EFTA SURVEILLANCE AUTHORITY

Brussels, 10 April 2019
Cases No: 80996 and 82368
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Norwegian Ministry of Finance
P.O. Box 8008 Dep
NO-0030 Oslo
Norway

Dear Sir or Madam,

Subject: Letter of formal notice to Norway concerning the authorisation of financial undertakings in Norway

1 Introduction

1. By letter dated 28 August 2017 (Doc No 867116), the EFTA Surveillance Authority ("the Authority") informed the Norwegian Government that, following the judgment of the EFTA Court in Case E-08/16 *Netfonds Holdings* [1], the Authority had opened an own initiative case to examine whether Norwegian rules and administrative practices concerning the authorisation of banks and insurance companies complied with Articles 31, 36 and 40 of the Agreement on the European Economic Area ("EEA" or "the EEA Agreement").

2. In *Netfonds Holdings*, the EFTA Court interpreted Articles 31, 36 and 40 EEA in the context of the Norwegian rules and administrative practices applicable to the ownership of Norwegian companies at the time of their application for authorisation as banks and insurance companies, as described by the referring court. It concluded that those rules and practices constituted restrictions falling predominantly within the scope of Article 31 EEA, which either did not seem to be suitable to achieve the identified legitimate objective or, if suitable, seemed to go beyond what was necessary in order to attain that objective.

3. Moreover, on 12 July 2018, the Authority received a complaint (Doc No 923939-923947) concerning a rejection by the Norwegian Ministry of Finance of an application to establish a bank, based on a general evaluation of the planned ownership structure of the prospective bank, in which the complainants, two independent cooperative building associations, intended to establish an ownership percentage of 25 percent each, representing a qualifying holding of the bank. According to the complainants, Norwegian rules and administrative practices concerning the authorisation of financial undertakings are in breach of the EEA Agreement.

4. After having assessed the Norwegian provisions and practices at issue the Authority holds the view that by maintaining in force an administrative practice whereby no single shareholder is, as a main rule, allowed to own more than 20-25 percent of the

[1] Judgment of 16 May 2017 of the EFTA Court in Case E-08/16 *Netfonds Holdings ASA, Netfonds Bank AS, and Netfonds Livsforsikring AS and the Norwegian Government* [2017] EFTA Ct. Rep. 163.

total shares in financial undertakings, as well as a rule according to which three quarters of the share capital in a bank or an insurance company shall be subscribed by capital increase without any preferential rights for shareholders or others, Norway is in breach of Articles 31 and 40 EEA.

2 Correspondence

5. In the abovementioned letter of 28 August 2017, the Norwegian Government was invited to inform the Authority of how it intended to comply with the EFTA Court's judgment in *Netfonds Holdings*.
6. The Norwegian Government replied by letter dated 28 September 2017 (ref. 17/3573, Doc No 875727), where it stated that in the judgment in *Netfonds Holdings*, the EFTA Court had answered the questions referred to it by Oslo District Court (*Oslo tingrett*). However, it had not made any decisions on whether the Norwegian legislation was in line with the EEA Agreement, and that the Norwegian Government would not be able to provide further comments on the matter before the national court's case was concluded.
7. The case was discussed at the package meeting which took place in Oslo on 26-27 October 2017 [2] where the Norwegian Government was repeatedly invited to provide a reply to the question referred to in the request for information, *i.e.* how the Government intended to comply with the EFTA Court's judgment in *Netfonds Holdings*. By letter dated 15 December 2017 (ref. 17/3573, Doc No 889073), the Norwegian Government replied to the Authority's letter following up on the meeting and put forward its view that the Norwegian legislation was compliant with EEA law and that the EFTA Court had not concluded otherwise, without further explaining the Government's line of argumentation.
8. Based on the information provided by the Norwegian Government and on the information which could be drawn from the judgment in *Netfonds Holdings*, the Internal Market Affairs Directorate of the Authority ("the Directorate") assessed the case and preliminarily concluded that the Norwegian legislation breaches Article 31 EEA. Therefore, on 20 February 2018 (Doc No 892186), it sent a Pre-Article 31 letter to the Norwegian Government.
9. Norway replied by letter of 20 March 2018 (ref. 17/3573, Doc No 903700). In this letter, it provided an explanation of the Norwegian rules and administrative practices at stake, as well as comments concerning their suitability and necessity with regard to the aims pursued.
10. The Norwegian Government was informed about the abovementioned complaint by letter of 18 July 2018 (Doc No 924555). A request for information was sent to the Norwegian Government on 1 August 2018 (Doc No 925890). On 1 October 2018 (ref. 18/2969, Doc No 932303), Norway replied to the Authority's request for information mainly referring to its reply of 20 March 2018 to the Pre-Article 31 letter.
11. The issue was discussed at the package meeting in Oslo on 25-26 October 2018 [3] where the representatives of the Norwegian Government informed the Authority that a working group was being established to assess the criteria of Section 6-3 of the Norwegian Financial Undertakings Act (see Case No 77973). It was proposed that this

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[2] See the follow-up letter to the package meeting, Doc No 878916.
[3] See the follow-up letter to the package meeting, Doc No 1039214.

working group would also look into the financial undertakings' ownership regime. The report of the working group was expected in spring 2019.

3 Relevant national law

The national law currently in force

12. Section 1-1 of the Norwegian Financial Undertakings Act of 2015 [4] reads:

"*The purpose of the act is to contribute to financial stability, including to ensure that financial undertakings function in an appropriate and satisfactory manner. Financial stability means that the financial system is sufficiently robust to receive and pay out deposits and other repayable funds from the general public, channel funds, transact payments and redistribute risk in a satisfactory manner.*" [5]

13. Section 1-3 first paragraph of the Norwegian Financial Undertakings Act provides the definition of a financial undertaking:

"An undertaking which carries out one of the following activities shall be considered as a financial undertaking:

a) bank,

b) credit undertaking,

c) financial undertaking,

d) insurance undertaking,

e) pension undertaking,

f) holding undertaking in financial groups." [6]

14. Section 3-2 of the Norwegian Financial Undertakings Act provides:

"1. A licence, approval or consent under this Act is granted by the Ministry. Conditions may be attached to the licence, approval or consent, including that the business shall be operated in a particular manner or within certain limits, or other conditions in accordance with the purposes that the legislation on financial undertakings is intended to serve.

