ESA | EFTA Surveillance Authority

Case No: 77973
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Decision No: 105/23/COL

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 EEA rules on the prudential assessment of acquisitions and increases of qualifying holdings in the financial sector

1 Introduction

By letter dated 30 September 2015 (Document No 774340), the EFTA Surveillance Authority ("the Authority") informed Norway that it had opened an own-initiative case to examine whether Norway's practices regarding the assessment of proposed acquisitions and increase of holdings in the financial sector are compliant with 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* ("Directive 2007/44/EC").[1]

By a letter of formal notice dated 15 March 2017 (Document No 817335), the Authority informed Norway that Articles 19a of Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 *relating to the taking up and pursuit of the business of credit institutions (recast)*[2] ("Directive 2006/48/EC"), as amended by Directive 2007/44/EC, and Article 59 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)*[3] ("Solvency II") had not been correctly implemented into the Norwegian law regulating credit institutions and insurance undertakings.

Directive 2006/48/EC has since been repealed and replaced by Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 *on access to the activity of credit institutions and the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[4] ("Directive 2013/36/EU" or "CRD IV"), entering into force under the EEA Agreement on 1 January 2020.[5] The assessment criteria of Article 19a of Directive 2006/48/EC, was subsequently found in Article 23 of CRD IV as amended[6] by Directive (EU) 2019/878 *as regards exempted entities, financial holding companies, mixed financial holding companies, remuneration, supervisory measures and powers and capital conservation measures*[7] ("Directive 2019/878" or "CRD V" and, together with CRD IV, "the CRD"), that entered into force in the EEA EFTA States on 1 July 2022.[8]

The Authority considered it necessary, due to the above changes in the EEA legislation, to send a supplementary letter of formal notice on 28 September 2022 (Doc No 1303403) supplementing the letter of formal notice dated 15 March 2017, where the Authority concluded that Article 22(8), 23(1) and (2) of CRD and Article 58(7), 59(1) and (2) of Solvency II, as incorporated and adapted to the EEA Agreement by Protocol 1 thereto, had not been correctly implemented into the Norwegian law regulating credit institutions and insurance undertakings.

Correspondence

[1] Act previously referred to at point 7a, 7b, 11, 14, 31 ba of Annex IX of the EEA Agreement.
[2] Act previously referred to at point 14 of Annex IX of the EEA Agreement.
[3] (OJ L 335, 17.12.2009, p. 1–155), act referred to at point 1 and 31d of Annex IX of the EEA Agreement.
[4] (OJ L 176, 27.6.2013, p. 338–436), act referred to at point 14 and 31ea of Annex IX of the EEA Agreement.
[5] Notification from the EFTA Secretariat dated 29 November 2019 (Document No 1100483).
[6] With changes to CRV IV by Directive 2019/878 Article 23(1)(b) of CRD IV was amended.
[7] (OJ L 150, 7.6.2019, p. 253–295), act referred to at point 14 of Annex IX of the EEA Agreement.
[8] Notification from the EFTA Secretariat dated 13 May 2022 (Document No 128950).

By the abovementioned letter of 30 September 2015,[9] the Authority sent Norway a request for information about Norway's practices regarding acquisitions and increase of holdings in the financial sector. In its request for information, the Authority referred to a publicly available letter from the Norwegian Ministry of Finance dated 25 June 2014, where it had been stated that according to consistent and long-lasting practices, individual persons and individual companies would, as a starting point, not be allowed to own more than 25 percent of the shares in a bank.

By letter dated 4 November 2015 (Document No 779208), Norway replied to the Authority's request for information.

By letter dated 7 January 2016 (Document No 787074), Norway provided information about its administrative practices regarding insurance undertakings and finance companies.

By letter dated 12 February 2016 (Document No 792236), the Authority invited Norway to provide information about provisions in Norwegian law setting out criteria for assessment on the suitability of acquirers of qualifying holdings.

By letter dated 21 March 2016 (Document No 798227), Norway replied to the Authority's request for information.

By letter dated 9 September 2016 (Document No 817559), the Authority invited Norway to provide information regarding national measures implementing Directive 2007/44 regarding investment firms.

By letter dated 6 October 2016 (Document No 821310), Norway replied to the Authority's request for information.

The case was discussed with representatives of Norway at the package meetings in Norway on 12 November 2015 and 27 October 2016.

By a letter of formal notice dated 15 March 2017[10] the Authority concluded that Articles 19a of Directive 2006/48/EC, as amended by Directive 2007/44/EC, and Article 59 of Solvency II had not been correctly implemented into the Norwegian law regulating credit institutions and insurance undertakings.

