REPORT FOR THE HEARING

in Case E-13/23

APPLICATION to the Court 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 in the case between

EFTA Surveillance Authority

and

The Kingdom of Norway,

seeking a declaration that, by maintaining in force an authorisation requirement to set up subsidiaries of Norwegian financial institutions in other EEA States, Norway has breached the following provisions: Articles 14, 26, 57 and 60 of Directive 2009/138/EC, Articles 8, 16 and 24 of Directive 2013/36/EU, Articles 9 and 20 of Directive 2003/41/EC, Article 5 of Directive (EU) 2015/2366, Article 3 of Directive 2009/110/EC and Article 31 of the EEA Agreement.

I Introduction

1. The EFTA Surveillance Authority ("ESA") asserts that, by maintaining an authorisation requirement for Norwegian financial institutions setting up subsidiaries in other EEA States, prescribed by Section 4-1 of the Norwegian Financial Institutions Act ("the FIA"), Norway has breached its obligations under Article 31 of the Agreement on the European Economic Area ("EEA Agreement" or "EEA") as well as Articles 14, 26, 57 and 60 of Directive 2009/138/EC, Articles 8, 16, and 24 of Directive 2013/36/EU, Articles 9 and 20 of Directive 2003/41/EC, Article 5 of Directive (EU) 2015/2366 and Article 3 of Directive 2009/110/EC.

2. Norway contests the action.

II Legal background

EEA law

3. Article 31 EEA reads:

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

nationals of any EC Member State or EFTA State established in the territory of any of these States.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of Article 34, second paragraph, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of Chapter 4.

2. Annexes VIII to XI contain specific provisions on the right of establishment.

4. 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) (OJ 2009 L 335, p. 1; Norwegian EEA Supplement 2015 No 76, p. 987) ("Directive 2009/138") was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 78/2011 of 1 July 2011 (OJ 2011 L 262, p. 45; Norwegian EEA Supplement 2011 No 54, p. 57). Constitutional requirements were indicated and fulfilled by Norway on 23 October 2012, and the decision entered into force on 1 December 2012.

5. Recital 11 of Directive 2009/138 reads:

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

6. Recital 74 of Directive 2009/138 reads:

The legal framework has so far provided neither detailed criteria for a prudential assessment of a proposed acquisition nor a procedure for their application. A clarification of the criteria and the process of prudential assessment is therefore needed to provide the necessary legal certainty, clarity and predictability with regard to the assessment process, as well as to the result thereof. Those criteria and procedures were introduced by provisions in Directive 2007/44/EC. As regards insurance and reinsurance those provisions should therefore be codified and integrated into this Directive.

7. Recital 75 of Directive 2009/138 reads:

Maximum harmonization throughout the Community of those procedures and prudential assessments is therefore critical. However, the provisions on qualifying holdings should not prevent the Member States from requiring that the supervisory authorities are to be informed of acquisitions of holdings below the thresholds laid down in those provisions, so long as a Member State imposes no more than one additional threshold below 10% for that purpose. Nor should those provisions prevent the supervisory authorities from providing general guidance as to when such holdings would be deemed to result in significant influence.

8. Article 14 of Directive 2009/138, entitled "Principle of authorisation", reads:

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

2. The authorisation referred to in paragraph 1 shall be sought from the supervisory authorities of the home Member State by the following:

(a) any undertaking which is establishing its head office within the territory of that Member State; or

(b) any insurance undertaking which, having received an authorisation pursuant to paragraph 1, wishes to extend its business to an entire insurance class or to insurance classes other than those already authorised.

9. Article 18 of Directive 2009/138, entitled "Conditions for authorisation", reads:

1. The home Member State shall require every undertaking for which authorisation is sought:

(a) in regard to insurance undertakings, to limit their objects to the business of insurance and operations arising directly therefrom, to the exclusion of all other commercial business;

(b) in regard to reinsurance undertakings, to limit their objects to the business of reinsurance and related operations; that requirement may include a holding company function and activities with respect to financial sector activities within the meaning of Article 2(8) of Directive 2002/87/EC;

(c) to submit a scheme of operations in accordance with Article 23;

(d) to hold the eligible basic own funds to cover the absolute floor of the Minimum Capital Requirement provided for in Article 129(1)(d);

(e) to show evidence that it will be in a position to hold eligible own funds to cover the Solvency Capital Requirement, as provided for in Article 100, going forward;

(f) to show evidence that it will be in a position to hold eligible basic own funds to cover the Minimum Capital Requirement, as provided for in Article 128, going forward;

(g) to show evidence that it will be in a position to comply with the system of governance referred to in Chapter IV, Section 2;

(h) in regard to non-life insurance, to communicate the name and address of all claims representatives appointed pursuant to Article 4 of Directive 2000/26/EC in each Member State other than the Member State in which the authorisation is sought if the risks to be covered are classified in class 10 of Part A of Annex I to this Directive, other than carrier's liability.

2. An insurance undertaking seeking authorisation to extend its business to other classes or to extend an authorisation covering only some of the risks pertaining to one class shall be required to submit a scheme of operations in accordance with Article 23.

It shall, in addition, be required to show proof that it possesses the eligible own funds to cover the Solvency Capital Requirement and Minimum Capital Requirement provided for in the first paragraph of Article 100 and Article 128.

3. Without prejudice to paragraph 2, an insurance undertaking pursuing life activities, and seeking authorisation to extend its business to the risks listed in classes 1 or 2 in Part A of Annex I as referred to in Article 73, shall demonstrate that it:

(a) possesses the eligible basic own funds to cover the absolute floor of the Minimum Capital Requirement for life insurance undertakings and the absolute floor of the Minimum Capital Requirement for non-life insurance undertakings, as referred to in Article 129(1)(d);

(b) undertakes to cover the minimum financial obligations referred to in Article 74(3), going forward.

4. Without prejudice to paragraph 2, an insurance undertaking pursuing non-life activities for the risks listed in classes 1 or 2 in Part A of Annex I, and seeking authorisation to extend its business to life insurance risks as referred to in Article 73, shall demonstrate that it:

(a) possesses the eligible basic own funds to cover the absolute floor of the Minimum Capital Requirement for life insurance undertakings and the absolute floor of the Minimum Capital Requirement for non-life insurance undertakings, as referred to in Article 129(1)(d);

(b) undertakes to cover the minimum financial obligations referred to in Article 74(3) going forward.

10. Article 26 of Directive 2009/138, entitled "Prior consultation of the authorities of other Member States", reads:

1. The supervisory authorities of any other Member State concerned shall be consulted prior to the granting of an authorisation to:

(a) a subsidiary of an insurance or reinsurance undertaking authorised in that Member State;
(b) a subsidiary of the parent undertaking of an insurance or reinsurance undertaking authorised in that Member State; or
(c) an undertaking controlled by the same person, whether natural or legal, who controls an insurance or reinsurance undertaking authorised in that Member State.

2. The authorities of a Member State involved which are responsible for the supervision of credit institutions or investment firms shall be consulted prior to the granting of an authorisation to an insurance or reinsurance undertaking which is:

(a) a subsidiary of a credit institution or investment firm authorised in the Community;

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

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

3. The relevant authorities referred to in paragraphs 1 and 2 shall in particular consult each other when assessing the suitability of the shareholders and the fit and proper requirements of all persons who effectively run the undertaking or have other key functions involved in the management of another entity of the same group.

They shall inform each other of any information regarding the suitability of shareholders and the fit and proper requirements of all persons who effectively run the undertaking or have other key functions which is of relevance to the other competent authorities concerned for the granting of an authorisation as well as for the ongoing assessment of compliance with operating conditions.

11. Article 57 of Directive 2009/138, entitled "Acquisitions", reads:

1. Member States shall require any natural or legal person or such persons acting in concert (the proposed acquirer) who have taken a decision either to acquire, directly or indirectly, a qualifying holding in 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.

2. Member States shall require any natural or legal person who has taken a decision to dispose, directly or indirectly, of a qualifying holding in an insurance or reinsurance undertaking first to notify in writing the supervisory authorities of the home Member State, indicating the size of that person's holding after the intended disposal. Such a person shall likewise notify the supervisory authorities of a decision to reduce that person's qualifying holding so that the proportion of the voting rights or of the capital held would fall below 20 %, 30 % or 50 % or so that the insurance or reinsurance undertaking would cease to be a subsidiary of that person. 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.

12. Article 59 of Directive 2009/138, entitled "Assessment", reads, in extract:

1. 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.

2. 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.

3. Member States shall neither impose any prior conditions in respect of the level of holding that must be acquired nor allow their supervisory authorities to examine the proposed acquisition in terms of the economic needs of the market.

...

13. Article 60 of Directive 2009/138, entitled "Acquisitions by regulated financial undertakings", reads:

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

(a) a credit institution, insurance or reinsurance undertaking, investment firm or management company within the meaning of point 2 of Article 1a of Directive 85/611/EEC (the UCITS management company) authorised in another Member State or in a sector other than that in which the acquisition is proposed;

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

> *(c) a natural or legal person controlling a credit institution, insurance or reinsurance undertaking, investment firm or UCITS management company authorised in another Member State or in a sector other than that in which the acquisition is proposed.*
>
> *2. The supervisory authorities shall, without undue delay, provide each other with any information which is essential or relevant for the assessment. In this regard, the supervisory authorities shall communicate to each other upon request all relevant information and shall communicate on their own initiative all essential information. A decision by the supervisory authority that has authorised the insurance or reinsurance undertaking in which the acquisition is proposed shall indicate any views or reservations expressed by the supervisory authority responsible for the proposed acquirer.*

14. Article 145 of Directive 2009/138, entitled "Conditions for branch establishment", reads, in extract:

> *1. Member States shall ensure that an insurance undertaking which proposes to establish a branch within the territory of another Member State notifies the supervisory authorities of its home Member State. ...*

15. Article 146 of Directive 2009/138, entitled "Communication of information", reads, in extract:

> *1. Unless the supervisory authorities of the home Member State have reason to doubt the adequacy of the system of governance or the financial situation of the insurance undertaking or the fit and proper requirements in accordance with Article 42 of the authorised agent, taking into account the business planned, they shall, within three months of receiving all the information referred to in Article 145(2), communicate that information to the supervisory authorities of the host Member State and shall inform the insurance undertaking concerned thereof. ...*

16. 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 (OJ 2013 L 176, p. 338; Norwegian EEA Supplement 2022 No 13, p. 569), as corrected by OJ 2017 L 20, p. 1, ("Directive 2013/36") was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 79/2019 of 29 March 2019 (OJ 2019 L 321, p. 170; Norwegian EEA Supplement 2019 No 99, p. 1). Constitutional requirements were indicated and fulfilled by Norway on 25 June 2019 and the decision entered into force on 1 January 2020.

17. Article 3(1)(1) of Directive 2013/36 adopts as a definition for the term "credit institution" the definition set out in point (1) of Article 4(1) of Regulation (EU) No 575/2013 which in turn reads:

'credit institution' means 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;

18. Recital 15 of Directive 2013/36 reads:

It is appropriate to effect harmonisation which is necessary and sufficient to secure the mutual recognition of authorisation and of prudential supervision systems, making possible the granting of a single licence recognised throughout the Union and the application of the principle of home Member State prudential supervision.

19. Recital 25 of Directive 2013/36 reads:

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

20. Recital 47 of Directive 2013/36 reads:

Supervision of institutions on a consolidated basis aims to protect the interests of depositors and investors of institutions and to ensure the stability of the financial system. In order to be effective, supervision on a consolidated basis should therefore be applied to all banking groups, including those the parent undertakings of which are not credit institutions or investment firms. Member States should provide competent authorities with the necessary legal instruments to enable them to exercise such supervision.

21. Recital 49 of Directive 2013/36 reads:

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

22. Article 8 of Directive 2013/36, entitled "Authorisation", reads, in extract:

1. 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.

2. EBA shall develop draft regulatory technical standards to specify:

(a) the information to be provided to the competent authorities in the application for the authorisation of credit institutions, including the programme of operations provided for in Article 10;

(b) the requirements applicable to shareholders and members with qualifying holdings pursuant to Article 14; and

(c) obstacles which may prevent effective exercise of the supervisory functions of the competent authority, as referred to in Article 14.

...

23. Article 14 of Directive 2013/36, entitled "Shareholders and members", reads:

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

In determining whether the criteria for a qualifying holding are fulfilled, the voting rights referred to in Articles 9 and 10 of Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and the conditions regarding aggregation thereof set out in Article 12(4) and (5) of that Directive, shall be taken into account.

Member States shall not take into account voting rights or shares which institutions hold as a result of providing the underwriting of financial instruments or placing of financial instruments on a firm commitment basis included under point 6 of Section A of Annex I to Directive 2004/39/EC, provided that those rights are not exercised or otherwise used to intervene in the management of the issuer and are disposed of within one year of acquisition.

2. The competent authorities shall refuse authorisation to commence the activity of a credit institution if, taking into account the need to ensure the sound and prudent management of a credit institution, they are not satisfied as to the suitability of the shareholders or members, in particular where the criteria set out in Article 23(1) are not met. Article 23(2) and (3) and Article 24 shall apply.

3. Where close links exist between the credit institution and other natural or legal persons, competent authorities shall grant authorisation only if those links do not prevent the effective exercise of their supervisory functions.

The competent authorities shall refuse authorisation to commence the activity of a credit institution where the laws, regulations or administrative provisions of a third country governing one or more natural or legal persons with which the credit institution has close links, or difficulties involved in the enforcement of those laws, regulations or administrative provisions, prevent the effective exercise of their supervisory functions.

The competent authorities shall require credit institutions to provide them with the information they require to monitor compliance with the conditions referred to in this paragraph on an ongoing basis.

24. Article 16 of Directive 2013/36, entitled "Prior consultation of the competent authorities of other Member States", reads:

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

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

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

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

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

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

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

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

3. The relevant competent authorities referred to in paragraphs 1 and 2 shall in particular consult each other when assessing the suitability of the shareholders and the reputation and experience of members of the

management body involved in the management of another entity of the same group. They shall exchange any information regarding the suitability of shareholders and the reputation and experience of members of the management body which is of relevance for the granting of an authorisation and for the ongoing assessment of compliance with operating conditions.

25. Article 22 of Directive 2013/36, entitled "Notification and assessment of proposed acquisitions", reads:

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

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

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

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

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

For the period between the date of request for information by the competent authorities and the receipt of a response thereto by the proposed acquirer, the assessment period shall be suspended. The suspension shall not exceed 20 working days. Any further requests by the competent authorities for

completion or clarification of the information shall be at their discretion but shall not result in a suspension of the assessment period.

4. The competent authorities may extend the suspension referred to in the second subparagraph of paragraph 3 up to 30 working days if the proposed acquirer is situated or regulated in a third country or is a natural or legal person not subject to supervision under this Directive or under Directive 2009/65/EC, 2009/138/EC, or 2004/39/EC.

