REPORT FOR THE HEARING

in Case E-9/11

APPLICATION to the Court pursuant to the second paragraph of Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice in the case between the

EFTA Surveillance Authority

and

The Kingdom of Norway

seeking 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 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.

I Introduction

1. The case concerns provisions in the Norwegian Act of 29 June 2007 No 74 on Regulated Markets (hereinafter the "Stock Exchange Act) and in the Act of July 2002 on the Registration of Financial Instruments (hereinafter the "Securities Depositories Act") imposing ownership and voting rights limitations on stock exchanges and central securities depositories (hereinafter also: CSDs).

2. The main rule prohibits the holding of more than 20 per cent of the shares in stock exchanges or central securities depositories as well as the voting of more than 20 per cent of the total voting capital or 30 per cent of the shares represented at a general meeting.

3. There is no dispute between the EFTA Surveillance Authority (hereinafter: ESA) and the Kingdom of Norway that the contested rules restrict the freedom of establishment and the freedom of capital provided in Articles 31 and 40 EEA, and that the objectives of the contested provisions – to ensure the independence, neutrality and integrity of these infrastructure institutions in the market – are

overriding reasons in the general interest capable of justifying national measures of free movement.

4. In dispute is whether the contested measures go beyond what is necessary to achieve the objectives and are consequently incompatible with Articles 31 EEA and 40 EEA.

II Legal background

EEA law

5. Article 31 of the Agreement on the European Economic Area (hereinafter: EEA) reads:

> *1. Within the framework of the provisions of this Agreement, there shall be no restrictions on the freedom of establishment of nationals of an EC Member State or an EFTA State in the territory of any 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* [...]*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...*

6. 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.*

7. 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...*

8. Article 1 of Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty[1], referred to at point 1 of Annex XII to the EEA Agreement, as adapted by Protocol 1 thereto, (hereinafter "Directive 88/361") reads:

1 OJ 1988 L 178, p. 5

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.

9. 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.

10. Article 1 of Directive 88/361 refers to a non-exhaustive Nomenclature in Annex I to the Directive for the notion of capital movements. Under heading I of Annex I *"Direct Investments"* are *inter alia* listed:

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 [...]

11. Under Heading III of Annex I *"Operations in Securities normally dealt on the Capital Market"* are *inter alia* listed:

(a) Shares and other securities of a participating nature

...

A - Transactions in securities on the capital market 1. Acquisition by non-residents of domestic securities dealt in on a stock exchange (1).

3. Acquisition by non-residents of domestic securities not dealt in on a stock exchange

...

12. Under the heading "Explanatory notes", the following meanings are assigned to direct investments:

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.

...

13. Article 1(1) of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets and financial instruments, as amended[2], referred to at Point 31ba of Annex IX to the EEA Agreement, as adapted by Annex IX and Protocol 1 thereto, (hereinafter "MiFID") reads:

This Directive shall apply to investment firms and regulated markets.

14. Article 4(1) points 14 and 27 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;

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2 Directive 2006/31/EC of the European Parliament and of the Council of 5 April 2006; Directive 2007/44/EC of the European Parliament and of the Council of 5 September 2007; Directive 2008/10/EC of the European Parliament and of the Council of 11 March 2008; Directive 2010/78/EU of the European Parliament and of the Council of 24 November 2010.

15. Article 10 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.

16. Article 10a 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 (1), 2002/83/EC, 2005/68/EC (2) or 2006/48/EC (3).

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….

17. Article 10b 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.

18. Title III of MiFID, consisting of Articles 36 to 47, deals with "Regulated Markets". Article 36MiFID 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.

...

19. Article 38 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.

20. Article 39 MiFID reads:

Organisational requirements

Member States shall require the regulated market:

(a) to have arrangements to identify clearly and manage the potential adverse consequences, for the operation of the regulated market or for its participants, of any conflict of interest between the interest of the regulated market, its owners or its operator and the sound functioning of the regulated market, and in particular where such conflicts of interest might prove prejudicial to the accomplishment of any functions delegated to the regulated market by the competent authority;

(b) to be adequately equipped to manage the risks to which it is exposed, to implement appropriate arrangements and systems to identify all significant risks to its operation, and to put in place effective measures to mitigate those risks;

(c) to have arrangements for the sound management of the technical operations of the system, including the establishment of effective contingency arrangements to cope with risks of systems disruptions;

(d) to have transparent and non-discretionary rules and procedures that provide for fair and orderly trading and establish objective criteria for the efficient execution of orders;

(e) to have effective arrangements to facilitate the efficient and timely finalisation of the transactions executed under its systems;

(f) to have available, at the time of authorisation and on an ongoing basis, sufficient financial resources to facilitate its orderly functioning, having regard to the nature and extent of the transactions concluded on the market and the range and degree of the risks to which it is exposed.

National Law[3]

21. Section 2 of the Stock Exchange Act reads:

(1) The Act applies to the activities of regulated markets in Norway. Chapter 6 of the Act [Sections 33 to 43] applies only to regulated markets that are stock exchanges.

22. Section 3(1) of the Stock Exchange Act reads:

...

[3] Unofficial translations submitted by ESA; the translations have not been contested by Norway.

an undertaking authorised pursuant to Section 4 that decides whether to admit financial instruments to listings on the market, and that organises or operates a multilateral facility that provides the conditions for regular trading of listed instruments in accordance with legislation, regulations pursuant to legislation and objective trading rules determined by the market itself;

23. 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).

24. Section 33(1) of the Stock Exchange Act reads:

The business of a stock exchange may only be carried out by an undertaking that is authorised for this purpose by the Ministry.

...

25. 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 acquisitions 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 market places 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 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.

26. 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 thie 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).

27. The Securities Depositories Act lays down corresponding provisions with respect to securities depositories.

28. Section 1-3 of the Securities Depositories Act reads:

"In this Act, "securities depository" means an undertaking authorised under this Act to operate registration of financial instruments."

29. Section 5-2 of the Securities Depositories Act on ownership control 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 an reduction of a holding triggers the obligation to notify as stated in Section 5-3(3).

30. Section 5-3 of the Securities Depositories 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.

31. Section 5-4(3) and (4) of the Securities Depositories Act on voting rights restrictions read:

(3) *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.*

(4) *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).*

III Pre-litigation procedure

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

33. On 17 July 2003, ESA issued a letter of formal notice concerning provisions on financial infrastructure institutions in Norwegian legislation. The respective Norwegian law then provided for a restriction of stock exchange or securities depository ownership. No shareholder was allowed to own more than 10% of the share capital or of voting rights.[4] As for voting rights, no shareholder was allowed to cast votes representing more than 10% of the total voting capital or 20% of the stocks represented at the general meeting.[5] Exceptions were applicable on certain conditions.

