REPORT FOR THE HEARING
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 the case between

Netfonds Holding ASA,

Netfonds Bank AS, and

Netfonds Livsforsikring AS

and

The Norwegian Government, represented by the Ministry of Finance,

concerning the interpretation of Articles 31, 36 and 40 of the Agreement on the European Economic Area in the context of the procedure for obtaining ownership of Norwegian banks and insurance companies.

I Introduction

1. By a letter of 21 June 2016, registered at the Court on 27 June 2016, Oslo District Court (*Oslo tingrett*) made a request for an Advisory Opinion in a case pending before it between 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") and the Norwegian Government, represented by the Ministry of Finance ("the defendant").

2. The case before Oslo tingrett concerns the plaintiffs' claim for compensation on the grounds of an alleged breach by the defendant of Article 31 of the Agreement on the European Economic Area ("the EEA Agreement" or "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 undertaking licence to Netfonds Livsforsikring despite the plaintiffs' requests for full licences. According to

the plaintiffs, this led to loss of income from the time that full licences should have been granted.

II Legal background

EEA law

3. Article 31(1) 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.*

4. 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.*

5. 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.*

6. 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.[1] No constitutional requirements were indicated and the decision entered into force on 1 March 2001.

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

> *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.*

8. Recital 12 in the preamble to Directive 2000/12/EC read:

> *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.*

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

> *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.*

[1] OJ 2001 L 117, p. 13, and EEA Supplement 2001 No 22, p. 8.

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.

10. 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.[2] Constitutional requirements were indicated and the decision entered into force on 1 November 2010.

11. 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.

12. 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.

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[2] OJ 2008 L 257, p. 27, and EEA Supplement 2008 No 58, p. 9.

13. 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.*
>
> *In determining a qualifying holding in the context of this Article, the voting rights referred to in Article 92 of Directive 2001/34/EC of the European Parliament and of the Council of 28 May 2001 on the admission of securities to official stock exchange listing and on information to be published on those securities shall be taken into consideration.*
>
> *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.*

14. 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 to the Agreement by EEA Joint Committee Decision No 60/2004 of 26 April 2004.[3] No constitutional requirements were indicated and the decision entered into force on 27 April 2004.

[3] OJ 2004 L 277, p. 172, and EEA Supplement 2004 No 43, p. 156.

15. Recital 7 in the preamble to Directive 2002/83/EC read:

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.

16. Recital 28 in the preamble to Directive 2002/83/EC read:

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.

17. Article 8 of Directive 2002/83/EC read:

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.

18. 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.[4] Constitutional requirements were indicated and the decision entered into force on 1 November 2010.

19. 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

[4] OJ 2008 L 280, p. 7, and EEA Supplement 2008 No 64, p. 1.

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.

20. 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.

21. 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.

22. 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 15b:

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, adding, *inter alia*, a new Article 19a:

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[5]

24. Regulation of the financial market in Norway is based on a fundamental public licensing requirement. According to the request for an Advisory Opinion, 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, e.g. they receive and manage a large part of the public's savings, and reinvestment of these funds often forms the financial basis for other business activity.

25. At the material time, commercial banks were regulated by the Act of 24 May 1961 No 2 on commercial banks ("the Commercial Banks Act"),[6] while insurance companies were regulated by the Act of 10 June 1988 No 39 on insurance activity ("the Insurance Activity Act of 1988")[7] and subsequently by the Act of 10 June 2005 No 44 on insurance activity ("the Insurance Activity Act of 2005").[8] Banks and insurance companies were also subject to the Act of 10 June 1988 No 40 on financing activity and financial institutions ("the Financial Institutions Act").[9]

26. In order to conduct commercial banking activity 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".

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5 Translations of national provisions are unofficial.

6 *Lov om forretningsbanker*. LOV-1961-05-24-02.

7 *Lov om forsikringsvirksomhet*. LOV-1988-06-10-39.

8 *Lov om forsikringsvirksomhet*. LOV-2005-06-10-44.

9 *Lov om finansieringsvirksomhet og finansinstitusjoner*. LOV-1988-06-10-40.

27. 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.*

28. 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.*

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

30. 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.

31. The Financial Institutions Act had originally included a provision which stated 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 referred to as the "ownership limitation rule". This rule was amended in 2003 after the EFTA Surveillance Authority ("ESA") issued a reasoned opinion in which it concluded that the ownership limitation rule constituted an unlawful restriction on the free movement of capital provided for in Article 40 EEA. The Norwegian authorities maintained that the ownership limitation rule was in accordance with EEA law, but nonetheless chose to replace the ownership limitation rule by an ownership control rule, which requires that the licensing authority must be "convinced that owners of qualifying holdings", which are 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 follow up on its reasoned opinion after the legislation was amended in 2003.

32. 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.*

33. In addition to the above mentioned rules concerning the granting of licences, Norwegian law also 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.

III Facts and procedure

34. Net Fonds ASA (which later amended its name to Netfonds Bank ASA and later became Netfonds Bank AS) was formed on 1 June 1996. Its original activities consisted in offering securities trading on the internet.

35. Following an extension of activities to include limited activity as a commercial bank and life insurance undertaking, the company structure was reorganised. At present, Netfonds Holding is owned by Rolf Dammann and his father Axel Dammann, who own 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.

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

37. The case before Oslo tingrett 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 loss of income from the time that full licences should have been granted.

38. The limitations imposed on the authorisations in question are also referred to as licence conditions by the referring court. According to its 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.

39. 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.

