JUDGMENT OF THE COURT
16 July 2012

(Failure of an EEA State to fulfil obligations – Right of establishment – Free movement of capital – Ownership limitations and voting right restrictions in financial services infrastructure institutions – Proportionality – Legal certainty)

In Case E-9/11,

EFTA Surveillance Authority, represented by Xavier Lewis, Director, Florence Simonetti, Deputy Director, and Gjermund Mathisen, Officer, Department of Legal & Executive Affairs, acting as Agents,

applicant,

v

The Kingdom of Norway, represented by Pål Wennerås, Advocate, the Attorney General of Civil Affairs, and Beate Gabrielsen and Janne Tysnes Kaasin, Advisers, Ministry of Foreign Affairs, acting as Agents,

defendant,

APPLICATION for a declaration that by maintaining in force restrictions on the rights of persons and undertakings established in EEA States to own holdings and exercise voting rights in financial services infrastructure institutions in Norway, such as provided for in Sections 35(1), (2), and (3) and 36 of the Act of 29 June 2007 No 74 on Regulated Markets (the Stock Exchange Act) and Sections 5-3(1), (2) and (3) and 5-4 of the Act of 5 July 2002 on the Registration of Financial Instruments (the Securities Depositories Act), the Kingdom of Norway has failed to fulfil its obligations arising from Articles 31 EEA and 40 EEA.

THE COURT,

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

Registrar: Skúli Magnússon,

having regard to the written pleadings of the applicant, the defendant, and the written observations of the Republic of Poland, represented by Maciej Szpunar, Undersecretary of State, Ministry of Foreign Affairs, acting as Agent, and the European Commission, represented by Elisabetta Montaguti, Julie Samnadda and Radoslava Vasileva, Members of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

having heard oral argument of the applicant, represented by its Agents Xavier Lewis, Florence Simonetti and Gjermund Mathisen; the defendant, represented by its Agent Beate Gabrielsen and by its Higher Executive Officer Kristin Nordland Hansen; and the European Commission, represented by its Agents Elisabetta Montaguti, Julie Samnadda and Radoslava Vasileva, at the hearing on 24 April 2012,

gives the following

Judgment

I Pre-litigation procedure

1 In 2001, ESA initiated a review of the legal framework for the financial markets in Norway.

2 On 17 July 2003, ESA issued a letter of formal notice concluding that certain provisions on financial infrastructure institutions in Norwegian legislation infringed Article 40 of the EEA Agreement (hereinafter "EEA"). The relevant Norwegian law at the time, Act No 80/2000 on Stock Exchanges (hereinafter the "Stock Exchange Act of 2000") and Act No 64/2002 on Central Securities Depositories (hereinafter the "CSD Act"), provided for a restriction on stock exchange or securities depository ownership. No shareholder was allowed to own more than 10 percent of the share capital or of voting rights. As for the exercise of voting rights, no shareholder was allowed to cast votes representing more than 10 percent of the total voting capital or 20 percent of the stocks represented at the general meeting. Exceptions were applicable under certain conditions.

3 On 1 June 2004, ESA delivered a reasoned opinion, concluding that, by maintaining in force the aforementioned provisions restricting the ownership and exercise of voting rights, Norway had infringed Article 40 EEA. Thereafter, the Norwegian Government informed ESA that a working group had been established to revise the relevant legislation. During the assessment period, ESA and Norway discussed the matter on various occasions.

4 In a letter of 23 June 2009, the Norwegian Government informed ESA that the Norwegian Parliament had adopted the Act of 19 June 2009 No 59 (*lov 19. juni 2009 nr. 59 om endringer i finansieringsvirksomhetsloven, børsloven, verdipapiregisterloven, verdipapirhandelloven mv.* (*eierskap i finansinstitusjoner og i infrastrukturforetak på verdpapirområdet*)) amending the relevant legislation to enter into force on 1 July 2009. The amendments comprised, *inter alia*, an increase from 10 percent to 20 percent in the threshold for ownership restrictions in relation to stock exchanges and securities depositories and from 10 percent to 20 percent and from 20 percent to 30 percent in the thresholds for the restrictions on voting rights. Further, holding acquisitions in the segment between 10 percent and 20 percent were made subject to a notification procedure. With some alterations, limited exemptions continued to apply under certain conditions.

5 In light of the Act of 19 June 2009, ESA closed the case concerning the earlier unamended legal framework by a decision of 10 March 2010.

6 However, ESA was of the opinion that the amendments did not sufficiently address the concerns raised in the reasoned opinion of 1 June 2004. It therefore opened a new case, which forms the basis of the present proceedings.

7 On 16 December 2009, ESA issued a letter of formal notice to Norway, in which it contended that the amended legislation in force from 1 July 2009 was contrary to Article 31 EEA on the right of establishment and Article 40 EEA on the free movement of capital as well as Council Directive 88/361 EEC of 24 June 1988 for the implementation of Article 67 of the EEC Treaty.

8 The Norwegian Government replied to the letter of formal notice on 8 March 2010 accepting ESA's view that the legislation in question entailed restrictions for the purposes of Articles 31 and 40 EEA. However, it argued that the restrictive provisions were justified as suitable, necessary and proportionate means in pursuit of legitimate objectives, such as ensuring independent neutral stock exchanges and securities depositories.

9 On 15 December 2010, ESA delivered a reasoned opinion concluding that Articles 31 and 40 EEA had been infringed, questioning the justification, i.e. the proportionality, of the restrictive measures at issue and requesting that Norway take the necessary steps to comply with the reasoned opinion within two months.

10 In its reply of 21 February 2011, the Norwegian Government rejected ESA's view, contending that there were no less restrictive measures that were equally effective.

11 On that basis, ESA decided, on 20 July 2011, to bring the matter before the Court under Article 31(2) of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (hereinafter "SCA"). The Application was registered at the Court on 21 July 2011.

II EEA law

12 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.*

13 Article 33 EEA reads:

> *The provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health.*

14 The first paragraph of Article 34 EEA reads:

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

15 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.*

16 Article 1(1) of Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the EEC Treaty (OJ 1988 L 178, p. 5), referred to at point 1 of Annex XII to the EEA Agreement, (hereinafter "Directive 88/361") reads:

> *1. Without prejudice to the following provisions, Member States shall abolish restrictions on movements of capital taking place between persons resident in Member States. To facilitate application of this Directive, capital movements shall be classified in accordance with the Nomenclature in Annex I.*

17 Article 4 of Directive 88/361 reads:

> *This Directive shall be without prejudice to the right of Member States to take all requisite measures to prevent infringements of their laws and regulations, inter alia in the field ... of prudential supervision of financial institutions, ...*
>
> *Application of those measures ... may not have the effect of impeding capital movements carried out in accordance with Community law.*

18 Article 1 of Directive 88/361 refers to a non-exhaustive Nomenclature set out in Annex I to the Directive for the classification of capital movements. Under heading I of Annex I "*Direct investments*", are listed, *inter alia*, the following capital movements:

> *1. Establishment and extension of branches or new undertakings belonging solely to the person providing the capital, and the acquisition in full of existing undertakings.*
>
> *2. Participation in new or existing undertaking with a view to establishing or maintaining lasting economic links.*
>
> ...
>
> *A – Direct investments on national territory by non-residents ...*

19 Under the heading "Explanatory notes", the expression "direct investments" is assigned the following meaning:

Investments of all kinds by natural persons or commercial, industrial or financial undertakings, and which serve to establish or to maintain lasting and direct links between the person providing the capital and the entrepreneur to whom or the undertaking to which the capital is made available in order to carry on an economic activity. This concept must therefore be understood in its widest sense.

