JUDGMENT OF THE COURT
16 May 2017*

(Freedom of establishment – Article 31 EEA – Directive 2000/12/EC – Directive 2002/83/EC – Directive 2006/48/EC – Directive 2007/44/EC – Credit institutions – Assurance undertakings – Qualifying holdings – Proportionality – Suitability – Necessity)

In Case E-8/16,

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by Oslo District Court (*Oslo tingrett*), in a case pending before it between

Netfonds Holding ASA,

Netfonds Bank AS, and

Netfonds Livsforsikring AS

and

The Norwegian Government

concerning the interpretation of Articles 31, 36 and 40 of the Agreement on the European Economic Area in the context of the rules and practices applicable to the ownership of Norwegian companies at the time of their application for authorisation as banks or insurance companies.

THE COURT,

composed of: Carl Baudenbacher, President, Per Christiansen and Páll Hreinsson (Judge-Rapporteur), Judges,

Registrar: Gunnar Selvik,

having considered the written observations submitted on behalf of:

* Language of the request: Norwegian. Translations of national provisions are unofficial and based on those contained in the documents of the case.

- Netfonds Holding ASA, Netfonds Bank AS, and Netfonds Livsforsikring AS (referred to individually as "Netfonds Holding", "Netfonds Bank", and "Netfonds Livsforsikring" and collectively as "the plaintiffs"), represented by Stephan L. Jervell, advocate;

- the Norwegian Government, on behalf of the Ministry of Finance ("the defendant"), represented by Magnus Schei, advocate, Office of the Attorney General (Civil Affairs), acting as Agent;

- the EFTA Surveillance Authority ("ESA"), represented by Carsten Zatschler and Auður Ýr Steinarsdóttir, members of its Department of Legal & Executive Affairs, acting as Agents; and

- the European Commission ("the Commission"), represented by Luigi Malferrari, Karl-Philipp Wojcik and Nicola Yerrell, members of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

having heard oral argument of the plaintiffs, represented by Morten Goller, advocate; the defendant, represented by Magnus Schei; ESA, represented by Auður Ýr Steinarsdóttir; and the Commission, represented by Luigi Malferrari and Karl-Philipp Wojcik, at the hearing on 6 December 2016,

gives the following

Judgment

I Legal background

EEA law

1 Article 31(1) of the Agreement on the European Economic Area ("the EEA Agreement" or "EEA") reads:

> *Within the framework of the provisions of this Agreement, there shall be no restrictions on the freedom of establishment of nationals of an EC Member State or an EFTA State in the territory of any other of these States. This shall also apply to the setting up of agencies, branches or subsidiaries by nationals of any EC Member State or EFTA State established in the territory of any of these States.*
>
> *Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of Article 34, second paragraph, under*

the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of Chapter 4.

2 Article 34 EEA reads:

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

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

3 Article 36(1) EEA reads:

Within the framework of the provisions of this Agreement, there shall be no restrictions on freedom to provide services within the territory of the Contracting Parties in respect of nationals of EC Member States and EFTA States who are established in an EC Member State or an EFTA State other than that of the person for whom the services are intended.

4 Article 40 EEA reads:

Within the framework of the provisions of this Agreement, there shall be no restrictions between the Contracting Parties on the movement of capital belonging to persons resident in EC Member States or EFTA States and no discrimination based on the nationality or on the place of residence of the parties or on the place where such capital is invested. Annex XII contains the provisions necessary to implement this Article.

5 At the material time, the rules concerning authorisation for the taking up of the business of banks were originally included in Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions (OJ 2000 L 126, p. 1, and EEA Supplement 2001 No 57, p. 187). The Directive was incorporated into the EEA Agreement at point 14 of Annex IX to the Agreement by EEA Joint Committee Decision No 15/2001 of 28 February 2001 (OJ 2001 L 117, p. 13, and EEA Supplement 2001 No 22, p. 8). No constitutional requirements were indicated and the decision entered into force on 1 March 2001.

6 Recital 7 in the preamble to Directive 2000/12/EC reads:

The approach which has been adopted is to achieve only the essential harmonisation necessary and sufficient to secure the mutual recognition of authorisation and of prudential supervision systems, making possible the granting of a single licence recognised throughout the Community and the application of the principle of home Member State prudential supervision.

Therefore, the requirement that a programme of operations must be produced should be seen merely as a factor enabling the competent authorities to decide on the basis of more precise information using objective criteria. A measure of flexibility may none the less be possible as regards the requirements on the legal form of credit institutions of the protection of banking names.

7 Recital 12 in the preamble to Directive 2000/12/EC reads:

The home Member State may also establish rules stricter than those laid down in Article 5(1), first subparagraph and (2), and Articles 7, 16, 30, 51 and 65 for institutions authorised by its competent authorities.

8 Among the provisions cited in recital 12 in the preamble to Directive 2000/12/EC was Article 7 thereof, which reads:

1. The competent authorities shall not grant authorisation for the taking-up of the business of credit institutions before they have been informed of the identities of the shareholders or members, whether direct or indirect, natural or legal persons, that have qualifying holdings, and of the amounts of those holdings.

For the purpose of the definition of qualifying holding in the context of this Article, the voting rights referred to in Article 7 of Council Directive 88/627/EEC shall be taken into consideration.

2. The competent authorities shall refuse authorisation 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 abovementioned shareholders or members.

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

The competent authorities shall also refuse authorisation if the laws, regulations or administrative provisions of a non-member country governing one or more natural or legal persons with which the credit institution has close links, or difficulties involved in their enforcement, 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 a continuous basis.

9 Directive 2000/12/EC was later replaced by Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (OJ 2006 L 177, p. 1, and EEA Supplement 2013 No 59, p. 64), which was incorporated into the EEA Agreement at point 14 of Annex IX to the Agreement by EEA Joint Committee Decision No 65/2008 of 6 June 2008 (OJ 2008

L 257, p. 27, and EEA Supplement 2008 No 58, p. 9). Constitutional requirements were indicated and the decision entered into force on 1 November 2010.

10 Recital 7 in the preamble to Directive 2006/48/EC reads:

> *It is appropriate to effect only the essential harmonisation necessary and sufficient to secure the mutual recognition of authorisation and of prudential supervision systems, making possible the granting of a single licence recognised throughout the Community and the application of the principle of home Member State prudential supervision. Therefore, the requirement that a programme of operations be produced should be seen merely as a factor enabling the competent authorities to decide on the basis of more precise information using objective criteria. A measure of flexibility should nonetheless be possible as regards the requirements on the legal form of credit institutions concerning the protection of banking names.*

11 Recital 15 in the preamble to Directive 2006/48/EC reads:

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

12 Among the provisions cited in recital 15 in the preamble to Directive 2006/48/EC is Article 12 thereof, which reads:

> *1. The competent authorities shall not grant authorisation for the taking-up of the business of credit institutions unless they have been informed of the identities of the shareholders or members, whether direct or indirect, natural or legal persons, that have qualifying holdings, and of the amounts of those holdings.*
>
> ...
>
> *2. The competent authorities shall not grant authorisation 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.*
>
> *3. Where close links exist between the credit institution and other natural or legal persons, the competent authorities shall grant authorisation only if those links do not prevent the effective exercise of their supervisory functions.*
>
> *The competent authorities shall also not grant authorisation if 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 a continuous basis.

13 At the material time, the rules concerning the taking up of assurance business were provided for in Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance (OJ 2002 L 345, p. 1, and EEA Supplement 2006 No 58, p. 1612), incorporated into the EEA Agreement at point 11 of Annex IX by EEA Joint Committee Decision No 60/2004 of 26 April 2004 (OJ 2004 L 277, p. 172, and EEA Supplement 2004 No 43, p. 156). No constitutional requirements were indicated and the decision entered into force on 27 April 2004. On 1 December 2012, Directive 2002/83/EC was replaced by Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (recast) (OJ 2009 L 335, p. 1, and EEA Supplement 2015 No 76, p. 987). The Directive was incorporated into the EEA Agreement at point 1 of Annex IX by EEA Joint Committee Decision No 78/2011 of 1 July 2011 (OJ 2011 L 262, p. 45, and EEA Supplement 2011 No 54, p. 57). Constitutional requirements were indicated and the decision entered into force on 1 December 2012.

