

Chapter 13

Worker involvement during a public takeover: the case of Norway

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1. Introduction

In Norway, the EU Takeover Bids Directive is implemented by, in particular, Chapter 6 of the 2007 Securities Trading Act.¹ Regulations on takeover bids are also issued through self-regulation by the Norwegian Corporate Governance Board through the Norwegian Code of Practice for Corporate Governance.² Mergers of public limited companies are not regulated by the public takeover rules, but rather by the 1997 Public Limited Liability Companies Act.

A takeover may be carried out as an acquisition of the target company's shares or of all or most of its assets. There are, in principle, no foreign investor restrictions in Norway. In the takeover situation both parties – both the bidding party (offeror) and the target company (offeree) – in the transaction are obliged to inform and discuss the transfer or acquisition of business with their employees' elected representatives as early as possible. This is stated in Chapter 8, Section 8-2 of the 2005 Act relating to Working Environment, Working Hours and Employment Protection. The employees affected by the takeover shall be informed by their employer as early as possible. Neither the employee representatives nor the employees can block a takeover from being concluded, however.

When assets are transferred, but not, *nota bene*, when shares are transferred, the employees at the transferor may be subject to transfer if the conditions for a legal transfer or a merger according to the Transfer of Undertaking Directive (2001/23/EC) are met.

1. See http://www.finanstilsynet.no/archive/stab_pdf/01/04/10200042.pdf for an unofficial translation into English.

2. For an English version of the code <http://www.nues.no/filestore/Dokumenter/Anbefalingene/2012/2012-10-23CodeofPracticeforCorporateGovernance.pdf>

2. Key elements of the takeover legislation

2.1 Legislation

Public takeovers are regulated primarily by Chapter 6 of the 2007 Securities Trading Act.³ These provisions for the most part implement the Takeover Bids Directive (2004/25/EC) into Norwegian legislation. Moreover, in this context, also the 2007 Securities Trading Regulation,⁴ the 2007 Stock Exchange Act,⁵ the 2004 Competition Act,⁶ the 1997 Private Limited Liability Companies Act⁷ and the 2005 Act relating to Working Environment, Working Hours and Employment Protection⁸ might be of some relevance for the takeover bid situation. Regulations on takeover bids are also issued through self-regulation by the Norwegian Corporate Governance Board, namely by means of the Norwegian Code of Practice for Corporate Governance.⁹ Mergers of public limited companies are not regulated by the public takeover legislation, but by the 1997 Public Limited Liability Companies Act.¹⁰

The legislation on takeover bids applies to takeovers of Norwegian companies listed on a Norwegian regulated market, that is, the Oslo Stock Exchange (Chapter 6, Section 6-23 of the 2007 Securities Trading Act). Norwegian rules will also apply to Norwegian target companies that have their shares listed on a regulated market of another European Economic Area (EEA) state. Furthermore, the rules apply in cases involving the shares of foreign companies that have their shares listed on the Oslo Stock Exchange, but not in their home country.

The Financial Supervisory Authority (in effect, the Oslo Stock Exchange) may decide how these rules shall apply in cases where a Norwegian company has shares both in Norway and in a state outside the EEA, and

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3. See http://www.finanstilsynet.no/Global/English/Laws_and_regulations/Securities_market/Securities_Trading_Act.pdf for an unofficial translation into English.
 4. http://www.oslobors.no/ob_eng/Oslo-Boers/Regulations/Acts
 5. http://www.oslobors.no/ob_eng/Oslo-Boers/Regulations/Acts
 6. <http://www.konkurransetilsynet.no/en/legislation/The-Competition-Act-of-2004>
 7. <http://www.finanstilsynet.no/en/Secondary-menu/About-Finanstilsynet/Regulation/Laws-and-regulations>
 8. <http://www.arbeidstilsynet.no/lov.html?tid=78120>
 9. For an English version of the code <http://www.nues.no/filestore/Dokumenter/Anbefalingene/2012/2012-10-23CodeofPracticeforCorporateGovernance.pdf>
 10. http://www.oslobors.no/ob_eng/Oslo-Boers/Regulations/Acts

to companies registered outside the EEA but with shares listed in Norway (Chapter 6, Section 6-23, para. 3 of the 2007 Securities Trading Act). Further details may be given in regulations issued by the Ministry (Chapter 6, Section 6-23, para. 2 of the 2007 Securities Trading Act).