2. A licence to establish and operate as a financial undertaking shall be refused where:

a) the financial undertaking does not have its headquarters and registered office in Norway, unless the undertaking is applying for a licence under chapter 5,

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[4] *Lov om finansforetak og finanskonsern (finansforetaksloven) av 10. april 2015 No 17.*

[5] Unofficial translation by the Authority. The original wording: "*Formålet med loven er å bidra til finansiell stabilitet, herunder at finansforetak virker på en hensiktsmessig og betryggende måte. Med finansiell stabilitet menes at det finansielle systemet er robust nok til å motta og utbetale innskudd og andre tilbakebetalingspliktige midler fra allmennheten, formidle finansiering, utføre betalinger og omfordele risiko på en tilfredsstillende måte*."

[6] Unofficial translation by the Authority. The original wording: "*Som finansforetak regnes foretak som driver virksomhet som:*

a) bank,
b) kredittforetak,
c) finansieringsforetak,
d) forsikringsforetak,
e) pensjonsforetak,
f) holdingforetak i finanskonsern."

b) the conditions of sections 3-3 to 3-5 are not met,

c) evidence has not been provided that the financial undertaking will be in a position to fulfil requirements for prudent operation as set out in sections 8-16 to 8-20, sections 13-4 to 13-7, section 13-13, chapter 14 and section 16-1,

d) there is reason to presume that the undertaking will not meet the requirements set in law or pursuant to law, or that the business will be against the legal order.

3. In the assessment of whether or not a licence shall be granted, substantial importance shall be given to the undertaking's capital structure and solvency, including whether its start-up capital is in reasonable proportion to the planned business, and whether the organisation plan and operations plan are adequate to the business to be engaged in. Substantial importance shall also be given to whether the license in other ways may have unfortunate effects on the financial undertaking's customers or groups of customers.

4. The decision on an application shall be communicated to the applicant within six months of receipt of the application. For applications for a payment undertaking licence the time limit is three months. If the application does not contain the information necessary to decide whether a licence shall be granted, the time limit shall be reckoned from the date such information was received. However, the application shall in all cases be decided within twelve months of its receipt." [7]

15. Section 3-3 first and second paragraphs of the Financial Undertakings Act read as follows:

"1. The Ministry shall know the identity of the owners of the undertaking and be convinced that the owners of qualifying holdings are suited to own such holdings and to exercise such influence over the undertaking as is enabled by the holdings.

2. Three quarters of the share capital in a bank or an insurance undertaking shall be subscribed by capital increase without any preferential rights for shareholders or others. […]" [8]

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[7] Unofficial translation by the Authority. The original wording: *"(1) Tillatelse, godkjennelse eller samtykke etter denne loven gis av departementet. Det kan settes vilkår for tillatelsen, godkjennelsen eller samtykket, herunder at virksomheten drives på en bestemt måte eller innenfor visse rammer, eller andre vilkår i samsvar med de formål som lovgivningen om finansforetak skal ivareta.*
(2) Tillatelse til å etablere og drive virksomhet som finansforetak skal nektes dersom:
a) finansforetaket ikke har hovedsete og forretningskontor her i riket, med mindre finansforetaket søker tillatelse etter kapittel 5,
b) vilkårene i §§ 3-3 til 3-5 ikke er oppfylt,
c) det ikke er godtgjort at finansforetaket vil være i stand til å oppfylle krav til forsvarlig virksomhet som følger av §§ 8-16 til 8-20, §§ 13-4 til 13-7, § 13-13, kapittel 14 og § 16-1,
d) det er grunn til å anta at foretaket ikke vil oppfylle de krav som stilles i lov eller i medhold av lov, eller at virksomheten vil være i strid med rettsordenen.
(3) Ved vurdering av om tillatelse skal gis, skal det legges vesentlig vekt på om foretakets kapital- og soliditetsforhold er betryggende, herunder om startkapitalen står i rimelig forhold til den planlagte virksomhet, og om organisasjons- og driftsplanen er betryggende for den virksomhet som skal drives. Det skal også legges vesentlig vekt på om tillatelsen på annen måte kan få uheldige virkninger for finansforetakets kunder eller grupper av kunder.
(4) Avgjørelse av en søknad skal meddeles søkeren innen seks måneder etter at søknaden er mottatt. For søknad om tillatelse som betalingsforetak eller e-pengeforetak er fristen tre måneder. Dersom søknaden ikke inneholder de opplysninger som er nødvendige for å avgjøre om tillatelse skal gis, regnes fristen fra det tidspunkt slike opplysninger ble mottatt, likevel slik at søknaden i alle tilfelle skal være avgjort innen tolv måneder etter at den er mottatt."

[8] Unofficial translation by the Authority. The original wording: *"(1) Departementet skal kjenne identiteten til eierne i foretaket og være overbevist om at eiere av kvalifiserte eierandeler er egnet til å inneha slike*

16. As regards the reasons underlying the abovementioned provisions, the preparatory works of the Financial Undertakings Act (Prop. 125 L (2013-2014)) refer to the assessment made in the previous preparatory works on the issue (Proposition No 50 to the Odelsting (2002-2003), Section 5.3), relevant parts of which will be cited below.

Former national provisions subject to the proceedings in the Authority and the EFTA Court

The 10 percent rule concerning Norwegian financial institutions

17. The Financial Activity and Financial Institutions Act [9] originally provided that no one could in principle own more than 10 percent of the share capital of a Norwegian financial institution (“the 10 percent rule”).

18. At the time, the 10 percent rule was accompanied by the rule in the Commercial Banks Act [10], according to which a commercial bank had to be established by a minimum of 10 promoters with at least 20 shareholders, following a public offering (“the issue rule”).

19. The 10 percent rule was amended in 2003 [11] after the Authority had issued a reasoned opinion [12], in which it concluded that the rule, such as it was established in Section 2-2 paragraph 1, first sentence of the Financial Activity and Financial Institutions Act, constituted an unlawful restriction on the free movement of capital guaranteed in Article 40 EEA. However, the reasoned opinion of 2001 did not concern the issue rule.

20. The Norwegian authorities replaced the ownership limitation rule with the ownership control regime. Section 2-3 of the Financial Activity and Financial Institutions Act stated:

“*Section 2-3 Suitability Assessment*

The King can authorise acquisition of shares in a financial institution in cases where the acquirer is suited to exercise the influence following from his total holding as calculated in accordance with Section 2-2. In case the acquirer hereby acquires equal to or more than 25 %, the King shall refuse authorisation, unless he is convinced that the criteria stipulated in paragraph 2 are met. In addition, the King shall in these cases be convinced that the acquisition will not lead to undesired consequences for the functioning of the capital and credit market. The authorisation can be made conditional.