14 Recital 7 in the preamble to Directive 2002/83/EC reads:

The approach adopted consists in bringing about such harmonisation as is essential, necessary and sufficient to achieve the mutual recognition of authorisations and prudential control systems, thereby making it possible to grant a single authorisation valid throughout the Community and apply the principle of supervision by the home Member State.

15 Recital 28 in the preamble to Directive 2002/83/EC reads:

Certain provisions of this Directive define minimum standards. A home Member State may lay down stricter rules for assurance undertakings authorised by its own competent authorities.

16 Article 8 of Directive 2002/83/EC reads:

The competent authorities of the home Member State shall not grant an undertaking authorisation to take up the business of assurance before they have been informed of the identities of the shareholders or members, direct or indirect, whether natural or legal persons, who have qualifying holdings in that undertaking and of the amounts of those holdings.

The same authorities shall refuse authorisation if, taking into account the need to ensure the sound and prudent management of an assurance undertaking, they are not satisfied as to the qualifications of the shareholders or members.

17 New rules on the assessment of qualifying holdings in credit institutions and assurance undertakings were introduced by Directive 2007/44/EC of the European Parliament and of the Council of 5 September 2007 amending Council Directive 92/49/EEC and Directives 2002/83/EC, 2004/39/EC, 2005/68/EC and 2006/48/EC as regards procedural rules and evaluation criteria for the prudential assessment of acquisitions and increase of holdings in the financial sector (OJ 2007 L 247, p. 1, and EEA Supplement 2013 No 73, p. 1) ("the Qualifying Holdings Directive"), incorporated into the EEA Agreement at points 7a, 7b, 11, 14 and 31ba of Annex IX to the Agreement by EEA Joint Committee Decision No 79/2008 of 4 July 2008 (OJ 2008 L 280, p. 7, and EEA Supplement 2008 No 64, p. 1). Constitutional requirements were indicated and the decision entered into force on 1 November 2010.

18 Recital 1 in the preamble to the Qualifying Holdings Directive reads:

> *Council Directive 92/49/EEC of 18 June 1992 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance (third non-life insurance Directive), Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance, Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments, Directive 2005/68/EC of the European Parliament and of the Council of 16 November 2005 on reinsurance and Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (recast) regulate situations in which a natural or legal person has taken a decision to acquire or increase a qualifying holding in a credit institution, assurance, insurance or re-insurance undertaking or an investment firm.*

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

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

20 Recital 6 in the preamble to the Qualifying Holdings Directive reads:

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

This Directive should not prevent the Member States from requiring that the competent authorities are to be informed of acquisitions of holdings below the thresholds laid down in this Directive, so long as a Member State imposes no more than one additional threshold below 10 % for this purpose. Nor should it prevent the competent authorities from providing general guidance as to when such holdings would be deemed to result in significant influence.

21 Article 2 of the Qualifying Holdings Directive amended the rules for acquisitions of qualifying holdings under Directive 2002/83/EC, adding, inter alia, a new Article 15a(7):

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

22 Article 2 of the Qualifying Holdings Directive also added a new Article 15b to Directive 2002/83/EC:

1. In assessing the notification provided for in Article 15(1) and the information referred to in Article 15a(2), the competent authorities shall, in order to ensure the sound and prudent management of the assurance undertaking in which an acquisition is proposed, and having regard to the likely influence of the proposed acquirer on the assurance 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 assurance 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 assurance undertaking in which the acquisition is proposed;

(d) whether the assurance undertaking will be able to comply and continue to comply with the prudential requirements based on this Directive and, where applicable, other Directives, notably, Directives 98/78/EC and 2002/87/EC, in particular, whether the group of which it will become a part has a structure that makes it possible to exercise effective supervision, effectively exchange information among the competent authorities and determine the allocation of responsibilities among the competent authorities;

(e) whether there are reasonable grounds to suspect that, in connection with the proposed acquisition, money laundering or terrorist financing within the meaning of Article 1 of Directive 2005/60/EC is being or

has been committed or attempted, or that the proposed acquisition could increase the risk thereof.

2. The competent authorities may oppose the proposed acquisition only if there are reasonable grounds for doing so on the basis of the criteria set out in paragraph 1 or if the information provided by the proposed acquirer is incomplete.

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

4. Member States shall make publicly available a list specifying the information that is necessary to carry out the assessment and that must be provided to the competent authorities at the time of notification referred to in Article 15(1). The information required shall be proportionate and adapted to the nature of the proposed acquirer and proposed acquisition. Member States shall not require information that is not relevant for a prudential assessment.

5. Notwithstanding Article 15a(1), (2) and (3), where two or more proposals to acquire or increase qualifying holdings in the same assurance undertaking have been notified to the competent authority, the latter shall treat the proposed acquirers in a non-discriminatory manner.

23 Article 5 of the Qualifying Holdings Directive amended the rules for acquisitions of qualifying holdings under Directive 2006/48/EC, providing, inter alia, for a new Article 19(8):

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

24 Article 5 of the Qualifying Holdings Directive also added a new Article 19a to Directive 2006/48/EC:

1. In assessing the notification provided for in Article 19(1) and the information referred to in Article 19(3), the competent authorities shall, in order to ensure the sound and prudent management of the credit institution in which an acquisition is proposed, and having regard to the likely influence of the proposed acquirer on the credit institution, 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 credit institution as a result of the proposed acquisition;

(c) *the financial soundness of the proposed acquirer, in particular in relation to the type of business pursued and envisaged in the credit institution in which the acquisition is proposed;*

(d) *whether the credit institution will be able to comply and continue to comply with the prudential requirements based on this Directive and, where applicable, other Directives, notably, Directives 2000/46/EC, 2002/87/EC and 2006/49/EC, in particular, whether the group of which it will become a part has a structure that makes it possible to exercise effective supervision, effectively exchange information among the competent authorities and determine the allocation of responsibilities among the competent authorities;*

(e) *whether there are reasonable grounds to suspect that, in connection with the proposed acquisition, money laundering or terrorist financing within the meaning of Article 1 of Directive 2005/60/EC is being or has been committed or attempted, or that the proposed acquisition could increase the risk thereof.*

2. The competent authorities may oppose the proposed acquisition only if there are reasonable grounds for doing so on the basis of the criteria set out in paragraph 1 or if the information provided by the proposed acquirer is incomplete.

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

4. Member States shall make publicly available a list specifying the information that is necessary to carry out the assessment and that must be provided to the competent authorities at the time of notification referred to in Article 19(1). The information required shall be proportionate and adapted to the nature of the proposed acquirer and the proposed acquisition. Member States shall not require information that is not relevant for a prudential assessment.

5. Notwithstanding Article 19(2), (3) and (4), where two or more proposals to acquire or increase qualifying holdings in the same credit institution have been notified to the competent authority, the latter shall treat the proposed acquirers in a non-discriminatory manner.

National law

25 Regulation of the financial markets in Norway is based on a public licensing requirement. According to the request, the licence system is intended to ensure that the fundamental organisational and structural conditions in the sector are satisfactory and adequate. The reasoning behind the system reflects the very important role that banks and insurance companies play in society. For example, they receive and manage large

parts of the public's savings, and investment of these funds often forms the financial basis for other business activity.

26 At the material time, commercial banks were regulated by the Act of 24 May 1961 No 2 on commercial banks (*lov om forretningsbanker*) ("the Commercial Banks Act"), while insurance companies were regulated by the Act of 10 June 1988 No 39 on insurance activity (*lov om forsikringsvirksomhet*) ("the Insurance Activity Act of 1988") and subsequently by the Act of 10 June 2005 No 44 on insurance activity (*lov om forsikringsvirksomhet*) ("the Insurance Activity Act of 2005"). Banks and insurance companies were also subject to the Act of 10 June 1988 No 40 on financing activity and financial institutions (*lov om finansieringsvirksomhet og finansinstitusjoner*) ("the Financial Institutions Act").

27 In order to conduct commercial banking and insurance activity, authorisation was required under Section 8 first paragraph of the Commercial Banks Act and Section 2-1 first paragraph of the Insurance Activity Acts of 1988 and 2005, respectively. In both cases, conditions could be attached to the licence granted. The national legal framework concerning authorisation includes what are known as "issue rules" and "ownership control rules".

