Board of Directors' handbook 2022

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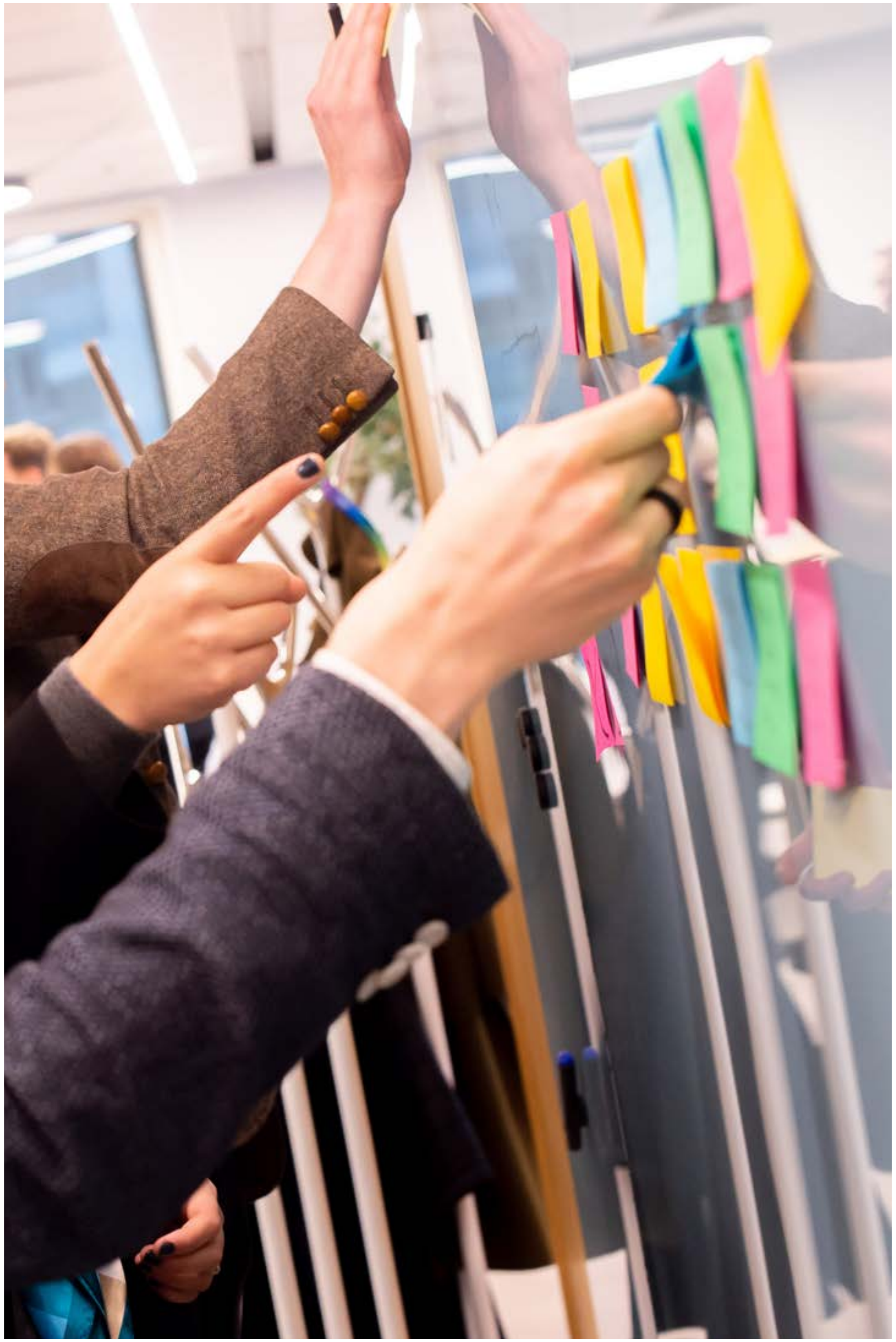
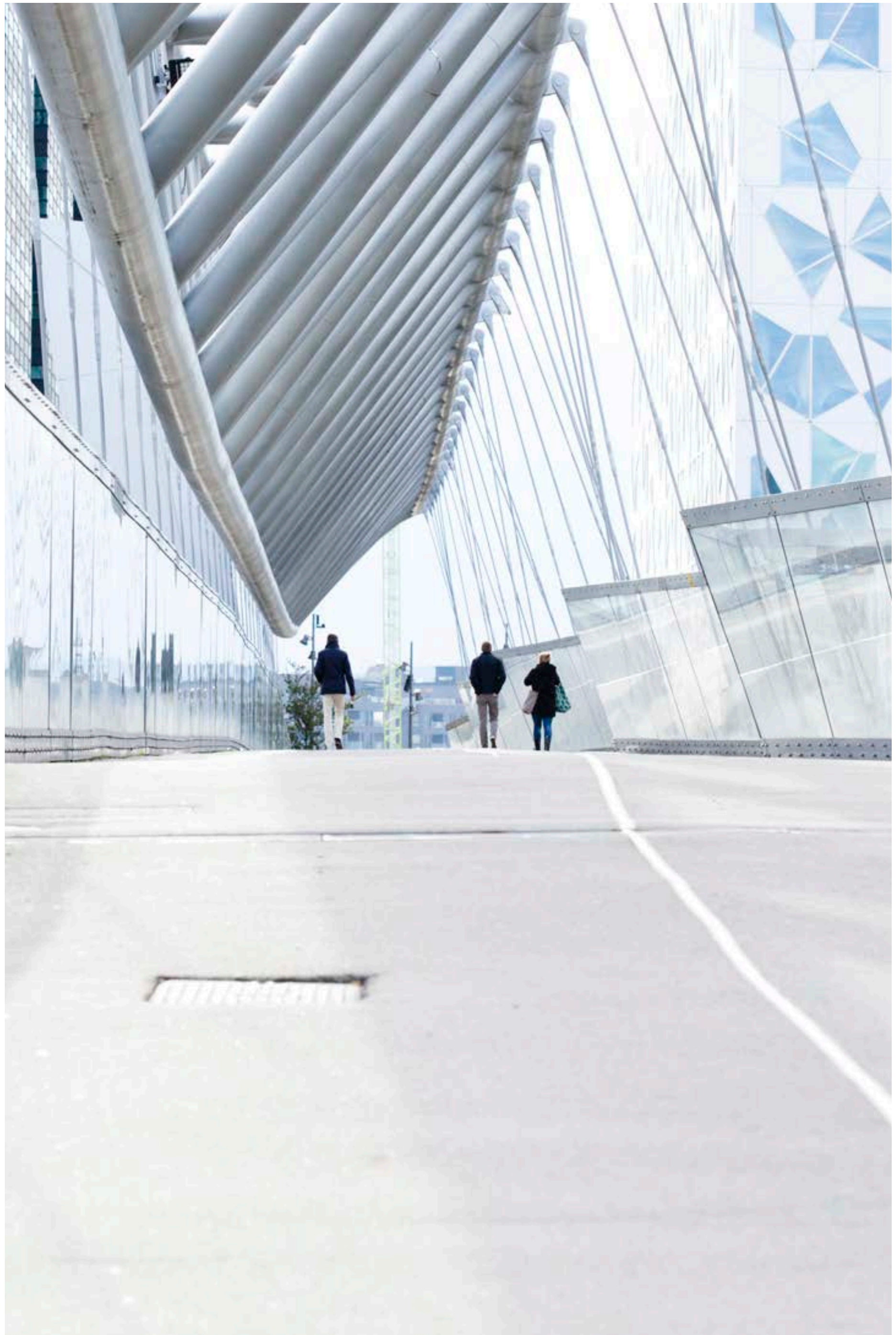
The Board of Directors' Handbook 2022 provides general information and guidance, and PwC accepts no liability for decisions based on its contents.

Please contact our auditors, lawyers and/or advisers with any questions you may have about the contents of this handbook.



Contents



Eli Moe-Helgesen

Signe Moen

Introduction

The past two years have been strongly impacted by the Covid-19 pandemic and the resulting uncertainty, with supply chains under pressure, political upheaval and unprecedented increases in energy prices, while at the same time the focus on sustainability has intensified. Businesses have an increasingly important role to play in this regard, both now and in the future.

When the world changes, a company's board of directors has to become even more proactive in their monitoring of management's understanding and response to changes, risks and opportunities. Boards must ensure that their companies implement effective risk-reduction measures and seize new business opportunities. Not least, boards have a key role to play in ensuring that management takes social responsibility requirements and expectations seriously. Integrating sustainability issues into strategy development is critical not only for society, but also for individual companies. Boards must make targeted efforts to ensure that their companies adopt appropriate goals, achieve results and report on target achievements, including those in non-financial areas

This PwC publication discusses topics such as the roles and responsibilities of company boards and strategy development. In the near future, most probably in 2024, many Norwegian companies will become subject to the requirement to prepare externally verified sustainability reports. This marks a significant change for many companies, and the transition must be planned carefully.

We hope that you will find this book helpful and interesting. Please do not hesitate to contact us with questions or suggestions regarding topics to be included in future editions.

Oslo, 3 January 2022

Eli Moe-Helgesen
Partner and Head of Audits and Trust Solutions Department

Signe Moen
Director and Head of Technical

The role and responsibilities of the Board of Directors

The board's role will vary and depend on a number of factors depending on the company. The board's role will also change with the company's development and environment. In this chapter, we review the various formal requirements for the role of the board, and also the personal responsibilities of the board members.

The board's role is constantly evolving and the environment's expectations of the board's responsibilities are changing. What applied last year will not necessarily be good for the future. Increased focus on the development of competence in the boardroom are among the trends we observe to ensure that the board acts as a corporate body. We hope this chapter can contribute to increased insight.

Marius Thorsrud
Partner, Oslo

The role and responsibilities of the Board of Directors

In this chapter, we discuss the company-law framework for board activities, including the board's role as a strategic, supervisory, advisory and decision-making body. Board tasks and roles which arise in exceptional circumstances are also covered. However, since the legislation does not use the above terminology, this publication is written so as to link these board tasks with the relevant legal provisions.

The Norwegian Private limited liability company act and the Norwegian public limited liability company act state that the responsibility for the management of the company falls to the board of directors (the board). The managing director's (CEO's) role is defined such that he or she is in charge of the day-to-day management of the company's business and responsible for complying with the guidelines and instructions issued by the board. In practice, this means that the board is responsible for the management of the company and delegates the day-to-day management of the company to the managing director.

A well-functioning board has the following characteristics:

- exercises its overall authority of the company,
- safeguards the company's interests and objectives,
- makes necessary decisions, and
- ensures relevant internal controls.

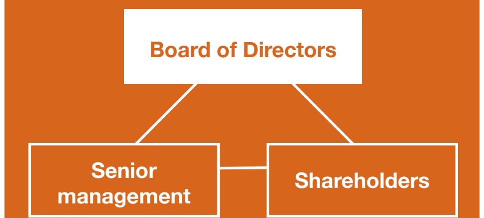
Cooperation with shareholders and management

It is important for the board to create and maintain good cooperation between themselves, the shareholders and management. In addition, the board should also safeguard the interests of other company stakeholders. This will include, for example, employees, suppliers, creditors, customers, governmental authorities and society at large (often represented by the media). Important values in this regard are transparency, information-sharing and collaboration.

The board bears the primary responsibility for the proper functioning of these relationships, and trust between all of the parties involved is essential. The shareholders, as owners of the company, have a responsibility to clearly communicate clearly to the board their investment objectives. The board is then responsible to actively promote and implement good governance and management practises on behalf of the shareholders.Transparency and proper reporting are key factors in gaining stakeholders' trust.

For many companies reputation, stakeholder trust and support will be crucial drivers of sustainable growth.

Cooperation triangle – the Board of Directors



Focus on shareholder value

Perhaps the most important task of the board is to create value for the shareholders and communicate to the shareholders the value that has been created. The board achieves its goals in collaboration with the company's senior management and the shareholders. The board is appointed by the owners to safeguard and manage the shareholders' investment.

The board may be regarded as a "rubber stamping body" if it allows itself to be dictated to by management or the shareholders and if it fails to demonstrate a proactive and positive approach to achieving the company's goals. The board has a duty to safeguard the company's best interests at all times, and it can often be challenging to unite stakeholders with differing agendas to support a common goal. The board has a vital role to play in this regard.