The undertakings mentioned under I-1 of the Nomenclature include legally independent undertakings (wholly-owned subsidiaries) and branches.

As regards those undertakings mentioned under I-2 of the Nomenclature which have the status of companies limited by shares, there is participation in the nature of direct investment where the block of shares held by a natural person of another undertaking or any other holder enables the shareholder, either pursuant to the provisions of national laws relating to companies limited by shares or otherwise, to participate effectively in the management of the company or in its control.

20 Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets and financial instruments (hereinafter "MiFID"), as amended, referred to at point 30ca of Annex IX to the EEA Agreement (subsequently renumbered as 31ba by Decision No 114/2007 of 28 September 2007 [OJ 2007 L 47, p. 34, and EEA Supplement No 9, 21.2.2008, p. 28], confirmed entry into force date 1 August 2009), was introduced in the EEA Agreement by Decision No 65/2005 of the EEA Joint Committee of 29 April 2005 (OJ 2005 L 239, p. 50, and EEA Supplement No 46, 15.9.2005, p. 31). The confirmed entry into force date of Decision No 65/2005 was 1 August 2007. Provided no notification was made to the contrary, MiFID was to be applied provisionally in Norway, pending the fulfilment of the constitutional requirements, as of 29 October 2005.

21 Article 1(1) of MiFID reads:

This Directive shall apply to investment firms and regulated markets.

22 Points 14 and 27 of Article 4(1) of MiFID read:

For the purposes of this Directive, the following definitions shall apply:

…

(14) "Regulated market" means a multilateral system operated and/or managed by a market operator, which brings together or facilitates the bringing together of multiple third‑party buying and selling interests in financial instruments – in the system and in accordance with its nondiscretionary rules – in a way that results in a contract, in respect of the financial instruments admitted to trading under its rules and/or systems, and which is authorized and functions regularly and in accordance with the provisions of Title III;

…

(27) "Qualifying holding" means any direct or indirect holding in an investment firm which represents 10% or more of the capital or of the voting rights, as set out in Article 9 and 10 of Directive 2004/109/EC, taking into account the conditions regarding aggregation thereof laid down in Article 12(4) and (5) of that Directive, or which makes it possible to exercise a significant influence over the management of the investment firm in which that holding subsists;

23 Article 10 of MiFID on shareholders and members with qualifying holdings reads:

1. The competent authorities shall not authorise the performance of investment services or activities by an investment firm until 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 the amounts of those holdings.

The competent authorities shall refuse authorisation if, taking into account the need to ensure the sound and prudent management of an investment firm, they are not satisfied as to the suitability of the shareholders or members that have qualifying holdings.

Where close links exist between the investment firm and other natural or legal persons, the competent authority shall grant authorisation only if those links do not prevent the effective exercise of the supervisory functions of the competent authority.

2. The competent authority shall refuse authorisation if the laws, regulations or administrative provisions of a third country governing one or more natural or legal persons with which the undertaking has close links, or difficulties involved in their enforcement, prevent the effective exercise of its supervisory functions.

3. Member States shall require any natural or legal person or such persons acting in concert (hereinafter referred to as the proposed acquirer), who have taken a decision either to acquire, directly or indirectly, a qualifying holding in an investment firm or to further increase, directly or indirectly, such a qualifying holding in an investment firm as a result of which the proportion of the voting rights or of the capital held would reach or exceed 20%, 30% or 50% or so that the investment firm would become its subsidiary (hereinafter referred to as the proposed acquisition), first to notify in writing the competent authorities of the investment firm in which they are seeking to acquire or increase a qualifying holding, indicating the size of the intended holding and relevant information, as referred to in Article 10b(4).

Member States shall require any natural or legal person who has taken a decision to dispose, directly or indirectly, of a qualifying holding in an investment firm first to notify in writing the competent authorities, indicating the size of the intended holding. Such a person shall likewise notify the competent authorities if he has taken a decision to reduce his qualifying holding so that the proportion of the voting rights or of the capital held would fall below 20%, 30% or 50% or so that the investment firm would cease to be his subsidiary.

Member States need not apply the 30% threshold where, in accordance with Article 9(3)(a) of Directive 2004/109/EC, they apply a threshold of one-third.

In determining whether the criteria for a qualifying holding referred to in this Article are fulfilled, Member States shall not take into account voting rights or shares which investment firms or credit institutions may hold as a result of providing the underwriting of financial instruments and/or placing of financial instruments on a firm commitment basis included under point 6 of Section A of Annex I, provided that those rights are, on the one hand, not exercised or otherwise used to intervene in the management of the issuer and, on the other, disposed of within one year of acquisition.

...

5. Member States shall require that, if an investment firm becomes aware of any acquisitions or disposals of holdings in its capital that cause holdings to exceed or fall below any of the thresholds referred to in the first subparagraph of paragraph 3, that investment firm is to inform the competent authority without delay.

At least once a year, investment firms shall also inform the competent authority of the names of shareholders and members possessing qualifying holdings and the sizes of such holdings as shown, for example, by the information received at annual general meetings of shareholders and members or as a result of compliance with the regulations applicable to companies whose transferable securities are admitted to trading on a regulated market.

6. Member States shall require that, where the influence exercised by the persons referred to in the first subparagraph of paragraph 1 is likely to be prejudicial to the sound and prudent management of an investment firm, the competent authority take appropriate measures to put an end to that situation.

Such measures may consist in applications for judicial orders and/or the imposition of sanctions against directors and those responsible for

management, or suspension of the exercise of the voting rights attaching to the shares held by the shareholders or members in question.

Similar measures shall be taken in respect of persons who fail to comply with the obligation to provide prior information in relation to the acquisition or increase of a qualifying holding. If a holding is acquired despite the opposition of the competent authorities, the Member States shall, regardless of any other sanctions to be adopted, provide either for exercise of the corresponding voting rights to be suspended, for the nullity of the votes cast or for the possibility of their annulment.

24 Article 10a of MiFID reads:

Assessment period

1. The competent authorities shall, promptly and in any event within two working days following receipt of the notification required under the first subparagraph of Article 10(3), as well as following the possible subsequent receipt of the information referred to in paragraph 2 of this Article, acknowledge receipt thereof in writing to the proposed acquirer.

The competent authorities shall have a maximum of sixty working days as from the date of the written acknowledgement of receipt of the notification and all documents required by the Member State to be attached to the notification on the basis of the list referred to in Article 10b(4) (hereinafter referred to as the assessment period), to carry out the assessment.

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

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

For the period between the date of request for information by the competent authorities and the receipt of a response thereto by the proposed acquirer, the assessment period shall be interrupted. The interruption shall not exceed 20 working days. Any further requests by the competent authorities for completion or clarification of the information shall be at their discretion but may not result in an interruption of the assessment period.

