THE PRIVATE EQUITY REVIEW

SEVENTH EDITION

Editor
Stephen L Ritchie

THE LAWREVIEWS

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PREFACE

The seventh edition of *The Private Equity Review* follows a turbulent and at times nerve-wracking 2017. It was also a year in which private equity demonstrated its strength as an asset class in spite – perhaps because – of that turbulence. Deal activity and fundraising were strong in almost every major market despite fierce competition from public strategic buyers and strong returns in other asset classes, demonstrating private equity's ability to adapt quickly to changing conditions to find profitable investment opportunities. As a result, we expect private equity will continue to play an important role in global financial markets, not only in North America and Western Europe, but also in developing and emerging markets in Asia, South America, the Middle East and Africa. In addition, we expect the trend of incumbent private equity firms and new players expanding into new and less-established geographical markets to continue, although recent protectionist trends remain a risk factor.

While no one can predict how 2018 will unfold, one can confidently say that private equity will continue to play an important role in the global economy, and will likely seek to expand its reach and influence. It remains to be seen how local markets and policymakers respond.

Private equity professionals need – now more than ever – guidance from local practitioners about how to raise money and close deals in multiple jurisdictions. This review has been prepared with this need in mind. It contains contributions from leading private equity practitioners in 27 different countries, with observations and advice on private equity deal-making and fundraising in their respective jurisdictions.

As private equity has grown, it has also faced increasing regulatory scrutiny throughout the world. Adding to this complexity, regulation of private equity is not uniform from country to country. As a result, the following chapters also include a brief discussion of these various regulatory regimes.

I want to thank everyone who contributed their time and labour to making this seventh edition of *The Private Equity Review* possible. Each of them is a leader in his or her respective market, so I appreciate that they have used their valuable and scarce time to share their expertise.

Stephen L Ritchie
Kirkland & Ellis LLP
Chicago, Illinois
March 2018

Part II

Investing

Chapter 13

NORWAY

Peter Hammerich and Markus Heistad[1]

I OVERVIEW

i Deal activity

The Norwegian private equity sector is, much like the Norwegian economy, directly or indirectly exposed to the oil and gas extraction and related industries (products and services) through its investments. The Norwegian economy remained, in part due to the income derived from oil and gas extraction, largely unaffected by the consequences of the financial crisis of 2007–2008 and the subsequent sovereign debt issues in Europe. However, the substantial reduction in the price of oil starting in 2014 (from US$115 per barrel in June 2014 to approximately US$30 at the start of 2016, since levelling out at around half of its 2014 high)[2] has made itself felt in the Norwegian 'real' economy, with severely reduced investment activity, lay-offs of personnel and debt restructuring in the oil-related sectors which have only recently shown signs of abating and reversal.

These developments in the Norwegian economy affect private equity investors, as they do other investors. The most direct consequence of the reduction in oil prices, has been that sellers have shown themselves hesitant to sell based on the reduced oil prices. Correspondingly, buyers have been generally unwilling to buy based on the older higher prices. The perceptible reduction in deals towards the end of 2014 carried on into 2015 and 2016. How and to what extent the reduction in oil prices will affect the private equity sector in the longer term, remains to be seen. This will of course depend upon the future oil prices, other economic factors, and whether the relatively lower oil price reduction will remain.

After an increase from 6.5 billion kroner in 2014,[3] to 8.9 billion kroner in 2015, there was a sharp drop in total investments in 2016, to 1.3 billion kroner by funds advised by Norwegian managers.[4] There were no public-to-private deals (of any significance) in 2016.[5]

The number of private equity exits continued its downward trend from 45 in 2015 (and 49 in 2014) to 35 in 2016.[6] No exits were made in the form of an initial public offering (IPO) in 2016 or 2017.[7] There has been a substantial and lasting decline in the number of exits being made in the form of an IPO, mirroring the relative decline of the Oslo Stock

1 Peter Hammerich is a partner and Markus Heistad is a senior lawyer at BAHR.
2 Official Brent Oil Prices.
3 Activity report 2016, Norwegian Venture Capital and Private Equity Association (NVCA).
4 Activity report 2016, Norwegian Venture Capital and Private Equity Association (NVCA).
5 Internal study, BAHR.
6 Activity report 2016, Norwegian Venture Capital and Private Equity Association (NVCA).
7 Internal study, BAHR.

