ESA | EFTA Surveillance Authority

Case No: 85119
Document No: 1376243
Decision No: 103/23/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 incorrect application of EEA rules on the prudential assessment of acquisitions and increases of qualifying holdings in the financial sector

ESA | EFTA Surveillance Authority

1 Introduction

By a letter dated 14 May 2020 (Doc No 1132290), the EFTA Surveillance Authority ("the Authority") informed Norway that it had received a complaint against Norway regarding administrative practices for the prudential assessment of acquisitions and increases of qualifying holdings in insurance companies. In the complainant's opinion, the circumstances relating to Norway's refusal to approve the increase by a private company of a holding in a Norwegian insurance company, from 24.99% to 29.99%, amounted to a breach of EEA rules on the prudential assessment of acquisitions and increases of qualifying holdings in the financial sector.

After having examined the complaint and the information submitted by Norway, the Authority considers that this refusal to approve an increase of a holding in a Norwegian insurance company is indicative of a general administrative practice in Norway concerning refusals to approve acquisitions and increases of holdings of more than 20-25% in insurance undertakings and credit institutions.

In this reasoned opinion, the Authority maintains its conclusions presented in the letter of formal notice of 28 September 2022 (Doc No 1308730), that Norway has failed to fulfil its obligation arising from Articles 57-59 of Directive 2009/138/EC *on the taking-up and pursuit of the business of insurance and reinsurance*[1] ("Solvency II"), as regards the insurance sector, and its obligation arising from Articles 22-23 of Directive 2013/36/EU *on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms*[2] ("CRD IV") as amended by Directive 2019/878 as regards exempted entities, financial holding companies, mixed financial holding companies, remuneration, supervisory measures and powers and capital conservation measures[3] ("CRD V" and, together with CRD IV, "CRD"), as regards the banking sector.

2 Correspondence

On 25 August 2020 (Doc No 1143769), the Authority issued a request for information, inviting Norway to submit information to the Authority by 25 September 2020.

Norway replied on 8 September 2020 (Doc No 1152256), requesting an extension of the deadline to 26 October 2020. This extension was granted by the Authority (Doc No 1153282).

On 26 October 2020 (Doc No 1160009, your ref. 20/3709 - 3), Norway replied to the Authority's letter ("the RQI response").

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[1] 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), incorporated into the EEA Agreement at point 1 of Annex IX to the Agreement by Decision of the EEA Joint Committee No 78/2011 of 1 July 2011.

[2] 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 (OJ L 176, 27.6.2013, p. 338), incorporated into the EEA Agreement at points 14 and 31ea of Annex IX to the Agreement by Decision of the EEA Joint Committee No 79/2019 of 29 March 2019.

[3] Directive (EU) 2019/878 of the European Parliament and of the Council of 20 May 2019 amending Directive 2013/36/EU *as regards exempted entities, financial holding companies, mixed financial holding companies, remuneration, supervisory measures and powers and capital conservation measures* (OJ L 150, 7.6.2019, p. 253), incorporated into the EEA Agreement at point 14 of Annex IX to the Agreement by Decision of the EEA Joint Committee No 383/2021 of 10 December 2021.

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

After having assessed the Norwegian rules, practices and other information provided by Norway, on 28 September 2022 (Doc No 1308730), the Authority issued a letter of formal notice to Norway. In this letter, the Authority stated that by maintaining in force the administrative practice which requires the approval of national authorities for acquiring 20-25% or more of voting rights or capital in insurance undertakings and credit institutions and which, in and of itself and where limited exceptions do not apply, results in the rejection of an application with no consideration of its merits, Norway had failed to fulfil its obligation arising from Articles 57-59 of Solvency II and Articles 22-23 of CRD, as adapted to the Agreement on the European Economic Area ("the EEA Agreement") by Protocol 1 thereto.

The case was discussed at the package meeting in Oslo on 27-28 October 2022. There, the representatives of Norway noted that research into the impact of different kinds of ownership structures on the governance of financial institutions supported continued reliance on the administrative practice. Moreover, that the administrative practice applied at the time of initial authorisation of insurance undertakings and credit institutions and that extending the practice to also cover subsequent acquisitions or increases of qualifying holdings ensured that the policy would not be circumvented.

Norway replied to the letter of formal notice by letter of 4 January 2023 (Doc No 1340360, your ref. 20/3709 -) ("the LFN response"). In its reply, Norway stated that it did not agree with the Authority's assessment. Norway argued that EEA law does not preclude the attaching of conditions to initial authorisations of financial undertakings and that it should not be possible to circumvent these conditions at a later stage. Moreover, that the rules and practices apply to financial undertakings as such and do not concern the suitability of shareholders.

