ESA | EFTA Surveillance Authority

Brussels, 11 December 2019
Case No: 78022
Document No: 900171
Decision No: 090/19/COL

Norwegian Ministry of Finance
Postboks 8008 Dep
N-0030 Oslo
Norway

Dear Sir or Madam,

Subject: Letter of formal notice to Norway concerning an authorisation requirement to set up subsidiaries of Norwegian financial institutions in other EEA States

1 Introduction

1. By letter dated 15 October 2015 (Doc No 775977), the EFTA Surveillance Authority ("the Authority") informed the Norwegian Government that it had opened an own initiative case concerning an authorisation requirement to set up subsidiaries of Norwegian financial institutions in other EEA States.

2. After having assessed the Norwegian provisions at issue the Authority holds the view that an authorisation requirement, such as the one established in Section 4-1 first paragraph of the Norwegian Financial Institutions Act ("the FIA")[1], is in breach of Directives 2006/48/EC[2], 2009/138/EC[3], 2003/41/EC[4], 2007/64/EC[5]

[1] *Lov om finansforetak og finanskonsern (finansforetaksloven) av 10. april 2015 No 17*.
[2] 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 The directive has been replaced by Directive 2013/36/EU, which was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 79/2019 (entering into force in the EEA EFTA States on 1 January 2020).
[3] 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).
[4] Directive 2003/41/EC of the European Parliament and of the Council of 3 June 2003 *on the activities and supervision of institutions for occupational retirement provision* (OJ L 235, 23.9.2003, p. 10, and EEA Supplement No 39, 16.7.2009, p. 439), incorporated at point 30cb of Annex IX of the EEA Agreement by Decision of the EEA Joint Committee No 88/2006 (OJ L 289, 19.10.2006, p. 26). The directive has been replaced by Directive (EU) 2016/2341, which has not yet been incorporated into the EEA Agreement.
[5] Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 *on payment services in the internal market* (OJ L 319, 5.12.2007, p. 1, and EEA Supplement No 10, 20.2.2006, p. 26), incorporated at point 16e of Annex IX of the EEA Agreement by Decision of the EEA Joint Committee No 114/2008 (OJ L 339, 18.12.2008, p. 103). The directive has been replaced by Directive (EU) 2015/2366, which was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 165/2019 (not yet in force in the EEA EFTA States).

and 2009/110/EC[6] and/or constitutes an unjustified restriction on the freedom of establishment, in breach of Article 31 of the Agreement on the European Economic Area ("the EEA Agreement").

2 Correspondence

3. By the abovementioned letter of 15 October 2015, the Authority asked the Norwegian Government to provide certain information for the purpose of the Authority's examination of the matter. By letter of 8 February 2016 (ref. 16/39-4 JCW, Doc No 792371), the Norwegian Government provided the requested information. It claimed essentially that the authorisation requirement in Section 4-1 first paragraph of the FIA ensures financial stability and complies with Article 31 of the EEA Agreement.

4. The case was discussed at the package meeting in Oslo on 27-28 October 2016 [7] where the Norwegian Government reiterated that the authorisation requirement can be justified by the need to ensure financial stability and that the restriction is proportionate with regard to the aim sought.

5. Based on the information provided by the Norwegian Government, the Internal Market Affairs Directorate of the Authority ("the Directorate") assessed the relevant aspects of the case and came to the preliminary view that the Norwegian legislation was in breach of Article 31 EEA. Therefore, on 22 June 2018 (Doc No 906322), it sent to Norway a Pre-Article 31 letter.

6. The Government replied by letter of 21 September 2018 (ref. 16/39, Doc No 930846). In this letter, it maintained its view that Section 4-1 first paragraph of the FIA is both suitable and necessary in order to achieve the aim of financial stability.

7. The issue was discussed at the package meeting in Oslo on 25-26 October 2018 [8] where the Norwegian Government provided arguments as to the suitability and necessity of the national measure. The Authority stated that it would continue to examine and assess the case and was likely to revert with requests for further information.

8. On 23 November 2018 (Doc No 1039260), the Authority sent an additional request for information to Norway. The Government replied by letter of 3 January 2019 (ref. 16/39, Doc No 1045358).

9. At the package meeting in Oslo on of 24 and 25 October 2019 [9], the representatives of the Norwegian Government informed the Authority that they did not have any additional information as concerns proportionality of the national measure. There are currently no discussions in Norway concerning the repeal of

[6] Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 *on the taking up, pursuit and prudential supervision of the business of electronic money institutions* (OJ L 267, 10.10.2009, p. 7, and EEA Supplement No 49, 27.8.2015, p. 332), incorporated at point 15 of Annex IX of the EEA Agreement by Decision of the EEA Joint Committee No 120/2010 (OJ L 58, 3.3.2011, p. 77).
[7] See the follow-up letter to the package meeting, Doc No 824382.
[8] See the follow-up letter to the package meeting, Doc No 1039214.
[9] See the follow-up letter to the package meeting, Doc No 1096584.

the authorisation requirement at issue in this case nor discussions on its necessity.

3 Relevant national law

10. Section 1-3 of the FIA provides the definition of a financial institution and reads:

> "*(1) A "financial institution" is an entity carrying on business as a:*
>
> *a) bank,*
>
> *b) mortgage credit institution,*
>
> *c) finance company,*
>
> *d) insurance undertaking,*
>
> *e) pension undertaking,*
>
> *f) holding company of a financial group.*
>
> *(2) Except as otherwise provided by or pursuant to this Act, an entity licensed to operate as a payment institution or electronic money institution is also considered to be a financial institution.*"[10]

11. Section 4-1 first paragraph of the FIA reads as follows:

> "*A Norwegian financial institution may not establish or acquire a financial institution as a subsidiary in another EEA member state unless it is licensed under section 17-1. The procedural rules of section 17-5 and chapter 3, with the exception of section 3-2 subsection (2), section 3-3 and section 3-4, apply mutatis mutandis. Sections 17-7 to 17-9 and chapter 18 apply mutatis mutandis to the group relationship between the subsidiary and the financial institution and the financial group of which the financial institution forms part.*"[11]

12. Section 17-1 first paragraph of the FIA provides that the set-up of a financial group requires authorisation from the Ministry of Finance:

> "*A financial group may only be established under authorisation of the Ministry*

---

[10] Here and further the Authority relies on the translation of the FIA found at https://www.finanstilsynet.no/globalassets/laws-and-regulations/laws/financial-institutions-act-2015.pdf. The original wording of Section 1-3 of the FIA: "*(1) Som finansforetak regnes foretak som driver virksomhet som:*
a) bank,
b) kredittforetak,
c) finansieringsforetak,
d) forsikringsforetak,
e) pensjonsforetak,
f) holdingforetak i finanskonsern.
(2) Som finansforetak regnes også foretak som er gitt tillatelse til å drive virksomhet som betalingsforetak eller e-pengeforetak, når ikke annet følger av bestemmelse gitt i eller i medhold av denne loven."

[11] The original wording: "*Et norsk finansforetak kan ikke etablere eller erverve finansforetak som datterforetak i annen EØS-stat uten tillatelse etter § 17-1. Saksbehandlingsreglene i § 17-5 og kapittel 3, unntatt § 3-2 annet ledd, § 3-3 og § 3-4, gjelder tilsvarende. For konsernforholdet mellom datterforetaket og finansforetaket og det finanskonsern finansforetaket inngår i, gjelder §§ 17-7 til 17-9 og kapittel 18 tilsvarende.*"

of Finance. The same applies where a financial group is expanded by the establishment of a group relationship to another financial institution or to an investment firm, insurance intermediary, real estate agency or asset management company. The provisions of section 6-1 subsections (4) and (5) and section 6-5 apply mutatis mutandis."[12]

13. Under Section 1-3 of the Norwegian Public Limited Liability Companies Act[13]:

"*Company groups*

(1) A parent company constitutes, together with a subsidiary or subsidiaries, a company group.

(2) A public limited liability company is a parent company if it, owing to agreement or as owner of shares or partnership interests, has determinative influence over another company. A public limited liability company shall always be deemed to have determinative influence if the company:

1. owns so many shares or parts in another company that they represent a majority of the votes in such other company or;

2. has the right to elect or remove a majority of the members of the board of directors of such other company.