34. On 1 June 2004, ESA delivered a reasoned opinion. ESA considered that Norway had, by maintaining in force the aforementioned provisions restricting the ownership and exercise of voting rights, infringed Article 40 of the EEA Agreement and Article 1 of Directive 88/361/EEC.

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[4] See Section 4-1 of Act No 80/2000 on Stock Exchanges (the Stock Exchange Act of 2000) and Section 5-2 of Act No 64/2002 on Central Securities Depositories (the CSD Act).

[5] See Section 4-2 of Act No 80/2000 on Stock Exchanges (the Stock Exchange Act of 2000) and Section 5-3 of Act No 64/2002 on Central Securities Depositories (the CSD Act).

35. Thereafter, the Norwegian Government informed ESA that a working group had been established to revise the respective legislation. During the assessment period, ESA and Norway discussed the matter on various occasions. In a letter of 23 June 2009 ESA was informed by the Norwegian Government that the Norwegian Parliament had adopted the Act of 19 June 2009 amending the relevant legislation and entering into force on 1 July 2009. The amendments comprised, *inter alia*, an increase in the ownership restriction thresholds in stock exchanges and securities depositories from 10% to 20% as well as in the restriction on voting rights from 10% to 20% and from 20% to 30 %. Further, acquisitions in the segment between 10% and 20% were made subject to a notification procedure. With some alterations, limited exemptions continued to apply on certain conditions. The amended provisions constitute the present Norwegian legislation.

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

37. 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. On 16 December 2009, ESA issued a letter of formal notice to Norway, in which it held the amended legislation in force from 1 July 2009 to be 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. The Norwegian Government replied to the letter of formal notice on 8 March 2010. In brief, it acknowledged ESA's view on the restrictions of the freedom of establishment and the free movement of capital. 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.

38. On 15 December 2010, ESA delivered a reasoned opinion questioning the justification of the restrictive measures at issue and requesting that Norway take the necessary measures to comply with the reasoned opinion within two months. By letter of 21 February 2011, the Norwegian Government replied to the reasoned opinion disputing ESA's view.

39. On 20 July 2011, ESA lodged its Application, registered at the Court on 21 July 2011.

IV Forms of order sought by the parties

40. The EFTA Surveillance Authority requests that the Court declare that:

> *1. By maintaining in force such restrictions on the rights of persons and undertakings established in EEA States to own holdings and exercise voting rights in regulated markets in Norway as provided for in Sections*

35(1), (2) and (3) and 36 of the Act of 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 July 2002 on Registration of Financial Instruments (the Securities Depositories Act), the Kingdom of Norway has failed to fulfil its obligations arising from Articles 31 and 40 EEA.

2. The Kingdom of Norway bears the costs of the proceedings

41. The Kingdom of Norway requests the Court to:

1. Dismiss the Application of the EFTA Surveillance Authority as unfounded.

2. Order the EFTA Surveillance Authority to pay the costs of the proceedings.

V Written procedure before the Court

42. Written arguments have been received from the Parties:

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

- the Kingdom of Norway, represented by Pål Wennerås, Advocate, the Attorney General of Civil Affairs, and Janne Tysnes Kaasin, Adviser, Ministry of Foreign Affairs, acting as Agents.

43. 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 Republic of Poland, represented by Maciej Szpunar, Undersecretary of State, Ministry of Foreign Affairs, acting as Agent;

- the European Commission, represented by Elisabetta Montaguti, Julie Samnadda and Radoslava Vasileva, Members of its Legal Service, acting as Agents.

VI Summary of the pleas in law and arguments of the Parties

The Applicant

Restriction of freedom of establishment and free movement of capital

44. The application is based on the plea that Norway has infringed Articles 31 and 40 EEA by maintaining Sections 35 and 36 of the Norwegian Stock Exchange Act and Sections 5-3 and 5-4 of the Securities Depositories Act. ESA submits that that the prohibitions on acquiring shares above a certain level as well as the limitation of voting rights hinder or make less attractive the exercise of the fundamental freedom of establishment under Article 31 EEA and the free movement of capital under Article 40 EEA, in parallel.6

The scope of the fundamental freedoms in question

45. ESA submits that in accordance with settled case-law, national provisions applying 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 companies' decisions, and which allow them to determine its activities, come within the scope of the freedom of establishment.\7 Acquisitions of shares below this threshold come within the substantive scope of the free movement of capital.

46. As regards the national provisions at hand, ESA argues that the limitations set out in Sections 35 of the Stock Exchange Act and 5-3 of the Securities Depositories Act restricting the ownership of more than 20% of the share capital or voting capital usually concern the freedom of establishment. In ESA's view the free movement of capital is also affected as the acquisition of a shareholding exceeding the maximum percentage foreseen in the contested legislation might not render definite influence on the stock exchange or securities depository and enable the shareholder to determine its activities.

47. Similarly ESA argues that Section36 of the Stock Exchange Act and Section 5-4 of the Securities Depositories Act, restricting the possibility to cast votes at the general meeting representing more 20% of the total voting capital or 30% or the capital represented at the meeting, encroach upon the freedom of establishment and the free movement of capital.

48. Article 40 EEA does not define "capital movements". The Applicant points out that Directive 88/361 and the Nomenclature in its Annex I have indicative value for that definition.[8] In light of the contested Norwegian provisions, ESA acknowledges the "direct investments" under Heading I of the Nomenclature as the most pertinent category of capital movements. It covers, *inter alia*, the

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6 Reference is made to Case E-2/06 Norwegian Waterfalls [2007] EFTA Ct. Rep. 164; Case C-79/01 Payroll and others [2002] ECR I-8923, paragraph 26; Case C-98/01 *Commission v United Kingdom* [2003] ECR I-4641, para. 47; and the case-law cited.

7 ESA refers to Case C-524/04 *Test Claimants in the Thin Cap Group Litigation* [2007] ECR I-2107, paragraph 27: Case C-326/07 *Commission v Italy* [2009] ECR I-2991, paragraph 34: Case C-303/07 *Aberdeen Property Fininvest Alpha Oy* [2009] ECR I-5145, paragraph 34.

8 Reference is made to Norwegian Waterfalls, paragraph 67; Case E-10/04 *Piazza* [2005] EFTA Ct. Rep. 76, para. 34 to 36; Case C-174/04 *Commission v. Italy* [2005] ECR I-4933, paragraph 27 and Case 207/07 *Commission v Spain* [2008] ECR I-111*, para. 32; and the case law cited.

acquisition in full of existing undertakings as well as the participation in new or existing undertakings. ESA submits further that according to case-law[9] and by virtue of the explanatory notes to the Nomenclature, such direct investment is characterised by the possibility to effectively participate in the management and control of the company.

49. ESA concludes that the contested legislation should be assessed on the basis of the two fundamental freedoms at stake in parallel.