5. If the competent authorities decide to oppose the proposed acquisition, they shall, within two working days of completion of the assessment, and not exceeding the assessment period, inform the proposed acquirer in writing, providing the reasons. Subject to national law, an appropriate statement of the reasons for the decision may be made accessible to the public at the request of the proposed acquirer. This shall not prevent a Member State from allowing the competent authority to publish such information in the absence of a request by the proposed acquirer.

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

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

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

9. EBA shall develop draft implementing technical standards to establish common procedures, forms and templates for the consultation process between the relevant competent authorities as referred to in Article 24.

EBA shall submit those draft implementing technical standards to the Commission by 31 December 2015.

Power is conferred on the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1093/2010.

26. Article 24 of Directive 2013/36, entitled "Cooperation between competent authorities", reads:

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

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

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

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

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

27. Article 35 of Directive 2013/36, entitled "Notification requirement and interaction between competent authorities", reads:

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

2. Member States shall require every credit institution wishing to establish a branch in another Member State to provide all the following information when effecting the notification referred to in paragraph 1:

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

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

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

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

3. Unless the competent authorities of the home Member State have reason to doubt the adequacy of the administrative structure or the financial situation of the credit institution, taking into account the activities envisaged, they shall, within three months of receipt of the information referred to in paragraph 2, communicate that information to the competent authorities of the host Member State and shall inform the credit institution accordingly.

The home Member State's competent authorities shall also communicate the amount and composition of own funds and the sum of the own funds requirements under Article 92 of Regulation (EU) No 575/2013 of the credit institution.

By way of derogation from the second subparagraph, in the case referred to in Article 34 the home Member State's competent authorities shall communicate the amount and composition of own funds of the financial institution and the total risk exposure amounts calculated in accordance with Article 92(3) and (4) of Regulation (EU) No 575/2013 of the credit institution which is its parent undertaking.

4. Where the competent authorities of the home Member State refuse to communicate the information referred to in paragraph 2 to the competent authorities of the host Member State, they shall give reasons for their refusal to the credit institution concerned within three months of receipt of all the information.

That refusal or a failure to reply shall be subject to a right to apply to the courts in the home Member State.

5. EBA shall develop draft regulatory technical standards to specify the information to be notified in accordance with this Article.

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1093/2010.

6. EBA shall develop draft implementing technical standards to establish standard forms, templates and procedures for such notification.

Power is conferred on the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1093/2010.

7. EBA shall submit the draft technical standards referred to in paragraphs 5 and 6 to the Commission by 1 January 2014.

28. Article 36 of Directive 2013/36, entitled “Commencement of activities”, reads:

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

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

3. In the event of a change in any of the information communicated pursuant to points (b), (c) or (d) of Article 35(2), a credit institution shall give written notice of the change in question to the competent authorities of the home and host Member States at least one month before making the change in order to enable the competent authorities of the home Member State to take a decision following a notification under Article 35, and the competent authorities of the host Member State to take a decision setting out the conditions for the change pursuant to paragraph 1 of this Article.

4. Branches which have commenced their activities, in accordance with the provisions in force in their host Member States, before 1 January 1993, shall be presumed to have been subject to the procedures set out in Article 35 and in paragraphs 1 and 2 of this Article. They shall be governed, from 1 January 1993, by paragraph 3 of this Article and by Articles 33 and 52 and Chapter 4.

5. EBA shall develop draft regulatory technical standards to specify the information to be notified in accordance with this Article.

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1093/2010.

6. EBA shall develop draft implementing technical standards to establish standard forms, templates and procedures for such notification.

Power is conferred on the Commission to adopt the implementing technical standards referred to in the first subparagraph in accordance with Article 15 of Regulation (EU) No 1093/2010.

7. EBA shall submit the draft technical standards referred to in paragraphs 5 and 6 to the Commission by 1 January 2014.

29. Directive 2003/41/EC of the European Parliament and of the Council of 3 June 2003 on the activities and supervision of institutions for occupational retirement

provision (OJ 2003 L 235, p. 10; Norwegian EEA Supplement 2009 No 39, p. 439) ("Directive 2003/41") was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 88/2006 of 7 July 2006 (OJ 2006 L 289, p. 26; Norwegian EEA Supplement 2006 No 52, p. 21). The decision entered into force on 12 April 2007.

30. Article 9 of Directive 2003/41, entitled "Conditions of operation", read:

> *1. Each Member State shall, in respect of every institution located in its territory, ensure that:*
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> *(a) the institution is registered in a national register by the competent supervisory authority or authorised; in the case of cross-border activities referred to in Article 20, the register shall also indicate the Member States in which the institution is operating;*
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> *(b) the institution is effectively run by persons of good repute who must themselves have appropriate professional qualifications and experience or employ advisers with appropriate professional qualifications and experience;*
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> *(c) properly constituted rules regarding the functioning of any pension scheme operated by the institution have been implemented and members have been adequately informed of these rules;*
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> *(d) all technical provisions are computed and certified by an actuary or, if not by an actuary, by another specialist in this field, including an auditor, according to national legislation, on the basis of actuarial methods recognised by the competent authorities of the home Member State;*
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> *(e) where the sponsoring undertaking guarantees the payment of the retirement benefits, it is committed to regular financing;*
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> *(f) the members are sufficiently informed of the conditions of the pension scheme, in particular concerning:*
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> *(i) the rights and obligations of the parties involved in the pension scheme;*
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> *(ii) the financial, technical and other risks associated with the pension scheme;*
>
> *(iii) the nature and distribution of those risks.*
>
> *2. In accordance with the principle of subsidiarity and taking due account of the scale of pension benefits offered by the social-security regimes, Member States may provide that the option of longevity and disability cover, provision for surviving dependants and a guarantee of repayment of contributions as additional benefits be offered to members if employers and employees, or their respective representatives, so agree.*

3. A Member State may make the conditions of operation of an institution located in its territory subject to other requirements, with a view to ensuring that the interests of members and beneficiaries are adequately protected.

4. A Member State may permit or require institutions located in its territory to entrust management of these institutions, in whole or in part, to other entities operating on behalf of those institutions.

5. In the case of cross-border activity as referred to in Article 20, the conditions of operation of the institution shall be subject to a prior authorisation by the competent authorities of the home Member State.

31. Article 20 of Directive 2003/41, entitled "Cross-border activities", read:

1. Without prejudice to national social and labour legislation on the organisation of pension systems, including compulsory membership and the outcomes of collective bargaining agreements, Member States shall allow undertakings located within their territories to sponsor institutions for occupational retirement provision authorised in other Member States. They shall also allow institutions for occupational retirement provision authorised in their territories to accept sponsorship by undertakings located within the territories of other Member States.

2. An institution wishing to accept sponsorship from a sponsoring undertaking located within the territory of another Member State shall be subject to a prior authorisation by the competent authorities of its home Member State, as referred to in Article 9(5). It shall notify its intention to accept sponsorship from a sponsoring undertaking located within the territory of another Member State to the competent authorities of the home Member State where it is authorised.

3. Member States shall require institutions located within their territories and proposing to be sponsored by an undertaking located in the territory of another Member State to provide the following information when effecting a notification under paragraph 2:

(a) the host Member State(s);

(b) the name of the sponsoring undertaking;

(c) the main characteristics of the pension scheme to be operated for the sponsoring undertaking.

4. Where a competent authority of the home Member State is notified under paragraph 2, and unless it has reason to doubt that the administrative structure or the financial situation of the institution or the good repute and professional qualifications or experience of the persons running the

institution are compatible with the operations proposed in the host Member State, it shall within three months of receiving all the information referred to in paragraph 3 communicate that information to the competent authorities of the host Member State and inform the institution accordingly.

5. Before the institution starts to operate a pension scheme for a sponsoring undertaking in another Member State, the competent authorities of the host Member State shall, within two months of receiving the information referred to in paragraph 3, inform the competent authorities of the home Member State, if appropriate, of the requirements of social and labour law relevant to the field of occupational pensions under which the pension scheme sponsored by an undertaking in the host Member State must be operated and any rules that are to be applied in accordance with Article 18(7) and with paragraph 7 of this Article. The competent authorities of the home Member State shall communicate this information to the institution.

6. On receiving the communication referred to in paragraph 5, or if no communication is received from the competent authorities of the home Member State on expiry of the period provided for in paragraph 5, the institution may start to operate the pension scheme sponsored by an undertaking in the host Member State in accordance with the host Member State's requirements of social and labour law relevant to the field of occupational pensions, and any rules that are to be applied in accordance with Article 18(7) and with paragraph 7 of this Article.

7. In particular, an institution sponsored by an undertaking located in another Member State shall also be subject, in respect of the corresponding members, to any information requirements imposed by the competent authorities of the host Member State on institutions located in that Member State, in accordance with Article 11.

8. The competent authorities of the host Member State shall inform the competent authorities of the home Member State of any significant change in the host Member State's requirements of social and labour law relevant to the field of occupational pension schemes which may affect the characteristics of the pension scheme insofar as it concerns the operation of the pension scheme sponsored by an undertaking in the host Member State and in any rules that have to be applied in accordance with Article 18(7) and with paragraph 7 of this Article.

9. The institution shall be subject to ongoing supervision by the competent authorities of the host Member State as to the compliance of its activities with the host Member State's requirements of labour and social law relevant to the field of occupational pension schemes referred to in paragraph 5 and with the information requirements referred to in paragraph 7. Should this supervision bring irregularities to light, the competent authorities of the host Member State shall inform the competent authorities of the home Member

State immediately. The competent authorities of the home Member State shall, in coordination with the competent authorities of the host Member State, take the necessary measures to ensure that the institution puts a stop to the detected breach of social and labour law.

10. If, despite the measures taken by the competent authorities of the home Member State or because appropriate measures are lacking in the home Member State, the institution persists in breaching the applicable provisions of the host Member State's requirements of social and labour law relevant to the field of occupational pension schemes, the competent authorities of the host Member State may, after informing the competent authorities of the home Member State, take appropriate measures to prevent or penalise further irregularities, including, insofar as is strictly necessary, preventing the institution from operating in the host Member State for the sponsoring undertaking.

32. Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market (OJ 2015 L 337, p. 35; Norwegian EEA Supplement 2020 No 7, p. 223), as corrected by OJ 2018 L 102, p. 97, ("Directive 2015/2366") was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 165/2019 of 14 June 2019 (OJ 2022 L 291, p. 50; Norwegian EEA Supplement 2022 No 74, p. 52). Constitutional requirements were indicated and fulfilled by Norway on 28 March 2022 and the decision entered into force on 1 May 2022.

33. Article 5 of Directive 2015/2366, entitled "Applications for authorisation", reads:

1. For authorisation as a payment institution, an application shall be submitted to the competent authorities of the home Member State, together with the following:

(a) a programme of operations setting out in particular the type of payment services envisaged;

(b) a business plan including a forecast budget calculation for the first 3 financial years which demonstrates that the applicant is able to employ the appropriate and proportionate systems, resources and procedures to operate soundly;

(c) evidence that the payment institution holds initial capital as provided for in Article 7;

(d) for the payment institutions referred to in Article 10(1), a description of the measures taken for safeguarding payment service users' funds in accordance with Article 10;

(e) a description of the applicant's governance arrangements and internal control mechanisms, including administrative, risk management and accounting procedures, which demonstrates that those governance arrangements, control mechanisms and procedures are proportionate, appropriate, sound and adequate;

(f) a description of the procedure in place to monitor, handle and follow up a security incident and security related customer complaints, including an incidents reporting mechanism which takes account of the notification obligations of the payment institution laid down in Article 96;

(g) a description of the process in place to file, monitor, track and restrict access to sensitive payment data;

(h) a description of business continuity arrangements including a clear identification of the critical operations, effective contingency plans and a procedure to regularly test and review the adequacy and efficiency of such plans;

(i) a description of the principles and definitions applied for the collection of statistical data on performance, transactions and fraud;

(j) a security policy document, including a detailed risk assessment in relation to its payment services and a description of security control and mitigation measures taken to adequately protect payment service users against the risks identified, including fraud and illegal use of sensitive and personal data;

(k) for payment institutions subject to the obligations in relation to money laundering and terrorist financing under Directive (EU) 2015/849 of the European Parliament and of the Council and Regulation (EU) 2015/847 of the European Parliament and of the Council, a description of the internal control mechanisms which the applicant has established in order to comply with those obligations;

(l) a description of the applicant's structural organisation, including, where applicable, a description of the intended use of agents and branches and of the off-site and on-site checks that the applicant undertakes to perform on them at least annually, as well as a description of outsourcing arrangements, and of its participation in a national or international payment system;

(m) the identity of persons holding in the applicant, directly or indirectly, qualifying holdings within the meaning of point (36) of Article 4(1) of Regulation (EU) No 575/2013, the size of their holdings and evidence of their suitability taking into account the need to ensure the sound and prudent management of a payment institution;

(n) the identity of directors and persons responsible for the management of the payment institution and, where relevant, persons responsible for the management of the payment services activities of the payment institution, as well as evidence that they are of good repute and possess appropriate knowledge and experience to perform payment services as determined by the home Member State of the payment institution;

(o) where applicable, the identity of statutory auditors and audit firms as defined in Directive 2006/43/EC of the European Parliament and of the Council;

(p) the applicant's legal status and articles of association;

(q) the address of the applicant's head office.

For the purposes of points (d), (e) (f) and (l) of the first subparagraph, the applicant shall provide a description of its audit arrangements and the organisational arrangements it has set up with a view to taking all reasonable steps to protect the interests of its users and to ensure continuity and reliability in the performance of payment services.

The security control and mitigation measures referred to in point (j) of the first subparagraph shall indicate how they ensure a high level of technical security and data protection, including for the software and IT systems used by the applicant or the undertakings to which it outsources the whole or part of its operations. Those measures shall also include the security measures laid down in Article 95(1). Those measures shall take into account EBA's guidelines on security measures as referred to in Article 95(3) when in place.

2. Member States shall require undertakings that apply for authorisation to provide payment services as referred to in point (7) of Annex I, as a condition of their authorisation, to hold a professional indemnity insurance, covering the territories in which they offer services, or some other comparable guarantee against liability to ensure that they can cover their liabilities as specified in Articles 73, 90 and 92.

3. Member States shall require undertakings that apply for registration to provide payment services as referred to in point (8) of Annex I, as a condition of their registration, to hold a professional indemnity insurance covering the territories in which they offer services, or some other comparable guarantee against their liability vis-à-vis the account servicing payment service provider or the payment service user resulting from non-authorised or fraudulent access to or non-authorised or fraudulent use of payment account information.

4. By 13 January 2017, EBA shall, after consulting all relevant stakeholders, including those in the payment services market, reflecting all interests

involved, issue guidelines, addressed to the competent authorities, in accordance with Article 16 of Regulation (EU) No 1093/2010 on the criteria on how to stipulate the minimum monetary amount of the professional indemnity insurance or other comparable guarantee referred to in paragraphs 2 and 3.