3. The competent authorities may extend the interruption referred to in the second subparagraph of paragraph 2 up to 30 working days if the proposed acquirer is:

(a) situated or regulated outside the Community; or

(b) a natural or legal person not subject to supervision under this Directive or Directives 85/611/EEC, 92/49/EEC, 2002/83/EC, 2005/68/EC or 2006/48/EC.

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

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

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

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

25 Article 10b of MiFID reads:

1. In assessing the notification provided for in Article 10(3) and the information referred to in Article 10a(2), the competent authorities shall, in order to ensure the sound and prudent management of the investment firm in which an acquisition is proposed, and having regard to the likely influence of the proposed acquirer on the investment firm, 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 investment firm 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 investment firm in which the acquisition is proposed;

(d) whether the investment firm will be able to comply and continue to comply with the prudential requirements based on this Directive and, where applicable, other Directives, notably, Directives 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.

In order to take account of future developments and to ensure the uniform application of this Directive, the Commission, acting in accordance with the procedure referred to in Article 64(2), may adopt implementing measures which adjust the criteria set out in the first subparagraph of this paragraph.

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 10(3). 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 10a(1), (2) and (3), where two or more proposals to acquire or increase qualifying holdings in the same investment firm have been notified to the competent authority, the latter shall treat the proposed acquirers in a non-discriminatory manner.

26 Title III of MiFID, consisting of Articles 36 to 47, deals with "regulated markets". Article 36 of MiFID reads:

> *Authorisation and applicable law*
>
> *Member States shall reserve authorisation as a regulated market to those systems which comply with the provisions of this Title.*
>
> *Authorisation as a regulated market shall be granted only where the competent authority is satisfied that both the market operator and the systems of the regulated market comply at least with the requirements laid down in this Title.*
>
> *In the case of a regulated market that is a legal person and that is managed or operated by a market operator other than the regulated market itself, Member States shall establish how the different obligations imposed on the market operator under this Directive are to be allocated between the regulated market and the market operator.The operator of the regulated market shall provide all information, including a programme of operations setting out inter alia the types of business envisaged and the organisational structure, necessary to enable the competent authority to satisfy itself that the regulated market has established, at the time of initial authorisation, all the necessary arrangements to meet its obligations under the provisions of this Title.*
>
> ...

27 Article 38 of MiFID reads:

> *Requirements relating to persons exercising significant influence over the management of the regulated market*
>
> *1. Member States shall require the persons who are in a position to exercise, directly or indirectly, significant influence over the management of the regulated market to be suitable.*
>
> *2. Member States shall require the operator of the regulated market:*
>
> *(a) to provide the competent authority with, and to make public, information regarding the ownership of the regulated market and/or the market operator, and in particular, the identity and scale of interests of any parties in a position to exercise significant influence over the management;*
>
> *(b) to inform the competent authority of and to make public any transfer of ownership which gives rise to a change in the identity of the persons exercising significant influence over the operation of the regulated market.*

3. The competent authority shall refuse to approve proposed changes to the controlling interests of the regulated market and/or the market operator where there are objective and demonstrable grounds for believing that they would pose a threat to the sound and prudent management of the regulated market.

III Norwegian rules on ownership and voting rights limitations concerning stock exchanges and securities depositories – factual and legal background

28 In accordance with Norwegian law, it is for each stock exchange to determine, *inter alia*, the financial instruments which are subject to regular trading and the investment firms which may become members of it. Each stock exchange also verifies that the listed companies and the market members act in accordance with Norwegian law and the rules of the stock exchange. A stock exchange is empowered to impose sanctions on its members and the listed companies. It is also the takeover supervisory authority as regards shares listed on the stock exchange. A stock exchange may demand information from issuers notwithstanding rules on secrecy and confidentiality. Issuers are obliged to inform the stock exchange when delaying the publication of inside information.

29 During the relevant time period, Oslo Stock Exchange, Oslo Børs ASA (hereinafter "OSE"), was the only stock exchange operating in the market for equities, bonds and other transferable securities.

30 A central securities depository (CSD) is a rights registry for financial instruments. These instruments are dematerialised and exist only as book entries in the register, which provide for legal protection. All parties may rely on the accuracy and completeness of the registered information.

31 The Norwegian system is a "direct holding system", i.e. financial instruments are normally registered in the name of the beneficial owner. In indirect holding systems beneficial owners do not have accounts in CSDs. Custodians or even sub-custodians, i.e. normally banks or investment firms, hold the financial instruments for the benefit of the beneficial owners. In such a set-up, the information is kept by the custodians and not by a CSD.

32 Consequently, under Norway's system, the information on the investors' Norwegian portfolio is kept by the CSD. The Norwegian Financial Supervisory Authority and the Norwegian tax authorities have access to the information in the register. Furthermore, certain financial instruments, i.e. shares issued by Norwegian public limited liability companies and Norwegian bonds, must be registered in a CSD.

33 According to the CSD Act, a CSD is empowered to self-regulate, *inter alia*, the registration process, the financial instruments which may be registered and the entities which may operate an account. Furthermore, most corporate actions

affecting the registered companies, e.g. takeovers, mergers, demergers and the issuing of financial instruments, must be registered in accordance with the Norwegian Securities Settlement System that is organised in cooperation with the Central Bank of Norway.

34 During the relevant time period, the Norwegian Securities Depository, Verdipapirsentralen ASA (hereinafter "VPS") operated as a central securities depository.

35 Section 17 of the Stock Exchange Act reads:

> *(1) Prior notice must be given to the Financial Supervisory Authority before acquiring any significant ownership interest in a regulated market.*
>
> *(2) A significant ownership interest means a direct or indirect ownership interest that represents at least 10 percent of the share capital or voting share capital, or that in some way makes it possible to exercise significant influence over the management of the undertaking. In this respect, shares owned by such shareholders as mentioned in Section 18 shall be considered to be equivalent to shares held by the person in question.*
>
> *(3) The Financial Supervisory Authority shall, within three months from the day it receives a notice as mentioned in paragraph (1), refuse to agree to such an acquisition if it deems that the shareholder in question is not suitable to ensure sound and proper management of the undertaking.*
>
> *(4) Any disposal of ownership interest that causes a shareholder's interest to fall below the limit mentioned in paragraph (2) must be notified to the Financial Supervisory Authority.*
>
> *(5) The provisions of this Section do not apply for acquisitions that trigger an obligation to apply for permission according to Section 35(3). The same applies when a reduction of a holding triggers the obligation to notify as stated in Section 35(3).*

36 Section 35 of the Stock Exchange Act reads:

> *(1) No shareholder in a stock exchange may own more than 20 percent of the share capital or voting capital. Rights to acquire shares are to be considered equivalent to holding of shares for this purpose where such rights must be seen to represent a de facto acquisition of shares. The Ministry may grant a time limited exception from the requirements of this paragraph in special circumstances.*
>
> *(2) The limitations in paragraph (1) shall not prevent a stock exchange being wholly owned, 100 percent, by an undertaking with head office in an EEA State which has no other activities than management of its ownership of subsidiaries for the most part operate or own regulated markets, similar*

markets places or related infrastructure. Paragraph (1) applies equally to such undertakings.