(3) A company which is related as mentioned in the preceding paragraph to a parent company is deemed to be a subsidiary.

(4) In calculating the voting rights and rights to elect or remove members of the board of directors, the rights of the parent company and that of its subsidiaries shall be included. The same applies to anyone acting in his own name but on account of the parent company or a subsidiary."[14]

---

[12] The original wording: "*Et finanskonsern kan bare etableres etter tillatelse gitt av departementet. Tilsvarende gjelder dersom et finanskonsern utvides ved at det etableres konsernforhold til et annet finansforetak eller til verdipapirforetak, forsikringsmeglerforetak, eiendomsmeglerforetak, eller forvaltningsselskap for verdipapirfond. Bestemmelsene i § 6-1 fjerde og femte ledd og § 6-5 gjelder tilsvarende.*"

[13] *Lov av 13. juni 1997 nr. 45 om allmennaksjeselskaper (allmennaksjeloven)*

[14] Translation of the Act provided at https://www.oslobors.no/ob_eng/Oslo-Boers/Regulations/Acts-and-regulations. The original wording: "*Konserner*

(1) Et morselskap utgjør sammen med et datterselskap eller datterselskaper et konsern.

(2) Et allmennaksjeselskap er et morselskap hvis det på grunn av avtale eller som eier av aksjer eller selskapsandeler har bestemmende innflytelse over et annet selskap. Et allmennaksjeselskap skal alltid anses å ha bestemmende innflytelse hvis selskapet:

1. eier så mange aksjer eller andeler i et annet selskap at de representerer flertallet av stemmene i det andre selskapet, eller

2. har rett til å velge eller avsette et flertall av medlemmene i det andre selskapets styre.

(3) Et selskap som står i forhold som nevnt i annet ledd til et morselskap anses som datterselskap.

(4) Ved beregningen av stemmerettigheter og rettigheter til å velge eller avsette styremedlemmer skal rettigheter som morselskapet og morselskapets datterselskaper innehar, regnes med. Det samme gjelder rettigheter som innehas av noen som handler i eget navn, men for morselskapets eller et datterselskaps regning."

4 Relevant EEA law

4.1 The EEA Agreement

14. Article 31 first paragraph of the EEA Agreement 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 second paragraph of the EEA Agreement, 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.

4.2 The legal framework concerning credit institutions

15. Directive 2006/48/EC contains rules concerning authorisation for the taking up and pursuit of the business of credit institutions.

16. Article 4 first point of Directive 2006/48/EC defines a "*credit institution*" as an undertaking whose business is to "*receive deposits or other repayable funds from the public and to grant credits for its own accounts*".

17. Recital 7 of Directive 2006/48/EC reads:

> "*It is appropriate to effect only the essential harmonisation necessary and sufficient to secure the mutual recognition of authorisation and of prudential supervision systems, making possible the granting of a single licence recognised throughout the Community and the application of the principle of home Member State prudential supervision. […]*"

18. Under Recital 15 of the directive:

> "*The Member States may also establish stricter rules than those laid down in Article 9(1), first subparagraph, Article 9(2) and Articles 12, 19 to 21, 44 to 52, 75 and 120 to 122 for credit institutions authorised by their competent authorities. The Member States may also require that Article 123 be complied with on an individual or other basis, and that the sub-consolidation described in Article 73(2) be applied to other levels within a group.*"

19. Recital 46 of the directive provides:

> "*In order to ensure adequate solvency of credit institutions within a group it is essential that the minimum capital requirements apply on the basis of the consolidated financial situation of the group. In order to ensure that own funds are appropriately distributed within the group and available to protect savings where needed, the minimum capital requirements should apply to individual credit institutions within a group, unless this objective can be effectively otherwise achieved.*"

20. Recitals 57 and 58 provide:

"*(57) Supervision of credit institutions on a consolidated basis aims at, in particular, protecting the interests of the depositors of credit institutions and at ensuring the stability of the financial system.*

(58) In order to be effective, supervision on a consolidated basis should therefore be applied to all banking groups, including those the parent undertakings of which are not credit institutions. The competent authorities should hold the necessary legal instruments to be able to exercise such supervision."

21. Recital 60 states:

"*The Member States should be able to withdraw banking authorisation in the case of certain group structures considered inappropriate for carrying on banking activities, in particular because such structures could not be supervised effectively. In this respect the competent authorities should have the necessary powers to ensure the sound and prudent management of credit institutions.*"

22. Article 6 of Directive 2006/48/EC states that EEA States shall require credit institutions to obtain an authorisation before commencing their activities. Articles 9 to 12 of the directive set out the relevant conditions for the assessment of whether to grant an authorisation to a credit institution. The main of those conditions concern own funds, good repute and sufficient experience of the persons who effectively direct the business of the credit institution and the disclosure of the identity of the shareholders or members having qualifying holdings.

23. Article 15 of Directive 2006/48/EC provides for a consultation mechanism and reads:

"*1. The competent authority shall, before granting authorisation to a credit institution, consult the competent authorities of the other Member State involved in the following cases:*

(a) the credit institution concerned is a subsidiary of a credit institution authorised in another Member State;

(b) the credit institution concerned is a subsidiary of the parent undertaking of a credit institution authorised in another Member State; or

(c) the credit institution concerned is controlled by the same persons, whether natural or legal, as control a credit institution authorised in another Member State.

2. The competent authority shall, before granting authorisation to a credit institution, consult the competent authority of a Member State involved, responsible for the supervision of insurance undertakings or investment firms in the following cases:

(a) the credit institution concerned is a subsidiary of an insurance undertaking or investment firm authorised in the Community;

(b) the credit institution concerned is a subsidiary of the parent undertaking of an insurance undertaking or investment firm authorised in the Community; or

(c) the credit institution concerned is controlled by the same person, whether natural or legal, as controls an insurance undertaking or investment firm authorised in the Community.

3. The relevant competent authorities referred to in paragraphs 1 and 2 shall in particular consult each other when assessing the suitability of the shareholders and the reputation and experience of directors involved in the management of another entity of the same group. They shall exchange any information regarding the suitability of shareholders and the reputation and experience of directors which is of relevance for the granting of an authorisation as well as for the ongoing assessment of compliance with operating conditions."

24. Directive 2007/44/EC[15] amended, *inter alia*, Directive 2006/48/EC and introduced maximum harmonisation rules and evaluation criteria for the prudential assessment of acquisitions and increases of holdings.

25. Recital 6 to Directive 2007/44/EC reads:

"*For markets that are increasingly integrated and where group structures may extend to various Member States, the acquisition of a qualifying holding is subject to scrutiny in a number of Member States. Maximum harmonisation throughout the Community of the procedure and the prudential assessments, without the Member States laying down stricter rules, is therefore critical. The thresholds for notifying a proposed acquisition or a disposal of a qualifying holding, the assessment procedure, the list of assessment criteria and other provisions of this Directive to be applied to the prudential assessment of proposed acquisitions should therefore be subject to maximum harmonisation. […]*"

26. Article 19 of Directive 2006/48/EC, as amended by Directive 2007/44/EC, provides that the EEA States shall require any natural or legal person who has decided to acquire, directly or indirectly, a qualifying holding in a credit institution first to notify the competent authority of the credit institution in which they are seeking to acquire or increase a qualifying holding. The same notification obligation applies in case of decisions to further increase a qualifying holding as a result of which the proportion of voting rights or the capital held would reach or exceed 20 %, 30 % or 50 % or so that the credit institution would become its subsidiary. Upon completion of the assessment by the competent authorities, they can decide to oppose the proposed acquisition. However, if they do not oppose the proposed acquisition, it shall be deemed to be approved.

