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FINANSDEPARTEMENT

Royal Ministry of Finance

EFTA Surveillance Authority
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Your ref	Our ref	Date
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Response from Norway to the EFTA Surveillance Authority's reasoned opinion concerning the Financial Undertakings Act Section 4-1

1. INTRODUCTION

Reference is made to the EFTA Surveillance Authority's ("the Authority's") reasoned opinion of 8 July 2020 concerning the authorisation requirement to set up or acquire subsidiaries of Norwegian financial undertakings in other EEA States, pursuant to the Financial Undertakings Act ("the FUA"), Section 4-1 paragraph 1. The deadline to take measures in response to the reasoned opinion was extended to 8 December 2020, following two prolongations by the Authority. Reference is also made to previous correspondence in this case.

In this letter, the Norwegian Government ("the Government") will show how the relevant EEA legal framework supports the notion that competent authorities should have sufficient supervisory powers in cases where an entity under its supervision plans to establish a group with subsidiaries in other EEA States and provide its views on the current Norwegian authorisation scheme. In addition, the Government will present a proposal by a working group lead by the Norwegian Financial Supervisory Authority ("the FSA") to amend FUA Section 4-1, and provide a preliminary assessment of a notification requirement that may replace the current authorisation scheme.

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On the basis of a preliminary assessment of a notification requirement in cases of group establishments, the Government welcomes dialogue and an exchange of views with the Authority on a legislative proposal for amending Section 4-1 with the view to introduce a notification requirement rather than a prior authorisation scheme.

2. OVERVEW OF THE AUTHORITY'S MAIN CONCLUSIONS IN THE REASONED OPINION

In its reasoned opinion of 8 July 2020, the Authority argues that Norway, by requiring Norwegian financial institutions to obtain an authorisation from the Norwegian authorities before establishing or acquiring a financial undertaking as a subsidiary in another EEA State, is in breach of the authorisation procedures applicable to the establishment and acquisition of credit institutions, insurance undertakings, institutions for occupational retirement provision, payment institutions and electronic money institutions, as provided, correspondingly, in Directive 2013/36/EU[1], Directive 2009/138/EC[2], Directive 2003/41/EC[3], Directive 2007/64/EC[4] and Directive 2009/110/EC[5]. Furthermore, in relation to other financial institutions not subject to the secondary legislation referred to above, the Authority argues that the Norwegian authorisation requirement is in breach of Article 31 EEA.

The Authority further asserts that if it is established that the EEA secondary legislation invoked does not apply to the measure in question, the authorisation requirement constitutes a restriction on the freedom of establishment under Article 31 EEA. Moreover, the Authority argues that the authorisation requirement does not comply with the principle of legal certainty and, as such, cannot be considered as justified. In any case, the Authority holds that the authorisation requirement is not suitable with regard to the aims sought, and/or goes beyond what is necessary to ensure the aims indicated by the Norwegian Government.

3. INTRODUCTORY REMARKS

The Government recalls that the Authority's Internal Market Affairs Directorate, in its Pre-Article 31 letter of 22 June 2018, in Part 4.1 of the letter, made the following preliminary assessment on applicable EEA law in the current case:

> *"The issue at hand in this case, i.e. whether an EEA State may require a financial undertaking to obtain an authorisation from that State before establishing or acquiring a subsidiary in another EEA State, is however not explicitly regulated in Directives 2006/48 and 2009/138. The Directorate is thus of the view that the Norwegian measure subject to examination in this case falls outside the scope of the above-mentioned EEA secondary legislation applicable to credit institutions and insurance*

[1] Articles 8, 16, 22 and 24.
[2] Articles 14, 26, 57 and 60.
[3] Articles 9 and 20.
[4] Article 5.
[5] Article 3.

undertakings and must therefore be assessed under Article 31 EEA on the freedom of establishment.

With regard to occupational pension undertakings, Directive 2003/41/EC contains minimum harmonisation rules, whereas Directives 2007/64/EC and 2009/110/EC on payment institutions and e-money institutions provide for full harmonisation. With reference to the above-mentioned argumentation, the Directorate takes the view that the measure at issue falls outside the scope of those maximum harmonisation rules. Furthermore, although EEA States are free to enact stricter rules than those provided for in Directive 2003/41/EC, such rules must be compatible with the fundamental freedoms.

It follows from the aforementioned that the requirement of authorisation by the Norwegian competent authority for both the initial establishment of subsidiaries of financial undertakings in other EEA States as well as the subsequent acquisition of qualifying holdings of financial undertakings in other EEA States falls to be assessed under Article 31 EEA on the freedom of establishment."