The Takeover Bids Directive has a rather complicated choice of legal rules, laid down in Article 4 of the Directive. These rules differ between financial market law and securities law, on one hand, and company law and labour law, on the other (Article 4.2.e of the Directive, *cf.* Chapter 6, Section 6-23 of the Securities Trading Act). In matters regarding the bid itself, the choice of law shall be dealt with in accordance with the rules of the European Economic Area (EEA) state of the competent authority.¹¹ For company law and labour law matters, the competent authority and applicable rules shall be those of the EEA state in which the offeree company has its registered office.

2.2 Supervision

There are several regulatory and supervisory authorities. The Financial Supervisory Authority¹² is the governmental supervisory authority for the financial markets. The Financial Supervisory Authority is responsible for the supervision of the regulation on takeover bids (Chapter 15, Section 15-1, of the 2007 Securities Trading Act; *cf.* Article 4.1 of the Takeover Bids Directive). The Oslo Stock Exchange¹³ is the authorised exchange for stocks and other equity instruments (see the 2007 Stock Exchange Regulations). The Norwegian Competition Authority¹⁴ is responsible for the supervision, implementation and enforcement of competition law (Chapter 8 of the 2004 Competition Act). The Register of Business Enterprises¹⁵ is responsible for company registration of both domestic companies and foreign enterprises in Norway, including local branches.

11. The 28 EU Member States and the EFTA Member States Iceland, Lichtenstein and Norway (but not Switzerland).

12. <http://www.finanstilsynet.no/en>

13. <http://www.oslobors.no>

14. <http://www.konkurransetilsynet.no/en>

15. <http://breg.no/english>

2.3 Procedure

The rules on takeovers distinguish between voluntary and mandatory offers, but the abovementioned Norwegian rules shall apply irrespective of whether the bid is mandatory or voluntary (Chapter 6, Section 6-19, para. 1, of the 2007 Securities Trading Act). Voluntary bids will also in some other cases be regarded as equal to a mandatory bid (Chapter 6, Section 6-1, para. 5 of the 2007 Securities Trading Act).

A voluntary offer for a company listed on the Oslo Stock Exchange must immediately be notified to the Oslo Stock Exchange and the target company, and the target company and the bidder company must inform their employees (Chapter 6, Section 6-19 of the 2007 Securities Trading Act). The Oslo Stock Exchange makes the notification public.

The offer document must be filed with and approved by the Oslo Stock Exchange before it is published. The bid shall be launched within a reasonable period after the decision to launch a voluntary bid is taken. Once approved by the Oslo Stock Exchange, the offer document must be distributed to all shareholders of the target company and also be made known to the employees of the target company. The target company is obliged to cooperate with the bidder company to facilitate distribution of the offer document, irrespective of whether the bid is hostile or recommended, mandatory or voluntary. There are no particular restrictions on the content of a voluntary offer. A mandatory offer must be unconditional (Chapter 6, Section 6-10 of the 2007 Securities Trading Act).

2.4 Statement by the board of the target company

The board of the acquirer is required to issue a public statement on the offer not later than one week before the day the offer period expires (Chapter 6, Section 6-16 of the 2007 Securities Trading Act).

The board of the acquirer has a general duty to act in the best interests of the company and its shareholders. The board may not take any action that could confer on certain shareholders or other parties an unfair advantage at the expense of the shareholders of the acquirer. According to Chapter 6, Section 6-17 of the 2007 Securities Trading Act, the board or CEO in the target company may not make decisions in regard to (i) issuance of shares or other financial instruments by the company or by a subsidiary,

(ii) merger of the company or subsidiary, (iii) sale or purchase of significant areas of operation of the company or its subsidiaries, or other dispositions of material significance to the nature or scope of its operations, or (iv) purchase or sale of the company's shares.

