Case No: 78022
Document No: 1336699
Decision No: 052/23/COL

SUPPLEMENTARY REASONED OPINION

delivered in accordance with Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice

concerning Norway's breach of

Articles 8, 16, and 24 of Directive 2013/36/EU,
Articles 14, 26, 57 and 60 of Directive 2009/138/EC,
Articles 9 and 20 of Directive 2003/41/EC,
Article 5 of Directive (EU) 2015/2366,
Article 3 of Directive 2009/110/EC and
Article 31 of the EEA Agreement

by maintaining in force an authorisation requirement to set up subsidiaries of Norwegian financial institutions in other EEA States

1 Introduction

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, prescribed by Section 4-1 of the Norwegian Financial Institutions Act ("the FIA"),[1]

The Authority has taken cognisance, as noted in the Authority's Supplementary Letter of Formal Notice of 5 October 2022 (Doc No 1308892), that certain amendments have been made to Section 4-1 of the FIA, which entered into force on 1 June 2022.[2] These have substantially altered the structure of the Section. Nonetheless, the amendments do not fundamentally alter the Authority's previous assessment concerning the legislation in question.

Under Section 4-1 as amended, a Norwegian financial undertaking must notify the Norwegian Financial Supervisory Authority ("Finanstilsynet") if the undertaking acquires an ownership stake of ten percent or more of the capital or votes in a financial undertaking in another EEA state. The same applies to acquisitions that increase the qualified shareholding to 20, 30 or 50 per cent or more of the capital or votes in the financial undertaking, or such that the shareholding provides decisive influence in the undertaking. In addition, a Norwegian financial undertaking must notify Finanstilsynet when establishing a financial undertaking as a subsidiary in another EEA state. On the basis of the notification, Finanstilsynet may set conditions or give orders that the establishment or acquisition shall not be carried out.

The Authority is of the opinion that, by subjecting the notification scheme set out in Section 4-1 to an effective veto right, the amended legislation amounts to a *de facto* prior authorisation scheme. It is clear from the wording of Section 4-1 that the establishment or acquisition shall not proceed if Finanstilsynet issues an order to this effect. Finanstilsynet may decide whether and under which circumstances establishments or acquisitions falling under the scope of Section 4-1 of the FIA may proceed, and is empowered by Section 4-1 to veto such establishments or acquisitions in certain circumstances.

Articles 8, 10-14, 16, 22 and 24 of Directive 2013/36/EU, Article 14 and 18 *et seq.* of Directive 2009/138/EC, Articles 9 and 20 of Directive 2003/41/EC, (EU)2015/2366 and Article 3 of 2009/110/EC 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. The directives contain a requirement to obtain prior authorisation from the competent authority of the EEA State in which these financial undertakings seek to establish subsidiaries, but not that of the parent financial undertaking.

In relation to credit institutions, insurance undertakings, institutions for occupational retirement provision, payment institutions or electronic money institutions, if it were established that the above-mentioned EEA secondary legislation does not apply to the requirement of authorisation by the Norwegian

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

[2] The FIA was amended by Act 18 June 2021 no. 100 (in force 1 June 2022 according to res. 6 May 2022 no. 807.

competent authority for the establishment/acquisition of subsidiaries of financial institutions in other EEA States, this requirement would still have to comply with the freedom of establishment per Article 31 EEA.[3]

Article 31 EEA is also applicable in circumstances in which a Norwegian financial institution seeks to establish or acquire in another EEA State as a subsidiary a financial institution, other than a financial institution for which a harmonised EEA legal framework is in place.

In this reasoned opinion, the Authority maintains its conclusions presented in the supplementary letter of formal notice of 5 October 2022 (Doc No 1308892), that a *de facto* authorisation requirement, such as that established in Section 4-1, paragraphs 1-5 of the FIA, as amended, is in breach of Articles 8, 16 and 24 of Directive 2013/36/EU[4], Articles 14, 26, 57 and 60 of Directive 2009/138/EC[5], Article 20 of Directive 2003/41/EC,[6] Article 5 of Directive (EU)2015/2366[7] and Articles 3-9 of Directive 2009/110/EC[8] and constitutes an unjustified restriction on

[3] 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. This judgment was principally concerned with Directive 2006/48/EC, but the relevant provisions of that directive have been replaced with materially identical provisions in Directive 2013/36/EU.

[4] 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 - CRD IV, incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 79/2019 (which entered into force in the EEA EFTA States on 1 January 2020, incorporated at point 14 of Annex IX of the EEA Agreement), replaced 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). Directive 2006/48/EC had formed the legal basis for much of the legal argumentation advanced by both the Authority and Norway in previous correspondence. However, as the provisions of both directives on the points at issue are largely substantively identical, references to previous correspondence in the present letter apply the reasoning based upon Directive 2006/48/EC to Directive 2013/36/EU, *mutatis mutandis.*

[5] 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).

[6] 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 since constitutional requirements have been flagged.

[7] Directive (EU) 2015/2366, of the European Parliament and of the Council of 25 November 2015 *on payment services in the internal market*, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC (OJ L 337, 23.12.2015, p. 35–127) incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 165/2019 replaced 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).

[8] 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).

the freedom of establishment, in breach of Article 31 of the Agreement on the European Economic Area ("the EEA Agreement").

2 Correspondence

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.

The case was discussed at the package meeting in Oslo on 27-28 October 2016[9] 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.

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.

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.

The issue was discussed at the package meeting in Oslo on 25-26 October 2018[10] 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.

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).

At the package meeting in Oslo on of 24 and 25 October 2019,[11] the representatives of the Norwegian Government informed the Authority that they did not have any additional information as concerns proportionality of the national measure.

After having assessed the Norwegian provisions and other information provided by Norway, on 11 December 2019, the Authority issued a Letter of Formal Notice to Norway (Doc No 900171). In this letter, it held the view that by maintaining in force an authorisation requirement, such as that one established in Section 4-1 first paragraph of the FIA, Norway is in breach of Directives 2013/36/EU, 2009/138/EC, 2003/41/EC, (EU) 2015/2366 and 2009/110/EC and/or of Article 31 EEA.

Following the extension of the deadline, Norway replied to the Letter of Formal

[9] See the follow-up letter to the package meeting, Doc No 824382.
[10] See the follow-up letter to the package meeting, Doc No 1039214.
[11] See the follow-up letter to the package meeting, Doc No 1096584.

Notice by letter of 2 March 2020 (ref. 16/39, Doc No 1117887). In its reply, Norway maintained its view that the authorisation requirement contributes to the legitimate goal of safeguarding financial stability in Norway. However, the Norwegian Government noted that it would ask a forthcoming working group to assess, whether it is possible to achieve the same high level of protection of financial stability through other measures than the prior authorisation scheme.

By letter of 24 March 2020 (Doc No 1122927), the Authority requested from Norway further details on the working group, such as the timeline on the commencement and the finalisation of its work related to the prior authorisation scheme addressed in the letter of formal notice. In addition, the Government was invited to inform the Authority about the timeline on the implementation of the working group's potential proposals.

After the extension of the time-limit, on 13 May 2020, the Norwegian Government replied to this request (ref. 16/39, Doc No 1132730) by essentially referring to the information provided in their letter of 2 March 2020. It added, however, that part one of the working group's report, due on 1 October 2020, would include the issue concerning the prior authorisation scheme, which is the subject matter of the letter of formal notice.

On 12 March 2020, the Authority sent a Reasoned Opinion to Norway (Doc No 1120918). In this Reasoned Opinion, it maintained the view expressed in the Letter of Formal Notice that by maintaining in force an authorisation requirement, such as that one established in Section 4-1 first paragraph of the FIA, Norway is in breach of Directives 2013/36/EU, 2009/138/EC, 2003/41/EC, (EU) 2015/2366 and 2009/110/EC and/or of Article 31 EEA.

After repeated extensions of the time-limit, on 9 December 2020, the Norwegian Government replied to the Reasoned Opinion (ref. 16/39, Doc No 1168066). In its Reply, Norway re-iterated its view that the authorisation requirement contributes to the legitimate goal of safeguarding financial stability in Norway. The Norwegian Government further noted that the relevant EEA legal framework supports the notion that competent authorities should have sufficient supervisory powers in cases where an entity under its supervision plans to establish a group with subsidiaries in other EEA States. Annexed to the Reply to the Reasoned Opinion was a text and translation of the proposed amendments to Section 4-1 of the FIA (Doc No 1168068).

The case was discussed with the representatives of the Norwegian Government at an (online) meeting on 23 February 2021. There, the representatives of the Authority made it clear that, in their view, the proposed legislative amendments to Section 4-1 of the FIA did not solve the outstanding issues, and that the notification scheme proposed effectively amounted to a disguised, or *de facto*, authorization scheme.

