishes-esg-reporting-guidelines/> accessed 29 March 2022.
[112] Warsaw Stock Exchange, *ESG Reporting Guidelines Guide for Issuers*, supra n 6, 8.
[113] Ibid, 11

the power to nominate, appoint and remove them. Hence, we do not recommend Poland to follow the German route of stakeholderism as it will offer no panacea for achieving more sustainable companies.[114] Moreover, given the lack of effective instruments for the private-legal enforcement of the director duties and the virtually complete lack of experience of the Polish judiciary in resolving disputes on this background,[115] it seems that the stakeholder model would only become a pretext for the instrumental subordination of the company's interests to those of the largest shareholders. In the case of SOEs, this would mean an even more far-reaching domination of the political narrative in terms of setting the strategy of these companies under the pretext of pursuing labour or society-wide goals. The German model, after all, presupposes experienced courts that, in the event of disputes, are able to skilfully examine the extent to which a particular decision of the company's managers is truly dictated by the need to protect the interests of stakeholders other than shareholders, or on the other hand, the extent to which it facilitates using the company assets to advance the goals of the dominant shareholder. It is also not without significance that Poland has a relatively archaic and inflexible labour law, with relatively strong trade unions. In this context, establishing the protection of employees' interests as a determinant of the duties of the company's managers may be seen as a solution that goes too far. [116]

However, the shareholder value approach (as adopted in the US law)[117] is too narrow and rather the British ESV approach should be adopted. Arguably, as indicated in Section II above, Polish law already epitomises the ESV approach. The only task would be to articulate this clearly to make the market participants aware that companies are allowed and indeed encouraged to consider the interests of other stakeholders during decision-making processes as well. According to the prevalent approach, in Poland the interests of other stakeholders should be allowed only in as much as they align with shareholders' interests, and thus not as an independent factor, but only to the extent this is beneficial for shareholders. The supporters of this approach argue that in the long run the interests of

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[114] See in the similar vein Ringe and Gözlügöl. According to these authors, other potential weakness is the difficulty in balancing different interests when directors need to pursue a stakeholderist approach. Wolf-Georg Ringe and Alperen Gözlügöl, *The EU Sustainable Corporate Governance Initiative: Where are We and Where are We Headed?* (2022) <https://corpgov.law.harvard.edu/2022/03/18/the-eu-sustainable-corporate-governance-initiative-where-are-we-and-where-are-we-headed/> accessed 18 March 2022.
[115] Oplustil supra note 52, 364
[116] Łukasz Pisarczyk, *Reforma zbiorowego prawa pracy* 10 (Warsaw; C.H. Beck, 2019).
[117] The shareholder value theory is predominantly perceived as a proper decision-making norm in the US. See Leo Strine Jr, *Our Continuing Struggle with the Idea that For-profit Corporations Seek Profit* 47 Wake Forest Law Review 135, 147 fn 34 (2012) and *Dodge v. Ford Motor Company* 170 NW 668 (Mich 1919). Not all commentators agree with the shareholder value primacy though. For instance, there are views that *Dodge v. Ford Motor Company* is wrongly cited for the proposition that maximising shareholder wealth is the legal rule, as shareholder wealth maximisation should be rather perceived as a standard of conduct, which suggests that the law does not impose on a board a legal duty to maximise shareholder value. See: Lynn Stout, *Why We Should Stop Teaching Dodge v. Ford* 3(1) Virginia Law & Business Review 163 (2008). Further, Bainbridge argues that neither the shareholder nor the stakeholder models are fully satisfactory. In his view, the director primacy concept also has influence in Delaware since directors there exercise broad decision-making powers. See Stephen Bainbridge, *Director v Shareholder Primacy in the Convergence Debate* (2002) 16 Transnational Lawyer 45 (2002).

shareholders and the entities from the company's environment tend to converge – company's competitiveness, which translates into shareholder profit, is further enhanced by the so-called social capital, construed as the relationships with the broader social environment, as well as image and reputation. In consequence, as a rule, attentiveness to the players from the company's environment is perceived to be in the interest of the company itself.[118] Nevertheless, it is argued that in the process of defining the interest of the company, shareholders' interests cannot be equated with those of stakeholders, as "serving many masters" does not do any good, excessively diluting management's accountability and making it hard for them to determine whose interests, i.e. which stakeholders, they should put first. What is more, such approach provides a convenient alibi for unfortunate decisions – in the end, this or that stakeholder group needs to be satisfied.[119] To put in briefly, the enlightened shareholder value approach is arguably already well grounded in Poland and should be preferred whereas the stakeholder value approach would be too far-reaching.

