

THE LENDING
AND SECURED
FINANCE REVIEW

SEVENTH EDITION

Editor
Azadeh Nassiri

THE LAWREVIEWS

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AND SECURED
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PREFACE

This seventh edition of *The Lending and Secured Finance Review* contains contributions from leading practitioners in 21 different countries, and I would like to thank each of the contributors for taking the time to share their expertise on the developments in the corporate lending and secured finance markets in their respective jurisdictions, and on the challenges and opportunities facing market participants. I would also like to thank our publishers without whom this review would not have been possible.

I hope that the commentary that follows will serve as a useful source for practitioners and other readers.

Azadeh Nassiri

Slaughter and May

London

June 2021

NORWAY

Ida Windrup, Audun Nedreliid and Markus Nilssen¹

I OVERVIEW

Bank lending remains the main source of debt capital in the Norwegian market, although the introduction of more rigid capital adequacy rules in recent years has limited the growth in bank lending of Norwegian banks. As lending is a strictly regulated activity in Norway, any shortfall in corporate bank lending has primarily been covered by tapping into Norway's very active high-yield bond market where the traditionally internationally oriented businesses such as shipping and offshore service suppliers, in particular, have been able to raise asset-secured debt capital. The downturn in the oil industry from 2014 to 2017, which suffered another knockback during the covid-19 outbreak in 2020, has resulted in both the shipping and offshore sectors sustaining heavy losses, with substantial debt restructurings as a result. It is, however, currently expected that the Norwegian economy will recover moderately to well from the second half of 2021 and into 2022, as large stimulus packages from the Norwegian government combined with lowered interest rates during the covid-19 pandemic have helped most businesses cope throughout the lockdown periods. Particularly sensitive business areas such as travel and tourism, aviation, restaurants and nightlife, as well as live culture and sport have suffered extensively during the downturn, while the shift into digital transformation and remote working has held up activity in larger parts of the economy surprisingly well during the pandemic. As in other European jurisdictions, businesses managing the shift into online sales have also gained from the recent developments, as the megatrend towards a more digital economy has taken a huge leap forward during the lockdowns. Another trend in the Norwegian market is the energy shift into renewables, which has seen significant amounts invested by traditional fossil fuel companies into separate renewable energy ventures. As Norway traditionally has had a large percentage of its economy in the energy sector, it is expected that this will continue also after the 'green shift' into renewable power and related products. General M&A activity in Norway for 2020 was significant during the last half of the year, and this trend has continued with force into 2021.

Although lending as a regulated bank activity is suggested to be more liberal in Norway (see Section II), we expect bank lending to continue to be the largest source of debt capital in Norway and for this to continue in for the foreseeable future. The two largest Norwegian banks are DNB Bank ASA and Nordea Bank Abp, filial i Norge. DNB Bank ASA holds, together with the Norwegian branch of Nordea, a market share of around 40 per cent of the

¹ Ida Windrup, Audun Nedreliid and Markus Nilssen are partners at Advokatfirmaet BAHR AS.

Norwegian bank lending market. The Norwegian branches of the other leading Scandinavian banks are also significant players in the Norwegian market, the most notable being Danske Bank with around 7 per cent market share.²

II LEGAL AND REGULATORY DEVELOPMENTS

Lending is a regulated activity in Norway, and a licence or a passport as a bank or other credit institution is needed to conduct lending activities. Norway is not a member of the European Union, but through the European Economic Area (EEA) Agreement it is committed to implementing the relevant directives for the finance industry. This means that the free establishment rule applies for EEA banks wishing to provide lending products and services in Norway, and for Norwegian banks wishing to provide similar products and services in the EEA.

The European Union's banking prudential requirements (CRD IV and CRR) was fully implemented in Norway at the end of 2019, thus levelling the regulatory playing field between Norwegian banks and foreign banks operating in the Norwegian market through branches or cross-border passports. Further, the EU Bank Recovery and Resolution Directive (BRRD) was implemented in Norway on 1 January 2019 and the Norwegian Financial Supervisory Authority communicated its MREL (Minimum Requirement for own funds and Eligible Liabilities) capital requirements for the nine first Norwegian banks in December 2019.