40. On 5 August 2005, the Ministry of Finance granted Net Fonds ASA's application to conduct limited banking activity pursuant to Section 8 first paragraph of the Commercial Banks Act. 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"). This was in accordance with the application. 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. On that basis, the Ministry of Finance found that Net Fonds ASA's activities did not have the same public interest implications in relation to, for example, business and credit policy as more traditional banking activities might have. The reason for granting authorisation while accepting the ownership structure in question was thus that the activity was regarded as a niche 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. Thus, the Ministry of Finance did not include a dispersion sale as a condition for the authorisation despite the suggestion by the Financial Supervisory Authority of Norway ("the FSA") that a sale of such kind should be included as a licence condition.

41. 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.

42. By a letter of 27 March 2006, Netfonds Bank notified the 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.

43. On 6 December 2006, an application was submitted for the establishment of a life insurance company (Netfonds Livsforsikring) pursuant to Section 2-1 of the Insurance Activity Act and for the establishment of a new subsidiary of Netfonds Holding according to Section 2a-3 of the Financial Institutions Act. The application was exclusively for a licence to offer unit-linked endowment insurance. The application was granted by the Ministry of Finance's decision 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 find grounds for imposing the requirement of a dispersion sale. In assessing whether the ownership structure was acceptable or whether to make a dispersion sale a condition, 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 less relevance. The reason for granting authorisation while accepting the ownership structure in question was thus that the activity was regarded as a niche activity.

44. By a letter of 14 August 2007, the subsidiary requested the Ministry of Finance to amend its decision of 17 July 2007, such 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 is not authorised to market or offer individual pension insurance contracts or individual annuities".

45. Subsequently, Netfonds Livsforsikring was established on 3 February 2009. 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.

46. 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 included the following statement:

> *Netfonds Livsforsikring AS was authorised to conduct life insurance activities even though the company did not meet the requirements for dispersed ownership of financial institutions, which are laid down inter alia in Section 2-1 of the Insurance Activity Act. The reason for granting such authorisation for life insurance activities given the current ownership structure, was that the activities for which authorisation was granted were deemed to be niche activities. As regards small niche companies, the legislator has opened for making exemptions from the requirement for dispersed ownership laid down in the financial legislation; see Section 5.3 of Proposition No 50 (2002-2003) to the Odelsting. Hence the Ministry found that an exemption could be granted from the rules on dispersed ownership pursuant to Section 15-8 of the Insurance Activity Act, as long as this was limited to individual endowment insurance contracts. The same considerations formed the basis for the extension of the scope of the licence on 28 May 2008. [...] The Ministry of Finance agrees with the FSA's assessment that the scope of Netfonds Livsforsikring's licence for life insurance activities cannot be extended to include group pension insurance schemes given the parent company's current ownership structure.*

47. 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.

48. Netfonds Livsforsikring brought an appeal against the decision by a letter of 10 January 2011. Its appeal 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 contended:

> *It seems clear, nonetheless, that the Directive will have a bearing also on the granting of licences in that the general provisions of the EEA Agreement on the freedom of establishment and free movement of capital will apply. Since the considerations related to [ownership] structure cannot be maintained in connection with subsequent acquisitions, such considerations can neither be practised in relation to the original owners of qualifying holdings.*

49. 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.

50. 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 decision included the following statement:

> *When considering whether to make a dispersion sale in Net Fonds Holding ASA a condition, the Ministry gave substantial weight to the (then) Net Fonds ASA having been authorised to engage in limited banking activity only, both with respect to accepting deposits and extending credit. [...] Like the FSA, the Ministry of Finance is of the opinion 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.*

51. 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.

52. On 4 May 2012, the King in Council 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.

53. The Royal Decree concerning Netfonds Livsforsikring includes the following statement on the grounds for rejection:

> *Netfonds Livsforsikring AS subsequently applied for a licence to offer group occupational pensions (unit-linked defined contribution pension schemes). Group occupational pensions are not a niche activity, and, in the Ministry's opinion, there are no grounds for granting an exemption from the dispersed ownership requirements for such activity. [...] Different ownership control rules apply to the granting of licences and the acquisition of a qualifying holding. In Norwegian Official Report NOU 2008:13, the Banking Law Commission reported on necessary legislative amendments as a result of Directive 2007/44/EC on ownership control in financial institutions. The Banking Law Commission concluded that it was not*

> *necessary to amend the rules by which dispersed ownership was required in order to be granted a licence, and also did not propose any amendment of these rules. [...] The ownership control rules address fundamental considerations related to preventing private financier activity in financial institutions, as explained in chapter 3 above. 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.*

54. 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. Were the view to be taken that amendment to the dispersed ownership requirement was necessary, any amendment would have to be by act of law and not by dilution of the requirements through a practice of granting exemptions.

55. 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.*

56. 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 stated further that were the view to be taken that an amendment to the dispersed ownership requirement was necessary, any amendment would have to take place by act of law and not by dilution of the requirements through a practice of granting exemptions.

57. 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.

58. 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 of Finance 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 of Finance, would require a dispersion sale.

59. The decision of 28 January 2014 was appealed by a letter of 18 February 2014. The referring court's order for reference does not elaborate on the result of that appeal.

60. 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, which included the following statement:

> *The Ministry considers 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 does not agree that a rejection of the application for authorisation to change the group structure would be in contravention of EEA law. The Ministry's rejection of the application is based on considerations related to the licensed activities in Norway and not considerations related to the Latvian [sic] bank.*

61. On 24 February 2015, Netfonds Livsforsikring again applied for an extension of the scope of its licence in order to be able to offer several specified services, alternatively such services as Nordnet Livsforsikring, one of the company's competitors, had been authorised to provide. According to the referring court, that application was still under consideration with the Ministry of Finance at the time when the plaintiffs instigated the present proceedings.

62. The following questions were submitted 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.

63. According to the referring court, the third question is based on the plaintiffs' description of the defendant's administrative practice, but the referring court adds that the defendant rejects the plaintiffs' understanding of that practice. The referring court adds that its references to the Insurance Activity Act in the questions referred 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 each relevant decision.

