DET KONGELIGE
FINANSDEPARTEMENT

Royal Ministry of Finance

EFTA Surveillance Authority
Rue Belliard 35
1040 Brussels, Belgium

Your ref	Our ref	Date
	20/3709 - 3	26.10.2020

Concerning the application of Directive 2009/138 (Solvency II)

Reference is made to the letter dated 25 August 2020 from the EFTA Surveillance Authority ("the Authority") regarding Directive 2009/138/EC.

1. INTRODUCTION

According to the letter, the Authority has received a complaint against Norway concerning the administrative practice relating to acquisitions of holdings in insurance companies. The complainant alleges that the relevant Norwegian authorities' approach entails a 25 per cent ownership restriction on non-financial owners in insurance companies. In order for the Authority to examine and assess the complaint, the Authority has asked the Norwegian Government to provide information and to comment on five questions concerning the administrative practice and the notification thresholds with regard to acquisitions of holdings.

To begin with, the Government refers to its previous letters regarding the dispersed ownership policy, which a financial institution is subject to at the stage for initial authorisation.[1] The Government will (as a main rule) not grant a licence to establish and operate as a financial institution unless the owner is a financial institution or if the ownership structure is dispersed. Based on this, no single shareholder is (as a main rule) allowed to own more than 20-25 per cent of the total shares in financial institutions.
It is the view of the Government that rules regarding subsequent acquisitions of qualifying holdings cannot be used as a basis to circumvent this requirement.[2] This is further addressed by the Government in section 4 below.

[1] Reference is inter alia made to the Governments response 11 June 2020 to the reasoned opinion from the Authority concerning the authorisation of financial undertakings (Case No 80996).
[2] Reference is made to the same letter, where the Government in Section 4.6.2 explains its understanding of secondary law, including the Qualifying Holdings Directive.

Postal address
P.O Box 8008 Dep
NO-0030 Oslo, Norway
postmottak@fin.dep.no

Office address
Akersg. 40

Telephone
+47 22 24 90 90
Org. no
972 417 807

Financial Markets Department
Telephone +47 22 24 45 21
Telefax +47 22 24 27 16

2. RELEVANT EEA LAW

Directive 2007/44/EC ("QHD") amended the sectoral Directives regulating inter alia credit institutions and insurance companies. QHD introduced rules and evaluation criteria for the prudential assessment of acquisitions and increase of holdings, including the thresholds for notifying a proposed acquisition. QHD did not regulate the stage of initial licensing of the institutions, only subsequent acquisitions.[3]

Since QHD entered into force, the legal acts regulating insurance companies and credit institutions have been replaced by Directive 2009/138/EC ("Solvency II") and Directive 2013/36/EU ("CRD IV"). Both Directives have been incorporated into the EEA Agreement, and accordingly, the currently applicable EEA law is Solvency II and CRD IV. The rules introduced by QHD are however maintained in both Directives.[4] References to the preamble of QHD are therefore included below by the Government to the extent that those are relevant for the interpretation of the provisions introduced by QHD.

3. THE COMPLAINT

The complainant alleges that the relevant Norwegian authorities' approach entails a 25 per cent ownership restriction on non-financial owners in insurance companies. According to the complainant, Norway's handling of an application to increase a holding in a Norwegian insurance company entails a breach of Article 57 and 59 of Solvency II.

4. THE VIEW OF THE GOVERNMENT

In Norway, the rules introduced by QHD are implemented in the Act of 10 April 2015 no 17 on Financial Undertakings and Financial Groups (The Financial Undertakings Act). The Act applies to financial undertakings, which include credit institutions and insurance companies, cf. Section 1-3. Rules regarding subsequent acquisitions of shares follows from chapter 6 of the Act.

The *first question* from the Authority concerns the notification thresholds used with regard to acquisitions of qualifying holdings:

1. What are the notification thresholds used by the NFSA with regard to acquisitions of qualifying holdings? Please explain and elaborate on whether they differ from the percentages stipulated in Section 6-1 of the Norwegian Act of 10 April 2015 No 17 on Financial Institutions and Financial Groups that implements, inter alia, Section 57(1) of Solvency II.