On 7 July 2022, the representatives of the Norwegian Government wrote to the Authority to state that, as of 1 June 2022, the relevant provisions of Section 4-1 of the FIA had been amended (Doc No 1301145). Moreover, they stated that the form that these amendments took ultimately largely reflected the proposed amendments discussed with the Authority previously.

After having assessed the amended Norwegian provisions and other information provided by Norway, on 5 October 2022, the Authority issued a Supplementary Letter of Formal Notice to Norway (Doc No 1308892). In this letter, the Authority stated that it held the view that the amendments of the relevant legislation had merely replaced an authorisation requirement *simpliciter* with a *de facto*

authorisation requirement, and that by maintaining in force an authorisation requirement, such as that one established in Section 4-1 first paragraph of the FIA, Norway is in breach of Directives 2013/36/EU, 2009/138/EC, 2003/41/EC, (EU) 2015/2366 and 2009/110/EC and/or of Article 31 EEA.

The case was discussed at the Package Meeting in Oslo on 27-28 October 2022. There, the representatives of the Norwegian Government noted that the new legislative regime had replaced an outright authorisation requirement with something essentially amounting to a safety measure to be used only in extreme cases. The procedures involved were intended to create increased legal certainty for all parties involved, and this model was not at all like the previous authorisation requirement. The Authority sent a follow-up letter to the Norwegian Government on 15 December 2022 (Doc No 1325668). The letter noted that the Authority would assess the Norwegian Government's reply to the letter of formal notice, and would determine the next steps to be taken in the case.

Norway replied to the Supplementary Letter of Formal Notice by letter of 2 December 2022 (ref. 16/39, Doc No 1334134). In its reply, Norway stated that it did not agree with the Authority's assessment that the amendments to the relevant legislation had resulted in the creation of a *de facto* authorisation scheme, but that the notification requirement, and the safety measures attached thereto – which are only applicable in the cases of special risk, or if the acquisition or establishment would impede supervision of the group – contribute to the legitimate goal of safeguarding financial stability in Norway.

3 Relevant National Law

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."[12]

[12] 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.",

Section 4-1 of the FIA reads as follows:

Section 4-1. Purchase of a qualifying share in and establishment of a subsidiary in another EEA state.

(1) A Norwegian financial undertaking must notify Finanstilsynet if the undertaking acquires an ownership stake of ten percent or more of the capital or votes in a financial undertaking in another EEA state. The same applies to acquisitions that increase the qualified shareholding to 20, 30 or 50 per cent or more of the capital or votes in the financial undertaking, or such that the shareholding provides decisive influence as mentioned in the Public Limited Liability Companies Act § 1-3 in the financial undertaking. The provisions in § 6-1 fourth and fifth paragraphs and § 6-5 apply accordingly when calculating the ownership shares. The provisions in section 17-9 , second and third paragraphs, apply correspondingly in the case of disposal of such business. Section 17-1 of the Financial Enterprises Act first paragraph does not apply.

(2) A Norwegian financial undertaking must notify the Norwegian Financial Supervisory Authority when establishing a financial undertaking as a subsidiary in another EEA state. Section 17-1 first paragraph of the Financial Enterprises Act does not apply.

(3) Notification pursuant to the first or second subsection must at least contain information on:

a. the financial institution that is established or in which a qualified ownership interest is acquired,

b. the purpose of the establishment or acquisition,

c. financing of the establishment or acquisition, and

d. the group structure after the establishment or acquisition.

(4) Finanstilsynet may set conditions or give orders that the establishment or acquisition shall not be carried out, if:

a. the acquisition or establishment will expose the Norwegian company or group to special risk, or

b. the acquisition or establishment will make it difficult to supervise the group.

(5) In the assessment pursuant to subsection four letter a, emphasis must be placed on whether the establishment or acquisition is justifiable based on the financial situation of the Norwegian enterprise or group, including the effect on financial stability.

(6) In the case processing of notification pursuant to the first or second subsection, the deadlines in § 6-2 third subsection apply correspondingly. If Finanstilsynet has not made a decision pursuant to subsection four by the end of the deadline pursuant to Section 6-2 subsection three, Finanstilsynet shall be deemed to have no objections to the establishment or acquisition.[13]

[13] Original wording: *§ 4-1.Kjøp av kvalifisert eierandel i og etablering av datterforetak i annen EØS-stat*
(1) Et norsk finansforetak skal gi melding til Finanstilsynet dersom foretaket erverver en eierandel på ti prosent eller mer av kapitalen eller stemmene i finansforetak i annen EØS-stat. Det samme gjelder ved erverv som øker den kvalifiserte eierandelen til henholdsvis 20, 30 eller 50 prosent eller mer av kapitalen eller stemmene i finansforetaket, eller slik at eierandelen gir bestemmende innflytelse som nevnt i allmennaksjeloven § 1-3 i finansforetaket. Bestemmelsene i § 6-1 fjerde og femte ledd og § 6-5 gjelder tilsvarende ved beregning av eierandelene. Bestemmelsene i § 17-9

Section 1-3 of the Norwegian Public Limited Liability Companies Act[14] provides as follows:

> "*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.*"[15]

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annet og tredje ledd gjelder tilsvarende ved avhendelse av slik virksomhet. Finansforetaksloven § 17-1 første ledd kommer ikke til anvendelse.
(2) Et norsk finansforetak skal gi melding til Finanstilsynet ved etablering av et finansforetak som datterforetak i en annen EØS-stat. Finansforetaksloven § 17-1 første ledd kommer ikke til anvendelse.
(3) Melding etter første eller annet ledd skal minst inneholde opplysninger om:
a. finansforetaket som etableres eller som det erverves kvalifisert eierandel i,
b. formålet med etableringen eller ervervet,
c. finansiering av etableringen eller ervervet, og
d. konsernstrukturen etter etableringen eller ervervet.
(4) Finanstilsynet kan sette vilkår eller gi pålegg om at etableringen eller ervervet ikke skal gjennomføres, dersom:
a. ervervet eller etableringen vil utsette det norske foretaket eller konsernet for særskilt risiko, eller
b. ervervet eller etableringen vil vanskeliggjøre tilsynet med konsernet.
(5) I vurderingen etter fjerde ledd bokstav a skal det legges vekt på om etableringen eller ervervet er forsvarlig ut fra den finansielle situasjonen i det norske foretaket eller konsernet, herunder effekten på finansiell stabilitet.
(6) Ved saksbehandlingen av melding etter første eller annet ledd gjelder fristene i § 6-2 tredje ledd tilsvarende. Dersom Finanstilsynet ikke har truffet vedtak etter fjerde ledd innen utløpet av fristen etter § 6-2 tredje ledd, skal Finanstilsynet anses å ikke ha innsigelser til etableringen eller ervervet.

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

[15] Translation of the Act provided at https://www.oslobors.no/ob_eng/Oslo-Boers/Regulations/Acts-and-regulations. 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

4 Relevant EEA law

4.1 The EEA Agreement

Article 31 provides:

"1. Within the framework of the provisions of this Agreement, there shall be no restrictions on the freedom of establishment of nationals of an EC Member State or an EFTA State in the territory of any other of these States. This shall also apply to the setting up of agencies, branches or subsidiaries by nationals of any EC Member State or EFTA State established in the territory of any of these States.

Freedom of establishment shall include 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, 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.[…]"

Article 34 provides:

"Companies or firms formed in accordance with the law of an EC Member State or an EFTA State and having their registered office, central administration or principal place of business within the territory of the Contracting Parties shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of EC Member States or EFTA States.

'Companies or firms' means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making."

4.2 The legal framework concerning credit institutions

Directive 2013/36/EU contains rules concerning authorisation for the taking up and pursuit of the business of credit institutions.

Article 3(1)(1) of Directive 2013/36/EU defines a "*credit institution*" as per the definition of this term in point (1) of Article 4(1) of Regulation (EU) No 575/2013. The latter provision defines a credit institution as an undertaking, the business of which is to "*take deposits or other repayable funds from the public and to grant credits for its own accounts*".