The Government shares the Directorate's preliminary views in this case, namely that the Norwegian measure must be assessed under Article 31 EEA only. As will be discussed further below, the Government takes the view that the EEA secondary legislation invoked by the Authority in the letter of formal notice and reasoned opinion does not explicitly regulate the power of the competent authority to assess establishments or acquisitions *by* entities under its supervision, from a group supervisor perspective. Consequently, the Government argues that EEA States may have national provisions introducing appropriate supervisory powers in such situations, in order to ensure the protection of financial stability.

4. EEA SECONDARY LEGISLATION DOES NOT PREVENT NATIONAL REGULATION OF HOME STATE SUPERVISION OF THEIR ENTITIES IN CASE OF THEIR ESTABLISHMENT OF A GROUP STRUCTURE

4.1 Directive 2013/36/EU – CRD IV (credit institutions)

Directive 2013/36/EU (CRD VI) contains rules on *"the authorisation of the business, the acquisition of qualifying holdings, the exercise of the freedom of establishment and of the freedom to provide services, the powers of supervisory authorities of home and host Member States in this regard and the provisions governing the initial capital and the supervisory review of credit institutions and investment firms."*[6]

[6] Recital 2 in the Preamble to the CRD IV. See also Article 1 of the CRD IV.

In particular, the Directive defines the powers of home and host Member States, with emphasis on the principle of home State prudential supervision.[7] The "home Member State" is defined in the Regulation (EU) 575/2013 (CRR) as the state in which an institution has been granted authorisation.[8]

Article 4 of the CRD IV provides, in essence, that the competent authorities should have at their disposal the necessary tools to assess and ensure that credit institutions under their supervision comply with the CRD and the CRR. Paragraph 2 and 3 of Article 4 reads:

> *"2. Member States shall* ***ensure that the competent authorities monitor the activities of institutions****, and where applicable, of financial holding companies and mixed financial holding companies, so as* ***to assess compliance with the requirements of this Directive and Regulation*** *(EU) No 575/2013.*
>
> *3. Member States shall* ***ensure that appropriate measures are in place to enable the competent authorities to obtain the information needed to assess the compliance of institutions*** *and, where applicable, of financial holding companies and mixed financial holding companies,* ***with the requirements referred to in paragraph 2 and to investigate possible breaches of those requirements***" (emphasis added).

Recital 44 of the CRD IV also states that:

> *"Competent authorities should be entrusted with* ***ensuring*** *that institutions have a* ***good organisation*** *and* ***adequate own funds****, having regard to the* ***risks to which*** *the institutions* ***are or might be exposed****."* (emphasis added).

Article 18 of the CRD IV states that competent authorities "may only withdraw the authorisation granted to a credit institution" in specific situations. The provision does not exclude from its scope competent authorities who supervise credit institutions that are or might become parent undertakings in a financial group.

Recital 49 of the CRD IV provides similarly that:

> "*Member States should be able to refuse or withdraw a credit institution's authorisation in the case of certain group structures considered inappropriate for carrying out banking activities, because such structures cannot be supervised effectively. In that respect the competent authorities should have the necessary powers to ensure the sound and prudent management of credit institutions.* [...]"

Article 64 of the CRD IV further provides that:

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[7] See recital 15 in the Preamble to the CRD IV.
[8] See Article 4 (1) (43) of Regulation (EU) 575/2013.

> *"Competent authorities shall be given* ***all supervisory powers to intervene in the activity of institutions that are necessary*** *for the exercise of their function, including in particular the right to withdraw an authorisation in accordance with Article 18, the powers required in accordance with Article 102 and the powers set out in Articles 104 and 105."* (emphasis added).

The Government notes for the sake of clarity that Article 102, as referred to in Article 64 above, concerns "supervisory measures", and sets out that "[c]*ompetent authorities shall require an institution to take the necessary measures at an early stage to address relevant problems*" in terms of not meeting the requirements of the CRR or the CRD IV, or if the competent authorities have evidence that the institution "is likely to breach" the requirements of the CRR or CRD IV within the following 12 months. Article 104 specifies which powers, at a minimum, the competent authorities should have at their disposal to remedy failings on the part of the credit institution under their supervision. For instance, Article 104 paragraph 1 point (e) mentions that competent authorities should be able to "*to restrict or limit the business, operations or network institutions or to request the divestment of activities that pose excessive risks to the soundness of an institution*". For the sake of completeness, Article 105 (also referenced in Article 64) concern the power to impose specific liquidity requirements on supervised entities.

Read in context, the Government would argue that the abovementioned Articles and recitals clearly emphasise that the home State competent authority must carry out close and continuous supervision of its entities, especially in relation to activities by the entity that may change the prudential profile of the entity. The establishment of a group with subsidiaries should surely be considered such an activity necessitating a prudential assessment on the part of the competent authority, and, if necessary, prudential measures to remedy risks stemming from that activity.