Pursuit of legitimate aims

50. ESA acknowledges that the objectives of the contested provisions – the promotion of properly functioning and efficient financial markets by creating safeguards against conflicts of interest and covert misuse of power in infrastructure institutions, central securities depositories and stock exchanges, and inspiring confidence among market operators in the independence and impartiality of the institutions – are overriding reasons in the general interest capable of justifying national restrictions on free movement.[10]

Proportionality

51. The Applicant contends that the essential question is whether the contested national legislation is proportionate – i.e. suitable, necessary and proportionate *stricto sensu*[11] – and, in particular, necessary.

52. In this respect, ESA submits that the level of protection sought has to be determined in order to set the proper benchmark for the suitability and necessity test. EEA States have discretion when setting the level of protection sought by national legislation such as that at hand.[12] Still, this is only the case within the limits set by the Treaty.[13] Furthermore, the determination of the level actually chosen is subject to judicial control. As the terms of the contested legislation do not explicitly define the level of protection, ESA adds in its reply, the Court must review the contested terms in their entirety to decide upon what level of protection they may be taken to reflect.

53. ESA maintains that the terms of the contested legislation are the primary basis for determining the level chosen. Considering the general prohibition on

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[9] ESA refers to Case C-326/07 *Commission v Italy* [2009] ECR I-2291, para. 35, and the case-law cited; Case C-174/04 *Commission v Italy* [2005] ECR I-4933, para. 28.

[10] Reference is made to the case-law cited by Norway, Case C-384/93 *Alpine Investments* [1995] ECR I-1141, para. 42.

[11] Reference is made to Case E-1/09 *EFTA Surveillance Authority v Liechtenstein* [2009-2010] EFTA Ct. Rep. 46, para. 38.

[12] Reference is made to Case E-3/06 *Ladbrokes* [2007] EFTA Ct. Rep. 86, paras. 58-60.

[13] ESA refers to the judgments cited by Norway (defence, para 197, footnote 75) at the same paragraphs. ESA also points out that it believes that Norway's reference to Case 11/05 *Commission v Germany* [2009] ECR I-519 should read Case C-112/05 *Commission v Germany* [2007] ECR I-8995.

shareholdings and the exercise of voting rights above certain thresholds, ESA acknowledges, at first sight, that the contested national legislation renders a high level of protection.

54. ESA contends, at second glance, that this high level of protection is lowered because of the exemptions provided for in Sections 35(1) third sentence, 35 (2) and 36 (2) as well as 35(3) Stock Exchange Act and accordingly provided for in the provisions of the Securities Depositories Act.[14]

55. As regards Section 35(1) third sentence of the Stock Exchange Act[15], ESA criticises *inter alia* the insufficient definition of the scope of the Ministry's discretionary power, it being unclear whether and how an exemption must be applied for and what time limits there are for the decision to be taken. The provision also lacks a definition of the time limit that has to be set if an exemption is granted.

56. Sections 35(2) and 36(2) Stock Exchange Act[16] are in ESA's view unclear as to how the exemptions are to be granted.

57. As regards Section 35(3) Stock Exchange Act[17], the Applicant points out *inter alia* the lack of a time limit within which the Ministry is to make its discretionary assessment and decide upon an application. In addition, it is asserted that it is unclear whether a 100% holding or only lesser holdings may be permitted.

58. ESA acknowledges that Norway has chosen a higher level of protection than is provided by the minimum requirements set out in Articles 36 et seq. MiFID, given that Sections 35 and 36 Stock Exchange Act and Sections 5-3 and 5-4 Securities Depositories Act are in addition to those requirements. ESA submits, however, that the level of protection chosen is in fact not so high that – as if by definition – there can be no suitable alternative to prohibiting shareholdings exceeding certain limits and capping voting rights. ESA points out that the exemptions are inconsistent with such a high level of protection, and the provisions do not appear to form a coherent set of measures. The Applicant points out in its reply that Norway seems to have understood the Applicant as saying with this argument that the exceptions are so broad as to jeopardise the level of protection intended by the system. According to ESA, though, the point here is that Norway itself has made exceptions to its prohibitions against shareholdings and the exercise of voting rights exceeding certain thresholds. This choice reflects a lower level of protection rather than an absolute prohibition.

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[14] Sections 5-3(1) third sentence, 5-3(2) and 5-4(2) as well as 5-3(3) Securities Depositories Act.

[15] As well as Section 5-3(1) of the Securities Depositories Act.

[16] As well as Sections 5-3(2) and 5-4(2) of the Securities Depositories Act.

[17] As well as Section 5-3(3) of the Securities Depositories Act.

59. In addition, ESA denies in its reply that Norway is reproached for any breach of the EEA Agreement which was not the subject of the administrative proceedings.

Suitability

60. ESA does not dispute the suitability of the contested legislation as a means to attain the stated objectives at the level of protection chosen.

Necessity

61. ESA points out that the necessity test consists of assessing whether the contested legislation is functionally needed in order to achieve legitimate objectives at the level of protection chosen by the EEA State concerned. The Applicant states that under the necessity test Norway is obliged to choose the least restrictive measure available to achieve the protection sought,[18] but whenever there are alternatives that are equally limited in their restrictive effects, Norway is free to decide as to each of them.

62. ESA further argues in response to Norway's defence[19] that it is not attempting to usurp the EEA States' discretion, but rather insists on Norway's obligation to choose the least restrictive alternative available, in accordance with the necessity test under the principle of proportionality.

63. The Applicant submits that under the contested legislation, prohibition of shareholdings exceeding certain limits and capping of voting rights are unnecessary. According to ESA's alternative, less restrictive measures are available that would be sufficiently effective.

64. In ESA's view one option would be legislation largely corresponding to the amended provisions in Articles 10-10b MiFID on investment firms. These provisions, as amended by Directive 2007/44/EC[20], provide for a more detailed and more comprehensive system of information disclosure, notification requirements and enforcement measures essentially aimed at securing the sound and prudent management of investment firms. Thus, ESA acknowledges that MiFID provides for a higher level of protection with respect to investment firms than Articles 36-47 MiFID dealing with regulated markets since the latter provisions have not been subject to corresponding amendments.

65. ESA submits that – with some adaptions – a system, such as that foreseen in Articles 10, 10a and 10b MiFID, could provide for a level of protection as high

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[18] ESA refers to Case E-3/06 *Ladbrokes* [2007] EFTA Ct. Rep. 86, paragraph 58.

[19] Reference is made to paras. 199-201 in the Defence.