27. Articles 19a and 19b were inserted into Directive 2006/48/EC by Directive 2007/44/EC. Article 19a sets out rules for the assessment of the suitability of the potential owners of qualifying holdings and Article 19b provides for a consultation procedure in the case of acquisitions, similar to the one established in Article 15 of Directive 2006/48/EC. Article 19b reads:

"*1. The relevant competent authorities shall work in full consultation with each other when carrying out the assessment if the proposed acquirer is one of the following:*

[15] 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).

a. a credit institution, assurance undertaking, insurance undertaking, reinsurance undertaking, investment firm or management company within the meaning of Article 1a, point 2 of Directive 85/611/EEC (hereinafter referred to as the UCITS management company) authorised in another Member State […];

b. the parent undertaking of a credit institution, assurance undertaking, insurance undertaking, reinsurance undertaking, investment firm or UCITS management company authorised in another Member State […]; or

c. a natural or legal person controlling a credit institution, assurance undertaking, insurance undertaking, reinsurance undertaking, investment firm or UCITS management company authorised in another Member State [..].

2. The competent authorities shall, without undue delay, provide each other with any information which is essential or relevant for the assessment. In this regard, the competent authorities shall communicate to each other upon request all relevant information and shall communicate on their own initiative all essential information. A decision by the competent authority that has authorised the credit institution in which the acquisition is proposed shall indicate any views or reservations expressed by the competent authority responsible for the proposed acquirer."

28. Articles 25-27 of Directive 2006/48/EC are applicable in cases where a credit institution wishes to establish a branch within a territory of another EEA State. Article 25 provides that in such a case the information specified therein has to be notified by the credit institution to the competent authorities of the EEA State of establishment. Unless the competent authorities of the EEA State of establishment have reason to doubt the adequacy of the administrative structure or the financial situation of the credit institution, taking into account the activities envisaged, they shall within three months of receipt of the required information communicate that information to the competent authorities of the EEA State where the branch is sought to be established.

29. Under Article 26 of the directive, the competent authorities of the EEA State where the branch is sought to be established shall, within two months of receipt of the information referred to in Article 25, prepare for the supervision of the credit institution. The branch may be established and may commence its activities on receipt of a communication from the competent authorities of the EEA State where the branch is sought to be established, or in the event of the expiry of the two months period.

30. Chapter 2 of Title V of Directive 2006/48/EC (Articles 56 to 122a) concerns technical instruments of prudential supervision. The provisions of this chapter take into account the situation of credit institutions within a group. Therefore, minimum capital requirements apply on the basis of the consolidated financial situation of the group and on the individual level.

31. According to Article 125 of Directive 2006/48/EC, where a parent undertaking is a parent credit institution in an EEA State or an EEA parent credit institution, supervision on a consolidated basis shall be exercised by the competent authorities that authorised it.

32. Directive 2006/48/EC has been replaced by Directive 2013/36/EU, which was incorporated into the EEA Agreement by Decision of the EEA Joint

Committee No 79/2019 (entering into force in the EEA EFTA States on 1 January 2020). Articles 3, 8, 12-14, 16, 22-24, 35, 36, 38 and 111, as well as certain other provisions of Directive 2013/36/EU contain materially identical rules to those provisions of Directive 2006/48/EC, which are cited in this letter.

4.3 The legal framework concerning insurance and reinsurance undertakings

33. Directive 2009/138/EC regulates the taking up and pursuit of the business of insurance and reinsurance.

34. Recital 11 of Directive 2009/138/EC is materially identical to Recital 7 of Directive 2006/48/EC and reads:

> "*Since this Directive constitutes an essential instrument for the achievement of the internal market, insurance and reinsurance undertakings authorised in their home Member States should be allowed to pursue, throughout the Community, any or all of their activities by establishing branches or by providing services. It is therefore appropriate to bring about such harmonisation as is necessary and sufficient to achieve the mutual recognition of authorisations and supervisory systems, and thus a single authorisation which is valid throughout the Community and which allows the supervision of an undertaking to be carried out by the home Member State.*"

35. Recitals 100 and 102 of the directive provide:

> "*(100) It is necessary to calculate solvency at group level for insurance and reinsurance undertakings forming part of a group.*
>
> *[…]*
>
> *(102) Insurance and reinsurance undertakings belonging to a group should be able to apply for the approval of an internal model to be used for the solvency calculation at both group and individual levels.*"

36. Article 14 of Directive 2009/138/EC stipulates that the taking up of the business of insurance and reinsurance undertakings (hereinafter "insurance undertakings") requires prior authorisation from the competent authority of the EEA State where the undertaking seeks to establish itself.

37. Article 18 *et seq*. of Directive 2009/138/EC sets out the conditions for authorisation and Article 26 of the directive contains the same consultation obligation as Article 15 of Directive 2006/48/EC.

38. Furthermore, Articles 57, 59, 60, 145 and 146 of Directive 2009/138/EC contain materially identical rules, as set out in Articles 19, 19a, 19b and 25-27 of Directive 2006/48/EC.

39. Section 5 (Articles 128 to 131) of Chapter VI of Title I of the directive ("*Rules relating to the valuation of assets and liabilities, technical provisions, own funds, Solvency Capital Requirement, Minimum Capital Requirement and investment rules*") establishes the Minimum Capital Requirement applicable to insurance undertakings.

40. The whole Title III of Directive 2009/138/EC is dedicated to supervision of

insurance undertakings in a group. The title does not only contain rules on the cooperation of supervisors from all EEA States, in which undertakings of the group are established, but also, for example, rules specifically aiming to ensure group solvency.

4.4 The legal framework concerning institutions for occupational retirement provision, payment institutions and electronic money institutions

41. With regard to institutions for occupational retirement provision, payment institutions and electronic money institutions, the relevant EEA secondary legislation is Directives 2003/41/EC, 2007/64/EC and 2009/110/EC.

42. The directives contain a requirement to obtain prior authorisation from the competent authority of the EEA State in which these financial undertakings seek the setting up of subsidiaries. Such requirements are established in Articles 9 and 20 of Directive 2003/41/EC, Article 5 of Directive 2007/64/EC and Article 3 of Directive 2009/110/EC.

43. Moreover, Directives 2003/41/EC, 2007/64/EC and 2009/110/EC set out the relevant conditions for the assessment of whether to grant an authorisation to an institution for occupational retirement provision, payment institution and electronic money institution, including the conditions concerning initial capital, own funds and solvency, good repute and appropriate professional qualifications and experience of the persons running the institution, sound administrative and accounting procedures, adequate internal control mechanisms, as well as the rules for the prudential supervision.

44. As regards groups of companies, Directive 2007/64/EC provides in Article 7 second paragraph:

> "*Member States shall take the necessary measures to prevent the multiple use of elements eligible for own funds where the payment institution belongs to the same group as another payment institution, credit institution, investment firm, asset management company or insurance undertaking. This paragraph shall also apply where a payment institution has a hybrid character and carries out activities other than providing payment services listed in the Annex. […]*"

45. Under Articles 3 and 13 of Directive 2009/110/EC, the relevant provisions of Directive 2007/64/EC, including the above cited provision, apply *mutatis mutandis* to electronic money institutions.

46. Directive 2003/41/EC has been replaced by Directive (EU) 2016/2341, which has not yet been incorporated into the EEA Agreement. Articles 9, 10-12, 22-28, 31, 37 and 59, as well as certain other provisions of Directive (EU) 2016/2341 contain materially identical rules to those provisions of Directive 2003/41/EC, which are cited in this letter.

47. Directive 2007/64/EC has been replaced by Directive (EU) 2015/2366, which was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 165/2019 (not yet in force in the EEA EFTA States). Articles 5 and 8, as well as certain other provisions of Directive (EU) 2015/2366 contain materially identical rules to those provisions of Directive 2007/64/EC, which are

cited in this letter.

5 The Authority's assessment

5.1 EEA law provisions applicable to the authorisation procedure at issue

48. Section 4-1 first paragraph of the FIA establishes a prior authorisation scheme for Norwegian financial institutions that intend to either establish or acquire financial institutions as subsidiaries in other EEA States.

49. As mentioned before, Directives 2006/48/EC, 2009/138/EC, 2003/41/EC, 2007/64/EC and 2009/110/EC contain rules concerning authorisation for the taking up and pursuit of the business of, respectively, credit institutions, insurance undertakings, institutions for occupational retirement provision, payment institutions and electronic money institutions. Therefore, those directives are applicable where a Norwegian financial institution seeks to establish or acquire a credit institution, an insurance undertaking, an institution for occupational retirement provision, a payment institution or an electronic money institution as a subsidiary in another EEA State.

