Legal 500
Country Comparative Guides 2025

Norway
Private Equity

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This country-specific Q&A provides an overview of private equity laws and regulations applicable in Norway.

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Norway: Private Equity

1. What proportion of transactions have involved a financial sponsor as a buyer or seller in the jurisdiction over the last 24 months?

The Norwegian transaction market has in recent years attracted high interest from Norwegian, Nordic and international financial sponsors (private equity firms). According to available market data, approximately 1/3 of transactions in the Norwegian market during the last 24 months have involved a financial sponsor as a buyer or seller. This figure does not include add-on acquisitions or divestments made by portfolio companies of financial sponsors. If such transactions are added to the overall figure, the proportion of transactions involving financial sponsors would be significantly higher.

2. What are the main differences in M&A transaction terms between acquiring a business from a trade seller and financial sponsor backed company in your jurisdiction?

Currently, there are only minor differences in M&A transaction terms between acquiring a business from a trade seller and financial sponsor backed company in the Norwegian market. Financial sponsors have traditionally been somewhat more resistant to provide comprehensive representations and warranties in share purchase agreement than trade sellers. With the breakthrough of W&I insurance in the Norwegian market around 2015, which currently is used on almost all sales processes conducted by financial sponsors, they are, however, able to offer broadly the same representations and warranties package to the buyers as trade sellers. Aside from that, financial sponsors are generally less willing to take on any residual liabilities under the share purchase agreement, such as specific indemnities and restrictive covenants, than trade sellers. Financial sponsors often need to liquidate their holding structure in Norway and abroad to repatriate proceeds in a tax efficient manner. A full liquidation may however often not be possible if the liquidating company has outstanding contingent liabilities remaining under the share purchase agreement.

3. On an acquisition of shares, what is the process for effecting the transfer of the shares and are transfer taxes payable?

Upon completion of an acquisition of shares, the title to and ownership of the shares are transferred from the seller to the buyer by way of entering the buyer into the target company's shareholders register as owner of such shares. Such register is held by the target company itself and no public registration is required. If the target company's shares are electronically registered in the VPS (the Norwegian Central Securities Depository), the title to and ownership of the shares are transferred from the seller to the buyer by way of transferring such shares from the seller's VPS account to the buyer's VPS account. There are no stamp duties or other transfer taxes payable in Norway in connection with transfer of shares in a Norwegian private limited company or a Norwegian public limited company. Further, there is no requirement to notarize the transfer of the shares.

4. How do financial sponsors provide comfort to sellers where the purchasing entity is a special purpose vehicle?

The comfort provided to sellers where the purchasing entity is a special purpose vehicle varies. International financial sponsors typically offer to issue an equity commitment letter to the acquiring entity. Such letters customarily contain an obligation for the sponsor to provide equity funding at closing of the acquisition, and it may be made subject to satisfaction of all closing conditions and certain funds debt being available. Frequent negotiation topics with the seller are whether the equity commitment letter also should be addressed to, and be enforceable by, the seller, and whether drawdown of funds could be enforced should the acquiring entity be in breach of the share purchase agreement. Norwegian financial sponsors typically tend to be more flexible on the form and scope of the comfort to be provided, and are frequently willing to execute the share purchase agreement directly in the capacity as guarantor for all the obligations of the acquiring entity under the share purchase agreement.

5. How prevalent is the use of locked box pricing mechanisms in your jurisdiction and in what circumstances are these ordinarily seen?

According to available market data, locked box pricing mechanism is used in approximately 2/3 of the transactions in the Norwegian market, with some variations from year to year. Such variations may be caused by market conditions and the mix of transactions executed by financial sponsors and industrial players. The locked box approach is generally preferred by financial sponsors, while industrial players – in particular those from the US – are often more comfortable with using completion accounts. In controlled auction processes, a locked box approach would normally be preferred unless there are strong arguments for using completion accounts.

6. What are the typical methods and constructs of how risk is allocated between a buyer and seller?

Private M&A transactions in the Norwegian market are customarily structured as a sale and purchase of shares in the target company, except in circumstances where the parties find it more beneficial to structure the deal as an asset transaction. The share purchase agreement, or the assets purchase agreement, as the case may be, sets out the terms and conditions of the transaction amongst the parties. Such agreements customarily contains all the typical provisions on risk allocation as you would find in Nordic and European transactions, such as purchase price mechanism, pre-closing covenants, closing conditions, representations and warranties and specific indemnities. It could be noted that general disclosure against the warranties of the dataroom is the market norm, rather than using a specific disclosure letter, but the warranties customarily also include sweeping provisions on the accuracy and completeness of the dataroom. The representations and warranties are normally given both at signing and closing, without disclosures after signing being permitted except in insured transactions. On the other hand, it is increasingly uncommon to permit the buyer to withdraw from the agreement on basis of material adverse changes between signing and closing. The risk allocation in the individual case depends on the market conditions, nature of the transaction and the parties bargaining power. The recent years it has however generally been a fairly seller-friendly environment in Norway, which also impacts the terms of the transaction agreements favorably to the seller.