Recital 15 of Directive 2013/36/EU reads:

> "*It is appropriate to effect harmonisation which is 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 Union and the application of the principle of home Member State prudential supervision.*"[16]

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samme gjelder rettigheter som innehas av noen som handler i eget navn, men for morselskapets eller et datterselskaps regning.",

[16] It should be noted that under Recital 15 of Directive 2006/48/EC (which preceded Directive 2013/36/EU, and which previously represented the relevant frame of reference in the present case), it was further provided that:

Recital 25 of the directive provides:

> *"Responsibility for supervising the financial soundness of a credit institution and in particular its solvency on a consolidated basis should lie with its home Member State. The supervision of Union banking groups should be the subject of close cooperation between the competent authorities of the home and host Member States."*[17]

Recital 47 provides:

> "*Supervision of institutions on a consolidated basis aims to protect the interests of depositors and investors of institutions and to ensure the stability of the financial system. 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 or investment firms. Member States should provide competent authorities with the necessary legal instruments to enable them to exercise such supervision."*

Recital 49 states:

> "*Member States should be able to refuse or withdraw a credit institution's authorisation in the case of certain group structures considered inappropriate for carrying out banking activities, because such structures cannot be supervised effectively. In that respect the competent authorities should have the necessary powers to ensure the sound and prudent management of credit institutions. In order to secure a sustainable and diverse Union banking culture which primarily serves the interest of the citizens of the Union, small-scale banking activities, such as those of credit unions and cooperative banks, should be encouraged."*

Article 8 of Directive 2013/36/EU provides:

> *"Member States shall require credit institutions to obtain authorisation before commencing their activities […]."*

Article 10 provides:

> *"Member States shall require applications for authorisation to be accompanied*

"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.",

Recital 46 of that directive provided:
"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.",

However, there is no equivalent of these provisions in 2013/36/EU, thus narrowing the potential scope of action of states.

[17] It should be noted in this regard that Article 1(1)(a) of Decision of the EEA Joint Committee No 79/2019 provides that:

"Notwithstanding the provisions of Protocol 1 to this Agreement, and unless otherwise provided for in this Agreement, the terms "Member State(s)" and "competent authorities" shall be understood to include, in addition to their meaning in the Directive, the EFTA States and their competent authorities, respectively.",

by a programme of operations setting out the types of business envisaged and the structural organisation of the credit institution."

Article 11 provides:

"Member States shall not require the application for authorisation to be examined in terms of the economic needs of the market."

Article 12 provides:

"1. Without prejudice to other general conditions laid down in national law, the competent authorities shall refuse authorisation to commence the activity of a credit institution where a credit institution does not hold separate own funds or where its initial capital is less than EUR 5 million.

2. Initial capital shall comprise only one or more of the items referred to in Article 26(1)(a) to (e) of Regulation (EU) No 575/2013.

3. Member States may decide that credit institutions which do not fulfil the requirement to hold separate own funds and which were in existence on 15 December 1979 may continue to carry out their business. They may exempt such credit institutions from complying with the requirement contained in the first subparagraph of Article 13(1).

4. Member States may grant authorisation to particular categories of credit institutions the initial capital of which is less than that specified in paragraph 1, subject to the following conditions:

(a) the initial capital is no less than EUR 1 million;

(b)the Member States concerned notify the Commission and EBA of their reasons for exercising that option."

Article 13(1) provides:

"1. The competent authorities shall grant authorisation to commence the activity of a credit institution only where at least two persons effectively direct the business of the applicant credit institution.

They shall refuse such authorisation if the members of the management body do not meet the requirements referred to in Article 91(1)."

Article 14(1) and (2) provide:

"1. The competent authorities shall refuse authorisation to commence the activity of a credit institution unless a credit institution has informed them of the identities of its shareholders or members, whether direct or indirect, natural or legal persons, that have qualifying holdings and of the amounts of those holdings or, where there are no qualifying holdings, of the 20 largest shareholders or members […]."

"2. The competent authorities shall refuse authorisation to commence the activity of a credit institution if, taking into account the need to ensure the sound and prudent management of a credit institution, they are not satisfied as to the suitability of the shareholders or members […]."

Article 16 provides for a consultation mechanism and reads:

"*1. The competent authority shall, before granting authorisation to a credit institution, consult the competent authorities of another Member State where the credit institution is:*

(a) a subsidiary of a credit institution authorised in that other Member State;

(b) a subsidiary of the parent undertaking of a credit institution authorised in that other Member State;

(c) controlled by the same natural or legal persons as those who control a credit institution authorised in that other Member State.

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

(a) a subsidiary of an insurance undertaking or investment firm authorised in the Union;

(b) a subsidiary of the parent undertaking of an insurance undertaking or investment firm authorised in the Union;

(c) controlled by the same natural or legal persons as those who control an insurance undertaking or investment firm authorised in the Union."

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 members of the management body 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 members of the management body which is of relevance for the granting of an authorisation and for the ongoing assessment of compliance with operating conditions."

Article 22 provides:

"*1. Member States shall require any natural or legal person or such persons acting in concert (the "proposed acquirer"), who have taken a decision either to acquire, directly or indirectly, a qualifying holding in a credit institution or to further increase, directly or indirectly, such a qualifying holding in a credit institution as a result of which the proportion of the voting rights or of the capital held would reach or exceed 20 %, 30 % or 50 % or so that the credit institution would become its subsidiary (the "proposed acquisition"), to notify the competent authorities of the credit institution in which they are seeking to acquire or increase a qualifying holding in writing in advance of the acquisition, indicating the size of the intended holding and the relevant information, as specified in accordance with Article 23(4). Member States shall not be required to apply the 30 % threshold where, in accordance with Article 9(3)(a) of Directive 2004/109/EC, they apply a threshold of one-third.*

2. The competent authorities shall acknowledge receipt of notification under paragraph 1 or of further information under paragraph 3 promptly and in any event within two working days following receipt in writing to the proposed acquirer.

The competent authorities shall have a maximum of 60 working days as from the date of the written acknowledgement of receipt of the notification and all documents required by the Member State to be attached to the notification on the basis of the list referred to in Article 23(4) (the "assessment period"), to carry out the assessment provided for in Article 23(1) (the "assessment").

The competent authorities shall inform the proposed acquirer of the date of the expiry of the assessment period at the time of acknowledging receipt.

3. The competent authorities may, during the assessment period if necessary, and no later than on the 50th working day of the assessment period, request further information that is necessary to complete the assessment. Such a request shall be made in writing and shall specify the additional information needed.

For the period between the date of request for information by the competent authorities and the receipt of a response thereto by the proposed acquirer, the assessment period shall be suspended. The suspension shall not exceed 20 working days. Any further requests by the competent authorities for completion or clarification of the information shall be at their discretion but shall not result in a suspension of the assessment period […].

6. If the competent authorities do not oppose the proposed acquisition within the assessment period in writing, it shall be deemed to be approved.

7. The competent authorities may fix a maximum period for concluding the proposed acquisition and extend it where appropriate.

8. Member States shall not impose requirements for notification to, or approval by, the competent authorities of direct or indirect acquisitions of voting rights or capital that are more stringent than those set out in this Directive […].”

Article 24 provides:

“*1. The relevant competent authorities shall fully consult each other when carrying out the assessment if the proposed acquirer is one of the following:*

(a) a credit institution, insurance undertaking, reinsurance undertaking, investment firm, or a management company within the meaning of Article 2(1)(b) of Directive 2009/65/EC ("UCITS management company") authorised in another Member State or in a sector other than that in which the acquisition is proposed;

(b) the parent undertaking of a credit institution, insurance undertaking, reinsurance undertaking, investment firm or UCITS management company authorised in another Member State or in a sector other than that in which the acquisition is proposed;

(c) a natural or legal person controlling a credit institution, insurance undertaking, reinsurance undertaking, investment firm or UCITS management company authorised in another Member State or in a sector other than that in which the acquisition is proposed.

2. The competent authorities shall, without undue delay, provide each other with any information which is essential or relevant for the assessment. In that 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.”

Article 35 provides:

“*1. A credit institution wishing to establish a branch within the territory of another Member State shall notify the competent authorities of its home Member State.*

2. Member States shall require every credit institution wishing to establish a

branch in another Member State to provide all the following information when effecting the notification referred to in paragraph 1:

(a) the Member State within the territory of which it plans to establish a branch;

(b) a programme of operations setting out, inter alia, the types of business envisaged and the structural organisation of the branch;

(c) the address in the host Member State from which documents may be obtained;

(d) the names of those to be responsible for the management of the branch.

3. Unless the competent authorities of the home Member State 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 information referred to in paragraph 2, communicate that information to the competent authorities of the host Member State and shall inform the credit institution accordingly […].”

Article 36 provides:

"*1. Before the branch of a credit institution commences its activities the competent authorities of the host Member State shall, within two months of receiving the information referred to in Article 35, prepare for the supervision of the credit institution in accordance with Chapter 4 and if necessary indicate the conditions under which, in the interests of the general good, those activities shall be carried out in the host Member State.*

2. On receipt of a communication from the competent authorities of the host Member State, or in the event of the expiry of the period provided for in paragraph 1 without receipt of any communication from the latter, the branch may be established and may commence its activities […].”