The Government notes that both CRD IV and Solvency II allows supervisory authorities to withdraw previously granted authorisations, if certain conditions apply. For CRD IV, this follows from Article 18, and for Solvency II this is included in Article 144 (cited below in Part 4.2). The Government holds that the supervisory authorities may encounter cases of proposed establishments or acquisitions by entities under their supervision which could result in the conditions for withdrawal to be satisfied. In those cases, a less disruptive approach would be to attach requirements or restrictions on that entity, rather than require that entity to cease all operations.

The Government recalls that the Authority in its letter of formal notice and reasoned opinion has argued that the authorisation requirement in Section 4-1 constitutes a breach of four specific provisions of the CRD IV; Articles 8, 16, 22 and 24.

Article 8 provides that credit institutions must obtain an authorisation before commencing their activities. Article 16 states that competent authorities in a Member State shall consult the competent authorities of another Member State when the credit

institution, if granted authorisation pursuant to Article 8, would become a subsidiary of an entity authorised in that other Member State. According to paragraph 3 of Article 16, the competent authorities should "in particular" consult with each other when assessing the *suitability of the shareholders and the reputation and experience of members of the management body* involved in the management of another entity of the same group. They shall exchange any information regarding the suitability of shareholders and the reputation and experience of members of the management body which is of relevance for the granting of an authorisation and for the ongoing assessment of compliance with operating conditions.

The Government points out that the consultation mechanism in Article 16 concerns a harmonised process regarding the establishment of a credit institution *in* a Member State, in particular regarding the suitability assessment to be carried out by the subsidiary's home State competent authorities. The Government is of the opinion that such a consultation mechanism is useful, specifically as regards the suitability assessment. However, is must be underlined that Article 16 does not regulate the responsibilities or the powers of the competent authorities of the prospective parent entity for the credit institution under establishment in another EEA State, as regards the evolving situation of the parent entity. In the Government's view, there is nothing in Article 16 that should prevent the competent authorities of the prospective parent undertaking in that situation to have in place a procedure to ensure that all relevant aspects of the group establishment, from the parent undertaking perspective, is prudent and appropriate.

Article 22 concerns the process for proposed acquisitions in credit institutions, and paragraph 1 of that Article requires any natural or legal person to "notify the competent authorities of the credit institution *in which* they are seeking to acquire or increase a qualifying holding in writing in advance of the acquisition (emphasis added)." Article 22 sets out the procedure for how the home State competent authorities of the entity *in which there is an acquisition* should proceed, but it does not, in the Government's view, limit the supervisory powers of the home State competent authorities of the prospective acquirer. Therefore, the home State competent authority of the *acquired* entity must make assessments on, inter alia, the suitability of the proposed acquirer in accordance with the criteria set out in Article 23. At the same time, the home State competent authority of the *acquirer* should be able to assess the soundness of the proposed group structure as a whole, in accordance with their supervisory powers as set out above, as this assessment is not limited by Article 22. Because the assessments made by the two competent authorities are distinct from one another, they are not mutually exclusive – they can and should coexist in parallel.

Article 24 concerns the manner in which competent authorities should cooperate in relation to prospective acquisitions in a credit institution. Paragraph 2 of that Article indeed states that "[t]he competent authorities shall, without undue delay, provide each other with any information which is essential or relevant for the assessment". However,

again this cooperation mechanism concerns exchange of information related to the assessment of the acquisition *in* a credit institution, not the assessment of the acquisition *by* a credit institution. The existence of the cooperation mechanism should not in and of itself imply that the supervisory powers of the competent authorities for the acquiring institution have been limited or restricted.

In conclusion, the Government's preliminary assessment is that the CRD IV strongly emphasises the supervisory powers of the home State competent authority, and that the consultation mechanisms in place for initial authorisations or acquisitions do not appear to limit these supervisory powers. Provisions in national law that enables the home State authority of a prospective parent entity to assess the soundness of a group constellation prior to its establishment, appears appropriate in light of Articles 4 and 64 CRD IV.

4.2 Directive 2009/138/EC – Solvency II (insurance and reinsurance undertakings)

Article 14 of Directive 2009/138/EC (Solvency II) provides that insurance or reinsurance covered by Solvency II is subject to prior authorisation by the supervisory authorities in the home Member state of the undertaking. Conditions for authorisation follow from Article 18. The authorisation constitutes a single licence within the EEA area, pursuant to conditions set out in Article 15. Article 26 provides for at prior consultation mechanism between Member state authorities in relation to authorisation processes. It follows from paragraph 3 of Article 26 that the competent authorities

> "*shall in particular consult each other when assessing the suitability of the shareholders and the fit and proper requirements of all persons who effectively run the undertaking or have other key functions involved in the management of another entity of the same group*."