The notification thresholds follows from Section 6-1 (1) of the Financial Undertakings Act: [5]

> *"Any person intending to carry out an acquisition whereby that person will become the owner of a qualifying holding in a financial institution must have notified the Financial Supervisory Authority thereof in advance. The same applies to acquisitions whereby a*

---

[3] *Netfonds Holdings* paragraphs 101-102.

[4] The letter from the Authority primarily concerns Article 57 and 59 of the Solvency II Directive. However, in its fifth and last question, the Authority also asks whether the Government has the same or similar practice "[w]ith regard to notification thresholds and prudential assessments, as regards the acquisition of holdings of credit institutions".

[5] Unofficial translation of the Act can be found at: https://www.finanstilsynet.no/globalassets/laws-and-regulations/laws/financial-institutions-act.pdf

qualifying holding will reach or exceed 20 per cent, 30 per cent or 50 per cent, respectively, of the capital or voting rights of a financial institution, or whereby a holding confers controlling influence as referred to in section 1-3 of the Public Limited Companies Act. A qualifying holding is deemed to be a holding that represents 10 per cent or more of the capital or voting rights of a financial institution, or which otherwise makes it possible to exercise significant influence over the management of an institution and its business. In the calculation of a qualifying holding in an institution that has issued equity certificates, such holding is calculated as a proportion of the sum of ownerless capital and owner capital or of the voting rights at the general meeting. Acquisitions carried out by two or more acquirers in concert are deemed to be single acquisition."

As far as the Government understands, the complainant does not imply that the relevant provision breaches EEA law. However, the complainant argues that a condition that hinders an investor to further increase a holding to more than 25 per cent without obtaining approval from the authorities is in breach with Article 57 of Solvency II.

The Government does not agree with the complainant's point of view. The requirement of dispersed ownership is a requirement that lies on the institution itself and which the institution has been subject to since its initial authorisation. Against this backdrop, a natural or legal person who wishes to acquire or increase a qualifying holding whereby the shares would exceed 20-25 per cent, must apply in accordance with the conditions for the initial authorisation of the institution. In the view of the Government, this does not violate the Solvency II Directive as the EEA EFTA States – even after the introduction of QHD – maintained the right to law down conditions for the initial authorisation of insurance companies.

Since the *second, third and fourth question* concern the administrative practice, the Government will consider these questions together:

2. Does this mean that no individual assessment takes place, and that private operators are, as a main rule, not considered suitable to own more than 25 percent of the shares in insurance companies?
3. The complainant states that the practices referred to above are systematic and consistent. Please indicate at what point in time these practices were introduced.
4. [...] how and whether the Norwegian Government considers that the abovementioned administrative practices comply with the provisions in Article 57 and 59 of Solvency II.

Norway has opted for a particularly high level of protection in the financial sector. Stability and integrity of the financial system are essential parts of the Norwegian approach to the financial regulation. The dispersed ownership policy (which the administrative practice is a part of) has gradually been developed since amendments were made to the provisions in Norwegian legislation concerning limitations on ownership and thresholds for holdings in financial institutions. In the legislative history of the Financial Institutions Act, the reasoning behind the regulatory framework is explained, inter alia, in Proposition No 50 (2002-2003).

It is the view of the Government that the rules on subsequent acquisitions of qualifying holdings cannot be used to circumvent conditions set on the financial institution on the basis

of its initial business authorisation. This is supported by the recital 3 of QHD, which reads: "[t]his Directive prevents any circumvention of the initial conditions for authorisation by acquiring a qualifying holding in the target entity in which the acquisition is proposed." Moreover, it is also supported by recital 4 of the QHD.[6] As previously mentioned, QHD did not address the level of harmonisation governing the initial authorisation of insurance companies. Therefore, regulatory differences could emerge. In the view of the Government, recital 3 of QHD attends to this, by preventing circumvention of conditions attached by the national authorities.

According to Section 6-4 (1) of the Financial Undertakings Act the competent authority will grant an authorisation to acquire a qualifying holding to the extent the authority finds that the acquirer fulfils the criteria mentioned in Section 6-3. The requirement of dispersed ownership however prevents a single shareholder from obtaining more than 20-25 per cent of the total shares in a financial institution.[7]

Furthermore, it is the view of the Government that QHD does not prevent the competent authorities from imposing requirements on the ownership structure, as a condition for the approval of an acquisition of a qualifying holdings in order to prevent the undue influence of the proposed acquirer.

