The Private Equity Review

Twelfth Edition

Editor
Stephen L Ritchie

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THE PRIVATE EQUITY REVIEW

TWELFTH EDITION

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Editor
Stephen L Ritchie

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PREFACE

The 12th edition of *The Private Equity Review* comes in the wake of a successful – but bumpy – year for dealmakers, which came on the heels of 2021's record-breaking level of activity. While private equity dealmakers remained active in 2022, with merger and acquisition (M&A) activity at the second-highest level on record (and well above 2020 and pre-pandemic levels), that activity was largely a continuation of 2021's unprecedented momentum carrying into the first half of 2022 before dropping sharply in the latter part of the year. That drop was due to a confluence of factors, including rising borrowing costs, challenged debt markets, high inflation, fears of a potential recession and declining boardroom confidence. The net result was an overall reduction in deal activity of roughly 40 per cent by value and 15 per cent by deal count from 2021. Large deals were up slightly as a percentage of overall M&A value but down in absolute numbers from 2021 levels, driven by the steep drop in mega-deals in the second half of 2022. Private equity exit activity decreased substantially in 2022, with value down 63 per cent and count down 28 per cent. Consistent with these trends, initial public offering and M&A by special purpose acquisition corporations (SPACs) – one of the biggest drivers of 2021's record-breaking deal volume – came to a screeching halt in 2022. The number of liquidated SPACs, with SPAC funds being returned to investors without a deal being done, shot up in the fourth quarter of 2022, with more expected as additional SPACs face upcoming expirations. Although 2022 did see a steady increase in announced de-SPAC M&A activity, likely due in part to SPAC sponsors seeking a deal ahead of the significant number of SPACs approaching their expiry dates, these deals were done at much smaller average sizes than peak 2021 levels and amid an overall background of increasing numbers of terminated de-SPAC transactions.

That said, more than US$1 trillion of global activity in 2022 was attributed to private equity sponsors – at roughly 33 per cent of global deal value, exceeding the prior all-time-high metric set in 2021. Private equity sponsors continued to seek out larger public targets in record number, with overall take-private activity and value surpassing recent levels – the average take-private deal size was US$3.5 billion in 2022, up significantly from US$2.6 billion in 2021. With continued confidence in the performance of private equity as an asset class, fundraising activity remained strong as well, with private equity funds raising aggregate capital of over US$1.2 trillion and continued record amounts of available capital, or dry powder, at, by one estimate, over US$1.4 trillion.

The year 2022 again demonstrated private equity's enormous impact and the continuing creativity of private equity dealmakers. Given private equity funds' success, creativity and available capital, private equity will continue to play a major role in the global economy, not

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only in North America and Western Europe, but also in developing and emerging markets in Asia, South America, the Middle East and Africa, notwithstanding ongoing and potential additional political, regulatory and economic challenges.

Private equity professionals need practical and informed guidance from local practitioners about how to raise money and close deals in multiple jurisdictions. We intend for *The Private Equity Review* to help address this need. It contains contributions from leading private equity practitioners in 14 different countries, with observations and advice on private equity dealmaking and fundraising in their respective jurisdictions.

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

I want to thank everyone who contributed their time and labour to making this 12th 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 2023

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Part II

Investing

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Chapter 18

NORWAY

Peter Hammerich and Markus Heistad[1]

I OVERVIEW

i Deal activity

The Norwegian economy is, to a large degree, directly and indirectly, exposed to the oil and gas extraction and related industries. Although Norwegian fund managers increasingly have sought to 'decouple' from direct exposure to these sectors, in 2021, among Norwegian private equity firms, the petroleum sector attracted the most capital of all sectors, followed by the IT sector.[2] Further, the general investment climate is affected by the fortunes of the oil and gas industries. After a period of disinterest for the sector due to a climate transition focus, profits from oil and gas have increased substantially in the past year, not least due to Russia's war on Ukraine and Norway increasing its own role as a supplier of natural gas to other European countries.

During 2021, funds advised by Norwegian sponsors[3] deployed a total of 18.5 billion Norwegian kroner compared with 8.3 billion and 9.5 billion Norwegian kroner in 2019 and 2020, respectively. There have been no public to private deals (of any significance) carried out by private equity investors during the past few years.[4]

The number of private equity exits by funds advised by Norwegian sponsors continued its downward trend, to 23, although the value of exits increased.[5]

There has been a lasting decline in the number of private equity exits being made in the form of an initial public offering (IPO). This trend may indicate that IPOs are not seen as being as viable an exit route as previously in the Norwegian market, except in exceptional cases. Listings on the Euronext Oslo Stock Exchange main exchange have been eclipsed by listings on the multilateral trading facility Euronext Growth Oslo. Together with the main market, listings were at an all-time high during 2021, but neither 2021 nor 2022 saw any private equity exits.

