

# The role of the board of directors of a listed company

Tone Østensen and Anne Lise Ellingsen Gryte

Oslo, 6 December 2022

*Wiersholm*

# The BIG difference

## Private

- One or few known shareholders
- Consistent ownership
- Bilateral agreements on share sales/purchases

**VS.**

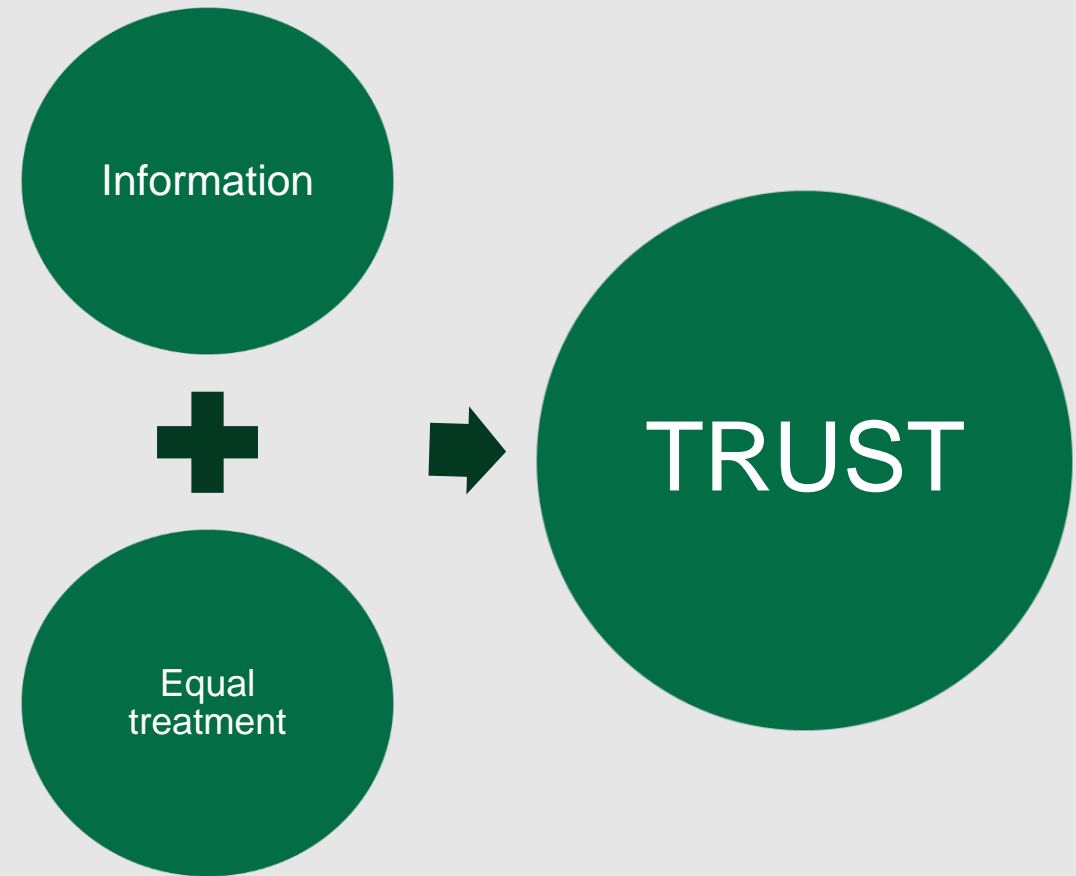
## Listed

- Many (unknown) shareholders
- Continuous ownership changes
- Share sales/purchases based on orders

The majority of the shareholders in listed companies are "more distant" from the board of directors and the company

# The board of directors

- Ensure that the company treats its shareholders equally
- Ensure that the company complies with its duty to provide information
- Ensure compliance with the duties referred to the board of directors in certain situations



# 01 Disclosure obligation

# The role of the board of directors

- The company's management has the main responsibility for compliance
- The board of directors has a control function
- The activity obligation will depend on the type of company
- Ensure that the company has guidelines on how to handle inside information
  - Guidelines not enough



# The role of the board of directors

- Follow up that the management has sufficient competence/awareness
  - Identify matters that typically may affect the price
  - Initiate negotiations/ongoing processes
    - Think through when in the process inside information may arise
- Project lists
  - Precautionary principle