7. How prevalent is the use of W&I insurance in your transactions?

According to estimates from M&A insurance brokers active in the Norwegian market, W&I insurance is used in 20 – 30% of the transactions in the mid- and large cap space in the Norwegian market. W&I insurance is frequently used by financial sponsors, and increasingly used also by industrial players.

8. How active have financial sponsors been in acquiring publicly listed companies?

We have seen an increase in public takeovers on the Oslo Stock Exchange and Euronext Growth Oslo (a multilateral trading facility operated by the Oslo Stock Exchange) in the past years. A total of 16 public takeovers were announced in 2023, which are a few more than in 2022 and above the average for the last five years. Slightly less than half of the public takeover bids announced in 2023 were made by a financial sponsor (backed) bidder.

9. Outside of anti-trust and heavily regulated sectors, are there any foreign investment controls or other governmental consents which are typically required to be made by financial sponsors?

The Norwegian National Security Act provides that certain transactions are subject to ownership control by Norwegian public authorities. Pursuant to the Act, a direct or indirect acquisition of a "qualified shareholding" (i.e. 1/3 of shares/votes, or rights to 1/3 of shares/votes or other significant influence over the management) in a target company being of particular interest for the Norwegian national security and which as a result thereof is included on a "National security list" by the Norwegian Ministry responsible for the sector of such company, must be notified to and approved by such Ministry. The "National security list" is not publicly available. In 2023 a number of changes to the Act were adopted by the Norwegian Parliament, of which some went into force on 1 July 2023 while the remaining, including a lowering of the notification threshold to 10 per cent of shares/votes in the target and automatic prohibition against completion of any transaction subject to filing requirement before clearance by the relevant authorities, are expected to enter into force in 2024.

10. How is the risk of merger clearance normally dealt with where a financial sponsor is the acquirer?

The handling of merger clearance risk where a financial sponsor is the acquirer is a common negotiation point in share purchase agreements in the Norwegian market.

While financial sponsors certainly prefer to include a closing condition upon which they can withdraw from the transaction without liability if the required merger clearance is not obtained on satisfactory terms, they may from time to time need to concede to more burdensome “hell or high-water” obligations, especially in controlled auction processed where there is a competitive environment. Such “hell or high-water” clauses would typically impose an obligation on the financial sponsor to divest parts of the target business and/or litigate any competition challenges if required to obtain clearance. It would on the other hand not extend to divesting any existing portfolio companies of the financial sponsor.

11. Have you seen an increase in (A) the number of minority investments undertaken by financial sponsors and are they typically structured as equity investments with certain minority protections or as debt-like investments with rights to participate in the equity upside; and (B) ‘continuation fund’ transactions where a financial sponsor divests one or more portfolio companies to funds managed by the same sponsor?

The vast majority of the transactions undertaken by financial sponsors in the Norwegian market, in particular in the mid- and large cap space, are executed as traditional buy-outs of a majority ownership stake. In the upper large cap space, there have been some recent examples of financial sponsors executing club deals where all take up minority positions due to the overall deal size exceeding the target investment size of one or more of the sponsors. In the small cap and venture space, minority investments are seen, but then typically by venture firms and specialized investment firms. Such investments may take many forms, such as various forms of equity investments, PIK loans and other financial instruments (convertible loans, warrants, etc.), and with different forms of minority protection for the sponsor. The use of ‘continuation fund' transactions has increased in the recent years amongst Nordic and Norwegian sponsors.

12. How are management incentive schemes typically structured?

Financial sponsors usually expect management to make a meaningful (re)investment in the acquired portfolio company. In transactions where management holds substantial ownership in the target company, they may also be required to rollover a part of their investment alongside the financial sponsors. Management incentives in the Norwegian market come in many forms, but are customarily equity-based. The choice of model and structure would usually depend on the financial sponsor. International financial sponsors typically prefer to deploy their standard model with as few changes as possible, while Norwegian and Nordic financial sponsors more regularly build a model tailored to the specific circumstances. The MIP models range from structures such as a straight forward co-investment alongside the financial sponsor in the equity of the portfolio company, to more complex structures providing substantial gearing to management's investment and a different return profile. An example of the latter, would be the typical “International styled” MIP structure where the new holding company of the portfolio company is capitalized with ordinary shares, preference shares and/or shareholder PIK loan held by the financial sponsors, and the management invests in a portion of the ordinary shares or a mix of all instruments. The management's investment in ordinary shares may be bundled in a separate joint holding company, a pooling vehicle, and the management would be bound by a management shareholders agreement. In some instances, where it is desirable that certain members of management shall have the same return profile on their investment as the sponsor, they will also invest alongside the sponsor in the same instruments and same proportions as the sponsor. Share options are rare in the Norwegian private equity market as they are less tax efficient than other forms of equity-based incentivation and will normally be most relevant for management incentives in publicly listed companies and early phase VCs.