Over the next few years, the new prudential requirements to be introduced by the European Union's 'Risk Reduction Package' (which includes CRD V and CRR II) will continue to have an impact on the activities of Norwegian banks. Further, legislation implementing the European Union's securitisation regulation in Norwegian law was passed in April 2021 and is expected to take effect in late 2021 or early 2022. Additionally, a proposal for legislation implementing the EU rules for ELTIF and MMF funds was published by the Norwegian Ministry of Finance in April 2021.

The upcoming amendments to Norwegian law and the EEA Agreement are expected to result in less 'gold-plating' and special Norwegian rules for banks and other financial market participants in the future. Norwegian authorities will need to pay increased attention to EEA-relevant financial markets legislation coming out of the European Union and will have less freedom to implement bespoke domestic solutions.

III TAX CONSIDERATIONS

Norwegian borrowers are currently not subject to withholding taxes on payments to lenders. Legislative committees have suggested that Norway should also implement withholding taxes on payments on (among other things) interest payments; however, currently only loan transactions between certain related parties will give rise to withholding tax on interest payments (effective from 1 July 2021). Further, Norway has a large number of double tax treaties with other jurisdictions where the right to charge withholding taxes to parties in the other jurisdiction is waived by Norway. Even though Norwegian authorities now implement

² The most recent figures for market share can be found at: www.finans Norge.no/en/statistics/banking-sector/.

withholding taxes on related party loans to a borrower in Norway, it will still take time before the legal basis for claiming withholding tax becomes effective towards lenders in a large number of jurisdictions.

To prevent tax base erosion and profit shifting out of Norway, there are limitations on the level of interest costs that are allowed for tax deduction in Norway (basically calculated as a formula on taxable earnings before interest, taxes, depreciation and amortisation of the Norwegian entities). Both interest paid to related and non-related lenders (i.e., banks and bondholders) can at the outset be subject to a limitation of tax deduction; however, tax deduction of interest costs will be allowed for a Norwegian borrower in a corporate group if the equity ratio of the company or the Norwegian part of the corporate group is at least as high as the equity ratio of the corporate group as a whole (implying that corporate groups with only Norwegian entities will be allowed full tax deduction on interest costs). However, interest costs paid by a Norwegian borrower to related lenders outside a corporate group can still be subject to a limitation of tax deduction. In this respect, a third-party debt guaranteed by a shareholding entity of the borrower is considered incurred in respect of debt to related parties (and thereby subject to a limitation of tax deduction). As a result of this, parent company guarantees are no longer commonly part of the security package in Norwegian financings (see Section IV.ii).

No Norwegian stamp or documentary taxes are applicable in connection with the establishment, trading or enforcement of a loan under Norwegian law. Perfection or registration costs for security, and court fees for enforcement procedures are nominal only and unrelated to the amount of the loan or security in question.

The standard Foreign Account Tax Compliance Act (FATCA) riders prepared by the Loan Market Association (LMA) are customarily included in loan agreements made under Norwegian law. Norway and the United States have entered into an agreement of automatic exchange of tax-relevant information, thereby limiting the risk of any FATCA liabilities for Norwegian lenders.

IV CREDIT SUPPORT AND SUBORDINATION

i Security

Obtaining security is straightforward and there are only nominal registration fees involved in the uptake of security. However, the financial assistance limitations for target companies as mentioned in Section IV.ii also apply to security created by a Norwegian target company for the benefit of a lender of acquisition financing granted in connection with the purchase of its shares or the purchase of shares in its parent company.

The most common security taken out in a Norwegian debt financing is share security, which is perfected by way of a notice to the company whose shares have been charged. As Norway has implemented the Financial Collateral Directive (Directive 2002/47/EC), obtaining share security under Norwegian law follows a similar approach to that in the European Union, and pre-agreed enforcement procedures are commonly included to ensure swift enforcement of shares by way of either appropriation or a pre-agreed sales process.

Mortgages over real registered asset classes are also easily obtained by filing simple standard forms with the relevant Norwegian registry. Mortgage over real estate is obtained by filing the mortgage form with the Norwegian Land Registry, mortgages over vessels are

obtained by filing the mortgage form with the Norwegian Ship Registry, and mortgages over aircraft and certain equipment related to aircraft (in accordance with the Cape Town Convention) are obtained by filing a mortgage form with the Norwegian Civil Aircraft Registry.