It is important that the shareholders have an understanding and appreciation that the board of directors works for them, and compensate the board accordingly with respect to the level of work expected from the board to achieve the shareholders' expectations. The boards' compensation is agreed by the shareholders at the General Assembly. The shareholders normally receive a return on their investment in the form of dividends and/or an increase in the share price.

The five main tasks of the board

Simply put, the board has to make decisions based on budgets, contractual requirements, applicable regulations and the agenda items imposed and communicated by shareholders, employees, authorities and other stakeholder groups. The board must formulate targets and strategies, establish organisational structures, quality-assure plans and budgets, set deadlines, and monitor and control compliance with board policies. Company reporting is another board responsibility that is growing in importance as a means of ensuring corporate transparency. External reporting includes social responsibility and sustainability reporting, an area in which legislative requirements are increasingly mandating transparency not only about operational matters such as non-discrimination in the workplace and beneficial ownership , but also about matters external to the company (the Transparency Act and management of company suppliers).

We have chosen to categorise the board's primary tasks as follows:

1. Strategic tasks
2. Organisational tasks
3. Internal control related tasks
4. Reporting related duties
5. Board specific duties and responsibilities

The first three categories cover the requirements in section 6–12 of the Private Limited Liability Companies Act, while formal reporting obligations are given in the Norwegian Accounting legislation and stock-exchange rules. The board's strategic tasks are discussed further in the chapter entitled, "The board's role in strategy development", while reporting activities are reviewed in the section External Reporting".

The board must base its day-to-day activities on the priority tasks defined for the company in view of the nature and needs of the business. There may also be other tasks the board considers important and relevant, and it is vital that these are discussed by the shareholders and the key management group so that all parties are in agreement as to the board's objectives before the board gets to work.

What regulates the boards' duties and responsibilities?

The board's responsibilities and duties are primarily determined by the three central documents as shown in the figure below.

The legal rules applicable to private and public limited liability companies are found in the Private Limited Liability Companies Act and the Public Limited Liability Companies Act. The board can only perform its tasks and duties properly if it is familiar with the boundaries and requirements drawn up by the Companies Acts. These acts contain both mandatory provisions which the board must know and comply with and provisions which may be varied (for example through the company's articles of association).

Many boards have a tendency to forget that the company has articles of association which may be relevant for governing board activities. All articles of association contain a purpose clause, and it is an important responsibility of the board to ensure compliance. Articles of association and the shareholder agreement may also contain other terms and conditions of which the board should be aware and take under advisement when carrying out their duties. Shareholder agreements regulate relations between shareholders, and may result in the issuing of specific instructions by a shareholder to individual board members in accordance with the shareholder agreement.

Companies with employee-elected board members (reference to sections 6–3 and 6–4 of the Norwegian limited liability companies act) are required to have written instructions for the board. This is a requirement of section 6–23 of the Norwegian limited liability companies act. It is often beneficial for other companies not explicitly covered by these legal requirements to adopt guidelines for the board of directors.

The Norwegian Corporate Governance Board (NCGB) issues recommendations on corporate governance. The purpose of the recommendations is to ensure a clear distinction between the roles held by shareholders, the board and top management, over and above the statutory minimum requirements.

Regulatory framework

What laws and policies regulate board responsibilities and duties?

↓	↓	↓
The Norwegian limited liability companies act	**The company's articles of association**	**Mandate to the board**

Provisions in the companies acts on board activities

The Norwegian limited liability companies act contains, in chapter 6, key provisions with which all board members must be familiar. Sections 6–12 and 6–13 are particularly important, as section 6–12 defines the board's governing responsibilities and section 6–13 specifies the board's oversight and control responsibilities.

Through such provisions, the limited liability companies act establishes guidelines for the work of the board. The purpose of assigning ultimate responsibility and specific tasks to the board is to give it a mandate to ensure that management performs all necessary tasks in a cost-effective, optimal manner.

Perhaps the most important factor is to achieve the correct balance between board involvement in the development of operational strategies, supervision and control of the company's progress on key priorities and implementation of approved projects and plans.

Section 6-12 of the limited liability companies act makes it clear that the governance of the company is a board responsibility. The board has overall responsibility and full authority to manage the company's business, including the control over company assets and legal rights.

While the ordinary general meeting legally is the company's supreme governing body, the ordinary general meeting does not participate in the management and governance of the company.The ordinary general meeting is not authorised to represent the company. Representation occurs through the board, both externally in dealings with contractual partners and public authorities and internally vis-á-vis the managing director and top management.

Section 6–12 states that the board shall (not may or should):

- Ensure that the business is properly organised,
- Adopt necessary plans and budgets for the company's activities, and
- Keep itself updated on the company's financial position and ensure that commercial activities, accounts and asset management are subject to satisfactory controls.

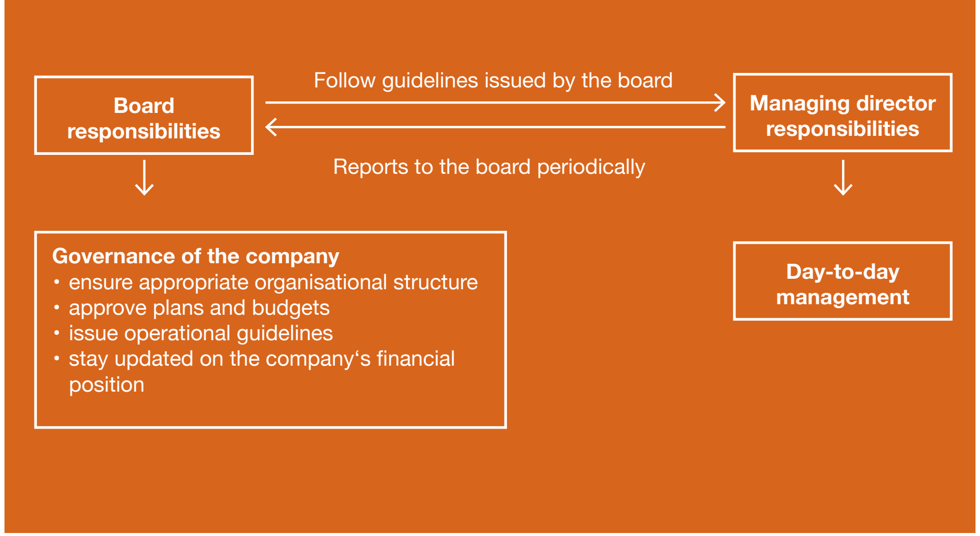
It is also a clear mandate in section 6–12 that the board initiate such investigations as it deems necessary for the performance of its tasks. This is to ensure that it is not good enough to state that the board "did not know", if it was clear that the situation indicated that the board should/must initiate an investigation.

Section 6–13 of the limited liability companies acts likewise requires the board to supervise the day-to-day management of the company and the operations.

Section 6–2 of the limited liability companies act states that the board shall appoint the company's managing director and determine the compensation package unless the shareholders at the ordinary general meeting have reserved the right to make such decisions themselves. Accordingly, one of the most important tasks of the board is to ensure that the company has a managing director who performs well in respect to the company's objectives and strategies.

The daily operations of the company must be overseen by the managing director/top management, but the board of directors guides and supervises such that the managing director does their job in the best manner possible and in accordance with the guidelines established by the board. The board can also establish operational guidelines. The board has the discretion to decide whether instructions should be issued to the CEO, and what form any such instructions should take. The board may issue both general instructions and instructions on company specific issues. There is also legislation that additionally requires the board to adopt specific guidelines for certain operational activities, and states that this task may not be delegated to the management group.

The interplay of board responsibilities and management responsibilities can be illustrated as shown in the figure below. The managing director has a responsibility to report to the board on a regular periodic basis. This specific duty of the managing director is derived from sections 6–14 and 6–15 of the limited liability companies act, as well as from instructions issued by the board.



Interplay between the board of directors and the managing director

The managing director‘s duties to the board

1. The managing director must inform the board, in writing or in a meeting, on the company‘s operations, financial position and profitability atleast every four months (Limited Liability Companies Act) or monthly (Public Limited Liability Companies Act).
2. The board can at their own discretion at time require the managing director to provide the board with a detailed account of specific issues. Individual board members may also request additional information directly from the managing director.

The managing director has a reporting duty irrespective of any specific requests made by the board. The board and managing director should have an agreement as to the content, structure and form of the monthly reporting and how it is communicated to the board, such that the board has the necessary information to perform their supervisory duties related to internal controls, financial reporting and maintenance of shareholder value. The board of a public limited liability company must be kept informed on a monthly basis by the CEO, while the board of a private limited liability company must be updated at least every four months.

Division of responsibilities between the board and the managing director

The board shall be actively engaged with a focus on the general goals for the company, such as the mission statement, company vision and overall strategy. The managing director is responsible for the day-to-day planning and implementing of the goals and objectives established by the board. The division of work between the managing director and the board is a key aspect of the board’s activity. A well-functioning relationship between the board and the managing director is a crucial factor for the achievement of the company’s objectives. The board and managing director must be in agreement as to the success factors for the company, and work together on the appropriate issues. Finding and hiring the best and most competent managing director is therefore very important.

It is often the case that when the managing director is underperforming, that the board is not functioning well and that the company is also underperforming.

A necessary replacement of the managing director is the board’s responsibility. One reason for the many errors made in this area is, quite simply, that it is an unpleasant task. The board has a desire to make as many allowances as possible for the managing director. This will often create risks for the company associated with the replacement of a managing director.

Performance evaluation of the managing director

The board has a duty to evaluate the performance of the managing director. The board and the managing director should have a common understanding beforehand on the specific criteria and performance targets that will form the basis for the evaluation.

Annual evaluations are easier to conduct when both parties have agreed on the relevant performance measures. Best practise is to conduct the annual evaluation in the same time frame as the annual review of the remuneration package.

Equity

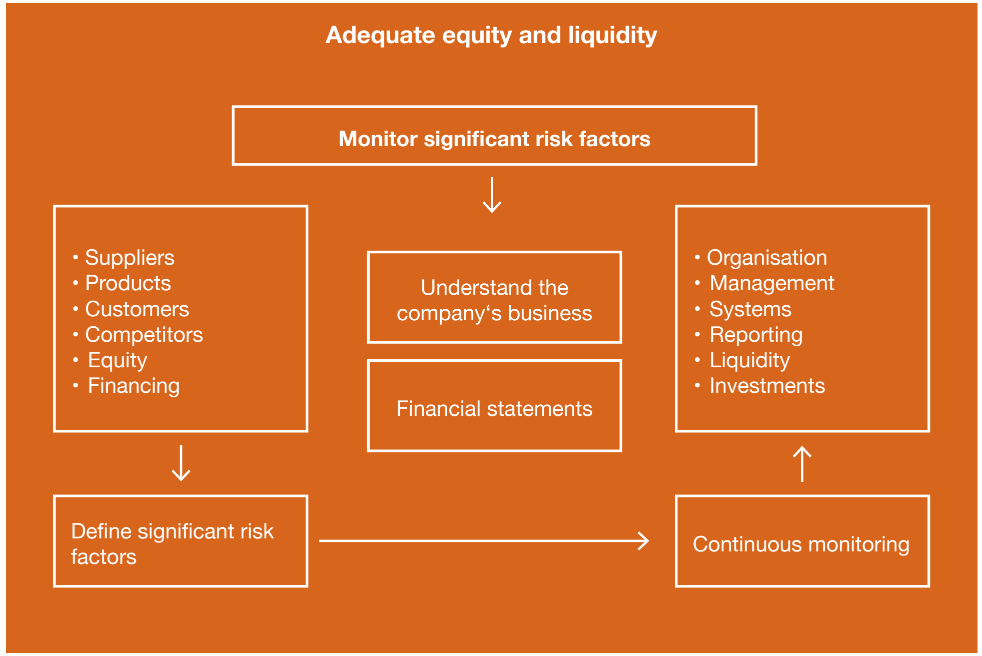
ASA-designated companies (which includes listed companies on regulated markets) are required to act if book value of equity is less than half of its registered share capital.