In his assessment, the King shall in particular consider the following:

a) whether the acquirer can be considered as suitable in light of his prior conduct in commercial relations, his financial resources available and with regard to the general requirement of appropriate/prudent business activities,

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eierandeler og utøve slik innflytelse i foretaket som eierandelene gir grunnlag for. Med kvalifisert eierandel menes en eierandel som nevnt i § 6-1 første ledd, jf. § 6-1 fjerde og femte ledd.
(2) Tre firedeler av aksjekapitalen i bank eller forsikringsforetak skal være tegnet ved kapitalforhøyelse uten fortrinnsrett for aksjeeiere eller andre. […]”

[9] *Lov om finansieringsvirksomhet og finansinstitusjoner av 10. juni 1988 No 40.*

[10] *Lov om forretningsbanker av 24. mai 1961 No 2.*

[11] By *Lov om endringer i lov 10. juni 1988 nr. 40 om finansieringsvirksomhet og finansinstitusjoner og i enkelte andre lover (eierkontroll i finansinstitusjoner), LOV-2003-06-20-42.*

[12] Reasoned opinion of 30 October 2001 (Doc No 109382).

b) whether it can be assumed that the acquirer will use his influence in the institution to achieve advantages for his own or for related businesses, or whether he would indirectly influence other commercial activities,

c) whether the acquisition is in line with the aim of achieving a financial market founded on competition between independent bodies or whether the institution's independence in relation to other market operators will be impaired,

d) whether the ownership structure after the acquisition will render the supervision of the institution more difficult.

The King may lay down further guidelines for the exercise of this discretion in a regulation.

The King may repeal an authorisation, when there are reasons to believe that the acquirer has acted in such a way that the conditions that determined the authorisation are no longer fulfilled." [13]

21. It was stated in the preparatory works (NOU 2002:3) that it was proposed "*[...] to replace the existing Norwegian ownership rules with a system based on the provisions on ownership control as contained in the relevant EEA-directives. It is the opinion of the Group that such a system based on concrete assessments in particular cases in a better way than the existing regime will attend to the legislative considerations behind rules on ownership in financial institutions*" [14].

22. The proposition to the Storting (Proposition No 50 to the Odelsting (2002-2003)) concerning amendments to the Financial Activity and Financial Institutions Act (*Lov om finansieringsvirksomhet og finansinstitusjoner av 10. juni 1988 No 40*) and some other acts (ownership control in financial institutions) provided in Section 5.3:

    "*The need to ensure an independent finance industry will in any case be among the most important considerations that the authorities must be able to emphasise in a discretion-based system when assessing whether the acquisition can take place. This warrants exercising discretionary judgment in such a way that big owners that are not financial institutions will generally not be accepted. It cannot be excluded however, that in some cases situations may arise in which parties other than financial institutions should be permitted to acquire control of a financial institution, for example in connection with the establishment of small niche enterprises in the field of banking and insurance.*" [15]

23. At the same time, the issue rule was amended in the Commercial Banks Act.

24. Section 4 first paragraph of the Commercial Banks Act provided:

    "*Authorisation under Section 8 of this Act shall be refused unless more than three quarters of the commercial bank's share capital is subscribed in connection with a capital increase effected without any preferential rights for shareholders or others.*" [16]

25. A corresponding rule was introduced in the Insurance Activity Act [17]. Section 2-1 first paragraph last sentence of the Insurance Activity Act [18] provided as follows:

[13] Unofficial translation by the Authority.
[14] English summary of NOU 2002:3 in Section 0.3.
[15] The translation taken from Case E-08/16 *Netfonds Holdings*, cited above, paragraph 33.
[16] The translation taken from Case E-08/16 *Netfonds Holdings*, cited above, paragraph 28.
[17] *Lov om forsikringsvirksomhet av 10. juni 1988 No 39*.
[18] In 2005, *Lov om forsikringsvirksomhet av 10. juni 1988 No 39* was replaced by *Lov om forsikringsvirksomhet av 10. juni 2005 No 44*. The issue rule remained substantially the same in Section 2-1 first paragraph last sentence of the new Act.

"*A licence shall be refused unless more than three quarters of the insurance company's share capital is subscribed in connection with a capital increase without any preferential rights for shareholders or others.*" [19]

26. Section 8.2.3 of the proposition notes that the issue rule is closely connected to the ownership control rules. The issue rule aims at dispersing the ownership from the beginning.

27. The rules in Section 2-3 of the Financial Activity and Financial Institutions Act were replaced by the current Section 3-3 first paragraph of the Financial Undertakings Act. The issue rule, identical to the rules cited in paragraphs 24 and 25 is currently established in Section 3-3 second paragraph first sentence of the Financial Undertakings Act.

28. The issue rule in the Commercial Banks Act and the Insurance Activity Act was the subject of the judgment in *Netfonds Holdings*.

The capital and voting rights restrictions concerning Norwegian financial services infrastructure institutions

29. Moreover, similar ownership limitation rules were contained in the Stock Exchanges Act [20] and the Registration of Financial Instruments Act [21]. In particular, according to those acts, no shareholder of a stock exchange or a securities depository was allowed to own more than 10 percent of the share capital or voting rights. Those rules were amended in 2009 after the Authority had issued a reasoned opinion [22], in which it concluded that the rules constituted an unlawful restriction on the free movement of capital guaranteed in Article 40 EEA. The amendments increased from 10 percent to 20 percent the threshold for ownership restrictions in relation to stock exchanges and securities depositories. Further, holding acquisitions in the segment between 10 percent and 20 percent were made subject to a notification procedure.

30. In light of these amendments, the Authority closed the case concerning the earlier legal framework in the field of the financial services infrastructure. However, holding the opinion that the amendments did not sufficiently address the concerns raised in the reasoned opinion of 1 June 2004, it opened a new case, which formed the basis of the infringement proceedings in the EFTA Court in Case E-09/11 *ESA* v *Norway* [23].

31. In its judgment in Case E-09/11 *ESA* v *Norway* [24], the EFTA Court declared that, by maintaining in force restrictions on the rights of persons and undertakings established in EEA States to own holdings in financial services infrastructure institutions, Norway has failed to fulfil its obligations arising from Articles 31 and 40 EEA.