By a letter dated 15 June 2017 (Document No 861399), Norway submitted its written comments to the Authority on the letter of formal notice. Norway maintained that the Directives' provisions had been correctly implemented into Norwegian law but recognised that an adjusted wording could reflect the meaning of the directive in a more precise manner. To facilitate legal certainty, the Ministry was to look further into the matter and initiate necessary proceedings. The Ministry planned to organise a working group by autumn 2017, to be given the task of drafting possible amendments to the legislation to ensure that Norwegian law would reflect the wording of the directive more precisely.

The case was discussed with representatives of Norway at the package meeting in Norway on 25-26 October 2018.

By a letter dated 23 November 2018 (Documents No 1039563 and No 1039214) Norway was invited to inform the Authority about adoption of the revised legislation, in particular the following: (1) once the expert group had been established; its mandate and an estimated timeline for the legislative process, (2) the expert group's report with draft amendments to the legislation once it is provided to the Ministry of Finance, and (3) Norway's proposal to amend the legislation once this was put forward to the Parliament.

[9] Document No 774340.
[10] Document No 817335.

By a letter 19 December 2018 (Document No 1044470) Norway informed the Authority that Mr. Bekkedal had been given the task of producing a legal study regarding the assessment of acquisition and increase of holdings in the financial sector.[11]

By informal correspondence 2 July 2020 (Document No 1152257) the Authority requested Norway to inform the Authority whether any measures had been taken regarding the issue.

By informal correspondence 8 July 2020 (Document No 1152257) Authority received a reply from Norway indicating that the follow-up of the case had been delayed due to the Covid-19 outbreak, and that Norway would come back to the Authority on the issue.

The case was discussed with representatives of Norway at the package meeting in Norway on 28 October 2021.

By follow-up letter to the package meeting dated 26 November 2021 (Documents No 1247902 and No 1247323), the Authority informed Norway that it did not view the case as being directly and inseparably linked to other cases (specifically, Cases No 80996 and No 85119), as this issue concerned solely an implementation of a specific article introduced by Directive 2007/44/EC and an area fully harmonised under EEA secondary legislation. The Authority's understanding was that Norway had indicated its intention to address the issue and obtain a new report and/or an assessment in the context of a wider reform of the legal framework.

By informal correspondence of 17 January 2022 (Document No 1291928) the Norwegian Ministry of Finance stressed that it had made note of the Authority's assessment on the matter. On that basis, the Ministry of Finance stated that was committed to consider changes in the national legislation. It was expected that a proposal for amendments would be circulated for consultation in spring 2022, which would be submitted to Parliament in autumn 2022.

By a supplementary letter of formal notice of 28 September 2022 (Document No 1303403), the Authority reiterated its position based on the new EEA legislative framework, that is its conclusion that Article 22(8), 23(1) and (2) of CRD and Article 58(7), 59(1) and (2) of Solvency II, as incorporated and adapted to the EEA Agreement by Protocol 1 thereto, had not been correctly implemented into the Norwegian law regulating credit institutions and insurance undertakings.

By a letter dated 28 November 2022 (Document No 1332215, your ref 15/4296), Norway submitted its written comments to the Authority on supplementary letter of formal notice, wherein it recognized as before that Norwegian law could reflect the above-mentioned directives in a more precise manner. It further informed the Authority that Norway was committed to draft a legislative proposal to address the issue and assured the Authority that this process was given high priority. Norway stated that it would keep the Authority up to date on the issue and that the aim was to send a proposal on public consultation during the winter of 2022-2023.

To date, the Authority has received no further updates from Norway on the measures to be taken.

[11] Mr. Bekkedal's report, dated in April 2019, was published on the Norwegian Government's website. Therein, Mr. Bekkedal came to the conclusion that all of ESA's objections to the formulation of the criteria in the Financial Institutions Act § 6-3 should be addressed. See: https://www.regjeringen.no/no/dokumentarkiv/regjeringen-solberg/aktuelt-regjeringen-solberg/fin/nyheter/2019/utredning-om-utforming-av-eierkontrollreglene/id2643416/

2 Relevant national law

In Norway, the rules initially introduced by Directive 2007/44/EC were transposed by the Act of 10 April 2015 No 17 on Financial Institutions and Financial Groups ("the Financial Institutions Act" or "the Act")[12] regarding credit institutions and insurance undertakings. The Act applies to financial institutions. Section 1-3 first paragraph of the Act provides the following definition of the notion of "financial institutions":