[20] 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 (O.J. L 247, 2007, p.1 – 16)

as the level of protection presently secured by the contested legislation. ESA also quotes the preparatory works to the contested legislation[21], where the Ministry notes:

"The working group refers in its report to Directive 2007/44/EC. Said Directive seeks to coordinate the suitability assessment for a number of undertakings in the financial section by exhaustive criteria laid down in Directives. This concerns inter alia Articles 20, 20a and 10 b of the MiFID...The Ministry notes that a suitability assessment under the new Article 10 of the MiFID will have a much narrower scope [than the Norwegian rules] for assessing the suitability of the acquirer. For example, it may not be taken into account in the same way whether the acquisition may entail unwanted effects for the functioning of the financial markets. The Ministry therefore does not see any reason to take into account the amendments to Articles 10 et. seq. of the MiFID when drafting the amended ownership rules for infrastructure undertakings in the securities sector. The Ministry's assessment is that those rules are not necessarily sufficient to attain the public interest objectives underlying the rules restricting ownership, and the ministry is therefore of the opinion that harmonisation in the direction of the suitability assessment following from EEA rules corresponding to Directive 2007/44/EC does not come into consideration."

66. In the Applicant's view the idea of employing the system prescribed under Articles 10, 10a, 10b MiFID was discarded mainly because it was considered to leave too little scope for taking account of any undesirable effects on the operations of the financial markets. Thus, ESA refers to possible adaption(s) that might be made in order to deal with that main concern and to further enhance the effectiveness of a system such as that foreseen in Articles 10, 10a, 10b MiFID. In the Applicant's view, such a system would be in accordance with MiFID when employed for regulated markets.

67. ESA adds in its reply that such a system would also respond to specific concerns raised by Norway. For example, in respect of Norway's argument that the contested legislation ensures that "*no single owner may alone be able to preclude a proposal for adjustment of the statutes which is supported by other shareholders"* because "*Norwegian company law provides that a shareholder representing more than 1/3 of the share capital or votes cast at the general meeting, may block changes to the company's statutes*." ESA refers to the measures foreseen under Article 10(6) MiFID subparagraphs 1 and 2. The system would not have been contrary to MiFID, ESA points out, when employed for the regulated markets, and a simple adaption would seem to meet at least the main concern expressed in the preparatory works to the contested legislation.

68. In its reply, ESA also denies Norway's repeated assertion that it proposed an alternative that would be singularly based on a suitability assessment or only

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[21] Reference is made to Ot.prp. nr. 80 (2008-2009), p. 57, point 3.8.3. It is stated that the translation at hand is unofficial.

based on discretionary assessment of suitability. ESA points out that it had referred to a system such as the one foreseen in Article 10, 10a, 10b MiFID and recalls that Article 10 MiFID is not singularly concerned with suitability assessment, but also foresees rules on the provision of information, the exercise of supervision, cooperation between relevant authorities and requirements for appropriate enforcement.

69. Besides this, ESA refers to Norway's argument that it is "*in any event not pertinent to authorise a dominant owner position to owners who also employ the services of stock exchanges or CSD.*"[22] However, ESA submits, the contested legislation allows this on a discretionary basis, at the very least in "special circumstances" and for a period of time, but seemingly also as long as the owners "for the most part" operate or own regulated markets. In this light the Applicant is of the opinion that it cannot be necessary to rule out, *a priori*, that owners who also employ the services of stock exchanges or securities depositories could ever be authorised to hold more than 20% of the shares in such companies, even if subject to appropriate controls by assessment, supervision and enforcement. ESA submits further that through such rules on information and authorisation, supervision, co-operation and enforcement as foreseen in MiFID, and with appropriate adaptions, the Norwegian authorities may secure the necessary independence, neutrality and integrity of the financial services infrastructure institutions concerned.

Legal Certainty

70. ESA has difficulties seeing the coherence in the present Norwegian legislation, which is fundamentally based on a set of prohibitions but equally characterised by broad administrative discretion and somewhat unclear or inconsistent provisions on exemptions. A system of provisions closely modelled on Articles 10, 10a, 10b MiFID seems more conducive to ensuring legal certainty than the contested national legislation.

71. In its reply, ESA contests the assertion that the exceptions to the limitations on holding shares in stock exchanges and securities depositories are conducive to ensuring legal certainty, which the critics brought forward when considering the level of protection chosen by Norway. Because of lack of greater clarity and more transparency in the said exemptions, economic operators are left with a less than desirable level of foreseeability and legal certainty.

72. In conclusion, ESA states that its suggested alternative would better reconcile the legitimate objectives pursued by the restrictive legislation with the exigencies of the internal market.

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[22] Defence, para. 174-175.

Case-law and Directive 2006/43/EC

73. Finally, ESA refutes in its reply that the judgments in *Alpine Investments*[23], *Wouters*[24] and *Commission v France*[25] are determinative in the present case. The outcome of *Alpine Investment* points out only that it takes more for national measures limited in scope and therefore in their effects to be disproportionate.[26] As regards *Wouters*, the ECJ held that the measures taken by the Bar of the Netherlands, being an association of undertakings restrictive of competition – it prohibited members of the Bar from practising in a multi-disciplinary partnership with accountants – were justified.[27] ESA points out that this was mainly the case because the ECJ took account of the different legal regimes governing the members of the Bar and accountants. Concerning *Commission v France*, ESA asserts that the ECJ found reason to stress that the medical biology sector is special, that it is at the forefront of healthcare and that, in France a medical role has been assigned to biologists.[28] According to ESA, the ECJ stressed the foremost importance of the protection of the health and life of humans by the EC Treaty and applied the precautionary principle accordingly.[29] On these grounds, ESA continues, the French restrictions on ownership of biomedical analysis laboratories were found justified, whereas the ECJ disallowed Greek ownership restrictions for optician's shops in *Commission v Greece*.[30] In the latter case it was emphasised that the risk to public health presented by incorrect or inappropriate dispensing of optical products is not comparable to the risk involved in, and the serious effects liable to be brought about by, the incorrect or inappropriate performance of biomedical analyses.[31] Therefore, ESA remarks that the applicable precedent is the latter decision since the present case does not exhibit such distinguishing features as were found in *Commission v France.*

74. ESA also submits that the rules on statutory auditors and audit firms to which Norway refers[32] show only that particular ownership restrictions may be justified in particular circumstances, whereas it does not follow from these rules that the contested legislation in the case at hand is justified.

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23 Reference is made to Case C-384/93 *Alpine Investments,* cited above.

24 Reference is made to Case C-309/99 *Wouters* [2002] ECR I-1577.

25 Reference is made to Case C-89/09 *Commission v France*, Judgment of 16 December 2010, not yet reported.

26 Referring to Case C-384/93 *Alpine Investments*, cited above, paras 97-110.

27 Referring to Case C-309/99 *Wouters,* cited above, paras 98 and 108.

28 Referring to Case C-89/09 *Commission v France*, judgment of 16 December 2010, not yet reported, para. 56.

29 Referring to Case C-89/09 *Commission v France*, judgment of 16 December 2010, not yet reported, para. 42, 55.

30 Reference is made to Case C-140/03 *Commission v Greece* [2005] ECR I-3177.

31 Reference is made to Case C-140/03 *Commission v Greece*, cited above, para. 65

32 Reference is made to Directive 2006/43/EC; Defence, paras. 171-173.

The Defendant

75. Since ESA does not dispute that the contested measures are non-discriminatory, justified by legitimate objectives, and suitable to achieve these objectives, Norway argues that the subject matter of the case is restricted to whether the measures are necessary within the meaning of Articles 31 and 40 EEA,[33] whereas observations on the other requirements that must be fulfilled in case of a restriction on the four freedoms without discrimination on grounds of nationality[34] are only provided for the sake of completeness.

