THE

# Private Equity Review

Ninth Edition

**Editor**
Stephen L Ritchie

THE LAWREVIEWS

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# THE PRIVATE EQUITY REVIEW

NINTH EDITION

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This article was first published in April 2020
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Published in the United Kingdom
by Law Business Research Ltd, London
Meridian House, 34–35 Farringdon Street, London, EC4A 4HL, UK
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Enquiries concerning editorial content should be directed
to the Publisher – tom.barnes@lbresearch.com

ISBN 978-1-83862-487-3

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

# ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

A&L GOODBODY

ALLEN & OVERY

BAHR

BONELLI EREDE

CAMPOS MELLO ADVOGADOS IN COOPERATION WITH DLA PIPER

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# PREFACE

The ninth edition of *The Private Equity Review* follows another extremely active year for dealmakers in 2019. While the number and value of global private equity deals completed declined slightly from 2018, deal activity was still robust, weighted towards the upper end of the market, and included several large take-private transactions. Fundraising activity was also strong with aggregate capital raised just slightly below 2018's record levels, as institutional investors remained extremely interested in private equity as an asset class because of its continued strong performance. That, combined with some caution due to an uncertain market environment, has resulted in private equity funds having significant amounts of available capital, or dry powder. This dry powder, together with competition from non-traditional dealmakers, such as sovereign wealth funds, family offices and pension funds, led to very competitive transactions being completed at increasing purchase price multiples. This has caused private equity firms to become even more creative as they seek opportunities in less competitive markets or in industries where they have unique expertise. Given private equity funds' dry powder and creativity, 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.

While there are potential headwinds – including trade tensions, the upcoming US election and an eventual end to one of the longest-running recoveries in US history – on the horizon for 2020 and beyond, we are confident that private equity will continue to play an important role in the global economy, and is likely to further expand its reach and influence.

Private equity professionals need practical and informed guidance from local practitioners about how to raise money and close deals in multiple jurisdictions. *The Private Equity Review* has been prepared with this need in mind. It contains contributions from leading private equity practitioners in 22 different countries, with observations and advice on private equity dealmaking 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.



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I want to thank everyone who contributed their time and labour to making this ninth edition of *The Private Equity Review* possible. Each of these contributors is a leader in their respective markets, 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 2020



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Part II

# INVESTING

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Chapter 12

# NORWAY

*Peter Hammerich and Markus Heistad*[1]

## I OVERVIEW

### i Deal activity

The Norwegian economy is to a large degree, directly or indirectly, exposed to the oil and gas extraction and related industries. The Norwegian economy was less affected than other countries by the consequences of the financial crisis of 2007–2008 and the subsequent sovereign debt issues in Europe, in part because of the income it derived from oil and gas extraction. However, the substantial reduction in the price of oil that started 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] had quite immediate effects in the Norwegian 'real' economy. This led to severely reduced investment activity, lay-offs of personnel and debt restructuring in the oil-related sectors. Although the sector has mostly successfully restructured to the new level of oil prices, investment activity has more recently seen signs of abating following the decision of some investors to 'decarbonise' their portfolios as part of their sustainability strategies. Future investor appetite for the sector will be important for its development. Lower investments may also drive up oil prices and potential return.

The perceptible reduction in deals in the Norwegian market towards the end of 2014 has persisted. With respect to investments made by funds advised by Norwegian sponsors,[3] there was a sharp drop from top levels in 2016 of 12 billion Norwegian kroner to 8.5 billion Norwegian kroner in 2017, levelling out at 8.1 billion Norwegian kroner in 2018. There were no public-to-private deals (of any significance) in 2018 or 2019.[4]

The number of private equity exits by funds advised by Norwegian sponsors continued its downward trend from 39 in 2017 (and 39 in 2016) to 31 in 2018.[5]

In 2017, no private equity exits were made in the form of an initial public offering (IPO). In 2018, government-backed venture investor Investinor (see below) partially exited poLight through an IPO, as was the case for fitness group Sats Elixia, previously controlled by Altor. There has been a lasting decline in the number of exits being made in the form of an IPO, mirroring a decline of the Oslo Stock Exchange as a source for risk capital. This trend may indicate that IPOs are not seen as being as viable an exit route as previously in

1 Peter Hammerich is a partner and Markus Heistad is a senior lawyer at BAHR.
2 Official Brent Oil prices.
3 Definition by the Norwegian Venture Capital & Private Equity Association (NVCA).
4 BAHR AS internal study.
5 NVCA, Private Equity Funds in Norway – Activity Report 2016, and Private Equity Funds in Norway – Activity Report 2017.



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the Norwegian market, except in exceptional cases. In 2019, Oslo Børs was acquired by the French Euronext group, and will likely become more integrated with the Euronext capital market infrastructure.