> *(1) A "financial institution", is an entity carrying out business as a*
> *a) bank*
> *b) mortgage credit institution*
> *c) finance company*
> *d) Insurance undertaking*
> *e) pension undertaking*
> *f) financial holding company*[13]

Section 6-1, first and second paragraph of the Act provides:

> **Section 6-1. Acquisition of holdings in financial institutions etc.**
> *(1) Any person intending to carry out an acquisition whereby that person will become the owner of a qualifying holding in a financial institution must have notified Finanstilsynet thereof in advance. The same applies to acquisitions whereby a qualifying holding will reach or exceed 20 per cent, 30 per cent or 50 per cent, respectively, of the capital or voting rights of a financial institution, or whereby a holding confers controlling influence as referred to in section 1-3 of the Public Limited Companies Act. A qualifying holding is deemed to be a holding that represents 10 per cent or more of the capital or voting rights of a financial institution, or which otherwise makes it possible to exercise significant influence over the management of an institution and its business. (…)*
>
> *(2) Acquisitions covered by subsection (1) may only be carried out under a licence issued by the Ministry of Finance.* [14]

Section 6-3 of the Act provides:

> **Section 6-3. Assessment of suitability and propriety**
> *(1) In the decision of whether or not a licence shall be issued under section 6-1 subsection (2), the Ministry of Finance shall, with due regard for the need to assure proper and adequate management of the financial institution and its activities and in consideration of the level of influence the acquirer will as owner be able to exercise in the institution after the acquisition, assess the acquirer's suitability and propriety as owner of his overall holding after the acquisition, and whether the acquisition of the holding is financially sound.*
>
> *(2) In any assessment made under subsection (1) the Ministry of Finance shall in particular take into consideration:*
> *(a) the acquirer's general reputation, professional competence, experience and previous conduct in business relationships,*
> *(b) the general reputation, professional competence, experience and previous conduct in business relationships of persons who after the acquisition will form part of the board of directors or management of the institution's business,*
> *(c) whether the acquirer will be able to use the influence conferred by the holding to obtain advantages for his own or associated activity, or indirectly exert*

[12] Lov 17 april 2015 No 17 om finansforetak og finanskonsern (finansforetaksloven).
[13] Authority's translation.
[14] Authority's translation.

influence on other business activity, and whether the acquisition could result in impairment of the institution's independence.

(d) whether the acquirer's financial situation and available financial resources are adequate to the types of activity in which the institution is engaged or in which it must be assumed that the institution will become engaged after the acquisition, and whether the acquirer and its business are subject to financial supervision,

(e) whether the financial institution is and will continue to be in a position to meet capital adequacy and prudential requirements and other supervisory requirements that follow from the financial legislation,

(f) whether the ownership structure of the institution after the acquisition or special ties between the acquirer and a third party will impede effective supervision of the institution, in particular whether the group of which the institution will form part after the acquisition is organised in a manner that does not impede effective supervision, including effective exchange of information and allocation of supervisory tasks between the supervisory authorities involved,

(g) whether there are grounds for assuming that money laundering or financing of terrorism, or any attempt to commit such an act, is taking place in connection with the acquisition, or that the acquisition will increase the risk of such an act.[15]

3 Relevant EEA law

Directive 2007/44/EC amended the sectoral Directives regulating, *inter alia*, credit institutions and insurance undertakings by introducing identical rules and evaluation criteria for the prudential assessment of acquisitions and increases of holdings. The Directive did not regulate the stage of initial licensing of the institutions but only subsequent changes of ownership.

After Directive 2007/44/EC entered into force, the legal acts in the insurance field have been replaced by Solvency II. The rules introduced by Directive 2007/44/EC have been maintained in Solvency II.

Directive 2006/48/EC, which Directive 2007/44/EC amended, was repealed and replaced by another directive, CRD IV. The rules with regard to prudential assessment of acquisition and increases of holdings introduced by Directive 2007/44/EC have been maintained in CRD IV, and were amended by CRD V, together the CRD, as stated above, in the introduction.

Accordingly, the currently applicable EEA law is CRD, and Solvency II. However, references to the preamble of Directive 2007/44/EC are included below to the extent that those are relevant for the interpretation of the provisions which were introduced by that directive.