In developing the guidelines referred to in the first subparagraph, EBA shall take account of the following:

(a) the risk profile of the undertaking;

(b) whether the undertaking provides other payment services as referred to in Annex I or is engaged in other business;

(c) the size of the activity:

(i) for undertakings that apply for authorisation to provide payment services as referred to in point (7) of Annex I, the value of the transactions initiated;

(ii) for undertakings that apply for registration to provide payment services as referred to in point (8) of Annex I, the number of clients that make use of the account information services;

(d) the specific characteristics of comparable guarantees and the criteria for their implementation.

EBA shall review those guidelines on a regular basis.

5. By 13 July 2017, EBA shall, after consulting all relevant stakeholders, including those in the payment services market, reflecting all interests involved, issue guidelines in accordance with Article 16 of Regulation (EU) No 1093/2010 concerning the information to be provided to the competent authorities in the application for the authorisation of payment institutions, including the requirements laid down in points (a), (b), (c), (e) and (g) to (j) of the first subparagraph of paragraph 1 of this Article.

EBA shall review those guidelines on a regular basis and in any event at least every 3 years.

6. Taking into account, where appropriate, experience acquired in the application of the guidelines referred to in paragraph 5, EBA may develop draft regulatory technical standards specifying the information to be provided to the competent authorities in the application for the authorisation of payment institutions, including the requirements laid down in points (a), (b), (c), (e) and (g) to (j) of paragraph 1.

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1093/2010.

7. The information referred to in paragraph 4 shall be notified to competent authorities in accordance with paragraph 1.

34. Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions (OJ 2009 L 267, p. 7; Norwegian EEA Supplement 2015 No 49, p. 332) ("Directive 2009/110") was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 120/2010 of 10 November 2010 (OJ 2011 L 58, p. 77; Norwegian EEA Supplement 2011 No 12, p. 20), which entered into force on 1 November 2012.

35. Article 3 of Directive 2009/110 reads:

1. Without prejudice to this Directive, Articles 5 and 10 to 15, Article 17(7) and Articles 18 to 25 of Directive 2007/64/EC shall apply to electronic money institutions mutatis mutandis.

2. Electronic money institutions shall inform the competent authorities in advance of any material change in measures taken for safeguarding of funds that have been received in exchange for electronic money issued.

3. Any natural or legal person who has taken a decision to acquire or dispose of, directly or indirectly, a qualifying holding within the meaning of point 11 of Article 4 of Directive 2006/48/EC in an electronic money institution, or to further increase or reduce, directly or indirectly, such qualifying holding as a result of which the proportion of the capital or of the voting rights held would reach, exceed or fall below 20 %, 30 % or 50 %, or so that the electronic money institution would become or cease to be its subsidiary, shall inform the competent authorities of their intention in advance of such acquisition, disposal, increase or reduction.

The proposed acquirer shall supply to the competent authority information indicating the size of the intended holding and relevant information referred to in Article 19a(4) of Directive 2006/48/EC.

Where the influence exercised by the persons referred to in the second subparagraph is likely to operate to the detriment of the prudent and sound management of the institution, the competent authorities shall express their opposition or take other appropriate measures to bring that situation to an end. Such measures may include injunctions, sanctions against directors or managers, or the suspension of the exercise of the voting rights attached to the shares held by the shareholders or members in question.

Similar measures shall apply to natural or legal persons who fail to comply with the obligation to provide prior information, as laid down in this paragraph.

If a holding is acquired despite the opposition of the competent authorities, those authorities shall, regardless of any other sanction to be adopted, provide for the exercise of the voting rights of the acquirer to be suspended, the nullity of votes cast or the possibility of annulling those votes.

The Member States may waive or allow their competent authorities to waive the application of all or part of the obligations pursuant to this paragraph in respect of electronic money institutions that carry out one or more of the activities listed in Article 6(1)(e).

4. Member States shall allow electronic money institutions to distribute and redeem electronic money through natural or legal persons which act on their behalf. Where the electronic money institution wishes to distribute electronic money in another Member State by engaging such a natural or legal person, it shall follow the procedure set out in Article 25 of Directive 2007/64/EC.

5. Notwithstanding paragraph 4, electronic money institutions shall not issue electronic money through agents. Electronic money institutions shall be allowed to provide payment services referred to in Article 6(1)(a) through agents only if the conditions in Article 17 of Directive 2007/64/EC are met.

National law[1]

36. Section 1-3 of the Norwegian Financial Institutions Act of 10 April 2015 No 17 *(Lov om finansforetak og finanskonsern (finansforetaksloven))* ("the FIA") provides the definition of a financial institution and reads:

(1) A 'financial institution' is an entity carrying on business as a:

a) bank,

b) mortgage credit institution,

c) finance company,

d) insurance undertaking,

e) pension undertaking,

f) holding company of a financial group.

[1] Translations of national provisions are unofficial and based on those contained in the documents of the case.

(2) Except as otherwise provided by or pursuant to this Act, an entity licensed to operate as a payment institution or electronic money institution is also considered to be a financial institution.

37. Section 4-1 of the FIA reads as follows:

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

(1) A Norwegian financial institution must notify Finanstilsynet (FSA) if the undertaking acquires an ownership stake of ten percent or more of the capital or votes in a financial institution in another EEA state. The same applies to acquisitions that increase the qualified shareholding to 20, 30 or 50 per cent or more of the capital or votes in the financial institution, or such that the shareholding provides decisive influence as mentioned in the Public Limited Liability Companies Act Section 1-3 in the financial institution. The provisions in Section 6-1 fourth and fifth subsections and Section 6-5 apply accordingly when calculating the ownership shares. The provisions in Section 17-9, second and third subsections, apply correspondingly in the case of disposal of such business. Section 17-1 of the Financial Enterprises Act first subsection does not apply.
(2) A Norwegian financial institution must notify the Norwegian Financial Supervisory Authority when establishing a financial institution as a subsidiary in another EEA state. Section 17-1 of the Financial Enterprises Act first subsection does not apply.
(3) Notification pursuant to the first or second subsection must at least contain information on:
    a. the financial undertaking that is established or in which a qualified ownership interest is acquired,
    b. the purpose of the establishment or acquisition,
    c. financing of the establishment or acquisition, and
    d. the group structure after the establishment or acquisition.
(4) Finanstilsynet may set conditions or give orders that the establishment or acquisition shall not be carried out, if:
    a. the acquisition or establishment will expose the Norwegian company or group to special risk, or
    b. the acquisition or establishment will make it difficult to supervise the group.
(5) In the assessment pursuant to the fourth subsection letter a, emphasis must be placed on whether the establishment or acquisition is justifiable based on the financial situation of the Norwegian enterprise or group, including the effect on financial stability.
(6) In the case of processing of notification pursuant to the first or second subsection, the deadlines in Section 6-2 third subsection apply correspondingly. If Finanstilsynet has not made a decision pursuant to the fourth subsection by the end of the deadline pursuant to Section 6-2 third

subsection, Finanstilsynet shall be deemed to have no objections to the establishment or acquisition.

III Pre-litigation procedure

38. On 15 October 2015, ESA opened an own-initiative case. In a letter sent on the same day, ESA asked the Norwegian Government to provide information for the purpose of ESA's examination of the matter.

39. On 8 February 2016, the Norwegian Government provided the requested information, as well as essentially claiming that the authorisation requirement in Section 4-1 first subsection of the FIA ensures financial stability and complies with Article 31 EEA.

40. Between 2015 and 2019, ESA and the Norwegian Government engaged in detailed correspondence about the issues raised in the letter from ESA of 15 October 2015 and the related rules.

41. On 11 December 2019, ESA issued a letter of formal notice to Norway. After having assessed the information provided by Norway in their previous correspondence over the years, as well as having assessed the Norwegian provisions, ESA came to the conclusion that by maintaining in force an authorisation requirement such as that established in Section 4-1 first subsection of the FIA, Norway was in breach of Directives 2013/36, 2009/138, 2003/41, 2015/2366 and 2009/110 and/or of Article 31 EEA.

42. Norway replied to the letter of formal notice on 20 March 2020. In the reply, Norway maintained that the authorisation requirement contributes to the legitimate goal of safeguarding financial stability in Norway. Moreover, the reply informed ESA that the Norwegian Government would ask a forthcoming working group to assess whether it is possible to achieve the same high level of financial stability through measures other than the prior authorisation scheme.

43. On 8 July 2020, ESA sent a reasoned opinion to Norway where it maintained the view expressed in the letter of formal notice.

44. After further correspondence between ESA and the Norwegian Government with regard to the working group, Norway replied to the reasoned opinion on 9 December 2020 and maintained that the authorisation requirement contributes to the legitimate goal of safeguarding financial stability in Norway. In the same reply, Norway set out the text and translations of the proposed amendments to Section 4-1 of the FIA.

45. On 7 July 2022, Norway informed ESA that the relevant provisions of Section 4-1 of the FIA had been amended with regard to previous discussions with ESA on the relevant legislation.

46. After assessing the amended Norwegian provisions as well as other information provided by Norway, ESA issued a supplementary letter of formal notice to Norway on

5 October 2022. In the letter, ESA concluded that the amendments made to the relevant legislation amounted to a de facto prior authorisation requirement and that, by maintaining in force an authorisation requirement such as that established in Section 4-1 first subsection of the FIA, Norway was in breach of Directives 2013/36, 2009/138, 2003/41, 2015/2366 and 2009/110 and/or Article 31 EEA.

47. Norway replied to ESA's supplementary letter of formal notice on 2 December 2022. In the reply, Norway stated that it did not agree with the assessment conducted by ESA and argued that the amendments made to the relevant legislation had not resulted in a de facto authorisation scheme as concluded by ESA. Moreover, Norway argued that the authorisation requirement, and the safety measures attached thereto – which are only applicable in the cases of special risk, or if the acquisition or establishment would impede supervision of the group, contribute to the legitimate goal of safeguarding financial stability in Norway.

48. On 19 April 2023, ESA sent a supplementary reasoned opinion to Norway in which ESA maintained its conclusions in the supplementary letter of formal notice.

49. Norway replied to ESA's supplementary reasoned opinion on 20 June 2023. In the reply, Norway rejected ESA's conclusions in the supplementary reasoned opinion and conveyed their intentions for further revision of Section 4-1 of the FIA and requested a time extension to conduct the revision.

50. On 25 July 2023, ESA denied Norway's request for a time extension, principally on the grounds that amendments had already been made to the legislation in question, which did not resolve ESA's concerns which had been expressed in prior correspondence.

IV Procedure and forms of order sought by the parties

51. On 9 October 2023, ESA lodged an application ("the Application") 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 seeking a declaration that Norway has breached the following provisions: Articles 14, 26, 57 and 60 of Directive 2009/138/EC, Articles 8, 16 and 24 of Directive 2013/36/EU, Articles 9 and 20 of Directive 2003/41/EC, Article 5 of Directive (EU) 2015/2366, Article 3 of Directive 2009/110/EC and Article 31 of the EEA Agreement.

52. ESA requests the Court to declare that:

> *(i) By maintaining in force an authorisation requirement in Section 4-1 of the Norwegian Financial Institutions Act to set up subsidiaries or acquiring of Norwegian financial institutions in other EEA States, Norway has breached:*
>
> – *Articles 14, 26, 57 and 60 of Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on*

the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (recast);

– *Articles 8, 16 and 24 of Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC;*

– *Articles 9 and 20 of Directive 2003/41/EC of the European Parliament and of the Council of 3 June 2003 on the activities and supervision of institutions for occupational retirement provision;*

– *Article 5 of Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market;*

– *Article 3 of Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions; and*

– *Article 31 of the EEA Agreement.*

53. On 18 December 2023, Norway submitted its Defence ("the Defence"), pursuant to Article 107 of the Rules of Procedure ("RoP"). Norway requests the Court to:

(i) Dismiss the Application of the EFTA Surveillance Authority as unfounded.

(ii) Order the EFTA Surveillance Authority to pay the costs of the proceedings.

54. On 19 December 2023, ESA was served with the Defence. The President set 31 January 2024 as the deadline for the submission of ESA's reply ("the Reply").

55. On 31 January 2024, ESA submitted its Reply.

56. On 1 February 2024, the President set 6 March 2024 as the deadline for the submission of Norway's rejoinder ("the Rejoinder").

57. On 8 February 2024, ESA requested a stay of proceedings pursuant to Article 47 RoP. On the same day, the Court invited Norway to give its view on the request for a stay of proceedings, pursuant to Article 47(1) RoP. On 13 February 2024, Norway stated that it did not object to a stay of proceedings and left the decision to the Court's discretion.

58. On 14 February 2024, the President, pursuant to Article 47(2) of the Rules of Procedure, decided not to stay the proceedings stating that, if necessary, interested parties will be afforded sufficient opportunity to present their views during the oral hearing.

59. On 6 March 2024, Norway submitted its Rejoinder.

V Written submissions

60. Pleadings have been received from:

- the applicant, ESA, represented by Ingibjörg Ólöf Vilhjálmsdóttir, Kyrre Isaksen and Melpo-Menie Joséphidès, acting as Agents; and

- the defendant, Norway, represented by Kristin Hallsjø Aarvik, Thea Westhagen Edell and Fredrik Bergsjø, acting as Agents.

61. Pursuant to Article 20 of the Statute, written observations have been received from:

- the Commission, represented by Gaetane Goddin, Dimitrios Triantafyllou, and Corneliu Hoedlmayr, acting as Agents.

The applicant

Introduction

62. ESA contends that, under EEA law, Norway is required to follow the rules on establishment and acquisition provided for in the relevant directives in question, Directive 2009/138, Directive 2013/36, Directive 2003/41, Directive 2015/2366 and Directive 2009/110 (together "the Directives"). Furthermore, ESA asserts that those provisions are applicable where any natural or legal person seeks to establish or acquire a credit institution, an insurance undertaking, an institution for occupational retirement provision, a payment institution or an electronic money institution as a subsidiary in another EEA State. The Directives contain a requirement to obtain prior authorisation from the competent authority of the EEA State in which these financial institutions seek to establish subsidiaries, but not that of the home State.

63. ESA submits that, by maintaining the authorisation requirement set out in Section 4-1 of the FIA[2] as an effective veto right, the legislation amounts to a de facto prior authorisation requirement. Furthermore, ESA asserts that the wording of Section 4-1 suggests that the FSA holds the authority to determine if and under what conditions such financial undertakings may proceed, effectively enabling it to veto such establishments or acquisitions in certain circumstances.

[2] Reference is made to Lov om finansforetak og finanskonsern (finansforetaksloven), LOV-2015-04-10-17.