IV Written observations

64. Pursuant to Article 20 of the Statute of the Court and Article 97 of the Rules of Procedure, written observations have been received from:

- the plaintiffs, represented by Stephan L. Jervell, advocate;
- the defendant, represented by Magnus Schei, advocate, Office of the Attorney General (Civil Affairs), acting as Agent;
- 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.

V Summary of the arguments submitted

The plaintiffs

65. The plaintiffs maintain that the defendant's rejections of their applications are based on national law and national administrative practice which establish a system where (i) a promoter of a bank or an insurance company must offer and sell at least 75 per cent of the shares to external investors, and (ii) no individual or company can own more than 20 to 25 per cent of the shares in a financial institution, unless the company offers only niche services. In their view, this constitutes a breach of Articles 31, 36 and 40 EEA and cannot be justified with reference to overriding reasons in the public interest.

66. According to the plaintiffs, the three relevant fundamental freedoms must be applied in parallel in this case, as it is established case law that the fundamental freedoms must be applied in parallel unless it appears, in the circumstances of the case, that one of them is entirely secondary in relation to the other and may be considered together with it.[10] The plaintiffs add that even where a centre of gravity can be found in relation to one

[10] Reference is made to Joined Cases E-3/13 and E-20/13 *Olsen and Others* [2014] EFTA Ct. Rep. 400, paragraph 112.

fundamental freedom, a national measure can at least have a restrictive effect in relation to other fundamental freedoms.[11]

67. On 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.[12] First, with regard to the freedom of establishment, the establishment of Netfonds Holding in Lithuania was hindered when its application for authorisation to acquire all the shares in the Lithuanian bank Bankas Finasta AB was rejected. Second, with regard to the freedom to provide services, Netfonds Bank has notified the FSA of cross-border activity in a number of EEA States. Similarly, Netfonds Livsforsikring offers its services to clients and potential clients in other EEA States. These operations have been limited by the national measures. Third, with regard to the free movement of capital, the defendant rejected Netfonds Bank's application to extend the scope of its licence to include pure savings accounts and occupations pensions, which would have been used by Netfonds Bank to acquire Swedish and Icelandic customers from the Danish bank Saxo Privatbank A/S. The case therefore falls within the scope of these three fundamental freedoms.

68. The plaintiffs maintain that the national measures described in the questions referred constitute restrictions in breach of Articles 31, 36 and 40 EEA.

69. With regard to Question 1, the plaintiffs maintain that the relevant issue rules, 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), provided that the application for a licence is not simply for a niche activity, constitute a restriction, first, within the meaning of Article 40 EEA, since a public issue prevents investors from securing a controlling holding. This leads to uncertainty and reduces the foreseeability of investments in Norwegian financial institutions. Thus, the requirement of a public issue makes it less attractive for investors to seek controlling holdings in Norwegian financial institutions.[13] Furthermore, a public issue is more time consuming and thus more costly. Indirectly, this reduces capital transactions as well as cross-border transactions. Second, the rules constitute a restriction within the meaning of Article 31 EEA, since they make it more difficult to obtain definite influence and control over a financial institution, and hence determine its activities.[14] In the plaintiffs' view, there is little doubt that the issue rules make it less attractive to establish financial institutions in Norway. Third, the rules constitute a restriction within the meaning of Article 36 EEA,

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[11] Reference is made to Case E-7/07 *Seabrokers* [2008] EFTA Ct. Rep. 172, paragraph 27.

[12] Reference is made to the judgment in *Alpine Investments*, C-384/93, EU:C:1995:126, paragraph 22.

[13] Reference is made to Case E-2/06 *ESA* v *Norway* [2007] EFTA Ct. Rep. 164, paragraph 64.

[14] Reference is made to the judgments in *DKV Belgium*, C-577/11, EU:C:2013:146, paragraph 31, and *Test Claimants in the Thin Cap Group Litigation*, C-524/04, EU:C:2007:161, paragraph 27.

since, by reason of the arguments presented concerning Articles 31 and 40 EEA, financial institutions in Norway will be dissuaded from offering their bank and insurance services in Norway and in other EEA States.[15]

70. With regard to Question 2, the plaintiffs maintain that the relevant issue rules, 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, provided that the application for a licence is not simply for a niche activity, constitute a restriction, first, within the meaning of Article 40 EEA, since the national measure prohibits promoters from holding more than 25 per cent of the shares in a bank or an insurance company. In the plaintiffs' case, this has led to a series of rejections in relation to licence applications. Consequently, the issue rules have prevented a series of potential capital transactions. Furthermore, the rules impede the acquisition of shares in Norwegian financial institutions, which is dissuasive for investors.[16] Second, the rules constitute a restriction within the meaning of Article 31 EEA, since they preclude the promoters from obtaining definite influence on the decisions of banks or insurance companies, and render it impossible to determine their activities.[17] Additionally, the rules make it less attractive for investors from other EEA States to establish financial institutions in Norway and to invest in such companies.[18] Furthermore, the rules have been used to refuse Netfonds Holding's application to acquire the Lithuanian bank Bankas Finasta AB.[19] Third, the rules constitute a restriction within the meaning of Article 36 EEA, since the issue rules in question limit the establishment of new banks and insurance companies and thereby hinder a range of services related to that business. More precisely, the plaintiffs have been unable to provide clients in Norway and other EEA States with a wide range of banking and insurance services.

71. With regard to Question 3, the plaintiffs maintain that 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 niche activity only, and the relevant application does in fact concern a licence for more than simply a niche activity constitutes a restriction under Articles 31, 36 and 40 EEA for the same reasons as were submitted with regard to Question 2. However, the plaintiffs argue that in addition to those arguments, there are several elements concerning the administrative practice which render it more restrictive than the issue rules described

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[15] Reference is made to the judgment in *DKV Belgium*, cited above, paragraph 31.