28 The issue rules for banks were included in Section 4 first and third paragraphs of the Commercial Banks Act and read as follows:

> *Authorisation under Section 8 of this Act shall be refused unless more than three quarters of the commercial bank's share capital is subscribed in connection with a capital increase effected without any preferential rights for shareholders or others. ... The first and second paragraphs imply no restriction of the right of a commercial bank to form part of a financial group pursuant to the Financial Institutions Act section 2a-6.*

29 The issue rules for insurance companies as laid down in Section 2-1 first paragraph last sentence of the Insurance Activity Acts of 1988 and 2005 provided as follows:

> *A licence shall be refused unless more than three quarters of the insurance company's share capital is subscribed in connection with a capital increase without any preferential rights for shareholders or others.*

30 However, exemptions from the provisions of these two Acts could be made in special cases.

31 According to the referring court, the issue rules constitute an instrument for attaining the legislature's objective of dispersed ownership. In that sense, there is an indirect relationship between the issue rules and rules concerning ownership control.

32 The Financial Institutions Act originally provided that no one could own more than ten per cent of the share capital of a financial institution. Both commercial banks and insurance companies were subject to that rule. This rule was amended in 2003 after ESA had issued a reasoned opinion in which it concluded that the rule constituted an unlawful

restriction on the free movement of capital provided for in Article 40 EEA. The Norwegian authorities replaced the rule with an ownership control rule, which requires that the licensing authority must be "convinced that owners of qualifying holdings", meaning holdings of 10 per cent or more of the capital, are "suitable to own such holdings and to exercise such influence in the undertaking as is conferred by the holdings" (see Section 8a fourth paragraph first and second sentence of the Commercial Banks Act, and Section 2-1 first paragraph second and third sentence of the Insurance Activity Act). ESA did not pursue the matter after the legislation was amended in 2003.

33 According to the referring court, even though a discretion-based system for control of ownership of financial institutions was adopted, it was evident from the preparatory works that the objectives of the legislation remained unchanged, and that ensuring the financial industry's independence of individuals and other industries would still be a crucial consideration, see Proposition No 50 to the Odelsting (2002-2003) Section 5.3, p. 24:

> *The need to ensure an independent finance industry will in any case be among the most important considerations that the authorities must be able to emphasise in a discretion-based system when assessing whether the acquisition can take place. This warrants exercising discretionary judgment in such a way that big owners that are not financial institutions will generally not be accepted. It cannot be excluded however, that in some cases situations may arise in which parties other than financial institutions should be permitted to acquire control of a financial institution, for example in connection with the establishment of small niche enterprises in the field of banking and insurance.*

34 In addition to the above-mentioned rules concerning the granting of licences, Norwegian law includes rules providing for a suitability assessment in connection with authorisations to subsequently acquire holdings in financial institutions that have already been granted an activity licence.

II Facts and procedure

Introduction

35 Net Fonds ASA (which later changed its name to Netfonds Bank ASA and even later became Netfonds Bank AS) was established on 1 June 1996. Its original activity consisted in offering securities trading on the internet.

36 Following an extension of activities to include limited activity as a commercial bank and life insurance company, the company structure was changed. At present, Netfonds Holding is owned by Rolf Dammann and his father Axel Dammann, who hold 89 per cent and 1.5 per cent of the shares respectively. The remaining 9.5 per cent of the shares are owned by Lars Ingebrigtsen, the Netfonds group's IT manager.

37 Netfonds Holding is licensed as the parent company of a financial group pursuant to the Financial Institutions Act. The company has three subsidiaries, Netfonds AS ("Netfonds"), Netfonds Bank and Netfonds Livsforsikring.

38 The case before Oslo District Court concerns the plaintiffs' claim for compensation on the grounds of an alleged breach by the defendant of Article 31 EEA on the freedom of establishment, Article 36 EEA on the freedom to provide services and Article 40 EEA on the free movement of capital. The basis for the claim is that the defendant issued only a limited banking licence to Netfonds Bank and only a limited insurance company licence to Netfonds Livsforsikring despite the plaintiffs' request for full licences. According to the plaintiffs, this led to a loss of income from the time full licences should have been granted.

39 The limitations imposed on the authorisations in question are also referred to as licence conditions by the referring court. According to the request, the essential and recurring conditions that the plaintiffs contest are the defendant's requirement that, in order to be granted a full banking and insurance licence, three quarters or more of the share capital must be dispersed through a capital increase or sale effected without any preferential or pre-emption right for shareholders or others, known as a "dispersion sale", or that, as an alternative to a dispersion sale, only a limited licence for banking and insurance activity (referred to as "niche activity") is issued.

The application procedure for banking and insurance activity licences

40 By a letter of 7 February 2005, Net Fonds ASA applied for a licence to establish a financial group and a commercial bank in order to be able to accept deposits from the customers of its investment business.

41 On 5 August 2005, the Ministry of Finance granted Net Fonds ASA's application to conduct limited banking activity. One of the conditions for the authorisation was that the company could not accept deposits other than free funds from the client accounts belonging to customers of the securities trading business ("Licence Condition No 7"). No requirement was laid down for a dispersion sale. The decision states that when considering whether to make a dispersion sale in Netfonds Holding a condition of the authorisation, substantial weight was given to the fact that Net Fonds ASA's authorisation was for limited banking activity only, both with respect to receiving deposits and extending credit. The reason for granting authorisation while accepting the ownership structure in question was the niche nature of the activity. A number of other conditions were imposed, including the requirement that the bank could not accept deposits from or extend credit to Netfonds Holding, its shareholders or enterprises over which the latter had a material influence, or any closely associated customers of these parties.

42 The Netfonds group was established on 13 March 2006. Net Fonds ASA changed its name to Netfonds Bank ASA (and became Netfonds Bank AS on 13 October 2010). Netfonds Holding was the parent company, with Netfonds Bank as an operational

subsidiary with limited investment firm and commercial banking licences as described above.

43 By a letter of 27 March 2006, Netfonds Bank notified the Financial Supervisory Authority of Norway ("FSA") of cross-border activity. The company stated that it wished to offer its services in Sweden and Germany. In a letter of 23 August 2007, Netfonds Bank also gave notification of cross-border activity with Denmark, Finland, Iceland, Estonia, Lithuania and Latvia. The company received authorisation to conduct such cross-border activity, limited however to the activities for which the company held a licence in Norway.

44 On 6 December 2006, an application was submitted for the establishment of a life insurance company (Netfonds Livsforsikring) which was to become a new subsidiary of Netfonds Holding. The application was exclusively for a licence to offer unit-linked endowment insurance. The application was granted by a decision of the Ministry of Finance of 17 July 2007. It was made clear that the authorisation was limited to offering unit-linked endowment insurance, as had been applied for. Hence, the authorisation included neither group insurance nor annuity or pension insurance schemes. As in the case of the licence granted to Netfonds Bank, conditions were imposed, including the requirement that the company could not enter into insurance contracts with or extend credit to Netfonds Holding, its owners or enterprises over which the latter had a material influence, or any of their closely associated parties. The Ministry did not impose a dispersion sale. In this regard, the decision stated that weight had been given to the fact that the life insurance activity for which authorisation was granted would be more limited than more traditional life insurance activities and that dispersed ownership considerations were therefore of lesser relevance. The reason for granting authorisation while accepting the ownership structure in question was thus that the activity was regarded as a niche activity.

45 By a letter of 14 August 2007, Netfonds Livsforsikring requested the Ministry of Finance to amend its decision of 17 July 2007, so that the company would also be able to offer individual annuity and pension insurance contracts. By a decision of 28 May 2008, authorisation was granted to extend the scope of the licence. The extension was limited, however, to "individual annuity and pension insurance contracts taken over from other insurance companies in connection with the taking over of portfolios of individual unit-linked endowment insurance contracts". The decision made clear that "Netfonds Livsforsikring AS was not authorised to market or offer individual pension insurance contracts or individual annuities".

46 On 27 May 2010, Netfonds Livsforsikring submitted an application to have the scope of the company's licence extended, this time in order to be able to offer mandatory company pension schemes.

47 The application was rejected by the Ministry of Finance by a decision of 16 December 2010. The Ministry took the view that such an extension of the scope of the company's activities could not be authorised given the company's current ownership structure. The decision stated that Netfonds Livsforsikring did not meet the requirements for dispersed

ownership of financial institutions and that Netfonds Livsforsikring's licence for life insurance activities could not be extended to include group pension insurance schemes given the parent company's current ownership structure.

48 For authorisation to be granted for an extension of the scope of Netfonds Livsforsikring's licence, a dispersion sale would therefore have to be carried out at the parent company level.