(3) Upon application the Ministry may grant an undertaking that for the most part operates or owns a regulated market, similar marketplaces or related infrastructure, permission to own shares representing more than 20 percent of the share capital or voting rights in a stock exchange or a holding company as mentioned in paragraph (2). Such permission may only be given if the Ministry finds that the owner is fit to ensure the good and proper operation of the stock exchange in this assessment special weight shall be put on:

(a) The owner's previous conduct

(b) the owner's available economic resources and the consideration for proper operation

(c) whether the ownership can lead to undesirable effects for the operations of the financial markets

(d) the competition related situation on the relevant market

(e) the possibility to exercise effective supervision, including whether there is established co-operation with the supervisory authorities in the owner's home state,

(f) whether the ownership can affect rights and obligations of the actors on the respective stock exchange, and

(g) whether the underlying ownership structure is compatible with the considerations that this provision is intended to ensure.

Owners that are granted permission according to this paragraph, are also obliged to apply to the Ministry for a permission when there are changes that lead to the relevant person gaining control of a holding of, or voting rights for, more than 1/3, 1/2, 2/3, or 9/10 of the shares. Upon reduction of a holding or voting rights referred to in the previous sentence as well as in paragraph (1) a notification shall be made to the Ministry.

(4) If a shareholder holds shares in contravention of the rules set out in this Section, the Ministry may set a deadline for the ownership interest to be brought into compliance with the provisions of this Act. If this is not done within the deadline, the Ministry may sell the shares in question in accordance with the regulations for the compulsory sale of transferrable securities to the extent that these apply. The provisions of Section 10-6 in connection with Section 8-16 of the Legal Enforcement Act shall not apply. The shareholder concerned shall be given two weeks' notice prior to such sale being undertaken.

(5) Until a sell-off or a compulsory sale has taken place, the shareholder may not, as regards that part of the shares which exceeds the permitted limit, exercise other rights in the undertaking than the right to dividends and the right of pre-emption in the event of an increase in share capital.

(6) The Ministry may, by regulation, lay down more detailed rules filling in the provisions of this Section.

37 Section 36 of the Stock Exchange Act on voting rights limitations reads:

(1) At the general meeting of a stock exchange no shareholder may cast votes representing more than 20 percent of the total voting rights of the undertaking or for more than 30 percent of the votes represented at the general meeting.

(2) The provision of this Section do not apply to the general meeting of a stock exchange which is subject to the provisions of Section 35(1), third sentence or Section 35(2) or (3).

38 The CSD Act lays down corresponding provisions with respect to securities depositories.

39 Section 5-2 of the CSD Act on the control of ownership reads:

(1) Prior notice must be given to the Financial Supervisory Authority before acquiring any significant ownership interest in securities depository.

(2) A significant ownership interest means a direct or indirect ownership interest that represents at least 10 percent of the share capital or voting share capital, or that in some other way makes it possible to exercise significant influence over the management of the undertaking. In this respect, shares owned by such shareholders as mentioned in Section 5-5 shall be considered to be equivalent to shares held by the person in question.

(3) The financial Supervisory authority shall, within three months from the day it receives a notice as mentioned in paragraph (1), refuse to agree to such an acquisition if it deems that the shareholder in question is not suitable to ensure sound and proper management of the undertaking.

(4) Any disposal of ownership interest that causes a shareholder's interest to fall below the limit mentioned in the paragraph (2) must be notified to the Financial Supervisory Authority.

(5) The provisions of this Section do not apply for acquisitions where permission according to Section 5-3(3) must be applied for. The same applies when a reduction of a holding triggers the obligation to notify as stated in Section 5-3(3).

40 Section 5-3 of the CSD Act on ownership restrictions reads:

(1) No shareholder in a securities depository may own more than 20 percent of the share capital or voting capital. Rights to acquire shares are to be considered equivalent to holdings of shares for this purpose where such rights must be seen to represent a de facto acquisition of the shares. The Ministry may grant a time limited exemption from the requirements of this paragraph in special circumstances.

(2) The limitations in paragraph (1) shall not prevent a securities depository being wholly owned, 100 percent, by an undertaking with head office in an EEA State which has no other activities than management of its ownership of subsidiaries and the subsidiaries for the most part operate or own securities depositories, similar registration functions or related infrastructure. Paragraph (1) applies equally to such undertakings.

(3) Upon application the Ministry may grant an undertaking that for the most part operates or owns securities depositories, similar registration functions or related infrastructure, permission to own shares representing more than 20 percent of the share capital or voting rights in a securities depository or a holding company as mentioned in paragraph (2). Such permission may only be given if the Ministry finds that the owner is fit to ensure the good and proper operation of the securities depository. In this assessment special weight shall be put on:

(a) the owners' previous conduct,
(b) the owners' available economic resources and the consideration for proper operation,
(c) whether the ownership can lead to undesirable effects for the operations of the financial markets,
(d) the competition related situation on the relevant market,
(e) the possibility to exercise effective supervision, including whether there is established co-operation with the supervisory authorities in the owners' home state,
(f) whether the ownership can affect rights and obligations of the actors on the respective securities depository, and
(g) whether the underlying ownership structure of the owner is compatible with the considerations that this provision is intended to ensure.

Owners that are granted permission according to this paragraph, are also obliged to apply to the Ministry for a permission when there are changes that lead to the relevant person gaining control of a holding of, or voting rights for, more than 1/3, 1/2, 2/3 or 9/10 of the shares. Upon reduction of a holding or voting rights referred to in the previous sentence as well as in paragraph (1) a notification shall be made to the Ministry.

(4) If a shareholder holds shares contravention of the rules set out in this Section, the Ministry may set a deadline for the ownership interest to be brought into compliance with the provisions of this Act. If this is not done within the deadline, the Ministry may sell the shares in question in accordance with the regulations for the compulsory sale of transferable securities to the extent that these apply. The provisions of Section 10-6 in connection with Section 8-16 of the Legal Enforcement Act shall not apply. The shareholder concerned shall be given two week's notice prior to such sale being undertaken.

(5) Until a sell-off or a compulsory sale has taken place, the shareholder may not; as regards that part of the shares which exceeds the permitted limit, exercise other rights in the undertaking than the right to dividends and the right of pre-emption in the event of an increase in share capital.

(6) The Ministry may, by regulation, lay down more detailed rules filling in the provisions of this Section.

41 Section 5-4(3) and (4) of the CSD Act on voting rights restrictions reads:

At the general meeting of a securities depository no shareholder may cast votes representing more than 20 percent of the total voting capital of the underrating, nor may any shareholder cast votes representing more than 30 percent of the votes represented at the general meeting.

The provisions of this Section do not apply to the general meeting of a securities depository which is subject to the provisions of Section 5-3(1), third sentence or Section 5-3(2) or (3).

42 The aforementioned rules on ownership are based on a dual-track system. Under this system, a distinction is made based on the shareholder's activity and the risk posed in relation to the independence, neutrality and integrity of the relevant institution. Therefore, shareholders who employ the services of a stock exchange or CSD are subject to a main rule imposing an absolute ceiling on ownership, with the possibility of exceptions only under exceptional circumstances, and limited in time. On the other hand, shareholders engaged in similar infrastructure activity are eligible for an exception from that ceiling, subject to a suitability assessment.