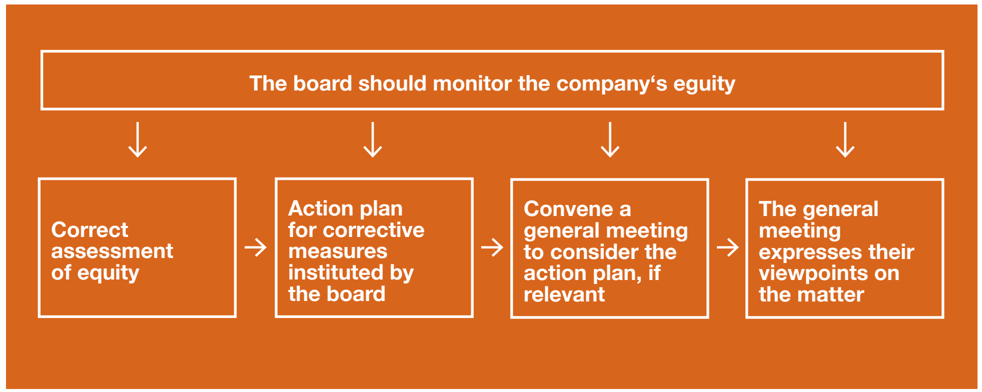
It is a legal requirement that a company shall have an appropriate retained earnings and liquidity position when evaluated relative to the overall business model and risks related to the company's operations. Norwegian Accounting Act section 3–4 stipulates that the board has an obligation and responsibility to maintain oversight over this legal requirement. This is illustrated on the next page.

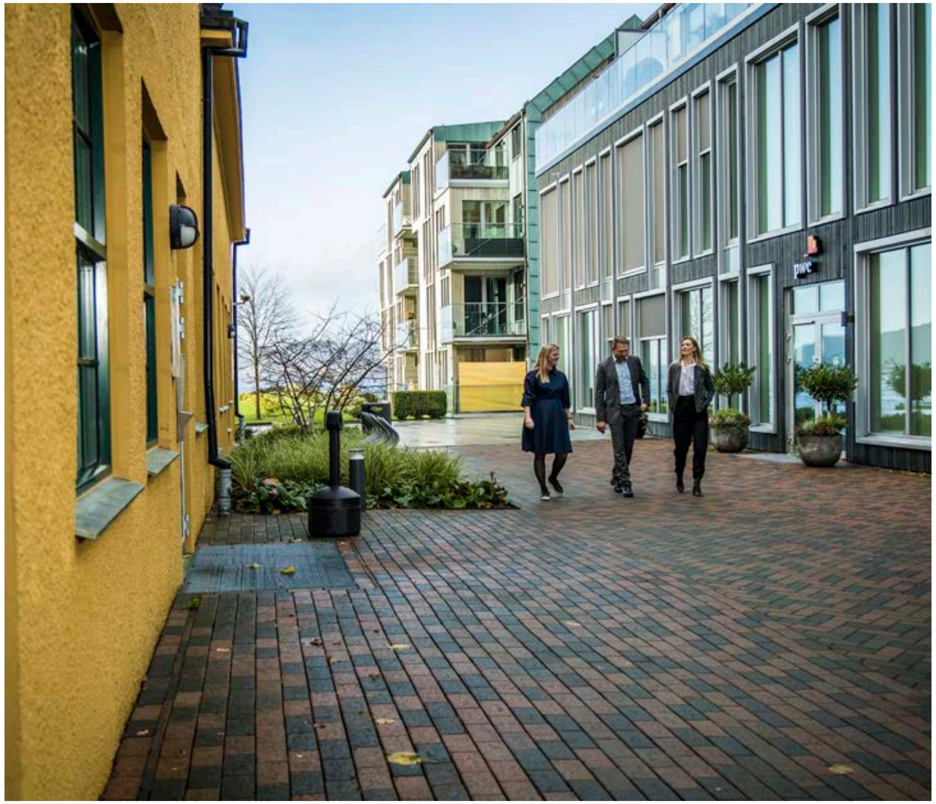
There is no definitive or general answer to the question of what risk profile and related equity level is acceptable for a specific company. According to the basis for conclusions in the exposure draft to the Limited Liability Companies Act, risks should be assessed within the context of the nature of the business. A high-risk business is subject to stricter equity requirements than a low-risk business. Many other factors and circumstances are also relevant.

Debt-to-equity ratio, growth projections, whether the business is meeting targeted goals, start-up operations, and seasonal fluctuations, to name a few examples. The reference to equity in section 3–5 of the Limited Liability Companies Act is not referring to the equity recognised in the balance sheet, but rather to the company's value adjusted equity.

Section 3–4 of the Limited Companies Act must be read in conjunction with section 3–5, which requires the board to act if equity is deemed to be inadequate.







When assessing equity, defined as the net of assets less liabilities, the board can take into account any off-balance sheet items, as well as remeasuring balance sheet items to a market value as opposed to a book value. This can include assets such as goodwill, intangible assets, and certain liabilities. Additionally, as part of the equity adequacy assessment, financing should be incorporated into the assessment: long-term, stable financing and subordinated loans can contribute to changing an otherwise low equity to an adequate and acceptable equity position.

If the company comes into a situation where the board has an obligation to act where assets need to be converted to cash, it is often the case that the company will not be able to realise full market values for the assets.

Sections 3–4 and 3–5 of the Limited Liability Companies Act must be considered in conjunction with the managing director's duty to keep the board updated on the company's operations, financial position and profit development pursuant to section 6–15. In our opinion, there are far too many instances where the board fails to take sections 3–4 and 3–5 seriously. If the board fails to meet its duty to act, a trustee could have a liability case against the board members in the event of a bankruptcy.

What if there is a liquidity crisis?

In the event of financial turmoil, access to liquidity funding may be critical for both the company's continued operations and market share price valuation. While the possibility of a liquidity crisis should not dissuade management from utilising debt financing, it does reinforce the importance of having a "plan B" to secure liquidity needs.

Sometimes management becomes familiar with the bankruptcy laws. Pursuant to section 61 of the Bankruptcy Act, a company becomes insolvent when it can no longer meet its liabilities as they fall due, unless its inability to pay is deemed as temporary. However, insolvency does not arise if the debtor's assets and income together are deemed to cover the liabilities in full, even if payment will be delayed because assets have to be sold first.

This insolvency rule is relevant in the assessment of whether the company may apply the going-concern assumption when preparing their financial statements. If the company lacks adequate liquidity and an asset sale will not cover all liabilities, the company is deemed to be insolvent. In such cases, the board has a duty to engage in debt renegotiation proceedings or declare bankruptcy.

This obligation of the board carries a possible prosecution penalty, as failure to fulfill this duty is subject to penalties, with contravention being punishable by imprisonment for up to two years if the person in question has been negligent and the asset recovery opportunities of the company have been reduced.

A liquidity crisis may influence the assessment of whether the financial statements can be issued in accordance with the going-concern assumption.

The going-concern assumption may only be applied if in the board's opinion it is likely that the company will continue to operate over the next 12 months after the balance sheet date. Before issuing the annual accounts, the board must conduct a thorough and well-documented assessment of whether or not the company has adequate equity and liquidity to support the going-concern assumption.

Vidar Lorentzen
Partner, Oslo

Board activities in connection with special measures

The limited liability companies act also specifies other tasks and responsibilities which are not discussed further here.

These include:

- Company incorporation
- Changes in capital
- Mergers/demergers
- Transformation
- Board meetings
  1. related-party transactions (assessments provided according to section 3–8 of the limited liability companies act)
  2. enquiries and investigations
- General assembly meetings
- Special agreements
- Insider trading

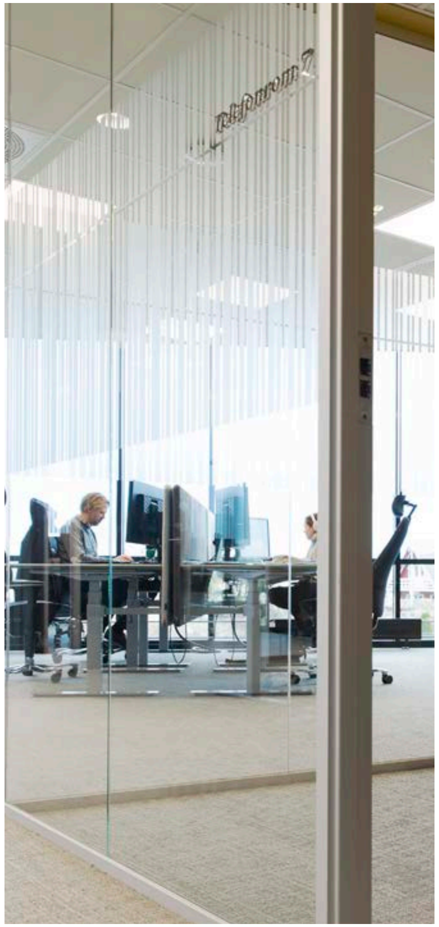
ownership and management oversight function. Transparency and compliance reporting is essential to established trust. For many companies, reputation, trust and indorsement from stakeholders is essential for sustained growth.

Magne Sem
Director, Oslo

Board committees – which ones are mandatory and which ones are optional?

The general meeting and the board of directors may delegate certain matters to sub-committees. Board committees help with proper consideration of identified issues, thereby reducing the board's overall workload. While the board may delegate tasks to board committees, it cannot delegate its responsibility. Some committees are required by law, such as the audit committee, whereas others are recommended in the Norwegian Code of Practice for Corporate Governance. PwC recommends that companies consider appointing board sub-committees even through the committee is not required by law. The Code of Practice explicitly recommends having both a nomination committee and a remuneration committee in addition to an audit committee. The board of directors should issue explicit instructions for the audit committee and the remuneration committee. The boards of financial institutions should adopt instructions for the risk committee and the remuneration committee. The nomination committee is not a board sub-committee. It is the shareholders at the general meeting who decide and adopt the detailed guidelines for the nomination committee.

In line with the Code of Practice, the board should inform shareholders of the use of board committees in the annual report, as well their mandates, composition and work processes.



Audit committee – a statutory requirement for many companies

The audit committee is a sub-committee of the board. Members of board sub-committees are selected by the board and are member of the board. The legal requirement is that the audit committee as a whole must possess the expertise the company requires, in view of the company's organisational structure and operations, to perform the audit committee's tasks.

The requirement to have an audit committee was introduced as a measure to improve companies' risk management and internal controls in the context of financial reporting, following several major international accounting scandals around the year 2000. Since 1 January 2021, the responsibilities and tasks of audit committees have been defined in greater detail as a result Norway's implementation of the EU Audit Regulations. See further details in the chapter on the work of audit committees.

Remuneration committee – recommended in the Code of Practice for Corporate Governance

The Code of Practice recommends that the board consider establishing a remuneration committee to support a thorough and independent consideration of matters related to executive remuneration. The tasks of the remuneration committee include preparing all matters concerning remuneration schemes for a decision by the full board membership. New rules on guidelines and reporting of pay and other executive remuneration have increased the relevance and importance of establishing a remuneration committee.

Nomination committee – recommended in the Code of Practice for Corporate Governance

According to the Code of Practice, companies operating in regulated markets should have a nomination committee. The nomination committee is not a board committee. Its chair and members should be elected by the general meeting, which should also approve its remuneration and applicable guidelines. The Code of Practice recommends that companies specify in their articles of association that they must have a nomination committee.

When preparing proposals for new board members, the nomination committee should contact shareholders, board members and the CEO. The composition of the nomination committee should ensure that the collective interests of the shareholders are safeguarded. The majority of the nomination committee members should be independent of the board and other executives. At least one member of the nomination committee should not be a member of the company's corporate assembly or board. Board members and executives should not be members of the nomination committee. The nomination committee should provide sufficient support and documentation of the rationale for the nomination of each proposed board candidate.

It is important that the nomination committee focuses on the overall expertise of the board. The framework conditions in which undertakings operate are increasing in complexity, making it necessary to ensure that the board as a whole has the skills needed for each company's specific operations. For example, legislation requires that the audit committee collectively possesses the expertise needed to perform its tasks. This also requires the board to have the same necessary knowledge, so that it can appoint a sub-committee that fulfils the expertise requirements.