3 Background

This case is linked to two other cases that the Authority has opened against Norway.

First, Case No 77973 concerning the Norwegian rules for the assessment of acquisitions and increases of qualifying holdings in the financial sector. In a reasoned opinion (Doc No 1384696) issued on the same date as the present reasoned opinion, the Authority concluded that Norway had incorrectly implemented the relevant provisions of Solvency II and CRD, and accordingly is in breach of its obligations under those Directives. This includes parts of the provisions which the Authority considers that Norway has failed to apply correctly in the present case.

Second, Case No 80996 concerning the Norwegian rules and practices for prior authorisation of credit institutions and insurance undertakings. In particular, the condition for authorisation set out in Section 3-3, second paragraph, first sentence of the Norwegian act on financial undertakings and financial groups ("the Financial Undertakings Act")[4], that three-quarters of the share capital of a bank or an insurance undertaking be subscribed for by way of a capital increase without preferential subscription rights ("the issue rule") and the administrative practice of not allowing any single shareholder to hold a stake of more than 20-25% ("the administrative practice"). In a reasoned opinion dated 11 March 2020 (Doc No 1092776), the Authority found that the Norwegian rules and practices effectively prevented any single shareholder, with only limited exceptions, from holding a stake of 25% or more in a financial undertaking at the

[4] LOV-2015-04-10-17 *Lov om finansforetak og finanskonsern (finansforetaksloven)*.

stage of initial authorisation. The Authority concluded that by maintaining in force those rules and practices, Norway had breached Articles 31 and 40 of the EEA Agreement.

In its response to that reasoned opinion (Doc No 1137825), Norway, while maintaining that the national measures in question did not breach the EEA Agreement, referred to the issue rule and the administrative practice collectively as "the dispersed ownership policy", and acknowledged that it formed part of its ownership control regime in the financial sector. This was also confirmed by Norway in the LFN response.

In the RQI response, Norway further confirmed that the administrative practice extended to the national authority's assessment of acquisitions and increases of holdings in excess of 20-25% in insurance undertakings. Moreover, it confirmed that the same would apply with respect to banks.

In this reasoned opinion, as in the letter of formal notice, the Authority has focused its assessment on the administrative practice as extended to the acquisition and increases of qualifying holdings in insurance undertakings and credit institutions.

4 Relevant national law

Section 3-2, first paragraph, second sentence of the Financial Undertakings Act reads:

> *Conditions may be attached to the licence, approval or consent, including that the business shall be operated in a particular manner or within certain limits, or other conditions in accordance with the purposes that the legislation on financial institutions is intended to serve.*[5]

Section 3-3, second paragraph, first sentence of the Financial Undertakings Act reads:

> *Three-quarters of the share capital of a bank or insurance undertaking shall be subscribed by increase of capital with no preferential right for shareholders or others.*[6]

5 Relevant EEA law

5.1 The Qualifying Holdings Directive

As set out in the letter of formal notice, Directive 2007/44/EC *on procedural rules and evaluation criteria for the prudential assessment of acquisitions and increase of holdings in the financial sector*[7] ("the Qualifying Holdings Directive") amended certain sectoral Directives to establish a fully harmonised legal framework for the prudential assessment of acquisitions by natural or legal persons of a qualifying holding in the financial sector.

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[5] English translation published by Finanstilsynet. In Norwegian, the provision reads as follows: "*Det kan settes vilkår for tillatelsen, godkjennelsen eller samtykket, herunder at virksomheten drives på en bestemt måte eller innenfor visse rammer, eller andre vilkår i samsvar med de formål som lovgivningen om finansforetak skal ivareta*."

[6] English translation published by Finanstilsynet. In Norwegian, the provision reads as follows: "*Tre firedeler av aksjekapitalen i bank eller forsikringsforetak skal være tegnet ved kapitalforhøyelse uten fortrinnsrett for aksjeeiere eller andre.*"

[7] 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), incorporated into the EEA Agreement at points 7a, 7b, 11, 14 and 31ba of Annex IX to the Agreement by Decision of the EEA Joint Committee No 79/2008 of 4 July 2008.

With the subsequent repeal of the directives which it amended, this Directive has also been repealed under the EEA Agreement. The full harmonisation has been retained in the current legal framework.