Article 22(1) of CRD provides that the EEA EFTA States are to require any natural or legal person who has decided to acquire a qualifying holding in a credit institution (the proposed acquirer) first to notify the competent authority of the credit institution in which they are seeking to acquire or increase a qualifying holding. The same notification obligation applies in case of decisions to further increase a qualifying holding as a result of which the proportion of voting rights or the capital held would reach or exceed 20 %, 30 % or 50 % or so that the credit institution would become its subsidiary.

Identical rules for insurance undertakings are set out in Article 57(1) of Solvency II.

[15] Authority's translation.

Article 23 of CRV, sets out rules for the assessment of the suitability of the potential owners of qualifying holdings:

> *(1) In assessing the notification provided for in Article 22(1) and the information referred to in Article 22(3), the competent authorities shall, in order to ensure the sound and prudent management of the credit institution in which an acquisition is proposed, and having regard to the likely influence of the proposed acquirer on that credit institution, assess the suitability of the proposed acquirer and the financial soundness of the proposed acquisition in accordance with the following criteria:*
>
> *(a) the reputation of the proposed acquirer;*
> *(b) the reputation, knowledge, skills and experience, as set out in Article 91(1), of any member of the management body who will direct the business of the credit institution 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 credit institution in which the acquisition is proposed;*
> *(d) whether the credit institution will be able to comply and continue to comply with the prudential requirements based on this Directive and Regulation (EU) No 575/2013, and where applicable, other Union law, in particular Directives 2002/87/EC and 2009/110/EC, including 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 of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing ([5]) 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.*
>
> *[…]*

Identical rules for insurance undertakings are set out in Article 59 of Solvency II, except for point 23(1)(b) that was amended in CRD IV with CRD V. Article 59(1)(b) provides:

> *(b) the reputation and experience of any person who will direct the business of the insurance or reinsurance undertaking as a result of the proposed acquisition;*

Article 3(33) of CRD defines "qualifying holding" as qualifying holding as defined in point (36) of Article 4(1) of Regulation (EU) No 575/2013:[16] a "qualifying holding" is there

[16] Act referred to at point 14a of Annex IX of the EEA Agreement.

defined as a "direct or indirect holding in an undertaking which represents 10 % or more of the capital or of the voting rights or which makes it possible to exercise a significant influence over the management of that undertaking".

The definition of "qualifying holding" in Article 13(21) of Solvency II is materially identical with the definition in CRD.

4 The Authority's Assessment

The Authority's initial requests for information to Norway related to the practices of the Norwegian Government. However, after various correspondence and having assessed the information provided by Norway, the Authority concludes that Norwegian law is not fully in compliance with the rules in Article 23 of CRD and Article 59 of Solvency II.

The reference to administrative practices below has been included in order to illustrate Norway's interpretation and application of the relevant national legislation. The Authority assessment of the administrative practices of Norway is dealt with in Case No 85119. In a reasoned opinion (Doc No 1376243) issued on the same date as the present reasoned opinion, the Authority concluded that Norway had incorrectly applied the relevant provisions of Solvency II and CRD, and accordingly is in breach of its obligations under those Directives.

As set out in detail below, the Authority must conclude that Article 23 of CRD and Article 59 of Solvency II have not been correctly implemented in Norwegian law in two respects: first, the Norwegian legislation allows the competent authorities to take into consideration other assessment criteria than those listed in the relevant EEA legislation CRD and Solvency II (section 4.1. below); second, assessment criteria which are not in line with the criteria of the relevant EEA legislation, CRD and Solvency II are maintained in Norwegian law (section 4.2 below).

The matter has been discussed repeatedly with Norway. As noted above, Norway submitted its written comments to the Authority on supplementary letter of formal notice, in its letter dated 28 November 2022 (Document No 1332215, your ref 15/4296). Therein, Norway recognized that Norwegian law could reflect the above-mentioned directives in a more precise manner. It further informed the Authority that Norway was committed to draft a legislative proposal to address the issue and assured the Authority that this process was given high priority. Norway stated that it would keep the Authority up to date on the issue and that the aim was to send a proposal on public consultation during the winter of 2022-2023. To date, the Authority has received no further updates from Norway on the measures to be taken.

4.1 Assessment criteria in Norwegian law is not exhaustive

Section 6-3(2) first sentence of the Financial Institutions Act provides that the criteria listed in the second paragraph shall "*in particular*" be taken into consideration in the suitability assessment. Such wording clearly indicates that criteria other than those exhaustively listed in CRD may be taken into account. In its letter of 21 March 2016, Norway confirmed that the list of assessment criteria in the second paragraph is not exhaustive.