# The role of the board of directors

- Matters that typically may affect the price:
  - Signing of significant contracts
  - Termination of significant contracts
  - Sale/purchase of significant business
  - Significant disputes
  - Award/termination of significant permits/approvals
  - Financial problems/profit warnings
  - Raising capital
  - Primary insiders' sale/purchase of shares
  - Other

Tid	Marked	Utst.ID	Meldingstittel	Korr
05.12.2022 12:00		NB	Utvidelse av statsobligasjonslån NGB 03/2025	
05.12.2022 12:00		NB	Reopening of government bond NGB 03/2025	
02.12.2022 12:05	MERK	ZENA	Development of Italian Gas Production Portfolio	
02.12.2022 07:03	XOSL	AKSO	Aker Solutions ASA: Aker BP's Board Approves Field Development Projects	
02.12.2022 07:00	MERK	ANDF	Andfjord Salmon: Continued strong biological conditions   Third quarter 2022 financial results	
02.12.2022 07:00	XOSL	OKEA	Discovery confirmed in the Calypso exploration well (PL938) operated by Neptune	
01.12.2022 23:00	XOSL	SPCP	Seaspan Announces Summons for Bondholders' Meeting	
30.11.2022 22:23	XOSL	SCHA	Schibsted ASA (SCHA/SCHB) - Successfully completed sale of existing shares in Adevinta ASA	
30.11.2022 16:39	XOSL	SCHA	Schibsted ASA (SCHA/SCHB) - TRS agreement and contemplated sale of existing shares in Adevinta ASA	
30.11.2022 10:50	XOSL	HIBID	Update on HI Bidco Bonds	
30.11.2022 08:01	XOSL	BHMH	Placement of shares and retail offering in connection with proposed admission to Euronext Growth Oslo and Proposed...	
30.11.2022 08:00	XOSL	NAPA	Napatech A/S: Resultater for tredje kvartal 2022	
30.11.2022 08:00	XOSL	NAPA	Napatech A/S: Q3 2022 Financial Results	
30.11.2022 07:59	XOSL	XXL	XXL ASA – Freddy Sobin appointed as CEO in XXL Group	
30.11.2022 07:00	XOSL	TIETO	Inside information: Tietoevry initiates a strategic review of its Tietoevry Transform and Tietoevry Connect as a combined...	
30.11.2022 07:00	MERK	HAV	HAV Group: Resultater for tredje kvartal 2022	
30.11.2022 07:00	MERK	HAV	HAV Group: Financial results for the third quarter of 2022	

