

THE “NORWEGIAN” HIGH YIELD BOND MARKET AND POTENTIAL IMPACT OF CMU

EFTA WG on Financial Services Seminar

Advokat Tore Mydske



**"NORWEGIAN" HIGH YIELD
BOND MARKET – LEGAL
ISSUES**

B Ø R S E N

OVERVIEW OF LEGAL NORMS

- ▶ Key features of the instrument
 - ▷ Standardised bond agreement and documentation will be used as the basis for the issuance
 - > Norwegian law, short loan agreement, moderate costs, well accepted by investors.
 - ▷ Compared to Eurobonds and US bond issues, the process is much quicker and the documentation less comprehensive.
 - ▷ Usually maintenance covenants rather than incurrence covenants
 - ▷ Typically, no public rating required
 - > Managers credit research frequently compute shadow ratings on new issues, based on Moody's and S&P methodology
 - ▷ Nordic Trustee ASA acts as bond trustee
 - ▷ Issued through the Norwegian CSD ("VPS") in dematerialised form

OVERVIEW OF LEGAL NORMS (CONTD.)

- ▶ Prospectus requirements
 - ▷ Offering prospectus?
 - ▷ Listing prospectus?
 - > OSE – based on PD
 - > Nordic ABM
- ▶ Issuer obligations
 - ▷ On-going reporting obligations
 - > Listed bonds – based on MAD
 - > Unlisted bonds

OVERVIEW OF LEGAL NORMS (CONTD.)

- ▶ Regulation of investors
 - ▷ Prohibition of market abuse
 - > Definition of inside information
 - > Dual purpose of inside information
 - ▷ Based on MAD
- ▶ Regulation of intermediaries(as arranger)
 - ▷ Two different customers that must be looked after – based on MiFID
 - > Issuer
 - > Investor
 - ▷ Duty of care and conflicts of interest – based on MiFID
 - ▷ Potential civil liability
 - ▷ Trading in bonds – obligation to report trades

OVERVIEW OF LEGAL NORMS (CONTD.)

- ▶ Identity of bondholders
 - ▷ Identity of bond holders registered in the CSD is confidential – also towards the issuer
 - ▷ Public register would not reveal end investor due to nominee issues

- ▶ Regulation of the Trustee function
 - ▷ Regulatory status
 - ▷ Legal capacity to represent the bond holders

- ▶ Conclusions:
 - ▷ Not a market without legal norms
 - ▷ Will be impacted by forthcoming amendments to EU legislation (MAR, MiFIR/MiFID II, CSDR)



POTENTIAL IMPACT OF CMU

POTENTIAL IMPACT OF CMU – SOME DISCUSSION POINTS

- ▶ Revision of the prospectus directive
 - ▷ Positive for the Norwegian high yield market
- ▶ Revision of the securitisation legislation
 - ▷ Prohibited in Norway for banks (a Norwegian paradox?)
- ▶ Increase availability of infra-structure investments
 - ▷ Raise structural issues in Norway
- ▶ Increased regulation of peer to peer funding?
- ▶ Increased harmonization of corporate bonds?
 - ▷ Should avoid harmonization – “ dont fix it if it ain’t broken”
- ▶ Other issues?

QUESTIONS?



THOMMESSEN

TORE
MYDSKE
PARTNER
ADVOKAT

—
T +47 23 11 12 52
M +47 91 62 09 11
—

tmy@thommessen.no
thommessen.no

APPENDIX – FURTHER DETAILS ON HY BOND ISSUANCE

NORWEGIAN VS. U.S. HIGH YIELD BONDS

	Norwegian HY Bonds	U.S. HY Bonds
Minimum size	~US\$ 20 million	~US\$ 150-200 million
Maximum size	~US\$ 500 million	~US\$ 2,000 million
Tenor	3 to 7 years	5 to 10 years
Coupon type	Fixed or floating	Typically fixed
Amortization	Bullet or amortizing	Bullet
Call options	Non-call period, thereafter callable at a premium	Non-call period, thereafter callable at premium
Public rating	Not required	Moody's / S&P required
Covenants	Maintenance and incurrence	Incurrence
Modifications	Waiver and consents not uncommon	Consents difficult
Governing law	Norwegian	New York
Market depth	Less liquid given market size	Deep and liquid