Mandatory board committees for financial institutions

Remuneration committee

The Financial Institutions Regulations make remuneration committees mandatory for certain financial institutions. The remuneration committee is intended to function as a preparatory body for the board on matters concerning monitoring of the company's general remuneration programme and the setting of remuneration for the CEO and top executive management. The remuneration committee must include at least one employee representative. The committee meets at times designated by the committee chair, and at least once a year before the meeting when the entire board approves the executive remuneration for that year.

Risk committee

The Financial Institutions Act requires financial institutions to have a risk committee. Alternatively, financial institutions with less than NOK 20 billion in capital under management may appoint a joint audit and risk committee. Other companies which are not subject to the Financial Institutions Act may also choose to establish a corresponding committee.

Jone Bauge
Partner, Oslo

The board of directors as a cohesive unit

A cohesive unit with individual responsibility?

All companies are governed by a board of directors acting as a cohesive unit. Decisions are often consensus-based, with all board members supporting the board's final decision. The cohesive nature of the board of directors may seem to be in conflict with the personal nature of the appointment and the personal liability of the board members.

Board members can be held jointly and severally liable for the collective decisions of the board. Similarly, a failure to make or implement a decision can also result in liability. This dual collective and personal liability imposes a heavy responsibility on all board members to help ensure proper examination and consideration of all matters before the board. In practice, this often presents practical challenges linked to the preparation of board minutes, the recording of dissenting opinions, prioritising of agenda items and determining what constitutes adequate board documentation. Board members who find themselves constantly having to correct the understanding of other board members by questioning the board chair's leadership of meetings or asking that dissenting opinions be included in the board minutes should perhaps reconsider their board position. In practice, extended disagreements among board members often results in changes to board composition through either resignation or refusal of re-election by the individual board member.

Sub-committees and board liability

The cohesive decision-making nature of the board of directors also extends to the delegation of certain board responsibilities to sub-committees, such as a remuneration committee, risk committee or audit committee. Although a sub-committee considers matters initially, the board as whole still makes the final decision based on the sub-committee's work and advice to the board. Moreover, even board members who have not participated in the sub-committee's meetings may have personal liability. Special requirements apply to audit committees, for which new rules have recently been implemented.

Liability of group boards

All board members have personal liability, regardless of whether they are elected by shareholders or employees. Moreover, board members who are nominated by a parent company to serve on the board of a partially or wholly-owned subsidiary are treated the same as other board members as regards liability, even if their appointment occurs in the context of their employment by the group. Some individuals may find it difficult to sit on the boards of group companies – with personal liability – when the board chair and other board members are their superiors in other working relationships within the group.

The rules on unanimity and dissenting opinions

It can be helpful to note that while company law includes provisions on when a board is quorate, it contains few rules on majority voting or requirements for a qualified majority, even for very important decisions. In most cases, a simple majority – i.e. more than half of the votes – is all that is required, and most boards seek to achieve agreement to ensure the greatest possible alignment of different stakeholders represented on the board. However, difficulties will arise if there is longer term disagreement with board assessments and decisions regarding the future direction of the company. Over time, board members may find documenting disagreements insufficient from the perspective of reducing personal liability. Moreover, even if no personal liability results, individual members of boards who have faced criticism may find themselves being regarded as less electable to – or less suitable for – other board positions. Even though resignation may attract media attention and bring personal disadvantages, it is often preferable to being part of a board minority.

Although articles of association may contain additional voting rules (potentially supplemented by board instructions), generally few boards have specified the number of votes required for adoption of a valid resolution in their articles. Some articles of association give the board chair a double vote, but there are few examples of a qualified majority or consensus being required for certain decisions.

In addition, board instructions often regulate board work in detail, and can serve as a useful supporting document for the work of the board. In public limited liability companies, broader support is required for material changes to established circumstances, but this topic is not considered further in this publication.

How are board tasks and duties regulated?

Companies legislation	Articles of association	Board instructions

Duty of good faith of board members to safeguard company interests

Applicable legislation requires boards to safeguard the best interests of the company, and board members therefore have a duty of good faith in this regard. The company, as expressed through general meeting resolutions, is the board's client. Where shareholders are split into different factions with differing objectives for the company's development and targets, board members can find it difficult to identify the company's best interests and optimal targets because they represent different stakeholder groups. In some situations, board members may vote in accordance with their ownership interests, which may also be regulated by shareholder agreements between different stakeholders. Identifying the best interests for the company can be difficult when it comes to understanding the company's situation, and identifying potential conflicts of interest between employees, management, and the

Gry Møller Fyrileiv, *Director* and Liss Johansen Sandø, *Partner, both Trondheim*

Katarina Lindøen-Kjellnes
Partner, Bergen

shareholders. Board members often have to find a middle ground that unites these competing interests. Ultimately, however, decisions that prioritise either short-term gains or long-term objectives often involve difficult discussions and processes in the boardroom.

Conflicts of interest may be even more prominent in situations where a board includes employee representatives. However, employee representatives also have a duty to act in the company's best interests and personal liability for board decisions. Moreover, such board members are subject to the same confidentiality requirement as other board members. In many companies, this has resulted in a productive discussion of long-term choices at an early stage. Many companies and trade unions provide extensive training to board members who represent employees. Well-functioning boards often have a track record of successfully onboarding and providing ongoing training and skills development for all board members. The current broad reorientation occurring in many commercial sectors due to the green shift will necessitate significant skills development in many boardrooms in response to new laws, regulations and stakeholder expectations. An increased focus on the development of boardroom skills can also be an important counterbalance to the administration's role as day-to-day manager of the company, as many regulatory requirements have both strategic and operational consequences, in addition to the requirement to be incorporated into the board's reporting.

However, it is important to emphasise that board members cannot simply represent "their areas" or "their expertise". All board tasks are a personal responsibility, and it is crucial that necessary questions and unclear matters are discussed and resolved in the boardroom by the board as a whole and with the company's best interests in mind. Special interests on the part of individual shareholders, employees or other stakeholders must generally be subordinated to the duty of board members to safeguard the company's best interests.

Board composition

Who decides?

Board composition is generally decided by the shareholders through general meeting resolutions. Most companies also have an independent nomination committee that makes recommendations to the general meeting and thus has primary responsibility for ensuring that board composition reflects both the shareholder interests and the overall expertise requirements. Companies above a certain size have the additional requirement to ensure employee representation. Where companies have more than 200 employees, the board is normally elected by the corporate assembly.

Some companies subject to licensing requirements face the additional requirement that the board must be deemed suitable and that the board members collectively must possess sufficient expertise to exercise the board's role properly. This includes a requirement that the board must be sufficiently independent to safeguard the company's best interests when these conflict with shareholder and/or other interests. Accordingly, the decisions of a properly elected board may still be re-examined with reference to regulatory requirements.

How large should the board be?

The applicable legislation grants some flexibility in terms of the number of board members and board composition. Public limited liability companies must have at least three board members, or at least five board members if they have a corporate assembly. Experience shows that board size often increases further when employees are entitled to board representation.

Board size often reflects company size and complexity. Demand for particular expertise is governed by a company's developmental stage, i.e. start-ups and more mature, listed companies with global operations have differing needs. Board composition and size should always be balanced with the need for the board to function as a cohesive unit and effective decision-making body. Few Norwegian companies have more than ten board members.

What considerations have been taken into account when putting together a board?

Larger companies often try to cover multiple interests when composing a board of directors. Since 2006, public limited liability companies have been subject to the additional requirement that at least 40% of board members must be of each gender. This requirement has for the most part been directed at increasing the representation of women in the boardroom.

Boardrooms are becoming increasingly more professional in response to the increased complexity and the need for board involvement in management activities. Many individuals elected to the boards of larger companies also hold other board memberships. Increased professionalisation has also intensified the focus on whether boards are doing the work needed in each individual company and whether board members have sufficient capacity to accept their various appointments. While regulatory intervention in this area has been discussed, at present the issue primarily remains a challenge for nomination committees.

As board agendas continue to develop and demands for business sector participation in the green shift grows, expectations regarding boardroom expertise are also changing. Increased codification of complex regulatory requirements is leading to the election of more lawyers to ensure compliance. Stricter requirements for transparent reporting and communication with company stakeholders are generating similar demand for communications expertise. Likewise, a stronger focus on working conditions and the importance of safeguarding employees and their skills is boosting demand for experienced board members with “soft skills” in fields such as HR and other management expertise. Increased digitalisation is raising concerns about cyberattacks, the protection of personal data and other business risk factors. This is likely to increase demand for relevant technical skills in the boardroom going forward. However, economic and financial risk remain key requirements in terms of the board’s administrative and control functions, and future boards will necessarily also have to possess this type of expertise.

In addition to understanding purely regulatory requirements, boards often require insight into the individual market context of their company. Reputational risk frequently differs in Norway and internationally. The reputational perspective may differ from the viewpoint of the relevant industry, customers, the authorities or society at large. These types of insights and understanding are also having an increasing role in decisions related to board composition.

A factor which is commonly underestimated in the context of board composition, but which is increasingly discussed in specialist literature, is the personal characteristics needed to ensure successful cohesive functioning of the board. Board members represent themselves, but stronger demands for value-based management and culture-building as drivers of successful long-term company development mean that this aspect of board composition should also be emphasised. Boards have to balance the demands of different stakeholders – primarily shareholders and the administration – and in this context trust and well-founded processes will strengthen company management. Surveys show that personal trust in the boardroom is crucial for successful handling of crises and difficult situations, as well as company growth and development.

Board chair or board member, and board meetings

Board meetings

Boards of directors are generally required to consider matters at a physical in-person meeting, unless the board chair concludes that a matter can be dealt with in writing. It is good practice for written proceedings to be reserved for matters where there are no concerns about the approach, for example because the matter has been discussed verbally and is awaiting completion of formal documentation, or where it is otherwise deemed appropriate to use a written procedure. However, some restrictions apply, for example the statutory requirement that annual accounts and annual reports have to be considered at a physical in-person meeting.

During the Corona epidemic, digital meetings were adopted to a far greater extent than previously. In addition, temporary exemptions were granted from the requirement to hold in-person board meetings to approve annual reports and annual accounts. It seems likely that different companies have had differing experiences in this regard in terms of both costs and the quality of board work. Digital board meetings offer the potential advantage of time and cost savings. However, they cannot ensure the quality assurance inherent in boardroom discussions, or the personal dynamic of an in-person meeting. Digital meetings will be less of a burden for boards with an established collegial atmosphere of trust, but it seems unlikely that board meetings will remain wholly digital going forward. Rather, in-person meetings will probably remain the best means of building boardroom trust and ensuring dynamic discussions going forward.

The role of board chair

All board members know that board dynamics are a crucial factor in the handling of matters considered by the board. The role of board chair often sets the tone in the boardroom, not least in terms of prioritising matters, setting a timetable and sticking to the agenda. While these activities can be regarded as administrative tasks inherent in the role of board chair, they can also be decisive with respect to the discussions which take place and the decisions which are made. Although a

board chair has limited formal power, even when the articles of association give the chair a double vote, the position can carry significant practical authority.

In formal terms, the role of board chair requires the holder to “organise consideration of relevant matters falling within the purview of the board”. Some companies may have adopted more detailed regulatory provisions in board instructions. If performed correctly, the role of board chair can ensure progress, goal achievement, robust decision-making and a good collegial board culture.

If performed poorly, the role can reduce the board’s decision-making effectiveness and increase internal conflict on the board, with the administration or with shareholders.

The board chair often bears primary responsibility for dialogue with the CEO, and monitors the board’s annual work-plan, prioritisation of matters and – not least – implementation of key agenda items. Cooperation with the CEO and top management also includes a particular responsibility for coordinating necessary preparation of matters to be considered by the board and ensuring that board decisions are implemented. A further responsibility is to call and chair board meetings, including prioritisation of time and involvement.

Chairing board meetings may seem like a formality but can be important in practice as a means of ensuring that important matters are properly considered and, not least, that board members have sufficient time to ask questions, request additional documentation or clarification from the administration. Strict time management can ensure that meeting proceed efficiently, but may also be difficult to enforce, as different board members may not be comfortable with the approach. From a liability perspective, all board members should be ready to make decisions, and the board chair should be open, responsive to different viewpoints and aware of the board’s overall responsibility.