To conclude, despite the criticism the ESV approach accumulated over the years, it appears to be the most appropriate approach for the Polish circumstances. Especially, taking into consideration the concentrated share ownership structure, the role of the majority shareholders, broad discretionary powers of the management board and the fact that directors' duties are rarely enforced. In any case it seems extremely unlikely that a clearer definition of the interest of the company would be introduced in the legislation. Legal scholars aptly point out to the multidimensionality of the company's interest clause. As a result, in order to decode it, one must rely on several factors inherent to the company as well as its legal, regulatory and economic context. In consequence, even if a single definition of the interest of the company was included in CCC, it could in no way cater to all specific conditions in which companies operate.[120] Reducing all companies to a common denominator, regardless of their shareholding structure and owners' preferences, their sector, purpose, size, competitive environment, corporate model etc., seems to be doomed to fail from the very start. The notion of the interest of the company must be filled with the content on case to case basis, following the analysis of internal relationships in a specific company, and cannot be abstracted in vacuum. In fact, this notion is a precise indefinite expression, suitable for the flexible company structure.[121]

Since the interest of the company has not traditionally been discussed in the legislation, these authors suggest that the Polish Code of Good Practice as a soft law tool (i.e. "comply or explain" – where the "compliance" part is voluntary, but the "explanation" part is mandatory) should expand on this notion whilst leaving the final assessment for companies – especially, since Provision II of the

[118] Opalski, supra n 48, 19; Opalski, supra n 44, 171; Błaszczyk, supra n 49, 322-323.
[119] Opalska, supra n 48, 90; Oplustil, supra n 51, 163-164; Błaszczyk, supra n 49, 321.
[120] Gębusia, supra n 64, 462, cf Szmid, supra n 50, 21.
[121] Michał Romanowski, *Znaczenie sporu o metodę odczytywania pojęcia „interes spółki kapitałowej"* Przegląd Prawa Handlowego, No. 7, 14 (2015). Further, the Constitutional Court points out that it is the task of the legal sciences and case law to make the "corporate interest" more precise. Constitutional Court Judgement of 21 June 2005, *P 25/02, OTK-A 2005, no 6, item 65.*

2021 Code of Good Practice already mentions “the interest of the company,” however, without providing any context.

In our view, the Code[122] is an ideal instrument to start encouraging companies in Poland to move beyond shareholder primacy and voluntarily paying more attention to the interests of other stakeholders in a more systematic way. A soft law, but a clear and consistent approach to including the interests of not only shareholders but also other stakeholders in the decision-making processes, rather than a direct legal obligation should be adopted in Poland. In our view, mandatory rules on sustainability will not work in a shareholder primacy jurisdiction and are unlikely to be introduced in Poland. In the similar vein, Radwan and Regucki argued already in 2012 that a revision of the Code of Good Practice to accommodate references to CSR appears to be an easily identifiable measure that could be capable of promoting sustainable companies in Poland. They also pointed out the Code of Good Practice has some spill-over potential and may also influence the interpretation of the statutory law (CCC) in that context.[123]

Moreover, according to Gilson, codes epitomise the shift from corporate law to corporate governance, a shift from legal rules standing alone to legal rules interacting with non-legal processes and institutions.[124] Also, MacNeil and Esser notice that the introduction of the Cadbury Code in the UK in the early 1990s marked an important turning point in the evolution of corporate governance around the world, since the comply or explain approach prioritised flexibility and the role of market discipline in its approach.[125] Although in general codes are non-binding, they can create powerful norms. For instance, Hill underlines the role of the codes in creating powerful norms concerning the role of directors and officers and the exercise of their powers.[126] Due to a relative flexibility in changing them, codes articulate the current goals of the regulator and are more responsive to the developments in the corporate world. Corporate governance codes are also widely regarded as the ultimate sign of a modern and efficient market economy.[127]

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[122] Just to note as a reminder that the UK’s Cadbury Report 1992 (available at <https://ecgi.global/sites/default/files//codes/documents/cadbury.pdf> accessed 6 April 2022) was the first code in the world followed by similar codes of good practice or principles of corporate governance in many other countries. See the European Corporate Governance Institute website for a database of the corporate governance codes: <https://ecgi.global/content/codes> accessed 6 April 2022.

[123] Radwan and Regucki, supra n 4, 44.

[124] Ronald Gilson, *From Corporate Law to Corporate Governance* in Jeffrey Gordon and Wolf-Georg Ringe (eds.) *The Oxford Handbook of Corporate Law and Governance* 3 (Oxford; Oxford University Press, 2018).

[125] Iain MacNeil and Irene-marie Esser, *The Emergence of ‘Comply or Explain’ as a Global Model for Corporate Governance Codes* 33(1) European Business Law Review 1 (2022).