[16] Reference is made to Case E-9/11 *ESA* v *Norway* [2012] EFTA Ct. Rep. 442, paragraph 80.

[17] Ibid., paragraph 81.

[18] Reference is made to the judgments in *Commission* v *France*, C-483/99, EU:C:2002:327, paragraph 41, and *Commission* v *Italy*, C-174/04, EU:C:2005:350, paragraphs 30 to 31.

[19] Reference is made to Case E-15/11 *Arcade Drilling* [2012] EFTA Ct. Rep. 676, paragraph 59.

in Questions 1 and 2. More precisely, the administrative practice applies to any individual or legal entity attempting to acquire qualifying holdings in financial institutions, and not simply the promoters. Additionally, the administrative practice applies both to the establishment of a financial institution and to acquisitions of a holding in such an institution.

72. Having concluded that the national measures described in Questions 1, 2 and 3 all constitute restrictions within the meaning of Articles 31, 36 and 40 EEA, the plaintiffs address the issue whether the restrictions pursue a legitimate objective, and, on the basis that they do, whether such restrictions are suitable and necessary within the meaning of EEA law.

73. With regard to the objective of the contested measures, the plaintiffs argue that their primary objective goes back to the ownership limitation rule that was established in Norwegian law in 1988, and which, as a consequence of ESA's reasoned opinion, was repealed before the events at issue in the present case took place. The plaintiffs submit that the primary objective of this legislation was dispersed ownership. Furthermore, they contend that although dispersed ownership is an objective in itself, it also pursues several secondary objectives, which are (i) prevention of detrimental granting of credit, (ii) securing independence (preventing the misuse of power), (iii) avoiding large owners that are not subject to FSA supervision, (iv) increasing chances of financial support from owners, and (v) stimulating competition. The plaintiffs do not deny that objectives (i) and (ii) may be deemed legitimate. However, they contest the legitimacy of the other objectives.

74. On the issue of suitability, in general, the plaintiffs deny that the rules and administrative practice described in the questions referred are suitable for attaining the primary objective of dispersed ownership and consequently also any secondary objective derived from that objective.

75. Addressing Question 1 specifically, the plaintiffs submit that the issue rules, as described in that question, are not suitable for securing the primary objective of dispersed ownership, and thus not for any secondary objective derived from such ownership. The provisions do not prevent the owners from subscribing to shares in the public issue, and actually obtaining a controlling holding. Depending on the circumstances, the issue rules may lead to dispersed ownership. However, since the result of a public issue is highly uncertain, the issue rules themselves are not suitable for obtaining dispersed ownership and avoiding large private holdings in a consistent and coherent manner. Furthermore, the issue rules do not form part of a consistent and coherent system because they do not apply to subsequent acquisitions. However, the plaintiffs acknowledge that the notion of dispersed ownership is in principle suitable to achieve objectives (ii) and (iii) concerning the securing of independence (preventing the misuse of power) and avoiding large owners that are not subject to FSA supervision.

76. Addressing Question 2 specifically, the plaintiffs reiterate their arguments on Question 1, adding that the issue rules, as they are interpreted in Question 2, are suitable to achieve dispersed ownership among the promoters only, but do not, however, prevent other persons from obtaining more than 25 per cent of the shares in a financial institution in the issuance process. According to the plaintiffs, this means that the issue rules do not ensure dispersed ownership in a consistent manner.

77. Addressing Question 3 specifically, the plaintiffs contend that the administrative practice described in that question can only be regarded as suitable for achieving the intended objectives in relation to the primary objective of dispersed ownership and objective (ii) concerning the securing of independence (preventing the misuse of power).

78. Finally, addressing the issue of necessity in Questions 1, 2 and 3, the plaintiffs submit that, as a starting point, whether a restrictive measure is necessary to achieve a legitimate objective must be evaluated in light of the EEA State's chosen level of protection.[20] However, the level of protection itself is not sheltered from judicial review. For example, an EEA State cannot introduce a level of protection that represents clear overprotection.[21] In their assessment, that is the case here – the defendant has chosen an extremely high level of protection which represents overprotection. Furthermore, EEA law requires that the chosen level of protection is applied consistently in national law. In addition, the interpretation of secondary EEA legislation may give reason to censor an EEA State's chosen level of protection and, in the case at hand, the Qualifying Holdings Directive provides such a reason.[22] Also, it follows from the Court's established case law that a prohibition on the holding of a certain percentage is not acceptable.[23] Lastly, the plaintiffs argue that the defendant is attempting to circumvent EEA law. It follows that the defendant's chosen level of protection cannot be upheld, particularly as regards the primary objective of dispersed ownership.

79. According to the plaintiffs, the proportionality of the five secondary objectives must also be examined. In that regard, the plaintiffs submit that those objectives can clearly be achieved by less restrictive measures, which are just as efficient. More precisely, the plaintiffs contend, first, that the suitability assessment required under the Qualifying Holdings Directive provides the authorities with comprehensive information about potential owners. Second, when granting a licence, the authorities can lay down licensing conditions prohibiting the financial institution from granting credit to owners and related parties. Third, the authorities regularly supervise and monitor financial institutions, which

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[20] Reference is made to the judgment in *Stanleybet International and Others*, Joined Cases C-186/11 and C-209/11, EU:C:2013:33, paragraph 28.

[21] Reference is made to the judgment in *Commission* v *Denmark*, 302/86, EU:C:1988:421.

[22] Reference is made to the judgments in *GB-INNO-BM*, C-362/88, EU:C:1990:102, paragraphs 13 to 18, and *Schumacher*, 215/87, EU:C:1989:111.