IV Pleas and arguments of the parties

Introductory remarks

43 The applicant and defendant both contend that the national rules in question should be assessed by reference to Articles 31 and 40 EEA in parallel. In their view, assessment of the compatibility of Stock Exchange Act rules with the EEA Agreement may not be limited to the MiFID rules, as the Commission proposes.

44 It is common ground between the parties that the limitations on ownership and voting rights constitute restrictions for the purposes of Articles 31 and 40 EEA. The parties also agree that the objectives of the contested measures – maintaining the good reputation of the financial sector by ensuring the independence, neutrality and integrity of vital infrastructure institutions, such as stock exchanges and central securities depositories – constitute overriding reasons in the general interest capable of justifying national restrictions on the freedom of establishment and the free movement of capital. They further agree that the contested rules are suitable. Hence, at issue is simply the question whether the contested legislation is necessary.

The applicant

45 The applicant submits that, in accordance with settled case-law, national provisions that apply to holdings by nationals of an EEA State in the capital of a company established in another EEA State, which give them definite influence on the company's decisions, and which allow them to determine its activities, fall within the scope of the freedom of establishment. Acquisitions of shares below this threshold come within the substantive scope of the free movement of capital.

46 The applicant further asserts that the contested legislation should be assessed by reference to Articles 31 and 40 EEA in parallel. In the applicant's view, the contested provisions restrict the acquisition of shareholdings and exercise of voting rights above the set threshold, regardless of whether the (underlying) holding gives a definite influence on the decisions of the stock exchange or securities depository and allows the shareholder to determine its activities. The applicant argues, however, that the latter is usually the case. Thus, normally the freedom of establishment is concerned. However, depending on the particular ownership structure, there might also be cases in which a definite influence on the decisions of the stock exchange or securities depository is not given and the shareholder may not determine its activities. Nonetheless, by reason of the holding's size, such an acquisition or an exercise of voting rights of that kind falls within the scope of the national provisions. Accordingly, the contested legislation encroaches upon the freedom of establishment and the free movement of capital.

47 The applicant submits further that the contested limitations must be assessed by reference to the primary law governing securities depositories and stock exchanges. Contrary to the submission advanced by the European Commission, assessment of the Stock Exchange Act rules may not be limited to an examination of secondary legislation in the form of the MiFID rules.

48 As regards the notion of "capital movements" specified in Article 40 EEA, the applicant submits that Directive 88/361 and the Nomenclature in Annex I thereto have indicative value in that connection. In the context of the contested provisions, the applicant submits that "direct investments" under Heading I of the Nomenclature constitutes the most pertinent category of capital movements. In its view, that covers, *inter alia*, the acquisition in full of existing undertakings as

well as the participation in new or existing undertakings. According to case-law and in light of the explanatory notes to the Nomenclature, direct investment of that kind is characterised by the possibility to effectively participate in the management and control of the company.

49 In the applicant's view, the essential question is whether the contested rules are necessary. In this respect, the applicant submits that, subject to the limits set by the EEA Agreement, the EEA States have discretion when setting the level of protection accorded to the good reputation of the financial sector by ensuring the independence, neutrality and integrity of vital infrastructure institutions, such as that which the contested legislation seeks to achieve. The determination of the level chosen is subject to judicial control.

50 The applicant contends that the high level of protection conferred by the contested rules is lowered because of the exemptions in relation to the contested thresholds that are provided for in the Stock Exchange Act and the CSD Act. At a later stage of the proceedings the applicant added that the defendant's choice to introduce exceptions reflects a level of protection below that of an absolute prohibition. Thus, the level of protection chosen is not so high that there cannot be a suitable alternative to a prohibition on shareholdings exceeding certain limits and to a cap on voting rights. The applicant argues that, for the purposes of determining necessity, it has to be assessed whether the contested legislation is functionally needed in order to achieve legitimate objectives at the level of protection chosen by the EEA State concerned. In that regard, an EEA State must always choose the least restrictive measure available to achieve the protection sought, but whenever there are alternatives that are equally limited in their restrictive effects, a State is free to decide which to pursue.

51 The applicant contends that the prohibition on shareholdings exceeding certain limits and the caps on voting rights provided for in the contested legislation are unnecessary since there are less restrictive measures available that are equally effective. In the applicant's view, a less restrictive option would be a legal framework largely corresponding to Articles 10 to 10b of MiFID, as amended, governing investment firms that provides for a more comprehensive and detailed system of information disclosure, notification requirements and enforcement measures essentially aiming to secure the sound and prudent management of investment firms.

52 In this respect, the applicant acknowledges, first, that MiFID provides for a higher level of protection as regards investment firms than for regulated markets since the provisions dealing with the latter have not been subject to corresponding amendments. Second, it asserts that, subject to the necessary adaptations, a system such as that specified in Articles 10 to 10b of MiFID could provide for a level of protection as high as that ensured by the contested legislation. Third, in its view, the adaptations proposed would deal with the defendant's (main) concerns, such as leaving too little scope to take account of undesirable effects on the operations of the financial markets. Other concerns, such as the possibility that deviating from the current dual-track system might

enable a single shareholder to hinder a proposal for adjustment of the statutes supported by other shareholders, would be directly addressed by the system provided for in Articles 10 to 10b of MiFID. Fourth, the applicant denies Norway's repeated assertion that it proposed an alternative that would be singularly based on a discretionary assessment of suitability. The alternative it proposes also envisages rules on the provision of information, the exercise of supervision, cooperation between relevant authorities and requirements for appropriate enforcement. Fifth, in its view, such a system would conform to MiFID requirements when employed for regulated markets. Finally, the suggested alternative would be more conducive than the contested national dual-track system to ensuring legal certainty and to reconciling the legitimate objectives pursued by the restrictive legislation with the exigencies of the internal market.

53 The applicant also argues that the exemptions from the ownership limitations and voting right restrictions are not sufficiently certain or transparent, and are characterised by a broad administrative discretion. It claims that decisive terms, the application procedure and the time frame for an exemption are all not defined. Thus, the level of foreseeability and legal certainty afforded to economic operators is less than desirable.

The defendant

54 The defendant submits that the contested rules are identical as regards the regulation of stock exchanges and CSDs and that the aims underlying the rules are the same. Thus, the assessment should have the same outcome in respect of both types of institution.

55 The defendant notes that the MiFID rules on "regulated markets" constitute minimum harmonisation in relation, *inter alia*, to stock exchanges. In the defendant's view, the applicant has acknowledged that the contested rules in the Stock Exchange Act provide for a higher level of protection than the minimum requirements laid down in the Directive. Moreover, CSDs do not constitute a regulated market and fall outside of the scope of the MiFID provisions. Hence, the subject matter of the application is whether the contested rules comply with Articles 31 and 40 EEA.

56 As to the necessity of the contested rules, the defendant emphasises the special nature of the business conducted by stock exchanges and CSDs and to the vital role these institutions play for the proper functioning of financial markets.

57 In this regard, the defendant contends that stock exchanges have been attributed extensive regulatory functions in Norway. Unlike the situation in most other countries, the stock exchange has been appointed, for instance, as takeover authority and has been given the power to sanction contraventions of the issuers' obligation to disclose inside information. CSDs play a special role in business similar to stock exchanges. They are subject to a regulatory regime which is different from that applied in most other countries. Thus, the Norwegian

regulation is based on a "direct holding" system, whereby the register of CSDs normally contains full information on investors' portfolios. At the same time, the use of CSDs is mandatory for large groups of issuers and investors.