50. There is no harmonised EEA legal framework applicable to the taking up and pursuit of the business of other financial institutions than credit institutions, insurance undertakings, institutions for occupational retirement provision, payment institutions or electronic money institutions. Therefore, Article 31 EEA is applicable where a Norwegian financial institution seeks to establish/acquire in another EEA State as a subsidiary a financial institution, other than a credit institution, an insurance undertaking, an institution for occupational retirement provision, a payment institution or an electronic money institution.

51. In the alternative, if it were established that the above-mentioned EEA secondary legislation does not apply to the requirement of authorisation by the Norwegian competent authority for the establishment/acquisition of subsidiaries of financial institutions in other EEA States, this requirement would still have to comply with Article 31 EEA on the freedom of establishment[16].

52. In light of the above, the Authority will proceed with the assessment of Section 4-1 first paragraph of the FIA under EEA secondary legislation. Further, the assessment under Article 31 EEA will be provided.

5.2 The assessment under EEA secondary legislation

5.2.1 Breach of Directives 2006/48/EC and 2009/138/EC as regards credit institutions and insurance undertakings

53. With regard to credit institutions and insurance undertakings Directives 2006/48/EC and 2009/138/EC set out rules on the relevant procedures and conditions governing the authorisation for the initial establishment, as well as for

[16] 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, paragraph 102.

the subsequent acquisitions of qualifying holdings of these financial institutions.

54. In particular, under Directives 2006/48/EC and 2009/138/EC, establishment or acquisition of a credit institution or an insurance undertaking as a subsidiary in another EEA State is subject to an authorisation from the competent authority in the EEA State of the subsidiary[17]. This EEA secondary legislation thus requires one single authorisation from the EEA State where the establishment or acquisition is sought and is based on the principle of mutual recognition of authorisations and supervisory systems[18].

55. In cases where the credit institution or the insurance undertaking concerned is a subsidiary of a credit institution or an insurance undertaking authorised in another EEA State, or a parent company of a credit institution or an insurance undertaking, Directives 2006/48/EC and 2009/138/EC respectively provide for a consultation mechanism. The competent authority of the EEA State where establishment or acquisition of the subsidiary is sought is required to consult with the competent authority of the EEA State of the parent institution, before an authorisation is granted[19]. This consultation obligation entails that the Norwegian competent authority would always be informed of the intended establishment or acquisition of a subsidiary and would have an opportunity to provide the competent authority in the EEA State of the subsidiary with any information or views it would deem relevant prior to the granting of an authorisation.

56. However, Section 4-1 first paragraph of the FIA requires that before establishing or acquiring a subsidiary in another EEA State a Norwegian financial institution must obtain an authorisation from the Norwegian competent authority. In other words, according to the provision at issue, a Norwegian financial institution cannot apply for an authorisation to the competent authority in the EEA State of the subsidiary, as provided for in Directives 2006/48/EC and 2009/138/EC, unless an authorisation from the competent Norwegian authority is obtained.

57. The Norwegian Government has explained that the aims of Section 4-1 of the FIA are equivalent to those pursued by the provisions regarding domestic subsidiaries in Section 17-1 of the FIA. The assessment criteria which are taken into consideration for the purposes of the examination of an application pursuant to Section 4-1 of the FIA are the same criteria that are considered for an application to establish a domestic financial group. These include an assessment whether the establishment or acquisition poses a risk to the solvency of the parent institution, whether the group structure and governance will be adequate and transparent after the establishment/acquisition and whether the type of the subsidiary acquired or established and the subsidiary's activities are in accordance with the parent company's license.

58. In this respect, the Authority notes that, by requiring to acquire an authorisation and by reviewing the above listed circumstances for the purposes of deciding whether a subsidiary in another EEA State could be

[17] See Articles 6 and 19 of Directive 2006/48/EC and Articles 14 and 57 of Directive 2009/138/EC.
[18] See, for example, Recital 7 of Directive 2006/48/EC and Recital 11 of Directive 2009/138/EC.
[19] See Articles 15 and 19b of Directive 2006/48/EC and Articles 26 and 60 of Directive 2009/138/EC.

established/acquired, Norway infringes the authorisation procedures applicable to the establishment/acquisition of credit institutions and insurance undertakings set out by Directives 2006/48/EC and 2009/138/EC: it interferes in the competences of the EEA State where a subsidiary is sought to be established/acquired, and fails to respect the principle of mutual recognition of authorisations and supervisory systems.

59. In particular, Directives 2006/48/EC and 2009/138/EC lay down capital requirements applicable to credit institutions and insurance undertakings. These requirements, moreover, take into account the situation of financial institutions within a group. Specifically, in order to ensure adequate solvency of credit institutions within a group, the minimum capital requirements apply on the basis of the consolidated financial situation of the group. In addition, in order to ensure that own funds are appropriately distributed within the group and available to protect savings where needed, the minimum capital requirements apply to individual credit institutions within a group[20]. The same applies with regard to insurance undertakings[21].

60. As regards specifically credit institutions, the EEA States may also establish stricter rules than the minimum capital requirements laid down in Directive 2006/48/EC[22] [23]. However, the imposition of stricter rules in one EEA State does not mean that a credit institution established in that EEA State should not be able to establish/acquire a subsidiary in another EEA State, if it complies with the minimum rules required by the latter EEA State. This is because for the purposes of the authorisation of a credit institution, including cases where this credit institution is a subsidiary of a financial institution established in another EEA State, the competence to decide whether stricter requirements, in addition to the minimum ones, have to be imposed and whether the minimum or the stricter requirements, as the case might be, are complied with rests within the EEA State where the subsidiary is sought to be established/acquired, after consulting the EEA State of the parent institution.

61. The same is true concerning the assessment of the persons who effectively direct the business of the credit institution, as well as the suitability of the potential owners. In particular, where a credit institution or an insurance undertaking is established/acquired as a subsidiary of an institution in another EEA State, it is the competence of the EEA State where the subsidiary is sought to be established to assess and to authorise or to object the establishment/acquisition, in line with Directives 2006/48/EC and 2009/138/EC.

62. At the same time, as a supervisor of the parent financial institution, *Finanstilsynet* (the Financial Supervisory Authority of Norway) has power to impose conditions on this parent institution under Directives 2006/48/EC and 2009/138/EC. Moreover, after the establishment/acquisition by a Norwegian financial institution of a subsidiary in another EEA State, *Finanstilsynet*, as a group supervisor, will have to ensure the continuous fulfillment by the group of the capital requirements, as well as adequacy and transparency of the group structure

[20] See Recital 46 and Articles 56 *et seq* of Directive 2006/48/EC.
[21] See Recitals 100 and 102 and Articles 128 *et seq* of Directive 2009/138/EC.
[22] See Recital 15 of Directive 2006/48/EC.
[23] Directive 2009/138/EC provides maximum harmonisation. However, specific provisions of the directive might leave some room for deviation for the EEA States.

and governance. The directives require that the EEA States' competent authorities have the necessary powers to perform such supervision, such as a possibility to require the institutions to adopt necessary measures or to withdraw banking authorisation, for example, in the case of certain group structures considered inappropriate for carrying on banking activities, in particular because such structures could not be supervised effectively[24]. EEA States are under an obligation to ensure that their national laws provide the competent authorities with adequate powers.

63. However, such powers do not include, under Directives 2006/48/EC and 2009/138/EC, a power of the EEA State of the parent institution to object/not to authorise an establishment/acquiry of a subsidiary in another EEA State.

64. Norway has also referred to Article 35 third paragraph of Directive 2013/36/EU[25] and stated that the authorisation requirement under Section 4-1 first paragraph of the FIA has the same effect as the power of the competent authorities to refuse to communicate the information received to the supervisor or the EEA State where the establishment of a branch is sought, if they believe that the financial institution lacks the administrative structures, financial situation or managerial competence to establish and run the branch foreseen in that provision of Directive 2013/36/EU.