Article 111(1) provides:

"*1. Where a parent undertaking is a parent institution in a Member State or an EU parent institution, supervision on a consolidated basis shall be exercised by the competent authorities that granted authorisation […].”*

Article 129(1) provides:

"*1. Member States shall require institutions to maintain in addition to the Common Equity Tier 1 capital maintained to meet the own funds requirement imposed by Article 92 of Regulation (EU) No 575/2013, a capital conservation buffer of Common Equity Tier 1 capital equal to 2,5 % of their total risk exposure amount calculated in accordance with Article 92(3) of that Regulation on an individual and consolidated basis, as applicable in accordance with Part One, Title II of that Regulation.”*

Directive 2014/65/EU on markets in financial instruments[18], repealing Directive 2007/44/EC[19], sets out detailed rules for the proposed acquisition of qualified

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[18] *Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (recast)* (OJ L 173, 12.6.2014, p. 349), incorporated via Joint Committee Decision No 78/2019 of 29 March 2019 amending Annex IX (Financial services) to the EEA Agreement 2019/1836 (OJ L 279, 31.10.2019, p. 143 and EEA Supplement No 88, 31.10.2019, p. 1).

[19] It should be noted that Directive 2007/44/EC amended, *inter alia*, Directive 2006/48/EC (the forerunner of Directive 2013/36/EU) and introduced maximum harmonization rules and evaluation criteria for the prudential assessment of acquisitions and increases of holdings, which were then

holdings including an assessment procedure.

Article 13 of the Directive, entitled "Assessment", provides:

> *"1. In assessing the notification provided for in Article 11(1) and the information referred to in Article 12(2), the competent authorities shall, in order to ensure the sound and prudent management of the investment firm in which an acquisition is proposed, and having regard to the likely influence of the proposed acquirer on the investment firm, appraise the suitability of the proposed acquirer and the financial soundness of the proposed acquisition against all of the following criteria:*
>
> *(a) the reputation of the proposed acquirer;*
>
> *(b) the reputation and experience of any person who will direct the business of the investment firm as a result of the proposed acquisition;*
>
> *(c) the financial soundness of the proposed acquirer, in particular in relation to the type of business pursued and envisaged in the investment firm in which the acquisition is proposed;*
>
> *(d) whether the investment firm will be able to comply and continue to comply with the prudential requirements based on this Directive and, where applicable, other Directives, in particular Directives 2002/87/EC and 2013/36/EU, in particular, whether the group of which it will become a part has a structure that makes it possible to exercise effective supervision, effectively exchange information among the competent authorities and determine the allocation of responsibilities among the competent authorities;*
>
> *(e) whether there are reasonable grounds to suspect that, in connection with the proposed acquisition, money laundering or terrorist financing within the meaning of Article 1 of Directive 2005/60/EC is being or has been committed or attempted, or that the proposed acquisition could increase the risk thereof […]*
>
> *2. The competent authorities may oppose the proposed acquisition only if there are reasonable grounds for doing so on the basis of the criteria set out in paragraph 1 or if the information provided by the proposed acquirer is incomplete.*
>
> *3. Member States shall neither impose any prior conditions in respect of the level of holding that must be acquired nor allow their competent authorities to examine the proposed acquisition in terms of the economic needs of the market.*
>
> *4. Member States shall make publicly available a list specifying the information that is necessary to carry out the assessment and that must be provided to the competent authorities at the time of notification referred to in Article 11(1). The information required shall be proportionate and adapted to the nature of the proposed acquirer and the proposed acquisition. Member States shall not require information that is not relevant for a prudential assessment […]"*

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set out in greater detail in Directive 2014/65/EU. See 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).

4.3 The legal framework concerning insurance and reinsurance undertakings

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

Recital 11 of Directive 2009/138/EC 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.*"

Recitals 100 and 102 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.*"

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.

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 16 of Directive 2013/36/EU.

Furthermore, Articles 57, 59, 60, 145 and 146 of Directive 2009/138/EC contain materially identical rules to the corresponding provisions of Directive 2013/36/EU.

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.

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*

With regard to payment institutions and electronic money institutions, the relevant EEA secondary legislation is Directives (EU) 2015/2366[20] and 2009/110/EC.

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 Article 5 of Directive (EU) 2015/2366 and Article 3 of Directive 2009/110/EC.

With regard to institutions for occupational retirement provision, the relevant EEA secondary legislation is Directive 2003/41/EC. For these institutions, the conditions of operations and cross-border activities are established in Articles 9 and 20 of Directive 2003/41/EC. Article 20 of Directive 2003/41/EC also sets out the relevant conditions for the assessment of whether to authorise cross-border activities of an institution for occupational retirement provision.

Moreover, Article 5 of Directive (EU) 2015/2366 and Articles 3-9 of Directive 2009/110/EC set out the relevant conditions for the assessment of whether to grant an authorisation to 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.

As regards groups of companies, Directive (EU) 2015/2366 provides in Article 8(2):

> “*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.”*

Under Articles 3 and 13 of Directive 2009/110/EC, the relevant provisions of Directive (EU) 2015/2366, including the above cited provision, apply *mutatis mutandis* to electronic money institutions.

Directive 2003/41/EC has been replaced in the European Union 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.

5 The Authority’s Assessment

As noted in the Authority’s Supplementary Letter of Formal Notice,[21] the

[20] Directive 2007/64/EC was replaced by Directive (EU) 2015/2366, which was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 165/2019. 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 (principally Articles 5 and 7) cited in the Authority’s earlier correspondence with the Government of Norway in the present case.

[21] Supplementary Letter of Formal Notice of 5 October 2022 (Doc No 1308892).

amendments made to Section 4-1 of the FIA, which entered into force on 1 June 2022,[22] have substantially altered the structure of the Section, in particular by removing previous references to Section 17-1 of the FIA, requiring that the establishment of a financial institution necessitates authorisation from the Ministry of Finance. Nonetheless, as further noted in the Supplementary Letter of Formal Notice, the amendments undertaken to the scheme do not fundamentally alter the Authority's assessment. Nor is the Authority's assessment altered by the argumentation advanced in the Reply of the Norwegian Government to the Authority's Supplementary Letter of Formal Notice, which is discussed in greater detail below.[23]

Under Section 4-1 as it presently stands, a Norwegian financial undertaking must notify the Norwegian Financial Supervisory Authority ("Finanstilsynet") if the undertaking acquires an ownership stake of ten percent or more of the capital or votes in a financial undertaking in another EEA state. The same applies to acquisitions that increase the qualified shareholding to 20, 30 or 50 per cent or more of the capital or votes in the financial undertaking, or such that the shareholding provides decisive influence in the undertaking. In addition, a Norwegian financial undertaking must notify Finanstilsynet when establishing a financial undertaking as a subsidiary in another EEA state. This notification must, at a minimum, contain information on:

a. the financial institution that is established or in which a qualified ownership interest is acquired,
b. the purpose of the establishment or acquisition,
c. financing of the establishment or acquisition, and
d. the group structure after the establishment or acquisition.

On the basis of the notification, Finanstilsynet may set conditions or give orders that the establishment or acquisition shall not be carried out on one of two grounds, specifically:

(i) if the acquisition or establishment will expose the Norwegian company or group to special risk; or
(ii) if the acquisition or establishment will make it difficult to supervise the group.

As previously observed, the Authority is of the opinion that, by subjecting the notification scheme set out in Section 4-1 to an effective veto right on the part of Finanstilsynet, the model in effect amounts to a *de facto* prior authorisation scheme for Norwegian financial institutions that intend to either establish or acquire financial institutions as subsidiaries in other EEA States. It is clear from the wording of Section 4-1, first to fifth paragraphs, that the establishment or acquisition shall not proceed if Finanstilsynet issues an order to this effect. This entails that Finanstilsynet may decide whether and under which circumstances establishments or acquisitions falling under the scope of Section 4-1 of the FIA may proceed, and is empowered by Section 4-1 to veto such establishments or acquisitions in certain circumstances.

Articles 8, 10-14, 16, 22 and 24 of Directive 2013/36/EU, Article 14 and 18 *et seq.* of Directive 2009/138/EC, Articles 9 and 20 of Directive 2003/41/EC, (EU)2015/2366 and Article 3 of 2009/110/EC contain rules concerning cross-border activities and authorisation for the taking up and pursuit of the business of,

[22] The FIA was amended by Act 18 June 2021 no. 100 (in force 1 June 2022 according to res. 6 May 2022 no. 807.
[23] Reply of the Norwegian Government of 2 December 2022 (ref. 16/39, Doc No 1334134).

respectively, credit institutions, insurance undertakings, institutions for occupational retirement provision, payment institutions and electronic money institutions. These 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. The directives contain a requirement to obtain prior authorisation from the competent authority of the EEA State in which these financial undertakings seek to establish subsidiaries.

In relation to credit institutions, insurance undertakings, institutions for occupational retirement provision, payment institutions and electronic money institutions, 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.[24]

Article 31 EEA is also applicable in circumstances in which a Norwegian financial institution seeks to establish or acquire in another EEA State as a subsidiary a financial institution, other than a financial institution for which a harmonised EEA legal framework is in place.