The provisions of the Qualifying Holdings Directive have been reflected in the new sectoral Directives and Regulations, in particular Solvency II, CRD and Directive 2014/65/EU *of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments*.[8]

Recital 2 in the preamble to the Qualifying Holdings Directive reads:

> *The legal framework has so far provided neither detailed criteria for a prudential assessment of the proposed acquisition nor a procedure for their application. A clarification of the criteria and the process of prudential assessment is needed to provide the necessary legal certainty, clarity and predictability with regard to the assessment process, as well as to the result thereof.*

Recital 3 in the preamble to the Qualifying Holdings Directive reads:

> *The role of the competent authorities in both domestic and cross-border cases should be to carry out the prudential assessment within a framework of a clear and transparent procedure and a limited set of clear assessment criteria of strictly prudential nature. It is therefore necessary to specify criteria for the supervisory assessment of shareholders and management in relation to a proposed acquisition and a clear procedure for their application. This Directive prevents any circumvention of the initial conditions for authorisation by acquiring a qualifying holding in the target entity in which the acquisition is proposed. This Directive should not prevent the competent authorities from taking into account commitments made by the proposed acquirer to meet prudential requirements under the assessment criteria laid down in this Directive, provided that the rights of the proposed acquirer under this Directive are not affected.*

Recital 4 in the preamble to the Qualifying Holdings Directive reads:

> *The prudential assessment of a proposed acquisition should not in any way suspend or supersede the requirements of on-going prudential supervision and other relevant provisions to which the target entity has been subject since its own initial authorisation.*

The second and third sentences of Recital 6 in the preamble to the Qualifying Holdings Directive read:

> *Maximum harmonisation throughout the Community of the procedure and the prudential assessments, without the Member States laying down stricter rules, is therefore critical. The thresholds for notifying a proposed acquisition or a disposal of a qualifying holding, the assessment procedure, the list of assessment criteria and other provisions of this Directive to be applied to the prudential assessment of proposed acquisitions should therefore be subject to maximum harmonisation.*

5.2 Definitions

[8] 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* (OJ L 173, 12.6.2014, p. 349), incorporated into the EEA Agreement at points 13b and 31ba of Annex IX to the Agreement by Decision of the EEA Joint Committee No 78/2019 of 29 March 2019.

The term 'insurance undertaking' is defined in point 1 of Article 13 of Solvency II as "a direct life or non-life insurance undertaking which has received authorisation in accordance with Article 14".

The term 'financial undertaking' is defined in point 25 of Article 13 of Solvency II as any of the following entities:

> *(a) a credit institution, a financial institution or an ancillary banking services undertaking within the meaning of Article 4(1), (5) and (21) of Directive 2006/48/EC*
> *respectively;*
>
> *(b) an insurance undertaking, or a reinsurance undertaking or an insurance holding company within the meaning of Article 212(1)(f);*
>
> *(c) an investment firm or a financial institution within the meaning of Article 4(1)(1) of Directive 2004/39/EC; or*
>
> *(d) a mixed financial holding company within the meaning of Article 2(15) of Directive 2002/87/EC*

The term 'credit institution' is defined in point 1 of Article 4(1) of Regulation 575/2013 *on prudential requirements for credit institutions and investment firms*[9] 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 account".

5.3 Prior authorisation requirements

Article 14(1) of Solvency II reads:

> *The taking-up of the business of direct insurance or reinsurance covered by this Directive shall be subject to prior authorisation.*

Article 8(1) of CRD reads:

> *Member States shall require credit institutions to obtain authorisation before commencing their activities. Without prejudice to Articles 10 to 14, they shall lay down the requirements for such authorisation and notify EBA.*

5.4 Qualifications of shareholders, authorisation refusal

The second subparagraph of Article 24(1) of Solvency II reads:

> *Those authorities shall refuse authorisation if, taking into account the need to ensure the sound and prudent management of an insurance or reinsurance undertaking, they are not satisfied as to the qualifications of the shareholders or members.*

Article 14(2) of CRD reads:

[9] Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 *on prudential requirements for credit institutions and investment firms* and amending Regulation (EU) No 648/2012 (OJ L 176, 27.6.2013, p. 1), incorporated into the EEA Agreement at points 14a and 31bc of Annex IX to the Agreement by Decision of the EEA Joint Committee No 79/2019 of 29 March 2019.

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 in accordance with the criteria set out in Article 23(1). Article 23(2) and (3) and Article 24 shall apply.

5.5 Requirement to notify when seeking to increase or acquire a qualifying holding

Article 57(1) of Solvency II reads:

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 an insurance or reinsurance undertaking or to further increase, directly or indirectly, such a qualifying holding in an insurance or reinsurance undertaking 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 insurance or reinsurance undertaking would become its subsidiary (the proposed acquisition), first to notify in writing the supervisory authorities of the insurance or reinsurance undertaking in which they are seeking to acquire or increase a qualifying holding, indicating the size of the intended holding and relevant information, as referred to in Article 59(4). Member States need not apply the 30 % threshold where, in accordance with Article 9(3)(a) of Directive 2004/109/EC, they apply a threshold of one third.