Exchange (also seen in regulated markets in other countries) as a source for risk capital. This trend may indicate that IPOs are not seen as a viable exit route, except in exceptional cases. 2016 was otherwise a record low in Norway with respect to listings.

The fundraising level for 2016, on the other hand, reached a record level of 17 billion kroner over nine new funds. In 2016, Norvestor Equity closed its latest fund, Norvestor VII, at 4.9 billion kroner, OMP Capital AS, a portfolio company of HitecVision V LP, successfully closed their OMP Asset Yield Fund at US$381 million in commitments and FSN Capital closed its fifth fund, a Nordic mid-market buyout fund at 9.62 billion Swedish kronor. In 2017 HitecVision closed its co-investment fund for Point Resources at 2 billion kroner.

As at the start of 2018, a total of 125 Norwegian alternative investment fund managers were registered or regulated by the Financial Supervisory Authority of Norway, compared to 105 the year before. Approximately half are private equity managers. The exact number of alternative investment funds established in Norway is unclear, as many private equity funds will be covered by the grandfathering rules under the AIF Act, implementing the AIFM Directive. Five foreign private equity managers had a fixed place of business in Norway.

The Norwegian private equity scene may be divided in five main categories. The first category consists of relatively large generalist private equity investors, represented by FSN Capital, Herkules Private Equity and Norvestor Equity. The second category consists of sector-specialist investors, represented by HitecVision and Energy Ventures, both focusing on technology and assets connected to the exploration of oil and gas. Thirdly, there are a number of managers in the venture and seed capital segments, most prominently Northzone Ventures, which has made investments in a number of technology companies, such as Spotify and Klarna.

As a fourth category, some Stockholm and Helsinki-based managers are active in the Norwegian market to the extent of having established offices in Norway (e.g., EQT, Altor, Nordic Capital and Northzone). Occasionally, international private equity funds are active in the Norwegian market. Notable examples are the acquisition of the Norwegian software company Visma by HgCapital, Montagu Private Equity and other partners, Triton Partners acquisition of a 75.15 per cent stake in Glamox AS, the acquisition of Norsk Gjenvinning by Swedish Summa Equity.

A fifth category is made up of government-backed actors, and chiefly Argentum Fondsinvesteringer AS. Argentum is a government-owned investment company investing in private equity. Argentum is active both in the primary and secondary markets, as well as completing co-investments with private equity funds, and is a significant investor in most Norwegian and Scandinavian venture and private equity funds. Argentum has expanded its geographical investment area outside Scandinavia. In the venture segment, the government has established Investinor AS, an investment company for venture investments. As of Q3 2017, the investment portfolio of Investinor AS amounted to 2.2 billion kroner (compared to 1.77 billion kroner the year before). Investinor has financial assets and a commitment from the government amounting to 4.2 billion kroner.[8] The fund has sustained losses on its portfolio during the past few years.

There were a few new fund sponsors in Norway in 2016 such as Longship AS, which advises a Guernsey established fund targeting medium-sized growth companies in Norway, two sponsors managing funds focusing on healthcare investments, Hadean Ventures and Serendipity Partners AS.

8 Source: Investinor AS, Q3 2017 report.

The EU Alternative Investment Fund Managers Directive (AIFMD) was implemented in Norway in 2014 through the AIF Act, and transitional provisions expired on 31 December 2014. So far, the implementation has not produced any substantial changes in the private equity landscape. Some sponsors have, however, chosen to offshore to countries outside the EEA, while others, such as Norvestor Equity and HitecVision, have chosen to bolster their onshore operations through authorised management companies.

ii Operation of the market

Management incentive schemes

A key element of private equity investing is incentive schemes aimed at key personnel both at the fund (sponsor) and portfolio company levels. In Norway, incentive schemes at the sponsor level, aimed at key personnel of the manager, have traditionally been equity-based and modelled on traditional incentive schemes in the international private equity industry.

The specific structuring of sponsor management equity schemes will vary from case to case depending on, *inter alia*, the relevant legal framework applicable to the manager, and the participants and choice of investment model. Subject to the AIF Act (see Section V, *infra*), authorised fund managers are subject to remuneration rules that may affect incentive schemes that are not investment-based (carried interest).

In 2012, Norwegian courts decided in the first case to concern taxation of carried interest distribution (see Section IV.ii, *infra*).