58 In the defendant's view, the EU legislative bodies have adopted thus far only minimum harmonisation concerning stock exchanges and no harmonisation measures concerning CSDs, thus leaving it to the Member States to determine the level of protection in relation to those sectors. The defendant observes that the Commission consciously abstained from extending the proposed rules concerning investment firms, Articles 10 to 10b of MiFID, to regulated markets under Article 38 of MiFID and, at the same time, emphasised that any future proposals to this effect will take into account the special nature of the business conducted by regulated markets as well as the views of stakeholders and regulators.

59 The defendant contends that the exceptions provided for in the Stock Exchange Act and the CSD Act have not significantly lowered the level of protection ensured by the main prohibitions. Taken in its entirety, the dual-track system constitutes a coherent legal framework which ensures a high level of protection.

60 The defendant submits that the contested rules are necessary, since there is no alternative which is equally effective and, at the same time, less restrictive.

61 The defendant denies that a system based on an elaborate suitability assessment, such as provided for in Articles 10 to 10b of MiFID, regardless of any possible adaptations, is equally as effective as and has less restrictive effects than the contested legislation. In its view, it is difficult to see how replacing a system mainly based on objective limitations with a system based on discretionary assessments of suitability would not reduce the level of protection. A system based on an absolute ceiling on ownership will more effectively ensure the objectives of preserving the independence, neutrality and integrity of stock exchanges and CSDs than a system based on discretionary suitability assessments. While the acquirer's ownership share constitutes an observable and useable parameter for assessing the influence of the entity concerned, it is more difficult to assess beforehand how a given degree of influence will be exercised, and what the potential negative consequences may be. The defendant argues that ESA's proposal is clearly counter-intuitive and also runs counter to the basic tenets of the relevant case-law.

62 Having regard to the preparatory works of the contested legislation, the defendant asserts that the rules of the dual-track system provide for coherent differentiation between different groups depending on the extent to which they may pose a risk of conflicting interests capable of jeopardising the actual and perceived independence, neutrality and integrity of stock exchanges and CSDs. In this respect, the exceptions are consistent with the principles of a dual-track system such as the one implemented in Norway. The holding company exception provided for in Section 35(2) of the Stock Exchange Act and Section 5-3(2) of the CSD Act is intended simply to facilitate a practical structure of stock

exchange ownership, while the material requirements still apply. As regards the restructuring exception provided for in the final sentence of Section 35(1) of the Stock Exchange Act and in the final sentence of Section 5-3(1) of the CSD Act, the purpose of this exemption is to provide a temporary safety valve in extraordinary circumstances where an application of the main rule would lead to unnecessary formalism. This exception is the only one that involves an element of discretion and is itself limited. Section 35(3) of the Stock Exchange Act and Section 5-3(3) of the CSD Act establish an exception from the main rule in relation to an undertaking that in essence operates or owns a regulated market, similar marketplaces or related infrastructure, subject to a suitability assessment. As regards the latter, the rules lay down a list of objective criteria which are to be taken into account when assessing whether the owner is fit to ensure the good and proper operation of the stock exchange or CSD.

63 As regards the level of foreseeability and legal certainty inherent in the contested legislation and the elements of discretion involved therein, the defendant acknowledges that national laws cannot be devoid of objective criteria. However, the principle of legal certainty does not preclude the possibility that such criteria may also require national authorities to conduct partially discretionary assessments, in particular where these assessments must be supported by statements of reasons and are subject to judicial review. The contested rules fulfil these requirements. In that regard, the defendant emphasises that the Stock Exchange Act and the CSD Act are supplemented by the Administration Act of 1967 (*forvaltningsloven*), which requires a statement of reasons and provides for administrative appeal procedures (Section 28 et seq.). Furthermore, the defendant stresses that the Ministry's decisions are subject to judicial review.

The Republic of Poland

64 The Republic of Poland argues that the contested Norwegian legislation does not amount to a restriction on the free movement of capital or the freedom of establishment. The contested rules apply in a non-discriminatory manner. Due to its rationale, the Norwegian system does not hinder or make less attractive the exercise of fundamental freedoms. On the contrary, the limitations on ownership and/or voting ceilings create confidence among investors that no domination will take place. Moreover, the Norwegian system provides greater protection to minority shareholders without imposing more burdensome restrictions on major investors. Even if the contested rules are considered a restriction under the relevant provisions of EEA law, they should be regarded as both suitable and necessary for the achievement of the objectives pursued.

The Commission

65 According to the Commission, it is crucial to the case that the contested Stock Exchange Act rules have to be assessed solely by reference to the relevant harmonising measure, namely MiFID. In the Commission's view, it follows from established case-law that in the case of effective harmonisation an examination of contested national measures by reference to primary law is excluded. As regards

the acquisition of shareholdings in regulated markets, the focal provision is Article 38 of MiFID, since it provides for effective harmonisation of that kind. As a next step, according to the Commission, it has to be assessed whether there is some margin of manoeuvre left to the EEA States. In the Commission's view, Article 38 of MiFID leaves some margin of manoeuvre. However, in the case at hand, this is exceeded by Norwegian legislation as Article 38 MiFID, unlike the national measures, is not premised on an absolute prohibition. Further, any discretion of the EEA States must be exercised in a manner consistent with the aims and objectives of the directive in question. The Commission fears that the contested national legislation may not achieve the principal aim of cross-border market integration since it is tilted in favour of State intervention in the public interest. As regards the provisions covering securities depositories, the Commission supports ESA's line of argument and submits that they should be examined under Articles 31 and 40 EEA, especially in relation to the proportionality thereof.

66 Reference is made to the Report for the Hearing for a more complete account of the facts, the pre-litigation procedure and the legal background as well as the arguments of the parties and those who submitted written and oral observations.

V Findings of the Court

67 ESA argues that the provisions in the Stock Exchange Act and the CSD Act imposing limitations on ownership and the exercise of voting rights in relation to stock exchanges and central securities depositories are incompatible with Articles 31 and 40 EEA. The rules in question prohibit the holding of more than 20 percent of the shares in stock exchanges or central securities depositories, as well as the voting of more than 20 percent of the total voting capital or 30 percent of the shares represented at a general meeting.

68 When ESA, whether upon a complaint or on its own motion, considers that an EFTA State has failed to fulfil an obligation under the EEA Agreement, it is in the interest of the proper functioning of the EEA Agreement that ESA proceeds within an appropriate time when assessing whether to bring a Contracting Party before the Court. The Court recalls that the aim of the Agreement is, *in particular*, to promote a continuous and balanced strengthening of trade and economic relations between the Contracting Parties with equal conditions of competition for citizens and economic operators, and the respect of the same rules. In the matter brought before the Court in the present case, i.e. the proceedings that result from the letter of formal notice issued on 16 December 2009, ESA has acted without undue delay.