32. On 19 June 2015, the EFTA Court delivered the judgment in Case E-19/14 *ESA* v *Norway* [25] regarding Norway's failure to comply with the judgment of the EFTA Court of 16 July 2012 in Case E-09/11.

33. On 20 June 2014, Norway adopted certain legislative amendments [26], which entered into force on 1 July 2014 and which aimed at securing compliance with the obligations

[19] The translation taken from Case E-08/16 *Netfonds Holdings*, cited above, paragraph 29.
[20] *Lov av 17.11.2000 nr. 80, Børsloven*.
[21] *Lov av 05.07.2002 nr. 64 om registrering av finansielle instrumenter (verdipapirregisterloven).*
[22] Reasoned opinion of 1 June 2004 (Doc No 186264).
[23] Judgment of 16 July 2012 of the EFTA Court in Case E-09/11 *ESA* v *Norway* [2012] EFTA Ct. Rep. 442.
[24] *Ibid.*
[25] Judgment of 19 June 2015 of the EFTA Court in Case E-19/14 *ESA* v *Norway* [2015] EFTA Ct. Rep. 300.
[26] *Lov 20. juni 2014 nr. 29 om endringer i børsloven og verdipapirhandelloven mv.*

resulting from the judgment of 16 July 2012 in Case E-09/11 *ESA* v *Norway*. In particular, the amendments, among other things, abolished the ownership limitation rule and conferred on the Ministry of Finance discretionary authority, upon application, to authorize shareholdings exceeding 10 percent in stock exchanges and securities depositories.

34. There is no provision similar to the current Section 3-3 second paragraph first sentence of the Financial Undertakings Act in the Stock Exchanges Act or the Registration of Financial Instruments Act.

4 Relevant EEA law

35. Article 31(1) EEA prohibits all restrictions on the freedom of establishment of nationals of an EU Member State or an EEA EFTA State in the territory of any other of these States. This also applies to the setting up of agencies, branches or subsidiaries by nationals of any EU Member State or EEA EFTA State established in the territory of any of these States. Freedom of establishment includes the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of Article 34(2) EEA, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of Chapter 4.

36. Directive 2007/44/EC [27] amended several sectoral Directives regulating, *inter alia*, credit institutions [28] and insurance companies [29] by introducing identical rules and evaluation criteria for the prudential assessment of acquisitions and increases of holdings. The Directive does not regulate the stage of initial licensing of the institutions, but only subsequent changes of ownership. At the licensing stage, minimum harmonisation rules set out in the sectoral legislation, as well as the free movement provisions of the EEA Agreement apply.

37. After Directive 2007/44/EC entered into force, the acts in the insurance field have been replaced by a consolidated directive for insurance and reinsurance, Directive

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[27] Directive 2007/44/EC of the European Parliament and of the Council of 5 September 2007 *amending Council Directive 92/49/EEC and Directives 2002/83/EC, 2004/39/EC, 2005/68/EC and 2006/48/EC as regards procedural rules and evaluation criteria for the prudential assessment of acquisitions and increase of holdings in the financial sector* (OJ L 247, 21.9.2007, p. 1, and EEA Supplement No 73, 19.12.2013, p. 1), incorporated at an indent in points 7a, 11, 14 and 31ba of Annex IX of the EEA Agreement by Decision of the EEA Joint Committee No 79/2008 (OJ L 280, 23.10.2008, p. 1).

[28] Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 *relating to the taking up and pursuit of the business of credit institutions (recast)* (OJ L 177, 30.6.2006, p. 1, and EEA Supplement No 59, 24.10.2013, p. 64), incorporated at point 14 of Annex IX of the EEA Agreement by Decision of the EEA Joint Committee No 65/2008 (OJ L 257, 25.9.2008, p. 27). The directive has been replaced by Directive 2013/36/EU, which maintains the rules introduced by Directive 2007/44/EC. Directive 2013/36/EU was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 79/2019 (not yet in force in the EEA EFTA States).

[29] Council Directive 92/49/EEC of 18 June 1992 *on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and amending Directives 73/239/EEC and 88/357/EEC (third non-life insurance Directive)*, Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 *concerning life assurance* and Directive 2005/68/EC of the European Parliament and of the Council of 16 November 2005 *on reinsurance and amending Council Directives 73/239/EEC, 92/49/EEC as well as Directives 98/78/EC and 2002/83/EC*.

2009/138/EC [30] ("Solvency II"). The rules introduced in Directive 2007/44/EC have been maintained in Solvency II.

38. Accordingly, the currently applicable EEA law concerning the assessment of secondary acquisitions in credit institutions and insurance companies is Directive 2006/48/EC, as amended by Directive 2007/44/EC, and Solvency II.

5 The Authority's assessment

5.1 The Norwegian measures subject to the letter of formal notice

5.1.1 The judgment in Netfonds Holdings

39. In its judgment in *Netfonds Holdings*, the EFTA Court stated that the questions referred by *Oslo tingrett* reflected three different potential interpretations of national law and administrative practice, which the referring court would have to resolve [31]. In particular, according to the request for an Advisory Opinion:

a) the rules in Section 4 of the Commercial Banks Act and Section 2-1 of the Insurance Activity Act could be understood either as a requirement that:

   i) three quarters of the shares in new banks and insurance companies must be subscribed without preferential rights (offered as a public issue) (Question 1);

   ii) three quarters of the shares in new banks and insurance companies must be subscribed by persons other that the promoters (Question 2);

b) there is an established administrative practice whereby individuals or enterprises are not authorised to own more than 20 to 25 percent of the shares in financial institutions, except in those cases where the law itself authorises the establishment of a financial group or where the financial institution will engage in what is referred to as a niche activity only (Question 3).

40. However, since all the questions related to similar interpretative choices of national law and administrative practice, the EFTA Court decided to address the questions together [32].

41. It found, first, that the national legislation as described in Questions 1 and 2 and the administrative practice as described in Question 3 constitute restrictions that appear to fall predominantly within the scope of Article 31 EEA [33].

42. Second, the EFTA Court stated that the objective of reducing excessive risk incentives of owners of banks or insurance companies, particularly in relation to the risk of misuse of power, reflects overriding reasons in the general interest capable of justifying national measures which restrict the freedom of establishment as guaranteed by Article 31 EEA [34].