Generally, under Norwegian law, agreeing to a floating charge over all assets owned by a debtor from time to time is not allowed. However, much of the same effect can be achieved because floating charges over specific asset classes are allowed. This covers floating charges over a debtor's trade receivables from time to time, as well as its inventory and its operating assets. These floating charges are obtained and perfected by way of filing standard forms with the Norwegian Registry of Movable Property. The floating charge over operating assets also comprises all intellectual property used by an entity in its operating business. It is also possible to take out a separate security over patents (and applications for patents), and this security will cover patents that are not used by the debtor in its own operations, but instead developed for sale or licensing to third parties.

Assignment of specific monetary claims is possible and customary under Norwegian law. However, a Norwegian company can only assign as security any current or future monetary claim for payment in a specifically mentioned legal relationship; other contractual rights and interests cannot be assigned (contrary to what is possible in some other jurisdictions). Charges over bank accounts are possible, under Norwegian law, in the form of an assignment of the monetary claim against the bank for amounts deposited to the account. Such security may cover a fixed amount deposited on a blocked account or it can be a claim against the amounts from time to time standing to the credit of an operating bank account. Assignments of monetary claims are perfected by notification to the debtor of the claim.

ii Guarantees and other forms of credit support

Granting of guarantees is possible and customary in Norway; however, parent company guarantees may now have adverse consequences for tax reasons (see Section III) and are therefore usually avoided if the borrower is a Norwegian entity (unless it can be verified that an exemption from the tax deduction limitation on interest will apply).

Guarantees from subsidiaries are common in all types of corporate and acquisition financings. Norway has traditionally had strict financial assistance rules, which has meant that a Norwegian target company has only been able to grant guarantees or security, or advance funds in connection with an acquisition of its shares or its parent company, subject to very strict limitations. New legislation has been introduced to ease the possibility for a Norwegian target entity to grant security for acquisition financing with effect from January 2020 and, following clarifications by the authorities as to the interpretation of these new financial assistance rules, it is now generally also considered possible for the lenders under an acquisition financing to obtain guarantees and security from a target company (and its subsidiaries) if certain procedures are complied with.

The validity of the financial assistance (in the form of guarantees or security, or both) granted by a target group company is, however, still determined based on fact and not formality, as this is for the corporate benefit for the grantor of the financial assistance. We would, therefore, still recommend adding appropriate limitation language to ensure that the security and the guarantee obligations incurred will only extend to the amount allowed possible under the law on each occasion. There is no simple procedure or mere formality that can be relied upon to ensure safe passage for these financial assistance rules; each instance

must be carefully assessed based on the matters of fact on each occasion. Therefore, we would advise a careful approach for lenders under acquisition financings involving a Norwegian entity as target company, and legal advice should be sought in each specific case.

Norwegian entities (and their boards of directors) will generally have an obligation to act in the best interest of the company and ensure that there is sufficient corporate benefit when undertaking a transaction. This will, as a main rule, also apply to the granting of guarantees to related parties. Calculating the actual arm's-length consideration for a guarantee or security interest under Norwegian law can be complicated, but lenders should make sure that arrangements are in place ensuring that arm's-length provisions are paid to protect their security position, as this will typically be an assumption under the relevant legal opinions granted in favour of the lenders (see Section V).

The Norwegian financial assistance rules will not prohibit the Norwegian target from distributing ordinary dividends to the purchaser of its shares.