Applicable law

69 The applicant and defendant both argue that there is no secondary EEA law regulating the measures laid down in the CSD Act, that Title III of MiFID on regulated markets constitutes minimum harmonisation as regards the contested rules of the Stock Exchange Act, and that the contested provisions of the

Norwegian Stock Exchange Act and Securities Depositories Act fall within the scope of Articles 31 and 40 EEA.

70 As regards secondary EEA law, it is correct to assert that there is no such legislation governing the matters regulated in the contested national legislation on CSDs. On the other hand, the rules in Title III of MiFID on regulated markets address matters regulated in the contested provisions of the Stock Exchange Act.

71 In its written observations, the Commission claims that national measures such as those laid down in the Stock Exchange Act which impose a cap of 20 percent on the ownership of shares and a cap of 20 percent or as the case may be 30 percent on voting rights save where expressly authorised by the competent authority or where an exception applies should be examined in the light of the relevant provisions of MiFID, in particular Article 38 thereof.

72 Where a sphere of economic activity has been the subject of exhaustive harmonisation at EEA level, any national measure relating thereto must be assessed in the light of the provisions of the harmonising measure and not those of primary EEA law (see, for comparison, Case C-463/01 *Commission* v *Germany* [2004] ECR I-11734, paragraph 36, and the case-law cited). The Court must therefore determine whether the harmonisation brought about by MiFID precludes the compatibility of the contested rules of the Norwegian Stock Exchange from being examined under primary EEA law.

73 In relation to the provisions of EEA law applicable in circumstances such as those in the present proceedings, the Court notes that certain aspects of the matters regulated in the contested provisions of the Stock Exchange Act may come within the scope of MiFID, as is clear from Article 38(1) of the Directive. According to that article, EEA States shall require the persons who are in a position to exercise, directly or indirectly, significant influence over the management of the regulated market to be suitable.

74 Moreover, under the second paragraph of the same Article, EEA States shall require the operator of the regulated market to provide certain information to the competent authority. Article 38(3) of MiFID further states that the competent authority shall refuse to approve proposed changes to controlling interests of the regulated market and/or the market operator where there are objective and demonstrable grounds for believing that they would pose a threat to the sound and prudent management of the regulated market.

75 However, Article 38 of MiFID does not define when a person falling under the purview of Article 38(1) is to be deemed suitable. Nor does it define what constitutes objective and demonstrable grounds for believing that changes to controlling interests of a regulated market would pose a threat to the sound and prudent management of the regulated market.

76 It must also be kept in mind, as follows from recitals 64 to 66 in the preamble to MiFID, that the Directive is essentially confined to setting out framework

principles, and that further technical implementing measures are to be adopted by the Commission with the assistance of a committee. The Court notes that no such measures have been undertaken in relation to the requirements specified in Title III of the Directive.

77 In this regard that the system provided for regulated markets in Article 38 of MiFID is less comprehensive than the one established for shareholders and members with qualifying holdings in investment firms in Articles 10 to 10b of MiFID.

78 Accordingly, the national rules relating to the definition of when a person is considered to be suitable to exercise significant influence over the management of a regulated market or when there are objective grounds to believe that controlling interests might jeopardise the sound and prudent management of the regulated market have not been fully harmonised at EEA level. Thus, the provisions at issue in the current proceedings must be assessed by reference to Articles 31 and 40 EEA.

Restriction under Articles 31 and 40 EEA

79 According to established case-law, Article 31 EEA prohibits all restrictions on the freedom of establishment within the European Economic Area, whereas Article 40 EEA generally prohibits all restrictions on the free movement of capital between EEA States (compare, to that effect, Case C-483/99 *Commission* v *France* [2002] ECR I-4781, paragraphs 35 and 40, and Case C-98/01 *Commission* v *United Kingdom* [2003] ECR I-4641, paragraphs 38 and 43).

80 The Court holds that, having regard to Heading I “Direct investments”, items (1) and (2), set out in Annex I to Directive 88/361/EEC, the national measures at issue must be regarded as “restrictions” within the meaning of Article 40 EEA, since they are liable to prevent or limit the acquisition of shares in the undertakings concerned or to deter investors from other EEA States from investing in their capital (compare to that effect, in particular, *Commission* v *France*, cited above, paragraph 41, and Case C-174/04 *Commission* v *Italy* [2005] ECR I-4933, paragraphs 30 and 31).

81 Depending on the size of the shareholding and the shareholder structure, the restrictions at issue may concern the freedom of establishment under Article 31 EEA (see Case E-2/06 *ESA* v *Norway* [2007] EFTA Ct. Rep. 167, paragraph 64 et seq., and, for comparison, Case C-524/04 *Test Claimants in the Thin Cap Group Litigation* [2007] ECR I−2107, paragraph 27). An acquisition of a shareholding exceeding 20 percent of the share capital may or may not give definite influence on the decisions of the stock exchange or securities depository and may or may not allow the shareholder to determine its activities.

82 National measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the EEA Agreement, such as the contested

rules, are an encroachment upon these freedoms requiring justification (see *ESA* v *Norway*, cited above, paragraph 64 et seq.).

Justification

83 According to established case-law, a national measure which hinders the freedom of establishment laid down in Article 31 EEA or restricts the free movement of capital under Article 40 EEA can be justified on the grounds set out in Article 33 EEA or by overriding reasons in the public interest, provided that they are appropriate to secure the attainment of the objective which they pursue and do not go beyond what is necessary in order to attain it (compare, as regards freedom of establishment, *ESA* v *Norway*, cited above, paragraph 64 et seq.).

84 The applicant and the defendant submit that the objectives of the contested measures are to promote the well-functioning and efficiency of the financial markets by creating safeguards against conflicts of interests and covert misuse of powers in infrastructure institutions such as the ones at issue as well as to ensure the independence, neutrality and integrity of these important financial infrastructure institutions in the market. They agree that those aims pursued are overriding reasons in the general interest capable of justifying national measures restricting the freedoms established by Articles 31 and 40 EEA.

85 These goals are explicitly recognised in MiFID, which is based on the objective of "upholding the integrity and overall efficiency of the financial system". Further, pursuant to Article 38(3) of MiFID, EEA States are required to ensure the sound and prudent management of a regulated market in case of acquisitions of shareholdings giving controlling interests. Consequently, as regards regulated markets, a national rule that aims at ensuring the proper assessment of such acquisitions or disposals is required as a matter of EEA law. Moreover, those underlying principles are of a general nature.

86 Hence, the Court holds that the objectives of the contested national legislation reflect overriding reasons in the general interest capable of justifying national measures restricting the freedoms established by Articles 31 and 40 EEA (see Case E-2/01 *Dr Franz Martin Pucher* [2002] EFTA Ct. Rep. 46, paragraph 32). In particular, this is the case with regard to infrastructure institutions such as a stock exchange and a central securities depository. Moreover, as pointed out by the defendant, these institutions also have certain public law functions, and may to some extent be exposed to conflicts of interest.

Suitability and proportionality

87 In order to be justified, the contested rules must be suitable for achieving the intended objectives, and they must not go beyond what is necessary in order to attain the legitimate objectives which they pursue (see, *inter alia*, Case E-10/04 *Piazza* [2005] EFTA Ct. Rep. 76, paragraph 39).

