# Norway

**Robert Sveen and Odd Erik Johansen**

Advokatfirmaet Steenstrup Stordrange DA

### 1 Types of private equity transactions

What different types of private equity transactions occur in your jurisdiction?

Over the past 10 years private equity activity has increased substantially in Norway. The increase in deals did not extend into 2009, which became a consolidation year for most private equity players in Norway, in line with the global trend.

There are few limitations as to what type of deals we see in Norway compared to other countries with an active private equity market. Historically we have seen many LBO's of privately held companies, but now the transactions spread from mergers and investments in majority and minority stakes in different equity instruments both in private and public companies, to investment in debt and debt securities. The investments are usually leveraged towards the investment, but may be 'back leveraged' or for pure fund equity. We have also started to see fund-to-fund transactions and secondaries.

### 2 Corporate governance rules

What are the implications of corporate governance rules for private equity transactions? Are there any advantages to going private in leveraged buyout or similar transactions? What are the effects of corporate governance rules on companies that, following a private equity transaction, remain or become public companies?

The Norwegian corporate governance rules (Code of Practice) is a set of good business practice rules or code of conduct prepared and published by the Norwegian Corporate Governance Board (NUES) (a public good foundation). The Code is based on the 'comply or explain' principle, meaning that as long as you explain why, you do not need to comply with the Code as such. The Code only applies to listed companies, and the Oslo Stock Exchange requires that all listed companies annually publish a statement on the company's principles for corporate governance in accordance with the Code.

Based on the fact that the Code principally only sums up what is regarded as good business practise in Norway, and since the comply or explains principle provides for a great deal of flexibility, most market players does not view it to be of substantive consequence to be subject to the Code. To the extent any players choose to stay or go private due to legislative reasons, this is usually linked to the rather strict Norwegian disclosure requirements for listed companies, not the Code.

As Norway (through the EEA) is bound to implement most of the EU directives into Norwegian legislation, we are also closely monitoring the EU debate related to specific corporate governance or transparency rules for the venture capital or private equity industry. Apart from the EU rules that may emerge, there are no corporate governance or transparency rules specific to the venture capital or private equity industry in Norway, nor do plans exist to implement such rules to our knowledge.

### 3 Issues facing public company boards

What are the issues facing boards of directors of public companies considering entering into a going-private or private equity transaction? What is the role of a special committee in such a transaction where members of the board are participating or have an interest in the transaction?

The board of directors of a public company considering entering into a going-private or private equity transaction needs to satisfy its fiduciary duties to all stakeholders in the company. In particular, they should pay attention to the confidentiality and disclosure requirements as a listed company, as well as the equal treatment principle.

If any of the board members participate directly in the transaction as equity or debt holders, particular attention needs to be paid to conflict of interest issues and their legal competence to participate in decisions involving themselves as stakeholders. According to the corporate governance Code (see question 2), the company should make sure an independent valuation is conducted in relation to transactions between the company and board members.

Special committees are seldom formed in Norwegian companies to address these types of issues, and if formed, they can only do case preparations for the full board, who will then make the decisions.

### 4 Disclosure issues

Are there heightened disclosure issues in connection with going-private transactions or other private equity transactions?

No.

### 5 Timing considerations

What are the timing considerations for a going-private or other private equity transaction?

This depends on the structuring of the proposed transaction and the competition or regulatory law implications. If the transaction is subject to level two competition filing in the EU or Norway, this will significantly affect the timing.

Most going-private transactions are carried out as voluntary offers, with a subsequent squeeze-out and de-listing.

A timetable for a voluntary offer for the shares of a listed company would typically look as follows:

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| Within 14 days of offer | Announcement of intention to launch a public offer (can be done at day zero) |
| 14 days before offer | Offer document or listing particulars lodged with Oslo Stock Exchange for approval |
| Day of offer (day zero) | Offer document or listing particulars published, sent to all shareholders and made known to target company employees |
| Day 7 | If offer period is set at two weeks (minimum), this is last date for issue of statement by target board of directors (may be extended) |
| Day 14 | Generally earliest closing date for offer |
| Day ? | Settlement date varies depending potential extensions of the offer period, and compliance or waiver of the conditions in the offer document. Usually as soon as possible after all conditions have been met. |

If the acceptance threshold is set at 90 per cent and is successfully obtained, the buyer may effectuate a squeeze-out of the remaining shareholders. This procedure can be carried out directly following the completion of the offer, and adds another week or so to the timetable.