76. Norway argues that the regulation of stock exchanges and central securities depositories has been and remains virtually identical. The same applies to the rationale of the rules set out in the various preparatory works. Norway therefore points out that for the most part it will concentrate on the contested rules in the context of stock exchanges, whilst more briefly referring to the fact that the same applies for CSDs.

Justification

77. Norway argues at the outset that the provisions covered by ESA's complaint are applicable without discrimination on grounds of nationality.[35]

78. As regards justification, Norway submits that the objectives of the contested rules – maintaining the good reputation of the financial sector by ensuring the independence, neutrality and integrity of vital infrastructure institutions – constitute imperative reasons of public interest capable of justifying restrictions on the freedoms of establishment and capital.

79. Norway refers to ECJ *Alpine Investments* and contends that maintaining the good reputation of the national financial sector constitutes an imperative reason of public interest capable of justifying restrictions on the freedom to provide services.[36] This applies *mutatis mutandis*, Norway contends, to the rules on establishment and capital. The ECJ noted in this context, Norway continues, that financial markets play an important role in the financing of economic operators, and the smooth operation of financial markets is largely contingent on the confidence they inspire in investors.[37] The ECJ emphasised, Norway adds, that confidence depends in particular on the existence of professional regulations

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[33] Under Section 1.2 of the Defence Norway notes that Title III of Directive 2004/39/EC contains provisions concerning "regulated markets", which *inter alia* include stock exchanges. It is further noted that these rules constitute minimum harmonization.

[34] Norway submits that the contested legislation is applicable without discrimination on grounds of nationality. Reference is made to Case C-89/09 *Commission v France*, not yet reported, para. 51.

[35] Reference is made to Case C-89/09 *Commission v France*, not yet reported, para. 50.

[36] Reference is made to Case C-348/94 *Alpine Investments,* cited above, para. 44.

[37] Reference is made to Case C-348/94 *Alpine Investments*, cited above, para. 42.

serving to ensure the competence and trustworthiness of the financial intermediaries on whom investors are particularly reliant."[38]

80. Moreover, Norway argues, the ECJ has repeatedly recognised the legitimacy of ensuring that consumers are provided with the necessary guarantees in relation to the independence, integrity and experience of professional service providers, e.g. lawyers, financial intermediaries and public health services.[39]

81. Norway also refers to Directive 2004/39[40] and Directive 2006/43[41] that, in its view, underpin in their preambles the paramount importance of upholding the integrity and overall efficiency of the financial system.

Suitability

82. Norway acknowledges that the contested rules are appropriate for securing the independence, neutrality and integrity of stock exchanges and CSDs and thereby maintaining the good reputation of the national financial sector.

83. Norway asserts that the reasoning in the case-law[42] that suitable measures include, in particular, rules ensuring strict separation between different entities in order to avoid conflicts of interests or the perception that such conflicts may arise, similarly applies to the case at hand. Norway asserts that such reasoning is reminiscent of the rationale set out in the preparatory work of the contested legislation.

84. Norway argues that the independence, neutrality and integrity of stock exchanges and CSDs are of paramount importance since they ultimately affect the extent to which market actors have the necessary confidence in the domestic market in financial instruments. To this end, Norway submits that the contested rules provide for a dual-track system.[43]

85. Norway contends that in relation to owners employing the services of the respective institutions, it is inappropriate to permit a dominant owner position. The contested rules accordingly provide for absolute limitation of ownership and limitation of the casting of voting rights at the general meeting. In contrast, owners that run or own regulated markets, similar markets or affiliated

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38 Reference is made to Case C-348/94 *Alpine Investments*, cited above, para. 42.

39 Reference is made as concerns services provided by lawyers to C-309/99 *Wouters* [2002] ECR-I 1577, paras 97 et seq.; Case C-3/95 *Reisebüro Broede* [1996] ECR I-6511, para. 38; as concerns services provided by biomedical analysis laboratories to *Commission v France*, not yet reported, paras. 66-68.

40 Reference is made to para. 5 of the preamble, Directive 2004/39/EC.

41 Reference is made to para. 9-11 of the preamble, Directive 2006/43/EC.

42 Reference is made to C-309/99 *Wouters* [2002] cited above, para 105 et: C-89/09 *Commission v France*, not yet reported, paras. 66 and 82.

43 Reference is made to the Working Group Report of 28 June 2007, "The rules concerning ownership limitations for infrastructure companies in the field of financial instruments", p. 54-55.

infrastructure will in principle have no self-interest in influencing the relationship between the actors on the stock exchange and, thus, represent a group of owners presenting a lower risk of weakening confidence in the independence, neutrality and integrity of the stock exchanges or CSDs. Since the risk of conflict of interest is lower, there is no need for absolute ownership limitation. Acquisitions by such owners are therefore instead subject to a suitability assessment to determine whether the owner is fit to ensure the good and proper operation of the stock exchange or CSD.

86. Concerning the two other exemptions, Norway remarks that they are consonant with this system insofar as they allow for stock exchanges or CSDs to be organised as holding companies, or provide for temporary structural adjustments bringing the acquisition in line with the dual-track system.

Necessity

87. The Defendant Norway submits that the contested legislation is necessary within the meaning of Articles 31 and 40 EEA since there is no alternative which is equally effective, whilst being less restrictive.

88. When assessing the necessity of the contested rules, the special nature of the business conducted by stock exchanges and CSDs and the vital role these sectors play in the proper functioning of financial markets must be taken into account.

89. Norway asserts that the ECJ has repeatedly recognised the legitimacy of ensuring that consumers are provided with the necessary guarantees in relation to the independence, integrity and experience of professional service providers. A common feature of these cases was that the regulation concerned sectors in which the independence, integrity and experience of the service provider was particularly important in order to achieve the underlying aims. Norway contends that this applies similarly to the case at hand.

90. Stock exchanges and central securities depositories – by providing the essential infrastructure of the financial markets – are perhaps the most important of all financial intermediaries, and the smooth operation of financial markets is therefore particularly contingent on the confidence these institutions inspire in investors.[44] Therefore, the Norwegian legislation has considered the independence, neutrality and integrity to be of paramount public interest.