65. Indeed, Articles 25-27 of Directive 2006/48/EC and Articles 145 and 146 of Directive 2009/138/EC concern the exercise of the right of establishment by the credit institutions and insurance undertakings. These provisions are applicable in cases where a credit institution or an insurance undertaking wish to establish a branch within a territory of another EEA State. The directives provide that in such a case the credit institution or the insurance undertaking submit a notification to the competent institutions of the EEA State of establishment, which, unless they have reason to doubt the adequacy of the administrative structure or the financial situation of the institution or the undertaking in question, within three months communicate that information to the competent authorities of the EEA State where the branch is sought to be established. The competent authorities of the latter EEA State prepare for the supervision of the credit institution or the insurance undertaking within two months of receiving this information. The branch may be established and may commence its activities on receipt of a communication from the competent authorities of the EEA State where the branch is sought to be established, or in the event of the expiry of the two months period.

66. However, the above directives do not provide analogous powers of the EEA State of the parent institution where a credit institution or an insurance undertaking is established/acquired as a subsidiary in another EEA State. An authorisation requirement in the EEA State of the subsidiary, together with the consultation mechanism, apply instead. If the EEA legislature had considered that such powers were appropriate, they would have been directly foreseen in the text of Directives 2006/48/EC and 2009/138/EC.

67. In light of this, by requiring Norwegian financial institutions to obtain an

[24] See Recital 60 of Directive 2006/48/EC. See also Article 17 first paragraph litra (e) which provides that the competent authorities may withdraw the authorisation granted to a credit institution where such an institution falls within one of the cases, other than those listed in Article 17 first paragraph litra (a) to (d), where national law provides for withdrawal of authorisation.

[25] Article 25 third paragraph of Directive 2006/48/EC.

authorisation from the competent Norwegian authority before establishing or acquiring a credit institution or an insurance undertaking as a subsidiary in another EEA State Norway is in breach of the authorisation procedures applicable to the establishment/acquisition of credit institutions and insurance undertakings, as provided in Articles 6, 15, 19 and 19b of Directive 2006/48/EC (Articles 8, 16, 24 and 24 of Directive 2013/36/EU) and Articles 14, 26, 57 and 60 of Directive 2009/138/EC.

5.2.2 Breach of Directives 2003/41/EC, 2007/64/EC and 2009/110/EC as regards institutions for occupational retirement provision, payment institutions and electronic money institutions

68. The argumentation set out in part 5.2.1 applies equally with regard to the establishment/acquisition in another EEA State of institutions for occupational retirement provision, payment institutions and electronic money institutions.

69. In particular, Directives 2003/41/EC, 2007/64/EC and 2009/110/EC contain a requirement to obtain prior authorisation from the competent authority of the EEA State, in which these financial institutions are sought to be established/acquired[26]. Moreover, the directives set out the conditions for the assessment of whether to grant an authorisation, including the conditions concerning initial capital, own funds and solvency, good repute and appropriate professional qualifications and experience of the persons running the institution, sound administrative and accounting procedures, adequate internal control mechanisms, as well as the rules for the prudential supervision. Directives 2007/64/EC and 2009/110/EC, furthermore, provide specific rules where the groups of companies are at issue.

70. Therefore, by requiring Norwegian financial institutions to obtain an authorisation from the competent Norwegian authority before establishing or acquiring an institution for occupational retirement provision, a payment institution or an electronic money institution as a subsidiary in another EEA State, Norway is in breach of the authorisation procedures applicable to the establishment/acquisition of institutions for occupational retirement provision, payment institutions and electronic money institutions, as provided in Articles 9 and 20 of Directive 2003/41/EC, Article 5 of Directive 2007/64/EC and Article 3 of Directive 2009/110/EC.

5.3 The assessment under Article 31 EEA

5.3.1 The existence of a restriction on the freedom of establishment

71. Article 31 EEA requires the abolition of restriction on the freedom of establishment and Article 34 EEA extends that freedom to companies. That freedom entails, for companies or firms formed in accordance with the laws of an EEA State and having their registered office, central administration or principal

[26] See Articles 9 and 20 of Directive 2003/41/EC, Article 5 of Directive 2007/64/EC and Article 3 of Directive 2009/110/EC.

place of business within the EEA, the right to pursue their activities in other EEA States through a subsidiary, a branch or an agency[27].

72. It is settled case law of the Court of Justice of the European Union ("the Court of Justice") and the EFTA Court that, even though the wording of the provisions concerning freedom of establishment are directed to ensuring that foreign nationals and companies are treated in the host EEA State in the same way as nationals of that State, they also prohibit the EEA State of origin from hindering the establishment in another EEA State of one of its nationals or of a company incorporated under its legislation[28].

73. It is also established case law that all measures which, even though they are applicable without discrimination on grounds of nationality, are liable to hinder or render less attractive the exercise of the freedom of establishment, constitute a restriction on that freedom[29]. As regards prior authorisation schemes in particular, the Court of Justice has held that such procedures restrict, by their very purpose, the fundamental freedoms[30].

74. Pursuant to Section 4-1 first paragraph of the FIA, a Norwegian financial institution that wishes to establish or acquire a financial institution as a subsidiary in another EEA State needs to obtain an authorisation from the Norwegian competent authority before establishing or acquiring the subsidiary.

75. Such prior authorisation scheme in the EEA State of origin (Norway) restricts by its very purpose the freedom of establishment, as it is liable to hinder Norwegian financial institutions from establishing or acquiring financial institutions as subsidiaries in other EEA States. Therefore, the Authority holds the view that Section 4-1 first paragraph of the FIA amounts to a restriction on the freedom of establishment protected by Article 31 EEA.

76. 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[31]. The concrete arguments of the Government will be indicated further when assessing whether the national measure could be justified.

---

[27] Judgments of the Court of Justice of the European Union of 23 October 2008, *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt*, C-157/07, EU:C:2008:588, paragraph 28; of 25 February 2010, *X Holding*, C-337/08, EU:C:2010:89, paragraph 17; and judgment of 19 April 2016 of the EFTA Court in Case E-14/15 *Holship Norge AS* [2016] EFTA Ct. Rep. 240, paragraph 110.

[28] See, for example, judgments of the Court of Justice of 27 September 1988, *Daily Mail*, 81/87, EU:C:1988:456, paragraph 16; of 14 July 1994, *Peralta*, C-379/92, EU:C:1994:296, paragraph 31; of 16 July 1998, *Imperial Chemical Industries*, C-264/96, EU:C:1998:370, paragraph 21; of 13 December 2005, *Marks & Spencer*, C-446/03, EU:C:2005:763, paragraph 31; of 1 April 2014, *Felixstowe Dock*, C-80/12, EU:C:2014:200, paragraph 21; and judgments of the EFTA Court of 3 October 2012 in Case E-15/11 *Arcade Drilling* [2012] EFTA Ct. Rep. 67, paragraph 59; and of 2 December 2013 in Case E-14/13 *ESA* v *Iceland* [2013] EFTA Ct. Rep. 924, paragraph 24.

[29] See, for example, judgments of the Court of Justice of 30 November 1995, *Gebhard*, C-55/94, EU:C:1995:411, paragraph 37; of 5 October 2004, *CaixaBank France*, C-442/02, EU:C:2004:586, paragraph 11; of 6 December 2007, *Columbus Container Services*, C-298/05, EU:C:2007:754, paragraph 34; and of 10 March 2009, *Hartlauer*, C-169/07, EU:C:2009:141, paragraph 33.

[30] See, for example, judgments of the Court of Justice of 1 June 1999, *Konle*, C-302/97, EU:C:1999:271, paragraph 39; and of 10 March 2009, *Hartlauer*, C-169/07, EU:C:2009:141, paragraph 34.

[31] See, for example, the reply of the Norwegian Government of 21 September 2018 to the Pre-Article 31 letter.

5.3.2 The compliance of the Norwegian measure with the principle of legal certainty

77. At the outset, the Authority notes that the Norwegian legislation does not establish, which criteria have to be fulfilled, in order for a Norwegian financial institution wishing to establish/acquire a financial institution as a subsidiary in another EEA State to be issued with an authorisation. At the very least, the criteria, which have to be fulfilled, are not clear enough.