64. ESA first highlighted in 2015 the infringements by Norway that form the subject matter of the present application. Following the correspondence between ESA and Norway in 2015, Norway amended Section 4-1 of the FIA on 18 June 2021, with the amendments taking effect on 1 June 2022.[3] Despite these legislative amendments, ESA maintains that Norway is still in breach of certain provisions of the Directives and Article 31 EEA. Following the amendments, ESA issued a supplementary letter of formal notice on 5 October 2022, followed by a supplementary reasoned opinion on 19 April 2023, in which ESA maintained that the authorisation requirement established in the amended provisions of the FIA constitutes an unjustified restriction on the freedom of establishment, in breach of certain provisions of the Directives and Article 31 EEA.

EEA legal framework

65. ESA submits that authorisation requirements have been the subject of several judgments by the Court and the CJEU. The case law concerns a variety of national prior authorisation requirements, encompassing goods, persons, services and capital, raising different legal questions. The courts have systematically found that such requirements are restrictive.[4] Further, the CJEU addressed the freedom of establishment in Case C-169/07,[5] where the CJEU held that a rule mandating prior authorisation for the establishment of a business from another Member State constitutes a restriction under Article 43 EC, since it could impede the exercise of freedom of establishment by preventing the business from freely operating through a permanent establishment.

66. Furthermore, ESA submits that the EEA legal framework contains harmonising rules concerning cross-border activities and authorisation for the taking up and pursuit of the business of various entities, such as credit institutions, insurance undertakings, institutions for occupational retirement provision, payment institutions and electronic money institutions.

67. ESA specifies the relevant articles of the Directives which are applicable where a Norwegian financial institution seeks to establish or acquire an insurance undertaking, a credit institution, an institution for occupational retirement provision, a payment institution or an electronic money institution as a subsidiary in another EEA State. The Directives uniformly establish the requirement to obtain prior authorisation from the competent authority of the EEA State in which these financial institutions seek to establish subsidiaries.

68. Were the Court to find that the Directives do not apply to the requirement for authorisation by the Norwegian competent authority in relation to the establishment/acquisition of subsidiaries of financial institutions in other EEA States, ESA contends that the requirement would nonetheless need to adhere to Article 31 EEA

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3 Reference is made to LOV-2021-06-18-100.

4 Reference is made to Case E-8/20 *Criminal Proceedings against N*, judgment of 5 May 2021, paragraph 86, and Case E-19/15 *ESA* v *Liechtenstein* [2016] EFTA Ct. Rep. 437, paragraphs 49 and 50.

5 Reference is made to the judgment in *Hartlauer*, C-169/07, EU:C:2009:141, paragraph 34.

on the freedom of establishment.[6] Moreover, in ESA's submission, Article 31 EEA is also applicable when a Norwegian financial institution intends to establish or acquire, in another EEA State, as a subsidiary a financial institution not covered by the Directives. Section 4-1 of the FIA applies to all financial institutions as defined in Section 1-3 of the FIA. Hence, Norway subjects all financial institutions to the same authorisation requirements, obliging any financial institution looking to establish or acquire as a subsidiary a finance company in another EEA State to notify the FSA.

69. In the light of the above, ESA submits that the authorisation requirement set out in Section 4-1 of the FIA is in breach of the Directives. Moreover, ESA argues that the authorisation requirement is in breach of the fundamental freedom of right of establishment, in particular in a situation where the Directives do not apply, for example, in the case of financial institutions other than those covered by the Directives.

70. ESA refers to a prior judgment of the Court,[7] where it was held that, where a sphere of economic activity has been subject to exhaustive harmonisation at the EEA level, any national measure relating thereto must be assessed in the light of the harmonising measures and not those of primary EEA law.

71. Based on the assessment above, ESA explains that its argument is divided into two parts. First, it assesses Section 4-1 first subsection of the FIA under the relevant harmonisation provisions of the Directives. Second, it assesses the relevant provisions under Article 31 EEA.

The assessment under the Directives
Breach of Directive 2009/138 as regards insurance undertakings

72. ESA notes that recitals 74 and 75 of Directive 2009/138 state that, prior to the adoption of that Directive, the legal framework did not provide detailed criteria for a prudential assessment of a proposed acquisition, nor a procedure for their application. Therefore, clarification of the criteria and the process of prudential assessment was needed to ensure legal certainty, clarity and predictability with regard to the assessment process. Moreover, having regard to recital 75 of Directive 2009/138, ESA asserts that maximum harmonisation throughout the EEA of those procedures and prudential assessments is therefore critical.

73. ESA contends that the issue of harmonisation was also mentioned by Norway in the preparatory works to the FIA, where it is stated that the principle of full harmonisation means that Directive 2009/138 must be implemented into Norwegian law in its entirety, unadjusted.[8]

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6 Reference is made to Case E-8/16 *Netfonds Holding* [2017] EFTA Ct. Rep. 163, paragraph 102. ESA notes that this judgment was principally concerned with Directive 2006/48/EC, but that the relevant provisions of that directive have been replaced with materially identical provisions in Directive 2013/36.

7 Reference is made to Case E-9/11 *ESA* v *Norway* [2012] EFTA Ct. Rep. 442, paragraph 72.

8 Reference is made to Prop. 125 L 2013-2014, p. 62.

74. ESA submits that, on the basis of the principle of mutual recognition of authorisations and supervisory systems,[9] the establishment or acquisition of an insurance undertaking as a subsidiary in another EEA State is subject to a single authorisation from the competent authority in the EEA State of the subsidiary, as can be derived from Articles 14 and 57 of Directive 2009/138.

75. ESA submits that the consultation obligation in Articles 26 and 60 of Directive 2009/138 entails that the FSA would always be informed of the intended establishment or acquisition of a subsidiary in another EEA State, and would have an opportunity to provide the competent authority in the EEA State of the subsidiary with any information or views it deemed relevant prior to the granting of an authorisation, therefore, allowing the FSA to raise any concerns it might have with regard to the authorisation of a subsidiary in another EEA State. Furthermore, if there is a failure to consult or if the FSA considers that its concerns have not been properly taken into account, it may have recourse to the relevant European Supervisory Authority or ESA.

76. ESA asserts that Section 4-1 fourth subsection of the FIA effectively requires that any establishment or acquisition of a subsidiary in another EEA State by a Norwegian financial institution can be subject to conditions set by the FSA with regard to the establishment, or subject to a veto by the FSA, concerning the establishment or acquisition. Therefore, according to Norwegian law, a Norwegian financial institution cannot apply for an authorisation to the competent authority in the EEA State of the subsidiary as provided for in the Directive, in circumstances in which the FSA orders that the establishment or acquisition shall not be carried out.

77. ESA submits that the effect of Section 4-1 of the FIA is such that a financial institution is required, de facto, to obtain an authorisation, or failing that, to wait for three months to ensure that the FSA does not object to the establishment or acquisition in question. The requirement to obtain an authorisation, as mentioned above, infringes upon the authorisation procedures applicable to the establishment and acquisition of insurance undertakings set out by Directive 2009/138. ESA also contends that the authorisation requirement interferes with the competences of the EEA State where a subsidiary is sought to be established or acquired, and is not in accordance with the principle of mutual recognition, nor the harmonisation of the authorisation and supervisory systems in the EEA.

78. ESA also observes, as noted by Norway in its letter of 2 December 2022, that Article 34 of Directive 2009/138 requires that the Norwegian FSA, as the supervisor of the parent financial institution, has the power to take preventive and corrective measures to ensure that the parent institution complies with the laws, regulations and administrative provisions with which they have to comply in each EEA State. However, this does not include a power of the EEA State of the parent institution to object to, or veto, an establishment or acquisition of a subsidiary in another EEA State. Nor does it include a power to subject the parent institution to a condition of de facto prior authorisation from the EEA State in which the parent institution is established.

[9] Reference is made to recital 11 of Directive 2009/138.

Moreover, ESA argues that Norway's views as regards which financial supervisory authority is better positioned to assess the risks that the establishment of a subsidiary will entail for the group[10] do not reflect the directives in this field, which clearly state that attribution of competence in respect of prior authorisation is to the financial supervisory authority of the subsidiary, not the financial supervisory authority of the parent institution.

79. ESA also submits that Articles 145 and 146 of Directive 2009/138, which concern the exercise of the right of branch establishment by insurance undertakings, are applicable in cases in which a credit institution or an insurance undertaking wishes to establish a branch within the territory of another EEA State. In such a case, as set out in the provisions, the credit institution or the insurance undertaking submits a notification to the competent institutions of the EEA State of establishment, and unless they have a reason to doubt the adequacy of the administrative structure or financial situation of the institution in question, within three months communicate that information to the competent authorities of the EEA State where the branch is sought to be established.

80. ESA submits that the criteria prescribed by Directive 2009/138 concerning the allocation of competences between supervisory authorities are clear and unequivocal. Subsidiaries are independent legal entities while branches may be seen as more akin to departments of the parent financial institution, as may be seen in references in the relevant secondary legislation.[11] Moreover, if the EU legislative bodies had considered it appropriate for the supervisor of an institution to have the same level of involvement when that institution sets up a branch as when it sets up a subsidiary in another EEA State, ESA contends that such rules would have been directly included in the text of Directive 2009/138.

81. ESA submits further that rules relating to relevant procedures and conditions governing the authorisation for the initial establishment, as well as rules for subsequent acquisitions of qualifying holdings in insurance undertakings, have been fully harmonised at the EEA level.[12] In the light of the foregoing, ESA submits that, by subjecting the establishment or acquisition by a Norwegian financial institution of an insurance undertaking as a subsidiary in another EEA State to oversight amounting to a de facto authorisation requirement, Norway is in breach of the authorisation procedures applicable to the establishment or acquisition of insurance undertakings as provided for in Articles 14, 26, 57 and 60 of Directive 2009/138.

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[10] Reference is made to the letter of 2 December 2002 by which the Norwegian Government replied to the supplementary letter of formal notice (ref. 16/39, Doc No 1334134), p. 7, Annex A.17 to the Application.

[11] Reference is made, by way of illustration, to Articles 35 and 36 of Directive 2013/36, which refer to branches, whereas Articles 16 and 22 thereof refer to subsidiaries; Recital 11 and Articles 145 and 146 of Directive 2009/138 refer to branches, whereas Articles 9 and 20 of Directive 2003/41, Article 5 of Directive 2015/2366, and Article 3 of Directive 2009/110 refer to subsidiaries.

[12] Reference is made to Case E-9/11 *ESA* v *Norway*, cited above, paragraph 78.

Breach of Directives 2013/36, 2003/41, 2015/2366 and 2009/110 as regards credit institutions, institutions for occupational retirement provision, payment institutions and electronic money institutions

82. ESA contends that the arguments set out with regard to the breach of Directive 2009/138 are equally applicable with regard to the establishment or acquisition in another EEA State of credit institutions, institutions for occupational retirement provision, payment institutions and electronic money institutions.

83. In this regard, ESA specifically refers to Articles 8, 16 and 24 of Directive 2013/36, Articles 9 and 20 of Directive 2003/41, Article 5 of Directive 2015/2366 and Article 3 of Directive 2009/110. These provisions contain in relation to cross-border activities a requirement to obtain prior authorisation from the competent authority of the EEA State in which these financial institutions are sought to be established or acquired.

84. ESA submits that, by subjecting the establishment or acquisition by Norwegian financial institutions of a credit institution, an institution for occupational retirement provision, a payment institution or an electronic money institution as a subsidiary in another EEA State to oversight amounting to a de facto authorisation requirement from the competent Norwegian authority, Norway is in breach of the authorisation procedures provided for in the articles of the directives mentioned above.

The assessment under Article 31 EEA
The existence of a restriction on the freedom of establishment

85. ESA asserts that Article 31 EEA requires the abolition of restrictions upon the freedom of establishment and that Article 34 EEA extends that freedom to companies, essentially enabling companies or firms formed in accordance with the laws of an EEA State, and having their registered office, central administration or principal place of business within the EEA, to have the right to pursue their activities in other EEA States through a subsidiary, a branch or an agency.[13]

86. In ESA's submission, it is settled case law of the CJEU and the Court that, even if the wording of the provision concerning freedom of establishment is directed to ensuring that foreign nationals and companies are treated in the host EEA State in the same way as nationals of that State, it also prohibits the EEA State of origin from hindering the establishment in another EEA State of one of its nationals or of a company incorporated under its legislation.[14] Furthermore, ESA continues, it is also established case law that all measures which, even though they are applicable without discriminating on the grounds of nationality, are liable to hinder or render less attractive the exercise of

[13] Reference is made to judgments in *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt*, C-157/07, EU:C:2008:588, paragraph 28; and *X Holding*, C-337/08, EU:C:2010:89, paragraph 17; and to Case E-14/15 *Holship Norge AS* [2016] EFTA Ct. Rep. 240, paragraph 110.

[14] Reference is made to judgments in *Daily Mail*, 81/87, EU:C:1988:456, paragraph 16; *Peralta*, C-379/92, EU:C:1994:296, paragraph 31; *Imperial Chemical Industries*, C-264/96, EU:C:1998:370, paragraph 21; *Marks & Spencer*, C-446/03, EU:C:2005:763, paragraph 31; and *Felixstowe Dock*, C-80/12, EU:C:2014:200, paragraph 21; and to Case E-14/13 *ESA* v *Iceland* [2013] EFTA Ct. Rep. 924, paragraph 24.

the freedom of establishment constitute a restriction on that freedom.[15] Particularly with regard to prior authorisation schemes, the CJEU has held that such procedures restrict, by their very purpose, the fundamental freedoms.[16]

87. ESA submits that the authorisation requirement set out in Section 4-1 of the FIA, which could result in an order from the FSA that the establishment or acquisition shall not take place, restricts by its very purpose the freedom of establishment, as it is liable to hinder Norwegian financial institutions from establishing or acquiring financial institutions as subsidiaries in other EEA States. In the light of the above, ESA holds the view that Section 4-1 of the FIA amounts to a restriction on the freedom of establishment protected by Article 31 EEA.

88. ESA contends that Norway has not disputed that the rules as they presently stand constitute a restriction on the freedom of establishment. However, Norway has argued that the rules could be justified by overriding reasons of general public interest and are proportionate.[17] ESA also contends that Norway made the same arguments with respect to the rules that were in force prior to the introduction of the amendments that entered into force in 2022,[18] and has relied on its argumentation advanced with respect to the old rules when defending the new rules.[19] In Norway's reply to the supplementary letter of formal notice, Norway argued that even if the new rules constitute a restriction, they could nonetheless be justified by overriding reasons of general public interest and are proportionate. ESA rejects these arguments, as assessed above.

Possible justification of the Norwegian rules

89. ESA contends that, pursuant to established case law, a national measure that restricts the freedom of establishment laid down in Article 31 EEA can be justified on the grounds set out in Article 33 EEA or by overriding reasons of public interest, provided that the restriction is appropriate to secure the attainment of the objective which it pursues (the suitability test) and does not go beyond what is necessary in order to attain it (the necessity test).[20]

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[15] Reference is made to the judgments in *Gebhard*, C-55/94, EU:C:1995:411, paragraph 37; *Caixabank France*, C-442/02, EU:C:2004:586, paragraph 11; *Columbus Container Services*, C-298/05, EU:C:2007:754, paragraph 34; and *Hartlauer*, cited above, paragraph 34.