At the portfolio level, it is common practice for private equity funds to require that leading employees of a portfolio company shall own shares in such company by reinvesting alongside the fund in connection with a fund's acquisition of the company. Incentive schemes aimed at such persons have evolved over the past 10 years, migrating from option-based and bonus-based models to almost exclusively investment-based models.

In some cases, leading employees invest on the same terms and with the same risk on their investment as the fund. However, it is not uncommon that the employees' investment implies greater risk than the fund's investment, and also that the investment has the potential for a higher relative return. This is normally achieved by establishing different classes of shares in the company, the financial terms of which are often similar to the terms that are common for private equity funds (i.e., a carried-interest model). A common structure is to establish two classes of shares with different risk and return profiles. The share class with lower risk and potential for return (preferred shares) is predominantly subscribed by the fund, while the share class with higher risk and potential for return (subordinated shares) is subscribed by leading employees and, in some cases, the fund.

The exact terms of leading employees' investments differ between funds and individual portfolio companies. It is, however, possible to identify certain basic principles that apply in some form in most cases. For instance, it is customary that the terms applicable for the preferred shares imply that the fund shall be entitled to receive the entire amount it has invested, plus a predefined return on such investment (the preferred return), before the subordinated shares become entitled to any distributions, hence the greater risk on the employees' investment. After the fund has received its preferred return, each subordinated share will be entitled to receive a higher amount of excess distributions than each preferred share, hence the higher potential for return on the employees' investment.

Normally, leading employees that own subordinated shares are subject to certain restrictions and obligations that do not apply to preferred shares. These include transfer restrictions and obligations such as lock-up and standstill for a predefined period of time, right of first refusal for the fund and drag-along obligations (employees normally also have tag-along rights). It is also common that leading employees are subject to good-leaver and bad-leaver provisions, and undertake restrictive covenants such as non-compete and non-solicitation, and restrictions on other business interests and engagements.

On 1 January 2017, new legislation concerning non-compete clauses and certain types of non-solicitation clauses in employment contracts entered into effect. Under these rules, non-competition and non-solicitation clauses were made subject to several limitations in employment contracts. Among other things, non-compete clauses require compensation and such clauses may not extend longer than 12 months from the end of the employment. Exceptions may be agreed for the CEO (only). These new restrictions mean that non-compete and non-solicitation clauses should be addressed fully in the shareholder agreements for management incentive schemes and be linked to the status as an investor.

Private equity divestments

The terms of divestments by private equity funds will differ from case to case and generally between segments (venture, growth, buyout). The attractiveness of the target company will often be a dominant factor as to whether a sales process runs smoothly and quickly. As mentioned above, exits through IPOs are no longer commonplace, meaning that most exits take the form of a secondary sale or trade sale to an industrial actor.

As a general rule, divestments by Norwegian funds are made through structured auction processes targeting a limited number of potential buyers. It is good practice for the manager to formulate exit plans in connection with the original investment in the portfolio company, and also throughout the term of the investment as the portfolio company and market conditions develop: for authorised AIFMs, this is a legal requirement. Buyers will, depending on the target company in question, consist of industrial actors or other funds, or a combination thereof. The time and effort necessary to complete a divestment, as well as the terms that may be obtained by the divesting fund, will vary greatly depending on the size and other characteristics of the portfolio company and the prevailing market conditions.

II LEGAL FRAMEWORK

i Acquisition of control and minority interests

The investment objective of private equity funds is generally to achieve superior returns through control in its portfolio companies. In this section, we provide a brief description of the legal framework for a control investment in Norwegian public and private limited companies. Our discussion is limited to equity investments (we do not discuss asset transactions).

Listed companies are a subset of public companies. The regulatory regime applicable to takeover offers on shares differs significantly, depending on whether the target company is listed on a regulated market or not. Acquisition of controlling stakes in listed companies triggers particular requirements.

Norway has implemented the EU Takeover Directive[9] through rules in the Norwegian Securities Trading Act, which applies to Norwegian and (subject to certain exemptions) foreign companies listed on a Norwegian regulated marketplace (currently the Oslo Stock Exchange or Oslo Axess). The takeover rules distinguish between voluntary and mandatory

9 Directive 2004/25/EC.

offers. A voluntary offer, if accepted by the recipients of the offer, triggers a mandatory offer obligation for the buyer. A mandatory offer for the remaining shares in the target is triggered if the buyer (either through a voluntary offer or otherwise) becomes owner of more than one-third of the voting rights in the target (with repeat triggers at 40 and 50 per cent). Further, Norway has implemented the EU Transparency Directive[10] through rules in the Norwegian Securities Trading Act, requiring major shareholding notifications. Norway has not implemented the revised EU Transparency Directive (as amended through Directive 2013/50/EU) yet. This is expected in 2018.