The Government has elaborated on its understanding of secondary law in its letter 11 June 2020 to the Authority. For the sake of completeness, the Government will recount its arguments:

> "
> […]
> Instead, the Authority argues i) that recital 4 is designed to cover other circumstances, notably prudential requirements imposed by the directives in the financial sector such as capital requirements, and ii) that the contested measure is based on the suitability assessment of the owners of financial undertakings, which has been fully harmonised at the EEA level in Directive 2006/48/EC, as amended by Directive 2007/44/EC, and Solvency II, and that the relevant provisions in those directives would become devoid of their purpose if the Government's view would prevail.
>
> First, with regard to recital 4 (and recital 3), the Government submits that there is no basis for the Authority's narrow understanding to the effect that only conditions imposed by the directive would be covered as initial conditions, as opposed to those conditions attached by the national authorities to the granting of initial business authorisation in accordance with the directive.
>
> Second, it is misleading to claim that the dispersed ownership rule is based on the suitability assessment of the owners of financial undertakings, and incorrect to claim that the assessment of the owners has been fully harmonised.

[6] "The prudential assessment of a proposed acquisition should not in any way suspend or supersede the requirements of on-going prudential supervision and other relevant provisions to which the target entity has been subject since its own initial authorisation".

[7] As mentioned above, financial institutions can, depending on the circumstances, be approved as owners up to 100 per cent of the shares of another financial institution. Due to the circumstances, there might also be made exemptions if the licensed activity in question is limited (niche-activities).

It is recalled that the dispersed ownership rule consists of two parts - the issue rule and the administrative practice - which are considered as a whole. The national legal basis for the issue rule is section 3-3 second paragraph first sentence of the Financial Undertakings Act, while the administrative practise whereby no single shareholder is, as a main rule, allowed to own more than 20-25 percent of the total shares in financial undertakings, is legally based on section 3-2 first paragraph second sentence, according to which conditions may be set for the authorisation.

The suitability assessment of the owners is moreover not fully harmonised with regard to the initial authorisation, cf. e.g. article 7 of directive 2000/12 from which it follows that the competent authorities shall refuse authorisation if, taking into account the need to ensure the sound and prudent management of a credit institution, they are not satisfied as to the suitability of the abovementioned shareholders or members. Nor are the suitability criteria fully harmonised in CRD IV, cf. below.

Third, the Authority's argument that the relevant provisions in the secondary law would become devoid of their purpose if the Government's view would prevail, is also incorrect.

It is recalled that the QHD was adopted on the backdrop of the Commission's finding that the level of cross-border acquisitions in the financial market was sub-optimal, and moreover that differing national rules applicable to acquisitions constitutes a major hinder to an increased cross-border acquisitions. On that basis, it follows from recital 2 of the QHD that "[a] clarification of the criteria and the process of prudential assessment is needed to provide the necessary legal certainty, clarity and predictability with regard to the assessment process, as well as to the result thereof."

Since the adoption of the QHD, the possibilities for national authorities to introduce new criteria or apply other criteria than those following from QHD to a proposed acquisition is limited. That in turn "increases legal certainty, clarity and predictability with regard to the assessment process", as mentioned in recital 2 of the QHD, and it may thus also contribute to an increase in cross-border acquisitions in the financial EEA market.

The Government is of the opinion that the purpose of achieving the necessary legal certainty, clarity and predictability in order to increase cross-border transactions in the financial market will also be achieved with the Government's view. Potential acquirers of a qualifying holding in a financial institution in another country will usually perform some sort of Due Diligence of the target entity, both economic and legal. It is not unusual to consider the target entity's authorisations, including the conditions attached to those authorisations. This does not contradict the QHD's purpose of achieving the necessary legal certainty, clarity and predictability with regard to subsequent acquisitions, as this is part of the normal transaction procedure.

At the same time, the fact that the conditions are attached to the initial authorisation also effectively limits the possibility for the EEA State to suddenly attach new conditions to a given proposed transaction, under the guise of seemingly legitimate aims. It prevents

the EEA States from acting arbitrarily in the case of a proposed cross-border acquisition.