[16] Reference is made to the judgment in *Hartlauer*, cited above, paragraph 34.

[17] Reference is made to the letter of 2 December 2002 by which Norway replied to the supplementary letter of formal notice (ref. 16/39, Doc No 1334134), p. 3-4, Annex A.17 to the Application.

[18] Reference is made, for example, to the reply of Norway of 21 September 2018 to the Pre-Article 31 letter, Annex A.6 to the Application, as well as to the reply of Norway of 8 December 2020 to ESA's reasoned opinion, wherein the "two step" nature of the restriction is emphasised (the first step is imposing conditions for the establishment or acquisition, and the second step is potentially vetoing said acquisition). There, Norway contends that "imposing conditions on or opposing an unsuitable acquisition would be less intrusive and more proportional than withdrawing the banking authorisation altogether," Annex A.14 to the Application.

[19] Explicit reference in this regard is made to the letter of 2 December 2022 by which Norway replied to the supplementary letter of formal notice, cited above, p. 4, which states that "the arguments justifying the notification requirement largely coincide with those justifying the previous legislation".

[20] Reference is made to judgments in *Commission* v *Spain*, C-269/09, EU:C:2013:364, paragraph 62; and *Commission* v *Belgium*, C-383/10, EU:C:2013:364, paragraph 49; and to Case E-9/11 *ESA* v *Norway*, cited above, paragraph 83; and Case E-8/16 *Netfonds Holding*, cited above, paragraph 112.

90. ESA submits that it is for the national authorities, in adopting measures derogating from principles enshrined in EEA law, to show in each individual case that the requirements listed above are satisfactory. Reasons which may be invoked by an EEA State by way of justification must be followed by an analysis of the appropriateness and proportionality of the measure adopted by that State and by specific evidence substantiating its arguments.[21]

91. ESA observes that the Court has held that the protection of the functioning and good reputation of the financial services sector and the promotion of the well-functioning and efficiency of the financial markets constitute overriding reasons in the public interest capable of justifying national measures which restrict the fundamental freedoms.[22] Therefore, ESA acknowledges that the objective of the Norwegian measure may generally reflect overriding reasons in the general public interest. However, in ESA's submission, it must still comply with the principle of proportionality.

92. ESA takes the view that Norway has not provided substantial arguments concerning the necessity of the national measure as regards situations in which finance companies are established or acquired as subsidiaries of Norwegian financial institutions in other EEA States.

93. In the light of the above, ESA submits that requiring a Norwegian financial institution to obtain a de facto authorisation from the Norwegian competent authority, before establishing or acquiring a finance company as a subsidiary in another EEA State, goes beyond what is necessary for the purpose of ensuring financial stability. ESA concludes by submitting that Section 4-1 of the FIA constitutes an unjustified restriction on the freedom of establishment under Article 31 EEA.

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

94. ESA refers, in relation to the justification of a restriction on a fundamental freedom, to the general principle of EEA law according to which the measures must satisfy the principle of legal certainty.[23] Moreover, ESA continues, EEA law requires that national provisions do not render legitimate discretionary conduct on the part of the national authorities which is liable to negate the effectiveness of provisions of EEA law, particularly those relating to a fundamental freedom.[24] Thus, by leaving too much discretion to national authorities, an EEA State may be found in breach of its obligations under EEA law.[25] ESA contends that the Norwegian legislation does not clearly establish which criteria must be fulfilled such that a Norwegian financial institution

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[21] Reference is made to judgments in *Commission* v *Belgium*, C-296/12, EU:C:2014:24, paragraph 33; and *Scotch Whisky Association*, C-333/14, EU:C:2015:845, paragraph 54 and the case law cited therein, and to Case E-2/11 *STX Norway Offshore AS* [2012] EFTA Ct. Rep. 4, paragraph 99.

[22] Reference is made to Case E-8/16 *Netfonds Holding*, cited above, paragraph 113. See also Case E-9/11 *ESA* v *Norway*, cited above, paragraphs 85 and 86.

[23] Reference is made to Case E-1/04 *Fokus Bank* [2004] EFTA Ct. Rep. 11, paragraph 37, and Case E-9/11 *ESA* v *Norway*, cited above, paragraph 99.

[24] Reference is made, to that effect, to judgments in *Analir and Others*, C-205/99, EU:C:2001:107, paragraphs 37 and 38; *Müller-Fauré and van Riet*, C-385/99, EU:C:2003:270, paragraphs 84 and 85; and *Hartlauer*, cited above, paragraph 64; and to Case E-9/11 *ESA* v *Norway*, cited above, paragraph 100.

[25] Reference is made to the judgment in *Commission* v *Greece*, C-244/11, EU:C:2012:694, paragraphs 64 to 87.

wishing to establish or acquire a financial institution as a subsidiary in another EEA State may avoid an order from the FSA that the establishment or acquisition shall not be carried out, or a finding that the establishment or acquisition should be subject to additional conditions determined by the FSA.

Reply
The de facto authorisation scheme

95. In the light of Norway's description of Section 4-1 of the FIA in the Defence, ESA considers its assessment, as set out in the Application, to have been strengthened.[26] ESA contends that, having regard to the description and the wording of Section 4-1, it is clear that a Norwegian undertaking included in the institutions defined in Section 1-3 FIA[27] has an unequivocal obligation to notify the FSA when it conducts acquisitions or secondary establishment as described in Section 4-1 first subsection and second subsection respectively. The notification obligation therefore strongly indicates that the authorisation requirement constitutes a de facto prior authorisation scheme. Furthermore, ESA highlights Norway's explanation in the Defence of the considerations to which the FSA must have regard when assessing whether an acquisition or establishment will expose the Norwegian undertaking or a group to a "particular risk"[28] as "[meaning] that the assessment will include checking compliance with capital requirements, including minimum and buffer requirements, as well as other operational, administrative and reputational risks, that may affect the financial stability of the group".[29]

96. ESA contends that, until the finalisation of the FSA's assessment, the financial institution will not know whether the FSA will object to or set conditions for the establishment or acquisition, and consequently, the establishment or acquisition cannot proceed until there is a decision. In the case of an objection or the setting of conditions by the FSA, the establishment/acquisition will be at the risk of being futile. The same applies to any investments or operational steps taken prior to actual establishment, such as hiring, setting up systems and acquiring premises. ESA asserts that Norway's description of the purpose of Section 4-1 FIA as "primarily informational"[30] does not alter ESA's conclusion. The uncertainty will remain until the FSA has finalised its assessment, which might jeopardise the cross-border establishment or acquisition.

97. Furthermore, ESA rejects Norway's characterisation of Section 4-1 of the FIA, which, according to Norway, prevents it from being a de facto authorisation requirement.[31] ESA submits that whether something is to be considered an authorisation scheme, de facto or de jure, cannot depend on the likelihood of a refusal. Instead, it should be based on the legal requirements on the private operator, the procedure to be followed and to what extent and under which circumstances the procedure leads to a

[26] Reference is made to the Defence, paragraphs 27 to 29.
[27] Reference is made to the Application, paragraph 57. The institutions are hereinafter individually referred to as a "financial institution" and collectively as "financial institutions".
[28] Reference is made to the Defence, paragraph 28.
[29] Ibid.
[30] Reference is made to the Defence, paragraph 31.
[31] Reference is made to the Defence, paragraph 32.

binding decision. Moreover, it should be based on the degree to which this is foreseeable, based on objective, non-discriminatory criteria known in advance to the undertakings concerned.[32] ESA asserts further that, for the same reason, Norway's contentions in the Defence, claiming that the number of actual FSA interventions is limited and that the current authorisation scheme is "much simpler", are irrelevant.[33]

The assessment under the Directives

98. ESA observes that Norway, in its Defence, maintains its view that the Directives do not regulate the powers of the competent authority in the home EEA State in the event of an acquisition or establishment of a subsidiary in another EEA State.[34] ESA rejects the conclusion that Norway draws from this, namely, that, as a result, the Directives do not preclude national legislation such as the authorisation requirement.[35] On the contrary, in ESA's submission, the establishment or acquisition of an undertaking as a subsidiary in the host EEA State is subject to a single authorisation from the supervisory authority of that EEA State.[36] Furthermore, the supervisory authority in the home EEA State does not have supervisory powers over a subsidiary established in the host EEA State.[37]

99. ESA contends that the Directives contain rules concerning authorisation for various businesses and are applicable where a Norwegian financial institution seeks to establish or acquire one of the listed categories of financial institution as a subsidiary in another EEA State. Establishment or acquisition of a subsidiary in another EEA State is subject to an authorisation from the supervisory authority in the host EEA State. Therefore, in ESA's submission, the Directives require one single authorisation from the host EEA State in which the establishment or acquisition is sought and are based on the principle of mutual recognition of authorisations and supervisory systems.

100. ESA asserts that under the consultation mechanism that the Directives provide for the home EEA State would always be informed and have the opportunity to provide the supervisory authority in the host EEA State with any information or views it deems relevant prior to the granting of an authorisation by that supervisory authority under the Directives. In response to Norway's argument that the supervisory authority of the host EEA State and the home EEA State, respectively, will *assess different* aspects of the establishment or acquisition,[38] ESA contends that the consultation mechanism gives Norway, as home EEA State, precisely the opportunity to assess such different aspects and inform the host EEA State accordingly.

101. ESA asserts, as regards Article 34 of Directive 2009/138, that the supervisory powers do not include a power of the home EEA State to object to, or veto, an establishment or acquisition of a subsidiary in another EEA State, nor to subject

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32 Reference is made to Case E-9/11 *ESA* v *Norway*, cited above, paragraph 100.
33 Reference is made to the Defence, paragraphs 33 to 34.
34 Reference is made to the Defence, paragraphs 6 and 35.
35 Reference is made to the Defence, paragraphs 6, 37 and 38.
36 Reference is made to the Application, paragraph 80.
37 Reference is made to the Application, paragraph 88.
38 Reference is made to the Defence, paragraphs 7 and 90.

financial institutions to a condition of de facto prior authorisation from the home EEA State. ESA contends that this argument is equally applicable with regard to Directive 2013/36.[39]

102. ESA submits that, although the Directives contain provisions to the effect that authorities are permitted, to the extent necessary to exercise their functions, to intervene in the activity of institutions, which Norway refers to as a "system of home State supervision",[40] the existence in the Directives of such provisions cannot operate, in itself, as a defence for maintaining national provisions, which are in breach of the Directives.

103. ESA maintains that the supervisory powers, as referred to in Article 64 of Directive 2013/36 and Article 34 of Directive 2009/138, cannot go beyond the limits set out by other provisions of the Directives, or the fundamental freedoms of the EEA Agreement. Thus, these Articles of the Directives cannot be read as giving EEA States a "carte blanche" as regards home State supervisory powers in the area of financial services, as Norway seems to indicate.

104. ESA refers to Norway's submissions with regard to Directive 2003/41 and maintains that Articles 9 and 20 of Directive 2003/41 contain a requirement to obtain prior authorisation from the supervisory authority of the host EEA State,[41] subjecting the establishment or acquisition in question to a single authorisation from the supervisory authority of that EEA State.[42] ESA contends that, even if Directive 2003/41 only contains minimum prudential requirements, it does not justify Norway's legislation which is in breach of that single authorisation scheme.

105. ESA maintains, in conclusion, that by requiring financial institutions, in accordance with the provisions of national law, to obtain authorisation from the FSA before establishing or acquiring one of the listed categories of financial institution as a subsidiary in another EEA State, Norway is in breach of the authorisation procedures applicable to the establishment or acquisition of the applicable financial institutions set out in the Directives.

Article 31 EEA

106. In the event that Norway is not found to have breached the Directives, ESA maintains nonetheless that the authorisation requirement constitutes an unjustified restriction on the freedom of establishment, breaching Article 31 EEA.

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39 Reference is made to the Application, paragraphs 85, 86 and 92.

40 Reference is made to the Defence, paragraph 56.

41 Reference is made to the Defence, paragraphs 62 to 65. ESA observes that in the Defence, paragraph 65, Norway also states that Directive 2003/41 has been replaced by Directive (EU) 2016/2341, which has not yet been incorporated into the EEA Agreement. Notwithstanding the fact that this is without relevance for the present case, ESA notes that Directive (EU) 2016/2341 was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 54/2021, which entered into force on 1 August 2023.

42 Reference is made to the Application, paragraphs 92 to 94.

107. Moreover, ESA submits that, due to the lack of a harmonised EEA legal framework applicable to financial institutions other than those covered by the Directives, Article 31 EEA is applicable where a Norwegian financial institution seeks to establish/acquire in another EEA State a financial institution not covered by the Directives as a subsidiary.[43] Further, ESA maintains the submissions made in the Application to the effect that a prior authorisation scheme in the home EEA State restricts by its very purpose the freedom of establishment, possibly hindering Norwegian financial institutions from establishing or acquiring financial institutions as subsidiaries in other EEA States.[44]

108. ESA contends further that, while Norway has not disputed that its rules constitute a restriction on the freedom of establishment, Norway has argued that the rules could be justified by overriding reasons of general public interest and that they are proportionate. In response to Norway's contention in the Defence that "ESA does not argue that the notification requirement in itself constitutes a restriction",[45] ESA asserts that a notification requirement could in itself constitute a restriction.[46]

109. Further, as regards the proportionality of the de facto authorisation scheme in Section 4-1 of the FIA, ESA concurs with Norway that EEA States are free to define in detail the level of protection sought, as set out in *Netfonds Holding*.[47] However, ESA asserts that it was also held in that judgment that restrictive measures imposed must satisfy the conditions laid down in case law as regards their proportionality.[48] ESA reiterates that it is for national authorities to show in individual cases that the restriction imposed is appropriate to secure the attainment of the objective which it pursues and does not go beyond what is necessary in order to attain it.[49]

110. In response to the arguments by which Norway maintains that the rule set out in Section 4-1 of the FIA complies with the suitability and necessity tests[50] and that the consultation mechanism provided for in the Directives does not achieve Norway's desired level of protection,[51] ESA claims that Norway has not demonstrated why less

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43 Reference is made to the Application, paragraph 70.
44 Reference is made to the Application, paragraph 97.
45 Reference is made to the Defence, paragraphs 77 and 78.
46 Reference is made to Case E-6/13 *Metacom AG* [2013] EFTA Ct. Rep. 856, paragraphs 60 and 61.
47 Reference is made to Case E-8/16 *Netfonds Holding*, cited above, paragraph 130.
48 Ibid.
49 Reference is made to the Application, paragraphs 101 and 102. ESA observes that in a judgment which post-dates the application, *Nordic INFO*, C-128/22, EU:C:2023:951, the CJEU described, in paragraph 77, this principle in its fullest form, which involves a test with three limbs: "The requirement of proportionality specifically requires verification that measures such as those at issue in the main proceedings, first, are appropriate for attaining the objective of general interest pursued …, second, are limited to what is strictly necessary, in the sense that that objective could not reasonably be achieved in an equally effective manner by other means less prejudicial to the rights and freedoms guaranteed to the persons concerned, and, third, are not disproportionate to that objective, which implies, in particular, a balancing of the importance of the objective and the seriousness of the interference with those rights and freedoms". ESA considers that this description of the principle of proportionality is authoritative and comprehensive. However, for the purposes of the present proceedings, ESA considers it sufficiently clear that the measures at issue do not pass the second limb of the test, making it unnecessary at this stage to address the third in further detail.
50 Reference is made to the Defence, paragraph 87.
51 Reference is made to the Defence, paragraphs 89 to 91.

restrictive measures would not be sufficient. Further, ESA asserts that the reasons invoked by an EEA State by way of justification must either be accompanied by appropriate evidence or by an analysis of the appropriateness and proportionality of the measure in question, as well as specific evidence substantiating its arguments.[52] In this regard, ESA notes the proposal for less restrictive measures submitted by the Ministry of Finance to the Norwegian Parliament.[53] The proposal contains simplifications to the effect that the information to be provided to the FSA would be a copy of the application/notification to the supervisory authorities in the host EEA State.[54] Further, ESA refers to the relevant preparatory works in which the proposed amendments to Section 4-1 of the FIA are described.[55]

111. ESA claims that there is a discrepancy between the arguments put forward by Norway in the Defence as regards the necessity of the measures and the description of the proposed amendments set out in the preparatory works cited. ESA contends that if the current provisions of Section 4-1 of the FIA were necessary to pursue the aim of financial stability, one would expected this to be mentioned in connection with an amendment by which important elements of the current scheme are repealed, resulting in less restrictive measures.