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[30] Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 *on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (recast)* (OJ L 335, 17.12.2009, p. 1, and EEA Supplement No 76, 17.12.2015, p. 987), incorporated at point 1 of Annex IX of the EEA Agreement by Decision of the EEA Joint Committee No 78/2011 (OJ L 262, 6.10.2011, p. 45).
[31] Case E-08/16 *Netfonds Holdings*, cited above, paragraphs 66-67.
[32] Case E-08/16 *Netfonds Holdings*, cited above, paragraph 67.
[33] Case E-08/16 *Netfonds Holdings*, cited above, paragraph 111.
[34] Case E-08/16 *Netfonds Holdings*, cited above, paragraph 116.

43. Third, it found that the rules, as described in Questions 1 and 2, do not seem to be suitable to achieve the legitimate objective that has been identified by the Court, as they do not prevent, in a consistent and systematic manner, the promoters of a bank or an insurance company, or other investors, from obtaining an ownership of more than 25 percent in that institution at the time of its authorisation [35].

44. Finally, the Court noted that the administrative practice, as described in Question 3, appears suitable to achieve the legitimate objective that has been identified by the Court to the extent that it applies to applications for authorisation as a bank or an insurance company and not to secondary acquisitions after the granting of authorisation [36]. In the latter case, any restrictions on acquisitions must not go beyond the conditions introduced by Directive 2007/44/EC [37]. However, as there are apparently less restrictive and equally effective measures than the contested administrative practice, it does not pass the necessity test [38].

5.1.2 Oslo tingrett judgment following up the judgment in Netfonds Holdings

45. In its judgment of 8 June 2018 following the judgment of the EFTA Court in *Netfonds Holdings*, *Oslo tingrett* established that since 2004 the Norwegian Government operates a consistent administrative practice whereby when issuing a licence, a dispersion requirement with two exceptions [39] applies to ownership for more than about 25 percent of the shares in financial undertakings [40]. The rule that 75 percent of the share capital in a bank or an insurance company shall be subscribed by capital increase without any preferential rights for shareholders or others is still applicable [41].

46. *Oslo tingrett* furthermore stated that the aim sought by the Government was to ensure financial stability, including trust in the financial markets [42]. However, it is uncertain whether the Norwegian administrative practice is suitable for achieving the legitimate aim [43]. Moreover, the measure cannot be considered necessary with regard to this aim [44].

47. The Authority has been informed by the Norwegian Government that the judgment of *Oslo tingrett* was appealed and the appeal is currently pending at the Court of Appeal.

5.1.3 The Norwegian Government's position

48. In its reply to the Pre-Article 31 letter and the reply to the request for information dated 1 October 2018, as well as at the package meeting of 25-26 October 2018, the Norwegian Government acknowledged the existence of the administrative practice and stated that its legal basis are Sections 3-2 and 3-3 first paragraph of the Financial Undertakings Act. In accordance with this administrative practice, the Ministry of Finance will, as a main rule, not grant a licence to establish and operate as a financial

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[35] Case E-08/16 *Netfonds Holdings*, cited above, paragraphs 120 and 121.
[36] Case E-08/16 *Netfonds Holdings,* cited above, paragraph 124.
[37] As mentioned above, the rules are currently contained in Directive 2006/48/EC, as amended by Directive 2007/44/EC, and Solvency II.
[38] Case E-08/16 *Netfonds Holdings*, cited above, paragraph 134.
[39] In cases where a financial undertaking acquires control of another financial undertaking and where small niche undertakings are established in the field of banking and insurance.
[40] Judgment of 8 June 2018, *Netfonds Holdings ASA, Netfonds Bank AB, Netfonds Livsforskring AS* v *Staten v/Finansdepartementet*, Case No 15-072169TVI-OTIR/01, page 28.
[41] Case No 15-072169TVI-OTIR/01, cited above, page 28.
[42] Case No 15-072169TVI-OTIR/01, cited above, page 33.
[43] Case No 15-072169TVI-OTIR/01, cited above, page 41.
[44] Case No 15-072169TVI-OTIR/01, cited above, page 43.

undertaking, unless the owner is a financial undertaking or if the ownership structure is dispersed. Based on this, no single shareholder is, as a main rule, allowed to own more than 20-25 percent of the total shares in financial undertakings [45].

49. As explained by the Norwegian Government, the legal basis of the administrative practice is the ownership control regime. The issue rule, as well as the administrative practice restricting ownership in financial undertakings based on Sections 3-2 and 3-3 first paragraph of the Financial Undertakings Act, form an integral part of this regime [46].

5.1.4 The conclusion concerning the measures subject to this letter

50. Based on the above, the subject matter of this letter of formal notice is the administrative practice whereby no single shareholder is, as a main rule, allowed to own more than 20-25 percent of the total shares in financial undertakings, unless the shareholder is a financial undertaking or small niche undertakings are established in the field of banking and insurance ("the administrative practice restricting ownership in financial undertakings"). This administrative practice is recognised by *Oslo tingrett* and acknowledged by the Norwegian Government.

51. In addition, the subject matter of this letter is the issue rule, which establishes, in addition, the method by which the ownership of a bank or an insurance company has to be dispersed, *i.e.* it obliges to offer the shares on the market.

52. The issue rule itself could be understood as a requirement establishing ownership limitations (see, for example, Question 2 in the judgment in *Netfonds Holdings*). However, as Norway has admitted the existence of the administrative practice restricting ownership in financial undertakings and claimed that its legal basis is the ownership control regime as such rather than, specifically, Section 3-3 second paragraph of the Financial Undertakings Act, the issue rule should be seen as an instrument accompanying the administrative practice with regard to banks and insurance companies. Both the rule and the administrative practice are to be considered as instruments for attaining the Norwegian legislator's objective of dispersed ownership.

53. Therefore, as also suggested by the Norwegian Government, the issue rule and the administrative practice restricting ownership in financial undertakings should be assessed as a whole. Both the rule and the practice are herein referred to as "the Norwegian rules".

5.2 The existence of a restriction

54. The Norwegian rules limit investors from owning more than 20-25 percent of the shares in a financial undertaking. As regards banks and insurance companies, the Norwegian rules establish, in addition, the method by which the ownership of no more than 20-25 percent has to be sought. To the extent that the rules thus concern those shareholdings that enable the holder to exert a definite influence on a company's decision and to determine its activities, the national measures fall within the scope of Article 31 EEA. On the other hand, if and to the extent that those measures in fact

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[45] The reply of 20 March 2018 to the Pre-Article 31 letter, page 2, and the reply to the request for information dated 1 October 2018, page 2.