Article 22(1) of CRD reads:

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.

5.6 Not more stringent requirements

Article 22(8) of CRD reads:

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 58(7) of Solvency II reads:

Member States shall not impose requirements for the notification to and approval by the supervisory authorities of direct or indirect acquisitions of voting rights or capital that are more stringent than those set out in this Directive.

5.7 Assessment of qualifying holding notifications

Articles 59(1) of Solvency II reads:

> *In assessing the notification provided for in Article 57(1) and the information referred to in Article 58(2) the supervisory authorities shall, in order to ensure the sound and prudent management of the insurance or reinsurance undertaking in which an acquisition is proposed, and having regard to the likely influence of the proposed acquirer on the insurance or reinsurance undertaking, 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 insurance or reinsurance undertaking 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 insurance or reinsurance undertaking in which the acquisition is proposed;*
>
> *(d) whether the insurance or reinsurance undertaking will be able to comply and continue to comply with the prudential requirements based on this Directive and, where applicable, other Directives, notably, Directive 2002/87/EC, in particular, whether the group of which it will become part has a structure that makes it possible to exercise effective supervision, effectively exchange information among the supervisory authorities and determine the allocation of responsibilities among the supervisory 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 is being or has been committed or attempted, or that the proposed acquisition could increase the risk thereof.*

Articles 59(2) of Solvency II reads:

> *The supervisory 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.*

Article 23(1) of CRD reads:

> *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 is being or has been committed or attempted, or that the proposed acquisition could increase the risk thereof.

Article 23(2) of CRD reads:

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.

5.8 Guidelines

On 20 December 2016, the European supervisory authorities ("ESAs") published their Final Report on Joint Guidelines on the prudential assessment of acquisitions and increases of qualifying holdings in the financial sector.[10] The Guidelines applied

On 11 November 2021, the European Banking Authority ("EBA") published its Final Report on Guidelines on a common assessment methodology for granting authorisation as a credit institution under Article 8(5) of CRD.[11] Paragraph 146 of the guidelines reads:

For the purposes of Article 14(2) CRD, competent authorities should assess the compliance of shareholders and members with the criteria set out in Article 23(1) CRD as further specified in the ESAs' Joint Guidelines on the prudential assessment of qualifying holdings.

6 The Authority's Assessment

6.1 Incorrect implementation of the requirements set out in Solvency II and CRD

In a reasoned opinion in Case No 77973, the Authority concluded that Norway had incorrectly implemented certain provisions of Solvency II and CRD on the prudential assessment of acquisitions and increases of qualifying holdings in the financial sector by

[10] The Joint Guidelines applied from 1 October 2017. The competent authority in Norway submitted to the ESAs that it complies with the Joint Guidelines. The Joint Guidelines and a compliance table which includes the submission of the competent authority in Norway are available at https://www.eba.europa.eu/regulation-and-policy/other-topics/joint-guidelines-for-the-prudential-assessment-of-acquisitions-of-qualifying-holdings .

[11] Available at https://www.eba.europa.eu/regulation-and-policy/other-topics/guidelines-authorisation-credit-institutions .

any natural or legal person or such persons acting in concert ("the proposed acquirer"), and was accordingly in breach of its obligations under those Directives.

As noted in the Authority's letter of formal notice, EEA rules on the prudential assessment of acquisitions and increases of qualifying holdings in the financial sector have been fully harmonised. This is made clear in Recital 6 in the preamble to the Qualifying Holdings Directive and is reflected in Article 58(7) of Solvency II and Article 22(8) of CRD, which provide that EEA States cannot impose requirements for notification or approval of direct or indirect acquisitions of voting rights or capital in insurance undertakings and credit institutions that are more stringent than those set out in Solvency II or CRD.

Article 59(1) of Solvency II and Article 23(1) of CRD exhaustively set out the criteria for assessing the suitability of the proposed acquirer and the financial soundness of an acquisition of a qualifying holding, or an increase of a qualifying holding, in insurance undertakings and credit institutions, respectively. Only where there are reasonable grounds for doing so on the basis of this criteria, or if the information provided by the proposed acquirer is incomplete, can the national authorities oppose the acquisition, pursuant to Article 59(2) of Solvency II and Article 23(2) of CRD.