In the case of an unlisted target company (whether the target is a public or private limited company), the buyer is to a large extent free to determine the process pursuant to which a takeover shall be executed, subject to what may be agreed on a contractual basis with the target or the target company's shareholders.

However, EU fund managers that are authorised under national legislation implementing the AIFMD and non-EU fund managers that hold a marketing authorisation in an EEA Member State are subject to certain reporting requirements when investing in unlisted companies that are not small or medium-sized enterprises (SMEs).[11] Such managers shall notify the regulator whenever the proportion of voting rights of the non-listed company held by the fund or funds under management reaches, exceeds or falls below the thresholds of 10, 20, 30, 50 and 75 per cent. Additional disclosure requirements are triggered upon acquiring control in the relevant company (which also applies when the company is listed).

Investments by funds managed by EU fund managers authorised under national legislation implementing the AIFMD or by non-EU fund managers holding a marketing authorisation in an EEA Member State in unlisted (non-SMEs) and listed companies where the funds have acquired control of the company are also subject to rules concerning 'asset stripping'. These rules contain certain restrictions on distributions (dividend), capital reduction, share redemption and acquisition of own shares for a period of 24 months.

According to Norwegian merger regulations, all mergers and transactions involving acquisition of control (concentration) must be notified to the Norwegian Competition Authority if the undertakings involved in the transaction have a combined annual turnover in Norway of 1,000 million kroner or more, and at least two of the undertakings concerned each have an annual turnover exceeding 100 million kroner. An automatic standstill period, ending at the earliest 25 working days after a filing has been made, applies to all concentrations subject to the notification requirement. If the transaction is of a magnitude that requires merger clearance at EU level, the Norwegian filing requirements are suspended and absorbed by the EU rules.

Acquisition of substantive holdings or control in a target company may also trigger other filing, concession or approval requirements under Norwegian or foreign legislation. Such aspects must be assessed on a case-by-case basis. In Norway, this applies within, for example, the financial sector, fisheries, oil extraction and production of electricity.

The above rules apply independently of the jurisdiction of establishment of the investing fund. However, the jurisdiction of establishment of the investing fund will be among the

10 Directive 2004/109/EC.

11 Enterprises that employ fewer than 250 persons and that have an annual turnover not exceeding €50 million, or an annual balance sheet total not exceeding €43 million, or both.

considerations relevant to the choice of structuring of an investment in order to obtain a structure that is suitable from the point of view of the business and exit plans for the target company, as well as the prevailing tax laws.

ii Fiduciary duties and liabilities

Minority rights in Norwegian public and private limited companies

Minority shareholders in Norwegian public and private limited companies are conferred certain rights under Norwegian company law. The most significant restriction upon majority shareholders is the principle of equal treatment. This implies that the majority shareholder 'cannot adopt any resolution which may give certain shareholders or other parties an unreasonable advantage at the expense of other shareholders or the company'.[12]

With respect to transactions with shareholders, the principle does not mean that all shareholders have to be treated equally at all times. Generally, differential treatment is acceptable if this can be justified based on objective grounds and the best interests of the target company as a whole.

Majority shareholders that are private equity funds should also be aware that the Norwegian Private Limited Company Act and Public Limited Company Act contain specific provisions concerning the payment of dividend and of financial assistance to other group companies. The Ministry of Justice has carried out a consultation process, proposing to provide for greater flexibility concerning financial assistance for limited companies. This would require amending the relevant company acts, which have yet to be formally proposed. It is uncertain when such changes may enter into effect.

In the case of payment of financial assistance to a group company, the minority shareholders may claim payment of an equal dividend. If the general meeting decides not to pay out a dividend, the minority shareholders may challenge this decision in court.

Minority shareholder rights will normally be supplemented by the more specific provisions of a shareholders' agreement between the private equity fund and the minority shareholders (e.g., members of management) concerning rights at exit, etc.