[46] The reply of 20 March 2018 to the Pre-Article 31 letter, page 2.

have an effect on shareholdings which do not enable the holder to exert such an influence, they would fall within the scope of Article 40 EEA [47]. Such rules are in any event by their very nature restrictive and constitute a restriction on the freedom of establishment under Article 31 EEA [48] or, as the case may be, on the free movement of capital under Article 40 EEA [49]. Although the Authority's concerns relate to both freedoms, as the scheme of analysis for both is essentially the same, the focus will here be on Article 31 EEA, as the measures at issue touch at least *prima facie* upon the freedom of establishment.

55. *Oslo tingrett* decided that the administrative practice restricting ownership in financial undertakings is clearly a restriction under Article 31 EEA [50].

56. The Norwegian Government has not disputed that the Norwegian rules constitute a restriction on the freedom of establishment. It argued, however, that the rules could be justified by overriding reasons of general public interest and are proportionate [51].

5.3 Possible justification of the Norwegian rules

57. It is established case law that a national measure which restricts the freedom of establishment laid down in Article 31 EEA can be justified on the grounds set out in Article 33 EEA or by overriding reasons in the public interest, provided that the restriction is proportionate, *i.e.* is appropriate to secure the attainment of the objective which it pursues (the suitability test) and does not go beyond what it necessary in order to attain it (the necessity test) [52].

58. It is for the national authorities, where they adopt a measure derogating from a principle enshrined in EEA law, to show in each individual case that the requirements listed in paragraph 57 are satisfied. The reasons which may be invoked by an EEA State by way of justification must be accompanied by an analysis of the appropriateness and proportionality of the measure adopted by that State and by specific evidence substantiating its arguments [53].

5.3.1 The objectives pursued by the Norwegian Government

59. In the reply to the Pre-Article 31 letter, the Norwegian Government stated that the Norwegian rules attain a number of interrelated objectives, such as reducing the risk of different forms of misuse of ownership power to the direct detriment of smaller shareholders, depositors and competitors and reducing the inherent risk appetite by large shareholders; contributing to strengthening the effect of other regulatory

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[47] Judgment of the Court of Justice of the European Union (CJEU) of 21 November 2002, *X and Y*, C-436/00, EU:C:2002:704, paragraph 68 and Case E-09/11 *ESA* v *Norway*, cited above, paragraphs 81 and 82.

[48] Case E-08/16 *Netfonds Holdings,* cited above, paragraph 111.

[49] Case E-09/11 *ESA* v *Norway*, cited above, paragraph 80.

[50] Case No 15-072169TVI-OTIR/01, cited above, page 30.

[51] Case E-08/16 *Netfonds Holdings*, cited above, paragraphs 75-82 and the reply of the Norwegian Government of 20 March 2018 to the Pre-Article 31 letter.

[52] See, for example, Case E-09/11 *ESA* v *Norway*, cited above, paragraph 83 and Case E-08/16 *Netfonds Holdings,* cited above, paragraph 112.

[53] Judgments of the CJEU of 23 January 2014, *Commission* v *Belgium*, C-296/12, EU:C:2014:24, paragraph 33 and of 23 December 2015, *Scotch Whisky Association*, C-333/14, EU:C:2015:845, paragraph 54 and the case law cited therein, as well as the judgment of 23 December 2012 of the EFTA Court in Case E-02/11 *STX Norway Offshore AS* [2012] EFTA Ct Rep. 4, paragraph 99.

measures; aiming at strengthening the corporate governance structure of the financial undertakings, preventing conflict of interests and contributing to independence between financial undertakings; contributing to a sound capital situation where the undertaking is not too dependent on the financial situation of a single or only very few shareholders, while at the same time allowing for sufficiently large shareholders that are more likely to be willing to follow up on their investment with further capital injections, if need be.

60. According to the Norwegian Government, these interrelated objectives contribute to the protection of the functioning and good reputation of the financial services sector and the promotion of the well-functioning and efficiency of the financial markets. They strengthen the stability of the financial system as a whole, promote compliance with regulations and facilitate supervision and enforcement of such regulations and increase the confidence of investors and creditors in the Norwegian financial market. The overall protection of the integrity and stability of the financial market is, moreover, not only to the benefit of the well-functioning of the financial market as such, but also of the general economy.

61. According to established case law of the EFTA Court, the overriding reasons in the general interest capable of justifying restrictions on the fundamental freedoms in the financial sector include the protection of the functioning and good reputation of the financial service sector and the promotion of the well-functioning and efficiency of the financial markets [54]. Furthermore, in its judgment in *Netfonds Holdings*, the EFTA Court held that the objective of reducing excessive risk incentives of owners of banks or insurance companies, particularly in relation to the risk of misuse of power, promotes the well-functioning and efficiency of the financial markets and thus reflects overriding reasons in the general interest [55].

62. The Authority thus acknowledges that the objectives of the Norwegian measure may in principle reflect overriding reasons in the general interest, but it must still comply with the principle of proportionality, *i. e.* be suitable and necessary.

5.3.2 The suitability of the national measure

Whether small shareholdings contribute to the financial stability of the market

63. In the reply to the Pre-Article 31 letter, the Norwegian Government stated that the Norwegian rules are suitable with regard to the objectives sought. In this respect, it cited the judgment of the EFTA Court in *Netfonds Holdings*, paragraph 122, where the Court concluded that the administrative practice restricting ownership in financial undertakings appeared suitable to achieve the legitimate objective that had been identified by the Court.

64. The Authority notes, however, that the EFTA Court's conclusion in paragraph 122 was based on the premise that small shareholdings contribute to the financial stability of the market. However, as is also shown by the assessment of *Oslo tingrett*, this premise is not necessarily correct.

65. In the reply to the Pre-Article 31 letter, the Norwegian Government stated that there is an increasing amount of evidence demonstrating that financial undertakings with a more concentrated ownership structure take more risk than financial undertakings with

[54] Judgment of 1 July 2005 of the EFA Court in Case E-08/04 *ESA* v *Liechtenstein* [2005] EFTA Ct. Rep. 46, paragraph 24, and Case E-09/11 *ESA* v *Norway*, cited above, paragraphs 84-86 and the case law cited therein.