In light of the above, the Authority will proceed with the assessment of Section 4-1 first paragraph of the FIA under the relevant EEA secondary legislation, specifically Directives 2013/36/EU, 2009/138/EC, 2003/41/EC, (EU) 2015/2366 and 2009/110/EC. Thereafter, an assessment of the relevant provisions under Article 31 EEA will be provided.

5.1 The assessment under EEA secondary legislation

5.1.1 Breach of Directives 2013/36/EU and 2009/138/EC as regards credit institutions and insurance undertakings

Directives 2013/36/EU and 2009/138/EC set out rules concerning the relevant procedures and conditions governing the authorisation for the initial establishment, as well as for the subsequent acquisitions of qualifying holdings in credit institutions and insurance undertakings.

In particular, under Articles 8, 20 and 22 of Directive 2013/36/EU and Articles 14 and 57 of Directive 2009/138/EC, the 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. This EEA secondary legislation thus requires a 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 (see, for example, Recitals 15 and 16 of Directive 2013/36/EU and Recital 11 of Directive 2009/138/EC).

[24] 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. This judgment was principally concerned with Directive 2006/48/EC, but the relevant provisions of that directive have been replaced with materially identical provisions in Directive 2013/36/EU.

In cases in which 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, Articles 16 and 24 of Directive 2013/36/EU and Articles 26 and 60 of Directive 2009/138/EC respectively provide for a consultation mechanism. The competent authority of the EEA State in which the 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. 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. The consultation process allows the Norwegian competent authority to raise any concerns it may have concerning the authorisation of a subsidiary in a another EEA State. If there is a failure to consult or if the Norwegian competent authority considers that its concerns are not properly taken into account, it has recourse to the relevant European Supervisory Authority or the EFTA Surveillance Authority, as the case may be.

However, Section 4-1, fourth paragraph of the FIA effectively requires that any establishment or acquisition of a subsidiary in another EEA State by a Norwegian financial institution is subject to the caveat that Finanstilsynet may set conditions for the establishment or acquisition, or may give an order that the establishment or acquisition shall not be carried out. As such, 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 2013/36/EU and 2009/138/EC, in circumstances in which Finanstilsynet orders that the establishment or acquisition shall not be carried out.

In its letter of 2 December 2022, as well as in prior correspondence with the Authority, the Norwegian Government has explained that the aims of Section 4-1 of the FIA reflect the 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 acquisition or establishment will make it difficult to supervise the group. These conditions are also reflected by the text of Section 4-1, fourth paragraph, a. and b. of the FIA. The Norwegian Government has emphasized that the purpose of the notification requirement set out in Section 4-1 is primarily informational, and is intended to supply Finanstilsynet with an overview of movements in the financial market. Such information, it is argued, is essential for Finanstilsynet to properly conduct its task as supervisor, and to maintain financial stability. In this regard, in situations in which Finanstilsynet is of the view that the establishment or acquisition would expose the entity or group to particular risks, or would impede its supervision, Section 4-1 allows Finanstilsynet to prevent or set conditions for the group establishment.[25] While the Norwegian Government acknowledges the supervisory responsibilities of the Financial Supervisory Authority of the EEA State where a subsidiary is sought to be established or acquired, the aim of the legislation is stated as being *“to ensure that the interests of both the home State of the parent undertaking and the host state of the subsidiary are considered prior to an*

[25] See the Reply of the Norwegian Government to the Supplementary Letter of Formal Notice by letter of 2 December 2022 (ref. 16/39, Doc No 1334134), pp 2-3.

expansion.”[26]

The Authority observes that the effect of the legislation in question is that the financial undertaking in question is required, *de facto*, to obtain an authorisation – or failing that, to wait for three months to ensure that Finanstilsynet has no objections to the establishment or acquisition – and that, by reviewing the aforementioned criteria for the purposes of deciding whether a subsidiary in another EEA State could be established or acquired, Norway is infringing upon the authorisation procedures applicable to the establishment and acquisition of credit institutions and insurance undertakings set out by Directives 2013/36/EU and 2009/138/EC. This model interferes in the competences of the EEA State where a subsidiary is sought to be established or acquired, and fails to respect the principle of mutual recognition of authorisations and supervisory systems.

In particular, Directives 2013/36/EU 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, per Recital 43 and Title IV of Directive 2013/36/EU, 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. Per Recitals 100 and 102 and Articles 128 *et seq* of Directive 2009/138/EC, the same applies with respect to insurance undertakings.

The Authority further observes that, for credit institutions and insurance undertakings, the secondary law provides for a requirement to continuously provide information to the competent authorities on close links with other entities. This would include any subsidiaries which such entities might set up in other EEA States. Similarly, financial conglomerates are also required to regularly provide the competent authority with details on their legal structure, including all regulated entities and non-regulated subsidiaries. These mechanisms for receiving information allow competent authorities to consider whether there is any reason to re-evaluate whether the conditions for authorisation continue to be met.

As regards credit institutions in particular, the EEA States may also establish stricter rules than the minimum capital requirements laid down in Article 12 of Directive 2013/36/EU. 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 or 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 in which 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, should be imposed – and whether these requirements are complied with – rests within the EEA State where the subsidiary is sought to be established or acquired, after consulting the EEA State of the parent institution.

At the same time, as a supervisor of the parent financial institution, Finanstilsynet has power to impose conditions on this parent institution under Directives 2013/36/EU and 2009/138/EC. Moreover, after the establishment or acquisition by a Norwegian financial institution of a subsidiary in another EEA State, Finanstilsynet, as a group supervisor, will have to ensure the continuous

[26] *Ibid*, pp 6-7.

fulfillment by the group of the capital requirements, as well as adequacy and transparency of the group structure and governance. The relevant 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. In particular, Article 18, litra (e) of Directive 2013/36/EU 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. EEA States are under an obligation to ensure that their national laws provide the competent authorities with adequate powers.

However, such powers do not include, under Directives 2013/36/EU and 2009/138/EC, a power of the EEA State of the parent institution to object to, or in essence, to veto, an establishment or acquisition of a subsidiary in another EEA State, or indeed to subject it to a condition of *de facto* prior authorisation from the EEA State of the parent institution. While the Norwegian Government has expressed the view that *"it is the supervisory authority for the group, rather than the competent authority of the subsidiary, that is in a better position to assess the risks [that] an establishment will entail for the group",*[27] this does not reflect the relevant Directives in this field, which are clear that that attribution of competence in respect of prior authorisation is to the financial supervisory authority of the subsidiary.

In previous correspondence, Norway has also referred to Article 35(4) of Directive 2013/36/EU, and stated that the authorisation requirement under Section 4-1 of the FIA (as it stood before 1 June 2022) had 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. The same argumentation may be made with respect to the present arrangements under Section 4-1 of the FIA, and the *de facto* authorisation scheme that is now applicable.[28]

Indeed, Title V of Directive 2013/36/EU and Articles 145 and 146 of Directive 2009/138/EC concern the exercise of the right of establishment by credit institutions and insurance undertakings. These provisions are applicable in cases in which a credit institution or an insurance undertaking wishes to establish a branch within the territory of another EEA State. The directives provide that, in such a case, the credit institution or the insurance undertaking submits 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

[27] *Ibid*, p 7.

[28] Norway made these arguments in relation to the previous authorisation regime, and with respect to Article 25 third paragraph of Directive 2006/48/EC. However, the considerations involved with respect to the current *de facto* authorisation regime and Directive 2013/36/EU are substantially the same, and this argument is addressed in the present letter in the light of the now-applicable regime in Norway and updated EEA secondary law, *mutatis mutandis*.

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.

However, the above directives do not provide analogous powers for the EEA State of the parent institution where a credit institution or an insurance undertaking is established or 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. In case of misapplication of the consultation mechanism, the Norwegian competent authority has recourse to the relevant European Supervisory Authority or the EFTA Surveillance Authority, as the case may be.

The Authority observes that the criteria prescribed by the secondary legislation concerning the allocation of competences between supervisory authorities outlined in the secondary legislation are clear and unequivocal. Subsidiaries are independent legal entities while branches may be seen as more akin to departments of the parent financial institution, and the relevant secondary legislation makes references to the two categories in different contexts.[29] The principle of home EEA State supervision requires an additional level of involvement for the setting up of a branch. In contrast, a subsidiary will not be subject to the home EEA State supervision, although it may have responsibilities for supervision on a consolidated basis. If the EEA legislature had considered it appropriate for the supervisor of an institution to have the same level of involvement when that institution sets up a branch as when it sets up a subsidiary in another EEA State, they would have been directly foreseen in the text of Directives 2013/36/EU and 2009/138/EC.