49 Netfonds Livsforsikring brought an appeal against the decision by a letter of 10 January 2011. It was based in particular on the Qualifying Holdings Directive. Although the appeal stated that the Qualifying Holdings Directive "does not concern ... directly those EEA Directives that apply to the granting of licences and assessment of owners in that connection", Netfonds Livsforsikring was of the opinion that since considerations related to ownership structure could not be maintained in connection with subsequent acquisitions under the Qualifying Holdings Directive, such considerations could neither be practised in relation to the original owners of qualifying holdings.

50 On 19 February 2011, Netfonds Bank applied for an amendment to Licence Condition No 7 in its commercial banking licence of 5 August 2005 on the basis that it wished to accept deposits from customers other than its existing customers and not simply free client funds from customers of its securities trading business.

51 The application was rejected by the Ministry of Finance by a decision of 20 December 2011, on the grounds that if it was granted, the plaintiffs would no longer be engaged in a niche activity, but, on the contrary, in traditional banking, and that the ownership structure at the time was not compatible with such activity. Rolf Dammann and Axel Dammann had holdings of 80 and 15 per cent, respectively. The Ministry of Finance stated that "the right to accept deposits must be said to be the core of banking business, and that accepting deposits from the general public cannot be seen as a niche activity of the kind that Netfonds Bank AS has been engaged in, but rather as traditional banking activity".

52 The decision was appealed by a letter of 6 January 2012. Netfonds Bank once again argued that, following the implementation of the Qualifying Holdings Directive, it was no longer lawful to make the grant of an activity licence conditional on meeting a maximum permitted ownership requirement.

53 On 4 May 2012, the King in Council by Royal Decree rejected both the appeal from Netfonds Bank of 6 January 2012 and the appeal from Netfonds Livsforsikring of 10 January 2011. It was held that considerations related, in particular, to the prevention of private financier activities, high concentration of power and confusion of creditors and owners' interests warranted that authorisation for an expansion of the business of that kind should not be granted, given such a concentrated ownership structure. According to the Ministry of Finance, any removal of Licence Condition No 7 had to be conditional on a dispersion sale.

54 According to the Royal Decree concerning Netfonds Livsforsikring, the "ownership control rules address fundamental considerations related to preventing private financier activity in financial institutions". In addition the decree stated that the "dispersed ownership requirement for being granted a licence may only be deviated from by way of exception, and only for undertakings engaged in pure niche activities without the same public interest implications in relation to business and credit policy as more traditional banking and insurance activities".

55 The Royal Decree concluded that there were no grounds for exemption from the dispersed ownership requirement laid down in Section 2-1 first paragraph of the Insurance Activity Act to allow Netfonds Livsforsikring to expand its activities in accordance with its application while maintaining its current ownership structure. To grant exemptions would entail a dilution of the dispersed ownership requirement. Such an amendment would have to be made by act of law and not through a practice of granting exemptions.

56 The Royal Decree concerning the appeal by Netfonds Bank includes the following statement on the grounds for rejection:

> *The right to accept deposits must be said to be the core of banking business. As a point of departure, accepting deposits from the general public cannot be regarded as a niche activity, but rather as a traditional banking activity. Even if Netfonds Bank AS does not intend to engage in ordinary banking business, for example ordinary lending activity, any deposits activity whereby the bank can accept deposits from the general public, will mean that the bank can no longer be deemed to be engaged in a niche activity.*

57 The Royal Decree concluded that there were no grounds for granting an exemption from the dispersed ownership requirement in Section 4 of the Commercial Banks Act. It reiterated that any amendment would have to be made by amending the law and not by an administrative practice.

58 On 19 July 2012, Netfonds Bank applied for an extension of the scope of its licence to cover pure savings accounts and occupational pensions. Subsequently, by a letter of 31 October 2012, Netfonds Livsforsikring applied for authorisation to market and offer individual pension insurance.

59 The Ministry of Finance rejected Netfonds Bank and Netfonds Livsforsikring's applications by decisions of 17 April 2013 and 28 January 2014, respectively. In both cases, the Ministry held that extensions of that kind would mean that the company could no longer be regarded as engaging in a niche activity, which, in the view of the Ministry, would require a dispersion sale.

60 The decision of 28 January 2014 was appealed by a letter of 18 February 2014.

61 By a letter of 16 December 2014, Netfonds Holding applied for authorisation to acquire all the shares in the Lithuanian bank Bankas Finasta AB, and to change the structure of

the Netfonds group. The application was rejected by the Ministry of Finance by a decision of 24 March 2015. The decision stated "that the acquisition of a bank with full banking licences (without any limitation on activity) would imply that the group's business can no longer be regarded as a niche-like activity. Authorisation for the acquisition that has been applied for would therefore be contrary to the premises on which the licences to Netfonds Livsforsikring AS and Netfonds Bank AS are based, even though the application to acquire the bank was made by the holding company". The Ministry was further of the opinion that its rejection of the application for authorisation to change the group structure would not be in contravention of EEA law, as it was based on considerations related to the licensed activities in Norway and not considerations related to the Lithuanian bank.

Court proceedings and questions referred

62 In their action before Oslo District Court, the plaintiffs claim compensation from the defendant for the alleged loss of income resulting from not having been granted full banking and insurance company licences.

63 By a letter of 21 June 2016, registered at the Court on 27 June 2016, Oslo District Court referred the following questions to the Court:

1. *Do the issue rules in Section 4 of the Commercial Banks Act and Section 2-1 of the Insurance Activity Act, understood as a requirement that three quarters of the shares in new banks and insurance companies must be subscribed without preferential rights (offered as a public issue), constitute a restriction under Article 31 EEA, Article 36 EEA or Article 40 EEA, provided that the application for a licence is not just for a niche activity?*

    a. *Assuming that the rules constitute a restriction within the meaning of the EEA Agreement: Do the rules pursue a legitimate public objective?*

    b. *Assuming that the restriction pursues a legitimate public objective: Is such a restriction suitable within the meaning of EEA law?*

    c. *Assuming that the restriction pursues a legitimate public objective: Is such a restriction necessary within the meaning of EEA law?*

2. *Do the issue rules in Section 4 of the Commercial Banks Act and Section 2-1 of the Insurance Activity Act, understood as a requirement that three quarters of the shares in new banks and insurance companies must be subscribed by persons other than the promoters, constitute a restriction under Article 31 EEA, Article 36 EEA or Article 40 EEA, provided that the application for a licence is not just for a niche activity?*

    a. *Assuming that such rules constitute a restriction within the meaning of the EEA Agreement: Do the rules pursue a legitimate public objective?*

b. *Assuming that the restriction pursues a legitimate public objective: Is such a restriction suitable within the meaning of EEA law?*

c. *Assuming that the restriction pursues a legitimate public objective: Is such a restriction necessary within the meaning of EEA law?*

3. *Does an established administrative practice whereby individuals or enterprises are not authorised to own more than 20 to 25 per cent of the shares in financial institutions, except in those cases where the law itself authorises the establishment of a financial group or where the financial institution will engage in what is referred to as a niche activity only, constitute a restriction under Article 31 EEA, Article 36 EEA or Article 40 EEA, provided that the application for a licence is not just for a niche activity?*

   a. *Assuming that such an established administrative practice constitutes a restriction within the meaning of the EEA Agreement: Is the restriction in pursuance of a legitimate public objective?*

   b. *Assuming that the restriction pursues a legitimate public objective: Is such a restriction suitable within the meaning of EEA law?*

   c. *Assuming that the restriction pursues a legitimate public objective: Is such a restriction necessary within the meaning of EEA law?*

A premise for all the above questions is that no other circumstances exist that would constitute grounds for rejecting the licence application or for limiting the licence.

64 According to the referring court, the third question is based on the plaintiffs' description of the defendant's administrative practice. The referring court adds that the defendant rejects the plaintiffs' understanding of that practice and states that its references to the Insurance Activity Act must be understood as meaning either the Insurance Activity Act of 1988 or the Insurance Activity Act of 2005, depending on the date at which the defendant took the relevant decision.

65 Reference is made to the Report for the Hearing for a fuller account of the legal framework, the facts, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only insofar as is necessary for the reasoning of the Court.