112. Consequently, ESA maintains that the authorisation requirement set out in Section 4-1 of the FIA is in breach of EEA law.

Costs

113. ESA claims that, as a result of a clerical omission, the operative part of the Application did not include the issue of allocation of costs for the proceedings. ESA therefore requests that it is included in the operative part of the case, cf. Article 121(1) RoP, as set out and supplemented by the Reply, cf. Article 108(1) RoP.

The defendant

Summary of the Norwegian Government's position

114. Norway maintains its view on the Directives, as set out in the pre-litigation correspondence with ESA. Norway claims that the Directives referred to by ESA do not explicitly regulate the powers of the competent authority in the EEA State of the parent in the event of an acquisition or establishment of a subsidiary in another EEA State, thus

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52 Reference is made to Case E-8/20 *Criminal Proceedings against N*, cited above, paragraph 119.

53 Reference is made to the Defence, paragraphs 21 to 23.

54 Reference is made to the Defence, paragraph 24.

55 Reference is made to Prop. 13 L (2023-2024) as well as the original text in Norwegian: "Den forenklede meldeplikten sikrer at Finanstilsynet fremdeles får tidlig informasjon om norske finansforetaks konsernetableringer med finansforetak iandre EØS-stater. Imidlertid mister Finanstilsynet kompetanse til i forkant å sette vilkår for eller stanse konsernetableringer av hensyn til å sikre finansiell stabilitet i Norge. Etter konsernetableringen vil likevel Finanstilsynet kunne følge opp finanskonsernet på vanlig måte, etter gjeldende regelverk for finansforetak og finanskonsern".

not precluding national rules under which the competent authority in the EEA State of the parent may supervise and regulate the *parent* in this respect.

115. Norway submits that supervision by the competent authority in the EEA State of the parent undertaking is appropriate and necessary to safeguard the aim of maintaining financial stability. The competent authority in the EEA State of the subsidiary and the EEA State of the parent undertaking will assess different aspects of the establishment or acquisition. The authority in the EEA State of the subsidiary will, inter alia, assess the parent's ability to provide financial support to the subsidiary, while the authority in the EEA State of the parent assesses whether the establishment/acquisition poses a threat to the group, e.g. in terms of solvency. Whether, for example, an acquisition will expose the parent to risk is not part of the assessment of the authority in the EEA State of the subsidiary. Further, Norway contends that the authority in the EEA State of the subsidiary is not in a position to assess whether the establishment/acquisition will affect the group's financial risk. In order to ensure financial stability in the EEA State of the parent, it is necessary for the competent authority in the EEA State of the parent to have the power, however, in very limited circumstances, to intervene in the parent's establishment/acquisition in another EEA State.

116. Norway therefore maintains that Section 4-1 of the FIA does not constitute an unlawful restriction on the freedom of establishment in Article 31 EEA. The notification requirement, accompanied by the FSA's limited right to intervene in the establishment or acquisition of a subsidiary in another EEA State by a Norwegian undertaking, is a justified, necessary, and proportionate measure to obtain the goal of financial stability in Norway.

The aims of the legislation and the logic of the system

117. Norway asserts that the purpose of the notification requirement is primarily informational and aims to provide the FSA with an overview of developments in financial undertakings in Norway, particularly with regard to ensuring sound group structures and risk management.

118. Norway submits that the FSA's limited intervention right is intended to serve as a safety measure, preventing financial undertakings from establishing group structures that might represent a risk to Norway's financial stability. Norway further claims that the intervention right is merely a safety measure, and not an authorisation requirement, as is reflected in Section 4-1 subsections 4 and 5 of the FIA, which contains strict criteria for intervention by the FSA.

119. In Norway's submission, the nature of the intervention right as a safety measure, intended to be used in extreme cases, is illustrated by the limited number of cases in which the FSA has intervened in an establishment or acquisition. Under the authorisation requirement in the previous Section 4-1 of the FIA and its predecessor in Section 2a-3 of the FIA 1988, the FSA received 17 applications and intervened in only two. Norway asserts that, under the notification requirement in the current Section 4-1 of the FIA, the FSA has received three notifications of an acquisition or establishment

and intervened in none. Norway maintains that this practice demonstrates the high threshold for intervention and confirms that the power to intervene is intended to be a last resort, reserved for acquisitions or establishments with the potential of exposing financial markets, and the undertakings involved, to a special risk which affects financial stability in Norway.

120. Norway explains that the current notification requirement in Section 4-1 of the FIA differs from the prior authorisation requirement. The current provisions containing procedural requirements are much simpler than the previous provisions. Further, pursuant to the current Section 4-1 subsection 6, once the relevant deadline has passed, the FSA shall be considered as not having any objections to the establishment or acquisition in question.

The assessment under the Directives

121. Norway agrees with ESA that the Directives, with the exception of Directive 2003/41, provide for harmonisation in relation to the prudential standards set out in the Directives, such as capital requirements. However, in Norway's submission, it is not expressly regulated in the Directives whether an EEA State may require its financial undertakings to notify its competent authorities before establishing or acquiring a subsidiary in another EEA State. Accordingly, the Directives do not preclude national rules in this respect.

122. In particular, Norway continues, the Directives do not preclude national rules in relation to the home state authorities' power to supervise and assess establishments or acquisitions by entities under their supervision from the perspective of a group parent supervisor. Norway submits that such national rules should be assessed in light of the fact that the Directives do indeed require the competent authorities to ensure that the entities under their supervision continue to fulfil prudential requirements and to oversee the entities' risk exposures. Consequently, an EEA State may have national rules which introduce appropriate supervisory powers for its competent authorities, in situations where the establishment or acquisition of subsidiaries in other EEA States is proposed, for the purpose of maintaining protection of financial stability in that EEA State, including the power to require notification from its financial undertakings in such situations, and where appropriate, to attach conditions to, or oppose, the proposed establishment or acquisition.

123. In the light of the above, Norway concludes that the relevant EEA secondary legislation does not preclude Section 4-1 of the FIA and maintains that Section 4-1 must be assessed under Article 31 EEA only. Moreover, Norway claims that ESA, in its pre-Article 31 letter of 22 June 2018, part 4.1, made the same preliminary assessment of applicable EEA law in this case.

Directive 2013/36

124. Norway draws attention to recital 49 of Directive 2013/36, which states:

> *Member States should be able to refuse or withdraw a credit institution's authorisation in the case of certain group structures considered inappropriate for carrying out banking activities, because such structures cannot be supervised effectively. In that respect the competent authorities should have the necessary powers to ensure the sound and prudent management of credit institutions. ...*

125. In that regard, Norway argues that Articles 64 and 18 of Directive 2013/36 require that the competent authorities shall be given all supervisory powers to intervene in the activity of institutions that are necessary for the exercise of their function, as well as the right to withdraw an authorisation in specific situations. Norway claims that the scope of these provisions does not exclude supervisory powers in relation to credit institutions that are or might become the parent undertaking in a financial group. Furthermore, referring also to Articles 102, 104 and 105 of Directive 2013/36, Norway argues that the abovementioned provisions and recital clearly emphasise that the home State competent authority must carry out close and continuous supervision of its entities, particularly in relation to activities that may change their prudential profile. Such activities include the establishment of a group, in particular where the subsidiaries are established in other EEA States. Thus, this necessitates a prudential assessment by the competent authority, and if needed, prudential measures to remedy risks stemming from that activity.

126. Norway asserts that, pursuant to Directive 2013/36, supervisory authorities may withdraw authorisations previously granted if certain conditions apply. Norway contends that, in those situations, supervisory authorities may impose requirements or restrictions on that entity. Consequently, in cases where proposed establishments or acquisitions by entities would satisfy the conditions for the withdrawal of an authorisation, a less disruptive approach would be to attach requirements or to oppose the acquisition or establishment, rather than to withdraw the undertaking's authorisation, resulting in the cessation of all operations by the undertaking in question.

<u>The articles of Directive 2013/36 invoked by ESA do not preclude a national scheme such as Section 4-1 of the FIA</u>

127. Norway rejects ESA's argument that Section 4-1 of the FIA constitutes a breach of Articles 8, 16 and 24 of Directive 2013/36. Norway contends that the consultation mechanism in Article 16 concerns a harmonised process for the establishment of a credit institution in a Member State, particularly with respect to the suitability assessment to be conducted by the competent authorities of the subsidiary's home State. However, the Article in question does not regulate the duties or powers of the competent authorities of the prospective parent undertaking in light of the parent's evolving circumstances. From Norway's perspective, Articles 8 and 16 do not prevent the competent authorities of the prospective parent undertaking from ensuring that all pertinent aspects of the group establishment, seen from the standpoint of the parent undertaking, is prudent and appropriate.

128. As for Article 24 of Directive 2013/36, Norway asserts that the provision only concerns the exchange of information relevant to the assessment of the acquisition in a credit institution, conducted from the point of view of the home State authority of the subsidiary. Norway contends that Article 24 does not concern the assessment of the acquisition by a credit institution in relation to the prudential requirements of the group as a whole and claims that such an assessment should be carried out by the competent authority in the home State of the parent undertaking.

129. Moreover, Norway argues that, in accordance with Articles 22 and 23 of Directive 2013/36, the competent authority in the home State of the acquired undertaking is required to assess, inter alia, the suitability of the proposed acquirer. In Norway's assessment, however, neither of these Articles, nor Articles 8, 16 or 24 of Directive 2013/36 contain limitations on the supervisory powers of the home State authorities of the prospective acquirer, regarding the soundness of the proposed group structure and its likely effects on financial stability in that State. Lastly, Norway submits that the assessments made by the two competent authorities in question are distinct from one another and not mutually exclusive, whereby only the first assessment mentioned is governed by Directive 2013/36.

130. Norway submits that Directive 2013/36 emphasises the supervisory powers of the home State authority, which are not limited by the consultation mechanisms in place for initial authorisations or acquisitions. In light of Articles 4, 18 and 64 of the Directive, it is appropriate for national regulations to enable the home State authority of a prospective parent undertaking to assess the soundness of a group structure prior to its establishment, and to attach conditions to, or oppose, the establishment of the group structure.

Directive 2009/138

131. Norway rejects ESA's claim that Article 34 of Directive 2009/138 precludes a right for the supervisory authorities of the parent undertaking to object to, or set conditions for, the establishment or acquisition of a subsidiary in another EEA State. Norway asserts that the establishment of a group with subsidiaries can alter the prudential profile of the parent undertaking. In such cases, Articles 27 and 34 of Directive 2009/138 provide supervisory authorities with the powers necessary to ensure that the parent undertaking is operated prudently. Articles 27 and 34 establish a home State supervisory system, which supports the notion that competent supervisory authorities should be able to conduct an assessment of the impact that a potential group establishment may have on insurance or reinsurance undertakings. Norway asserts that the power to object to an establishment or acquisition of a subsidiary in another EEA State, as well as to subject it to conditions, falls within the scope of the abovementioned Articles of Directive 2009/138.

132. Norway reiterates its claim that if the conditions for the withdrawal of an authorisation, as set out in Article 144 of Directive 2009/138, are satisfied due to inappropriate group establishments, attaching requirements or restrictions to that

undertaking would be a less disruptive approach than for the supervisory authority to require the undertaking in question to cease all operations.

133. Norway asserts that Articles 14, 26, 57 and 60 of Directive 2009/138, which ESA claims Norway is in breach of, do not regulate or prohibit the right of the home State authorities to assess, and in cases of special risk, intervene in the parent undertaking's acquisition or establishment of a subsidiary in another EEA State. Further, Norway contends that Articles 57 and 60 of Directive 2009/138, which largely correspond to Articles 22 and 24 of Directive 2013/36, do not concern the effects which the acquisition may have on financial stability in the home State of the prospective undertaking. Therefore, Norway is of the view that Articles 57 and 60 of Directive 2009/138 do not prevent the supervisory authority of the prospective parent undertaking from ensuring that all relevant aspects of the group establishment, from the parent undertaking's perspective, are prudent and appropriate, and in certain cases, where it is deemed necessary, from objecting to, or attaching conditions to, the proposed establishment.

134. Norway claims, in conclusion, that it cannot see that the provisions in Directive 2009/138 preclude national regulations that enable the home State competent authorities to carry out appropriate supervision of their entities.

Directive 2003/41

135. Norway claims that Directive 2003/41 only contains minimum prudential requirements, as can be seen in recitals 18 and 20 of the Directive. Thus, as expressly stated in Article 9(3) of Directive 2003/41, a Member State is allowed to make the conditions of operation of an institution located in their territory subject to requirements in addition to those listed in the Directive.

136. Norway takes the view that Article 14, particularly Article 14(2) and (4) of Directive 2003/41, provides that competent authorities may prohibit or restrict activities of institutions located in their territory in the situations listed therein. Further, Directive 2003/41 does not, in any event, preclude competent authorities from requiring notification from supervised entities which wish to establish or acquire a subsidiary in another EEA State and, where appropriate, from attaching conditions to, or opposing, the proposed establishment or acquisition.