# The role of the board of directors

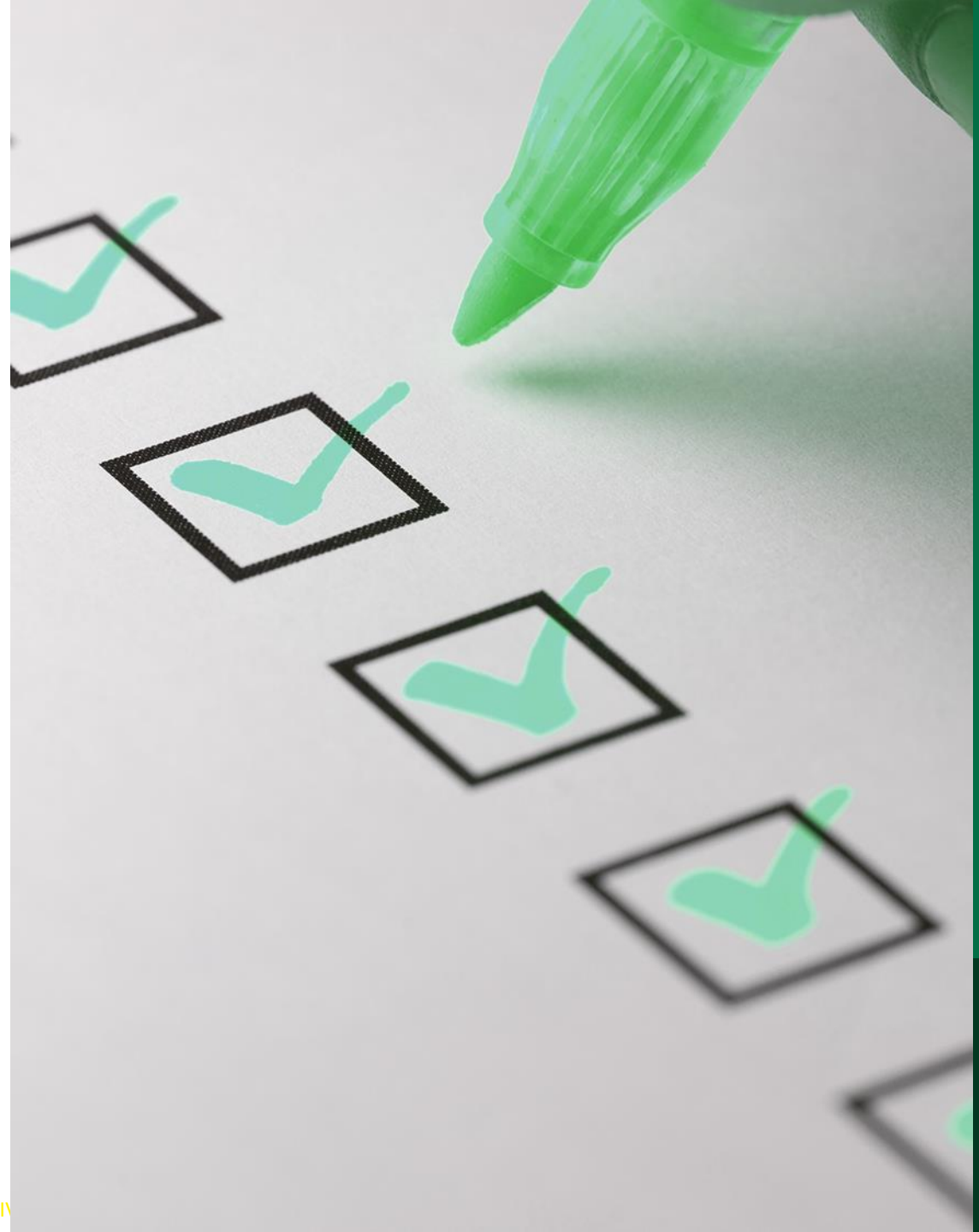
- The company provides "guidance" in quarterly reports/stock exchange announcements in respect of:
  - Operating income
  - Result
  - Margins
  - Harvesting volume
  - Other
- Particular challenges
  - Must have a good basis
  - May make deferred disclosure impossible





# To summarise

- The Board's role and responsibility for the assessment
- Determine guidelines and processes to ensure proper handling
- Consider whether certain circumstances can be pre-defined
- Not all sensitive information is inside information
- Better safe than sorry?



# 02 Equal treatment

# Equal treatment requirement



## Børssirkulære nr. 2/2014

Til: Utstedere av finansielle instrumenter notert på Oslo Børs,  
Oslo Axess og Nordic ABM

3. september 2014

Vår ref: 929149

<http://www.oslobors.no/Oslo-Boers/Regelverk/Boerssirkulaerer>

## Likebehandling

### 1 Innledning og sammendrag

Verdipapirhandelloven (vphl.) § 5-14 oppstiller et prinsipp om at utstedere av finansielle instrumenter opptatt til handel på norsk regulert marked skal likebehandle innehaverne av deres finansielle instrumenter. Forskjellsbehandling kan etter bestemmelsen likevel aksepteres dersom denne er saklig begrunnet ut fra utsteders og innehavernes felles interesser. Børsen har inntatt en likelydende bestemmelse om likebehandling i Løpende forpliktelser for selskaper med aksjer og egenkapitalbevis notert på Oslo Børs og Oslo Axess punkt 2.1, Obligasjonsreglene punkt 3.1.1 og ABM-reglene punkt 3.1.1.