Following a squeeze-out the company can be formally de-listed immediately. If a bidder does not reach the 90 per cent threshold, and the squeeze-out consequently cannot be carried out, the Oslo Stock Exchange very seldom approves de-listings as it deems it to be an acquired right of the minority shareholders to be shareholders in a listed company unless the majority shareholder has reached the 90 per cent threshold and has initiated a squeeze-out.

### 6 Purchase agreements

What purchase agreement issues are specific to private equity transactions?

As a consequence of the credit crunch, the private equity market and the M&A market in general has experienced a shift from a more seller-friendly market to a more purchaser-friendly market.

From a purchaser's perspective, it is typical to request that the purchase agreement contains a condition precedent in relation to the purchaser's ability to finance the deal, without any obligation on behalf of the purchaser. The seller, however, whether a private equity player or not, will try to limit the purchaser's possibility to withdraw from the transaction following signing. Since it is in the interest of both parties that financing is obtained, some sort of confirmation from the proposed debt provider is often sought prior to entering into a purchase agreement, although this is not always possible to get in a form binding on the debt provider.

A private equity buyer normally focuses specifically on the target's existing indebtedness, mainly because the existing indebtedness typically needs to be refinanced in connection with the transaction. If the seller is a private equity house, the purchase agreement sometimes contains provisions regarding escrow of part of the purchase price to secure claims in relation to representations and warranties. The size of the escrow would typically equal the main liability cap. The agreement will also contain standard representations and warranties from the seller. If due diligence reveals any risks or exposures, the seller is likely to have to indemnify the purchaser by way of specific indemnities. Given the current market situation with less competition, the purchaser is likely to be in a good position to negotiate favourable agreement terms at the expense of the seller. Break fees are not very common.

### 7 Participation of target company's management

How can management of the target company participate in a going-private transaction? What are the principal executive compensation issues?

It is common that the private equity investor offers key management the opportunity to co-invest alongside them. New employment agreements in accordance with the investor's template are also often put into place. Although sometimes heavily negotiated, it is usually unproblematic to agree new terms with management as they welcome the possibility to co-invest. Incentive schemes and co-investment opportunities are often put in place after completion of the offer. To the extent management holds equity in the target, a rollover needs to be on the exact same terms as the private equity sponsor to secure equal treatment.

The challenges in relation to management compensation are, for all practical purposes social security and income tax. The goal is often to structure the incentive scheme so that any gain will be taxed as capital gain. Due to very strict rules in Norway related to taxation of incentive schemes and in particular options, it is challenging to find solid models. Managements financing of their participation can also raise similar concerns if provided in whole or in part by the investor.

It is worth mentioning that management sometimes has a very active role from the start. It does happen that management initiates the P2P process, either on their own account or usually together with a private equity sponsor. In these circumstances many difficult issues may arise particularly in relation to management's fiduciary duties to the company and indirectly to the present shareholders. If management goes too far in relation to their involvement with a potential new buyer, and maybe de facto hinders other bidders from coming to the table, then management may face liability. The board obviously plays a key role here, and needs to meet its responsibilities and act as a representative and sometimes intermediary for all stakeholders.

### 8 Tax issues

What are the basic tax issues involved in private equity transactions? Can share acquisitions be classified as asset acquisitions for tax purposes?

Most private equity transactions are for equity (shares). Norwegian limited liability companies pay a flat 28 per cent on their profit. They also enjoy the benefit of the participation exemption rules, which provide for only a 3 per cent capital gains tax on dividends and gains on shareholdings. Consequently, the main issues arise in relation to transfer pricing and the deductibility of interest on shareholder loans to foreign investors. As withholding tax is common on dividends paid to most countries, profit in the form of capital gains is preferred.

In principle, a target can claim tax deductions on interest on all debt, including subordinated shareholder debt, as long as such debt and interest is provided on an arm's-length basis. The test is generally whether or not external investors would have invested in such debt, if offered to do so. The level of interest rates and the question of thin capitalisation are also relevant to this test. The evaluation needs to be on a case-by-case basis. If the debt takes on general characteristics usually associated with equity, and especially if the equity is deemed insufficient for the company's business operations, there is a risk of reclassification from debt to equity for tax purposes.

Executive compensation, stock options and deferred compensation plans are, as a starting point, taxed as salary at a marginal tax rate of 47.8 or 54.3 per cent excluding or including the employer's social contribution, unless structured so that management is deemed making an arm's length capital investment. If deemed a capital investment and structured accordingly, with an arm's length risk profile, gains should be deemed capital gains and taxed at 28 per cent if privately held, and 3 per cent if held through a limited liability company.