137. Moreover, Norway asserts that Article 20 of Directive 2003/41, invoked by ESA, appears to only regulate cross-border activities related to sponsorship between retirement institutions. Norway submits that Article 20 does not concern supervisory powers concerning the establishment of financial groups and is, therefore, irrelevant to the case at hand.

Directives 2015/2366 and 2009/110

138. Norway submits that Article 6 of Directive 2015/2366 corresponds to Article 22 of Directive 2013/36 and Article 57 of Directive 2009/138 and, as argued in relation to Article 57 of Directive 2009/138, Norway reiterates the claim that Article 6 of Directive

2015/2366 does not preclude national regulation enabling the home State authority to object to, or set conditions for, the establishment or acquisition of a subsidiary in another EEA State.

139. Norway asserts that Article 11 of Directive 2015/2366, unlike Article 16 of Directive 2013/36 and Article 26 of Directive 2009/138, does not provide for a consultation mechanism between competent authorities.

140. Moreover, in relation to Article 13 of Directive 2015/2366, Norway maintains that the wording of that article indicates that supervisory authorities have the power to pursue a less disruptive approach, attaching requirements to, or opposing, a proposed acquisition or establishment of a subsidiary in another EEA State, rather than requiring the entity to cease all operations.

141. Norway claims that none of the articles of Directive 2015/2366 regulate or prohibit supervisory authorities of home States in the assessment of and intervention in the proposed establishment or acquisition of a subsidiary by the parent undertaking in another EEA State as a supervisory measure. Lastly Norway refers to Directive 2009/110, specifically Article 3 thereof, and asserts that, in the light of that provision, the arguments made in relation to Directive 2015/2366 also apply in relation to Directive 2009/110.

The assessment under Article 31 EEA

142. Norway asserts that ESA does not argue that the notification requirement in itself constitutes a restriction. Norway claims further that the notification requirement is not liable to hinder the exercise of the freedom of establishment.

143. Moreover, Norway accepts that the FSA's limited right to intervene could constitute a restriction on the freedom of establishment protected by Article 31 EEA. However, Norway considers Section 4-1 of the FIA to be justified by overriding reasons of public interest, proportionate with the provisions in question passing the criteria of the suitability and necessity tests.

144. Norway asserts that Section 4-1 of the FIA pursues the objectives of the protection of the functioning and good reputation of the financial industry, as well as the promotion of the well-functioning and efficiency of the financial markets. Norway claims that the Court has held that these objectives constitute overriding reasons in the public interest capable of justifying national measures which restrict the fundamental freedoms.[56]

145. Norway contends that Section 4-1 of the FIA is appropriate to secure the attainment of the objective of the protection of financial stability. The notification requirement ensures that the FSA can carry out its supervisory role in relation to the functioning of the financial services sector.

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[56] Reference is made to Case E-8/16 *Netfonds Holding*, cited above, paragraph 113.

146. Norway claims that the FSA's power to intervene is limited to a "particular risk" that a proposed acquisition or establishment exposes Norwegian groups or undertakings to. The power that the FSA maintains to intervene in such circumstances serves as an effective and targeted tool in order to protect the well-functioning of the financial services sector.

147. Norway claims further that ESA was also of the view that the previous prior authorisation requirement in Section 4-1 of the FIA was appropriate for attaining the objective of financial stability in the case of credit institutions and insurance undertakings, since those undertakings are capable of having an impact on the stability of financial markets.[57]

148. Norway rejects ESA's claim that Norway has not provided substantial arguments concerning the necessity of the national measure as regards situations in which finance companies are established or acquired as subsidiaries in other EEA States. Further, Norway asserts that in *Netfonds Holding* the Court confirmed that the EEA States are free to define in detail the level of protection sought in different areas of society.[58] Moreover, Norway submits that it has chosen a high level of protection in the financial sectors. In these circumstances, according to Norway, the Court's case law indicates that the proportionality of a measure must be assessed "solely by reference to the objectives pursued by the EEA State concerned and the level of protection that it seeks to ensure".[59] Norway asserts that the Court has held that, when it comes to regulating banks and insurance companies, special concerns arise in regards to financial stability emphasising that soundly regulated and safe financial institutions are of decisive importance for financial stability in the EEA, mainly due to the functions of these institutions for the economy as a whole.[60]

149. Norway asserts that Section 4-1 of the FIA is necessary for achieving financial stability and that the provision does not exceed what is necessary to achieve this goal. Norway explains that, pursuant to the Directives, the competent authority in the EEA State of the subsidiary must consult with the competent authority in the EEA State of the parent before granting authorisation to an institution. It understands ESA to argue that this consultation process ensures that the FSA is always informed about the planned establishment or acquisition of a subsidiary and provides an opportunity for the FSA to supply the competent authority in the EEA State of the subsidiary with any information it considers relevant. It further understands ESA to argue that the consultation process also allows the FSA to express any concerns it may have regarding the authorisation of a subsidiary in another EEA State.

150. In response to this, Norway contends that not every EEA State requires all types of financial institutions to undergo an authorisation process as can be seen, for example, in the case of finance companies. Hence, Norway claims that, in instances where a Norwegian financial entity acquires or establishes a finance company in EEA States not

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57 Reference is made to ESA's letter of 22 June 2018, attached as Annex 5 to the Application.
58 Reference is made to Case E-8/16 *Netfonds Holding*, cited above, paragraph 113.
59 Ibid, paragraph 131.
60 Ibid, paragraph 132.

requiring an authorisation process, the FSA would neither be notified by a competent authority nor possess any means to contribute relevant information or voice concerns.

151. Norway stresses that the current opportunity for Norway to provide information or raise concerns to the competent authority in the EEA State of a subsidiary does not meet Norway's desired protection level. The consultation procedure fails to ensure the achievement of the objectives targeted by Section 4-1 of the FIA. Specifically, in Norway's submission, the competent authorities in the EEA States of the subsidiary and the parent assess different aspects of an establishment or acquisition. The competent authority in the EEA State of the subsidiary assesses, inter alia, the parent's ability to financially support the subsidiary, without evaluating potential threats to the group's solvency or other risks, which is the responsibility of the competent authority in the EEA State of the parent. Consequently, the assessments conducted by the authorities in the EEA State of the subsidiary and of the parent differ significantly. In this regard, Norway also contends that the competent authority in the EEA State of the subsidiary may not, to the same extent, be able to conduct an assessment of whether the establishment or acquisition could impact the group's financial risk.

152. Moreover, Norway argues that EEA States have the autonomy to define their own level of protection within the financial sector, leading to a situation where the competent authority in the EEA State of the subsidiary may have a different perspective on the risks of an establishment or acquisition in comparison with the competent authority in the EEA State of the parent, such as Norway. This divergence may result in differing assessments of what constitutes acceptable risk, highlighting, in Norway's submission, that the consultation procedure alone does not guarantee adequate supervision at the group level to protect financial stability in the EEA State of the parent. Norway contends that, if the FSA cannot intervene in group structures involving subsidiaries in other EEA States, the protection of financial stability within Norway could be compromised, reliant on the judgement of authorities in other EEA States. This situation could undermine Norway's sovereignty over its financial stability standards.

153. Norway reiterates its claim that both the previous and current rules aim to uphold financial stability and are suitable to achieve this aim. Despite changes in legislation, Norway contends that its stance remains to protect financial stability through appropriate measures, including the possible need for limited intervention by the FSA in cross-border financial activities. It concludes by arguing that, without such intervention capabilities, the level of protection in Norway's financial sector would fall short of the country's desired standards, thus confirming that the measures in Section 4-1 of the FIA are essential for maintaining financial stability.

Section 4-1 of the FIA complies with the principle of legal certainty

154. Norway submits that Section 4-1 of the FIA complies with the principle of legal certainty. Norway argues that Section 4-1 mandates Norwegian financial entities only to notify the FSA about any acquisitions or establishments of subsidiaries in other EEA States, providing a straightforward rule. This notification requirement, including the specifics that must be included in the notifications, is the primary obligation.

Furthermore, Norway contends that the FSA's right to intervene, as outlined, does not constitute an obligation on Norwegian financial firms nor a precondition for authorisation. Instead, it characterises this right of intervention for the FSA as a safety measure reserved for extreme cases, such as when an acquisition or establishment threatens Norway's financial stability, a situation not addressed by the consultation process in the Directives. To date, Norway continues, there have been no instances where the FSA has exercised this intervention right, underscoring its role as a measure of last resort.

155. Norway refers to Case E-9/11 *ESA* v *Norway*, where the Court assessed national provisions allowing for exceptions to the main rule imposing an outright ban on the acquisition of shareholdings and the exercise of voting rights in financial infrastructure undertakings beyond a certain threshold. The Court emphasised that, in the interests of legal certainty, exceptions must be sufficiently clear and precise. It acknowledged that while the principle of legal certainty does not preclude the conferral of discretionary powers on the competent authorities, these must be based, as a general rule, on objective, non-discriminatory criteria that are known in advance to the entities concerned.

156. Norway claims that, in contrast, Section 4-1 of the FIA does not impose a ban on the acquisition or establishment of subsidiaries in other EEA States, nor does it necessitate prior administrative approval. Consequently, in Norway’s submission, the limited intervention right granted to the FSA does not constitute “criteria” that Norwegian financial institutions are required to meet, in contrast to the situation addressed in Case E-9/11 *ESA* v *Norway*.

157. Norway contends that the principle of legal certainty does not preclude the conferral of discretionary powers on competent authorities, a stance reflected in Norway's regulatory framework. Specifically, subsection 4 of Section 4-1 of the FIA introduces objective and non-discriminatory criteria for the FSA’s right of limited intervention. Further clarity on the FSA's assessment is provided in subsection 5. Entities subject to intervention by the FSA are entitled to legal recourse. In any event, according to Norway, the FSA has yet to exercise this intervention right in any acquisitions or establishments, illustrating that such interventions are reserved for extreme cases rather than conditions for Norwegian financial entities to fulfil.

158. In the light of the above arguments, Norway requests the Court to dismiss the Application as unfounded and to order ESA to pay the costs of the proceedings.

Rejoinder

159. Norway maintains its claim in relation to the Directives, as set out in the Defence, that these do not regulate, and therefore do not preclude, national rules providing the home State authority of the prospective parent undertaking with the authority to require a notification or to object to, or impose conditions on, the establishment or acquisition of a subsidiary in another EEA State. Norway contends also that further support for its argument is provided by recently proposed amendments to Directive 2013/36.

160. Moreover, Norway maintains that Section 4-1 of the FIA does not constitute an unlawful restriction on the freedom of establishment, claiming that the proposed amendments to Directive 2013/36 provide further support for this argument.

The assessment under the Directives

161. Norway contends that the Directives do not specifically regulate the home State authority's power to require notification or to object to, or set conditions for, the establishment or acquisition of a subsidiary in another State. Norway agrees with ESA's submission that, under the Directives, the home State supervisory authority of the parent company has no supervisory powers over subsidiaries established in another EEA State.[61] However, Norway argues that the notification requirement in Section 4-1 of the FIA does not extend supervisory power over the subsidiary but rather over the parent entity's proposed acquisitions or establishments, which is not directly addressed by the Directives.

162. Norway reiterates its claim that the Directives mandate, nonetheless, that the competent authority of the home State must possess the necessary tools for adequate supervision to ensure sound and prudent operations of the entities under its supervision.[62] This includes monitoring new group formations to ensure that they meet prudential requirements and the authority to impose conditions or withdraw authorisation based on compliance and risk assessments.

163. In response to ESA's argument that these powers do not include a power to object to the establishment or acquisition of a subsidiary in another EEA State,[63] Norway insists that the Directives do not preclude national rules granting such powers. Moreover, Norway claims that a limited right for the home State supervisory authority to intervene before a group structure is established is an efficient measure for fulfilling the supervisory obligations outlined in the Directives.

164. Further, Norway rejects ESA's assertion that Norway interprets Article 64 of Directive 2013/36 and Article 34 of Directive 2009/138 as granting EEA States a "carte blanche" regarding home State supervisory powers in the financial services sector.[64] Norway's reiterates its claim, as outlined in the Defence, that the Directives do not specifically address this issue, thus not precluding national provisions that embody such supervisory powers. However, Norway acknowledges that any national provisions must not constitute an unlawful restriction on the fundamental freedoms of the EEA Agreement. Moreover, Norway asserts that the FSA's limited right to intervene, as detailed in Section 4-1 of the FIA, is in line with the objective and the system of the Directives concerning home State supervisory powers, also where the establishment of a group covering several EEA States is at issue.

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61 Reference is made to the Reply, paragraph 12.
62 Reference is made to the Defence, paragraph 73.
63 Reference is made to the Reply, paragraph 19.
64 Reference is made to the Reply, paragraph 21.

165. In response to ESA's argument that the consultation mechanism outlined in the Directives ensures that the EEA State of a prospective subsidiary will consider the information provided by the parent's home EEA State during its assessment,[65] Norway contends that, while the home State authority of the subsidiary is tasked with ensuring the sound and prudent management of the credit institution where an acquisition is proposed, that authority does not assess the effect of such an acquisition on the financial stability of the parent company. Therefore, Norway argues that the Directives' consultation mechanism does not ensure an assessment of the effects of the acquisition on the financial stability of the parent company or the financial situation in the parent's home State.[66]

166. Norway's contends that its argument is further supported by amendments to Directive 2013/36 recently agreed. It claims that, in December 2023, the preparatory bodies of the Council and the European Parliament endorsed the Banking Package 2021, which includes legislative amendments to Directive 2013/36 and the Capital Requirements Regulation, now published on the institutions websites.[67] Although these amendments are still subject to legal revision and final voting, Norway claims that no significant changes are anticipated before their adoption by the European Parliament in the second quarter of 2024.[68] The amendments introduce a requirement to notify the home State authorities of the parent company prior to the acquisition of a material holding and grant the competent authority the power to oppose the proposed acquisition under certain conditions.

Proposed amendments to Directive 2013/36

167. Norway identifies the proposed amendments to Directive 2013/36 which it claims are relevant to this case. It asserts that a number of the proposed amendments correspond to provisions in Section 4-1 of the FIA.

168. Norway draws particular attention to the proposed new Article 27b(3) of Directive 2013/36, which, in its submission, corresponds to a large degree with the power granted to the home State authority of a prospective parent undertaking pursuant to Section 4-1 subsection 4 of the FIA.

169. Norway claims that, in essence, the new provisions to be introduced in Directive 2013/36 closely resemble those in Section 4-1 of the FIA. Under both sets of rules, entities intending to acquire holdings in another undertaking must first notify their home State's competent authorities, which then assess the sound and prudent management of the acquirer post-acquisition and the risks involved. The authorities may object to the acquisition if there are reasonable grounds for doing so. While there are differences between the proposed amendments to Directive 2013/36 and Section 4-1 of the FIA, such as the notification threshold and the wording of the assessment criteria, Norway argues that these differences are not significant for the case at hand. Importantly, in

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65 Reference is made to the Reply, paragraphs 16 and 17.
66 Reference is made to the Defence, paragraphs 49, 59 and 76.
67 Reference is made to the published legal text on www.europa.eu.
68 Reference is made to the Commission's website for further information.