91. Stock exchanges have been attributed far-reaching regulatory functions in Norway. Contrary to the situation in most other countries, the stock exchange has for instance been appointed as takeover authority and has been given the power

[44] Reference is made to the Report of the Technical Committee of the International organization of Securities Commissions, "Issues Paper on Exchange Demutualization" (2001) p. 5, 10; and to the Final Report of the Technical Committee of the International Organization of Securities Commissions, "Regulatory Issues Arising From Exchange Evolution" (2006) p. 5.

to sanction contraventions of the issuers' obligation to disclose inside information. According to the Defendant, CSDs play a special role in business similar to stock exchanges. CSDs are regulated differently in its view than 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.

92. Finally, the Defendant notes that in its view the EU legislature has so far adopted only minimum harmonisation concerning stock exchanges and no harmonisation concerning CSDs, thus leaving it to the Member States to determine the level of protection within these sectors. Hence, the Commission consciously abstained from extending the proposed rules concerning investment firms, Articles 10-10b MiFID, to regulated markets under Article 38 MiFID, while emphasising that any future proposals to this effect must be taken into account when assessing the necessity of contested rules.

Equal effective measures being of less restrictive character

93. The Defendant firstly refutes ESA's assessment that the exceptions provided for in the Stock Exchange Act and the Securities Depositories Act have significantly lowered the level of protection ensured by the main prohibitions. Taken in its entirety, the dual-track system forms a consistent legal framework which ensures a high level of protection.

94. Sections 35(1-3) and 36 Stock Exchange Act correspond fully to Sections 5-3(1-3) and 5-4 of the Securities Depositories Act. Therefore, the Defendant concludes, it will mainly refer to the Stock Exchange Act provisions.

95. The Defendant refers to the preparatory works of the contested legislation and acknowledges that the contested rules of the dual-track system provide for coherent differentiation between different groups according to 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.

96. Norway adds that the two ancillary exceptions – temporary exceptions for structural adjustments in exceptional cases and the organisation of stock exchanges and CSDs as holding companies – are consistent with the principles of such a dual-track system. Norway further argues that the holding company exception under Section 35(2) of the Stock Exchange Act is solely meant to facilitate a practical structure of stock exchange ownership, while the material requirements still apply. As regards the restructuration exception under Section 35(1) third subparagraph of the Stock Exchange Act, Norway argues that the purpose of this exemption is to provide a temporary safety valve in extraordinary circumstances where an application of the main rule laid down in Section 35(1) or the criteria in Section 35(3) would lead to unnecessary formalism. Norway

remarks that the temporary exemptions have only been granted twice, and no exemptions have been granted since the amendment of the law in 2009.

97. Secondly, Norway denies that a system based on an elaborate suitability assessment, such as provided for in Articles 10, 10a, 10b MiFID is – regardless of possible adaptations – either equally effective or less restrictive 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. Such a proposition, Norway argues, is clearly counter-intuitive and also runs counter to the basic tenets of the relevant case-law.

98. Norway further remarks that ESA disregards the fundamental difference between the systems enshrined in the proposed measures – with or without possible adaptations – and the Norwegian rules. Norway refers to ESA's notice that the system in Articles 10-10b MiFID also foresees rules on, *inter alia*, the provision of information, supervision and enforcement that Norway could also introduce as "possible adaptations" to deal with its concerns, and that Article 10(6) of the MiFID allows for appropriate measures that may substitute the limitations set forth in Section 35(1) Stock Exchange Act and 5(3)-1 of the Securities Depositories Act as regards their goal of preventing a single owner from blocking changes to a company's statutes.

99. According to Norway, 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.[45]

100. Norway submits that the contested rules are based on the assessment that it is not in any event appropriate to authorise a dominant position for owners who also employ the services of stock exchanges and CSDs. However, it is asserted that ESA's proposed alternative would, in principle, allow market actors to gain dominant positions in stock exchanges and CSDs. It is evident, Norway concludes, that such an alternative would necessarily lower the level of protection, compared to a system prohibiting such actors from owning more than 20% of the shares in these institutions.

101. Norway adds that it finds the Applicant's submissions in the Application inconsistent with those in the pre-litigation procedure. Norway remarks that

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[45] Reference is made to Ot.prp.nr. 80 (2008-2009) p. 47; further reference is made to Articles 4 and 3(4)(b) of Directive 2006/43 on statutory audits of annual accounts and consolidation accounts, O.J. 2006, L157/87, as well as a Commission Recommendation concerning the independence of Statutory Auditors, O.J. 2002, L191/22.

ESA's main objection then to the contested rules was that the system was too restrictive because the exemptions were of unlimited scope. Norway submits further that it is difficult to see how ESA can subsequently assert that the exceptions are so broad as to jeopardise the level of protection intended by the system, and in any event to such an extent that a system solely based on suitability assessment would provide an equally high level of protection.

102. Thirdly, Norway acknowledges that the ECJ's case-law essentially echoes the reasoning put forward in the legislative deliberations concerning the necessity of national rules.[46] According to the Defendant, the basic tenet of these judgments is that objective prohibitions, including ownership limitations, ensure a higher level of protection of the independence, integrity and neutrality of the institutions concerned and the services provided than regulatory models based on *ex ante* suitability assessments and *ex post* supervision and enforcement. These judgments, Norway adds, also fit into a more general line of jurisprudence, in which the ECJ has ruled that measures other than prohibitions can guarantee a certain level of protection, cannot deny the Member States the possibility of attaining legitimate objectives by introducing general and simple rules which may be easily managed and supervised by the competent authorities.[47] Therefore, Norway argues that there are no equally effective measures.

103. Norway questions whether the alternative system proposed by ESA is less restrictive – in terms of legal certainty – than the one provided in the contested legislation. Norway argues that the contested system is motivated, in part, by a desire to ensure a higher degree of legal certainty than a system based on suitability assessments, which by their nature, leave room for discretion.[48]

104. The Defendant points out that the expert working group found it preferable that the main rule in the system – Section 35(1) of the Stock Exchange Act and Section 5-3(1) of the Securities Depositories Act – be based on objective prohibitions. The main rule, Norway submits, is mirrored by Sections 35(2) of the Stock Exchange Act and Sections 5-3(2) of the Securities Depositories Act, which essentially state that that rule shall not prevent holding companies from owning stock exchanges or CSDs as long as the ownership of the holding company fulfils the conditions in Section 35(1) of the Stock Exchange Act and Section 5-3(1) of the Securities Depositories Act. Section 35(3) of the Stock Exchange Act and Section 5-3(3) of the Securities Depositories Act provide an exception from the main rule as concerns an undertaking that in essence operates

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[46] Case C-384/94 *Alpine Investments*, cited above, paras. 51-53; Case C-309/99 *Wouters* [2002] ECR I-1577, para. 105 and 108; Case C-89/09, not yet reported, para. 82-85.