III Answers of the Court

Preliminary remarks

66 By its three questions, the referring court asks, in essence, whether the relevant legislation or the defendant's administrative practice applicable to the ownership of Norwegian companies at the time of their application for authorisation as banks or insurance companies constitutes a restriction under Articles 31, 36 or 40 EEA. If that is

the case, the referring court asks whether such a restriction can be justified in accordance with the legal test that the Court applies having regard to the legitimacy of a national measure's objectives, its suitability and necessity.

67 The questions referred reflect three different potential interpretations of national law and administrative practice, which the referring court has yet to resolve. Since the questions all relate to similar interpretive choices of national law and administrative practice, the Court finds it appropriate to address them together.

Observations submitted to the Court

68 The plaintiffs maintain that, even though Articles 31, 36 and 40 EEA may apply in parallel, Articles 31 and 40 EEA are the most important provisions in the present proceedings as the limitations on the freedom to provide services are incidental. Moreover, it is undisputed that the measures at issue constitute restrictions. Thus, the main issue in the case at hand is whether these restrictions can be justified.

69 As regards the existence of a cross-border element, the plaintiffs contend that the Norwegian provisions on ownership in financial institutions have restricted their attempts to engage in cross-border activities. They add that potential cross-border activity is sufficient for establishing a breach in this regard (reference is made to the judgment in *Alpine Investments*, C-384/93, EU:C:1995:126, paragraph 22).

70 The plaintiffs argue that the justification invoked by the defendant can be reduced, in essence, to the pursuit of two objectives: (i) to prevent the misuse of power, and (ii) to safeguard stability and confidence in the financial markets. The first objective may constitute an overriding reason in the general interest. However, the second objective, while, in principle, in the public interest, cannot be relied upon in the case at issue. This objective cannot be found in the preparatory works of the legislation at hand and has not been invoked by the defendant previously. Moreover, the Qualifying Holdings Directive – which may be considered by comparison – provides that national authorities may not examine a proposed acquisition in terms of the economic needs of the market. In the plaintiffs' view, this is because other rules in the EEA Agreement exist, which serve financial stability.

71 The plaintiffs further argue that the measures at issue are, in principle, suitable to prevent the misuse of power. They are, however, not suitable to safeguard stability and confidence in the financial markets. According to a Danish report on the reasons for the financial crisis and its consequences, restrictions on voting rights and ownership were considered one of the reasons behind the problems in many financial institutions. Restrictions of that kind may have prevented major owners from taking control who would have demanded more professional management.

72 Turning to necessity, the plaintiffs submit that even if the level of protection chosen by the defendant is particularly high, the Court still needs to determine whether the national measures are necessary (reference is made to Case E-3/06 *Ladbrokes* [2007] EFTA Ct. Rep. 86).

73 As regards the first objective – preventing the misuse of power – there are less restrictive measures which are even more effective, according to the plaintiffs, such as a suitability assessment. Furthermore, licensing conditions may equally prevent the misuse of power. Finally, the plaintiffs maintain that ongoing and regular supervision may also serve the identified objective. As regards the second objective – safeguarding stability and confidence in the financial sector – Norway has already, partially due to its commitments under the EEA Agreement, implemented a number of measures, which ensure this objective. These are less restrictive than an outright ban on large private holdings in banks and insurance companies. Ownership rules, solidity and liquidity requirements as well as the Norwegian deposit-guarantee scheme ensure the stability of the financial markets.

74 The defendant submits that a national measure may only constitute a restriction under EEA law to the extent that there is a relevant cross-border element. In this connection, the defendant distinguishes three categories of facts arising in the case in order to address the questions referred. The first category concerns the applications by the plaintiffs for the establishment of a bank and an insurance company operating in the Norwegian market. The second category concerns the notification by the plaintiffs, after having received a limited initial authorisation, of the pursuit of that business in Sweden, Germany, Denmark, Finland, Iceland, Estonia, Lithuania and Latvia. The third category concerns the application by the plaintiffs for authorisation to acquire all the shares in a Lithuanian bank. According to the defendant, a cross-border element exists only in some of these three categories.

75 Furthermore, the defendant acknowledges that the national measure may be liable to hinder or make less attractive the exercise of the freedom of establishment in EEA States other than Norway, or the provision of services to EEA States other than Norway, thus constituting a restriction, which, in principle, is prohibited by Article 31 EEA or Article 36 EEA.

76 As regards justification, the defendant submits that Norway has opted for a particularly high level of protection in the financial sector, and that integrity and stability of the financial system are essential parts of the Norwegian approach to these issues. As a general rule, the objectives pursued are legitimate under EEA law (reference is made to the judgments in *Panagis Pafitis and Others*, C-441/93, EU:C:1996:92, paragraph 49; *Peter Paul and Others*, C-222/02, EU:C:2004:606, paragraph 44; *Alpine Investments*, cited above, paragraph 44; Case E-2/01 *Pucher* [2002] EFTA Ct. Rep. 45, paragraph 32; Case E-8/04 *ESA* v *Liechtenstein* [2005] EFTA Ct. Rep. 46, paragraphs 24 to 26; and Case E-9/11 *ESA* v *Norway* [2012] EFTA Ct. Rep. 442, paragraph 84). More precisely, the national measure pursues several interconnected aims. One of the primary purposes is to address the excessive risk incentives that large owners have. It is considered less likely that banks with a dispersed ownership structure will be guided by those prospects than those with a concentrated ownership structure. Having a dispersed ownership structure will therefore significantly reduce the risk of misuse of power in granting favourable loans, guarantees etc. for the shareholder's own benefit or for the benefit of their business or private associates, or in imposing particularly stringent

conditions on customers who, for example, compete with the business of the influential owner in question.

77 At the hearing, the defendant stated that these rules were important in the 2008 financial crisis. According to the defendant, several studies found that owner-controlled banks incurred larger losses during the crisis than banks with dispersed ownership.

78 Turning to suitability, the defendant argues in general that the national measure is suitable, fully consistent with the aims pursued and forms an inherent element of a strict and coherent policy aimed at the prevention of misuse of power by shareholders and the correspondingly increased protection of the integrity and stability of the financial markets. Furthermore, it stresses that this assessment depends on questions of evidence and should therefore not be analysed in any detail by the Court.

79 With regard to the relevance of the Qualifying Holdings Directive, the defendant submits that its provisions only amended the criteria for the prudential assessment of acquisitions of qualifying holdings and not the conditions governing the initial authorisation before commencing banking or insurance activities (reference is made to the judgment in *CO Sociedad de Gestión y Participación and Others*, C-18/14, EU:C:2015:419, paragraphs 46, 48 and 56).

80 Turning to necessity, the defendant acknowledges that the national authorities must demonstrate that a restriction is justified, including that it is necessary. However, this is no more than a starting point. In particular, the defendant maintains, first, that the burden of proof does not imply that national authorities must provide positive proof that no other conceivable measure could be equally effective (reference is made to the judgment in *Commission* v *Italy*, C-110/05, EU:C:2009:66, paragraph 66). Second, the obligation to adduce proof for a certain submission will typically shift between the parties to a dispute. Third, the Court of Justice of the European Union ("ECJ") has rejected the notion that national authorities must be able to produce a particular study supporting the proportionality of a restrictive measure prior to its adoption (reference is made to the judgment in *Stoß and Others*, C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07, EU:C:2010:504, paragraphs 70 to 72). Fourth, in recent case law, the ECJ has come close to shifting the burden of proof, holding that it cannot be assumed that alternative measures would attain the objectives of the contested measure as effectively (reference is made to the judgments in *Commission* v *Italy*, C-110/05, cited above, paragraph 68; *Josemans*, C-137/09, EU:C:2010:774, paragraph 82; and *Commission* v *France*, C-89/09, EU:C:2010:772, paragraphs 81 to 87). The defendant concludes that the burden of proof and the intensity of judicial review should not be so strict as to effectively prevent an EEA State from adopting efficient measures to reduce the risk of facing the grave consequences of a breakdown in the financial sector.

81 Furthermore, the defendant maintains that there are no alternative, less restrictive measures, which are at least equally effective in achieving the objectives pursued. With regard to the plaintiffs' arguments concerning licence conditions and other measures, the defendant takes the view that these measures would not guarantee an equally high level of protection. These measures, which already exist in Norway, cannot be

considered genuine alternatives, but should be regarded as supplements to the ownership rules.