Additional arguments advanced by Norway in its Reply to the Supplementary Letter of Formal Notice

In its letter of 2 December 2022, the Norwegian Government sets out two additional arguments.

The first argument advanced in the letter notes that Articles 18 and 64 of Directive 2013/36/EU, regulating prudential supervision of credit institutions and investment firms, grant the financial supervisory authority of a parent financial institution power to impose conditions, penalties and withdraw authorisations in cases of non-compliance with prudential requirements. This entails that, following an assessment of a newly constituted group's compliance and exposure, the supervisory authority of the home State may impose conditions or withdraw an authorisation. The Norwegian Government argues that *"allowing the home State supervisory authority to conduct the required assessment and acting upon it* prior *to the establishment of the group structure is an efficient and resource saving measure for the FSA's fulfilment of its supervisory obligations in the mentioned directives."*

In relation to this point, the Authority observes that the law on this point is clear

[29] For example: Title V of Directive 2013/36/EU refers to branches, whereas Articles 16 and 22 thereof refer to subsidiaries; Recital 11 and Articles 145 and 146 of Directive 2009/138/EC refer to branches, whereas Articles 9 and 20 of Directive 2003/41/EC, Article 5 of Directive (EU) 2015/2366, and Article 3 of Directive 2009/110/EC refer to subsidiaries.

and that the question of whether an alternative model might be more or less efficient cannot have a bearing upon the interpretation of the law as it presently stands. It is true that, after the establishment or acquisition by a Norwegian financial institution of a subsidiary in another EEA State, Finanstilsynet, as a group supervisor, will have to ensure the continuous fulfilment by the group of the capital requirements, as well as adequacy and transparency of the group structure and governance. It is further the case that the relevant 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 effectively. However, such powers are only applicable and relevant *after* the establishment or acquisition by a Norwegian financial institution of a subsidiary in another EEA State, and these provisions cannot have a bearing on the legal situation prior to this juncture.

The second argument advanced by the Norwegian Government in its letter of 2 December 2022 posits that the power vested in Finanstilsynet by Section 4-1 of the FIA does not go beyond what is allowed by the secondary legislation. In particular, the letter draws attention to Article 64(1) of Directive 2013/36/EU, which requires that:

"Competent authorities shall be given all supervisory powers to intervene in the activity of institutions, financial holding companies and mixed financial holding companies that are necessary for the exercise of their function".[30]

The letter further draws attention to Article 34 (1) and (2) of Directive 2009/138/EC, which provides:

"1. Member States shall ensure that the supervisory authorities have the power to take preventive and corrective measures to ensure that insurance and reinsurance undertakings comply with the laws, regulations and administrative provisions with which they have to comply in each Member State.

2. The supervisory authorities shall have the power to take any necessary measures, including where appropriate, those of an administrative or financial nature, with regard to insurance or reinsurance undertakings, and the members of their administrative, management or supervisory body."[31]

In respect of the argument that these provisions entail that Section 4-1 of the FIA does not go beyond what is allowed by secondary legislation, the Authority observes that Article 64(1) of Directive 2013/36/EU specifies that *"competent authorities"* shall be given all supervisory powers *"that are necessary for the exercise of their function."* This provision must be understood as conferring upon financial supervisory authorities any and all supervisory powers that are required for them to do the tasks for which they are competent, with competence being determined with reference to the other provisions of Directive 2013/36/EU. As previously noted, under Articles 8, 20 and 22 of Directive 2013/36/EU, the 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, and not of the parent. As such, the financial supervisory authority of the parent is not the competent authority to exercise a *de facto* authorisation power, and does not require powers such as

[30] Reply of the Norwegian Government to the Supplementary Letter of Formal Notice by letter of 2 December 2022 (ref. 16/39, Doc No 1334134), p 6 [Norway's emphasis].
[31] *Ibid,* [Norway's emphasis].

those set out in Section 4-1 of the FIA to perform its functions.

The same logic is applicable with respect to Article 34 (1) and (2) of Directive 2009/138/EC. While EEA States are required to ensure that financial supervisory authorities are endowed with requisite powers to ensure that insurance and reinsurance undertakings comply with the laws, regulations and administrative provisions with which they are obliged to comply, and while they shall have the power to take any necessary measures in this regard, the responsibilities of each financial supervisory authority begin and end at the limits delineated by Directive 2000/138/EC. No additional competences can be aggregated to the supervisory body in the EEA State of the parent due to the provisions in question.

In light of the foregoing, by subjecting the establishment or acquisition by Norwegian financial institutions of a credit institution or an insurance undertaking as a subsidiary in another EEA State to oversight amounting to a *de facto* authorisation requirement from the competent Norwegian authority, Norway is in breach of the authorisation procedures applicable to the establishment or acquisition of credit institutions and insurance undertakings, as provided Articles 8, 16, 24 and 24 of Directive 2013/36/EU and Articles 14, 26, 57 and 60 of Directive 2009/138/EC.

5.1.2 Breach of Directives 2003/41/EC, (EU) 2015/2366 and 2009/110/EC as regards institutions for occupational retirement provision, payment institutions and electronic money institutions

The Authority notes that the arguments set out in part 5.1.1, above, are equally applicable with regard to the establishment or acquisition in another EEA State of institutions for occupational retirement provision, payment institutions and electronic money institutions.

Specific reference may be had, in this regard, to Articles 9 and 20 of Directive 2003/41/EC, Article 5 of Directive (EU) 2015/2366 and Article 3 of 2009/110/EC. These provisions contain requirement for cross-border activities and to obtain prior authorisation from the competent authority of the EEA State, in which these financial institutions are sought to be established or acquired. 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 (EU) 2015/2366 and 2009/110/EC, furthermore, provide specific rules where groups of companies are at issue.

Therefore, by subjecting the establishment or acquisition by Norwegian financial institutions of an institution for occupational retirement provision, a payment institution or an electronic money institution as a subsidiary in another EEA State to oversight amounting to a *de facto* authorisation requirement from the competent Norwegian authority, 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 (EU) 2015/2366 and Article 3 of Directive 2009/110/EC.

5.2 The assessment under Article 31 EEA

5.2.1 The existence of a restriction on the freedom of establishment

Article 31 EEA requires the abolition of restrictions upon the freedom of establishment. 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 place of business within the EEA, the right to pursue their activities in other EEA States through a subsidiary, a branch or an agency.[32]

It is settled case law of the Court of Justice of the European Union ("the Court of Justice/CJEU") 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.[33]

It is also established case law that all measures which, even though they are applicable without discriminating on the grounds of nationality, are liable to hinder or render less attractive the exercise of the freedom of establishment, constitute a restriction on that freedom.[34] As regards prior authorisation schemes in particular, the Court of Justice has held that such procedures restrict, by their very purpose, the fundamental freedoms.[35]

Pursuant to Section 4-1 of the FIA, a Norwegian financial institution that wishes to establish or acquire a financial institution as a subsidiary in another EEA State may be prevented from doing so if Finanstilsynet gives an order that the establishment or acquisition shall not take place. This amounts to a *de facto* authorisation requirement.

Such a *de facto* 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 of the FIA amounts to a restriction on the freedom of establishment protected by Article 31 EEA.

The Norwegian Government has not disputed that the rules as they presently stand constitute a restriction on the freedom of establishment. It has argued,

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[32] See 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.

[33] 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 judgment of the EFTA Court of 2 December 2013 in Case E-14/13 *ESA* v *Iceland* [2013] EFTA Ct. Rep. 924, paragraph 24.

[34] 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.

[35] See, for example, judgment of the Court of Justice of 10 March 2009, *Hartlauer*, C-169/07, EU:C:2009:141, paragraph 34.

however, that the rules could be justified by overriding reasons of general public interest and are proportionate.[36] It should be noted that the Norwegian Government made the same arguments with respect to the rules that were in force prior to June 2022,[37] and has relied upon its argumentation advanced with respect to the old rules when discussing the new rules.[38] At meetings to discuss the new rules, as well as in the Reply to the Supplementary Letter of Formal Notice, the Norwegian Government argued that even if the new rules might constitute a restriction, they could nonetheless be justified by overriding reasons of general public interest and are proportionate. The concrete arguments of the Government will be indicated further when assessing whether the rules that are now in force are susceptible of justification.

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

As observed in the Supplementary Letter of Formal Notice, the Authority notes that the Norwegian legislation does not clearly establish which criteria must be fulfilled, in order for a Norwegian financial institution wishing to establish or acquire a financial institution as a subsidiary in another EEA State to avoid an order from Finanstilsynet that the establishment or acquisition shall not be carried out, or indeed that the establishment or acquisition should be subjected to additional conditions determined by Finanstilsynet.