As at the start of 2020, a total of 167 Norwegian alternative investment fund managers were registered or authorised by the Financial Supervisory Authority of Norway, compared to 147 the year before. Approximately half are private equity managers. The exact number of alternative investment funds established in Norway is unclear, as some private equity funds will still be covered by the grandfathering rules under the Alternative Investment Fund Managers Act (the AIF Act), implementing the EU Alternative Investment Fund Managers Directive (AIFMD). The recent increase in numbers is likely also related to the fact that the regulator has stated that it views single asset funds (which has been an important asset class within real estate in Norway) as within the scope of the AIF Act.

From the point of view of investing activity, the Norwegian private equity scene may be divided into five main categories. The first category consists of (in a Norwegian context) relatively large generalist private equity investors, such as FSN Capital, Norvestor Equity and Herkules Capital. The second category consists of sector-specialist investors, such as HitecVision, Energy Ventures and Hadean, the first two focusing on technology and assets connected to the exploration of oil and gas, and the latter a healthcare specialist. In the third category are a number of smaller sponsors in the venture and seed capital segments, such as Proventure and Sarsia.

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). Increasingly, international private equity funds are active in the Norwegian market. A notable example is Partners Group's acquisition of CapeOmega, an owner-participant in the Gassled transportation, storage and processing infrastructure for gas from the Norwegian North Sea in 2019.

The 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, and in completing co-investments with private equity funds, and it 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 at the third quarter of 2019, the investment portfolio of Investinor AS amounted to 2.5 billion Norwegian kroner. Investinor has financial assets and a commitment from the government amounting to 4.2 billion Norwegian kroner, and had its equity increased through a capital injection of 350 million Norwegian kroner by the government in 2019.[6]

There were no new fund sponsors in Norway in 2019.

### ii Operation of the market

#### *Management incentive schemes*

A key element of private equity investing is appropriate incentive schemes aimed at key personnel both at the fund (sponsor) and portfolio company levels.

6 Source: Investinor AS, Q3 2019 report.



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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 on the participants and choice of investment model. Norwegian fund managers authorised under the AIF Act are subject to remuneration rules that may affect incentive schemes that are not investment-based (carried interest).

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

In some cases, key employees invest on the same terms as the fund, with their investment exposed to the same risk. 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 state that the fund shall be entitled to receive the entire amount it has invested, plus a predefined return on the 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, 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 enter into restrictive covenants such as non-compete and non-solicitation undertakings, 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-compete 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.



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***Private equity divestments***

The terms of divestments made 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. Exits through IPOs are fewer now than prior to the financial crisis. Consequently, most exits take the form of a secondary sale to other private equity investors or trade sales to industrial actors.

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 relevant 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.

Authorised AIFMs (when investing in assets of limited liquidity preceded by a negotiation phase, as is typically the case for private equity investments) are required to establish and update a business plan for the investment in accordance with the duration of the fund with a view to establishing exit strategies as from the time of the investment. While most private equity fund managers would expect to put such a plan in place as a fundamental aspect of the investment process, the AIFMD requires this as a statutory duty.

## 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[7] 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 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[8] through rules in the

7 Directive 2004/25/EC.

8 Directive 2004/109/EC.



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Norwegian Securities Trading Act, requiring major shareholding notifications. Norway has yet to implement the revised EU Transparency Directive (as amended through Directive 2013/50/EU). This is expected in 2020.

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.

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).[9] 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, capital reduction, share redemption and acquisition of own shares for a period of 24 months from the acquisition.

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 billion Norwegian kroner or more, and at least two of the undertakings concerned each has an annual turnover exceeding 100 million Norwegian kroner. An automatic standstill period applies to all concentrations subject to the notification requirement, until the Competition Authority has concluded its handling of the case. 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. These aspects must be assessed on a case-by-case basis. In Norway, this applies within, for example, the financial sector, fisheries, oil extraction and certain infrastructure, such as production or transfer 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 considerations relevant to the choice of structuring of an investment 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.

9 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.



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### ii Fiduciary duties and liabilities

Private equity sponsors or managers are not subject to any specific fiduciary duties or similar duties to other shareholders in portfolio companies. However, Norwegian company law provides for shareholder 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'.[10]

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 be aware that the Norwegian rules on financial assistance became more flexible with effect from 1 January 2020. The changes imply, inter alia, that an EEA or EU-based parent company now may acquire shares in a Norwegian company with financial assistance from such company without a limitation equal to such company's dividend capacity (which is the general rule). The exemption applies irrespective of whether the parent company already is or becomes a parent company due to the transaction to which the financial assistance relates. Procedural requirements must still be followed, and the financial assistance must be on market terms.

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.