In addition, Article 57(1) of Solvency II and Article 22(1) of CRD set out the precise thresholds which trigger a notification from the proposed acquirer. These are restricted to the direct or indirect acquisition of a qualifying holding or when the proportion of the voting rights or of the capital held would reach or exceed 20%, 30% (or, alternatively, a threshold of one third) or 50% or so that the insurance undertaking or the credit institution would become its subsidiary.

Norway has maintained in force national rules that allow for the administrative practice which deviates from these requirements of Solvency II and CRD, as further set out in the reasoned opinion in Case No 77973.

6.2 Incorrect application of the requirements set out in Solvency II and CRD

6.2.1 The administrative practice

As is stated in the Authority's letter of formal notice, the complainant highlighted an administrative practice of requiring the proposed acquirer of a stake of 25% or more in a Norwegian insurance undertaking to seek the national authority's approval. Moreover, that approval would be granted only in exceptional circumstances.

In the RQI response and in the LFN response, Norway confirmed that the proposed acquirer would, as a main rule, not be authorised to acquire a stake of 20-25% in insurance undertakings and credit institutions.

6.2.2 No discretion to impose additional requirements for acquisitions and increases of qualifying holdings

Norway referred to the judgment of the Court of Justice of the European Union ("CJEU") in Case C-18/14[12] in support of its view that national authorities are free to require a certain ownership structure as a condition for the approval of acquisitions and increases of qualifying holdings in the financial sector.

The Authority notes, at the outset, that it follows from the wording of Article 59(2) of Solvency II and Article 23(2) of CRD and Recitals 2, 3 and 6 in the preamble to the Qualifying Holdings Directive that the list of criteria set out in Article 59(1) of Solvency II and Article 23(1) of CRD for carrying out the prudential assessment of proposed

[12] Judgment of the CJEU of 25 June 2015, Case C-18/14, *CO Sociedad de Gestión y Participación SA and Others* v *De Nederlandsche Bank NV*, EU:C:2015:419.

acquisitions and increases of qualifying holdings in insurance undertakings and credit institutions ("the proposed acquisition") are exhaustive. This has been confirmed by the CJEU in Case C-18/14, where it is stated that the list of criteria "and in the light of which the prudential assessment of the proposed acquisition must be made, are exhaustive."[13]

The exhaustive nature of the criteria is further confirmed by Article 58(7) of Solvency II and Article 22(8) of CRD, pursuant to which EEA States may not impose requirements for the notification to, and approval by, the national authorities of direct or indirect acquisitions of voting rights or capital that are more stringent than those set out in those directives, as the CJEU has also stated in its judgment in Case C-18/14.[14]

This full harmonisation of the prudential assessment of acquisitions and increases of qualifying holdings in insurance undertakings and credit institutions has also been recognised by the EFTA Court in its judgment in Case E-8/16 *Netfonds Holding and Others*. In that judgment, the EFTA Court made clear, with respect to the Qualifying Holdings Directive, that:

> *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 must not go beyond the conditions introduced by the Qualifying Holdings Directive.*[15]

The full harmonisation of EEA law on the procedural rules and assessment criteria for acquisition or increase of a qualifying holding in the financial sector, is intended to ensure legal certainty, clarity and predictability with regard to the assessment process in light of the increasing integration of EEA financial markets. This means that EEA States are not free to introduce application or approval requirements that go beyond those established by EEA law. The Authority considers that the administrative practice that is the subject of the present reasoned opinion does go beyond those requirements. This remains the case notwithstanding the exceptions which Norway has indicated that it applies for some mergers, acquisitions by other financial undertakings and as regards target entities which have been authorised to carry out only limited activities.

The Authority must conclude that by applying the administrative practice Norway has in effect introduced requirements for the notification to, and approval by, the national authorities of direct or indirect acquisitions of voting rights or capital that are more stringent than those set out in Solvency II and CRD, in breach of Article 58(7) of Solvency II and Article 22(8) of CRD.

As is evident from the circumstances described in the complaint, the administrative practice requires the proposed acquirer to seek the approval of national authorities for crossing the threshold of holding 25% of the capital or voting rights in an insurance undertaking, even if the proposed acquirer has previously been approved to hold a stake in excess of 20%. This deviates from the notification thresholds which are exhaustively laid out in Article 57(1) of Solvency II. The same notification thresholds apply with respect to credit institutions, see Article 22(1) of CRD.