Section 4-1, fourth paragraph of the FIA makes it clear that Finanstilsynet “may” set conditions or give orders that the establishment or acquisition shall not be carried out, if either: the establishment or acquisition will expose the Norwegian company or group to “special risk”; or the establishment or acquisition will make it difficult to supervise the group. Section 4-1, third paragraph sets out the information that must be provided to Finanstilsynet pursuant to the notification required by the first and section paragraphs of the subsection. The information provided must presumably serve as the principal evidence to be weighed by Finanstilsynet in making its determination as to whether conditions should be set for the acquisition or establishment, or whether an order should be made that said acquisition or establishment should not take place.

The Authority notes, in this regard, that there is no prescribed documentation required when applying for establishing or acquiring a financial institution as a subsidiary in another EEA State. Rather, Section 4-1, third paragraph of the FIA merely sets out that any notification must “at least” contain information concerning:

[36] Reply of the Norwegian Government to the Supplementary Letter of Formal Notice by letter of 2 December 2022 (ref. 16/39, Doc No 1334134), pp 3-4.

[37] See, for example, the reply of the Norwegian Government of 21 September 2018 to the Pre-Article 31 letter. See, further, the reply of the Norwegian Government of 8 December 2012 to the Authority’s Reasoned Opinion, wherein the ‘two-step’ nature of the restriction (firstly, imposing conditions for the establishment or acquisition, and secondly, potentially vetoing said acquisition) is emphasised. There, the Norwegian Government notes that, in its view, “imposing conditions on or opposing an unsuitable acquisition would be less intrusive and more proportional than withdrawing the banking authorisation altogether.”.

[38] See explicit references in this regard in the Reply of the Norwegian Government to the Supplementary Letter of Formal Notice by letter of 2 December 2022 (ref. 16/39, Doc No 1334134), p 4 *(“…the arguments justifying the notification requirement largely coincide with those justifying the previous legislation…”).*

a) the financial institution that is established or in which a qualified ownership interest is acquired;
b) the purpose of the establishment or acquisition;
c) financing of the establishment or acquisition; and
d) the group structure after the establishment or acquisition.

This entails that different undertakings will likely submit significantly different information to Finanstilsynet in order to comply with the notification requirement in Section 4-1. In particular, the words “at least” would seem to suggest that it is open to undertakings to submit additional information, which may be taken into account by Finanstilsynet in deciding whether to set conditions for, or veto, the establishment or acquisition in question. This entails that it is difficult for undertakings to determine what, if any, additional information should be submitted to Finanstilsynet in order to ensure that the establishment or acquisition in question will not be submitted to additional conditions, or vetoed.

Further, Section 4-1, fourth paragraph states that if the establishment or acquisition will expose the Norwegian company or group to “special risk”, or the establishment or acquisition will make it “difficult to supervise” the group, Finanstilsynet is empowered to either set conditions for the establishment or acquisition, or to order that it may not be carried out. The terms “special risk” and “difficult to supervise” are not defined in the text, and the Authority is not aware of any definition in the FIA or elsewhere of either term that sets out criteria that would guide undertakings in determining the ambit of such terms.

The Authority notes that, in its Reply to the Supplementary Letter of Formal Notice, the Norwegian Government explains that *“the assessment of “special risk” will include checking compliance with capital requirements, including minimum and buffer requirements. Additionally, other financial risks, such as operational, administrative and reputational risks, that may affect the financial stability of the group might be investigated.”* [39] However, this explanation does not provide sufficient guidance or clarity. The very fact that certain risks “might” be investigated in individual cases, but not in others, is indicative of a regime that involves significant discretion and flexibility for the Norwegian authorities, which makes it very difficult for undertakings to gauge in advance whether the proposed acquisition or establishment will be permitted. Norway has not defined when it is deemed that the establishment or acquisition poses a “special risk” to the solvency of the parent institution, nor whether the test employed involves checking compliance with, for example, the higher capital requirements imposed by Norway or the minimum capital requirements set out in Title IV of Directive 2013/36/EU or, as the case might be, other directives.

With regard to the requirement that it should not be “difficult to supervise” the group, it is not clear whether Norway requires that, for example, only a credit institution can establish or 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. In its Reply to the Supplementary Letter of Formal Notice, the Norwegian Government states that this provision *“is included primarily to address cases with complex ownership structures”.*[40] However, this statement does not provide sufficient clarification to assuage the Authority with respect to

[39] Reply of the Norwegian Government to the Supplementary Letter of Formal Notice by letter of 2 December 2022 (ref. 16/39, Doc No 1334134), p 3.
[40] *Ibid.*

legal certainty. “Complex ownership structures” as a concept, are not legally defined, either in the Norwegian Government’s correspondence or in the relevant legislation, leading to the conclusion that whether an ownership structure is in fact complex will be decided on a case-by-case basis. In addition, if the provision is “primarily” included to address cases involving complex ownership structures, it remains to be determined for which subsidiary or secondary purposes the provision in question was intended to cater.

Section 4-1, fourth paragraph provides that Finanstilsynet “may” set conditions for, or veto, a particular establishment or acquisition if the establishment or acquisition will expose the Norwegian company or group to special risk, or the establishment or acquisition will make it difficult to supervise the group. This formulation suggests that Finanstilsynet disposes of a certain margin of discretion in determining whether an establishment or acquisition that satisfies these conditions should be subjected to conditions or vetoed. However, the parameters of this margin of discretion, or how it shall be exercised, are not described in the relevant legislation.

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.[41] 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 liable to negate the effectiveness of provisions of EEA law, in particular those relating to a fundamental freedom.[42] Therefore, an EEA State may be found not fulfilling its obligations under EEA law by leaving too much discretion to the national authorities.[43]

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

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 in its previous correspondence with the Authority.

5.2.1 Possible justification of the Norwegian rules

It is established case law that a national measure that 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.* appropriate to secure the attainment of the objective which it pursues (the suitability test) and does not go beyond what is

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[41] 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.

[42] 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.

[43] 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.

necessary in order to attain it (the necessity test).[44]

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 above 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.[45]

5.2.1.1 The objectives sought by the Norwegian Government

The Norwegian Government has explained that the overriding aim behind Section 4-1 of the FIA is to ensure financial stability, *i.e.* 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. 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. The Norwegian Government has noted, further, that the reform of Section 4-1 of the FIA entails that the model of supervision introduced in 2022 is significantly less burdensome than that which preceded it, and disputes the Authority’s characterisation thereof as a *de facto* authorisation scheme.

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.[46]

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.

5.2.1.2 The suitability of the national measure

The Norwegian Government claims that the *de facto* 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. This, the Norwegian Government argues, is achieved by mitigating the circumstances in which an acquisition or establishment can expose a Norwegian company or group to special risk (with potential knock-on effects for the market as a whole) and by ensuring that groups can be adequately supervised.

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[44] 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.

[45] 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.

[46] 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.

In its first Reasoned Opinion in the present case,[47] as well as in the Pre-Article 31 Letter,[48] the Authority expressed the view that the national measure then in force – which also involved an authorisation requirement – was not appropriate for obtaining 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.

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.*"

In its reply to the Reasoned Opinion, Norway noted the following:

> *"the EEA secondary legislation requires that the competent authority of the home State of a financial institution must have at its disposal the tools necessary to perform adequate entity supervision, in order to ensure sound and prudent operations in such entities, which in turn protects the financial stability in that State.*
>
> *… it follows from the review of secondary legislation that the procedure for assessments of establishments or acquisitions by supervised entities is not specifically regulated in the Directives the Authority relies on in its reasoned opinion."*

At the 2018 package meeting, the Norwegian Government further 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. At the (online) meeting on 23 February 2021 held to discuss the new rules (then in draft form), the Norwegian Government made similar remarks, noting that *ex ante* control was essential with respect to ensuring that special risk did not arise, and that groups would not be excessively difficult to supervise, and that this was the case even in relation to smaller financial institutions.

It should be noted that the explanations provided by the Norwegian Government are rather general in nature and the position of Norway has been inconsistent: in

[47] Reasoned Opinion of 12 March 2020 (Doc No 1120918).
[48] Pre-Article 31 letter of 22 June 2018 (Doc No 906322).

the reply to the Pre-Article 31 letter, the Norwegian Government claimed that the risk to 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. The latter position seems to have informed the reforms implemented in 2022, as the latter do not impose any *de minimis* thresholds, but rather apply to all establishments and acquisitions.

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

5.2.1.3 The necessity of the national measure

5.2.1.3.1 Credit institutions and insurance undertakings

Section 4-1 of the FIA provides that the Norwegian authorities – specifically Finanstilsynet – will review whether the establishment or acquisition in question poses a “special risk” to the company or group, or whether it will render it difficult to supervise the group. This position mirrors that of the previous regime, wherein the authorisation hinged upon whether it was determined that there was a risk to the solvency of the parent institution, whether the group structure and governance would be adequate and transparent after the establishment/acquisition and whether the type of the subsidiary acquired or established and the subsidiary’s activities were in accordance with the parent company’s license.