[23] Reference is made to Case E-9/11 *ESA* v *Norway*, cited above, paragraph 98.

are also subject to a comprehensive reporting scheme. Fourth, the Norwegian law on limited liability companies includes provisions that govern agreements with shareholders and closely related parties, legal capacity rules to ensure that board members do not take part in decisions involving themselves, and provisions to avoid misuse of power. Fifth, the Financial Institutions Act includes provisions on large exposures and internal auditing. According to the plaintiffs, these five arguments identify tools that are far less restrictive than the issue rules, but at least as effective and adequate in achieving objectives (i) and (ii) with a view to preventing the detrimental granting of credit and securing independence (i.e. preventing the misuse of power). Furthermore, the issue rules are not necessary to obtain objective (iii) concerning the avoidance of large owners that are not subject to FSA supervision, since that objective can be maintained by imposing supervision requirements. With regard to objective (iv) concerning the increased chances of financial support from owners, regardless of ownership structure, the plaintiffs submit that the owners of a financial institution cannot ignore a situation in which the institution does not comply with rules regarding solidity and liquidity. Also, the issue rules are not necessary to fulfil objective (v) of stimulating competition. Addressing Question 1 specifically, the plaintiffs contend that the assessment under that question should be stricter than under Question 2 because the effects of the rule are unpredictable for promoters, depending on the level of interest in the public issue.[24] Likewise, in relation to Question 3, the plaintiffs submit that, here too, a stricter assessment than under Question 2 is called for, since the administrative practice reduces foreseeability for nationals and companies.

80. The plaintiffs propose that the Court should answer the questions referred as follows:

> *1. Hereby the Court declares that, 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 and Article 40 EEA.*
>
> *1a. Hereby the Court declares that, the secondary objectives to (i) prevent detrimental granting of credit, and (ii) secure independence (misuse of power), are overriding reason in the general interest capable of justifying national measures restricting the freedoms established by Articles 31, 36 and 40 EEA.*
>
> *However, the primary objective of dispersed ownership, the secondary objectives (iii), to avoid large owners which are not subject to FSA supervision, (iv) increase chances of financial support from owners, and (v) to stimulate competition, cannot be regarded as overriding reasons in the general interest capable of justifying*

[24] Reference is made to Case E-24/13 *Casino Admiral* [2014] EFTA Ct. Rep. 732, paragraph 56.

national measures restricting the freedoms established by Articles 31, 36 and 40 EEA.

1b. Hereby the Court declares that, the contested measures are not suitable for ensuring dispersed ownership. Consequently, the contested measures are not suitable for securing the secondary objectives pursued.

1c. Hereby the Court declares that, the contested measures go beyond what is necessary to achieve the objectives pursued.

2. Hereby the Court declares that, 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 and Article 40 EEA.

2a. Hereby the Court declares that, the secondary objectives to (i) prevent detrimental granting of credit, and (ii) secure independence (misuse of power), are overriding reason in the general interest capable of justifying national measures restricting the freedoms established by Articles 31, 36 and 40 EEA.

However, the primary objective of dispersed ownership, the secondary objectives (iii), to avoid large owners which are not subject to FSA supervision, (iv) increase chances of financial support from owners, and (v) to stimulate competition, cannot be regarded as overriding reasons in the general interest capable of justifying national measures restricting the freedoms established by Articles 31, 36 and 40 EEA.

2b. Hereby the Court declares that, the contested measures are not suitable for securing dispersed ownership. Consequently, the contested measures are not suitable for securing the secondary objectives pursued.

2c. Hereby the Court declares that, the contested measures go beyond what is necessary to achieve the objectives pursued.

3. Hereby the Court declares that, an administrative practice whereby individuals or enterprises are not authorised to own more than 20 - 25 per cent of the shares in financial institutions, constitute a restriction under Article 31 EEA, Article 36 EEA and Article 40 EEA.

3a. Hereby the Court declares that, the secondary objectives set out to (i) prevent detrimental granting of credit, and (ii) secure independence (prevent misuse of power), are overriding reasons in the general interest capable of justifying national measures restricting the freedoms established by Articles 31, 36 and 40 EEA.

However, the primary objective of dispersed ownership cannot be regarded as overriding reasons in the general interest capable of justifying national measures restricting the freedoms established by Articles 31, 36 and 40 EEA.

3b. Hereby the Court declares that, the contested measures are suitable for ensuring the primary objective of dispersed ownership and the secondary objective set out to (ii) secure independence (prevent misuse of power).

However, the contested measures are not suitable for (i) preventing detrimental granting of credit.

3c. Hereby the Court declares that, the contested measures go beyond what is necessary to achieve the objectives pursued.

The defendant

81. The defendant submits that it is necessary, first, to assess the applicability of the provisions of EEA primary law invoked by the plaintiff. Second, 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.

82. With regard to the first category, the defendant maintains that, according to established case law, the purpose of the contested measure must be taken into consideration when assessing whether a situation is covered by Article 31 EEA or Article 40 EEA.[25] In the present case the very purpose of the national measure is to prevent single shareholders from exerting a dominant influence on banks and insurance companies. The level of 25 per cent is set on the basis of the experience that in the banking and insurance sector such holdings may *de facto* suffice to exert negative control, due to *inter alia* a fragmented ownership structure and low attendance rates at the general assembly.[26] Therefore it is solely Article 31 EEA that applies to that situation. However, there is evidently no cross-border element at all in relation to the first category as the plaintiffs merely wish to expand their operations within Norway and are also wholly owned by Norwegian nationals.

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[25] Reference is made to the judgment in *Commission* v *Portugal*, C-543/08, EU:C:2010:669, paragraphs 41 to 46.

[26] Reference is made to the judgments in *Commission* v *France*, C-89/09, EU:C:2010:772, paragraph 68, and Case E-9/11 *ESA* v *Norway*, cited above, paragraph 81.