78. In particular, the Norwegian Government has explained[32] that during the authorisation procedure under Section 4-1 first paragraph of the FIA, the Norwegian authorities review whether the establishment or acquisition poses a risk to the solvency of the parent institution, whether the group structure and governance will be adequate and transparent after the establishment/acquisition and whether the type of the subsidiary acquired or established and the subsidiary's activities are in accordance with the parent company's license. There is no prescribed documentation or information required when applying for establishing or acquiring a financial institution as a subsidiary in another EEA State. However, the information given must enable the Norwegian Government to consider the abovementioned factors. This normally means that, as a minimum, the applicant has to describe the business acquired, main risks involved and how the acquisition affects the solvency of the owner company/the group, as well as the group structure.

79. Section 4-1 first paragraph of the FIA refers to the procedural rules of Section 17-5 and Chapter 3, which, with the exception of certain provisions in this chapter, apply *mutatis mutandis*. However, Norway has not defined when it is deemed that the establishment/acquisition does not pose a risk to the solvency of the parent institution, nor whether the authorisation requirement in Section 4-1 first paragraph of the FIA involves checking compliance with, for example, the higher capital requirements imposed by Norway or the minimum capital requirements set out in Directive 2006/48/EC or, as the case might be, other directives.

80. Moreover, with regard to the requirement that the type of the subsidiary acquired or established and the subsidiary's activities were in accordance with the parent company's license, it is not clear whether Norway requires that, for example, only a credit institution can establish/acquire a credit institution as a subsidiary in another EEA State or whether this requirement should be understood as meaning that the subsidiary's activities should not pose a risk to the solvency and governance of the financial institution.

81. It is a general principle of EEA law that for a restriction on a fundamental freedom to be justified, the measures must satisfy the principle of legal certainty[33]. Moreover, it is a requirement of EEA law that national provisions do not render legitimate discretionary conduct on the part of the national authorities which is

[32] See, for example, the letter of the Norwegian Government of 3 January 2019.

[33] See, *inter alia*, judgments of the EFTA Court of 23 November 2004 in Case E-1/04 *Fokus Bank* [2004] EFTA Ct. Rep. 11, paragraph 37; and of 16 July 2012 in Case E-09/11 *ESA* v *Norway* [2012] EFTA Ct. Rep. 442, paragraph 99.

liable to negate the effectiveness of provisions of EEA law, in particular those relating to a fundamental freedom[34]. Therefore, an EEA State may be found not fulfilling its obligations under EEA law by leaving too much discretion to the national authorities[35].

82. In light of the above, the Authority holds the view that the Norwegian measure does not comply with the principle of legal certainty and, as such, cannot be considered as justified.

83. In any case, for the reasons indicated further, the authorisation requirement is not suitable with regard to the aims sought and/or goes beyond what is necessary to ensure the aims indicated by the Norwegian Government.

5.3.3 Possible justification of the Norwegian rules

84. 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)[36].

85. 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 84 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[37].

5.3.3.1 The objectives sought by the Norwegian Government

86. The Norwegian Government has explained that the overriding aim behind the authorisation requirement in Section 4-1 first paragraph of the FIA is to ensure the financial stability, *i.e.* the financial stability is ensured by providing the Norwegian supervisory authorities with the means necessary to perform prudential supervision of financial groups with subsidiaries in other EEA States.

---

[34] See, to that effect, judgments of the Court of Justice of 20 February 2001, *Analir and Others*, C-205/99, EU:C:2001:107, paragraphs 37 and 38, of 13 May 2003, *Müller-Fauré and van Riet*, C-385/99, EU:C:2003:270, paragraphs 84 and 85; and of 10 March 2009, *Hartlauer*, C-169/07, EU:C:2009:141, paragraph 64. See also to this effect Case E-09/11 *ESA* v *Norway*, cited above, paragraph 100.

[35] See, for example, judgment of the Court of Justice of 8 November 2012, *Commission* v *Greece*, C-244/11, EU:C:2012:694, paragraphs 86 and 87.

[36] See, for example, judgments of the Court of Justice of 12 July 2012, *Commission* v *Spain*, C-269/09, EU:C:2013:364, paragraph 62; of 6 June 2013, *Commission* v *Belgium*, C-383/10, EU:C:2013:364, paragraph 49; Case E-09/11 *ESA* v *Norway*, cited above, paragraph 83; and Case E-08/16 *Netfonds Holdings*, cited above, paragraph 112.

[37] Judgments of the Court of Justice 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, and judgment of 23 January 2012 of the EFTA Court in Case E-02/11 *STX Norway Offshore AS* [2012] EFTA Ct Rep. 4, paragraph 99.

The Norwegian Government has referred to the fact that problems within subsidiaries may affect the financial group as a whole and, consequently, the financial stability of the state of the parent institution.

87. The EFTA Court has held that 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 constitute overriding reasons in the public interest capable of justifying national measures which restrict the fundamental freedoms[38].

88. The Authority thus acknowledges that the objective 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.

5.3.3.2 The suitability of the national measure

89. The Norwegian Government claims that the authorisation requirement, which seeks to maintain satisfactory prudential supervision of Norwegian financial groups with subsidiaries in other EEA States, is a suitable measure to attain the goal of financial stability.

90. In the Pre-Article 31 letter, the Directorate held the preliminary view that the national measure was not appropriate for obtaining the financial stability in the case of Norwegian pension undertakings, payment institutions, electronic money institutions and finance companies that intend to establish or acquire financial undertakings in other EEA States, as well as of Norwegian financial undertakings that wish to acquire or establish pension undertakings, payment institutions, electronic money institutions or finance companies in other EEA States. The reason for that being the fact that the Norwegian Government had not provided the Authority with any explanations as to how in these situations the stability of financial markets could be affected.

91. In the reply to the Pre-Article 31 letter, Norway provided the following explanation concerning this issue:

> "*Payment service providers, including e-money institutions, may perform essential functions in the payment system. A well-functioning payment system is essential for financial stability. A small payment service provider may not be able to affect financial stability, whereas a failure of an undertaking having a large market share may have significant consequences. Concerning financing undertakings these may, depending on their size, complexity and risk exposure, pose a risk to financial stability and should therefore be subject to the same authorisation regime as credit institutions. Occupational pension undertakings may pose the same threat to financial stability as life insurance undertakings. Therefore, also in relation to those undertakings there must be in place a supervisory mechanism which carries out an assessment prior to the establishment of a financial group involving a subsidiary in another EEA State.*"

92. At the package meeting of 2018, the Norwegian Government further

[38] Case E-08/16 *Netfonds Holdings*, cited above, paragraph 113. See also Case E-09/11 *ESA* v *Norway*, cited above, paragraphs 85 and 86.

claimed that even institutions of a small size (such as payment institutions and electronic money institutions) may pose a threat to the stability of financial markets. The authorisation requirement must therefore be considered suitable in relation to all financial institutions.

93. The explanations provided by the Norwegian Government are of a very general nature and the position of Norway has been inconsistent: in the reply to the Pre-Article 31 letter it claimed that the risk to the financial stability might be posed depending on the size, complexity and risk exposure of a pension undertaking, payment institution, electronic money institution or finance company whereas at the package meeting of 2018, it stated that any financial institution may pose a threat to the stability of financial markets.

94. However, in any case, if the Norwegian measure were considered suitable, it has to be further assessed how concretely the authorisation requirement ensures the financial stability and whether the measure does not go beyond what is necessary to ensure financial stability.

5.3.3.3 The necessity of the national measure

5.3.3.3.1 Credit institutions and insurance undertakings

95. As mentioned above, the Norwegian Government has explained that during the authorisation procedure under Section 4-1 first paragraph of the FIA, the Norwegian authorities review whether the establishment or acquisition poses a risk to the solvency of the parent institution, whether the group structure and governance will be adequate and transparent after the establishment/acquisition and whether the type of the subsidiary acquired or established and the subsidiary's activities are in accordance with the parent company's license.