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“ *The issuer must not expose holders of its financial instruments to differential treatment that lacks a factual basis in the common interest of the issuer and the holders.*

“ *In connection with the trading or issuance of financial instruments or rights to such instruments, the issuer's corporate bodies, elected officers or senior employees must not adopt measures which are likely to confer upon themselves, certain holders of financial instruments or third parties an unreasonable advantage at the expense of other holders or the issuer.*

# What do the principle entail?

- The main principle for listed companies is equal treatment of shareholders
  - The company must have a justifiable reason to deviate from the principle
- Differential treatment is only allowed if:
  - It is considered to be in the best interest of the company and all the shareholders
  - It is proportionate
  - It does not confer an unreasonable advantage on the management, board of directors, some of the shareholders or third parties in connection with the issuance of new shares

## Vedum må svare om emisjoner og likebehandling

Finansministeren må svare på hvordan han planlegger å følge opp tapstyngede småaksjonærer. SV mener tilsynet er mangelfullt.



Trygve Slagsvold Vedum Adrian Nielen

# The duties of the board of directors

- Ensure that management has sufficient focus on equal treatment
- When the board of directors is involved in decisions that will involve differential treatment:
  - Discuss the situation
  - Consider alternatives
  - Consider whether the differential treatment will be in the best interest of the company and the shareholders
  - Document the assessment

## Oslo Børs: Uenig med Finanstilsynet om hvem som skal følge opp viktig regel

Hvem skal følge opp at aksjonærer behandles likt? Det diskuterer Oslo Børs og Finanstilsynet.



# Our experience with stock exchange intervention

- The Oslo Stock Exchange has focus on equal treatment
- Guidance in Circular 2/2014/letter dated 19.04.17
- Oslo Stock Exchange stated that it would only intervene in cases where the "*differential treatment clearly lacks a factual basis, is grossly unreasonable or has been carried out without proper consideration of the circumstances*".
- Sanctions
  - Public criticism
  - Infringement fees

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## Kritisk til Børsen som vakthund for småaksjonærer: – Svært problematisk

SV krever svar fra finansministeren om hvem som skal følge opp småaksjonærer, en rolle som i dag ligger hos Oslo Børs. Nordnet-topp mener Finanstilsynet bør ha ansvaret.



PEKER PÅ TILSYNET: Norgessjef Anders Skar i Nordnet mener det er et problem at en kommersiell aktør skal ha ansvaret for å følge opp at aksjonærer ikke forskjellsbehandles. Nordnet

# Typical situation

- Differentiated access to information
  - Legitimate need for anchoring
- Transactions with shareholders
  - Detailed rules in the Private and Public Limited Liabilities Companies Act
- Waiver of pre-emptive rights in the event of private placements of shares
  - Most common situation

## Slik kan de kriserammede rederiene forskjellsbehandle aksjonærene

Ikke bare står aksjonærene sist i køen – av og til står noen aksjonærer lengre bak enn andre. – Selskapene må være oppmerksomme, sier Oslo Børs etter forrige ukes børshot.



I KRISE: Havila Shipping mener at det er «strengt nødvendig og påkrevd» å forskjellsbehandle. Foto: Roger Hardy / Samfoto

# Equity financing

- Rights issue – the main rule of the Private and Public Limited Liabilities Companies Act
  - Right to pro rata allocation of shares
  - Normally transferable listed subscription rights
  - Equal treatment of shareholders
- Disadvantage
  - Offering prospectus
  - 3-4 months to complete
  - Underwriters – large discount

## Investorene på Oslo Børs forskjellsbehandles oftere

Over syv av ti kroner som hentes gjennom nyutstedelser i det norske aksjemarkedet, hentes fortsatt gjennom rettede emisjoner. Nykommerne trekker opp totalen.



REKORDÅR: Stadig mer penger kanaliseres til næringslivet gjennom Oslo Børs. Foto: Gorm Kallestad NTB scanpix



# Equity financing

- Equal treatment issues may arise in rights issues also:
  - Only main shareholders are invited to participate in the underwriting consortium
  - Subscription rights are not listed
  - Deviating allocation principles
    - No oversubscription allowed/underwriters are given priority
    - Oversubscription allowed, but underwriters are given priority

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## Flyr-topp om kraftig emisjonsrabatt: – Vi synes vi hadde uflaks

Finansdirektør Brede Huser legger skylden for at Flyr ga 40 prosent rabatt da utvalgte investorer fikk kjøpe aksjer, på børsfall i New York.