[47] Reference is made to Case 110/05 *Commission v Italy*, ECR I-519, para 67; Cases C-142/05 *Mickelsson and Roos*, [2009] ECR I-4273, para 36; and Case C-400/08 *Commission v Spain*, para. 124.

[48] Reference is made to the translation transmitted by Norway of the Working Group Report of 28 June 2007, "The rules concerning ownership limitations for infrastructure companies in the field of financial instruments", p. 54.

or owns a regulated market, similar market places or related infrastructure, subject to a suitability assessment.

105. The preconditions, Norway concludes, are thus subject to objective criteria. As for the subsequent suitability assessment, Norway submits, Section 35(3) and Section 5-3(3) of the Securities Depositories Act 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. The only exception that involves an element of discretion, being itself limited, Norway maintains, is found in the second subparagraph in Section 35(1) of the Stock Exchange Act and the second subparagraph in Section 5-3(1) of the Securities Depositories Act.

106. The Defendant submits that the contested legislation provides a level of certainty surpassing the alternative proposed by ESA, according to which all acquisitions beyond 10% of the shares are subject to a suitability assessment. It argues that the fact that objective criteria are set for the suitability assessment does not alter the fact that such assessment is ultimately subject to the exercise of discretion.

107. Furthermore, the Defendant refers to the Applicant's argument that the elements of discretion in the contested legislation leave operators with a less than desirable level of foreseeability and legal certainty.[49] National laws, the Defendant argues, must not be devoid of objective criteria. The principle of legal certainty does not preclude that such criteria require national authorities to conduct partially discretionary assessments[50], in particular where these assessments must be supported by statements of reasons and are subject to judicial review. It is asserted that the contested rules fulfil these requirements. Norway further argues that it is important to note that the Stock Exchange Act and the Central Securities Depositories 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 argues, the Ministry's decisions are subject to judicial review.

108. Finally, the Defendant addresses the Applicant's argument that the legislation must be proportionate *stricto sensu* under the necessity test. Norway submits that the principle of proportionality in EEA law does not include an assessment of so-called "proportionality *stricto sensu*" but consists of two distinct elements: suitability and necessity. It is submitted that in the absence of harmonisation, it is in principle for the Member States to decide on the degree of

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[49] Reference is made to the Reply, para. 11.

[50] Reference is made to case-law of the ECJ stating that the ECJ has never objected to such terms on grounds of legal certainty, Case C-503/99, *Commission v Belgium* [2002] ECR I-4809, para. 1, 51-52; Case C-452/01 *Ospelt* [2003] ECR I-09743 para. 53.

protection which they wish to afford to such legitimate interests and the way in which such protection is to be achieved.[51]

The Republic of Poland

109. 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. And if the contested rules are to be considered as constituting a restriction under applicable EEA law, they should be considered justified and proportionate.

110. Firstly, the Norwegian legislation is applicable without discrimination on ground of nationality or place of establishment, since it does not distinguish between entities originating from Norway from entities with seats in any other states, including Member States of the EEA. Thus, the contested rules are neutral as regards the origin of an investor intending to acquire shares in an operator of a stock exchange or a CSD.

111. Limitations, such as those in question, do not affect access to the market for undertakings from other Member States and thereby hinder trade within the EEA more than standard ownership restrictions and voting caps that are in existence under many national company laws. In France the articles of association may limit the number of votes that each shareholder has at a meeting of shareholders, if the limitation is imposed on all shareholders and without distinction between classes of shares.[52] Although the contested restrictions in the case at hand form part of national law and are not a result of the will of shareholders expressed in the articles of association, the rationale of such rules is the same: to limit the possibility of some owners or groups of owners to have dominant influence in the institutions concerned and thus, to reduce the risk that a dominant owner exercises undue pressure on the functionality of the institution by changing a company's statutes or articles of association to the detriment of the other shareholders or by blocking changes.

112. Due to the rationale of the contested measures, 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 will provide greater protection to minority shareholders without imposing more burdensome restrictions on major investors.

113. Even if the contested legislation were considered a restriction, it should be declared justified and proportionate.

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[51] Reference is made to Case E-4/04, *Pedicel* [2005] EFTA Ct. Rep. 1, para. 59 and Case C-11/05 *Commission v Germany* [2009] ECR I-519, para. 73; C-257/05 *Commission v Austria* [2006] ECR I-134, para. 18; and Case C-207/07 *Commission v Spain* [2008] ECR-111, para. 45.

[52] Reference is made to Article L.225-125 of the French Commercial Code.

114. Poland submits that it will limit its observations to the necessity aspect. Contrary to ESA, Poland is of the opinion that there are no alternative measures that are equally effective, whilst less restrictive than the contested rules.

115. Poland disagrees with ESA's view that a system closely modeled on the provisions of Article 10-10b MiFID concerning investment firms could provide for a level of protection as high as the one presently secured by the contested national legislation.

116. Articles 10-10b MiFID only regulate the acquisition of shares in investment firms and not in stock exchanges or CSDs, and the MiFID does not require Member States to apply the same model of assessment to the latter. On the contrary, Title II of MiFID contains provisions concerning regulated markets that include stock exchanges. Reference is made in particular to Article 38 MiFID. Due to the general character of these provisions, Poland argues, the Member States have the competency to determine the appropriate measures in the national legal system. As these provisions constitute minimum harmonisation, it is in principle for the Member States to decide on the level of protection and the way in which such protection is maintained.[53]

117. A similar conclusion must be drawn regarding restrictions on ownership and voting with respect to CSDs. These fall altogether outside the scope of MiFID. Furthermore, Poland submits that there is no EU/EEA secondary legislation regulating ownership and operations of such institutions. Thus, it is for Member States to adopt such measures as it considers necessary to preserve the level of protection, provided that they are consonant with the fundamental freedoms guaranteed by the EEA Agreement.

118. Poland asserts that by introducing the contested legislation, Norway has exercised its discretion in full compliance with the EEA Agreement as the system in Articles 10-10b MiFID was solely designed to take into account the characteristics of investment firms. In this context Poland argues that there is a difference in rationale between these two systems. The reason for rules of ownership in investment firms is to avoid structures over which owners could exercise undue influence as to the capital allocation of the institution, whereas as regards infrastructural institutions, the aim is to ensure that owners do not receive favourable treatment when they act as customers. Poland further argues that confidence in the market is dependent on the correct behaviour of intermediaries. Thus, it is decidedly important to maintain the contested rules in order to ensure the independence and neutrality of the institutions as well as remove any doubt that the institutions are not operating in an independent and neutral manner.

119. Furthermore, in Poland's view MiFID does not provide the same standard of protection as the contested system of legislation. The system of exceptions ensuring predictability and transparency and a higher degree of legal certainty

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[53] Reference is made to Case 11-05 *Commission v Germany* [sic!] [2009] ECR-I 519, para. 73.

than a system which is only based on a suitability assessment which by its nature leaves room for discretion. Agreeing with Norway, Poland prefers a dual-track system where a distinction is made between shareholders presenting inherent risks of conflicts of interest, typically shareholders who employ the services of a stock exchange or CSD, and shareholders engaged in similar infrastructure activity. Such a system reflects a distinction between different market actors, depending on the relative risk they pose as regards conflicts of interests and ultimately the market's confidence in their impartiality and independence.