82 With regard to the plaintiffs' arguments concerning the capacity of a suitability assessment to displace the ownership rules and the dispersed ownership policy, the defendant emphasises that the crucial issue is whether a system singularly based on a suitability assessment ensures an equally high level of protection as the ownership rules and the dispersed ownership policy. The defendant acknowledges that administrative considerations are not in themselves capable of justifying a restrictive measure, but adds that general and simple rules may be presumed to ensure a higher level of protection than measures of lesser scope, as they afford more effective enforcement and control (reference is made to the judgments in *Commission* v *Italy*, C-110/05, cited above, paragraph 67; *Åklagaren*, C-142/05, EU:C:2009:336, paragraph 36; and *Sopora*, C-512/13, EU:C:2015:108, paragraph 33). Furthermore, the nature of the risks involved demonstrates the necessity of *ex ante* structural regulations, in contrast to suitability assessments. According to the defendant, the case law of the ECJ contains several examples where safeguards such as suitability assessments have not been considered sufficient (reference is made to the judgments in *Alpine Investments*, cited above, paragraphs 52 and 53; *Wouters*, C-309/99, EU:C:2002:98, paragraph 105; and *Commission* v *France*, C-89/09, cited above, paragraphs 82 to 86).

83 ESA submits that Directive 2006/48/EC and Directive 2002/83/EC provide for minimum harmonisation. Therefore, the contested measures must be examined under EEA primary law.

84 ESA maintains that in order to ascertain whether national measures fall within one or other of the freedoms of movement, their purpose must be taken into consideration. More specifically, the purpose of the contested legislation, as described in Questions 1 and 2, is to attain the objective of dispersed ownership and to secure the independence of financial institutions. These rules are, by their very nature, restrictive. Moreover, as the promoters of Netfonds Holding have a determining influence on the decisions and activities of Netfonds Bank and Netfonds Livsforsikring, the Court should assess the measures solely under Article 31 EEA. Any restriction on the freedom to provide services or the free movement of capital appears to be an unavoidable consequence of the restriction on the freedom of establishment.

85 Turning to justification, ESA argues that the objectives of the national legislation may reflect, in principle, overriding reasons in the general interest capable of justifying the restriction (reference is made to Case E-9/11 *ESA* v *Norway*, cited above, paragraphs 84 and 86). However, the crucial aspect is whether the restrictive measure complies with the principle of proportionality.

86 As regards suitability, ESA submits that the contested national legislation, as described in Question 1, is not suitable for achieving its objective, since it does not prevent the promoters from acquiring the shares at market price.

87 However, the contested national legislation could be suitable if it were understood as described in Question 2. Nonetheless, according to ESA, such legislation does not pass the necessity test. It is for the EEA States to demonstrate that the level of protection they decide to afford to their legitimate interests is commensurate with the degree of interference which this causes to the fundamental freedoms (reference is made to the Opinion of Advocate General Poaires Maduro in *Ahokainen and Leppik*, C-434/04, EU:C:2006:462, point 26).

88 As regards Question 3, ESA notes that the precise scope of the alleged administrative practice appears to be uncertain. If it consists of a limitation on ownership by laying down a fixed fraction of property rights that cannot be exceeded, then the same arguments apply in essence as were raised in relation to Questions 1 and 2. If, however, the administrative practice consists solely of a suitability assessment, ESA argues that EEA States have a certain margin of discretion as regards the factors to be taken into account in such an assessment, provided that the principles of proportionality and legal certainty are fulfilled (reference is made to Case E-9/11 *ESA* v *Norway*, cited above, paragraphs 99 and 100 and case law cited).

89 The Commission contends that the harmonisation effected by Directive 2006/48/EC and Directive 2002/83/EC appears not to be exhaustive and the national provisions at stake do not appear to contradict any provision of those directives. Thus, the questions referred must be analysed by reference to EEA primary law.

90 In the Commission's view, it is unclear, whether the primary focus of the measures at issue is the distribution of the capital of a credit institution or insurance undertaking *per se*, or the determination of the level of capital required to exert influence on the company's decisions and to determine its activities. Although investment as such clearly comes into play here, the Norwegian rules also appear to be concerned with control, which falls within the ambit of the freedom of establishment (reference is made to the judgment in *Commission* v *Italy*, C-326/07, EU:C:2009:193, paragraph 34).

91 The Commission submits that the national rules, as understood in Questions 1 and 2, and the administrative practice described in Question 3 are all liable to prevent or limit the acquisition of shares in the undertakings concerned or deter investors from other EEA States from investing in their capital, and therefore constitute a restriction on the free movement of capital, as guaranteed by Article 40 EEA (reference is made to Case E-9/11 *ESA* v *Norway*, cited above, paragraph 80).

92 At the hearing, the Commission maintained, in addition, that the Norwegian measure infringes the fundamental right to property. A violation of a fundamental freedom may exist alongside a violation of a fundamental right.

93 As regards justification, the Commission states that it appears that the contested national measures are intended to create safeguards against possible conflicts of interests and misuse of power in credit institutions and insurance undertakings and to ensure their proper functioning. In essence, such objectives reflect overriding reasons in the general interest capable of justifying a restriction, particularly since the need for prudent and

sound management of these types of undertakings is expressly recognised in Directive 2006/48/EC and Directive 2002/83/EC.

94 With regard to the suitability, the Commission argued in its written observations that the contested measures, as described in Questions 1, 2 and 3, appear *prima facie* suitable for preventing conflicts of interest and misuse of power and ensuring the proper functioning of those undertakings. At the hearing, the Commission, indicated, however, that it had doubts about the suitability of the contested measures.

95 With regard to necessity, the Commission argues that it is for the EEA State which invokes a derogation from one of the fundamental freedoms to prove that its rules are necessary and proportionate to the aim pursued (reference is made to Case E-9/00 *ESA* v *Norway* [2002] EFTA Ct. Rep. 73, paragraph 54). The justification must be accompanied by appropriate evidence or by specific evidence substantiating its arguments (reference is made to the judgment in *Scotch Whisky and Others*, C-333/14, EU:C:2015:845, paragraph 54). Furthermore, Directive 2006/48/EC and Directive 2002/83/EC already contain a significant number of safeguards that provide less restrictive means of ensuring the prudent and sound management of credit institutions and insurance undertakings. The Commission also agrees with the plaintiffs' argument that other less restrictive means are available, such as a prohibition on extending credit to certain entities. Furthermore, it remains the duty of a national supervisor to monitor those institutions regardless of limitations on individual share ownership. Finally, the Commission shares the plaintiffs' view that the Qualifying Holdings Directive may also be relevant in this assessment.

96 In conclusion, the Commission indicates that it has serious doubts as to the proportionality of the contested national measures.

Findings of the Court

General remarks

97 The regulatory framework in the European Union concerning credit institutions and assurance undertakings, such as banks and insurance companies within the meaning of Norwegian law, has been subject to comprehensive revision in recent years. Some of that legislation has been incorporated into the EEA Agreement. However, in any event, the assessment in the present case must be based on the regulatory framework as it stood in EEA law at the relevant time.

98 The plaintiffs' applications for a banking licence were submitted in the period 2005 to 2014. During that period, the applicable EEA legislation concerning the taking up and pursuit of the business of banks was Directive 2000/12/EC until 1 November 2010, when it was replaced by Directive 2006/48/EC. The plaintiffs' applications for an insurance company licence were submitted in the period 2006 to 2012. The applicable EEA legislation concerning the taking up of assurance business was provided for in Directive 2002/83/EC until 1 December 2012 when it was replaced by Directive 2009/138/EC. However, according to the request, the latest application for an insurance

company licence that is relevant to the present proceedings was submitted before Directive 2009/138/EC entered into force.

99 Recital 7 in the preamble to Directive 2000/12/EC stated that the approach adopted achieved only the essential harmonisation necessary and sufficient to secure the mutual recognition of authorisation and of prudential supervision systems, making possible the granting of a single licence recognised throughout the EEA and the application of the principle of home EEA State prudential supervision. Furthermore, recital 12 in the preamble to the directive indicated that home EEA States could establish stricter rules than those laid down, inter alia in Article 7, on conditions for authorisation. The substance of this approach was maintained in Directive 2006/48/EC, as demonstrated by recitals 7 and 15 in its preamble and Article 12 thereof. Therefore, neither of these two directives harmonised exhaustively the conditions governing the authorisation of banks.