88 Moreover, according to settled case-law, it is for the EEA State which invokes a derogation from one of the fundamental freedoms to show in each individual case that their rules are necessary and proportionate to attain the aim pursued (see, to that effect, Case E-9/00 *ESA* v *Norway* [2002] EFTA Ct. Rep. 72, paragraph 54).

89 The reasons which may be invoked by an EEA State by way of justification must be accompanied by an analysis of the appropriateness and proportionality of the restrictive measure adopted by that State and specific evidence substantiating its arguments (see, for comparison, as regards the free movement of goods, Case C-254/05 *Commission* v *Belgium* [2007] ECR I-4269, paragraph 36; concerning the free movement of persons, Case C-147/03 *Commission* v *Austria* [2005] ECR I-5969, paragraph 63; and in the context of the freedom to provide services, Case C-8/02 *Leichtle* [2004] ECR I-2641, paragraph 45).

90 The Court notes that the contested measures are in principle suitable for ensuring the public interests pursued. The defendant has *inter alia* demonstrated that given the general rule of Norwegian company law which provides that a shareholder representing more than a third of the share capital or votes cast at the general meeting may block changes to the company's statutes, the limitations on ownership and voting rights guarantee, that a single owner cannot hinder an adjustment of the statutes supported by the other shareholders.

91 The question therefore is whether the dual-track system contained in the contested legislation is necessary.

92 In this regard, it must be observed that the contested provisions make a distinction with regard to the limitations on ownership and voting rights, depending on the activities of the shareholder in question. On the one hand, Section 35(1) of the Stock Exchange Act entails a general prohibition on owning more than 20 percent of share capital or voting capital in a stock exchange, from which only a time limited exception may be granted in special circumstances.

93 According to Section 35(3) of the same Act, however, an undertaking that for the most part operates or owns a regulated market, similar marketplaces or related infrastructure may, upon application, be granted permission to own shares representing more than 20 percent of the share capital or voting rights in a stock exchange or a holding company as mentioned in Section 35(2), provided that the owner is found to be fit to ensure the good and proper operation of the stock exchange, pursuant to, *inter alia*, the criteria listed in points (a) to (g) of Section 35(3).

94 It thus follows from the contested legislative provisions that undertakings meeting the conditions of Section 35(3) of the Stock Exchange Act may apply for permission from the competent authority to own more than 20 percent of the share capital or voting rights in a stock exchange. Moreover, the discretion of the competent authority to determine whether an undertaking is fit to ensure the good and proper operation of a stock exchange is governed by the criteria listed in the

contested legislation, subject to the obligation to state reasons and susceptible to administrative appeal in accordance with the Administration Act of 1967, all of which are conducive to effective judicial review.

95 However, other economic operators falling outside the category defined in Section 35(3) of the Stock Exchange Act are, in principle, excluded from owning more than 20 percent of the share capital of a stock exchange, and, pursuant to Section 36 of the Stock Exchange Act, are subject to a parallel exclusion on voting rights in general meetings of a stock exchange. Identical exclusions also apply in relation to ownership and voting rights in securities depositories pursuant to Section 5-3, 5-4(3) and 5-4(4) of the CSD Act.

96 In this regard, the Court finds that the defendant has not sufficiently demonstrated, at the level described in paragraphs 87 to 88 above, that other forms of control, even if administratively more burdensome, may not achieve the relevant public interest objectives in an equally effective way (see Case E-2/06 *ESA* v *Norway*, cited above, paragraph 88).

97 The Court holds that the dual-track system, which is based on a fixed ownership ceiling for all economic operators falling outside the ambit of Article 35(3) of the Stock Exchange Act, goes beyond what is necessary to achieve the objective pursued. In this respect, it must be recalled that the holding of shares in contravention of the contested rules may lead to an compulsory sale under Section 35(4) and (5) of the Stock Exchange Act and Sections 5-4 and 5-5 of the Securities Depositories Act which is subject to the exercise of discretion by the competent authority.

98 It is likely that measures other than the contested system would prove to be less restrictive and within the boundaries of the EEA Agreement and, at the same time, equally as effective to attain a high level of protection such as the one sought by the defendant. For example, a system based on a suitability assessment, similar to the one presently only applicable to a limited group of economic operators under Section 35(3) of the Stock Exchange Act and amended according to the specific circumstances of the national market and the specific business conducted by stock exchanges and CSDs and the legitimate public interests to be attained would be less restrictive and, at the same time, equally effective. The Court adds in this regard that a national system intended to implement the Annexes to the EEA Agreement must be designed in accordance with the general principles of EEA law.

99 In addition, the Court recalls that for a restriction on a fundamental freedom to be justified, the measures must satisfy the principle of legal certainty. This is a general principle of EEA law (see, *inter alia*, Case E-1/04 *Fokus Bank* [2004] EFTA Ct. Rep. 11, paragraph 37). In a case where the acquisition of shareholdings and the exercise of voting rights above a certain threshold are based on exceptions to main rules that provide for an outright ban, legal certainty calls for those exceptions to be sufficiently clear and precise.

100 In this regard, the Court recalls that, while the principle of legal certainty does not preclude the conferral of discretionary powers on the competent authorities, a system of prior administrative approval must be based, as a general rule, on objective, non-discriminatory criteria which are known in advance to the undertakings concerned. All persons affected by a restrictive measure of that type must have a legal remedy available to them (see, for comparison, Case C-463/00 *Commission* v *Spain* [2003] ECR I-4581, paragraph 69, and case-law cited). In the light of those requirements, the Court holds that the latitude of the discretion and the uncertainty of the scope of the exemption laid down in the final sentence of Section 35(1) of the Stock Exchange Act and the final sentence of Section 5-3(1) of the CSD Act entail an interference with the principle of legal certainty.

101 In light of the above, the Court holds that, by maintaining in force restrictions on the rights of persons and undertakings established in EEA States to own holdings and exercise voting rights in financial services infrastructure institutions in Norway, such as provided for in Sections 35(1), (2) and (3), and 36 of the Stock Exchange Act, and Sections 5-3(1), (2) and (3), and 5-4 of the CSD Act, the Kingdom of Norway has infringed Articles 31 and 40 of the EEA Agreement.

VI Costs

102 Under Article 66(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. The applicant has asked that the defendant be ordered to pay the costs. Since the latter has been unsuccessful, it must be ordered to pay the costs. The costs incurred by those who have submitted observations are not recoverable.

On those grounds,

THE COURT

hereby:

1. **Declares that, by maintaining in force restrictions on the rights of persons and undertakings established in EEA States to own holdings and exercise voting rights in financial services infrastructure institutions in Norway, such as provided for in Sections 35(1), (2) and (3), and 36 of the Act of 29 June 2007 No 74 on Regulated Markets (the Stock Exchange Act) and Sections 5-3(1), (2) and (3), and 5-4 of the Act of 5 July 2002 on the Registration of Financial Instruments (the Securities Depositories Act), the Kingdom of Norway has failed to fulfil its obligations arising from Articles 31 and 40 of the EEA Agreement.**

2. **Orders the Kingdom of Norway to pay the costs of the proceedings.**

Carl Baudenbacher Per Christiansen Páll Hreinsson

Delivered in open court in Luxembourg on 16 July 2012

Kjartan Björgvinsson
Acting Registrar

Carl Baudenbacher
President