Share acquisitions should generally not be classified as asset acquisitions for tax purposes.

### 9 Existing indebtedness

What issues are raised by existing indebtedness at a potential target of a private equity transaction? How can these issues be resolved?

As in any M&A transaction the buyer needs to establish if there are any change of control provisions or other restrictive covenants in the existing indebtedness through due diligence. Dependent on the terms of the financing the buyer will consider whether to refinance, renegotiate or keep the old financing. Usually most of the existing debt is refinanced to provide for the right seniority for the new debt.

The main issue that arises in relation to repayment or refinancing is costs. Refinancing or repayment may be quite expensive depending on the terms of the existing debt. As this is mainly a commercial question, it is solved through negotiations and usually agreement needs to be sought with existing debt prior to closing. If the transaction involves real estate it is relatively common to keep the existing debt related to the real estate.

**10 Debt-financing structures**

What types of debt are used to finance going-private or private equity transactions? Do margin loan restrictions affect the debt-financing structure of these transactions?

In previous years most private equity transactions were carried out as LBO's with revolver, senior, mezzanine and shareholder loans. Sometimes you would also see high-yield bonds and several layers of mezzanine funding. Now the financing structures vary more, and transactions with pure equity or straight-forward-back leveraging pending a better credit market are seen. In a traditional LBO, the revolver is usually for working capital purposes and is provided by the senior banks (commercial lending institutions). The revolver is taken up by the operating company and is secured by the target's assets. Senior debt is also provided by the same banks and is usually secured by shares in the target due to strict financial assistance rules in Norway. Further external financing, be it mezzanine funding or bonds, is usually structurally subordinated to the senior. Mezzanine funding may involve 'payment in kind' (PIK) notes. Shareholder loans are usually subordinated to all other financing.

There are no margin loan restrictions in Norway that affect the debt-financing structure of going-private or private equity transactions.

**11 Debt- and equity-financing provisions**

What provisions relating to debt- and equity financing are typically found in a going-private transaction? What other documents set out the expected financing?

Debt and equity financing in relation to a public-to-private (P2P) deal will usually contain similar provisions to any other private equity transaction. It is worth noting that Norwegian financial assistance restrictions will limit what requirements financing providers may demand in terms of security in underlying assets for acquisition financing and debt- or equity-servicing going-forwards that does not come from dividends or reductions of share capital or share premium funds. With regards to the actual terms of financing, these will not vary materially from regular private equity finanicing.

To secure the financing, the purchaser will need to provide acceptable collateral, usually in the form of shares in the target company. The shares are pledged by the purchaser to the debt provider in connection with the completion of the transaction. Also, debt already owed by the target company may be refinanced and secured against the target's own assets.

A Norwegian mandatory offer must contain a cash only alternative. Through a preceding voluntary offer, the offeror may seek to limit the cash element involved significantly, but this will rarely be relevant in a private equity backed offer. In these offers it is therefore important to be aware that a guarantee must be provided for the full settlement amount, issued by a bank authorised to operate in the Norwegian market.

Another issue that is generally related to financing terms is the ability to do due diligence reviews before an offer is made. Most equity or debt providers will require extensive due diligence to be undertaken in order to commit funds, but this can in some cases be difficult to achieve. There is no right for an offeror to be able to conduct due diligence under Norwegian law, and the offeror will therefore need the cooperation of the target company in order to be able to meet the funding providers' expectations in this respect. Listed companies have a general duty to disclose inside information, but to the extent an exemption from this duty to disclose is sought, it also has a general duty to keep inside information from being disclosed until it is disclosed to the general market. If the offer is friendly, the target company will usually open up for due diligence reviews to a certain extent. If the offer is not supported by the target, gaining access to information not in the public domain will be very difficult. Several potential offers have collapsed because the target has declined a request for access to even very limited reviews.

**12 Fraudulent conveyance issues**

Do private equity transactions involving leverage raise 'fraudulent conveyance' issues? How are these issues typically handled in a going-private transaction?

Private equity transactions involving leverage do not raise 'fraudulent conveyance' issues as such. However, Norwegian law imposes restrictions on certain transfers and transactions in order to prevent such issues arising.

The board of directors has an obligation to conduct the business of the company in the best interest of the company, and any actions that would put the company or its shareholders at risk of suffering losses would potentially raise director liability issues.