Structuring exits

Private equity investments are by nature temporary, and any acquisition by a private equity fund is made with the objective of a future exit. Acquisitions will normally be organised with the exit in mind, including measures to avoid complications due to minority shareholder rights (discussed above). Depending on the development of the relevant portfolio company or the prevailing market conditions, an exit may not be made as initially planned; the manager may also identify more commercially interesting forms of exits at a later stage. This implies that an exit will normally require bespoke structural and legal measures.

With the exception of general contract, company, tax and competition law, few general rules govern an exit of a portfolio company. If an exit is made in the form of an asset sale, then labour law will be relevant, as the employees of the business to be transferred are conferred certain rights under Norwegian labour law. Current Norwegian tax legislation will normally imply that asset transactions are less favourable than equity transactions.

12 The Private Limited Company Act and Public Limited Company Act, Sections 6 to 28.

Rights of stakeholders

As a general rule, Norwegian law does not confer any legal rights to other stakeholders that are legally binding upon the members of the board of directors of a limited company. The obligations of the board members (their fiduciary duties) are to the company and to the shareholders.

Potential liabilities for majority shareholders

Norwegian limited company law provides for the liability of board members, members of management and shareholders for losses in the hands of the company in the event of negligent or wilful acts or omissions. The provisions of the limited company acts only provide for damages suffered by the company, and not by third parties (although third parties may, in priority, file claims on the company's behalf).

Shareholders of a limited company may also be held liable by third parties (piercing the corporate veil) in some cases. The legal basis for such claims is based on unwritten and customary law and is, to our knowledge, without legal precedent in Norway.

III YEAR IN REVIEW

i Recent deal activity

Led by investments in the buyout segment, the total amount invested increased in 2016, compared to the year before, from 8.6 to 11.9 billion kroner.[13]

There were generally few large transactions made by Norwegian private equity sponsors, but foreign funds have made several investments in Norway. Notable examples are the Norwegian software company Visma acquired by HgCapital, Montagu Private Equity and other partners in a deal valued at approximately 500 million kroner.[14] In 2017, US-based agribusiness asset management firm AMERRA Capital Management acquired a 92 per cent stake in Marine Bioproducts AS, the Norway-based production and research company focusing on gentle and natural processing of fresh raw materials of marine origin. Norwegian generalist manager Norvestor Equity sold its stake in Phonero AS to the Swedish telecoms operator Telia valuing the company at 2.3 billion kroner on a cash and debt-free basis.

ii Financing

One of the main consequences of the financial crisis and the ensuing sovereign debt problems of European and other countries has been a relative decline in the availability of banking finance for private equity transactions and similar transactions. Traditionally, Norwegian sponsors have leveraged buyouts to a lesser degree than sponsors in other jurisdictions. In addition, Norwegian banks have been less affected by the market turmoil since the financial crisis than many European counterparts. The relatively minor role of non-bank financing is also related to the fact that lending is a regulated activity in Norway that only banks and regulated financing undertakings may carry out. This may change upon transposition of the EU EuVECA and ELTIF-regulations, which will allow such funds to provide loans (within certain limitations).

13 Activity report 2016, Norwegian Venture Capital and Private Equity Association (NVCA).

14 Internal study, BAHR.

This means that Norwegian private equity funds have been affected to a somewhat lesser degree by the shifting credit market. The main source of finance in leveraged acquisitions is therefore still bank financing, but mezzanine financing has been used in some deals. This may, however, change depending on how Norwegian banks will be affected by the ongoing downturn in the oil and oil services markets and exposures in those sectors. Norway has implemented the substantive rules of the EU CRD IV capital requirements, based on Basel III. The government has also announced that it will assess implementation of the SME supporting factor as a measure to increase bank lending to smaller enterprises.

Terms for bank financing are highly standardised, but the content of covenants will differ from case to case based on, *inter alia*, the financial position and business of the target company.

iii Key terms of recent control transactions

The terms of control transactions made by Norwegian private equity funds will as a rule be confidential. The disclosure rules under the AIF Act with respect to acquisition of control do not require the disclosure of such information, but the timing of such acquisitions may become public knowledge faster than before. In public-to-private deals, the rules on voluntary and mandatory bids, as well as a (normally) fragmented shareholder base, will mean that few terms will be set in such transactions.