Norway's submission, the proposed amendments show that Directive 2013/36 does not regulate this matter. Norway claims that similar authorisation schemes already exist in the national legislation of other Member States, including Italy and Sweden.

170. Further, Norway refers to the European Commission's Impact Assessment Report of 27 October 2021, in which the Commission stated that, while Directive 2013/36 ensures a minimum level of harmonisation across the Union, some Member States have added provisions to their national laws to address specific areas, making use of the discretion allowed under Directive 2013/36. In Norway's submission, this confirms that the current framework in Directive 2013/36 does not preclude Member States from enacting national rules that grant supervisory powers to the competent authorities of a parent undertaking regarding the establishment or acquisition of a subsidiary in another EEA State.

171. Norway asserts that the proposed amendments to Directive 2013/36 show that the Directives do not preclude national rules requiring financial undertakings to inform their home State's competent authorities in advance of an acquisition and which permit these authorities to oppose the proposed acquisition if it exposes the undertaking to a particular risk. Norway thus concludes that Section 4-1 of the FIA is not in breach of any secondary legislation.

The assessment under Article 31 EEA

172. Norway maintains that Section 4-1 of the FIA is a restriction which is justified by overriding reasons in the general interest and which is suitable and proportionate.

173. In response to ESA's claim that Norway has not demonstrated why less restrictive measures would not be sufficient, Norway refers to paragraphs 85 to 87 of the Defence. Moreover, Norway asserts that the proportionality of Section 4-1 must be assessed solely by reference to the objectives pursued by Norway and the level of protection that it seeks to ensure.

174. Norway reiterates that it has chosen a level of high protection for its financial services sector. It claims that the arguments in the Defence align with the preparatory works for a revised, simplified Section 4-1 of the FIA, indicating no contradictions in terms of the level of protection desired. The preparatory works reveal that this simplified procedure would eliminate the FSA's competence to impose conditions or oppose proposed acquisitions, leading to a lower level of protection compared to the high level of protection for financial stability ensured by the current Section 4-1. The Defence underscores that a basic notification requirement, without the right for the FSA to intervene in proposed acquisitions in limited circumstances, would be insufficient as a safety mechanism for ensuring financial stability in the national market.

175. Norway claims that this concern is recognised in the proposed amendments to Directive 2013/36 which aim to ensure that the supervisors of credit institutions possess comprehensive supervisory powers enabling them to assess and, if necessary, intervene in material operations that may be undertaken by the supervised entity. The proposed

amendments to Directive 2013/36, which, in Norway's submission, closely reflect the principles of Section 4-1 of the FIA, require that an acquirer notifies the competent authorities in their home State in advance when they intend to acquire a material holding in another undertaking. These authorities must then assess the sound and prudent management of the acquirer post-acquisition, and any risks to which the acquirer is or might be exposed. If there are reasonable grounds for doing so, the competent authorities may oppose the proposed acquisition.

176. Norway argues that the proposed amendments to Directive 2013/36 firmly support the argument that Section 4-1 of the FIA does not constitute an unlawful restriction on the fundamental freedoms and refers to the similarities between Section 4-1 and the proposed new Articles 27a and 27b of Directive 2013/36. Moreover, Norway asserts that this view is further supported by statements made by the Commission in the explanatory memorandum to the legislative proposal, in which it is underlined that the "new supervisory powers are framed in order [to] stay proportionate".[69] Norway submits that, since Article 31 EEA is substantially identical to Article 49 TFEU, the same would apply in an EEA context.

177. Norway reiterates in conclusion that, based on the arguments above, the Court should dismiss the Application as unfounded and order ESA to bear the costs of the proceedings.

The Commission

178. The Commission states that it submits only preliminary observations and reserves its final position until more information is provided in the written proceedings and during the oral hearing. In addition, in recognition of the fact that the degree and level of market monitoring and supervision vary across sectors due to sector-specific legislation, the Commission presents its views and analyses separately for each sector.

Directive 2013/36 – Legal assessment

179. The Commission asserts that, from its overview of the provisions of Directive 2013/36, it follows that while the competence for the authorisation of the establishment of a subsidiary falls to the jurisdiction of the location of the subsidiary, and the acquisition of a qualifying shareholding is subject to the jurisdiction of the competent authority of the target bank, Directive 2013/36 provides for cooperation between the supervisory authority responsible for the assessment of the authorisation or qualifying holding and the competent authority of the parent undertaking or the prospective acquirer. The authority which is competent for the authorisation is required to consult with the parent's competent authority during the authorisation process. This consultation is required similarly where one credit institution acquires a qualifying holding in another credit institution, supervised by a different competent authority.

[69] Reference is made to the European Commission's Proposal for a directive of the European Parliament and of the Council amending Directive 2013/36/EU as regards supervisory powers, sanctions, third-country branches, and environmental, social and governance risks, and amending Directive 2014/59/EU (COM(2021) 663 final).

180. The Commission observes that, although Directive 2013/36 does not explicitly require the competent authority supervising the parent to be formally notified, it provides for an ongoing obligation for the parent's competent authority to supervise both the parent entity and the entire group. This consolidated supervision, aimed at monitoring the financial stability of the group and, by extension, the financial stability of the home country, may include restrictions or limitations on the network of institutions.

181. Given the responsibilities of the parent's competent authority for consolidated supervision, the Commission considers the imposition of a notification requirement, although not currently specified in Directive 2013/36, to be reasonable. The Commission indicates that it has proposed the introduction of a new Article 27a to explicitly require credit institutions to notify their competent authority of any material acquisitions they intend to undertake. Such a notification process is deemed essential to enable a supervisory response from the parent institution's competent authority, especially in cases where it has not been adequately consulted by the competent authority in the Member State of the subsidiary, thus facilitating effective consultation.

182. The Commission considers that the question whether an obligation to notify the supervisor of the parent company is compatible with Directive 2013/36 depends on whether Directive 2013/36 it considered to be exhaustive or not. Even under the assumption that Directive 2013/36 constitutes complete harmonisation, although not explicitly stated as such, the Commission considers that a notification obligation of that kind could still be deemed compatible with Directive 2013/36. This would be particularly relevant in cases where the information submitted to the Member State of establishment is incomplete or misleading. A parallel notification to the supervisor of the parent could enhance supervisory effectiveness on a consolidated basis, fostering cooperation and consultation among authorities. This additional notification obligation could also be compatible with the freedom of establishment, as provided for in Article 31 EEA, to the extent that it is justified by the legitimate objective of effectively ensuring financial stability in the parent's Member State and the EEA as a whole.

183. Consequently, the Commission considers that a mere notification obligation could be consistent with the principle of cooperation between authorities and be justified by the objective of financial stability. This could involve a requirement to provide the FSA with a copy of the information provided to the supervisory authority in the subsidiary's home State.

184. Furthermore, while Section 4-1 subsection 4 of the FIA grants the FSA powers to impose conditions on, or prohibit, the establishment or acquisition of a subsidiary, powers not directly mentioned in Directive 2013/36, the Commission considers them consistent with the supervisory power to restrict or limit business, operations, or networks , or even to order divestment from risky endeavours, provided for in Article 104 of Directive 2013/36. Although Directive 2013/36 does not explicitly include a formal right of objection, it permits the imposition of conditions and restrictions, and requests for divestment to ensure institutional soundness and mitigate supervisory risks. The Commission understands that proposed amendments to the FIA, pending in the

Norwegian Parliament, aim to remove these powers from Section 4-1 subsection 4, further aligning Norwegian legislation with the requirements of supervision in the group's home State, as also provided in Directive 2013/36.

185. The Commission observes that Directive 2013/36 lacks detailed provisions on the conditions for exercising those supervisory powers. In contrast, Section 4-1 subsection 6 of the FIA implies a form of "tacit approval" by establishing a period of up to 80 working days, after which institutions may proceed with their projects without further objections. This provision aims to offer institutions clarity and certainty regarding their ability to move forward after this period. Currently, the Commission does not have any information on how these powers are exercised in practice in Norway and whether their use is disproportionate relative to financial stability risks.

186. The Commission contends that an assessment of the proportionality of provisions such as Section 4-1 subsection 6 of the FIA requires a consideration of the necessity of supervision in an individual case of cooperation between authorities, the case's complexity, and the nature and risk level of the transaction. Without more detailed information, the Commission is unable to conduct a thorough assessment of the proportionality of the period of up to 80 working days stipulated in Section 4-1 subsection 6 read in conjunction with Section 6-2 subsection 3 of the FIA. There is concern that this period could result in a standstill obligation on credit institutions, with considerable negative economic effects, thus raising doubts about its proportionality.

Directive 2009/138 – Legal assessment

187. The Commission observes that, from its overview of Directive 2009/138, it is evident that while the competence to authorise the establishment of a subsidiary lies with the jurisdiction of the subsidiary's location in accordance with Article 14 thereof, Directive 2009/138 provides for cooperation between the competent supervisory authority assessing the request for authorisation and the parent's competent authority. This involves mutual consultation and the sharing of information about shareholder suitability and the requirements in relation to management as specified in Article 26.

188. Despite Directive 2009/138 lacking a requirement for formal notification of the competent authority supervising the parent and Article 133(2) thereof prohibiting prior approval or systematic notification requirements for investment decisions, the Commission observes that Article 26 of Directive 2009/138 provides for consultation with the supervisory authority of the Member State where the insurance undertaking is authorised in cases of requests for the authorisation of a subsidiary. Directive 2009/138 leaves the implementation of this consultation to national discretion, potentially in the form of a notification to the parent's supervisory authority.

189. The Commission observes that, given the emphasis of Directive 2009/138 on group supervision, especially in Article 218 and following, which require detailed information for accurate financial assessments of the group, these supervision provisions could be seen as more specific compared to the broader rule prohibiting systematic notification requirements in Article 133(2). However, there remains a

challenge in balancing the general prohibition on systematic notification requirements with the need for sufficient information to ensure financial stability. The Commission notes this complexity and reserves the right to offer further arguments on achieving a proportionate reconciliation of these provisions.

190. The Commission considers that the question whether Directive 2009/138 encompasses the obligation to notify the supervisor of the parent undertaking depends on whether Directive 2009/138 is considered to be exhaustive or not. Even if Directive 2009/138 is interpreted as entailing complete harmonisation, the Commission considers that a mere notification requirement could be regarded as compatible with its provisions. Such a requirement facilitates essential consultation and cooperation between authorities, especially when the information from the applicant is incomplete or misleading. Requiring a parallel notification of the parent's supervisor could be seen as a reasonable measure to activate consolidated supervision through collaborative efforts.

191. The Commission observes that the additional notification obligation might also be considered as compatible with the freedom of establishment as provided for in Article 31 EEA, to the extent that it is justified by the legitimate objective of efficiently ensuring financial stability in the parent's Member State and the EEA as a whole.

192. In the light of the above, the Commission suggests that a well-defined, proportionate notification obligation could be consistent with the principle of cooperation between authorities, justified by the objective of financial stability, and distinguishable from a systematic notification requirement for investment decisions. This could involve a requirement to provide the FSA with a copy of the information given to the supervisory authority in the subsidiary's home State.

193. In the specific case of Section 4-1 subsection 4 of the FIA, the FSA has the power to specify conditions for, or prohibit, the acquisition or establishment of a subsidiary. In the Commission's assessment, these powers go beyond the framework of cooperation between authorities and do not reflect the wording of Directive 2009/138, which focuses on "rectifying measures" to counter solvency risks and allows group supervisors broad discretion. The Commission is uncertain whether similar ex ante powers could be justified, noting, however, that from a precautionary perspective such measures could be considered sensible, particularly if the harmonisation entailed by Directive 2009/138 is not deemed exhaustive. The Commission indicates that it lacks detailed information on how these powers are exercised in practice and whether their exercise is proportionate to the risks to the soundness of insurance undertakings and financial stability as a whole. Further, the Commission reserves the right to offer further arguments on the challenge of reconciling the useful effect of the prohibition on systematic notification requirements on investment decisions with the concern to maintain financial stability.

Directive 2015/2366

194. The Commission observes that, given the lack of explicit rules on subsidiaries or groups in Directive 2015/2366, unlike the situation under Directive 2013/36 and Directive 2009/138, and simply provision for the notification of new establishments to

the Member State of origin, a notification obligation regarding the establishment or qualified acquisition of subsidiaries does not appear to be contrary to Directive 2015/2366. Furthermore, such an obligation could also be considered as compatible with the freedom of establishment, which is subject to restrictions to ensure the legitimate objective of financial stability.

195. The same reasoning is also applicable to Directive 2009/110 on the taking up, pursuit and prudential supervision of the business of electronic money institutions, Article 3 of which renders the aforementioned provisions of Directive 2015/2366 applicable to electronic money institutions *mutatis mutandis*.

196. The Commission submits that, in the light of the above, a basic notification requirement could be consistent with the principle of cooperation between authorities, and be justified by the objective of financial stability. This could involve an obligation for financial institutions to provide the FSA with a copy of the information submitted to the supervisory authority in the subsidiary's home State.

197. In the specific context under discussion, Section 4-1 subsection 4 of the FIA grants the FSA powers to impose conditions on, or outright prohibit, the establishment or acquisition of a subsidiary. Although these powers extend beyond mere cooperation between authorities, they are, in the Commission’s assessment, not necessarily in conflict with Directive 2015/2366, which lacks provisions on group supervision. Directive 2015/2366 provides for an obligation to notify new establishments to the Member State of origin (Article 28) and allows for objections to the establishment of branches (Article 29). In these circumstances, the Commission indicates that it lacks detailed information on the exercise of these powers and whether their exercise is proportionate to the risks to financial stability.

Overall conclusions

198. The Commission observes that, in the light of the above arguments, a mere obligation to notify the competent authority of the parent company could be considered compatible with the established legal framework. However, the Commission notes that certain powers granted to the FSA in the FIA might exceed what is explicitly provided for in the legal framework, particularly the power to formally object, which could raise proportionality concerns.

199. Moreover, the Commission draws special attention to the period of 80 working days provided for in Section 4-1 subsection 6 read in conjunction with Section 6-2 subsection 3 of the FIA, during which the FSA is allowed to exercise its powers. This period could effectively impose a standstill obligation on the financial institution, since, otherwise, any definitive and irrevocable action taken by the institution during this period could render meaningless the FSA's powers. The Commission highlights the necessity to assess whether this period of inactivity is justified by the objective of protecting financial stability. This involves balancing the FSA's need to process and assess the notification against the detrimental impact such a delay could have on the financial institution's operational plans.

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