120. Poland underlines that the Norwegian legislation secures the stated objective in a consistent and systematic manner since the exceptions are based on an *ex ante* risk assessment made by the law-making body. A system based on an absolute ceiling on ownership and voting will more effectively ensure the objectives of preserving the independence, neutrality and integrity of stock exchanges and CSDs than a system in line with Articles 10-10b MiFID as proposed by ESA.

121. Poland concludes that the contested rules are not in breach of Article 31 and Article 40 of the EEA Agreement.

The European Commission

122. The European Commission deems the key issue to be addressed to be the extent to which EU secondary law relevant under the EEA Agreement regulates the matters covered by the restrictive national measures in both the Stock Exchange Act and the Securities Depositories Act.

123. The restrictions in the Stock Exchange Act should be assessed under the MiFID in view of the comprehensive regulatory framework established under this Directive with respect to the rules on the conduct, business, internal organisation and control of stock exchanges as a regulated market. In addition, MiFID should be interpreted alongside one of its implementing measures, Commission Directive 2006/73/EC implementing Directive 2004/39/EC.[54]

124. The Commission shares ESA's view that Title III of MiFID includes a number of provisions aimed at ensuring the sound and prudent management and operation of regulated markets. Furthermore, MiFID is not limited in its aim to sound and prudential management. Its principal aim is to create an integrated financial market providing the same level of protection to investors across the EEA. Such an aim is achieved by putting in place a set of common regulatory requirements relating to investment firms and governing the functioning of regulated markets so as to prevent opacity or disruption on one market from

[54] Hereinafter the Implementing Directive.

undermining the efficient operation of the European financial system as a whole.[55]

125. The Commission continues with a description of provisions it deems relevant, i. a. the rules on qualified holdings in relation to investment firms, Articles 10-10b MiFID, and the provisions applying to persons exercising significant influence over the management of regulated markets, Article 36 MiFID ff. It remarks that it follows from Article 31 MiFID that Member States shall not impose any additional regulatory or administrative requirements, in respect of matters covered by the MiFID on authorised and supervised investment firms exercising their right to freely perform investment services and/or activities as well as ancillary services, provided that such services and activities are covered by their authorisation. In addition, it reiterates that a stock exchange falls within the definition of a "regulated market" under Article 4(1) point 14, read alongside Recitals (6), (49), (56) of MiFID.

126. A "regulated market", the Commission submits, is a multilateral system operated and/or managed by a market operator. The definition of a "market operator" is broader than that of an investment firm and may include any legal or natural persons but also investment firms. According to the definition in Article 4, point 13 MiFID, the market operator may be the regulated market itself. The Commission submits that the provisions of MiFID dealing with regulated markets, i.e. Articles 36(1), 37(2), 38(1), (2) and (3), are of particular importance in the case at hand.

127. Norway seems to infer from the structure and purpose of the provisions applying to persons exercising significant influence over the management of a regulated market, i.e. Article 38(3) MiFID, and the provisions applying to qualified holdings in relation to investment firms, i.e. Articles 10-10b MiFID, are similar to the contested national provisions insofar as both MiFID and the restrictive national provisions pursue the aim of sound and prudent management of regulated market.

128. The Commission agrees with Norway's assessment that MiFID includes rules on qualified holdings as regards investments firms and requirements for persons exercising significant influence over the management of a regulated market, i.e. Articles. 10 and 38 MiFID. It is of the opinion, however, that MiFID's rules on qualified holdings under Article 10, and on requirements relating to persons exercising significant influence over the management of a regulated market, in the case of Article 38 MiFID, should be the only provisions applied by EEA States in accordance with the objective of an integrated financial market. According to the Commission, MiFID does not appear to leave scope for different rules as such, but only as regards the assessment that EEA States are required to make within the parameters of clearly defined criteria under Articles 10-10b and 38 MiFID. The Commission therefore argues that the substantive

[55] Reference is made to Recital (71) of the MiFID.

rules for investment firms and regulated markets are laid down in the MiFID and not in any implementing legislation which, in any event, is limited to procedural rules, as is the case with the Implementing Directive.

129. The Commission concludes that neither Articles 10-10b MiFID nor Article 38 MiFID foresee a cap, but only a threshold in case of acquisitions or disposals that lead to a controlling interest. If such a threshold, which has to be distinguished from a cap, is reached, the requirements of Articles 10-10b MiFID have to be applied. The Commission further argues that there is also no requirement of approval with respect to the level of holding to be acquired.

130. The Commission refers to Recitals 7-9 of the Implementing Directive and submits that the grounds to oppose an acquisition or disposal are rather narrow, and the threshold triggering an examination is limited.

131. In the case of the MiFID provisions on regulated markets, the Commission adds that according to Article 36 MiFID, authorisation granted to a regulated market is reserved only to those complying with the provisions of that Title. However, these provisions do not include a commensurate provision with respect to a controlling interest. The Commission submits that it follows that the requirements laid down in this Title are the minimum criteria to be met, and not an invitation to set other criteria in a manner inconsistent with the objective and purpose of the Directive.

132. In reference to Norway's contention that EEA States are free to set substantive rules in relation to regulated markets but not for investment firms, the Commission observes that the substantive rules for both investment firms and regulated markets are laid down in MiFID. MiFID, the Commission continues, lays down a common set of regulatory requirements, and there is no cap in either Articles 10-10b MiFID or Article 38 MiFID.

133. As regards securities depositories, the Commission submits that there is at present no relevant EU law on securities depositories. CSDs ensure the initial recording as well as safekeeping and settlement of securities and have certain core functions. These core functions include the so-called "notary function" of recording securities in a book entry; the "settlement function" which is to operate a securities settlement system; and a central safekeeping function to maintain a top tier account in a book entry system.

134. The Commission supports the analysis that the national restrictive measures in the Securities Depositories Act should be examined in the context of Articles 31 and 40 EEA and in particular concerning the proportionality of the contested legislation.

135. The Commission concludes that national measures such as those laid down in the Stock Exchange Act which impose a cap on ownership of shares and on voting rights in regulated markets should be examined in the light of the relevant

provisions of MiFID, in particular Article 38. National measures, such as those laid down in the Securities Depositories Act, which impose caps on the ownership of shares and voting rights for securities depositories, save where expressly authorised by the competent authority, or where an exemption applies, infringe Articles 31 and 40 EEA if it can be established that such rules are not proportionate to the objective pursued of sound and prudential management.

Carl Baudenbacher
Judge-Rapporteur