Defending the previous regime under Section 4-1 of the FIA, the Norwegian Government stated that although the applicable EEA secondary legislation implies a high degree of harmonisation throughout the EEA, Norway had imposed stricter requirements, where legally feasible. Examples include capital requirements and ownership rules.[49] 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 a mere consultation mechanism alone. In respect of the rules as they presently stand, the Norwegian Government has stated that the *de facto* authorisation requirement is intended to serve as a safety measure to prevent financial undertakings from establishing group structures that would cause serious effects on financial stability, and that this is reflected in what it dubs the “strict criteria” for intervention in paragraphs 4 and 5 of Section 4-1 of the FIA.[50]

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 of the FIA, it is appropriate to look at the harmonised provisions provided by this sectoral legislation.

Solvency

[49] 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).

[50] Reply of the Norwegian Government to the Supplementary Letter of Formal Notice by letter of 2 December 2022 (ref. 16/39, Doc No 1334134), pp 2-3.

With respect to the solvency of a financial group, Directives 2013/36/EU 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.[51] The same applies with regard to insurance undertakings.[52] 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.

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 2013/36/EU.[53] However, the imposition of stricter rules in one EEA State does not entail 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.

Norway has not adequately explained the meaning of “special risk” in Section 4-1 of the FIA. While, in its Reply to the Supplementary Letter of Formal Notice, the Norwegian Government explains that *“the assessment of “special risk” will include checking compliance with capital requirements, including minimum and buffer requirements. Additionally, other financial risks, such as operational, administrative and reputational risks, that may affect the financial stability of the group might be investigated,”*[54] the Authority observes, as previously notes, that this statement does not provide sufficient guidance or clarity. However, it is clear at least from the above statement that this will involve checking compliance with capital requirements. Whether these will be the higher capital requirements imposed by Norway or the minimum capital requirements set out in Directive 2013/36/EU is not clear, however. In either case, the Authority observes that, by checking compliance with capital requirements for the purposes of deciding whether a subsidiary in another EEA State could be established or acquired, Norway is intervening into the competence of that other EEA State as set out in Directive 2013/36/EU.

Moreover, Directives 2013/36/EU and 2009/138/EC provide sufficient means for EEA States, such as Norway, to ensure their chosen high level of protection. As mentioned above, the consultation obligation entails that the competent

[51] See Recital 43 and Chapter 4 of Directive 2013/36/EU.

[52] See Recitals 100 and 102 and Articles 128 *et seq* of Directive 2009/138/EC.

[53] It should be noted in this regard that Directive 2009/138/EC provides maximum harmonisation. However, specific provisions of the directive might leave some room for deviation for the EEA States.

[54] Reply of the Norwegian Government to the Supplementary Letter of Formal Notice by letter of 2 December 2022 (ref. 16/39, Doc No 1334134), p 3.

Norwegian authority is always informed of the intended establishment or acquisition of a subsidiary, and would thus always dispose of 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.

In its reply to the first Reasoned Opinion, Norway claims that the consultation mechanism alone *"does not provide for a sufficient degree of prudential supervision at the level of the parent undertaking, because the consultation mechanism concerns assessments to be made from the perspective of the subsidiary. Thus, the authorisation requirement is a vital supplement to the consultation mechanism, in order to safeguard the financial stability of the home market of the prospective parent undertaking."*[55] In the case of an acquisition of a 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.

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 2013/36/EU 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.

In the view of the Authority, where necessary, Finanstilsynet would be able to impose such conditions without having to resort to a *de facto* authorisation procedure, such as that in Section 4-1 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 2013/36/EU 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.[56]

[55] Reply of the Norwegian Government to the Authority's Reasoned Opinion, 8 December 2020 (Doc No 1168066) p 12.

[56] See Article 18, litra (e) of Directive 2013/36/EU, 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.

The group structure and governance

When discussing the authorisation scheme that was applicable prior to June 2022, it was noted by the Norwegian Government that, as the Norwegian competent authority will have certain supervisory responsibilities for the entire group under EEA sectoral legislation (being designated as the "group supervisor"), Norwegian authorities will need to approve the organization 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[57] and implemented accordingly in the Norwegian law. It was also asserted that the desired 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.

With respect to the new rules, similar arguments were proposed by the Norwegian Government during the (online) meeting held on 23 February 2021 to discuss the new rules (then in draft form) with the Authority. The Reply of the Norwegian Government to the Supplementary Letter of Formal Notice repeats the claim that the (new) regime does not go beyond what is allowed by relevant EEA secondary legislation. The letter draws attention to the fact that the relevant Directives require that the supervisory authorities of the home state ensure a new established group's continuous fulfilment of prudential requirements and oversee the group's exposure to financial risks. While acknowledging that this obligation only applies once the group has been established, the letter goes on to state that *"the Government is of the opinion that it is the supervisory authority for the group, rather than the competent authority of the subsidiary, that is in a better position to assess the risks an establishment will entail for the group."*[58]

Concerning the issue on how, after an authorisation has been granted pursuant to Section 4-1 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, and anti-money laundering issues), Finanstilsynet will require the group to remedy this. For example, 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 2013/36/EU and equivalent directives. In addition, the parent company provides consolidated financial and risk reporting regularly to Finanstilsynet.

Whilst discussing the rules that were in force prior to 2022, 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 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

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

[58] Reply of the Norwegian Government to the Supplementary Letter of Formal Notice by letter of 2 December 2022 (ref. 16/39, Doc No 1334134), pp 5 and 7.

exercise their powers foreseen in Directives 2013/36/EU and 2009/138/EC. The same arguments would seem to apply in respect of the amendments made to the FIA by the Norwegian Parliament, which entered into force on 1 June 2022.

Norway has thus confirmed, in essence, that the supervision of a financial group is performed by Finanstilsynet based on the measures already foreseen in Directives 2013/36/EU and 2009/138/EC. Norway has not attempted to show that supervision powers, in addition to those foreseen in Directives 2013/36/EU and 2009/138/EC, are necessary to supervise financial groups. However, it claims that powers pre-empting the establishment or acquisition of a subsidiary should be available to the Norwegian competent authorities.

In this respect, the Authority refers to its arguments set out above, to the effect that Directives 2013/36/EU 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 a *de facto* authorisation procedure such as that set out in Section 4-1 of the FIA.

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

The argumentation advanced in the previous subsection is also applicable concerning institutions for occupational retirement provision, payment institutions and electronic money institutions.

In particular, Articles 9 and 20 of Directive 2003/41/EC, Article 5 of Directive (EU) 2015/2366 and Article 3 of Directive 2009/110/EC contain requirements for cross-border activities and to obtain prior authorisation from the competent authority of the EEA State, in which these financial institutions are sought to be established or acquired. 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 (EU) 2015/2366 and 2009/110/EC, furthermore, provide specific rules where groups of companies are at issue.

Moreover, per the provisions of 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 acquire information from any financial institution wishing to establish or acquire a subsidiary in another EEA State.

In light of the foregoing, the Authority holds the view that a requirement that a Norwegian financial institution must also obtain a *de facto* 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.

5.2.1.3.3 Finance companies

In its previous correspondence with the Authority, the Norwegian Government has noted 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.

There is no EEA-level legal framework applicable to the taking up and 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 acquire information from any financial institution wishing to establish or acquire a finance company as a subsidiary in another EEA State and to subject it to certain conditions, if necessary.

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

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

In light of the foregoing, the Authority thus concludes that Section 4-1 of the FIA constitutes a disproportionate restriction on the freedom of establishment under Article 31 EEA.

FOR THESE REASONS,

THE EFTA SURVEILLANCE AUTHORITY,

pursuant to the first paragraph of Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, and after having given Norway the opportunity of submitting its observations,

HEREBY DELIVERS THE FOLLOWING REASONED OPINION

that by maintaining in force a *de facto* authorisation requirement, such as that in Section 4-1 of the Financial Institutions Act, Norway has failed to fulfil its obligations arising from

- Articles 8, 16 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 (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 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.

Further, the Authority must conclude that, by maintaining in force a *de facto* authorisation requirement, such as that in Section 4-1 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.

Pursuant to the second paragraph of Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, the EFTA Surveillance Authority requires Norway to take the measures necessary to comply with this reasoned opinion within *two months* of its receipt.

Done at Brussels,

For the EFTA Surveillance Authority

Arne Røksund	Stefan Barriga	Árni Páll Árnason
President	Responsible College Member	College Member

Melpo-Menie Joséphidès
Countersigning as Director,
Legal and Executive Affairs

This document has been electronically authenticated by Arne Roeksund, Melpo-Menie Josephides.