Furthermore, in that letter, Norway confirmed its interpretation that the list of criteria in Article 19a of Directive 2006/48/EC (now found in Article 23 CRD) is *not* exhaustive and stated the following:

> *"The Norwegian Government is of the view that criteria set out in Article 19a cannot be understood as an exhaustive enumeration of criteria that are relevant when considering whether to grant a permit. Generally it must be assumed that*

> *the purpose of the Directive Article 19a is to set certain limits on the conditions other than the enumerated criteria, that should be taken into account when considering whether to grant a permit. This assumption is in the view of the Norwegian Government also supported by the preamble paragraph 3 of the Directive".*

The Authority notes that Article 23(2) of CRD and Article 59 of Solvency II provides that the competent authorities may oppose the acquisition "*only if there are reasonable grounds for doing so on the basis of the criteria set out in paragraph 1*".

The Authority further notes that Article 22(8) of CRD and Article 58(7) of Solvency II provide that EEA 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 the Directives.

Furthermore, the Authority refers to recital 6 of Directive 2007/44/EC, which stated in the second sentence that:

> "*Maximum harmonisation throughout the Community of the procedure and the prudential assessments, without the Member States laying down stricter rules, is therefore critical".*

The Authority notes that the Court of Justice of the European Union ("CJEU") in its judgment of 25 June 2015 in Case C-18/14[17] found that the Directive 92/49[18], which was amended by Directive 2007/44/EC, sets out maximum harmonisation rules. As stated by the CJEU:

> *"41 It follows, first of all, from the wording of Article 15b(2) of Directive 92/49 and recitals 2, 3 and 6 in the preamble to Directive 2007/44, that the list of criteria set out in Article 15b(1) of Directive 92/49 and in the light of which the prudential assessment of the proposed acquisition must be made, are exhaustive.*
>
> *42 The exhaustive nature is confirmed by the wording of 15a(7) of Directive 92/49, according to which the Member States may not impose requirements for the notification to and approval by the competent authorities of direct or indirect acquisitions of voting rights or capital that are more stringent than those set out in that directive".*[19]

The Authority also notes that in Case E-8/16 *Netfonds Holding and Others,* the EFTA Court found that any restrictions on acquisitions subsequent to authorisation of banks and insurance companies must not go beyond the conditions stipulated by Directive 2007/44/EC, and that are now found in CRD and Solvency II. As stated by the Court in paragraph 123:

> "[…] *Insofar as Question 3 relates to secondary acquisitions of qualifying holding the referring court needs to take into account that the regulation of such acquisitions was fully harmonised in EEA law by the Qualifying Holdings Directive. Subject to the specific conditions introduced by that directive, the provisions envisage that individual investors may hold more than 25 per cent of the share capital of a bank or an insurance company. Therefore, any restrictions on acquisitions subsequent to the authorisation of banks and insurance companies*

[17] Judgment of the CJEU of 25 June 2015, Case C-18/14, *CO Sociedad de Gestion y Partipacion and Others v De Nederlandsche Bank NV*, EU:C:2015:419, paragraphs 41 and 42.
[18] The provisions equivalent to Articles 15a(7), 15b(1) and (2) of Directive 92/49 are Article 19(8), 19b(1) and (2) in Directive 2006/48 (now Articles 22(8) and 23(1) and (2) CRD IV as amended) and Articles 58(7) and 59(1) and (2) of Solvency II.
[19] See Case C-18/14*, cited above*, paragraphs 41 and 42.

> *must not go beyond the conditions introduced by the Qualifying Holdings Directive."*[20]

In the light of the above, the Authority must conclude that the list of prudential assessment criteria, in Article 23(1) CRD,[21] and Article 59(1) of Solvency II are exhaustive.

In the letter of 4 November 2015, Norway stated that there seems to be a general acceptance that financial stability considerations should be given weight when conducting suitability and propriety testing. Norway referred to the Report of 11 February 2013 from the Commission to the European Parliament *et al*. concerning the application of Directive 2007/44/EC, in which it is explicitly stated that financial stability is a relevant criterion when assessing acquisitions in accordance with Directive 2007/44/EC.

The Authority has taken note of the following statement in paragraph 19 of that Report:

> *"Currently the Directive does not contain an explicit assessment criterion allowing competent authorities to assess the impact of the proposed acquisition on the stability of the financial system. However, financial stability is implicitly addressed by the assessment criteria of the Directive. In particular, the criteria on financial soundness of the proposed acquirer and on compliance with prudential requirements implicitly encompass the assessment of financial stability risks since both criteria have a forward looking element*".