#### *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 damage 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 for claims 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. However, case law provides that there are circumstances where the court will be prepared to come to the conclusion that shareholders are personally liable. This does not, in itself, abolish the company's position as a separate legal entity; rather it is a form of shareholder liability. Although each case will depend on the court's assessment of the particular circumstances, the court has come to such conclusions where, inter alia, a shareholder or secured creditor has a right of control over the company so that the company is in reality not organisationally or financially independent, as required by the Norwegian private limited companies act, the

10 The Private Limited Company Act and Public Limited Company Act, Sections 6–28.



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company has been under-capitalised compared to the financial risk involved in its operations for a long time (under-capitalisation may not in itself be a legal reason to pierce the corporate veil, but may indicate the company is not sufficiently independent of its owners) or the company's funds have been used against its interests to benefit its shareholders.

***Rights of stakeholders***

As a general rule, Norwegian law does not confer any legal rights on 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.

***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). Authorised AIFMs are required to adopt exit plans in connection with the original investment in the portfolio company and also update them throughout the term of the investment.

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. Depending on the development of the relevant portfolio company or the prevailing market conditions, an exit may not be made as initially planned or set out in the exit plan; 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. Under current Norwegian tax legislation, equity transactions will normally be treated more favourably than asset transactions.

## III YEAR IN REVIEW

### i Recent deal activity

Following an all-time high in 2016 of 11.9 billion Norwegian kroner invested by funds advised by Norwegian sponsors, led by investments in the buyout segment, the figure declined to 8.5 billion Norwegian kroner in 2017 and 8.1 billion Norwegian kroner in 2018.[11] Numbers for 2019 are not yet available.

There were few large transactions made by Norwegian private equity sponsors in 2019. Norvestor was among the first Norwegian sponsors to carry out a roll-over exit of IT company Cegal, spun out from their fifth fund to a special purpose vehicle managed by Norvestor.

The long-term trend seems to be for transactions that are largely Nordic-centric, with Nordic private equity sponsors typically investing in the Nordic countries, followed by US and UK actors. The telecoms, business services and petroleum sectors dominate transactions

11 NVCA, Private Equity Funds in Norway – Activity Report 2018.



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overall. For a period following the fall in oil prices, retail was also an attractive sector for private equity investors. During 2018, a number of retail chains began facing financial difficulties, a trend that has increased in strength in 2019 leading to several bankruptcies of high street retail chains that are also private equity owned (e.g., beauty products chain Vita).

### 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, which only banks and regulated financing undertakings may carry out. 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.

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 vary greatly. 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, terms will as a rule be confidential. The disclosure rules under the AIF Act with respect to acquisitions of control, applicable to certain AIFMs, do not require the disclosure of the terms. However, the timing of such acquisitions may become public knowledge faster than before. 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 rights, to achieve an appropriate exit, as well as to accommodate co-investment opportunities for management.

### iv Exits

The downward trend in investment activity is also reflected in the exit activity. The number of exits by funds advised by Norwegian sponsors has declined from 79 in 2013 (the most recent high point) to 43 in 2017 and 31 in 2018.[12]

12 NVCA, Private Equity Funds in Norway – Activity Report 2016, and Private Equity Funds in Norway – Activity Report 2017.



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## IV REGULATORY DEVELOPMENTS

In Norway, the AIF Act, implementing the AIFMD, came into force on 1 July 2014. Before that, private equity funds were outside the scope of any specific regulatory regime in Norway. Now, the AIF Act regulates management of private equity funds, and the marketing of interests in such funds. The majority of Norwegian private equity managers have assets under management below the threshold values requiring authorisation (€100 million or €500 million, depending on the fund terms). A number of managers are affected by the authorisation requirement, which is also triggered by cross-border management or marketing, or when marketing units in funds to non-professional investors in Norway, while some have elected to operate on a purely offshore basis with Norwegian advisory hubs.

During the past year, the Financial Supervisory Authority of Norway (FSAN) has proven more active, having both issued a circular on the applicability of the AIF Act on single asset funds and taken a more acute interest in the distinction between management and advice for sponsors with – relative to offshore management – large Norwegian advisory companies. The circular is primarily aimed at single asset funds making real estate investments but would apply similarly to co-investment funds and similar structures.

In Norway, private equity funds are still unregulated at the fund level. Although the AIF Act is aimed at managers only, certain provisions have effect at the fund level. This concerns primarily the requirement to appoint a depositary, but also reporting and disclosure requirements. On 15 January 2019, the Ministry of Finance initiated a public consultation on the implementation of the amendments to the EU Regulation on European venture capital funds (EuVECA),[13] the EU Regulation on social entrepreneurship funds (EuSEF)[14] and delegated regulation under the EU Regulation on long-term investment funds (ELTIF).[15] None of the main regulations have entered into effect in Norway yet, and an amendment to the Financial Undertakings Act will be required to allow such funds to provide loans. The rules will, when implemented, introduce these regulated fund types in Norway. With respect to EuVECA and EuSEF funds, Norwegian registered managers will also be able to market interests in such funds to non-professional investors without being authorised under the AIF Act, in contrast to the current situation.