As at the start of 2023, a total of 246 Norwegian alternative investment fund managers (AIFMs) were registered or authorised by the Financial Supervisory Authority of Norway, compared with 235 the year before and 167 in 2019.[6] Approximately half are private equity

1 Peter Hammerich is a partner and Markus Heistad is a specialist partner at BAHR.
2 NVCA, Private Equity Funds in Norway, 2021.
3 Definition by the Norwegian Venture Capital & Private Equity Association (NVCA), based on where the private equity firm is headquartered, differing from Invest Europe's definition, which defines the nationality depending on where the responsible advisory team is located.
4 BAHR internal study.
5 NVCA, Private Equity Funds in Norway – Activity Reports 2018, 2019, 2020 and 2021.
6 Financial Supervisory Authority of Norway (FSAN) register.

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managers. The steady increase in number is likely 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 Alternative Investment Fund (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). International private equity funds are highly active in the Norwegian market, in which investments are largely unrestricted. 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 – chiefly, Argentum Fondsinvesteringer AS. Argentum is a government-owned investment company that invests in private equity. Argentum is active in both the primary and the 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 2022, the investment portfolio of Investinor AS amounted to 8 billion Norwegian kroner.[7]

There were few new fund sponsors in Norway in 2021, with the planned new active asset management company of industrialist Aker ASA, headed by former Norges Bank Investment Management CEO Yngve Slyngstad, as the largest newcomer.

ii Operation of the market

Management incentive schemes

A key element of private equity investing is appropriate incentive schemes aimed at key personnel at both 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 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

7 Source: Investinor AS: https://investinor.no/en/.

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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 who 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.

As of 2017, non-compete clauses and certain types of non-solicitation clauses in employment contracts are subject to several limitations. 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 restrictions mean that non-compete and non-solicitation clauses should be addressed fully in shareholder agreements for management incentive schemes and be linked to the status as an investor.

Private equity divestments

The terms of divestments made by private equity funds will differ from case to case and generally between segments (venture, growth and 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, except for exits in smaller companies to the multilateral trading facility Euronext Growth. Consequently, most exits take the form of a secondary sale to other private equity investors or trade sales to industrial actors. The trend towards more exits made in the form of continuation funds will likely also make itself felt among Norwegian fund sponsors. Norvestor was among the first to carry out a rollover exit of IT company Cegal.

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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. In the first half of 2020, the covid-19 pandemic generally brought the M&A markets to a halt, and both the after-effects of covid-19 and the current uncertainties as a consequence of the Russian war against Ukraine have prolonged a generally low level of activity. The years 2021 and 2022 overall represented a high rate of deployment of capital by private equity investors, but realisations remained low.

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. Although most private equity fund managers would expect to put such a plan in place as a fundamental aspect of the investment process, the Alternative Investment Fund Managers Directive (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 or not the target company is listed on a regulated market. Acquisition of controlling stakes in listed companies triggers particular requirements.

Norway has implemented the EU Takeover Directive[8] 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 Euronext Oslo Stock Exchange or Euronext Expand). 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[9] through rules in the Norwegian Securities Trading Act, requiring major shareholding notifications.

8 Directive 2004/25/EC.

9 Directive 2004/109/EC, as amended through Directive 2013/50/EU.

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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 a European Economic Area (EEA) Member State are subject to certain reporting requirements when investing in unlisted companies that are not small or medium-sized enterprises (SMEs).[10] 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 notification or authorisation requirements under Norwegian or foreign legislation. In Norway, this applies within, for example, the financial, fisheries and oil extraction sectors and for 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.

ii Fiduciary duties and liabilities

Private equity sponsors or managers are not subject to any specific fiduciary duties or similar duties to those of 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

10 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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on 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'.[11]

In respect of 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. 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.

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 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 because of the transaction to which the financial assistance relates. Procedural requirements must still be followed, and the financial assistance must be on market terms. Funds managed by authorised AIFMs must, however, comply with the asset stripping restrictions under the AIFMD that are applicable to target companies that are not SMEs or real estate holding companies.

Potential liabilities for majority shareholders

Norwegian limited company law provides for 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 statutory provisions provide only 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 in which 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 is required by the Norwegian Private Limited Companies Act, the company has been under-capitalised compared with 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 that the company is not sufficiently independent of its owners), or the company's funds have been used against its interests to benefit its shareholders.

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

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Rights of stakeholders

As a general rule, Norwegian law does not confer any legal rights on other stakeholders that are legally binding on 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 because of 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 to 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

During 2021, investment grew across all phases, most significantly in the buyout and venture phases, growing by 50 per cent and 160 per cent, respectively, and reaching 18.5 billion Norwegian kroner.[12] This is a record since tracking of the market started in 2007.