Although both the CEO and individual board members may demand that a matter be considered at a board meeting, a direct confrontation with the board chair is unlikely to be the wisest approach.

The role of board member

As reiterated several times above, it is important that individual board members are confident that the matters presented to the board are correct in all aspects of board liability. It is also important that every individual matter presented for a decision is properly documented and that an adequate decision-making basis is available. Personal liability means that appointees to the board of directors have a duty to act in the best interests of the board. Regardless of the factors which have influenced a board appointment, it is important that each board member takes responsibility for the cohesive functioning of the board, sets correct priorities and does not waste time on inconsequential matters.

Board members have access to a number of formal and informal tools which they can use in performing their role. Board members can request verbal board meetings, ask questions at meetings, record dissenting opinions in board minutes and/or resign from the board. In practice, however, board members can also request separate meetings with the administration to discuss topics they want to explore further, discuss matters informally with other board members or consult other experts. Some board members will have access to more resources than others, particularly if they represent corporate shareholders with a dedicated equities management team and related support system. Most boards in Norway operate on the basis of mutual trust in the board members’ expertise, robust boardroom discussions, constructive dialogue between the administration and shareholders in the boardroom, and the belief that as a cohesive and collegial body the board can leverage the experience and expertise of the board members to achieve good board decision-making.

Martin Henrik Alexandersen
Partner, Oslo

Accepting a board appointment

Being asked to accept a board appointment can be flattering, and is always exciting. It may also be challenging, and the responsibilities involved may entail financial and reputational risks, as well as potential criminal liability. However, such appointment entail significant responsibility, and it is therefore important to consider a number of factors thoroughly before accepting. If something goes wrong, it is not necessarily because the board members have done a poor job – the problem may be fundamental issues within the company. This chapter discusses factors which may be important to consider, and important questions to answer for yourself before accepting a board appointment.

It is vital that potential new board members familiarise themselves with the company and its situation, asking questions like "What is the company's current financial and business position?"; "What type of management structure is in place?" "What is the ownership structure?" and "Who is currently on the board?"

Certain types of companies (for example stock-listed companies and financial institutions) are subject to complex regulatory requirements. Potential amendment of such framework conditions represents a particular challenge, and requires close monitoring. While such appointments can often be exciting, educational and inspiring, the risks involved should also be carefully considered before accepting the board postition.

Financing and liquidity can present their own challenges. If liquidity or solvency become a significant issue, a board appointment may develop into something entirely different from what was expected, and may demand a much more extensive commitment than anticipated. The possibility of criminal penalties and liability in damages may also increase.

The identity of other candidates and board members is a highly relevant factor.

Personal circumstances, culture and attitudes can be important for successful board cooperation. Before accepting an appointment, it is important to meet key individuals within the business, the chairman of the board and, if relevant, a representative of the majority shareholder.

Asking the right questions is crucial. The checklist below is based on PwC's own new-customer due diligence procedures, and has been adapted for board candidates. Although not exhaustive, the list should help board candidates to conduct a thorough assessment before accepting the appointment.

Due Diligence

- What do I know about the owners, management and the board of directors?
- Are any of the persons involved defined as politically exposed persons?
- Does a Google search indicate caution?
- Does the company face reputational challenges, legal disputes or regulatory issues?
- If board members or managers have resigned recently, what are reasons for this?
- What is the board composition? (Expertise, is there a majority of "party representatives", their reputation, etc.)
- Who is the board chair, and what reputation does he/she have?
- What reputation does management have?
- Is management competent?
- What agreements have been entered into with management?
- If a group is involved, does the company structure appear appropriate? In other words, is the rationale behind a complex structure clear?
- Is the business model comprehensible, and does it appear realistic?
- Who are the most important customers?
- Who are the most important suppliers? Who are the most important partners (involved in a chain or other cooperation)?
- Have demergers, mergers, liquidations or other relevant transactions been registered in relation to the company in the Register of Business Enterprises (see brreg.no)?
- Have regulatory authorities inspected the company and made subsequent comments?
- Are any targets relating to financial data, acquired assets or commercial cooperation unrealistic?
- Does the company have assets, liabilities or non-balance sheet items that may entail particular risk?

Due Diligence

- Does the company have sufficient capital and long-term financing, and is liquidity satisfactory?
- Are there any special conditions related to the company's financing (covenants)?
- Are there any special conditions linked to leases and/or leasing agreements?
- Does company and accounting information give a professional impression?
- Does the company conduct a significant proportion of its operations in a geographical region where ethical standards are highly uncertain?
- Does the company have a reputable auditor?
- Are key audit issues and any audit exceptions and clarifications in the audit report comprehensible and manageable?
- Have risks been identified, and are these manageable?

Other questions

- What does the board's annual plan look like (number of meetings, length of meetings, topics/fixed agenda items)?
- Does the board of directors have sub-committees (audit, remuneration, risk, etc.), and who sits on these?
- Will a board candidate's personal expertise contribute positively to the board? What can the candidate contribute to the board, and what will his/her role be? Does the candidate have relevant expertise?
- Could conflicts of interest arise in connection with the board appointment?
- Is the remuneration on offer reasonable relative to the amount of work involved, and is it in line with/approved by a ordinary general meeting resolution on board remuneration?
- What is the risk of liability and damages claims if the company's finances fail? Does the company provide liability insurance? Is there a tradition that the ordinary general meeting approves liability limitations/exemptions for members of the company's board?

The above are some key points. The list is not necessarily exhaustive.

Hugo Marøy
Partner, Oslo

Liability of board members

Case law shows that most damages claims against Norwegian board members are brought by creditors after a company has failed to meet its liabilities. Damages claims therefore often arise in the aftermath of an economic downturn, albeit with a slight time lag.

Section 17–1 of the Private Limited Liability Companies Act/Public Limited Liability Companies Act contains general rules on liability in damages:
"The company, shareholders and other parties may claim damages from the managing director, a board member, a member of the corporate assembly, an investigator or a shareholder in respect of harm which such a party has intentionally or negligently caused to the person in question in the said capacity."

In the case of public limited liability companies, "independent experts" are also included among the persons who may be held liable.

Liability in damages is conditional on the fulfillment of four requirements:

- A basis of liability must exist. The basis of liability is an intentional or negligent and liability-inducing act. The basis of liability may comprise deliberate decisions, such as unlawful distributions or continuing operation without sufficient equity. Experience shows that, in practice, the basis of liability often focuses on omissions. It may be that the board has paid insufficient attention, that it has failed to undertake necessary investigations, that it has not intervened in management actions when it should have done so,

etc. The due care requirement must be evaluated in each individual case, but will – according to case law – be stricter when the company is in financial difficulties.
- An economic loss must exist. Such a loss is easy to document when a creditor has not received payment. The shareholders who have decided not to sell their shares, based on a polished set of annual accounts, will suffer a loss if the share price drop below the price for which they would have sold their shares if they had access to correct information.
- A causal link must exist between the basis of liability and the loss.
- A sufficiently close and foreseeable link must exist between the negligent or intentional act or omission and the loss which is the subject of the claim.

To whom is a damages claim addressed?

Most damages claims target the board chair. However, it should be noted that board members who fulfill the conditions for an award of damages have joint and several liability. A party that has suffered a loss may choose which board member to sue, provided that the board member is among the board members who – according to a concrete assessment – have acted negligently and may be held liable. Legal proceedings may be brought against the wealthiest board member, who will then have to initiate a recovery process against the other liable board members. The liability rules do not distinguish between board members elected by shareholders and employee representatives.

Whether specific conduct is negligent must be assessed individually for each board member. Nevertheless, there are limits on the scope of liability exemptions. Persons who have agreed to a board appointment have also accepted an obligation to fulfil the requirements of the appointment. In practice, board members are not exempted from liability in damages even if they:
- had insufficient time to fulfil the requirements of the appointment
- lacked insight into management, accounting rules, companies legislation or other relevant areas of expertise
- feel that their own influence on board decisions was limited
- received insufficient information, if they should have requested it
- delegated the relevant task to subordinates.

Liability in damages linked to organisation of the company

As explained in the chapter on the role and responsibilities of the board, the board bears overall responsibility for the proper organisation of the company and for adopting operational plans, budgets and guidelines. The board must ensure that the company is organised expediently, including that it has sufficient qualified personnel and an orderly organisational structure for daily operations. Further, the board must

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Partner, Bergen

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Partner, Stavanger

ensure that the company, accounts and asset management are subject to proper controls.

Breach of these fundamental obligations will often constitute grounds for liability in damages.

Liability in damages linked to business decisions

The board is also responsible for commercial decisions. In principle, the board can be held liable for choosing the wrong strategy, taking on excessive risk, choosing the wrong business partners, etc. The board may also be held liable if it does not try – in good faith – to ensure that the company meets its liabilities.

When it is clear that the company will be unable to meet its liabilities, or that the company is approaching a payment stoppage, the board may easily become independently liable to contractual partners.

However, the Supreme Court has stated that:
"The courts should normally be cautious about reviewing the exercise of commercial discretion and the industry knowledge on which the company's financial or operational targets are based."

Documentation is a keyword. The board minutes should document:

- assessments undertaken by the board
- the assumptions underpinning a decision
- the reasons for a decision
- any dissenting opinions among board members, and which board members expressed those views.

Damages claims by contractual partners

In recent years, the courts have heard a number of damages claims brought by contractual partners against company boards, as well as cases brought against companies and boards seeking performance or damages in contractual relationships. In newer case law, board members have been held liable for the company's deficient contractual performance when the company has gone bankrupt.

Liability in damages linked to legal offences

The rules on tax deductions are strict and absolute. Failure to transfer funds to a tax withholding account constitutes a legal offence, and can easily result in liability in damages.

Non-compliance with GDPR and money laundering rules represents an additional area of potential liability in damages. The same applies to situations where the company loses the ability to operate its business due to non-compliance with rules and legislation.

Key points in the Private Limited Liability Companies Act:

- **Objective liability in connection with capital increases**
  Share capital and share premiums reported as paid-in but not received by the company can be claimed regardless of whether the company has suffered a loss.

- **Dividend distributions and shareholder loans**
  The rules on dividend distributions have become more flexible and discretionary in recent years, in that the formal restrictions on distributions have been reduced. This gives the board considerable responsibility, and means that stricter requirements apply to the board's assessments of what constitutes a careful, proper dividend distribution. If the board has participated in an unlawful distribution, or if the board understood or should have understood that a distribution was unlawful, the board will be liable for repayment of the sum in question to the company.

  Given the possibility of potential damages claims against the board, it is important to note the importance of the board documenting its assessments related to distributions. It is also important that the board ensures that the company has reliable procedures in place for monitoring shareholder loans.

  The Private Limited Liability Companies Act specifies when a company may make loans to shareholders. Loans from private or public limited liability companies are subject to dividend taxation in accordance with the shareholder model.

- **Appropriate equity and liquidity?**
  The equity and liquidity of private and public limited liability companies must always be appropriate in view of the risk and scope of the company's activities. It is the actual market values of the assets and liabilities that are of relevance here, not the accounting values. If they are not, the board has a duty to act, and must deal with the matter immediately. The same duty arises in the case of public limited liability companies if it must be concluded that the company's equity has dropped below 50% of the share capital. The board must arrange an ordinary general meeting within a reasonable period of time, and must provide a statement on the company's financial position and propose measures to restore equity to an appropriate level. See also the chapter on the role and responsibilities of the board.

- **Agreements with the company's shareholders and their related parties, etc.**
  Such agreements are subject to special procedural and documentation requirements intended to ensure that agreements are binding on the company. If administrative procedures are not in accordance with such procedural and documentation requirements, a duty of restitution will be triggered, and liability in damages may arise.

Insurance

In our experience, companies are increasingly seeing the value of liability insurance for board members. This is largely due to a substantial rise in the number of both legal and non-legal disputes concerning the liability of board members. Every board and the individual board members should regularly evaluate whether, and if so what type of insurance for the board that may be appropriate in view of the risks and scope of the business. Insurance companies have developed a broad range of insurance products featuring different terms and conditions, and it can be worth engaging insurance experts when evaluating different insurance offers.