Also, a Norwegian company may not transfer assets for less than fair consideration unless this is done in accordance with the rules on distributions or corporate gifts – both of which require distributable reserves. A Norwegian company must also prepare a valuation statement for any transaction that is not part of its regular business operations between the company and a shareholder or a party associated with a shareholder, if the consideration given by the company exceeds 5 per cent of the company's share capital.

In the event that a transaction takes place within three months prior to insolvency, the transaction may be reversed by the estate. This is extended to a 10-year right of reversal if the other party did not act in good faith.

Fraudulent conveyance issues should also be carefully considered by sellers in highly leveraged transactions. A board of directors considering a sale of the company should review the financial projections provided by management to a prospective buyer and the indebtedness that the prospective buyer proposes that the company incur in connection with the transaction to evaluate any fraudulent conveyance risks.

**13 Shareholders' agreements**

What are the key provisions in shareholders' agreements covering minority investments or investments made by two or more private equity firms?

Most Norwegian P2P deals will have the offeror as a single purpose holding company at the end of a chain of Norwegian and sometimes foreign holding companies. This is usually done both for tax reasons and in order to achieve structural subordination between debt providers. Shareholder agreements in such transactions are therefore usually entered into at a level higher up in the corporate chain than at the level of the offeror or target company.

Typical terms of such agreements in a P2P will be similar to what is found in general private equity shareholders' agreements. Such shareholder agreements also usually include transfer restrictions, tag-along rights and drag-along rights. Sponsors typically seek other contractual rights relating to their potential exit from the investment, such as demand and piggyback registration rights (which may include the right to force an initial public offering), put rights or mandatory redemption provisions.

**14 Limitations on transaction size**

Do private equity firms have limitations on the size of transactions they may engage in?

The minimum or maximum size of transactions is in general determined by internal rules of the specific private equity fund, usually in the investment or limited partnership agreement. These rules will also usually regulate business areas open to the fund for investment, geographical restrictions, restrictions on ownership percentages, etc. There are no statutory limitations on private equity investments other than what follows from general principles of good asset management and general requirements for sufficient capital.

**Update and trends**

As a member of the EEA, Norway will be included in any regulations now under way in the EU for the conduct of private equity funds in general. As public sentiment points towards a desire for more and stricter regulation, Norway is likely to quickly codify requirements set out by the EU and implemented through the EEA.

Also, Norway has already incorporated the Markets in Financial Instruments Directive (MiFiD), the Transparence Directive and the Prospectus Directive, among other recent developments within the EU.

Regulation of transactions as such, and P2P deals in particular, are probably not going to undergo significant developments or changes. There is always a certain interest attached to continuity and predictability in the tax regime for capital gains, but no specific changes of material interest to this type of deal have been proposed so far. We have however, lately seen a growing interest from the tax authorities into leveraged cross-boarder structures. We find it likely that this trend will continue.

**15 Exit strategies and investment horizons**

How do the exit strategies and investment horizons of private equity firms affect the structuring and negotiation of leveraged buyout transactions?

Investors will be sceptical of businesses that are unable to provide a steady and reliable cash flow, not just for reasons related to business operations but also if this is a result of the composition of equity and other funding in the target. A main focus in structuring a deal will therefore be if and how the new owner will be able to tap into the cash flow of the company through dividends and other legal distributions within the limits set by the Norwegian financial assistance provisions.

To some extent a fund's investment horizon in particular may limit the representations, warranties and indemnifications the fund is willing to offer a purchaser in an exit from an investment.

For some private equity investors, it will be important to ensure that the management team are not only rewarded to deliver results during the investment period, but that they are also properly incentivised to stay on after the fund has been able to exit from the investment so as to give the best handover possible to a new buyer and thereby also the best price possible. Funds will therefore occasionally require that managers undertake to reinvest certain parts of their profits if and when the company is sold on, or to refrain from selling all or a majority of their shares within a certain time frame after an IPO or similar exit. In other deals we see management being asked to accept an obligation to give representations and warranties in return for their equity stake, instead of the funds involved in the deal giving the same.

**16 Principal accounting considerations**

What are some of the principal accounting considerations for private equity transactions?

As Norwegian financial assistance provisions only allow servicing of funding with legal distributions such as dividends, reduction of share capital or share premium funds, it will be very important to offerors to what extent capital and future earnings are locked in the target for accounting reasons, or whether such capital can be extracted to service interest payments and other payments.