3. Role of employee representatives in legislation

The rules on takeover bids concern mainly financial market law, securities law and company law. To some extent, however, the legislation also contains rules on employee involvement in a takeover situation. Accordingly, the boards of the offeree company and of the offeror company shall *inform* the representatives of their respective employees or the employees themselves, where there are no such representatives, as soon as the bid has been made public (Article 6.1 of the Takeover Bids Directive (2004/25/EC)).

After the offer document is made public, the boards of the offeree and of the offeror company shall *communicate* the document to the representatives of their respective employees or to the employees themselves, where there are no such representatives (Article 6.2 of the Directive). Such document shall, according to Article 6.3.i of the Directive, state – among other things – the offeror's intention with regard to safeguarding the jobs of the offeree's employees, including any material change in the conditions of employment and the likely effect on employment and the locations of the companies' places of business. Furthermore, Article 9.5 of the Directive stipulates that the board of the offeree company shall communicate to the representatives of its employees – or to the employees themselves, where there are no such representatives – an opinion on the bid and the reasons on which this opinion is based, especially on the effects on employment; the board is supposed to draw this opinion up and make it public. Finally, Article 14 of the Directive prescribes that the Directive shall be without prejudice to the national rules on employee involvement, in particular those adopted pursuant to the European Works Council Directive (2009/38/EC, previous 94/45/EC), the Collective Redundancies Directive (98/59/EC), the SE Directive (2001/86/EC) and the Information and Consultation Directive (2002/14/EC).

According to Chapter 6, Section 6-13, para. 2, subpara. 13, of the 2007 Securities Trading Act, an offer document shall state what significance the

implementation of the bid will have for the employees (*cf.* Article 6.3.i of the Directive). The offeror and the offeree shall, after the takeover supervisory authority has approved the bid, make the bid known to their employees (Chapter 6, Section 6-14, para. 3, of the Act). The board of the offeree company shall make public a statement setting out its opinion of the bid and the reasons on which it is based, including the effects on employment and the locations of the company's places of business (Chapter 6, Section 6-16, para. 1, of the Act, *cf.* Article 9.5 of the Directive). To this opinion, a separate opinion from the employees on the effects of the bid on employment shall be appended to the statement if the board receives it in good time (Chapter 6, Section 6-16, para. 1, *in fine*, of the Act).

4. Role of employee representatives in collective agreements

Rather than being authorised in the legislation on takeover bids, worker involvement is regulated mainly by other rules, including both legislation and legally binding collective agreements. Collective bargaining is carried out at different levels, central, sectoral and local. The Basic Agreements between trade unions and employers' associations specify the principal goals and lay down negotiation procedures, including information, cooperation and codetermination. The Basic Agreements are collective agreements between the national employers' organisations and the national union confederations which set the framework for bargaining on employment conditions. They cover both the private and public sectors. The Basic Agreement between the Norwegian Confederation of Trade Unions (LO) and the Confederation of Norwegian Enterprise (NHO) constitutes the model of the Basic Agreements. The latest is valid for the period 2014–2017 and contains – in Chapter IX – rules on information, cooperation and codetermination.¹⁶ Additionally, the Basic Agreement contains a Cooperation Agreement, which regulates the activities of the different coordinating bodies.

Chapter IX of the Basic Agreement between LO and NHO stipulates the management's obligation to discuss with the shop stewards as early as possible any reorganisations of operations and matters of company law

¹⁶. An English translation of the former Basic Agreement between LO and NHO can be found at: <http://www.fellesforbundet.no/Fellesforbundet/Lønns-%20og%20arbeidsvilkår/Hovedavtalene/Hovedavtalen%20LO-NHO%202010-2013%20Engelsk.pdf>).