Furthermore, with only limited exceptions, the administrative practice results in a decision to oppose each notification for acquiring or increasing a qualifying holding so that it would reach or exceed 25%. This is because, as Norway has acknowledged in the RQI response, "*[t]he requirement of dispersed ownership [...] prevents a single shareholder*

[13] *Ibid*, paragraph 41.
[14] *Ibid*, paragraph 42.
[15] Judgment of the EFTA Court of 16 May 2017 in Case E-8/16 *Netfonds Holding and Others* [2017] EFTA Ct. Rep. 163, paragraph 123.

from obtaining more than 20-25 per cent of the total shares in a financial institution". Thereby, in those circumstances, Norway fails to carry out a case-by-case assessment of whether the exhaustive criteria for the suitability of the proposed acquirer, as set out in Article 59(1) of Solvency II and Article 23(1) of CRD, have been met.

As regards the CJEU's judgment in Case C-18/14, the Authority notes that its subject matter can be distinguished from the case at hand. The CJEU assessed the situation where a national authority could oppose a proposed acquisition because the proposed acquirer did not fulfil the assessment criteria for acquiring a qualifying holding. In those circumstances, the CJEU ruled that national authorities could, in principle, attach restrictions or requirements to the approval of the proposed acquisitions instead of opposing it. The CJEU made clear that those restrictions could only be based on the exhaustive list of criteria applicable to the initial assessment of the proposed acquisition.[16] The administrative practice in Norway entails that no assessment is carried out of whether the criteria are fulfilled since, as acknowledged in the RQI response, Norway applies the administrative policy so that "*no single shareholder is (as a main rule) allowed to own more than 20-25 per cent of the total shares in financial institutions*". EEA law exhaustively sets out the criteria for assessing the suitability of the proposed acquirer and the financial soundness of the propsed acquisition. Only where there are reasonable grounds for opposing the propsed acquisition, based on the conclusions of this assessment, could national authorities attach restrictions or requirements to the approval of the proposed acquisitions instead of opposing it.

6.2.3 The administrative practice does not relate to the assessment of suitability

In the RQI response, Norway expressed its view that extending the administrative practice to the post-authorisation stage was crucial for maintaining the dispersed ownership policy. Since the dispersed ownership policy would, as a main rule, result in the rejection of an application for authorisation if a single shareholder or member ("shareholder") held a stake of more than 20-25% in the authorisation applicant, the Government argued that it could be circumvented if the same restrictions did not apply to subsequent acquisitions and increases of holdings.

Allowing for the initial authorisation requirements to be circumvented would, according to Norway, contradict the statement in Recital 3 in the preamble to the Qualifying Holdings Directive which provides that the "*Directive prevents any circumvention of the initial conditions for authorisation by acquiring a qualifying holding in the target entity in which the acquisition is proposed*." Recital 4 in the preamble to the Directive, on the interplay between the prudential assessment of the proposed acquisition and on-going prudential supervision and other relevant requirements placed on authorised undertakings, was also said to support this.

Moreover, Norway argued that the dispersed ownership policy was applied as a condition pursuant to Section 3-2, first paragraph, second sentence of the Financial Undertakings Act for the initial authorisation of insurance undertakings and credit institutions: a condition which Norway was free to apply since EEA rules had not fully harmonised the suitability assessment of shareholders at the stage of initial authorisation. Therefore, any acquisition or increase of holding of more than 20-25% would need to be assessed in light of those conditions irrespective of the EEA rules on the acquisitions and increases of qualifying holdings in the financial sector. This, Norway argued, should allow Norway to impose ownership structure requirements as a condition for the approval of acquisitions of qualifying holdings.

[16] Case C-18/14, *CO Sociedad de Gestión y Participación SA and Others* v *De Nederlandsche Bank NV*, cited above, paragraphs 46-48.

Additionally, Norway maintained that the Qualifying Holdings Directive was only intended to harmonise the suitability assessment of the proposed acquirer. It would contradict this intention if only these criteria could be applied when assessing the suitability of shareholders at the stage of initial authorisation.

In the LFN response, Norway reiterated its argumentation set out in the RQI response, that EEA law did not preclude EEA States from attaching conditions to the initial authorisation of financial undertakings and that these could not be circumvented by applying the rules on subsequent acquisition of qualifying holdings.

Norway also stated that Norwegian authorities had for a long time set requirements and conditions for authorisation of banking and insurance businesses. Norway had opted for a particularly high level of protection in the financial sector and that the stability and integrity of the financial system were essential parts of its approach to financial regulation. The rationale for this high level of protection was, according to Norway, explained in the preparatory works for the Financial Institutions Act, in particular Proposition No 50 (2002-2003).[17] Norway further noted that the dispersed ownership policy created safeguards against misuse of power and reduced the excessive risk incentives of large owners, which were evidenced by a recent scholarly publication.