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Director, Oslo

Employee-elected board members

Employee co-determination rights are a central aspect of corporate democracy. The number of board members and observers depends on the size of the company's workforce and whether the company has a corporate assembly. Employee representatives are elected directly from among company staff, unlike other board members, who are elected by the company's shareholders. Employee-elected board members function as ordinary board members and will often be an important resource for the board thanks to their particular insight into the inner life of the company. However, some important differences do arise in relation to such board members due to their representative role.

1 When can employees demand seats on the board?

The right of employees to be represented on governing bodies depends on the type of company, but the right of representation usually corresponds to the rules applicable to private or public limited liability companies. Board representation is only relevant when a company does not have a corporate assembly – the other means of ensuring employee representation.

The Private Limited Liability Companies Act distinguishes between situations where employees *may demand* board representation and situations where a company has an *independent duty* to ensure that employees are represented. The decisive factor is whether the company has less than 200 employees or more than 200 employees.

- If the company has more than 30 employees, a majority of the employees may demand employee representation on the board. The employees have the right to elect one board member and one observer, as well as alternates for these posts, from among the employees.
- If the company has more than 50 employees, a majority of the employees may demand employee representation. The employees have the right to elect one-third of the board, and no less than two board members and alternates, from among the employees.
- If the company has more than 200 employees, the company must generally establish a corporate assembly. If it has been agreed that there will be no corporate assembly, the employees have the right to elect one board member and an alternate for this post, or two observers, in addition to the representation applicable to companies with more than 50 employees (i.e. in addition to one-third of the board and no less than two board members). Any agreement not to have a corporate assembly must be entered into with a majority of the employees or local trade unions representing such a majority.

The calculation shall encompass all company employees, including part-time employees, temporary employees, employees on sick leave and employees who have been temporarily laid off. Persons engaged temporarily to cover holiday absence among other staff are not included, however. Part-time employees who work less than 50% of a full-time equivalent must be counted as half an employee.

The Representation Regulations provide which employees are entitled to vote and are electable, and how the vote must be conducted. The Dispute Resolution Board processes applications for exceptions from the representation requirements in the regulations, as well as complaints concerning election to governing bodies.

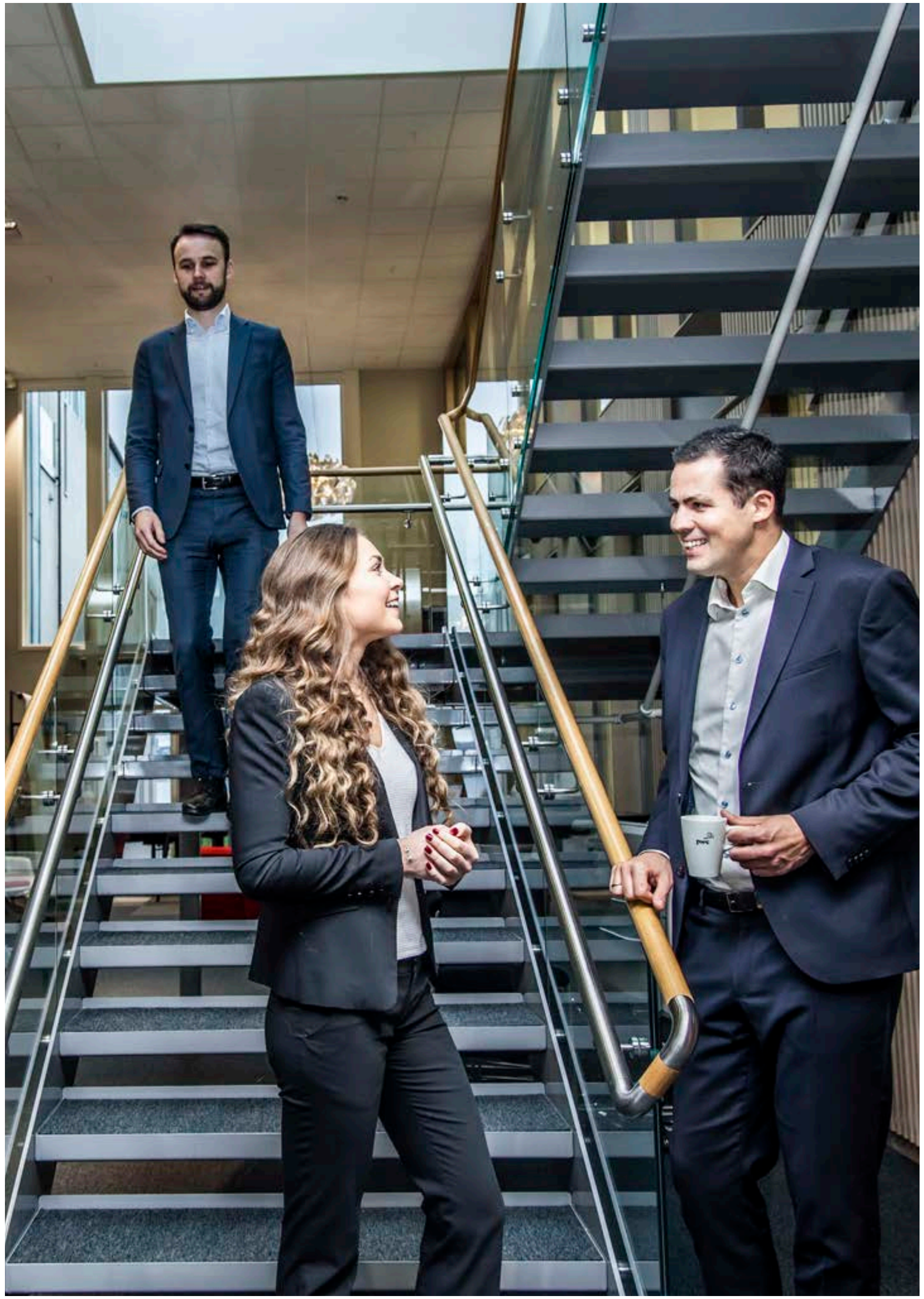
2 Are employees entitled to group-level representation?

Each company within a group is regarded as an independent entity, meaning that employees are generally not entitled to demand representation on the board of any parent company. However, a group wide arrangement may be agreed in writing. Such an agreement must be entered into between the group and a majority of its employees, or with one or more local trade unions representing such a majority. If the conditions for entering into such an agreement are not met, the Dispute Resolution Board may, on application, establish special arrangements for a group of companies.

3 The role and responsibilities of employee board representatives

Employee board representatives generally have the same rights and duties as shareholder-elected board members, and may be held liable on the same basis. Employee board representatives therefore have the same right to be consulted, voting rights and right of proposal. However, the following differences are important to note:

- The role of employee board representative is often referred to as *the most difficult board role*. This is because employee representatives not only have the same duty as other board members to safeguard the company's interests in good faith, but have also been elected by and from among the employees and therefore should also have a clear focus on matters affecting employees and on functioning as an advocate for employees when voting on matters during board meetings.
- Employee-elected board members cannot be "fired" by shareholders, and thus *retain their appointment as long as they have the trust of the employees*.
- Board instructions often include a *duty of confidentiality* which applies equally to employee board representatives. However, to allow an employee board representative to fulfill his or her function properly, it may sometimes be appropriate to waive the duty of confidentiality so that the representative can discuss a matter with an adviser, for example one or more general employee representatives or a lawyer.
- In this context, employee board representatives are obligated to ensure that they have *sufficient expertise* on matters to be considered by the board. The company should therefore provide employee board representatives with necessary expertise-development opportunities.
- Employee board representatives *should not simultaneously serve as general employee representatives*. Board members have access to confidential information which will make it difficult to serve as a general employee representative. Persons holding both roles may also experience conflicts between their duty as a board member to safeguard the company's interests and the role of general employee representative.
- Employee board representatives are subject to the same impartiality rules as shareholder-elected board members; see further the chapter on "Impartiality" in section 6. Board work will include matters with a potential or actual impact on the employment conditions of employee board representatives, such as reorganisation and downsizing processes.



Bjørn Lund
Partner, Oslo

The audit committees work

The rules on the role and responsibilities of audit committees were expanded with effect from 2021, and many boards have subsequently updated their audit committee mandates. This article provides additional information on how audit committees can arrange their work to comply with relevant statutory obligations.

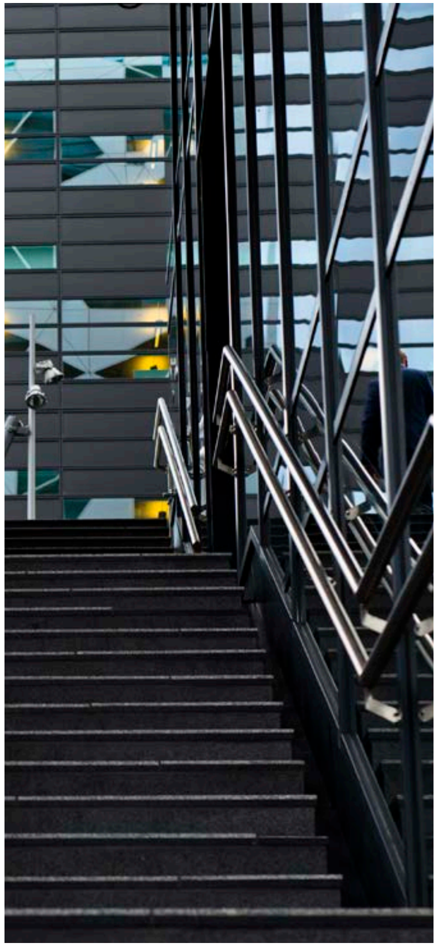
Purpose and tasks of the committee

The main tasks of the audit committee are to prepare the board's monitoring of audit work and auditor independence, as well as to advise the board on implementation of reporting procedures in the area of accounting and the content of reports. The audit committee has a purely administrative and advisory function. It is the full board of directors which has decision-making authority and ultimate responsibility for accounting reports.

Rules defining the tasks of audit committees are set out in section 6–43 of the Public Limited Liability Companies Act. Corresponding provisions can be found in section 8-20 of the Financial Institutions Act. Audit committee tasks are normally specified in audit committee instructions adopted by the board. The OECD Principles of Corporate Governance provide guidelines on good corporate governance practice and cover key topics relevant to audit committees.

How often and when should the audit committee meet?

The audit committee's responsibility to monitor financial reporting implies a minimum of four audit committee meetings per year if the company reports on a quarterly basis. Audit committees often hold at least one additional meeting to engage in-depth with other topics specified in the board-issued mandate. The number of audit committee meetings must be adjusted in view of the company's operations and complexity.



The committee's reports to the board should take the form of written minutes. Written minutes should be prepared for all audit committee meetings for submission to the board. The audit committee chair should give the board oral briefings on audit committee meetings. The audit committee prepares matters for consideration by the board, and should seek to meet a few days before the next board meeting.

What should the annual work plan for the audit committee include?

The range of audit committee tasks has been expanded. We recommend that the audit committee adopt an annual work plan that includes activities such as the following:

- Preparation of the board's consideration of annual and interim reports.
- Preparation of the board's ESEF-marked annual report (applicable to listed companies).
- Consider the company's application of materiality.
- Consider judgements and material events relevant to financial reporting.
- Consider and monitor the relevance of climate risk to financial reporting.
- Consider management's summary of changes in rules relevant to financial reporting.
- Consider management's internal control and risk management plan for financial reporting.
- Consider management's summary of risk management and internal controls related to financial reporting.
- Consider the auditor's plan for audit implementation.
- Consider summaries provided by the auditor.
- Consider any supplementary audit report issued in conjunction with the annual accounts.
- Approve additional services provided by the auditor (auditor independence).
- Monitor the size of the auditor's fees for additional services (auditor independence).
- Consider internal audit reports (if the company has an internal audit function).
- Evaluate the work of the audit committee (annually), including the mandate issued by the board, and identify any regulatory and responsibility-related changes.
- Consider the meeting plan and annual workplan for the audit committee.
- Prepare the board's consideration of the sustainability report, including internal controls designed to ensure that the sustainability report is reliable and of satisfactory quality.

Financial institutions are subject to the additional requirement that they must have a risk committee in place to prepare the board's monitoring and assessment of the company's risk, governance and control arrangements; see section 13–6(4) of the Financial Institutions Act and section 13–2 of the Financial Institutions Regulations. Financial institutions with less than NOK 20 billion in capital under management may have a joint audit and risk committee. The tasks of the risk committee include operational risk, while the responsibilities of the audit committee encompass risks linked to financial reporting.