Authorised and registered managers established in Norway are supervised by the FSAN. The FSAN also has oversight over activities of non-Norwegian managers following marketing authorisations under the national private placement regime. The FSAN has, so far, shown limited concern for the investment activity and transactions carried out by funds managed by managers under its supervision. This seems to be a policy choice, as the primary focus of the FSAN has been on investor rights and fair treatment of investors. The FSAN is, however, concerned with financial stability and market integrity, but it has yet to pursue any matters related to transactions in unlisted instruments. The FSAN will typically carry out its duties through inspections of premises or document-based inspections. In the case of non-Norwegian actors, the FSAN will typically consider whether they have the proper

13 Regulation (EU) No. 345/2013 of the European Parliament and of the Council of 17 April 2013 on European venture capital funds.

14 Regulation (EU) No. 346/2013 of the European Parliament and of the Council of 17 April 2013 on European social entrepreneurship funds.

15 Regulation (EU) 2015/760 of the European Parliament and of the Council of 29 April 2015 on European long-term investment funds.



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regulatory authorisation to carry out any regulated activities in or into Norway. With respect to investing, this will typically relate to the question of providing loans to Norwegian debtors, as this is a regulated activity (see Section III.ii).

There is otherwise no specific regime with respect to private equity transactions, which are legally no different from transactions between any other parties. The structure of private equity funds may, however, have consequences with respect to their position under competition law. Further, private equity investors as major shareholders in Norwegian companies in the financial sector (which require a prior authorisation) are a somewhat novel development. Regulators may, therefore, be stringent about applicants meeting documentation requirements when filing necessary applications.

## V OUTLOOK

Notwithstanding the market conditions affecting all investors, private equity investors are especially dependent upon professional and successful deal sourcing to be able to deploy committed capital and make divestments on optimal terms upon the prospect of the termination of a fund.

In the Nordic region, several private equity sponsors have significant amounts of uncalled capital, and this has – along with lower interest rates – raised prices for attractive targets. Norwegian insurance companies and pension funds are now both subject to Solvency II investment rules (since 2016 and 2019, respectively), and should – all else being equal – allocate more of their portfolios to long-term investments such as private equity. It remains to be seen how this will develop and whether the market will cater to such investors and provide the sought-after returns. Such investors could be expected to have extensive reporting-quality requirements (to satisfy Solvency II look-through rules) as well as environmental, social and governance (ESG) requirements.

The relative importance of bank financing over other financing sources may change going forward. Upon transposition of the EuVECA and ELTIF Regulations, the types of funds affected will be allowed to provide loans (within certain limitations). Norway has implemented the Capital Requirements Directive IV and the Capital Requirements Regulation with effect from 1 January 2020 (with certain transitional rules). This includes the SME supporting factor – providing for a lower capital charge for exposures towards SMEs. The government has, however, proposed to increase the systemic risk capital buffer to 4.5 per cent, seeking to maintain current capital requirement in practice. This suggests that Norwegian banks may become less competitive as sources of debt financing in future.

The coming year or two will likely see the advent of statutory ESG requirements. The Norwegian Ministry of Finance seems to prioritise implementation of EEA (EU) legal acts in this field, and the FSAN is focused on avoiding adverse effects of 'greenwashing' in the financial markets. For private equity fund managers, the increased focus will likely require them to integrate ESG into their investment and risk management processes to a higher degree than what has been the case to date.

Norway has traditionally had a broad and deep economic relationship with the United Kingdom, both before and after the United Kingdom became a member of the EU. Norwegian fund sponsors eager to attract non-Norwegian capital have also often relied on the power of City of London-based placement agents. It remains to be seen how Brexit will affect these relations and investment activity, both in the United Kingdom by funds advised by Norwegian managers and of UK-based funds in Norway.



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**Appendix 1**

# ABOUT THE AUTHORS

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Peter Hammerich is a partner at BAHR law firm, and head of BAHR's asset management and private equity group. Having practised within asset management, investment funds and private equity for more than 22 years (14 as a partner), Mr Hammerich represents hedge funds, private equity funds, open-ended investment companies and other asset management vehicles, as well as their sponsors, managers, service providers, portfolio companies and institutional investors. Mr Hammerich serves in various capacities in the Norwegian Venture Capital & Private Equity Association and is a board member of several leading Norwegian asset managers. He is the author of several publications within his field of expertise.

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ISBN 978-1-83862-487-3

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