ISSUE PROCESS

- ▶ The initiative for a bond issue is taken by the issuer, and the normal procedure is for the issuer to engage one or several managers (depending on the scope and size of the transaction).
- ▶ The manager will explore the market and the possibility for successfully marketing the contemplated bond issue, and may also pre-sound the contemplated bond issue with major investors in the bond market to ensure that the bonds are marketable.
- ▶ The manager will prepare a credit analysis.
- ▶ The manager will in cooperation with the issuer prepare a term sheet setting out the main terms and conditions of the bond issue. In addition, the documentation used for the offering of the bonds will normally comprise an investor presentation, an information memorandum, the credit analysis and terms of application.
- ▶ The manager will market the bonds on a best-efforts basis to well-known domestic and international private placement investors. The marketing process from the launch of the bond issue and until the bonds are subscribed normally takes from 1-2 weeks, depending on the nature of the bond issue.
- ▶ The bondholders will in the terms of application grant authority to the bond trustee to negotiate and execute the bond agreement and related documents within the parameters of the term sheet.

ISSUE PROCESS (CONT.)

- ▶ In parallel with the preparation of the marketing documentation, contact is established with Nordic Trustee ASA as bond trustee, and the preparation of the bond agreement and security documents (if applicable) is commenced. The bond agreement is based on the bond trustee's template agreement and negotiated between the issuer, the manager and the bond trustee. The manager and the issuer will usually have separate counsels, while the bond trustee in most cases will use in-house resources or rely on the manager's counsel. The agreements are fairly standardized and are entered into between the issuer and the bond trustee (on behalf of the bondholders).
- ▶ On the issue date, subject to the satisfaction of the agreed conditions precedent, the bonds are issued and the proceeds from the bond issue are transferred to the issuer, through the paying agent.
- ▶ It should be noted that Nordic Trustee ASA is not a paying agent or registrar, and usually does not participate in payment transfers between the issuer and the bondholders. However, in some cases the proceeds from the bond issue are placed in escrow on the issue date, pending the satisfaction of the conditions for disbursement of the funds to the issuer, and with the bond trustee acting as escrow agent.
- ▶ The main conditions precedent include the execution of all relevant transaction documents, including the bond agreement and (if applicable) any security documents, copies of the corporate resolutions (as required) and relevant financial documentation, as well as legal opinions to the bond trustee relating to the issuer's capacity to execute the agreements and the validity and enforcement of any security.

BENEFITS OF USING THE BOND TRUSTEE

- ▶ The issuer benefits from addressing one legal entity on behalf of the bondholders instead of a large number of creditors.
- ▶ Minor amendments to the bond agreement may be determined by the bond trustee without calling for a bondholder meeting.
- ▶ The contractual framework implies that each individual bondholder waives the right to personally pursue their claim or take legal action against the issuer, and effectively protects the issuer from enforcement steps taken by individual bondholders.
- ▶ During the term of the bond agreement the bond trustee monitors the issuer's fulfilment of its obligations thereunder.
- ▶ The contractual framework facilitates the equal treatment of the bondholders, and the bond trustee may not adopt resolutions which give certain bondholders an unreasonable advantage at the expense of others.

LISTING

- ▶ There is no requirement to list the bonds on a market place, and a substantial part of the Norwegian bond issues are not listed. However, we see that listing is becoming more common.
- ▶ Some investors will or can only invest in listed securities, and where the issuer is not already listed, the investors may prefer that the bonds are listed in order to benefit from the disclosure requirements of the regulated market.
- ▶ The Oslo Stock Exchange operates two market places for bonds: the main list, which is a regulated market, and the Nordic Alternative Bond Market (ABM), which is not a regulated market.
- ▶ The requirements for listing on the ABM are somewhat lighter than for listing on the main list, as a prospectus will normally not be required.
- ▶ The continuous disclosure obligations for the two markets are fairly similar.