In the LFN response, Norway also stated that the dispersed ownership policy did not concern the suitability of shareholders but was focused on the financial undertaking as such. Moreover, that EEA rules did not preclude Norway from pursuing this objective and that this was supported by the partly harmonising character of the Qualifying Holdings Directive and by Recital 3 in the preamble to that Directive.

Norway did maintain that a concrete assessment was carried out of notifications of a proposed acquisition of a qualifying holding, but that the national authorities also needed to assess whether the target entity would still fulfil the conditions attached to its initial authorisation.

The Authority cannot subscribe to the view of Norway that requirements for initial authorisation of insurance undertakings and credit institutions allow Norway to deviate from the exhaustive criteria for assessing acquisitions and increases of qualifying holdings in insurance undertakings and credit institutions. It is rather Norway's obligation to ensure that no provisions of national law or administrative practices circumvent or hinder the effective application of the fully harmonised EEA rules.

From a prudential point of view, it is essential that shareholders that are likely to exercise a significant influence over an insurance undertaking or a credit institution have the qualities necessary to promote the sound and prudent management of these entities. Recital 3 in the preamble to the Qualifying Holdings Directive makes it clear that national authorities have a role to play in ensuring this through a suitability assessment which should be of a strictly prudential nature.

As set out in the letter of formal notice, the Authority fails to see that the administrative practice relates to the assessment of suitability, as Norway also confirmed in the RQI response, where it stated that "*it is misleading to claim that the dispersed ownership rule is based on the suitability assessment of the owners of financial undertakings*". This has again been confirmed in the LFN response. As Norway has submitted in its response to the reasoned opinion in Case No 80996,[18] it is designed to pursue the dispersed ownership policy which has the objective of, firstly, reducing the risk of misuse of ownership powers and, secondly, reducing excessive risk incentives which are said to be inherent in financial undertakings with concentrated ownership structures. Its all-encompassing application makes no consideration of the suitability of an individual

[17] Ot.prp. nr. 50 (2002-2003).
[18] Doc No 1137825, referred to above.

shareholder, including whether the significant ownership of such a shareholder would put at risk the ability of the target entity to comply and continue to comply with the relevant prudential requirements. A total prohibition of certain ownership structures does not allow for carrying out an actual suitability assessment. In the absence of an assessment of suitability, there can be no reasonable grounds for opposing the proposed acquisition as is a requirement pursuant to both Article 59(2) of Solvency II and Article 23(2) of CRD.

In contrast to the fully harmonised rules on the assessment of suitability of the proposed acquirer, the authorisation requirements for insurance undertakings and credit institutions, as set out in Solvency II and CRD, are minimum harmonisation provisions. While the EEA States should require insurance undertakings and credit institutions to meet minimum requirements to obtain authorisation before commencing their activities, national law may provide for additional requirements. Those national requirements should be without prejudice to the requirements laid out in Solvency II and CRD on the suitability of shareholders at the time of authorisation, requirements which continue to apply to subsequent acquisitions and increases of qualifying holdings. Additionally, any national requirements with respect to credit institutions should be notified to EBA, as provided in Article 8(1) of CRD.

The second subparagraph of Article 24(1) of Solvency II and Article 14(2) of CRD provide that national authorities should refuse authorisation if they are not satisfied as to the suitability of the shareholders. Article 59(1) of Solvency II and Article 23(1) of CRD set out the criteria that a shareholder seeking to acquire a qualifying holding in an insurance undertaking or a credit institution, respectively, must meet in order to be considered suitable in the light of the objective of ensuring the sound and prudent management of credit institutions, having regard to the shareholder's likely influence on the insurance undertaking or credit institution concerned. While not explicitly set out in Solvency II, Article 14(2) of CRD makes it clear that the EEA States should for this assessment only apply the criteria for the prudential assessment of acquisitions and increases of qualifying holdings.[19] Paragraph 146 of EBA's guidelines on a common assessment methodology for granting authorisation as a credit institution further stresses the relevance of the suitability assessment of a proposed acquirer, also at the stage of initial authorisation.

Even if Norway had the discretion to put in place additional requirements for assessment of suitability at the stage of initial authorisation, the Authority considers that the administrative practice does not qualify as such since it does not concern the assessment of suitability.

Moreover, the Authority finds the administrative practice inconsistent. As Norway has explained, it is intended to ensure that authorised insurance undertakings and credit institutions continue to meet the requirements for their initial authorisations. However, the administrative practice puts in place additional requirements for the proposed acquirer rather than being applied to the authorised entities. Thereby, Norway has effectively put in place a regime for the notification and approval of acquisitions of voting rights or capital which deviates from the provisions of Solvency II and CRD, in breach of Article 58(7) of Solvency II and Article 22(8) of CRD and which is removed from the conditions of initial authorisation.