While the Authority is concerned with an alleged circumvention by EEA States of the requirements of QHD to subsequent acquisitions through the use of stricter conditions for the initial authorisation, the QHD is more concerned with the circumvention by potential acquirers of qualifying holdings of the initial conditions to which the target entity has been subject to through the use of the harmonised rules on subsequent acquisitions. The latter is prevented, cf. recital 3.

The Authority's view would entail that the harmonised rules on the procedure for and prudential assessment of subsequent acquisition of qualifying holdings would always prevail over the initial conditions attached to the business authorisation in the event of conflict. If accepted, it would entail a de facto harmonising directive also with regard to the initial authorisation procedure and assessment, which is difficult to reconcile with the partly harmonising character of the QHD.

Further, reference is made to Case C-18/14, in which the CJEU had the opportunity to interpret directive 92/49/EEC, which regulated the sector of direct insurance other than life assurance, as amended by the QHD. CJEU was called upon to decide whether the introduction by the QHD of the limited set of prudential criteria for the assessment of acquisitions of qualifying holdings, prevented the competent authorities from imposing a condition for the approval of such acquisition that at least half of the members of the supervisory boards of the target undertakings, including the chairs, should be independent of the shareholders.

The CJEU nevertheless found that member states were entitled to attach conditions to the authorisation of such acquisitions, provided that they sought to satisfy the prudential assessment criteria, and did not go beyond what was necessary in doing so.[8] Moreover, the CJEU held that the directive did not prevent the specific conditions concerning the composition and structure of the supervisory boards of the target companies. These conditions could legitimately be imposed on the basis of Article 15(1)(2) of Directive 92/49, as amended, which, according to the CJEU, allowed for conditions "relating to the ability of the insurance undertaking ... to comply and continue to comply with the prudential requirements based inter alia on that directive..."[9]

Advocate General Mengozzi stated in his Opinion that Article 15(1)(d) of directive 92/49 "provides that the competent authorities are to ensure the 'suitability' of the undertaking to 'comply and continue to comply' with its prudential obligations", and moreover that that provision concerned the "protection … against the undue influence of the proposed acquirer." [10] Next, Advocate General Mengozzi held that the "condition aimed at ensuring the independence of the supervisory board … appears to me to be appropriate to preclude the undue influence of the proposed acquirer."[11] If, on the other hand, the proposed acquirer would have been able to appoint the majority of the members of the management board, "there would be nothing to prevent it taking

[8] Case C-18/14 paragraphs 50-55.
[9] Case C-18/14 paragraph 56, cf. paragraph 49.
[10] Paragraph 66 of his Opinion in case C-18/14.
[11] Paragraph 68 of his Opinion in case C-18/14.

decisions contrary to the 'sound and prudent management' required by Article 15b{1) of Directive 92/49, as amended ..." [12]

In the view of the Government, therefore, the QHD does not prevent the competent authorities from imposing requirements on the ownership structure, as a condition for the approval of acquisitions of qualifying holdings, in order to prevent the undue influence of the proposed acquirer, thereby contributing to the sound and prudent management of the financial institution."

In its *fifth and last question*, the Authority asks if the Government:

5. have the same or similar administrative practices to those described above in questions (1) and (2), with regard to notification thresholds and prudential assessments, as regards the acquisition of holdings of credit institutions.

The dispersed ownership policy applies to both banks and insurance companies. In that connection the Government would like to emphasise that when it comes to regulating banks and insurance companies, special concern arises concerning financial stability. The societal costs of financial market turbulence and crises can be large and persistent. In particular, the interaction between the banking sector and the rest of the economy may result in the build-up of financial imbalances, and trigger turmoil and deep economic setbacks. The importance of banks and insurance companies for the economy as a whole, and the consequences for the general economy as a whole upon failures of those institutions, warrants additional and more robust regulation than for ordinary businesses.[13]

Yours sincerely,

Geir Åvitsland
Director General

Jens Christian Werring-Westly
Assistant Director General

This document has been signed electronically and it is therefore not signed by hand.

[12] Paragraph 68 of his Opinion in case C-18/14.
[13] In *Netfonds Holdings* paragraph 132, the EFTA Court emphasised that soundly regulated and safe financial institutions are of decisive importance for financial stability in the EEA, mainly due to the particular function of banks and insurance companies for the economy as a whole.