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 overall. Covid-19 seems to have had mixed effects on bricks and mortar-based businesses. Social distancing has represented a major push towards online shopping, but having large parts of the workforce working from home has led to a push for goods for the home (furniture and refurbishing, etc.). Recent inflationary trends and higher interest rates may affect this going forward.

12 NVCA, Private Equity Funds in Norway – Activity Report 2021.

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ii Financing

Traditionally, Norwegian sponsors have leveraged buyouts to a lesser degree than sponsors in other jurisdictions. 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. 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. 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 private transactions, terms will, as a rule, be confidential. The disclosure rules under the AIF Act in respect of 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

Divestments by Norwegian private equity sponsors slowed further in 2020 and 2021. In total, 23 divestments were made by such sponsors in 2021. Norvestor was among the first Norwegian sponsors to carry out a rollover exit of IT company Cegal, spun out from its fifth fund to a special purpose vehicle managed by Norvestor. The uncertainty and volatility introduced by covid-19 and further strengthened by the Russian war in Ukraine have clearly affected the market. Internationally, we have seen an increasing trend towards continuation vehicles and rollover exits, which we expect to include Norwegian fund sponsors going forward.

IV REGULATORY DEVELOPMENTS

In Norway, the AIF Act, implementing the AIFMD, regulates management of private equity funds and the marketing of interests in such funds. Upon entry into force of the pre-marketing rules under the amended AIFMD, pre-marketing will also be a regulated activity. 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, whereas some have elected to operate on a purely offshore basis with Norwegian advisory hubs.

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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. The EU Regulation on European Venture Capital Funds (EuVECA)[13] and the EU Regulation on Social Entrepreneurship Funds (EuSEF)[14] have now been implemented (in their original and unamended versions). The EU Regulation on Long-Term Investment Funds (ELTIF) entered into force on 1 January 2023.[15] The rules introduce these regulated fund types in Norway, including the ability of such funds to provide loans, which is a regulated activity under Norwegian law. In respect of 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 Financial Supervisory Authority of Norway (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 relating 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 regulatory authorisation to carry out any regulated activities in or into Norway. In respect of 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 in respect of private equity transactions, which are legally no different from transactions between any other parties, except for the asset stripping rules under the AIF Act, which are binding on AIFMs that are authorised. The structure of private equity funds may have consequences in respect of their position under competition law.

Norwegian rules implementing the EU Sustainable Finance Disclosure Regulation (SFDR) and the Taxonomy Regulation, which were adopted by the Norwegian Parliament in December 2020, entered into force on 1 January 2023. Although the rules do not – as a starting point – contain substantive investment restrictions, the spirit of the rules and the seeming appetite for environmental, social and governance (ESG) and sustainability products from institutional investors would likely require private equity sponsors to integrate ESG into their investment and risk management processes to a much higher degree than has been the case to date, also affecting the work of service providers in transactions. We expect compliance with the new rules to disproportionately affect registered AIFMs, which are often small with more limited internal resources to address additional regulatory and compliance requirements.

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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V OUTLOOK

Notwithstanding the market conditions affecting all investors, private equity investors are especially dependent on professional and successful deal sourcing to be able to deploy committed capital and make divestments on optimal terms on the prospect of the termination of a fund. High investment levels during 2020 indicate that Norwegian private equity sponsors have been able to deploy significant capital in a comparatively difficult market climate. Conversely, the low and decreasing levels of realisations may indicate that some fund managers may have difficulties exiting investments as planned for fund vintages.

The relative importance of bank financing over other financing sources may change going forward. The transposition of the EuVECA and ELTIF Regulations will provide Norwegian private equity managers with opportunities to establish funds that are allowed to provide loans (within certain limitations), which has not been possible until now. In particular, the ELTIF Regulations may open the venue for credit funds that are ready for opportunities in, in particular, the real estate sector – a sector in which several funds are approaching refinancing deadlines.

The statutory sustainability disclosure and reporting requirements under the SFDR and EU Taxonomy Regulation entered into force on 1 January 2023, and private equity managers will have to comply with the rules quickly. Norwegian private equity sponsors, having marketed funds in the EU, have already been required to comply with such rules since their entry into force in the EU, but most local managers have not adapted to the rules.

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Appendix 1

ABOUT THE AUTHORS

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Peter Hammerich is a partner and the chair of the board of directors at BAHR law firm, heading BAHR's asset management and private equity group. Having practised within asset management, investment funds and private equity for more than 23 years (15 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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Markus Heistad is a specialist partner in BAHR's asset management practice group, having practised within asset management for more than 10 years. Before joining BAHR, Mr Heistad held a position with the financial markets department of the Norwegian Ministry of Finance, working with financial services regulation. Mr Heistad's practice focuses on alternative asset management and banking and insurance regulation, as well as transactions within those fields.

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