[126] Jennifer Hill, *Shifting Contours of Directors’ Fiduciary Duties and Norms in Comparative Corporate Governance* (2020) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3521111>accessed 6 April 2020.

[127] Kershaw argues that one of the most important governance phenomena of the past 20 years has been the introduction of market controlled corporate governance codes designed to guide companies towards best practice. David Kershaw, *Corporate Law and Self-regulation* (2015) <http://ssrn.com/abstract=257420> accessed 6 April 2022.

On the other hand, codes are being criticised for lacking a theoretical or empirical rationale to the extent that they are unlikely to do much good, and if so only by accident.[128] Moreover, Sjåfjell whilst recognising positive exceptions, noted that corporate governance codes are a failure, because on a whole they are informed by and support the shareholder primacy drive, with its negative effects for society, for business and for all shareholders with anything but an extremely short-term perspective.[129]

Therefore, in order for the Code to have any practical importance in Poland, rather than only to create an impression of a jurisdiction that keeps up with the international developments (as it is arguably the case at the moment[130]), the Code should be less superficial when introducing the notions such as, for instance, the interest of the company.

We argue that the current Code of Good Practice should be revised, in the context of the company's interest. The 2021 version is quite brief and enigmatic and clearly does not adhere to the standards set up by the leading jurisdictions. More guidance should be offered, as to whose interests should be considered during the decision-making processes. The WSE – the body in charge of the Code and currently the most influential proponent of the sustainability agenda in Poland – is very well placed to initiate the transformation of the Code into a more meaningful legal instrument, tailored towards a sustainable company and an instrument that interlinks all related sustainability regulations and disclosure requirements.

Provision II of the 2021 Code of Good Practice – the main provision discussing the management of a company – is only able to get any practical significance, if it is provided with some content and scope. In these authors' view, the 2005 Code of Good Practice, especially provisions 32 and 33 were much better drafted – arguably epitomising the ESV approach – and should be revisited.[131] According to these sections:

> 32. With the company's interests in mind, the management board sets out the strategy and the main objects of the company's operations and submits them to the supervisory board. The management board is responsible for implementation and performance. The management board sees that the company's management system is transparent and effective and that its business is conducted in accordance with legal regulations and best practice.
> 33. When making decisions on corporate issues, management board members should act within the limits of justified business risk, i.e. after considering all information, analyses and opinions, which, in the reasonable opinion of the management board, should be taken into account in a given case in view of the company's interest. When determining the company's interests, the long-term interests of the company's shareholders, creditors and employees should be kept in mind, as well as those of other entities and persons cooperating with the company, also the interests of the local community.

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[128] Steen Thomsen, *The Hidden Meaning of Codes: Corporate Governance and Investor Rent Seeking* 7(4) European Business Organisation Law Review 845, 846 (2006).
[129] Sjåfjell, supra n 24, 1 and 2.
[130] However, some recent efforts to raise the Code's profile – such as the changes to the Code's compliance statement, discussed above – must be acknowledged as well.
[131] See also Opalska, supra n 48, 93; Błaszczyk, supra n 49, 329-330.

Although in section 33 shareholders, creditors and employees were listed in one line, potentially suggesting that the Code of Good Practice was based even not so much on enlightened shareholder value approach, but on stakeholder approach,[132] the section should be read in conjunction with the general principle no I, which provided that the:

> [B]asic purpose of corporate authorities is to pursue company interests construed as increasing the value of assets entrusted by the shareholders, while taking account of the rights and interests of actors other than shareholders, engaged in company's operations, with special focus on company's creditors and its employees.

In consequence, the primacy of shareholders' interest with respect to the interest of other stakeholders was assumed, but the latter should nevertheless be taken into account.[133] To conclude, to support the sustainable corporate practices in Poland and to constitute a pragmatic way forward, the interest of the company provision in the Code of Good Practice should follow the ESV approach and explicitly make reference to the interests of other stakeholders.

Apart from focusing on refining the interest of the company notion and reforming the Code of Good Practice, the non-financial reporting should be revisited as well. The implementation of the NFRD – although an important step forward in furthering the interests of other stakeholders in Poland – in the current form is ineffective. Non-financial reporting seems to be of secondary importance, inconsistent and it lacks transparency (because companies approach it differently). Since the NFRD is under review now, Poland should use this opportunity to implement the new Directive more efficiently. The aim of the current reform suggested by the European Commission is to enhance the consistency of sustainability reporting requirements with the broader legal framework on sustainable finance including the SFDR and the EU Taxonomy Regulation. On 21 April 2021, the Commission adopted a legislative proposal for a Corporate Sustainability Reporting Directive ("CSRD")[134] and the new provisions are likely to come into force in 2023.