The Authority does not see how the above Report corroborates the view of Norway. The Commission's view expressed in the Report is that financial stability is implicitly addressed by the assessment criteria of Directive 2007/44/EC. However, it cannot be taken into account as an additional, further-reaching and independent criterion.

In view of the above, the Authority considers that by maintaining in force Section 6-3(2), first sentence, of the Act, according to which the list of prudential assessment criteria is not exhaustive, Norway has failed to fulfil its obligation arising from Articles 22(8) and 23(1), first sentence, of CRD, and Articles 58(7) and 59(1), first sentence, of Solvency II.

5.2 The assessment criteria of Section 6-3(2) of the Act

As explained in detail below, the Authority considers that the criteria in Section 6-3(2) of the Act are not fully in line with those listed in Article 23 CRD and Article 59 of Solvency II. Given that the assessment criteria in Article 23 CRD and Article 59 of Solvency II are subject to maximum harmonisation, the deviation in national legislation from the criteria set out in those Directives amounts to incorrect implementation.

Initially the Authority wishes to recall that, where a sphere of economic activity has been subject to harmonisation at EEA level, any national measure relating thereto must be assessed in the light of the provisions of the harmonising measure and not those of primary EEA law.

In the letter of 21 March 2016 (Document No 798227), Norway stated that it is within the power of the national legislator to determine how the substantive requirements of the provisions of a directive shall be implemented into national law. In any event, Norway therein considered the criteria of Section 6-3 of the Act to be materially in line with the content of Directive 2007/44/EC.

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[20] Judgment of the EFTA Court of 16 May 2017, Case E-8/16 *Netfonds Holding and Others* [2017] EFTA Ct. Rep. 163, paragraph 123.

[21] Previously in Article 19a of Directive 2006/48/EC.

The Authority recalls that pursuant to Article 7 of the EEA Agreement, an act corresponding to an EU directive is binding, as to the result to be achieved, upon the Contracting Parties and is to be made part of their internal legal order leaving the authorities the choice of form and method of implementation.

Accordingly, as stated by the EFTA Court in Case E-15/12 *Wahl*[22] in paragraph 49, the implementation of a directive into domestic law does not necessarily require the provisions of the directive to be transposed in precisely the same words in a specific, express provision of national law, and a general legal context may be sufficient, provided it actually ensures the full application of the directive.

However, as stated by the EFTA Court in paragraph 54 of that judgment, "*the EEA States may not apply rules which are liable to jeopardise the achievement of the objectives pursued by the directive and, therefore, deprive it of its effectiveness*".[23]

In the present case, the Authority considers that the core objective of Directive 2007/44/EC was to provide legal certainty by establishing a clear and predictable prudential assessment criteria. In this respect, the Authority refers to recitals 2 and 3 of that directive. In order for the objectives of the directive to be achieved, it does not leave the EEA EFTA States any discretion to introduce assessment criteria in national legislation which deviate from or are additional to the assessment criteria.

In view of the above, the Authority considers that two of the assessment criteria in the Act – Section 6-3(2)(c) and (d) respectively – are additional to the criteria introduced by Directive 2007/44/EC, maintained in CRD and Solvency II, and thus constitute an incorrect implementation of CRD IV and Solvency II.

5.2.1 Section 6-3(2)(c) of the Act

Section 6-3(2)(c) of the Act provides the following:

> *"whether the acquirer will be able to use the influence conferred by the holding to obtain advantages for his own or associated activity, or indirectly exert influence on other business activity, and whether the acquisition could result in impairment of the institution's independence".*

Norway has outlined, in its letter dated 4 November 2015 (Document No 779208), the reasoning behind the regulatory framework by the following citation from the preparatory works:

> *"[The Ministry is of the view] that the regulatory framework should safeguard the independence of financial institutions in relation to other businesses and owners that might conceivably use their influence to favour themselves, their business associates or their private associates through underpriced loans, guarantees, etc. Control of, for example, a major financial group provides considerable influence over other businesses. Consequently, one should still seek to prevent non-financial owners from exerting undue influence over other businesses through major ownership stakes in Norwegian financial institutions, since such stakes may pave the way for arrangements motivated by extraneous considerations. Furthermore, one must still seek to prevent non-financial owners from using their positions to obtain favours (for example cheap credit, including credit that would otherwise not have been granted because of excessive risk) for themselves, their business associates or their private associates. Such conflicts of interest also provide incentives for imposing especially strict conditions on customers that are,*

[22] Judgment of the EFTA Court of 22 July 2013, Case E-15/12 *Jan Anfinn Wahl v the Icelandic State* [2013] EFTA Ct. Rep. 534, paragraph 49.
[23] *Ibid*.