SKYLDER PÅ NEW YORK-FALL: Finansdirektør Brede Huser i Flyr. Her sammen med Flyr-sjef Tonje Wikstrøm Frislid på onsdagens resultatpresentasjon. Ole Berg-Ruusten / NTB

# Equity financing

- Private placements are most common in the Norwegian market
  - Announced after the stock exchange closes – set during the evening
  - To avoid offer prospectus/listing prospectus:
    - Minimum subscription amount EUR 100 000
    - Max total subscription amount 20% of current share capital/no limit for Growth
  - Minimum subscription amount excludes smaller shareholders
  - Short time frame may also exclude larger shareholders

## Folketrygdfondet med massivt nedslag i XXL

Folketrygdfondet har de siste ukene dumpet aksjer for flere titalls millioner kroner i XXL.

1 MIN | PUBLISERT: 03.02.20 — 09.51 | OPPDATERT: 3 ÅR SIDEN



Folketrygdfondet stemte mot XXLs forslag til incentivprogram for ledelsen. På bildet er XXLs butikk i Oslo sentrum. (Foto: Javad Parsa)



# Equity financing

- Consider need for a repair issue
- Purpose is to allow shareholders that were not allocated shares in the private placement to subscribe for shares at the same price as in the private placement
- Size must be large enough to effectively repair
- Need will depend on:
  - The extent of participation among existing shareholders
  - The size of the discount
  - The size of the issue
  - Opportunity to trade in the market at similar prices

# 05 Our contact persons



## Tone Østensen

Partner

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### Industries

Fisheries and Aquaculture  
Banking and Finance

### Practice Areas

Capital Markets  
M&A  
Corporate Law

## Profile

Tone Østensen has extensive experience as an advisor in capital market transactions, including stock exchange listings and public and private placement, and mergers and acquisitions. She also gives general advice on company law and stock exchange and securities law. Chambers and Partners, Legal 500 and IFLR1000 have ranked Tone as one of Norway's most prominent experts on stock exchange and securities law. She is also ranked as one of Norway's leading lawyers on share issues and stock exchange listings in the Norwegian Financial Daily's annual lawyers survey.

## Selected experience

- Legal advisor to a number of listed companies in respect of stock exchange and securities law and corporate law
- Assisted a large number of issuers and managers in connection with listings on Oslo Stock Exchange, Euronext Expand and Euronext Growth
- Assisted Seaway 7 ASA in connection with a NOK 2 billion rights underwritten rights issue in October 2022
- Assisted Flyr AS in connection with a NOK 250 million underwritten rights issue in January 2022
- Assisted Flyr AS in connection with a NOK 250 million private placement and a NOK 80 million repair issue in May/June 2022
- Assisted Flyr AS in connection with a NOK 250 million private placement and issuance of independent subscription rights in November 2022

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## Utdannelse

- Cand. Jur., University of Oslo, 1986

## Professional Experience

- Partner, Wiersholm, 2000
- Lawyer, Wiersholm, 1997
- Lawyer, Oslo Stock Exchange, 1993
- Associate, Bugge, Arentz-Hansen & Rasmussen, 1990
- Trainee, Haight Gardner, Poor & Havens, 1989
- Assistant Judge, Indre Follo District Court, 1988
- Associate, Bugge, Arentz-Hansen & Rasmussen, 1987

*Tone Østensen is noted for her ECM expertise, with sources highlighting her "wealth of experience in the field." She advises clients on IPOs and private placements.*

– Chambers Global, 2021



## Anne Lise Ellingsen Gryte

Partner

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### Industries

Banking and Finance  
Private Equity

### Practice Areas

M&A and Corporate Law  
Capital Markets

### Profile

Anne Lise Ellingsen Gryte practices corporate and securities law with an emphasis on capital market transactions and advice to listed companies and shareholders. Her practice focuses primarily on initial public offerings, equity transactions and public takeovers. Anne Lise advises issuers, managers, boards of directors and shareholders in matters relating to corporate law and securities law.

Anne Lise also has wide M&A experience, and is regularly involved in mergers and acquisitions. In addition, she is the head of several nomination committees in listed companies.

Anne Lise ranked as "Associate to Watch" and "Rising Star", respectively, within capital markets by Chambers Europe and Legal500.