96. It has specified that, although the applicable EEA secondary legislation implies a high degree of harmonisation throughout the EEA, Norway has imposed stricter requirements, where legally feasible. Examples include capital requirements and ownership rules[39]. According to the Norwegian Government, the high level of protection it has chosen in the financial sector, in order to safeguard financial stability, cannot be ensured by the consultation mechanism alone.

97. The Authority notes that, even if the national measure falls outside the scope of the relevant EEA sectoral legislation, in order to assess the necessity of the authorisation requirement in Section 4-1 first paragraph of the FIA, it is appropriate to look at the harmonised provisions provided by this sectoral legislation.

Solvency

98. As regards solvency of the financial group, Directives 2006/48/EC and 2009/138/EC lay down capital requirements applicable to credit institutions and

[39] As regards ownership rules, the Authority refers to the letter of formal notice issued to Norway on 10 April 2019 (Doc No 924240 in Cases No 80996 and 82368).

insurance undertakings. These requirements, moreover, take into account the situation of financial institutions within a group. Specifically, in order to ensure adequate solvency of credit institutions within a group, the minimum capital requirements apply on the basis of the consolidated financial situation of the group. In addition, in order to ensure that own funds are appropriately distributed within the group and available to protect savings where needed, the minimum capital requirements apply to individual credit institutions within a group[40]. The same applies with regard to insurance undertakings[41]. Thus, the provisions of the directives concerning capital requirements, which intend to ensure adequate solvency of credit institutions and insurance undertakings, apply both on the basis of the consolidated financial situation of the group and on the individual level.

99. As regards specifically credit institutions, it is true that the EEA States may also establish stricter rules than the minimum capital requirements laid down in Directive 2006/48/EC[42] [43]. However, the imposition of stricter rules in one EEA State does not mean that a credit institution established in that state should not be able to establish/acquire a subsidiary in another EEA State, if it complies with the minimum rules required by the latter state. As explained above, this is because for the purposes of the authorisation of a credit institution, including cases where this credit institution is a subsidiary of an institution established in another EEA State, the competence to decide whether stricter requirements, in addition to the minimum ones, have to be imposed and whether the minimum or the stricter requirements, as the case might be, are complied with rests within the EEA State where the subsidiary is sought to be established/acquired, after consulting the EEA State of the parent institution.

100. Norway has not explained whether the authorisation requirement in Section 4-1 first paragraph of the FIA involves checking compliance with the higher capital requirements imposed by Norway or the minimum capital requirements set out in Directive 2006/48/EC. However, in any case, by checking compliance with the capital requirements for the purposes of deciding whether a subsidiary in another EEA State could be established/acquired, Norway is intervening into the competence of that other EEA State defined in Directive 2006/48/EC.

101. Moreover, Directives 2006/48/EC and 2009/138/EC provide sufficient means for EEA States, such as Norway, to ensure the chosen high level of protection. As mentioned above, the consultation obligation entails that the Norwegian competent authority is always informed of the intended establishment/acquisition of a subsidiary and would have an opportunity to provide the competent authority in the EEA State of the subsidiary with any information or views it would deem relevant prior to the granting of an authorisation.

102. Norway claims that the consultation mechanism is not sufficient to safeguard the high level of protection. It argues that the national prudential supervisory authorities of the parent institution and the subsidiary will consider different aspects of the matter at hand. In the case of an acquisition of a

[40] See Recital 46 and Articles 56 *et seq* of Directive 2006/48/EC.
[41] See Recitals 100 and 102 and Articles 128 *et seq* of Directive 2009/138/EC.
[42] See Recital 15 of Directive 2006/48/EC.
[43] Directive 2009/138/EC provides maximum harmonisation. However, specific provisions of the directive might leave some room for deviation for the EEA States.

subsidiary in another EEA State, the supervisory authority of the subsidiary will consider the parent institutions' ability to support the subsidiary and to safeguard their national financial stability. On the other hand, the supervisory authority of the parent institution will primarily seek to consider whether the expansion may pose a threat to the whole group, as well as at the level of the parent company and thus financial stability in that EEA State. Moreover, the supervisory authority may not have the same incentives in terms of reviewing the establishment or acquisition. This may, for example, be the case in a situation where the financial position of the subsidiary at the time of acquisition is weak, and new capital is highly needed.

103. However, as explained above, Norway also cannot impose its level of protection on other EEA States. Rather, it can only set higher standards within the sphere of its competences. In this respect, as a supervisor of the parent financial institution, *Finanstilsynet* has power to impose conditions under Directives 2006/48/EC and 2009/138/EC. For example, the Norwegian Government has noted that *Finanstilsynet* has granted a permission to acquire an insurance undertaking in another EEA State, but imposed several conditions in order to safeguard the overall solvency of the group and the parent (acquiring) company.

104. In the view of the Authority, where necessary, *Finanstilsynet* would be able to impose such conditions without having to resort to an authorisation procedure, such as the one in Section 4-1 first paragraph of the FIA. In particular, as a supervisor of the parent financial institution, *Finanstilsynet* has power to impose conditions on this parent institution under Directives 2006/48/EC and 2009/138/EC. Moreover, after the establishment/acquisition by a Norwegian financial institution of a subsidiary in another EEA State, *Finanstilsynet*, as a group supervisor, will have to ensure the continuous fulfillment by the group of the capital requirements, as well as adequacy and transparency of the group structure. The directives require that the EEA States' competent authorities have the necessary powers to perform such supervision, such as a possibility to require the institutions to adopt necessary measures or to withdraw banking authorisation, for example, in the case of certain group structures considered inappropriate for carrying on banking activities, in particular because such structures could not be supervised effectively[44]. Within this context, higher standards, where allowed by Directives 2006/48/EC and 2009/138/EC, could also be enforced.

The group structure and governance

105. According to the Norwegian Government, as the Norwegian competent authority will have certain supervisory responsibilities for the entire group under EEA sectoral legislation ("group supervisor"), Norwegian authorities will need to approve the organisation of the financial group. It stated that the requirements concerning the group structure and governance enforced during the authorisation procedure do not exceed existing EU requirements on a consolidated or solo level as set out in Article 74 first and second paragraphs of Directive 2013/36/EU[45] and implemented accordingly in the Norwegian law. It also claims that the desired

[44] See, Recital 60 of Directive 2006/48/EC. See also Article 17 first paragraph litra (e) which provides that the competent authorities may withdraw the authorisation granted to a credit institution where such an institution falls within one of the cases, other than those listed in Article 17 first paragraph litra (a) to (d), where national law provides for withdrawal of authorisation.

[45] Article 22 first and second paragraph of Directive 2006/48/EC.

level of protection of financial stability in Norway would be significantly weakened, if Norwegian supervisory authorities could not assess group structures involving subsidiaries in other EEA States proposed by parent institutions established in Norway before the group structure is implemented.

106. Concerning the issue on how, after an authorisation has been granted pursuant to Section 4-1 first paragraph of the FIA, the competent Norwegian authorities perform effective supervision of the financial group, the Norwegian Government explained that *Finanstilsynet* as a group supervisor will supervise the financial status of the group (solvency and liquidity), as well as the governance of the group. In case of increasing risk and/or deficiencies in group governance (including conduct risk issues, anti-money laundering issues), *Finanstilsynet* will require the group to remedy this. For example, the *Finanstilsynet* has required Norwegian groups to strengthen the governance of their activities abroad. *Finanstilsynet* will cooperate closely with the subsidiary's national supervisor through supervisory colleges, as set out in Directive 2006/48/EC and equivalent directives. In addition, the parent company provides consolidated financial and risk reporting regularly to *Finanstilsynet*.

107. Norway has also admitted that, if a subsidiary is already established in another EEA State, the EEA legislative framework does not allow it to withdraw the authorisation issued according to Section 4-1 first paragraph of the FIA, with the result that the subsidiary in another EEA State will have to be transferred to other parties or liquidated. In cases of an increased risk and/or deficiencies the Norwegian competent institutions would exercise their powers foreseen in Directives 2006/48/EC and 2009/138/EC.