Monitoring of the financial reporting process and internal controls.

The extensive responsibilities of the audit committee mean that the administration has to function as a secretariat and prepare the documentation the audit committee needs to conduct its assessments. Wherever possible, the audit committee should be able to rely on and refer to supporting documents provided by the administration in its reports to the board. The audit committee's statements should be recorded in minutes of the meeting.

The responsibilities of the audit committee require the audit committee to develop an in-depth understanding of internal controls and risk management related to financial reporting. This can be ensured by requiring the administration to submit an annual plan to the audit committee showing how financial reporting-related risk management and internal controls foster the integrity of the financial reporting process. Annual plans of this kind should also cover the company's use of materiality assessments.

The committee's role in sustainability reporting

The audit committee's reporting responsibilities in section 6–43 of the Public Limited Liability Companies Act (and section 8–19 of the Financial Institutions Act) are limited to financial reporting. At present, the act does not impose special tasks on the audit committee linked to sustainability reporting. However, sustainability is integrated into the board's annual reporting through the requirements in section 3–3, ninth paragraph, of the Accounting Act. Large undertakings are required to prepare a social responsibility statement in accordance with the requirements in section 3–3c of the Accounting Act. The EU's draft Corporate Sustainability Reporting Directive (CSRD) introduces more detailed reporting requirements which are already due to take effect in the EU for the 2023 financial year. The audit committee tasks in section 6–43 of the Public Limited Liability Companies Act (and section 8–19 of the Financial Institutions Act) will be expanded to include sustainability reporting and the work done by auditors to certify sustainability reporting. This suggests that audit committees should already include sustainability reporting on their agendas now.

Why is it important for the audit committee to be familiar with materiality assessments?

Companies' use of materiality assessments has been incorporated into questionnaires and thematic reports issued by Finanstilsynet (the Financial Supervisory Authority of Norway). Finanstilsynet has thereby communicated an expectation that audit committees should have procedures in place for monitoring and documenting companies' materiality assessments. Materiality assessments must be put on audit committee agendas well before financial and non-financial information is reported, to ensure proper assessment of both what information is relevant to primary users and what methodology the company should use if qualitative and quantitative materiality assessments become relevant during the concluding phase of report-preparation.

How audit committees can organise monitoring of the external auditor

The audit committee is required to brief the full board on the results of statutory audits, explain how audits foster the integrity of accounting reports and detail the audit committee's own role in the process. The audit committee shall also assess and monitor the conduct of audits and auditor independence.

Audit committees thus have extensive obligations in the area of auditor-monitoring, and auditors must enable audit committees to meet these obligations effectively.

Wherever possible, auditors should structure their reports to audit committees in such a way that the reports provide the committees with the information they need to meet their monitoring obligations. We urge audit committees and auditors to prepare a joint plan that safeguards the individual circumstances of the audited party optimally.

Auditors are required to submit an annual supplementary report to the audit committee. The first round of such reports will be made in 2022. The supplementary report must be issued no later than the date of the audit report. Overall, the content requirements applicable to supplementary reports represent a summary of key aspects of a completed audit, including the auditor's conclusions as set out in the audit report. The content requirements cover many of the same matters as the audit committee is required to monitor vis-à-vis the auditor. Thorough discussion by the audit committee – both with and without the participation of the auditor – of matters covered in the report will help the audit committee to monitor the auditor's work. The audit committee is also specifically required to monitor the conduct of audits by reference to matters identified by Finanstilsynet in any supervision reports sent to the auditor. Supervision reports relating to periodic and thematic inspections will be published on Finanstilsynet's website. Such matters are not a mandatory part of the supplementary report. To ensure that the audit committee can fulfil its monitoring responsibility effectively, the auditor may be asked for a statement on matters identified by Finanstilsynet in reports to the auditor.

Assessment and monitoring of auditor independence

Audit committees are required to assess and monitor how auditors apply the rules limiting the scope and content of auditor advisory services to companies. Monitoring must include approval of all supplementary services and verification that fees are not conditional and that the total fees charged for supplementary services are below statutory limits; see Articles 5 and 6 of the Audit Regulation.

Audit committees may authorise the administration to approve supplementary auditor services. To fulfil their monitoring obligations, audit committees must make advisory services and auditor independence a regular agenda item at committee meetings. It is advisable to discuss the question of independence directly with the company's auditor.

Thorough planning and well-prepared documentation raise the quality of audit committee work

The audit committee and the administration should agree a realistic and appropriate timetable for the despatch of meeting documents to the committee. Proper consideration of agenda items depends on the committee having sufficient time to prepare for each individual meeting. Large amounts of supporting documentation can represent a challenge for audit committee members. It can therefore be helpful to prepare thorough summaries setting out the background to relevant agenda items, management's assessment and conclusion, measures to be implemented and a timetable. In the case of regularly updated documents, new content should be highlighted. Details can be included in an annex, rather than in main documents.

Fredrik Gabrielsen
Partner, Bergen

The work of the remuneration committee

Remuneration committees play an important role in the monitoring of executives. New rules on guidelines and the reporting of pay and other executive remuneration for listed companies necessitate reconsideration of the tasks and responsibilities of the remuneration committee. If a company does not already have a remuneration committee, consideration should be given to whether one should be established. Since the board has a collective responsibility for all board decisions, the remuneration committee must be regarded as an advisory body, with final decisions being made by the board.

This chapter explains how remuneration committees can organise their work to ensure that board responsibilities are met and tasks are performed in the best manner possible.

Background and framework conditions

The Public Limited Liability Companies Act does not contain provisions on remuneration committees. On the other hand, many companies in the finance sector are required to have a remuneration committee. Such committees are intended to serve as preparatory bodies for the board on matters concerning the monitoring of a company's general remuneration programmes and the remuneration of the CEO and top executives.

The remuneration committee is a sub-committee composed of board members, and functions as a preparatory body for the board of directors in respect of matters concerning executive remuneration. The Norwegian Code of Practice for Corporate Governance recommends that the board of directors consider using the remuneration committee to help ensure thorough and independent consideration of matters relating to executive remuneration. The committee should comprise board

members who are independent of top management. The legislation does not assign responsibility for executive remuneration to the audit committee or risk committee, regardless of whether the company is required to have such committees or establishes them voluntarily. In companies without a remuneration committee, matters concerning executive remuneration will therefore have to be dealt with by the board directly.

The new report on pay and other executive remuneration must be reviewed by the company's auditor. The audit committee is the primary communication channel between the board and the auditor. It may therefore be sensible for a company without a remuneration committee to make the audit committee responsible for preparing matters for consideration by the board and conducting the dialogue with the auditor regarding the report on pay and other executive remuneration.

Purpose and tasks of the committee

The Public Limited Liability Companies Act contains new requirements on guidelines and reporting on executive remuneration; additional details are in the chapter *Executive remuneration guidelines and reporting*. The requirements of the Public Limited Liability Companies Act logically fall within the responsibility of the remuneration committee. The committee's tasks therefore naturally include preparing the following for the board's consideration:

- Guidelines on the setting of pay and other executive remuneration for top executives in listed companies
- Reports on pay and other executive remuneration for listed companies

Some remuneration committees are also tasked with preparing the board's consideration of management development plans, management evaluations and successor planning for managers, as well as diversity. It is also logical for the remuneration committee to have an active role in monitoring compliance with the company's guidelines and policies for executives. Issues relating to executive remuneration may include, for example, the need for legal or other external assistance. The committee should therefore be authorised to consult with external parties when necessary.

As a sub-committee of the board, the remuneration committee should have their responsibilities and working instructions established and approved by the board. This document should reflect the requirements and recommendations found in the laws, regulations and recommendations, and should describe the specific tasks falling within the committee's area of authority. Minutes should be kept of committee meetings, and it is of assistance to the committed when the company's HR department can act as the committee's secretariat, normally in the form of the HR director. The remuneration committee should also be authorised to draw on other administrative resources as needed.

The committee should evaluate its work at regular intervals, considering changes to regulatory frameworks and areas of responsibility, their board-issued mandate and the practical organisation of committee meetings.

How big should the committee be?

Two or three people often represents a sensible committee size, and the committee should meet at least twice a year. This will normally be sufficient to safeguard shareholder interests related to executive remuneration, and ensures continuity of the committee's work over time.

Committee composition

The board chair is often also the chair of the remuneration committee. It is recommended that the remuneration committee include a shareholder-elected board member to ensure that the executive remuneration arrangements are designed to not be in conflict with shareholder interests. To avoid conflicts of interest, the members of the remuneration committee should be independent of the company's' executives.

Eivind Nilsen
Partner, Oslo

Risk management committee

All companies assume some level of risk as part of their operations. It is important for the board to understand how risk affects value-generation and profits, and to adopt an active approach to the company's risk profile and risk tolerance.

In recent years, financial performance assessments for large companies – particularly in the financial industry – have shifted focus from simple bottom-line results and return on equity to risk-adjusted performance evaluation. Both the board and shareholders are focused on value creation relative to the risk a company has taken on in order to achieve its results. A risk committee can help the board improve its understanding of the most important risks affecting the company, and how these are managed. This chapter provides a general overview of best practice for risk committees.

Listed companies which are not financial institutions are not required to have a risk committee, but are free to delegate their monitoring of risk management to a dedicated committee composed of board members, or in the form of an expanded audit committee mandate. If the board decides not to appoint a risk committee, it may be appropriate to consider whether the full board can carry out the tasks which would otherwise be assigned to a risk committee. Such an assessment is a helpful means of focusing the full board's attention on whether it is adequately monitoring the company's overall risks and governance and control mechanisms.

The advantage of having a risk committee is that some board members gain the opportunity to engage in-depth with the company's risk management activities, enabling them to help the board as whole to develop a better decision-making basis in matters concerning the company's risk management. Conversely, some boards may conclude that important matters concerning risk management by the company should be fully examined by the entire board without preceding review by a risk committee.

Financial institutions are required to have a risk committee. The discussion below adopts the requirements applicable to financial institutions as its starting point, as these may also be of interest to other types of companies as an element in overall risk management. Established practices regarding the responsibilities and tasks of risk committees in financial institutions are based on international rules and international best practice, and therefore provide a good starting point for the formation of risk committees by other types of company.

Organization of the risk management committee

A risk management committee should function as the board's advisory and preparatory body, and should give the board an overview of the company's overall system of risk, governance and control mechanisms. To ensure the independence of the committee, its members may only include board members who are not involved in the day-to-day management of the company. Members of the risk management committee must have sufficient knowledge and expertise to understand and monitor the company's risk strategy and risk appetite.

The establishment of a dedicated risk management committee also requires the board to implement clear delimitation of the committee's mandate relative to the tasks of the audit committee and the remuneration committee. It is important to avoid work duplication, particularly in areas where responsibilities may overlap, such as internal auditing. A further example of potentially overlaps between the responsibilities of board committees is remuneration schemes. A risk management committee should consider the company's remuneration schemes and evaluate whether these promote responsible risk management and do not incentivise undesirably high risk-taking. The remuneration committee must always remain a body that evaluates remuneration schemes as a whole, develops guidelines on and agenda items concerning executive remuneration, and conducts ongoing assessments and monitoring of company policies in this area.

Risk management committee tasks

The purpose of establishing a risk management committee is to increase the focus on risk management within the company. According, the purpose of the risk management committee is to improve the board's assessments of the company's risk culture, establish guidelines and policies for the company's level of risk appetite and monitor management's implementation of and compliance with these. The risk management committee must also help ensure clear links between general strategies, risk management and capital planning.