> *for example, engaged in competition with such major owner's own business. Attaching weight to non-commercial considerations may also impair the position of other customers of the relevant financial institution, as well as the profitability of such financial institution, and hence also the other owners. In a worst case scenario, others will have to contribute funding to the financial institution in a rescue operation. Moreover, economic loss may be incurred if capital is not allocated to the most viable projects."*

Furthermore, Norway informed the Authority in its letter 21 March 2016 (Document No 798227) of a case of 25 January 2016 which demonstrates the Norwegian authorities' interpretation and application of that assessment criteria. The Norwegian Ministry of Finance stated the following, concerning Section 6-3(2)[24]:

> *"The second paragraph of this provision lists certain circumstances concerning the acquirer which the Ministry in the assessment under the first paragraph in particular shall take into consideration. [The acquirer's] suitability shall be assessed on the basis of a concrete, discretionary assessment of all relevant circumstances. Financial institutions' independence from individual persons and other businesses are relevant in the assessment. The same applies to the Ministry's licensing practice in similar cases. The principle of equal treatment is essential".*[25]

The Ministry's reasoning behind the decision not to consider the acquirer suitable to increase its holding to 29,99% was the following:

> *"The Ministry emphasizes, inter alia, the fact that [the acquirer] with an ownership share of 29,99% will obtain negative control of the bank on consolidated level. In case of low turnout, [the acquirer] may have decisive influence in the annual general meeting. As mentioned above, an essential aim of the legislation is to ensure that the financial industry remains independent of private persons and other industries. Accordingly, the Ministry of Finance considers that there is no basis for allowing [the acquirer] to increase the ownership share to 29,99 %".*[26]

The Ministry's decision to oppose the acquisition of 29,99 % is in the Authority's view not based on an assessment of the acquirer's integrity, professional competences or financial soundness. As the owner was considered as a "serious and sensible" owner of 15 % of the shares, the Ministry allowed the acquirer to increase its ownership up to 20 %.

It is the Authority's understanding that the provision in Section 6-3(2) represents a continuation of the provision in Section 2-4 of the Financial Institutions Act of 1988, which was replaced by the Act on 1 January 2016.

According to the preparatory works of Section 2-4 of the Financial Institutions Act, the Ministry considered that reasons for opposing an application pursuant to criterion c) would also be covered by a) and b). As referred to above, criterion a) relates to the reputation of the acquirer while criterion b) relates to the reputation of the persons who after the acquisition will form part of the board of directors or management of the financial institution's activities.

As set out in recital 8 of Directive 2007/44/EC, the criteria originally introduced by Article 19a(1)(a) and (b) of Directive 2006/48/EC, now in Article 23(1)(a) and (b) CRD and Article 59(1) and (2) of Solvency II related to the reputation of the acquirer would refer to "*whether any doubts exist about the integrity and professional competence of the*

[24] https://www.regjeringen.no/no/dokument/dep/fin/anbud-konsesjoner-og-brev/brev/utvalgte-brev/2016/soknad-om-okning-av-eierandel/id2472234/ .
[25] Authority´s translation.
[26] Authority´s translation.

proposed acquirer and whether these doubts are founded. Such doubts may arise, for instance, from past business conduct".

The Authority understands that the criteria (a) and (b) in Section 6-3(2) seem to transpose the criteria related to the reputation of the acquirer in Article 23(1)(a) and (b) of CRD and Article 59(1)(a) and (b) of Solvency II, as those criteria have been outlined in recital 8 of Directive 2007/44/EC. This indicates that the criterion in Section 6-3(2)(c) of the Act should be considered as an additional and independent criterion to the criteria in Section 6-3(2)(a) and (b).

Furthermore, the Authority notes that Section 6-3(2)(c) does not have a corresponding criterion in Article 23 CRD and Article 59 of Solvency II.

The assessment criterion in Section 6-3(2)(c) of the Act hardly has any connection with the acquirer's integrity and professional competence. Pursuant to subsection (c), the proposed acquirer may be considered as impairing the independence of the financial institution on the basis of different factors to doubts about its integrity and professional competence. Accordingly, the Authority considers that the scope of the criterion in subsection (c) is wider than the scope of criteria in subsections 23(1)(a) and (b) of CRD and Article 59(1)(a) and (b) of Solvency II. The Authority cannot see that the criterion in subsection (c) of the Act has a parallel in any of the other assessment criteria listed in Article 23 of CRD and Article 59 of Solvency II.