Notwithstanding that circumstance, this remains a question of fact which depends on findings that are for the referring court to make.[27]

83. With regard to the second category, the defendant submits that either Article 31 EEA or Article 36 EEA could apply.[28] It would seem that a cross-border element exists in any event. It is, however, for the referring court to determine this.

84. With regard to the third category, the defendant argues that Article 31 EEA appears to apply and adds that it would seem that a cross-border element exists in this regard. It is, however, for the referring court to determine this.

85. Having reached these conclusions, the defendant maintains that the real issue at stake is whether the national measure, as it relates to the second and third categories, constitutes a restriction prohibited by Article 31 or 36 EEA. In this regard, the defendant emphasises that the contested measure is completely non-discriminatory. Notwithstanding this fact, the defendant acknowledges that it would appear that the national measure may be liable to hinder or make less attractive either 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.

86. With regard to the issue of justification, the defendant begins by considering the objectives of the national measure. 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. Generally speaking, the objectives pursued are legitimate under EEA law.[29] 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 these 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.

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[27] Reference is made to the judgments in *Höfner and Elser*, C-41/90, EU:C:1991:161, paragraph 37; *Steen*, C-332/90, EU:C:1992:40, paragraph 9; and *Kurt*, C-104/08, EU:C:2008:357, paragraph 20.

[28] Reference is made to the judgment in *Gebhard*, cited above, paragraph 28.

[29] 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*, cited above, paragraph 84.

87. Furthermore, the national measure is intended to ensure the financial institutions' independence in relation to other business and industry, and in relation to owners that could conceivably use their influence for their own benefit or for the benefit of other closely related parties, thus preventing conflicts of interest. This will, first, protect smaller shareholders, customers, creditors and competitors, and, second, also work to the benefit of the financial system as a whole and the real economy. This is particularly so given the risk that a failure of one financial institution spreads to other financial institutions, and the fact that disruptions in the banking system will most probably also have a bearing on other non-bank financial institutions, as well as on the whole economy. Moreover, concentrated owner structures may in turn limit the competition in the financial market.

88. The defendant also emphasises the importance of confidence in the financial sector, in particular due to the risk of bank runs, either on the basis of real exposures or on the basis of a perceived threat of failure. This aspect renders it even more important to build a robust and solid structure in the market, which not only directly protects the consumers, but also contributes to the integrity and the stability of the financial market. Because of the important function in society that financial institutions play, it is therefore essential for the integrity and the stability of the financial market to prevent private financier activities and to ensure that these institutions' power is dispersed among several interests, which in turn strengthens confidence in them.

89. The defendant stresses that, according to settled case law, it is for the referring court to identify the aims that are actually pursued and to check whether, viewed objectively, the disputed measure promotes a legitimate aim.[30]

90. Turning to the issue of suitability, the defendant argues that in general the national measure is suitable to attain the objectives pursued and that case law supports this view.[31] It adds that the national measure is 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 market. Furthermore, it stresses that this assessment depends on questions of evidence and should therefore not be analysed in any detail by the Court.

91. 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

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[30] Reference is made to the judgments in Case E-16/10 *Philip Morris* [2011] EFTA Ct. Rep. 330, paragraph 78; Case E-3/06 *Ladbrokes* [2007] EFTA Ct. Rep. 86, paragraph 43; *Finalarte*, Joined Cases C-49/98, C-50/98, C-52/98, C-54/98 and C-68/98 to C-71/98, EU:C:2001:564, paragraphs 38 to 42; and *Portugaia Construções*, C-164/99, EU:C:2002:40, paragraphs 27 to 28.

[31] Reference is made to the judgments in Case E-9/11 *ESA* v *Norway*, cited above, paragraphs 84 to 86, and *Commission* v *France*, C-89/09, cited above, paragraphs 54 to 65.

acquisitions of qualifying holdings and not the conditions governing the initial authorisation before commencing banking or insurance activities.[32]

92. Turning to the issue of necessity, the defendant argues that, in the absence of harmonisation, EEA States retain the right to determine their level of protection. It is, however, for the referring court to ascertain the particular level of protection chosen in the case at hand.[33] Although the defendant acknowledges that, according to case law, it is for the national authorities to demonstrate that a restriction is justified, including that it is necessary, this is no more than a starting point. In particular, the defendant maintains that, first, the burden of proof does not imply that national authorities must provide positive proof that no other conceivable measure could be equally effective.[34] 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.[35] Fourth, in recent case-law, the ECJ has in fact 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.[36] 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.

93. With regard to the rationale behind the ownership limitations and their effect, the defendant, referring to economic literature, raises several points, particularly concerning the role of financial institutions in society, risk incentives, moral hazard, the importance of independence of financial institutions in relation to other business and industry, the prevention of misuse of powers by large shareholders, strengthening of the integrity and stability of the financial market, the interests of minority shareholders and depositors, and contagion risks and confidence in the financial sector. Finally, the defendant submits that there were no bank runs in Norway during the international financial crisis in the autumn of 2008, largely because of the robust and consistent financial regulation covering all financial sectors.

94. The defendant maintains that there are no alternative, less restrictive measures at least equally effective in achieving the objectives pursued. With regard to the plaintiffs'

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[32] 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.

[33] Reference is made to *Ladbrokes*, cited above, paragraphs 58 to 62.

[34] Reference is made to the judgment in *Commission* v *Italy*, C-110/05, EU:C:2009:66, paragraph 66.

[35] Reference is made to the judgment in *Stoß*, C-316/07, EU:C:2010:504, paragraphs 70 to 72.

[36] 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, cited above, paragraphs 81 to 87.

arguments concerning licence conditions, impartiality requirements, regulations of transactions between related parties, suitability requirements for board members and the general manager, and general requirements of sound and proper management, the defendant rejects the view that such measures could entail an equally high level of protection as that achieved by the national measure. The defendant reasons that these methods, which already exist in Norway, cannot be seen as genuine alternatives, but should be regarded as supplements to the ownership rules. It stresses the importance of having regulations in place that not only prohibit undesirable conduct but also help reduce the likelihood of such conduct, irrespective of other operational requirements.