100 Recital 7 in the preamble to Directive 2002/83/EC stated that the approach adopted by the Directive consisted in bringing about such harmonisation as was essential, necessary and sufficient to achieve the mutual recognition of authorisations and prudential control systems, thereby making it possible to grant a single authorisation valid throughout the EEA and apply the principle of supervision by the home EEA State. Furthermore, recital 28 in the preamble to the directive indicated that certain provisions of the directive defined minimum standards. Such minimum standards were laid down, inter alia, in Article 8 concerning the conditions for authorisation as an insurance company. It follows that Directive 2002/83/EC did not harmonise exhaustively the conditions governing the authorisation of insurance companies. An EEA State could therefore lay down stricter rules for assurance undertakings.

101 The Qualifying Holdings Directive amended the rules for acquisitions of qualifying holdings under Directive 2002/83/EC and Directive 2006/48/EC. The procedure and the prudential assessment of situations in which a natural or legal person has taken a decision to acquire or increase a qualifying holding in banks or insurance companies, were fully harmonised by that directive. This is evidenced by Articles 2 and 5 of the Qualifying Holdings Directive, which respectively added a new Article 15a(7) to Directive 2002/83/EC and a new Article 19(8) to Directive 2006/48/EC. It is further supported by recital 6 in the preamble to the Qualifying Holdings Directive (compare also the judgment in *CO Sociedad de Gestión y Participación and Others*, cited above, paragraphs 41 and 42). Importantly, however, the Qualifying Holdings Directive did not address the level of harmonisation governing the prudential conditions for authorisation of banks and insurance companies.

102 Thus, at the material time, Directive 2000/12/EC, Directive 2006/48/EC and Directive 2002/83/EC, also as amended by the Qualifying Holdings Directive, did not prevent the EEA States from maintaining stricter rules concerning the procedure for the authorisation of banks and insurance companies. Nonetheless, such rules must be compatible with the fundamental freedoms guaranteed by the EEA Agreement.

The fundamental freedoms and the existence of a restriction

103 The questions referred concern national measures that may limit ownership by the promoters of a bank or an insurance company to shares representing 20 to 25 per cent in each company. The exact nature of the measures is disputed and alternative interpretations follow from each of the three questions. In order to determine whether such measures restrict one or more of the fundamental freedoms, the Court must begin by considering whether to confine its analysis to one fundamental freedom or to evaluate more than one of them in parallel.

104 This assessment requires that the purpose of the measure concerned is taken into consideration (see Joined Cases E-3/13 and E-20/13 *Olsen and Others* [2014] EFTA Ct. Rep. 400, paragraph 111 and case law cited). According to the referring court, one of the main objectives underlying the national measures is to ensure that the Norwegian finance sector is independent of individual investors. Consequently, it appears that the contested measures are intended to apply to those shareholdings that enable the holder to exert a definite influence on a company's decisions and to determine its activities. Accordingly, the national measures seem to fall predominantly within the scope of Article 31 EEA and not Article 36 EEA (see *Olsen and Others*, cited above, paragraph 113 and case law cited). In this regard, the Court also notes that, according to Article 34 EEA, legal entities, such as the plaintiffs, may rely on Article 31 EEA.

105 As regards the relationship between Articles 31 and 40 EEA, the Court notes that the fact that the contested measures appear to be intended to apply to shareholdings which enable the holder to exert a definite influence on a company's decision making and to determine its activities would exclude the application of Article 40 EEA. The latter provision would only apply if and to the extent that the national legislation in fact has an effect on shareholdings which do not enable the holder to exert such an influence (compare the judgment in *X and Y*, C-436/00, EU:C:2002:704, paragraph 68). Accordingly, and having regard to the circumstances set out in the request, the measures at issue touch *prima facie* upon the freedom of establishment as guaranteed by Article 31 EEA.

106 National legislation and administrative practice are capable of falling within the scope of the provisions relating to the fundamental freedoms of the EEA Agreement to the extent that they apply to situations connected with trade between EEA States (see Case E-9/14 *Kaufmann* [2014] EFTA Ct. Rep. 1048, paragraph 31). A cross-border element clearly appears to exist in the case. As the defendant has acknowledged, a cross-border element exists with regard to the plaintiffs' services provided outside Norway and in relation to the planned acquisition of shares in the Lithuanian bank Bankas Finasta AB.

107 In assessing to what extent the facts of the case entail a cross-border element, the referring court must also bear in mind that even though, according to its wording, Article 31 EEA is intended to secure, in particular, the benefit of national treatment in a host State, it also prohibits the home State from hindering the establishment in other EEA States of its own nationals or companies incorporated under its legislation (see Case E-7/07 *Seabrokers* [2008] EFTA Ct. Rep. 172, paragraph 28 and case law cited).

108 In determining whether the national measures constitute restrictions under Article 31 EEA, the referring court needs to take account of the fact that national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the EEA Agreement are an encroachment upon these freedoms.

109 The Court has held previously that legislation which prohibits the holding of more than 20 per cent of the shares in certain companies constitutes a restriction under Article 31 EEA (see Case E-9/11 *ESA* v *Norway*, cited above, paragraphs 81 and 82). Nothing in the case file suggests that a different result is warranted in the present proceedings.

110 Even if the referring court were to find that the national measures fall within the scope of another freedom guaranteed by the EEA Agreement (see *Olsen and Others*, cited above, paragraph 117), the measures are, in any event, liable to hinder or make less attractive the exercise of the freedom concerned (see Case E-9/11 *ESA* v *Norway*, cited above, paragraphs 81 and 82; and the judgment in *Alpine Investments*, cited above, paragraph 30). Accordingly, the measures at issue constitute restrictions.

111 Based on the above, the Court finds that national legislation as described in Questions 1 and 2 and administrative practice as described in Question 3 constitute restrictions that appear to fall predominantly within the scope of Article 31 EEA. Whether this is the case is for the referring court to assess.

Legitimacy of the aims pursued by the measures at issue

112 According to established case law, a national measure which hinders the freedom of establishment laid down in Article 31 EEA can be justified on the grounds set out in Article 33 EEA or by overriding reasons in the public interest, provided that it 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 (see Case E-9/11 *ESA* v *Norway*, cited above, paragraph 83 and case law cited).

113 The overriding reasons in the general interest capable of justifying national measures restricting the fundamental freedoms in areas concerning the financial sector include, for example, the protection of the functioning and good reputation of the financial services sector (see Case E-8/04 *ESA* v *Liechtenstein*, cited above, paragraph 24 and case law cited) and the promotion of the well-functioning and efficiency of the financial markets (see Case E-9/11 *ESA* v *Norway*, cited above, paragraphs 84 to 86).

114 In the present proceedings, the Court concludes that the objective of reducing excessive risk incentives of owners of banks or insurance companies, particularly in relation to the risk of misuse of power, promotes the well-functioning and efficiency of the financial markets. Therefore, this objective reflects overriding reasons in the general interest.

115 However, it is not sufficient for the national measures to resort to a legitimate aim in the abstract. Rather, it must be assessed whether the measures at issue actually pursue the invoked aim (see Case E-14/15 *Holship*, judgment of 19 April 2016, not yet reported, paragraph 125). An obligation of dispersed ownership in banks and insurance companies

may only serve as a means, subject to the suitability and necessity assessment, of ensuring the objective pursued but not as a legitimate aim in itself.

116 Based on the above, the Court finds that the objective of reducing excessive risk incentives of owners of banks or insurance companies, particularly in relation to the risk of misuse of power, reflects overriding reasons in the general interest capable of justifying national measures which restrict the freedom of establishment as guaranteed by Article 31 EEA. It is for the referring court to identify the objectives which are in fact pursued by the national measures, as well as to determine whether the legitimate aims are pursued in a suitable and consistent manner.

Suitability/consistency

117 When a national measure constitutes a restriction on the fundamental freedoms of EEA law, it falls to the relevant EEA State to demonstrate that the measure is suitable to achieve the legitimate objective pursued along with genuinely reflecting a concern to attain that aim in a consistent and systematic manner (see Case E-1/06 *ESA* v *Norway* [2007] EFTA Ct. Rep. 8, paragraph 43).

118 The Court notes that it appears to be disputed if and to what extent rules on dispersed ownership lead to a reduction in risk incentives.

119 As for the issue whether the national measures attain the aims that they pursue in a consistent and systematic manner, the Court finds it appropriate to address each of the questions referred separately.