As mentioned above, a core objective of Directive 2007/44/EC was to introduce a limited set of clear prudential assessment criteria. The Authority considers that the criterion in in Section 6-3(2)(c) is an additional criterion to those listed in Article 23 of CRD and Article 59 of Solvency II. Accordingly, Article 22(8), 23(2) of CRD and Article 58(7) and 59(2) of Solvency II have not been correctly implemented into Norwegian law.

Furthermore, the Authority recalls that Article 23(1) first sentence CRD and Article 59(1) first sentence of Solvency II require an assessment of the suitability of the proposed acquirer. In the abovementioned decision of 25 January 2016, the Norwegian Ministry of Finance has explained that an essential aim of the Norwegian legislation is to ensure the financial industry's independence from other individual persons and other businesses. It is the Authority's understanding that the legal basis in Norwegian law would be Section 6-3(2)(c).

The Authority considers that ensuring the independence of the Norwegian financial industry, as underlined by the Norwegian Ministry of Finance in the abovementioned decision, is a criterion which does not relate to the individual capacity of a potential acquirer (such as financial soundness, competences, integrity). Rejecting an acquisition on the basis of such a criterion, indicates that Norway takes into consideration other factors than the suitability of the proposed acquirer. This is contrary to Article 23(1), first sentence, of CRD and Article 59(1), first sentence, of Solvency II.

Accordingly, by maintaining in force Section 6-3(2)(c) of the Act, Norway has failed to fulfil its obligation arising from Article 22(8), 23(1), first sentence, 23(2) of CRD and Articles 58(7) and 59(1), first sentence, and 59(2) of Solvency II.

5.2.2 Section 6-3(2)(d) of the Act

Section 6-3(2)(d) of the Act reads as follows:

> *"whether the acquirer's financial situation and available resources are adequate, especially in relation to the types of activity in which the institution is engaged or in which it must be assumed that the institution will become engaged after the*

acquisition, and whether the acquirer and its activities are subject to financial supervision".

The criterion "*whether the acquirer and its activities are subject to financial supervision*" does not have a parallel in the assessment criteria listed in Article 23(1) CRD and Article 59(1) of Solvency II.

The Authority notes that recital 8 of Directive 2007/44/EC provided that the assessment of the reputation of the acquirer is of particular relevance if the proposed acquirer is an unregulated entity but should be facilitated if the acquirer is authorised and supervised within the European Union. This recital, elaborating on the prudential assessment criteria originally introduced by Directive 2007/44/EC and maintained in Article 23(1) CRD and Article 59(1) of Solvency II, refers to situations where it would be of particular relevance to assess the acquirer's reputation, i.e. integrity and professional competence. It also implies that the acquirer might or might not be subject to financial supervision within the EEA.

Accordingly, the Authority considers that reference to whether the acquirer is subject to financial supervision Section 6-3(2)(d) of the Act is an additional criterion to those listed in Article 23(1) of CRD and Article 59(1) of Solvency II.

As referred to above, a core objective of Directive 2007/44/EC was to introduce a limited set of clear prudential assessment criteria. Accordingly, the Authority considers that reference to whether the acquirer is subject to financial supervision in Section 6-3(2)(d) of the Act is an additional criterion to those listed in Article 23(1) of CRD and Article 59(1) of Solvency II.

Accordingly, by maintaining in force Section 6-3(2)(d) of the Act, Norway has failed to fulfil its obligation arising from Articles 22(8) and 23(2) of CRD and Articles 58(7) and 59(2) of Solvency II.

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 Section 6-3(2), in particular its first sentence and provisions (c) and (d) thereof, of the Act of 10 April 2015 No 17 on Financial Institutions and Financial Groups, Norway has failed to fulfil its obligations arising from Articles 22(8), 23(1) and (2) 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*, referred to in Annex IX, point 14 to the EEA Agreement, as amended and adapted to the EEA Agreements by Protocol 1 thereto, and Articles 58(7), 59(1) and (2) of the 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), referred to in Annex IX, point 1, to the EEA Agreement, as amended and adapted to the EEA Agreement by Protocol 1 thereto.

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, 19 July 2023

For the EFTA Surveillance Authority

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

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

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