95. 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 responds that the pivotal 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.[37] 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.[38]

96. As regards any comparison of the case at hand with Case E-9/11 *ESA* v *Norway*, cited above, the defendant maintains that, although there are certain apparent similarities between the cases, there are, however, also crucial differences. First, in the case at hand, the Norwegian legislature has opted for a very high level of protection in the banking and insurance sector, and, besides the very rare exception for niche activities, there are no exceptions to the 25 per cent ownership limit. Second, the contested measures in the case at hand do not include a dual track system. On the contrary, they are very robust and consistent. Third, although both cases concern important national regulation of the financial markets, there are certain differences which, to an even larger extent, call for a structural approach to the ownership of banks and insurance companies. In this regard, the defendant reiterates previous arguments concerning the specific features of the market for banking and insurance.

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[37] 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.

[38] Reference is made to the judgments in *Alpine Investments*, cited above, paragraphs 52 to 53; *Wouters*, C-309/99, EU:C:2002:98, paragraph 105; and *Commission* v *France*, C-89/09, cited above, paragraphs 82 to 86.

97. Finally, the defendant stresses that the assessment of proportionality is a matter for the referring court, since it alone has jurisdiction to assess the facts of the case before it and to interpret the applicable national legislation.

98. The defendant proposes that the Court should answer the questions referred as follows:

> *1. A national measure, such as that described in the present case, may constitute a restriction on either Article 31 EEA, Article 36 EEA or Article 40 EEA, provided however that there exist a relevant cross-border element. It is for the national court to make the final assessment on the basis of the relevant facts.*
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> *2. A national measure, such as that described in the present case, pursues overriding reasons of general public interest capable of justifying a restriction, provided that the national court finds, on the basis of an objective assessment of the relevant facts, that it actually pursues one or more of the purported aims. These include, in particular, the prevention of misuse of ownership power to the direct detriment of smaller shareholders, depositors and competitors, the prevention of a ownership structure limiting the competition in the financial market, the prevention of conflict of interests, thus also strengthening the independence of financial institutions, and the overall aim of protecting the integrity and stability of the financial market to the benefit not only of the well-functioning of the financial market, but also of the general economy. Such a finding by the national court would, moreover, not be prohibited by the Qualifying Holding Directive (2007/44/EU).*
>
> *3. It is reasonable to assume that a national measure, such as that described in the present case, has some kind of effect on the attainment of the objectives pursued, in particular those described in the preceding question. Such a finding by the national court would, moreover, not be prohibited by the Qualifying Holding Directive (2007/44/EU).*
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> *4. It may legitimately be held that a national measure, such as that described in the present case, is necessary in order to achieve the level of protection chosen. It is for the national court to ascertain that there are no less restrictive alternative means which at least as effectively provides for the level of protection. The national court may, in this regard, take into account, inter alia, the broader regulatory environment that the national measure operates within, including the joint effect of several measures; the severity of the consequences that may follow if the risks involved were to materialise; and the effect that general and simple rules may have on the achievement of the objectives pursued.*

ESA

99. 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.

100. Referring to settled case law, 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.[39] More specifically, ESA submits that 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 by essentially preventing promoters from owning more than 25 per cent of the shares in a bank or insurance company. These rules are, by their very nature, restrictive. Moreover, as the promoters of Netfonds Holding have a determinative influence on the decisions and activities of Netfonds Bank and Netfonds Livsforsikring, the case falls within the material scope of the provisions of the EEA Agreement relating to the freedom of establishment and the Court should therefore solely assess the measures under Article 31 EEA, particularly since any restriction on the free movement of services or capital appears to be an unavoidable consequence of the restriction on the freedom of establishment.[40]

101. Turning to the issue of justification, ESA argues that the objectives of the national legislation may well in principle reflect overriding reasons in the general interest capable of justifying the restriction.[41] However, the crucial aspect on which the Court needs to give guidance is whether the restrictive measure complies with the principle of proportionality.

102. With regard to suitability, ESA submits that the contested national legislation, if 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), provided that the application for a licence is not simply for a niche activity, as described in Question 1, would not be suitable for achieving its objective, since it would not prevent the promoters from acquiring the shares at market price. By way of consequence, and by virtue of the duty incumbent on national courts to interpret national law in conformity with EEA law, the interpretation posited in Question 1 is precluded. However, the contested national

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[39] Reference is made to the judgments in *Cadbury Schweppes and Cadbury Scwheppes Overseas*, C-196/04, EU:C:2006:544, paragraphs 31 to 33; *Fidium Finanz*, C-452/04, EU:C:2006:631, paragraphs 34 and 44 to 49; *Test Claimants in Class IV of the ACT Group Litigation*, C-374/04, EU:C:2006:773, paragraphs 37 to 38; *Test Claimants in the FII Group Litigation*, C-446/04, EU:C:2006:774, paragraph 36; and *Test Claimants in the Thin Cap Group Litigation*, cited above, paragraphs 26 to 34.

[40] Reference is made to the judgments in *Test Claimants in the Thin Cap Group Litigation*, cited above, paragraph 32; *Cadbury Schweppes and Cadbury Scwheppes Overseas*, cited above, paragraph 33; Case E-9/11 *ESA* v *Norway*, cited above, paragraph 82; Case E-2/06 *ESA* v *Norway*, cited above; and *Commission* v *United Kingdom*, C-98/01, EU:C:2003:273, paragraph 47 and case law cited.