(Chapter 9, Section 9-4 and Section 9-5). In Chapter 9, Section 9-6, the obligation for the enterprise to allow shop stewards to present views before any decision is adopted is laid down, as well as management's obligation to inform the shop stewards of the reasons for and effects of its actions. Shop stewards also have the right of information regarding company accounts and financial matters (Chapter 9, Section 9-7).

Where there is a change in ownership of limited companies, the shop steward shall be informed under some conditions (Chapter 9, Section 9-10): management shall inform the shop steward if the buyer of the shares acquires more than 10 per cent of the company's share capital or shares representing more than 10 per cent of the votes in the company, or if the buyer becomes the owner of more than one-third of the share capital or of shares representing more than one-third of the votes.

If plans for expansion, cutbacks or restructuring may have a significant impact on employment in several enterprises within the same group of companies, the group management shall, at the earliest opportunity, discuss these issues with a coordinating committee of shop stewards (Chapter 9, Section 9-12). According to Chapter 9, Section 9-13 contact meetings shall – except when otherwise agreed between the parties – be held between the board of directors of the enterprise and the shop stewards whenever so requested by either party in enterprises owned by companies (limited companies, cooperative societies and so on). Sanctions for the breach of rules are laid down in Chapter 9, Section 9-14. Such breaches can be subject to fines.

Through the Basic Agreements the parties have a far-reaching possibility to deviate from rules set in legislation. Basic Agreements cover almost all of the public sector but only about half of the private sector. Legislation applies instead to the part of the private sector not covered by Basic Agreements.

Chapter 8 of the 2005 Act relating to Working Environment, Working Hours and Employment Protection and so on contains working rules on involvement that mainly implement the Information and Consultation Directive. There is an obligation for the employer to provide information concerning issues of importance for the employees' working conditions and to discuss such issues with the employees' elected representatives. However, this applies only to undertakings regularly employing at least fifty employees. Thus, approximately half of the undertakings in the

private sector are not covered by general information and consultation rules. Moreover, Chapter 15, Section 15-2 of the 2005 Act implements information rules according to the Collective Redundancy Directive, and Chapter 16, Section 16-5 of the 2005 Act implements information rules in the Transfer of Undertakings Directive.

Rules on board-level employee representation are laid down in Chapter 6 of the 1997 Limited Companies Act and in Chapter 6 of the 1997 Public Limited Companies Act. In both public limited companies and limited companies with more than thirty employees, a majority of the employees can demand the election of one of the board members and of an observer (Chapter 6, Section 6-4, para. 1). In a company with more than fifty employees, a majority of the employees can require the appointment of representatives constituting up to one-third and at least two of the board members (Chapter 6, Section 6-4, para. 2). If the company has more than two hundred employees, the employees shall, in addition to what is stated in para. 2, elect one board member or two observers. Under certain conditions, the company can instead establish a corporate assembly (Chapter 6, Section 6-35). The general assembly elects two-thirds of the corporate assembly members and the employees elect one-third.

5. Conclusion

Takeover bids concern primarily financial market law, securities law and company law. However, although takeovers may influence employment relations and employees' and trade unions' involvement, neither the Directive nor the Norwegian implementation rules pay much attention to this influence. The matters regarding worker involvement dealt with in the Takeover Bids Directive and the Norwegian implementation rules (Chapter 6 of the Securities Trading Act) concern decisions made by someone other than the employer, namely the owner(s).

The worker involvement rules in the Takeover Bids Directive and the Norwegian implementation legislation are not very far-reaching; they are limited to giving the employees' information as soon as the bid has been made public, to communicate the offer document to the employees after it has been made public; to make the bid known to the employees and to append to the company's opinion statement on the takeover a separate opinion from the employees. Therefore, one has to rely on general EU and national labour law rules on workers involvement, although from a

Scandinavian labour law perspective, EU law in this field does not contribute very much. Thus, the rules on worker involvement in Norway during takeovers are to be found mainly in the collective agreements between the labour market parties.