In purely private transactions, Norwegian private equity sponsors will consistently structure deals and set terms to obtain control in the portfolio companies with a view to exercising active ownership in the portfolio investments. As a rule, sponsors will seek to obtain control through a majority stake (50.1 per cent or higher) or through shareholders' agreements granting the sponsor the right to appoint the majority of the board. Such shareholders' agreements will routinely contain provisions concerning drag-along and tag-along in order to achieve an appropriate exit.

iv Exits

The downward trend in investment activity also reflects upon the exit activity, with fewer exits in 2016 than the year before (down to 35 from 47).[15] The lower exit activity primarily affects oil and gas-related sectors.

As mentioned above, Norvestor Equity exited its investment in Phonero AS to Swedish telecommunications operator Telia. Nord Kapitalforvaltning, managing the fund Nord I and II exited Hepro to Swedish industrialist AddLife active in the healthcare sector.

IV REGULATORY DEVELOPMENTS

i Regulatory changes

The AIF Act, implementing the EU AIFM Directive, came in to force on 1 July 2014 with grandfathering rules expiring on 31 December 2014. As a consequence, Norwegian private equity managers have now been subject to regulation for two full years. The AIF Act requires Norwegian private equity managers to register or to be authorised by the Norwegian regulator. The majority of Norwegian private equity managers have assets under management below the threshold values requiring authorisation (€100 or €500 million, depending on the fund

15 Activity report 2016, Norwegian Venture Capital and Private Equity Association (NVCA).

terms). More will likely be affected by the authorisation requirement following cross-border management or marketing, or the fact that an authorisation is required to market units in funds to non-professional investors in Norway.

Although the AIF Act is aimed at managers only, certain provisions have consequences at the fund level. This concerns primarily the requirement to appoint a depositary, but also reporting and disclosure requirements that require adaptations at the fund level. Private equity fund managers are now subject to a particular reporting requirement in the case of acquisitions of portfolio companies and regulations aimed at preventing 'asset stripping' of portfolio companies not applicable to other investors (see Section II.i, *supra*).

The AIF Act regulates marketing both to professional and non-professional investors, and these rules must be considered before fundraising in Norway. Prior to the entry into effect of the AIF Act, marketing of private equity funds was not subject to any specific rules. Private equity funds established within the EU or EEA and managed by an authorised AIFM may now be marketed to professional investors in Norway on the basis of the AIFMD passport regime. Marketing funds established outside the EU or EEA (regardless of the domicile of the manager) is legal only with a prior marketing authorisation from the Norwegian regulator. The latter also apply to marketing to non-professional investors, which may only be done by managers established within the EU or EEA. Marketing to non-professional investors is subject to a specific authorisation requirement. Notably, the manager must be authorised under legislation implementing the AIFMD (thus excluding non-EEA managers), the manager must be a member of a complaints handling scheme, produce a key information document and comply with the code of conduct rules under the Norwegian Securities Trading Act (requiring that the manager assesses whether an investment is suitable for the prospective investor).

Private equity funds, or other alternative investment funds established in Norway that are not defined as 'securities funds' subject to the Norwegian Investment Fund Act, are not regulated. As a consequence, Norwegian alternative investment funds will, at the fund level, be subject to Norwegian company law only (outside securities laws).

Norway is not a member of the EU system of financial supervision. Norway has entered into an agreement with the EU on (partial) integration into the system of financial supervision which was ratified in 2016, paving the way for a relatively high number of EU legislative acts being implemented in short order (CRD IV, Solvency II, AIFMD, MiFID II, UCITS V, EMIR, the short-selling regulation, etc.). Norway will also implement the new EU regulations concerning venture funds and social entrepreneurship funds, as well as the regulation on long-term investment funds. These regulations will regulate funds aimed at specific markets, and give Norwegian managers of such funds easier market access allowing for more efficient fundraisings. The FSAN has stated that implementation of the 'backlog' of legislative acts is likely to take between 18 to 24 months. As a stop-gap, Norwegian authorities have chosen to implement EU rules on a 'lookalike' basis even though they are not incorporated into the EEA Agreement. The most recent example of this was MiFID II, implemented in Norway with effect from 1 January 2018 through a set of regulations adopted by the regulator.