120 The issue rules, as described in Question 1, entail a requirement that three quarters of the shares in new banks and insurance companies must be subscribed without preferential rights (offered as a public issue). The promoters of a bank or an insurance company will be able to secure an ownership of 25 per cent of the shares in the institution at the time of its authorisation, but no preferential rights can be imposed as regards the remaining 75 per cent of the shares. Consequently, the ownership of the remaining 75 per cent of the shares will be determined entirely by market interest in the public issue. For example, if only the promoters participate in the public issue, they may together secure a 100 per cent ownership of the institution. Should they, however, decide not to participate in the public issue, one outside investor might, for example, secure 75 per cent ownership of the institution. For those reasons, the national measure appears not to prevent, in a consistent and systematic manner, the promoters of a bank or an insurance company, or indeed other investors, from obtaining an ownership of more than 25 per cent in that institution at the time of its authorisation. In particular, no argument has been submitted to the Court that would justify treating the promoters of a company differently to other investors. Therefore, the measure does not seem suitable to achieve the legitimate objective that has been identified by the Court.

121 The issue rules, as described in Question 2, entail a requirement that persons other than the promoters must subscribe three quarters of the shares in new banks and insurance companies. This means that the promoters will not be able to secure a holding of more

than 25 per cent of the shares at the time of its authorisation. As such, the rule appears suitable to achieve the legitimate objective that has been identified by the Court, but only with regard to the promoters. Other investors may acquire shares beyond 25 per cent. As stated above, no argument has been submitted to the Court that would justify treating the promoters of a company differently to other investors. Therefore, the measure does not seem suitable to achieve the legitimate objective that has been identified by the Court.

122 The administrative practice, as described in Question 3, entails that individuals and legal entities are not authorised to own more than 20 to 25 per cent of the shares in financial institutions, except in those cases where the law itself authorises the establishment of a financial group or where the financial institution will engage in what is referred to as a niche activity only. As this practice concerns both the promoters and other investors, it appears suitable to achieve the legitimate objective that has been identified by the Court.

123 However, unlike Questions 1 and 2, which concern only the application for authorisation as a bank or an insurance company, the administrative practice described in Question 3 may possibly be read as also covering secondary acquisitions of holdings in banks or insurance companies, that is acquisitions which take place after the establishment provided for in the authorisation. Insofar as Question 3 relates to secondary acquisitions of qualifying holdings, the referring court needs to take into account that the regulation of such acquisitions was fully harmonised in EEA law by the Qualifying Holdings Directive. Subject to the specific conditions introduced by that directive, the provisions envisage that individual investors may hold more than 25 per cent of the share capital of a bank or an insurance company. Therefore, any restrictions on acquisitions subsequent to the authorisation of banks and insurance companies must not go beyond the conditions introduced by the Qualifying Holdings Directive.

124 Thus, the Court finds that the issue rules, as described in Questions 1 and 2, do not seem suitable to achieve the legitimate objective that has been identified by the Court, whereas the administrative practice, as described in Question 3, appears suitable to achieve that objective to the extent that it applies to applications for authorisation as a bank or an insurance company and not to secondary acquisitions after the granting of authorisation.

Necessity

125 In the event that the referring court finds one or more of the national measures suitable for attaining a legitimate objective, it must also assess whether they go beyond what is necessary in order to attain that objective.

126 The necessity test implies that the chosen measure must not be capable of being replaced by an alternative measure that is equally useful but less restrictive to the fundamental freedoms of EEA law.

127 According to established case law, it is for the EEA State that invokes a derogation from one of the fundamental freedoms to show in each individual case that its rules are necessary and proportionate to attain the aim pursued (see Case E-9/11 *ESA* v *Norway*,

cited above, paragraphs 87 and 88 and case law cited). However, that burden of proof cannot be so extensive as to require the EEA State to prove, positively, that no other conceivable measure could enable that objective to be attained under the same conditions (see, for comparison, the judgment in *Commission* v *Italy*, C-110/05, cited above, paragraph 66 and case law cited).

128 The defendant argues that there are no alternative, less restrictive measures equally effective in achieving the objectives pursued. The plaintiffs and ESA contest this argument. The Commission states that it has serious doubts as to the proportionality of the contested national measures.

129 ESA maintains that the national measures do not pass the necessity test, since there is room to adapt the current system in Norway while maintaining a sufficiently high level of protection but restricting free movement less than the contested legislation does. ESA argues that the licence requirements could be based solely on a suitability assessment of owners, such as the assessment already provided for in other provisions of Norwegian law. The defendant has responded by stating that the crucial issue is whether a system based on a suitability assessment ensures an equally high level of protection as the ownership rules and the dispersed ownership policy.

130 The defendant has chosen a high level of protection in the field of banking and insurance. EEA States are free to define in detail the level of protection sought, but the restrictive measures imposed must satisfy the conditions laid down in case law as regards their proportionality (see *Ladbrokes*, cited above, paragraph 42 and the case law cited).

131 The mere fact that an EEA State has opted for a system of protection which differs from that adopted by another EEA State cannot affect the assessment of the proportionality of the provisions enacted to that end. Those provisions and the administrative practice 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 (see, for comparison, the judgment in *Stanleybet International and Others*, C-186/11 and C-209/11, EU:C:2013:33, paragraph 28).

132 Furthermore, when it comes to regulating banks and insurance companies, special concerns arise concerning financial stability. In this regard, the Court has emphasised that soundly regulated and safe financial institutions are of decisive importance for financial stability in the EEA (see Case E-16/11 *ESA* v *Iceland* [2013] EFTA Ct. Rep. 4, paragraph 129). This is mainly due to the particular function of banks and insurance companies for the economy as a whole.

133 In the case at issue there appear to be alternative means that may be just as effective in achieving the objective pursued. One possible solution may be to subject the granting of an authorisation to banks and insurance companies to special conditions aimed at preventing the risk of misuse of power. In particular, conditions that prevent the granting of favourable loans, guarantees or any comparable transactions for the benefit of large owners or their related parties, would, in combination with a suitability assessment of

applicants wishing to own qualifying holdings, address the excessive incentives related to the risk of misuse of power while still being less restrictive than the contested measures.

134 Accordingly, if the referring court finds one or more of the national measures suitable for attaining a legitimate objective, it must also assess whether they go beyond what is necessary in order to attain that objective. In the present proceedings, it appears that measures other than those contested are less restrictive while equally effective in attaining the legitimate objective identified.

IV Costs

135 The costs incurred by ESA and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are a step in the proceedings pending before the national court, any decision on costs for the parties to those proceedings is a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by Oslo District Court hereby gives the following Advisory Opinion:

1. **At the material time, Directive 2000/12/EC, Directive 2006/48/EC and Directive 2002/83/EC, also as amended by Directive 2007/44/EC, did not prevent the EEA States from maintaining stricter rules concerning the procedure for the authorisation of banks and insurance companies. Nonetheless, such rules must be compatible with the fundamental freedoms guaranteed by the EEA Agreement.**

2. **Legislation as described in Questions 1 and 2 and administrative practice as described in Question 3 constitute restrictions that appear to fall predominantly within the scope of Article 31 EEA. Whether this is the case is for the referring court to assess.**

3. **The objective of reducing excessive risk incentives of owners of banks or insurance companies, particularly in relation to the risk of misuse of power, reflects overriding reasons in the general interest capable of justifying national measures which restrict the freedom of establishment as guaranteed by Article 31 EEA. It is for the referring court to identify the objectives which are in fact pursued by the national measures, as well as to determine whether the legitimate aims are pursued in a suitable and consistent manner.**

4. **The issue rules, as described in Questions 1 and 2, do not seem suitable to achieve the legitimate objective that the Court has identified. The administrative practice, as described in Question 3, appears suitable to achieve that objective to the extent that it applies to applications for authorisation as a bank or an insurance company and not to secondary acquisitions after the granting of authorisation.**

5. **If the referring court finds one or more of the national measures suitable for attaining a legitimate objective, it must also assess whether they go beyond what is necessary in order to attain that objective. In the present proceedings, it appears that measures other than those contested are less restrictive while equally effective in attaining the legitimate objective identified.**

Carl Baudenbacher Per Christiansen Páll Hreinsson

Delivered in open court in Luxembourg on 16 May 2017.

Gunnar Selvik
Registrar

Carl Baudenbacher
President