[55] Case E-08/16 *Netfonds Holdings,* cited above, paragraph 114.

a more dispersed ownership structure [56]. It claimed moreover that the impact of bank regulations on bank risk depends critically on each bank's ownership structure. For instance, the stabilising effects of capital regulations diminish when the bank has a large owner with the incentives and power to increase bank risk, and with a sufficiently large owner, capital regulations will indeed increase bank risk [57]. Finally, according to the Norwegian Government, a dispersed ownership structure strengthens the corporate governance structure of the financial undertakings, prevents conflict of interests and contributes to the independence of financial undertakings [58].

66. The Authority notes that the evidence relied on by Norway cannot be considered as conclusive. The following comments have to be made in this respect.

67. First, at the package meeting of 25-26 October 2018, the Norwegian Government itself noted that, in certain other EEA States (notably, Denmark), it is considered that too small shareholdings pose a bank risk. This is because an ownership structure which is too dispersed leads to strong bank management. However, the Norwegian Government has neither provided to the Authority with any assessment of this fact nor its analysis in the scientific literature. Furthermore, it has not explained why the aim of ownership limitation in financial undertakings should be given more weight than, for example, the aim of ensuring sufficient ownership allowing to influence the decision making.

68. Second, it seems that the Norwegian Government is relying on relatively recent studies (dating from 2009 to 2013). However, the ownership limitations have had a long history in the Norwegian financial legislation. At the package meeting of 25-26 October 2018, the Norwegian Government explained that the reason for introducing the ownership limitation rule at the beginning were several practical examples of abuse. However, at that time the Norwegian Government did not possess any evidence concerning the issue whether small shareholdings contribute to the stability of the financial market. All the studies known to the Government were presented to the Authority and *Oslo tingrett* in the *Netfonds Holdings* case. In this respect, the Authority refers to the judgment of 15 September 2011, *Dickinger* [59], as authority for the proposition that it must be ascertained whether the national authorities really did intend at the material time to ensure the protection claimed [60]. National legislation is appropriate for ensuring attainment of the objective relied on only if it "*genuinely reflects a concern to attain it in a consistent and systematic manner*" [61].

69. In Norway's reply to the reasoned opinion in the abovementioned infringement case concerning the 10 percent rule (ref. CFS.051.400.002/00-8005-D, Doc No 113456), there is no mention of whether small shareholdings contribute to the financial stability of the market. According to the Norwegian Government, the legislative considerations behind the 10 percent rule were primarily based on competition policy (to ensure a structure inductive of effective competition between financial institutions), prudential and credit allocation concerns (to create a structure in which conflicts of interest between the role as an owner and the role as a debtor are reduced) and social concerns

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[56] Referring to Levine et al., Bank governance, regulation and risk taking (2009) and Gropp et al., Bank Owners or Bank Managers: Who is keen on Risk? Evidence from the Financial Crisis (2010).

[57] Referring to Levine et al., Bank governance, regulation and risk taking (2009), Gropp et al., Bank Owners or Bank Managers: Who is keen on Risk? Evidence from the Financial Crisis (2010) and Westman, The role of ownership structure and regulatory environment in bank corporate governance (2010).

[58] Referring to Laeven, Corporate Governance: what's special about banks? (2013).

[59] Judgment of the CJEU of 15 September 2011, *Dickinger*, C-347/09, EU:C:2011:582, paragraph 54.

[60] The CJEU was here concerned with whether the State did actually intend to ensure protection from gambling (a restriction on the freedom to provide services) at the relevant time.

[61] Judgment of the CJEU of 15 September 2011, *Dickinger*, C-347/09, cited above, paragraph 56.

(to avoid a concentration of economic power, considering the social function of insurance companies).

70. Third, the Norwegian Government has not explained why it has chosen in particular ownerships not exceeding 20-25 percent of shares of a financial undertaking.

71. The statements advanced by the Norwegian Government, including the evidence relied on, was also analysed by *Oslo tingrett* in its judgment of 8 June 2018. In particular, *Oslo tingrett* pointed out that a bank activity will always entail risk. The research submitted by the Government was not sufficient to decisively support its claim that small shareholdings contribute to the financial stability of the market. This was, *inter alia*, because the research differed in what was considered as high and low risk and "*controlling owners*". Examples from other countries also could not form a basis to conclude in favour of the Government's claim nor to completely reject it.

72. Therefore, *Oslo tingrett* concluded that it is at least doubtful whether the administrative practice restricting ownership in financial undertakings is suitable with regard to the aims sought, because there is no conclusive evidence that small shareholdings (in particular, ownerships not exceeding 20-25 percent of shares of a financial undertaking) contribute to the financial stability of the market [62].

Application of the ownership restrictions to the subsequent acquisitions

73. Moreover, the Authority would like to note that even conceding that small shareholdings contribute to the financial stability of the market, the administrative practice restricting ownership in financial undertakings could only be suitable to achieve the aims sought if it applied both to the grant of authorisation and subsequent acquisitions [63]. Otherwise, the practice would lack consistency, because after the grant of the authorisation, bigger holdings of a financial undertaking could be acquired.

74. However, it has to be noted that the contested administrative practice is based on the ownership control regime and, more specifically, the suitability assessment of the owners of financial undertakings. Therefore, its application to subsequent acquisitions is in breach of Directive 2006/48/EC, as amended by Directive 2007/44/EC, and Solvency II [64].

75. In its letter of formal notice of 15 March 2017 in Case 77973 (Doc No 817335), the Authority already concluded that by maintaining provisions such as Section 6-3(2)(c) of the Financial Undertakings Act, the interpretation of which by the competent Norwegian institutions was illustrated by administrative practice whereby acquisitions of qualifying holders by acquirers is not based on an assessment of the acquirer's integrity, professional competences or financial soundness, but on the level of the ownership, Norway was in breach of Directive 2006/48/EC, as amended by Directive 2007/44/EC, and Solvency II.

76. The Norwegian Government argues that Directive 2007/44/EC does not apply as regards the grant of authorisation. Therefore, if ownership limitation criteria are set for the grant of the authorisation, then these criteria must apply also for later acquisitions without being affected by this directive. This, in the view of the Government, is supported by Recital 4 of Directive 2007/44/EC, according to which the prudential assessment of a proposed acquisition should not in any way suspend or supersede the

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[62] Case No 15-072169TVI-OTIR/01, cited above, page 41.
[63] This was also confirmed by *Oslo tingrett* (Case No 15-072169TVI-OTIR/01, cited above, page 32).
[64] See to this effect Case E-08/16 *Netfonds Holdings*, cited above, paragraphs 123 and 124.

requirements of on-going prudential supervision and other relevant provisions to which the target entity has been subject since its own initial authorisation.