iii Priorities and subordination

Contractual subordination is recognised and customary under Norwegian law and may generally take two different forms. The first possibility is to agree to grant a fully subordinated loan (labelled as such), which under Norwegian law is recognised as a separate class of loan that ranks behind all *pari passu* debt (whether secured or unsecured), but ahead of equity claims from shareholders. In the event of a bankruptcy of the borrower, the holder of a fully subordinated loan will not be able to claim any dividend on the fully subordinated loan unless all the *pari passu* debt (as well as the prioritised claims, e.g., bankruptcy costs) has been paid. The second possibility is to agree to a contractual subordination and turnover in favour of another creditor (typically a bank) of claims of an ordinary (*pari passu*) claim against the borrower. In the event of a bankruptcy involving the borrower in this scenario, the holder of the loan will claim against the borrower in the bankruptcy as normal, but any dividend received from the bankruptcy estate will, in accordance with the subordination and turnover agreement, be turned over to the other party (typically the bank), in accordance with the contractually agreed terms and without involvement of the bankruptcy estate. Norway has not yet implemented the Creditor Hierarchy Directive, which implements the new class of 'senior non-preferred' liabilities, which rank below ordinary claims and above subordinated claims. This will likely be rectified as Norway transitions into the bail-in regime created by the BRRD.

Intercreditor agreements regulating security sharing are also customary and its content will vary depending on the structure and type of financing in question. The traditional security structure under Norwegian asset financings has been that of first and second priority security in the same asset, typically with a bank having first priority security in the asset and the junior creditors such as, for example, bondholders having second priority security. The intercreditor arrangements in such a setting would customarily revolve around enforcement rights, standstill periods and cash distribution waterfall, sometimes also with a purchase option for second priority security holders to purchase the first priority collateral position.

'LMA-style' intercreditor agreements are customarily seen where the structure is more akin to a financing of the whole group as such and not limited to specific assets. The concept of a security agent holding common security positions on behalf of different creditor classes is recognised under Norwegian law. The most typical intercreditor structure is probably the 'super senior' revolving credit facility granted by bank lenders to support a borrower with working capital facilities and secured on the same assets as a bond tranche having security

on the same priority in the same assets, but where the revolving facility takes priority in coverage from enforcement proceeds from realising the security. However, typical LMA-style intercreditor agreements will contain provisions that have not been tested under Norwegian law and may be difficult to enforce in a bankruptcy situation of the relevant obligor as the bankruptcy estate will, as a general rule, be entitled to decide whether or not to step into the position of unfulfilled contractual obligations in a contract of a mutually burdening nature. The obligation included in LMA-style intercreditor agreements to release intra-group claims in the event of a default will, for example, probably not be binding upon the bankruptcy estate unless there is a valid security interest over the intra-group claim (and if there is, as a main rule under Norwegian law, a prohibition to pre-agree sale or transfer procedures for such security positions). Regardless of the above, these intercreditor provisions are often entered into, and legal opinions will contain relevant carve-outs for these kinds of provisions in a bankruptcy (see Section V).

V LEGAL RESERVATIONS AND OPINIONS PRACTICE

The granting of legal opinions under Norwegian law typically follows the European practice where legal counsel to the lenders issues a legal opinion both in respect of the corporate capacity of the borrower (and guarantors) incorporated in Norway, and the legal validity of the Norwegian law documents. The opinions are, therefore, typically given under the assumption that all factual matters and all signatures contained in the documents (including on corporate resolutions and powers of attorney) are genuine and correct. Delivery of a certificate from a director of each opinion obligor confirming the same is commonly requested to minimise the risk of error.

Another reservation is made with regard to corporate benefit. All transactions between Norwegian entities should, as a matter of corporate law, be made in accordance with the arm's-length principle. This may imply that upstream guarantees and security granted by subsidiaries to a parent company to secure debt obtained by the parent must be remunerated by the parent by an arm's-length fee or some other tangible corporate benefit to the subsidiary. If this is not done, the consequence could be that the guarantee or security is not validly granted and binding on the subsidiary and may be set aside.

Norwegian corporate capacity opinions typically contain a reservation with respect to insolvency laws in general, as a Norwegian bankruptcy estate has wide discretion to elect whether it will fulfil unfulfilled contractual obligations under mutually binding contracts. Although a loan agreement will not be considered mutually burdening (as long as the loan is granted and the other party is only obliged to repay), certain intercreditor provisions typically found in LMA-style intercreditor agreements have not been tested by Norwegian courts and may not be upheld by a Norwegian bankruptcy estate (although the provisions are linked to a loan agreement that must be upheld). Further, all powers of attorney granted or contained in an agreement entered into by a Norwegian company will not be binding on the bankruptcy estate.