The Authority's conclusion is not altered by Norway's statement in the LFN response, that the dispersed ownership policy did not concern the suitability of shareholders but was focused on the financial undertaking as such. This is contradicted by Norway's further statement that, in addition to the concrete assessment of notifications of a proposed acquisition of a qualifying holding, national authorities also needed to ensure that the target entity would still fulfil the conditions attached to its initial authorisation. The practical implication would be that when this additional condition was not met, the

[19] Judgment of the General Court of 2 February 2022, Case T-27/19, *Pilatus Bank plc and Pilatus Holding Ltd.* v *European Central Bank*, EU:T:2022:46, paragraphs 64-71 and 129.

national authorities would oppose the proposed acquisition, as notified by the proposed acquirer. This entails a notification and approval requirement for direct or indirect acquisitions of voting rights or capital that are more stringent than those set out in Solvency II and CRD, in breach of Article 58(7) of Solvency II and Article 22(8) of CRD.

Neither is the Authority's conclusion altered by the fact that Norway has maintained these practices for a long time nor by the reasons put forward by Norway in the LFN response as apparent justification of the measures. Contrary to the statements of Norway, the Qualifying Holdings Directive introduced maximum harmonisation of the procedure and the prudential assessments for the acquisition of a qualifying holding.[20] Norway was obliged to ensure full application of the Directive not only in fact but also in law.[21] The same applies with respect to the provisions of Solvency II and CRD which have since replaced the Qualifying Holdings Directive. This includes an obligation to change any contradictory rules and practices which may have been in place when the fully harmonised EEA rules were introduced, regardless of their long-standing nature. Moreover, since the EEA rules for acquiring or increasing a qualifying holding in the financial sector have been fully harmonised, there is no room for the EEA states to introduce stricter requirements.[22]

6.2.4 Legal certainty not secured by other means

Norway also submitted in the RQI response that the additional conditions for acquisition or increases of qualifying holdings in insurance undertakings and credit institutions in Norway did not undermine the aim of the EEA rules to achieve "the necessary legal certainty, clarity and predictability" for the prudential assessment of acquisitions of qualifying holdings, as expressed in Recital 2 in the preamble to the Qualifying Holdings Directive. This, Norway argued, was because the introduction of new criteria had been limited by the Qualifying Holdings Directive and also because the proposed acquirer would, in any case, gather the necessary information on the applicable national rules, whether by way of a legal due diligence review or otherwise.

In the LFN response, Norway further submitted that legal certainty was ensured by attaching the conditions for the assessment process to the initial authorisation of the target entity.

The Authority notes that, in light of the exhaustive nature of the criteria for assessing the proposed acquisition, Norway is not free to choose other means to secure the legal certainty sought. In the Authority's view, Norway's reference to the customary practice of carrying out a detailed review of the national legal framework to ascertain the applicable rules and to identify the administrative practice rather shows the lack of legal certainty for market participants.

Moreover, the Authority fails to see that attaching conditions to the initial authorisation of the target entity ensures legal certainty.

An administrative practice that does not provide sufficient predictability for proposed acquirers and that goes beyond national rules which themselves are incompatible with fully harmonised EEA rules cannot be considered to validly pursue an objective of legal certainty. Legal certainty can only be achieved through an administrative practice that is compliant with harmonised EEA rules, themselves intended to ensure legal certainty.

FOR THESE REASONS,

[20] See Recital 6 in the preamble to the Qualifying Holdings Directive.
[21] Judgment of the EFTA Court of 9 December 2013 in Case E-15/12 *Jan Anfinn Wahl* and *the Icelandic State* [2013] EFTA Ct. Rep. 534, paragraph 51 and the case law cited therein.
[22] As set out in Section 6.2.2 of this reasoned opinion.

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 the administrative practice which requires the approval of national authorities for acquiring 25% or more of voting rights or capital in insurance undertakings and credit institutions and which, in and of itself and where limited exceptions do not apply, result in the rejection of an application with no consideration of its merits, Norway has failed to fulfil its obligation arising from Articles 57-59 of Directive 2009/138/EC *on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II)*, as amended and adapted to the EEA Agreement by Protocol 1 thereto and from Articles 22-23 of Directive 2013/36/EU *on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms* as amended by Directive 2019/878 *as regards exempted entities, financial holding companies, mixed financial holding companies, remuneration, supervisory measures and powers and capital conservation measures*, as 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
Director
Legal and Executive Affairs

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