13. Are there any specific tax rules which commonly feature in the structuring of management's incentive schemes?

Generally, management investors should be treated as investors and will need to take on genuine risk as holders of equity instruments (i.e. no downside protection should exist and the invested amount should be meaningful) to mitigate the risk of any reclassification of capital gains to salary payments. Thus, the terms of the management investment plan should be tailored to meet the financial investors' commercial terms and the managements' expectations with respect to tax treatment. The management's investments should be made at fair market value as any discount will be considered salary payments for Norwegian tax purposes and employer's national insurance contributions. Management will normally invest through investment vehicles (private companies) to benefit from Norwegian participation exemption and facilitate potential roll-over transactions in connection with a future exit. There are no specific Norwegian tax relieves available, except certain exemptions provided for roll-over transactions and options.

14. Are senior managers subject to non-competes and if so what is the general duration?

The shareholders' agreement governing management's investment in the portfolio company would customarily contain non-compete and non-solicitation provisions. The scope and duration of such restrictive covenants needs to be carefully considered to ensure that they are enforceable. Generally, a length of 12 month from the time the employee ceases to be a shareholder is in most cases deemed to be acceptable.

15. How does a financial sponsor typically ensure it has control over material business decisions made by the portfolio company and what are the typical documents used to regulate the governance of the portfolio company?

The financial sponsor's and management's investment in the portfolio company will customarily be governed by a shareholders' agreement, providing the financial sponsor with decisive influence over the portfolio company. The shareholders' agreements customarily include provision on inter alia board representation and quorum, consent rights, information rights and discretion over exit timing and execution. Usually, the agreements also include provisions enabling the financial sponsor to acquire the shares from members of the management whose employment with the portfolio company is terminated, and may include leaver provisions determining the amount payable to the departing senior manager.

16. Is it common to use management pooling vehicles where there are a large number of employee shareholders?

The use of management pooling vehicles various between financial sponsors. While international financial sponsors typically tend to use pooling vehicles to bundle the investment of management, Norwegian and Nordic financial sponsors often allow the individual manager to invest directly (through its own holding company) alongside the financial sponsor.

17. What are the most commonly used debt finance capital structures across small, medium and large financings?

Bank loans and high-yield bond financing are the most commonly used sources of debt financing of acquisitions in the medium and large cap space in Norway. In the recent years, there has been a highly efficient and liquid high-yield bond market in Norway, making bonds an attractive financing alternative to traditional bank loans. Bond financing is most often being applied as a take-out financing alternative, and so that the banks provide bridge financing on the closing of the relevant acquisition. Such financing may be combined with a refinancing of the target company's existing debt, typically with a term loan and a revolving credit facility. Direct lending structures with financing from specialized lending funds are also seen from time to time, but remains a small portion of the overall financing provided by third-party lenders. In the small cap space, the majority of the acquisitions are carried out without any third-party debt financing or with only smaller portions of external debt.

18. Is financial assistance legislation applicable to debt financing arrangements? If so, how is that normally dealt with?

The Norwegian Private Limited Companies Act and the Norwegian Public Limited Companies Act impose restrictions on a Norwegian target company's ability to provide credit, guarantees and/or security in connection with the financing of the acquisition of shares in the company. However, financial assistance is permitted under certain circumstances, including where the acquirer will form a part of the target company's group following the acquisition, is domiciled in an EU/EEA-country, the financial assistance is deemed to be in the interest of the target company and certain other requirements are met and formalities are complied with. Hence, in the context of leveraged buyouts, the target group may provide security for the acquirer's debt financing arrangements in addition to the acquiring entity providing security over the shares acquired in the target company. Any debt used to refinance the target company's existing debt, and/or to finance the group's general corporate and working capital requirements may, however, be secured by security created over the target company's assets without complying with the formal requirements listed above. Such debt is also often secured by guarantees provided by the various group companies.

19. For a typical financing, is there a standard form of credit agreement used which is then negotiated and typically how material is the level of negotiation?

Acquisition financing provided by banks in the Norwegian market is customarily documented by a loan agreement based on the Loan Market Association standard for leveraged acquisition finance transactions, simplified and adjusted to reflect Norwegian law and market conditions. Norwegian high-yield bond documents are drafted on standard documents commonly used in the Nordic high-yield bond market. Both the loan agreements and bond terms are subject to negotiation.

20. What have been the key areas of negotiation between borrowers and lenders in the last two years?

The general trend is that covenants tend to get lighter in most acquisitions financings. In particular, financial covenants remain a key area of negotiations, with borrowers continuously pushing for lighter covenants. That said, the key terms of a Norwegian financing are still quite far less sponsor/borrower friendly as compared with UK and European deals. In addition, lenders are frequently seeking to increase their ability to transfer their commitments without the consent of the borrower.

21. Have you seen an increase or use of private equity credit funds as sources of debt capital?

Private equity credit funds are increasingly seen in the Norwegian market. However, due to the availability of bank financing on attractive terms and the well-functioning bond market, the private equity credit funds still struggle to be competitive in the Norwegian market. Further, some unregulated private equity credit funds are prevented from offering credit as the banking monopoly in Norway is rather strong and a licence as a bank is required when providing credit to a Norwegian borrower unless any of the exemptions from a licensing requirement is applicable for the specific transaction.

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