Further, during an insolvency the bankruptcy estate will usually want to consider all transactions made by the debtor in the period leading up to the bankruptcy, as the courts will have many possibilities to set aside transactions made by the debtor prior to bankruptcy if the transaction may be said to give preference to some creditors at the expense of others or is made at an undervalue (or in favour of certain related parties). As a starting point, transactions made up to two years prior to the bankruptcy may be subject to a clawback;

however, in the case of transactions giving a creditor a fraudulent preference, transactions made up to 10 years prior to the bankruptcy may be set aside. Under Norwegian law, only the bankruptcy estate can approach the courts and ask that a transaction be set aside.

A few other provisions commonly contained in LMA-based loan documentation will also typically be problematic under Norwegian law and the legal opinions granted will usually include a reservation, for example, in respect of the following clauses.

‘Entire agreement’ clauses, stating that the loan agreement contains all relevant provisions of the agreement, will at the outset be upheld by Norwegian courts. They have, however, full discretion in assessment of evidence, and if the provision of the loan agreement is unclear or the matter at hand is not regulated in the agreement, a court may look at statements and other facts outside of the loan agreement to decide what the mutual understanding between the parties was. Further, clauses stating that provisions that are held to be invalid or non-binding by a court under the agreement should not affect the validity of other clauses or provisions of the agreement will not be binding upon a Norwegian court. Also, Norwegian law in general implies that where a party has a contractual right to resolve a matter in its discretion, the use of such discretion should be reasonable and will be subject to testing by Norwegian courts that the discretion has not been used to impose unfair contractual terms upon the counterparty.

Norwegian legal opinions also contain a statement that contractual obligations are enforceable under Norwegian law, with a reservation that the specific remedies available will be subject to the discretion of Norwegian courts from time to time.

Legal opinions are typically granted in favour of all the lenders at the time of entering into the financing transaction, and always with a possibility to disclose on a non-reliance basis to a wide range of other interested parties (including successor lenders in the syndicate). Sometimes reliance is also granted to new lenders following the primary syndication.

VI LOAN TRADING

Loan trading is possible and common in Norway. The main rule under Norwegian law is that a loan position can be assigned or transferred freely unless anything is agreed to the contrary in the underlying contract with between the lender and the borrower. Loan agreements commonly include the standard LMA provisions that consent of the borrower is needed unless the assignment or transfer is to another lender in the syndicate (or their respective affiliates) or to lenders on a pre-approved list of acceptable lenders. In some sectors where a higher degree of relationship lending has been common – for example, as a result of a more specific need for business or regulatory knowledge – it is sometimes seen that assignments or transfers are restricted to banks that are generally known to operate in the relevant sectors. This may, for example, be the case for loans made to companies in the oil and gas industry, which are subject to a strict regulatory regime of which such borrowers would like all of their lenders to be aware.

If a loan position is transferred to a successor lender, the benefit of the security position relating to the claim and held by a separate security agent will continue to secure the loan following the transfer and, as such, the security position may be said to follow the underlying claim. A security position can also be transferred under Norwegian law, so that the position as security agent may also be changed during the term of the loan.

VII OTHER ISSUES

As mentioned in Section IV, the softening of the strict Norwegian financial assistance rules from January 2020, which was intended to make it easier to obtain secured acquisition financing from Norwegian target companies, has been further clarified, and the modified financial assistance rules are also operational in practice. However, the rules are largely based on an assessment of the facts in each separate case, and there is no simple 'whitewash' procedure that can be followed to ensure that financial assistance (loans and guarantees) from a Norwegian target company will always be considered valid.

VIII OUTLOOK AND CONCLUSIONS

Norway has an open and internationally oriented economy, heavily weighted towards export, and the outlook for the lending activity in the Norwegian market will to a large extent depend upon the trends in global trade and the international finance markets. The Norwegian economy is primarily influenced by the developments in the oil and offshore sectors, and, as such, fluctuations in the price of oil and gas will affect activity in the Norwegian economy. Given the global covid-19 pandemic outbreak, the Norwegian economy suffered a slowdown in 2020, and it is expected that this will continue to impact the bank market and bond issuances well into 2021.

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