[41] Reference is made to Case E-9/11 *ESA* v *Norway*, cited above, paragraphs 84 and 86.

legislation could be understood as suitable if it were understood as in Question 2, where it is described as a requirement that three quarters of the shares in new banks and insurance companies must be subscribed by persons other than the promoters, provided that the application for a licence is not simply for a niche activity. Nonetheless, according to ESA, such legislation does 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. In this regard, ESA notes that the licence requirements could be based solely on a suitability assessment of owners, such as the assessment that is already provided for in other provisions of Norwegian law.[42] In this regard, ESA emphasises that 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 of the EEA Agreement.[43]

103. With regard to Question 3, ESA notes that the precise scope of the alleged administrative practice appears to be uncertain. In any event, the question is based on the plaintiffs' description of an alleged administrative practice, the existence of which the defendant disputes. To the extent that the practice at issue is of a consistent and general nature, it appears to constitute a restriction on the freedom of establishment that must be justified by the defendant.[44] Based on the information provided in the request, ESA understands the question to cover the initial licensing requirements for a bank or insurance company and not the rules concerning any subsequent change of ownership. If the alleged administrative practice consists of a limitation on ownership by laying down a fixed fraction of property rights that cannot be exceeded, then, according to ESA, the same arguments apply in essence as were raised in relation to Questions 1 and 2, as it is clear that ownership limitations are more restrictive than a suitability assessment of owners. 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.[45]

104. ESA proposes that the Court should answer the questions referred as follows:

> *1. Legislation, such as the issue rules in Section 4 of the Commercial Banks Act and Section 2-1 of the Insurance Activity Act, requiring a sale of three quarters of the*

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[42] Ibid., paragraph 98.

[43] Reference is made to the Opinion of Advocate General Poaires Maduro in *Ahokainen and Leppik*, C-434/04, EU:C:2006:462, point 26.

[44] Reference is made to Case E-6/12 *ESA* v *Norway* [2013] EFTA Ct. Rep. 618, paragraph 58 and case law cited.

[45] Reference is made to Case E-9/11 *ESA* v *Norway*, cited above, paragraphs 99 to 100 and case law cited.

shares in newly established banks or insurance companies constitutes a restriction of the freedom of establishment enshrined in Article 31 of the EEA Agreement.

2. Such legislation may in principle be justifiable by reference to an objective of ensuring the independence of financial institutions and the division of power through a dispersed ownership structure in order to prevent individuals and individual enterprises from controlling financial institutions and thereby the possibility of imprudent granting of credit.

3. In order to be considered suitable for achieving that objective, such legislation must be interpreted as precluding the possibility of the promoters themselves acquiring any of the shares required to be offered for sale.

4. Legislation as the one in issue in the present proceedings appears to go beyond what is necessary in order to achieve the objective pursued and therefore cannot be justified.

5. An administrative practice whereby individuals or enterprises are not, in most cases, authorised to own more than 20 to 25 per cent of the shares in financial institutions would, if established, for the same reasons constitute a disproportionate restriction on the freedom of establishment contrary to Article 31 of the EEA Agreement.

The Commission

105. As a preliminary comment, the Commission argues that the harmonisation effected by Directive 2006/48/EC and Directive 2002/83/EC appears not to be exhaustive. Further, the national provisions at stake do not appear to contradict any provision of those directives. The Commission therefore proposes that the questions referred be analysed by reference to EEA primary law and the fundamental freedoms.

106. In the Commission's view, it is unclear, taking into account the referring court's description of the purpose of the contested national legislation, whether its primary focus 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.[46]

107. 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

[46] Reference is made to the judgment in *Commission* v *Italy*, C-326/07, EU:C:2009:193, paragraph 34.

States from investing in their capital, and therefore constitute a restriction on the free movement of capital, as guaranteed by Article 40 EEA.[47]

108. Turning to the issue of 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, taking into account also their importance for the economy as a whole. The Norwegian authorities seem to wish to disperse power and prevent individuals from having full control over a credit institution or insurance undertaking, thus removing the possibility for major private shareholders to abuse their ownership position for their own benefit or that of their business associates, or to weaken competition. The Commission finds that 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. However, the Commission emphasises that the argument concerning the weakening of competition cannot be invoked, at least not in such broad terms, in order to restrict the free movement of capital.[48]

109. With regard to the issue of suitability, the Commission argues 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.

110. With regard to the issue of 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.[49] The justification must also be accompanied by appropriate evidence or with specific evidence substantiating its arguments.[50] Furthermore, Directive 2006/48/EC and Directive 2002/83/EC already provide 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 also available, such as a prohibition on extending credit to certain entities. Furthermore, it remains the duty of a national supervisor to monitor these institutions regardless of limitations on individual share ownership. Finally, the Commission takes the same view as the plaintiffs that the Qualifying Holdings Directive may also be relevant in this assessment. In conclusion, the Commission indicates that it has serious doubts as to the proportionality of the contested national measures.

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47 Reference is made to Case E-9/11 *ESA* v *Norway*, cited above, paragraph 80.

48 Reference is made to the judgment in *Commission* v *Portugal*, C-171/08, EU:C:2010:412, paragraph 70.

49 Reference is made to Case E-9/00 *ESA* v *Norway* [2002] EFTA Ct. Rep. 73, paragraph 54.

50 Reference is made to the judgment in *Scotch Whisky and Others*, C-333/14, EU:C:2015:845, paragraph 54.

111. The Commission proposes that the Court should answer the questions referred as follows:

National measures such as those contained in Section 4 of the Commercial Banking Act and Section 2.1 of the Insurance Activity Act and more specifically the requirement that authorisation as a credit institution or insurance undertaking is to be refused unless more than three quarters of the share capital is subscribed via a capital issue not involving pre-emptive rights for shareholders or others constitute a restriction to the freedom of establishment in Article 31 EEA and to the free movement of capital in Article 40 EEA.

Such rules may in principle be justified by overriding reasons in the public interest provided that they are proportionate.

Páll Hreinsson
Judge-Rapporteur