The risk management committee is a preparatory body, while the board is authorised to make decisions and bears full responsibility for the tasks performed by the risk management committee. While audit committees largely focus on risk and internal controls in the context of financial reporting, as well as dialogue with the external auditor, the risk management committee has the following tasks:

- Improve the board's assessments of risk and total capital requirements.
- Conduct a regular dialogue with the risk control function "risikokontrollfunksjonen" and receive relevant reports from the company's control functions.
- Review the company's risk policies at least annually.
- Monitor compliance with the company's risk policies.
- Assess whether the company's product prices are in line with the business model and risk strategy.
- Areas which the risk management committee should evaluate include:
- The company's frameworks for risk tolerance, risk appetite and risk management.
- The content, format and frequency of risk reporting by the administration.
- The company's self-assessment of risks and capital requirements (ICAAP, ORSA).
- The organisation and follow-up of the company's risk management function, with respect to expertise, resources and regulatory requirements.
- The design of incentive schemes, with respect to risk, capital, liquidity and earnings.
- The company's internal audit function, including internal audit plans, priorities and reporting.

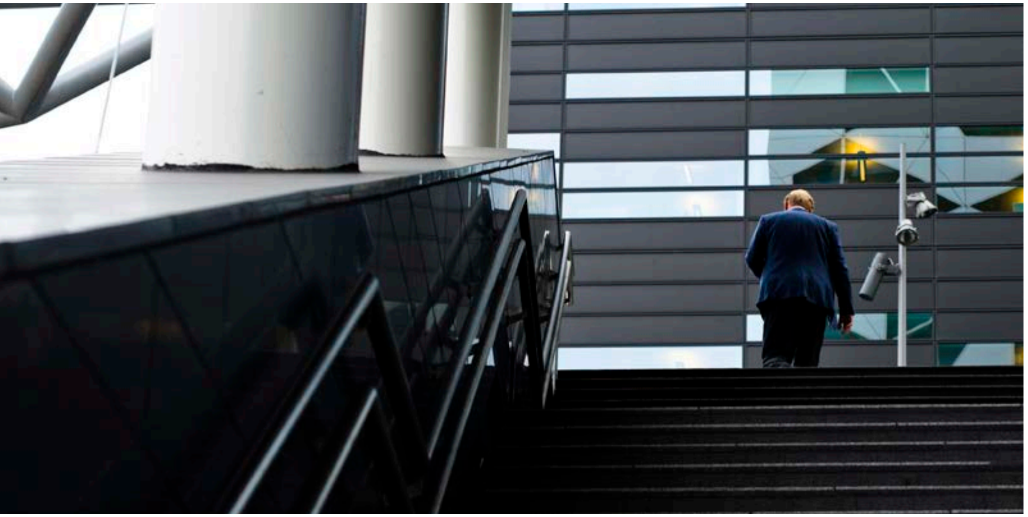
The risk management committee's meeting schedule should be aligned with the dates on which financial institutions have to submit their capital plans, and with reviews, updates and revisions of the company's risk appetite, risk tolerance and related risk policies.

Thomas Fraurud
Partner, Oslo

The board's role in strategy development

Developing strategies and deciding the long-term direction of a company's development and value creation are among the most important board tasks.As well as generating value for shareholders, companies must decide how the interests of other stakeholders should be considered when setting operational priorities. The board's role in strategy development is to define frameworks and set requirements for the strategy development process. By doing so, the board can ensure that the administration adopts a strategic process that is tailored to the company and its situation/environment. Monitoring of action plans and milestones allows the board to correct and challenge the strategy during the strategy period.

The board must invest time in evaluating the strategy. All board members have an objective responsibility to ensure that the board adopts a working method that helps ensure the most efficient and thorough consideration possible of matters of strategic importance to the company. In most companies, the board holds an annual strategy meeting at which it considers various recommendations by the administration. In recent years, however, there has been a trend towards a strategy development process whereby the board includes different strategic topics on its agenda throughout the year. This can help the board to get more involved in major strategic discussions related to the company. High volatility and rapid changes in the company's operating environment increase the importance of effective, regular strategic discussions between the board and the administration. Moreover, the board must be involved in ensuring that the organisation is prepared to deliver on adopted strategic targets.



As part of the strategy development process, the board should ask itself a number of fundamental questions, including:

- Does the board know what external factors will affect the industry and the company going forward?
- Does the board prepare robust assessments of the company's short-, medium- and long-term directional choices?
- Does the strategy support sufficient value creation?
- Does the strategy development process help identify and particularise future competitiveness? Is the board ready to make concrete choices, including decisions not to engage in certain activities?
- Is the strategy development process supporting the development and evaluation of new ideas? Does the board have a sensible growth strategy?
- Is the board correctly positioned for restructuring necessitated by technological advances and new objectives and opportunities?
- Does management invest sufficiently in strategic assessments, or is management's time consumed by day-to-day operations and "fire-fighting"?
- Does the strategy development process help the board to formulate clear targets?
- Is sufficient use being made of board expertise in the strategy development process?
- Is the strategy development process suitable for generating energy and motivation among the company's management and employees?
- Is the strategy plan being followed up with clear measures to implement the strategy in a satisfactory manner?

If the reply to one or more of these questions is no, the board should help to reinforce/improve the strategy development process.

The steps in a generic strategy development process

There are innumerable variations on how strategy work can be done. However, experience indicates that a strategy development process normally comprises six phases. The content of and role to be played by the board in each phase are described below

Define the strategy development process → Investigate strategic opportunities → Make strategic choices → Prepare action plans → Implement the strategy → Learn and correct →

1 Define the strategy development process

The board's role:
It is important that the board initiates a discussion with the administration on how the strategy development process can best be implemented. The board should establish a framework and requirements for the strategy development process, for example:

- Scope – is this a minor revision or a new strategy?
- Time horizon – one year, two years or several years?
- Deadlines and delivery requirements
- How will the actual strategy development process be implemented?

The board should ask the administration the following questions:

- What is the outlook for the industry, and what are the company's main challenges and opportunities?
- What is the competition situation like? What are competitors doing and is the company "on track" with respect to the technological shift?
- Is the volume of new knowledge such that employees outside of senior and middle management need to be involved? Or external parties?
- How can the board develop a good decision-making basis in strategic areas?

2 Investigate strategic opportunities

The board's role:
The board does not normally play an active role in procuring supporting documentation for strategic decisions. The board should ensure that strategic diagnoses (external and internal analyses) are of satisfactory quality.

The board should ask the administration the following questions:

- How is the competitive situation expected to develop going forward?
- What are the key drivers of current and future competitiveness?
- What different future scenarios are likely, and how should the company respond to them?
- What new ideas have been analysed and evaluated?
- What competitive advantages does the company have?
- Does the company have the right human capital?

3 Make strategic choices and formulate strategic objectives

The board's role:
The board's primary task in the context of strategy development is to make decisions on behalf of the shareholders regarding implementation of a strategy that increases the company's value. The strategic objectives must be clear and realistic. The normal working method during this phase is that the administration provides the board with assessments, including of the main features of the strategy. Often, working meetings are held with the board at which proposed strategies are discussed and challenged. In recent years, it has become increasingly common for the administration to give the board more regular briefings on key strategic issues throughout the year. This is a good opportunity for the board and the administration to engage in regular, open discussion of strategic topics, and allows the board to involve itself more closely in strategy development.

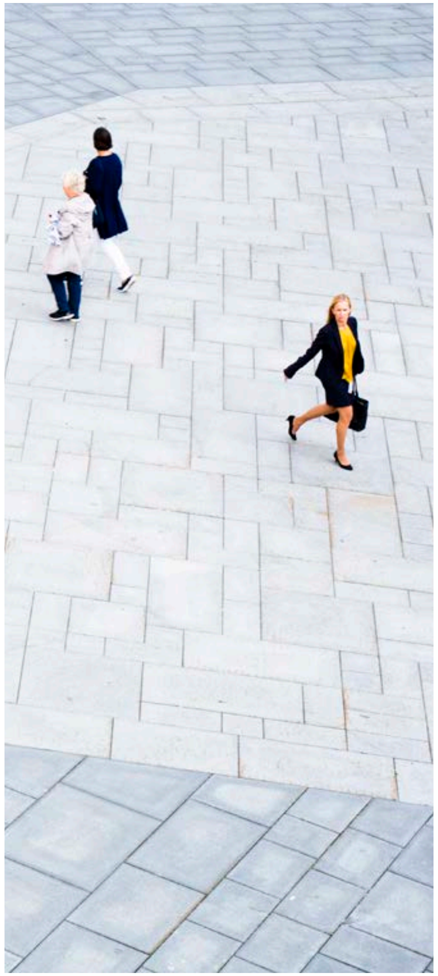
The board should ask the administration the following questions:

- What should the company's strategic targets be?
- Are strategic decisions in line with the company's vision and values?
- Does the company have sufficient management capacity and expertise to implement the strategy?
- What risks are related to the strategy, and how can these be minimised?
- Does the company have sufficient financing and liquidity?
- What challenges have to be overcome in order to implement the strategy?
- How should the strategy be communicated within the organisation?
- How will competitors and other external stakeholders respond to the strategy?

The board should adopt requirements specifying how the strategy is to be particularised and implemented.

4 Prepare action plans

The board's role:
The board's task is to ensure progress and facilitate future follow-up of measures proposed by the administration.



The board should ask the administration the following questions:

- What measures are required to adopt and implement the strategy?
- What strategic projects should be prioritised?
- What should be omitted?
- How should performance and progress be reported to the board, and how should the board follow up on such reports? What key performance indicators (KPIs) need to be measured to evaluate progress?
- Does the company have an optimal governance model for delivering on the strategy?

It is important that persons who are to implement action plans for implementing a strategy take ownership of them, and that the strategy is recorded in writing. It must be clearly specified who is responsible for what, as well as the deadline for completion. It is also important that strategy plans are flexible and can incorporate new information and lessons learned along the way. It must therefore be possible to revise and amend action plans as needed.

5 Implement the strategy

The board's role:
The board's main tasks during this phase are to ensure that progress on adopted plans/actions is evaluated, that the company is on track and that there is room for any necessary course adjustments. The board also has a responsibility to ensure that management has sufficient resources to implement adopted strategies.

The board should ask the administration the following questions:

- Has the company achieved, or is it on track to achieve, adopted targets?
- How can the company derive maximum benefit from achieved and planned results?
- Are there external changes, for example in opportunities or threats, that may necessitate revision of the strategy?
- Does the board understand the consequences of potential changes in internal and external framework conditions?
- What does the company need to become even more innovative?
- Are strategic projects pulling the company in the same direction?
- Does the company have necessary expertise and capacity?

6 Learn and correct

The board's role:
In this phase, the board's primary role is to evaluate implemented measures, assess whether a change of course is needed and identify strategic areas of improvement. Improvement points must then be implemented and reinforced within the company.

The board should ask the administration the following questions:

- Has the board really understood the key drivers of the company value? Is there a sufficient focus on these drivers in strategies and action plans?
- Does the board have adequate measurement and incentive systems to understand where the company is and to reinforce the desired direction and conduct?
- Is the board learning, and is it able to identify and preserve gained knowledge? Is the board good enough at making available and applying knowledge and lessons learned within the company?

A critical factor in succeeding with strategy implementation is ensuring ownership of targets, vision, values and action plans among employees, so that everyone is pulling in the same direction. The board should monitor that the administration is involving employees at the right level and at the right time and communicating the new strategy effectively.

PwC recommends the following in connection with strategy development:

- Look for opportunities to change the rules of the game in the industry before someone else does.
- Do not wait for a strategy development process to generate major revelations, but instead ensure that the process is fact-based and implemented in such a way that it generates a continuous stream of new ideas and evaluation of these.
- In many companies, strategy development is increasingly a continuous process. Strategies should not be seen as "the big plan" which must be perfectly formulated, since that plan can never be achieved. Strategies are just as much about regular re-evaluation of direction, in-depth consideration of individual topics and testing of new ideas, and then re-evaluating again.
- Ensure that the board plays an active role in formulating a strategy, ensuring support within the organisation and implementation.
- Adopt a deliberate focus on social responsibility and sustainability. Focusing on climate and the environment is business-critical.
- Have a clear opinion on where the company is heading, and adopt clear strategic targets for the company's achievements.
- In an increasingly volatile global situation, it is important to be able to change course. The rapid pace of change requires companies to be more flexible.
- Digitalisation and disruption risk cannot be ignored. New players may threaten the industry and the business, and not making changes may quickly prove to have been a critical decision.
- The primary objective is always to identify strategies for increasing company value. The company's strategy must be relevant and clear, and the board must make concrete decisions. Strategy development also involves deciding what a company should not do.