Norway is a member of the OECD Multilateral Competent Authority Agreement concerning automatic exchange of financial information for tax purposes. National legislation implementing the Common Reporting Standard entered into force on 1 January 2016, requiring Norwegian asset managers to collect and verify information on clients' and investors' home state for tax purposes and to report to Norwegian tax authorities. For private equity sponsors, the rules have proved somewhat complex with respect to portfolio holding companies and co-investment vehicles, and whether they constitute reporting 'investment entities' or not.

ii Local tax treatment of carried interest

For funds sponsored by Norwegian managers, the right to carried interest normally depends upon the investors having received payment for the entire contributed amount, in addition to a minimum return (typically 8 per cent). The excess proceeds are normally divided (usually 80/20) between the investors and those who have the right to carried interest.

2013 saw the first court case on taxation of carried interest, involving the management company Herkules Capital and three partners. The case concerned the validity of a reassessment of income for 2007 by the tax authorities against Herkules Capital and the three partners, who had received amounts under carried interest. The tax authorities had concluded that the amounts – which had accrued to the partners' personal wholly owned investment companies – constituted ordinary income (salary) for the relevant persons, and that the amounts received by the general partner were taxable as business income in the hands of Herkules Capital.

After an annulment of the tax authorities' reclassification in the court of first instance (district court) and a full win for the tax authorities in the court of appeal, the Supreme Court rendered its judgment on 12 November 2015.

The Supreme Court found that the amount of carried interest received by the partners' investment companies was not taxable as ordinary income (salary) for those persons. Further, the court found that the part of the carried interest amount received by the general partner corresponding to the partners' share could not be reallocated to Hercules Capital as business income. In coming to its conclusion, the Supreme Court emphasised that the taxation of carried interest must be based on the agreed allocation of income between the parties (unless the agreed allocation constitutes a tax avoidance in breach of the general anti-abuse rule or is not based on arm's-length principles). Further, the Supreme Court emphasised that even though the contribution by the partners was an important factor for the achievement of carried interest, carried interest was also a result of other factors, such as the persons working in the relevant portfolio companies and the market developments.

The judgment by the Supreme Court is relevant also for other management companies and their partners. After the win in the court of appeal, the tax authorities announced that they would file claims against 40 partners connected to six other funds. After the Supreme Court judgment, we understand that these cases have been dropped, at least with regard to the reclassification of carried interest to salary. At the same time, it is still an open question whether carried interest shall be considered as business income or capital income. This question must be assessed on a case-by-case basis, where the economic risk taken will be of importance. The judgment of the Supreme Court gives no guidance in this regard. Hence, the question of tax treatment of carried interest will remain a point of interest.

iii Finance tax

As of the income year of 2017, a specific 'finance tax' applies to Norwegian asset managers (and Norwegian branches of foreign asset managers). The tax is composed of two elements; a 5 per cent tax on the aggregate payroll expenses and a 25 per cent tax on net income (as compared to 23 per cent, which is the general tax rate on business income for 2018). The tax comes as a result of an ongoing debate on introduction of value added tax in the finance sector. In 2016 the government decided to abandon this (for now) and instead introduce a tax on actors in the finance sector. It has been stated that the structure of the tax will be reviewed, which may lead to adjustments in the future. The tax will generally encourage outsourcing of functions in order to reduce the tax base. The new coalition government, that entered office early 2018, has announced a willingness to refocus the finance tax away from payroll expenses.

V OUTLOOK

With added distance to the effects of the financial crisis and the reductions in oil prices, there may be fewer clearly identifiable factors affecting Norwegian private equity sponsors, outside the general uncertainties that affect all investors in a given market.

Regulatory change affects private equity sponsors directly (as managers of alternative investment funds), but also indirectly through investors that are regulated (such as insurers and pension undertakings) and sources of financing (credit institutions).

Higher capital requirements and more restricted bank lending means that the availability of banking finance is relatively lower than it was before the financial crisis. This has led to changes to the financing structures of both the acquisition and disposal of portfolio companies, with increased mezzanine financing, which historically has had only a limited role in Norwegian deals (this is also due to the current regulation of banking services, which effectively prohibits mezzanine funds access to the Norwegian credit market).

Norwegian fund sponsors will have to get to terms with the effects of the rapidly changing regulatory regime in the financial sector. The Solvency II Directive has affected EU insurance companies requirements to investing in private equity. Norwegian authorities are proposing changes to the capital requirements for pension funds, which should have a natural bias towards the long-term nature of private equity investments.

It remains to be seen whether private equity managers, as other types of fund managers, will be impacted by the recent development towards increased automation in the financial sector, such as banking, payment and index fund management.

Appendix 1

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