For the transactions as such, these will normally be accounted for as transactions both under Norwegian GAAP and the International Financial Reporting Standards (IFRS) (to the extent IFRS is used by the company). As goodwill is not recognised as an asset that counts towards free equity when calculating the company's distributable reserves, how goodwill effects both the acquisition, any preceding restructurings or transactions or subsequent restructurings will be very important.

**17 Target companies and industries**

What types of companies or industries have typically been the targets of going-private transactions? Has there been any change in focus in recent years? Do industry-specific regulatory schemes limit the potential targets of private equity firms?

The volume of P2P activity in the Norwegian market has not been such that particular business areas can be singled out as more active than others. In general, the highest activity has perhaps been within the IT sector, the oil and gas service sector and the retail sector. As much of the IT sector in terms of volume has now already been acquired and taken private (most recently highlighted by Cisco's acquisition of Tandberg), other sectors are perhaps more likely to come into focus.

There are few sectors where industry-specific regulatory schemes truly limit the targets of private equity firms. The highest actual thresholds will probably be found in the form of concession requirements within the financial services sector or within the energy or oil and gas sectors.

**18 Cross-border transactions**

What are the issues unique to structuring and financing a cross-border going-private or private equity transaction?

Cross-border private equity transactions are quite common in Norway. Several of the largest private equity deals in Norway over the past few years have been deals sponsored by foreign private equity firms, often based in the UK or the US.

Such deals are really not much different from local deals, but sometimes raise a couple of particular issues. First of all, Norwegian financial assistance restrictions are, as mentioned above, some of the strictest in Europe. This means that structuring a transaction will be of great importance to avoid locking in more distributable funds than absolutely necessary in order for investors to be able to service funding. It also means that international banks will have to be prepared to accept shares combined with a negative pledge as the major security provided for acquisition financing. Another issue is that exit more and more often takes place from one foreign shareholder (the fund) to another foreign secondary buyer. This has resulted in structuring of cross-border deals to often contain a Norwegian group of holding companies owned ultimately by holding companies incorporated in other European jurisdictions for tax reasons.

Norwegian tax authorities are likely to have a closer look at cross-border debt servicing, as agreements not deemed to be at 'arm's length' will lead to a 'tax leakage' and therefore be of interest to the tax authorities.

**19 Club and group deals**

What are the special considerations when more than one private equity firm (or one or more private equity firms and a strategic partner) is participating in a club or group deal?

There are no restrictions under Norwegian law that prevent or restrict more than one private equity firm from participating in a club or a group deal. From a practical point of view, participating firms need to regulate their relationship in a shareholders' agreement or similar.

One particular issue to keep in mind is that cooperating firms will usually be regarded as acting in concert under the Norwegian Securities Trading Act, which may therefore lower the threshold for total ownership spread out over the consortium or club before mandatory offer obligations are triggered.

**20 Recent credit market disruptions**

How have disruptions in the credit markets affected dealmaking? What specific changes to transaction terms have you seen and do you expect in the future?

From the year-end 2007 until now, the market for private equity transactions has been significantly lower in Norway. Even though Norway is widely regarded as having pulled through the recent turmoil relatively untroubled, we have seen a significant and material reduction both in deal volumes and individual deal sizes. A couple of recent mid-sized deals would perhaps indicate that the market is picking up again, but we believe that it is too soon to draw that conclusion based on the few deals that actually go through.

A significant proportion of Norwegian private equity transactions over the past few years have been driven by funds provided by foreign private equity funds, and funds based in the UK or the US in particular. As these jurisdictions remain somewhat 'under the weather' from a financial perspective, the funds that used to be available will likely take some time to regain their availability. This indicates somewhat lower private equity activity in the near future than the Norwegian financial situation would perhaps indicate in isolation. Also, we know that several Norwegian and Scandinavian funds and managers have been working hard over the past couple of years to not have to call on additional funding from investors at a time where additional calls for capital would perhaps be difficult to fulfil. Although there are definitely funds to be invested, we therefore believe that this also indicates a somewhat slower recovery than otherwise expected.

In the longer term, however, we expect to see both local and foreign private equity return to active investing.

**Robert Sveen** **rs@steenstrup.no**
**Odd Erik Johansen** **oej@steenstrup.no**

PO Box 1829
Vika – 0123 Oslo
Norway

Tel: +47 22 81 45 00
Fax: +47 22 81 45 01
www.steenstrup.no