108. Therefore, Norway has confirmed, in essence, that the supervision of a financial group is performed by *Finanstilsynet* based on the measures already foreseen in Directives 2006/48/EC and 2009/138/EC. The requirements concerning the group structure and governance enforced during the authorisation procedure also do not exceed those which are set out in the secondary EEA legislation. Norway has not attempted to show that supervision powers, in addition to the ones foreseen in Directives 2006/48/EC and 2009/138/EC, are necessary to supervise financial groups. However, it claims that the powers pre-empting an establishment/acquisition of a subsidiary should be available to the Norwegian competent authorities.

109. In this respect, the Authority refers to its arguments set out above in paragraphs 98-104, to the effect that Directives 2006/48/EC and 2009/138/EC already provide sufficient powers of the supervisory authorities of EEA States to ensure the chosen high level of protection and to impose on the parent undertaking and/or the financial group appropriate conditions, without having to resort to an authorisation procedure such as the one in Section 4-1 first paragraph of the FIA.

The type of the subsidiary acquired or established and the subsidiary's activities

110. As regards the issue of whether the type of the subsidiary acquired or established and the subsidiary's activities are in accordance with the parent company's license, the Authority notes again that Norway has not explained the

exact content of this requirement, *i.e.* does it have to be interpreted in the way that, for example, only a credit institution can establish/acquire a credit institution as a subsidiary in another EEA State or whether this requirement should be understood generally as meaning that the subsidiary's activities should not pose the risk to the solvency and governance of the financial institution.

111. If the former interpretation is correct, the Authority notes that such a restriction would have to be specifically justified. However, Norway has not provided any arguments to this effect.

112. If the second interpretation is the relevant one, then, as already explained above, if there are issues concerning increasing risk and/or deficiencies, the Norwegian competent authority will be able to take necessary measures as a supervisor of the financial institution seeking to establish/acquire a subsidiary and, after the subsidiary is established/acquired, as the group supervisor.

113. Based on the arguments set out above, the Authority is of the view that by requiring Norwegian financial institutions to obtain an authorisation from the competent Norwegian authority before establishing or acquiring a credit institution or an insurance undertaking as a subsidiary in another EEA State, for the purposes of reviewing whether the establishment or acquisition poses a risk to the solvency of the parent institution, whether the group structure and governance will be transparent after the establishment/acquisition of the subsidiary and whether the type of the subsidiary and its activities are in accordance with the parent company's licence, Norway is going beyond what is necessary to ensure the financial stability.

Conclusion concerning the necessity of the authorisation requirement with regard to credit institutions and insurance undertakings

114. In light of the above, it is the view of the Authority that a requirement that a Norwegian financial institution, intending to establish or acquire a credit institution or an insurance undertaking as a subsidiary in another EEA State, must – in addition to an authorisation from the EEA State of the subsidiary – also obtain an authorisation from the Norwegian competent authority, goes beyond what is necessary to attain the objective of financial stability. Based on the principle of mutual recognition of authorisations, enshrined in Directives 2006/48/EC and 2009/138/EC, Norway should respect the authorisation granted by the EEA State of the subsidiary and the assessment undertaken by the competent authority of that EEA State. Furthermore, it is of importance that the consultation mechanism provides for an opportunity for the Norwegian competent authority to submit its views and possible concerns to the competent authority of the EEA State of the subsidiary, before authorisation is granted. In those circumstances, an additional assessment by the Norwegian competent authority of an application for establishment or acquisition of a subsidiary in another EEA State becomes unnecessary. Finally, the above directives provide *Finanstilsynet* with sufficient powers to ensure the financial stability and the high level of protection sought.

115. Therefore, the Authority holds the view that a requirement that a Norwegian financial institution must also obtain an authorisation from the Norwegian competent authority, before establishing or acquiring a credit institution or an insurance undertaking as a subsidiary in another EEA State, goes beyond what is

necessary to ensure financial stability.

5.3.3.3.2 Institutions for occupational retirement provision, payment institutions and electronic money institutions

116. The same is true concerning institutions for occupational retirement provision, payment institutions and electronic money institutions.

117. In particular, Directives 2003/41/EC, 2007/64/EC and 2009/110/EC contain a requirement to obtain prior authorisation from the competent authority of the EEA State, in which these financial institutions are sought to be established / acquired [46]. Moreover, the directives set out the conditions for the assessment of whether to grant an authorisation, including the conditions concerning initial capital, own funds and solvency, good repute and appropriate professional qualifications and experience of the persons running the institution, sound administrative and accounting procedures, adequate internal control mechanisms, as well as the rules for the prudential supervision. Directives 2007/64/EC and 2009/110/EC, furthermore, provide specific rules where the groups of companies are at issue.

118. Moreover, according to the FIA, Norway subjects all financial institutions to materially the same supervisory measures. It is the Authority's view, therefore, that *Finanstilsynet* is able to get information from any financial institution wishing to establish/acquire a subsidiary in another EEA State and to subject it to certain conditions, if necessary.

119. It also has to be noted that Norway has not provided the Authority with any specific argumentation concerning the necessity of the authorisation requirement where Norwegian financial institutions acquire an institution for occupational retirement provision, a payment institution or an electronic money institution as a subsidiary in another EEA State.

120. In light of the above-mentioned, the Authority holds the view that a requirement that a Norwegian financial institution must also obtain an authorisation from the Norwegian competent authority, before establishing or acquiring an institution for occupational retirement provision, a payment institution or an electronic money institution as a subsidiary in another EEA State, therefore goes beyond what is necessary to ensure financial stability.

5.3.3.3.3 Finance companies

121. The Norwegian Government further states that not all financial institutions are subject to an authorisation regime in all EEA States. In particular, this is the case for finance companies. Where a Norwegian financial institution acquires or establishes a finance company in such states, the Norwegian prudential supervision authorities will have no safety measures in the normal procedures of authorisation.

122. There is no EEA-level legal framework applicable to the taking up and

[46] See Articles 9 and 20 of Directive 2003/41/EC, Article 5 of Directive 2007/64/EC and Article 3 of Directive 2009/110/EC.

pursuit of the business of finance companies. However, as mentioned above, according to the FIA, Norway subjects all financial institutions to materially the same supervisory measures. Therefore, *Finanstilsynet* is able to get information from any financial institution wishing to establish/acquire a finance company as a subsidiary in another EEA State and to subject it to certain conditions, if necessary.

123. Moreover, Norway has not provided any substantial arguments concerning the necessity of the national measure as regards situations where finance companies are established or acquired as subsidiaries of Norwegian financial institutions in other EEA States.

124. In light of this, the Authority holds the view that a requirement that a Norwegian financial institution must obtain an authorisation from the Norwegian competent authority, before establishing or acquiring a finance company as a subsidiary in another EEA State, therefore goes beyond what is necessary to ensure financial stability.

125. The Authority thus concludes that Section 4-1 first paragraph of the FIA constitutes a disproportionate restriction on the freedom of establishment under Article 31 EEA.

6 Conclusion

Accordingly, as its information presently stands, the Authority must conclude that, by maintaining in force an authorisation requirement, such as the one in Section 4-1 first paragraph of the Financial Institutions Act, Norway fails to fulfil its obligations arising from Articles 6, 15, 19 and 19b of 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)* (as from 1 January 2020, Articles 8, 16, 24 and 24 of Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 *on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC*), Articles 14, 26, 57 and 60 of 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)*, Articles 9 and 20 of Directive 2003/41/EC of the European Parliament and of the Council of 3 June 2003 *on the activities and supervision of institutions for occupational retirement provision*, Article 5 of Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 *on payment services in the internal market*, Article 3 of Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 *on the taking up, pursuit and prudential supervision of the business of electronic money institutions* and Article 31 of the EEA Agreement.

Alternatively, the Authority must conclude that, by maintaining in force an authorisation requirement, such as the one in Section 4-1 first paragraph of the Financial Institutions Act, which constitutes an unjustified restriction on the freedom of establishment, Norway has failed to fulfil its obligation arising from Article 31 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.

For the EFTA Surveillance Authority

Bente Angell-Hansen President	Frank J. Büchel Responsible College Member	Högni Kristjánsson College Member

Carsten Zatschler
Countersigning as Director,
Legal and Executive Affairs

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