### Selected experience

- Assistance to Arctic Fish Holding AS in connection with a private placing and listing on Euronext Growth Oslo
- Assistance to Gevevan Trading in connection with a mandatory offer for Axactor SE (2021)
- Assistance to ABG Sundal Collier in connection of a private placing and listing of Sonans Holding AS on Euronext Growth Oslo
- Assistance to Herkules Private Equity and Elektroimportøren AS in connection with a private placing and listing on Euronext Growth Oslo
- Assistance to the Ministry of Trade and Industry in connection with a Covid-19 package of measures to the aviation industry
- Assistance to Schibsted ASA in connection with Adevinta ASA's acquisition of eBay Classifieds
- Assistance to Schibsted ASA and Adevinta ASA in connection with a merger and subsequent listing of Adevinta ASA on Oslo Stock Exchange

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### Education

- Cand. Jur., Universitetet i Bergen, 2006
- Post-graduate subjects, K.U. Leuven, Belgium, 2006
- Project management, Metier Academy/SKEMA Business School,

### Professional Experience

- Partner, Wiersholm, 2021
- Managing Associate, Wiersholm, 2018
- Managing Associate, CLP, 2017
- Managing Associate, Thommessen, 2015
- Senior Associate, Thommessen London, 2011
- Senior Associate/Associate, Thommessen, 2009
- Associate, Haavind, 2006

*Anne Lise Gryte is "extremely hard-working and can handle complex projects," according to one client. She assists with IPOs and listings.*

– Chambers Europe, 2021

## Wiersholm in brief

We are **value-driven** and **value-creating**

Wiersholm is one of Norway's leading business law firms. Our professional expertise, our understanding of different business sectors and our collaborative culture make us well equipped to understand, simplify and improve our clients' everyday lives.

We are accommodating and diverse problem-solvers. We are sharp and alert. We see the small nuances and the big picture, which provides a wider perspective. We also take responsibility and create positive repercussions in the society in which we operate.

In this manner, we create value for our clients and drive business law forward.

332	Employees	54%	Women
215	Lawyers	46%	Men
44	Partners	18	Languages
16	Lawyers with right of audience before the Supreme Court	33	Practice Areas
1	Office (in Oslo)	18	Industries

## Practice Areas

Anti-Money Laundering  
Capital Markets  
Competition Law  
Construction  
Contract Law  
Corporate Criminal Law  
Data Protection/GDPR  
Employment Law  
Environmental Law  
ESG and Compliance  
EU/EEA Law  
Financing  
Human Rights Law  
Insurance  
Intellectual Property Law  
Investigation

IT Contracts  
Liability  
Litigation and Dispute Resolution  
M&A and Corporate Law  
Maritime and Transportation  
Media and Marketing Law  
Offshore Wind  
Oil and Gas  
Pensions  
Public Procurement  
Real Estate  
Regulatory  
Renewable Energy  
Restructuring and Insolvency  
Tax  
Telecommunication and Infrastructure  
Value-added Tax and excise duties

## Industries

Banking and Finance  
Commercial Property  
Fintech  
Fisheries and Aquaculture Industry  
Insurance  
Life Sciences  
Media and Entertainment  
Oil and Gas  
Private Equity  
Proptech  
Public Sector  
Renewable Energy  
Retail  
Shipping og offshore  
Sports  
Technology and Digitisation  
Transport

## Recognition

- **Kantar Sifo Prospera 2021: On top in the categories** "Overall Performance", "Public procurement", "Data protection & integrity", "Investigations" and "Dispute resolution"
- **Chambers Europe/Global 2021:** Wiersholm is ranked in 18 practice areas, on top in ten of them as "Band 1". In addition, our lawyers have received 47 individual distinctions, including 14 top placements
- **Legal 500 2021:** Wiersholm is ranked as "Tier 1" in 15 of 19 practice areas. 28 lawyers have achieved individual distinctions
- **IFLR1000 2021: Elected** "Norway Law Firm of the Year" and "Banking and Finance Firm of the Year". Ranked on top in all five categories.
- **The Norwegian Financial Daily's lawyers' survey 2021:** Wiersholm obtained the most points overall and most first and podium places. The firm tops the law firm ranking in public procurement, investigation and compliance, employment law and civil procedure.
- **The Lawyer European Awards 2020: Elected** "Nordic Law Firm of the Year" and nominated in the category "European Managing Partner of the Year"



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