77. The Authority is unconvinced by this argument as the recital in question is designed to cover other circumstances, notably prudential requirements imposed by the directives in the financial sector such as capital requirements. Even if it were apposite, the fact remains that the administrative practice restricting ownership in financial undertakings is based on the suitability assessment of the owners of financial undertakings, which has been fully harmonised at the EEA level in Directive 2006/48/EC, as amended by Directive 2007/44/EC, and Solvency II.

78. If EEA States were allowed to set suitability assessment criteria for the grant of the authorisation, which apply throughout the whole period of activity of a financial undertaking, the relevant provisions in Directive 2006/48/EC, as amended by Directive 2007/44/EC, and Solvency II would become devoid of their purpose. In particular, the maximum harmonisation aim of this directive could not be achieved [65]. An application of the contested administrative practice also to later acquisitions would thus amount to a breach of the relevant provisions of Directive 2006/48/EC, as amended by Directive 2007/44/EC, and Solvency II.

79. In addition, it should be noted that Directive 2013/36/EU (as mentioned above, not yet in force in the EEA EFTA States) applies also to the grant of the authorisation. In particular, it establishes in Article 14 second paragraph that the same assessment criteria are applicable to the authorisation to commence the activity of a credit institution as regards the suitability of the shareholders or members (see Article 23 first, second and third paragraphs and Article 24).

80. Therefore, as the administrative practice restricting ownership in financial undertakings, which is based on the suitability assessment of the owners of financial undertakings, cannot apply to subsequent acquisitions, it cannot ensure that the aims sought are pursued in a consistent manner and, consequently, cannot be considered as suitable.

Non-application of the ownership restrictions where a financial undertaking acquires control of another financial undertaking

81. Lastly, the Authority notes that the Norwegian rules comprise two exceptions, namely, the ownership restrictions and, correspondingly, the dispersion requirement do not apply where a financial undertaking acquires control of another financial undertaking and where small niche undertakings are established in the field of banking and insurance.

82. However, a financial undertaking, in particular, if it is established in another EEA State, might be 100 percent owned by an individual.

83. At the package meeting of 25-26 October 2018, the Norwegian Government admitted that the legal framework in force does not allow Norway to reject a secondary acquisition of a shareholding exceeding 25 percent by a bank established in another EEA State who is 100 percent owned by an individual.

84. This fact alone speaks against the suitability of the Norwegian rules. It is not clear how the acquisition by an individual of a shareholding exceeding 25 percent directly could be considered as posing more risk than an acquisition of the same shareholding

[65] See the Authority's letter of formal notice to Norway in Case 77973 (Doc No 817335) Section 5.2 for the arguments.

through a bank in another EEA State who is 100 percent owned by the same individual.

85. The Norwegian Government has not explained the reasoning behind this apparent inconsistency in its rules and practices.

86. In light of the above, the Authority holds the view that the Norwegian rules are not suitable with regard to the aims sought.

5.3.3 The necessity of the national measure

87. The Authority is of the opinion that even if the Norwegian rules were considered suitable, they go beyond what is necessary to attain any risk-reduction objective. As pointed out by the EFTA Court, there appear to be alternative means of obtaining the objective pursued, which are less restrictive while equally effective, such as to subject the granting of an authorisation to banks and insurance companies to special conditions aimed at preventing the risk of misuse of power. In particular, conditions that prevent the granting of favourable loans, guarantees or any comparable transactions for the benefit of large owners or their related parties, would, in combination with a suitability assessment of applicants wishing to own qualifying holdings, address the excessive incentives related to the risk of misuse of power while still being less restrictive than the contested measures [66].

88. *Oslo tingrett* also considered that the objective pursued can be attained through other measures. In its judgment, *Oslo tingrett* pointed out that pursuant to the current framework a range of conditions and requirements can be set, and intense supervision can be conducted. Therefore, the administrative practice restricting ownership in financial undertakings cannot be considered as necessary to attain the objectives pursued [67].

89. The Authority can only subscribe to these assessments.

90. Therefore, as its information currently stands, the Authority must conclude that the relevant Norwegian legislation is in breach of Articles 31 and 40 EEA.

5.4 Concluding remarks

91. It should be noted that the administrative practice restricting ownership in financial undertakings, in essence, only increased the threshold from 10 to 20-25 percent for the ownership restriction rule, which was the subject of the reasoned opinion of 30 October 2001 [68].

92. In a similar case concerning the ownership limitation in the financial infrastructure institutions, the Authority did not consider that such an increase sufficiently addressed the concerns raised in the reasoned opinion of 1 June 2004. Therefore, it submitted an application to the EFTA Court for failure by Norway to fulfil its obligations arising

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[66] Case E-08/16 *Netfonds Holdings*, cited above, paragraph 133-134.

[67] Case No 15-072169TVI-OTIR/01, cited above, pages 42 and 43.

[68] For the sake of completeness, at the package meeting on 25-26 October 2018, the Norwegian Government claimed that it had not only increased the threshold, but also introduced some flexibility, which was illustrated by the fact that the two exceptions are applicable. However, as explained above, the Authority considers that the exception concerning cases where a financial undertaking acquires control of another financial undertaking speaks itself against the suitability of the Norwegian rules.

from Articles 31 and 40 EEA (Case E-09/11 *ESA* v *Norway*) (see paragraphs 29-34 above).

6 Conclusion

Accordingly, as its information presently stands, the Authority must conclude that, by maintaining in force an administrative practice whereby no single shareholder is, as a main rule, allowed to own more than 20-25 percent of the total shares in financial undertakings, as well as a rule according to which three quarters of the share capital in a bank or an insurance company shall be subscribed by capital increase without any preferential rights for shareholders or others, such as the rule in Section 3-3 second paragraph of the Financial Undertakings Act, Norway has failed to fulfil its obligation arising from Articles 31 and 40 of the EEA Agreement.

In these circumstances, and acting under Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, the Authority requests that the Norwegian Government submits its observations on the content of this letter *within two months* of its receipt.

After the time limit has expired, the Authority will consider, in the light of any observations received from the Norwegian Government, whether to deliver a reasoned opinion in accordance with Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice.

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This document has been electronically authenticated by Bente Angell-Hansen, Carsten Zatschler.