This new proposal extends the scope to all large companies and all companies listed on regulated markets (except listed micro-enterprises). It has been estimated that in Poland it will apply to 3600 companies,[135] which indicates a substantial change. The proposal requires the audit

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[132] This problem has been also highlighted by Opalski, supra n 44, 173, footnote 46.

[133] In the same vein Opalski, supra n 48, 19-20; Oplustil, supra n 51, 177-178; Józef Okolski, Dominika Wajda, *Zasada Rządów Większości i Ochrona Akcjonariuszy Mniejszościowych wobec Pojęcia „Interesu Spółki Akcyjnej"* in: Józef Frąckowiak (ed.), *Kodeks spółek handlowych po pięciu latach* 750 (Wrocław; Wydawnictwo Uniwersytetu Wrocławskiego, 2006).

[134] Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) No 537/2014, as regards corporate sustainability reporting. See <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021PC0189&from=EN> accessed 22 April 2022.

[135] Magdalena Krukowska, <https://www.obserwatorfinansowy.pl/bez-kategorii/rotator/gielda-i-eboir-pomagaja-w-raportowaniu-pozafinansowym/> accessed 31 March 2022.

(assurance) of reported information and introduces more detailed reporting requirements,[136] and a requirement to report according to mandatory EU sustainability reporting standards.[137] It also requires companies to digitally 'tag' the reported information, so it is machine readable and feeds into the European single access point envisaged in the capital markets union action plan.[138] Overall, it is hoped that the CSRD will facilitate a more comprehensive non-financial reporting by Polish companies.

V. Conclusions

As a rule, Poland is a shareholder primacy jurisdiction, and Polish courts assume that the corporate objective is a derivative of the shareholders' interests. However, the view that corporate executives should take account of the interests of other stakeholders, rather than only that of shareholders is becoming increasingly more widespread among the Polish scholars. Moreover, the various developments listed above, and the role of the European initiatives suggest that Poland is moving – slowly but steadily – beyond a pure shareholder primacy.

Although the voices in favour of adopting stakeholder value approach are quite sparse, the number of supporters of the enlightened shareholder value approach is growing. Despite its shortcomings, the ESV approach would be the most appropriate for the local circumstances – especially, taking into consideration the concentrated share ownership structure, the role of the majority shareholders, broad discretionary powers of the management board and the fact that directors' duties are rarely enforced – and arguably it would help moving the sustainability agenda forward.

The fact that the biggest Polish companies are state controlled adds a layer of complexity to the debate on the nature of the company's interest. Although classical mechanisms applicable to private companies should be applied to decode the interests of such companies as well, and in consequence one should seek to identify the resultant of interests of all shareholders, the obtained results are quite particular. As the interests of the dominant shareholder (State Treasury) converges with the interest of the state defined at a specific time by the ruling party, eventually, in practice the interest of a company with a major State Treasury stake is identified with the interest of the state. This makes it by no means easier to debate the corporate objective, as any attempts to argue in favour of

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[136] It specifies in greater detail the information that companies should disclose. Compared to the existing provisions, it introduces new requirements for companies to provide information about their strategy, targets, the role of the board and management, the principal adverse impacts connected to the company and its value chain, intangibles, and how they have identified the information they report. See page 14 of the CSRD.

[137] The draft standards would be developed by the European Financial Reporting Advisory Group ("EFRAG"). The standards will be tailored to EU policies, while building on and contributing to international standardisation initiatives. The first set of standards would be adopted by October 2022.

[138] European Commission, *Corporate Sustainability Reporting* <https://ec.europa.eu/info/business-economy-euro/company-reporting-and-auditing/company-reporting/corporate-sustainability-reporting_en> accessed 31 March 2022.

ESV are put to test by the experiences of State Treasury-owned companies, where the inclusion of sustainability activities is associated with the political nepotism, cronyism and inefficiency.

Nevertheless, the promotion of the enlightened shareholder value approach is desirable for all companies. Even though the statutory mandate of such an approach by way of a hard law modification and the inclusion of a relevant definition of the interest of the company in CCC is neither likely nor appropriate, filling this notion with content by relevant soft law provisions (especially in the Code of Good Practice) is highly auspicious. Arguably, the ESV approach would also assist in building a more coherent approach to sustainability in Polish companies – i.e. a clear indication that companies are allowed and indeed encouraged to include the interests of other stakeholders during the decision-making processes would make all the current sustainability-related initiatives (i.e. non-financial disclosure obligations and the ESG reporting initiatives) better grounded and realistic. The WSE who sets the Code and is a driving force behind the reform towards sustainability in Poland is very well placed to initiate such reforms.