As regards supervision of insurance and reinsurance undertakings, Article 27 provides that

> *"Member States shall ensure that the supervisory authorities are provided with the necessary means, and have the relevant expertise, capacity, and mandate to achieve the main objective of super-vision, namely the protection of policy holders and beneficiaries."*

Furthermore, Article 29 sets out the general principles of supervision and states in paragraph 1 that:

> *"Supervision shall be based on* ***a prospective and risk-based approach****. It shall include the* ***verification on a continuous basis of the proper operation*** *of the insurance or reinsurance business and of the* ***compliance with supervisory provisions*** *by insurance and reinsurance undertakings*" (emphasis added).

Article 30 provide that:

> *"The financial supervision of insurance and reinsurance undertakings, including that of the business they pursue either through branches or under the freedom to provide services, shall be the sole responsibility of the home Member State."*

Article 34 provides rules on "general supervisory powers", and states that:

> *1. Member States shall ensure that the supervisory authorities have the power to take preventive and corrective measures to ensure that insurance and reinsurance undertakings comply with the laws, regulations and administrative provisions with which they have to comply in each Member State.*
>
> *2. The supervisory authorities shall have the power to take any necessary measures, including where appropriate, those of an administrative or financial nature, with regard to insurance or reinsurance undertakings, and the members of their administra-tive, management or supervisory body.*
>
> *3. Member States shall ensure that supervisory authorities have the power to require all information necessary to conduct supervision in accordance with Article 35.*[9]

Article 57 sets out the rules on acquisitions on qualifying holdings, which largely corresponds with Article 22 CRD IV. Furthermore, Article 60 provides for a consultation mechanism between supervisory authorities, similar to Article 24 CRD IV.

As is the case with CRD IV, Solvency II sets out that the home Member State supervisory authorities must have the powers necessary to ensure that insurance and reinsurance undertakings under their supervision are operated prudently. The system of home state supervision supports the notion that home state supervisors should be able to assess the impact a potential group establishment may have on insurance or reinsurance undertakings under their supervision, from the perspective of that entity. The harmonised process in Solvency II for the assessments of establishments of or acquisitions in an insurance or reinsurance undertaking constitutes a distinctly different form of assessment, and does not limit the ability of home State competent authorities to carry out appropriate supervision of their entities in case of group structure establishments.

As mentioned in Part 4.1 regarding the CRD IV, both CRD IV and Solvency II allows supervisory authorities to withdraw previously granted authorisations, if certain conditions apply. For Solvency II, this is included in Article 144. Again, in situations where the conditions for withdrawal are satisfied due to inappropriate group establishments, a

[9] Article 35 concerns «information to be provided for supervisory purposes».

less disruptive approach for the competent authorities is to attach requirements or restrictions on that entity, rather than require that entity to cease all operations.

Accordingly, the Government cannot see that the provisions of Solvency II is of hindrance to national regulation that enables the home State competent authorities to carry out appropriate supervision of their entities in case of group establishments.

4.3 Directive 2003/41/EC (Institution for occupational retirement provision)

Article 9 of directive 2003/41/EC sets out the conditions for operations, and includes provisions aiming to secure the prudent management and operation of an institution run pension scheme. Paragraph 3 of Article 9 states that:

> *"A Member State may make the conditions of operation of an institution located in its territory subject to other requirements, with a view to ensuring that the interests of members and beneficiaries are adequately protected."*

Article 14 paragraph 2 provides that:

> *"[t]he competent authorities shall have the power to take any measures including, where appropriate, those of an administrative or financial nature, either with regard to any institution located in their territories or against the persons running the institution, which are appropriate and necessary to prevent or remedy any irregularities prejudicial to the interests of the members and beneficiaries."*

Paragraph 4 of Article 14 further sets out that:

> *"The competent authorities may prohibit or restrict the activities of an institution located in their territories in particular if:*
>
> *(a) the institution fails to protect adequately the interests of members and beneficiaries;*
> *(b) the institution no longer fulfils the conditions of operation;*
> *(c) the institution fails seriously in its obligations under the rules to which it is subject;*
> *(d) in the case of cross-border activity, the institution does not respect the requirements of social and labour law of the host Member State relevant to the field of occupational pensions."*

Article 20, which the Authority has cited as a relevant provision in this case, deals with the process for cross-border activities of pension scheme operators (termed "sponsoring" in the directive). The definition of "sponsoring undertaking" in Article 4 point (c) is:

> *"any undertaking or other body, regardless of whether it includes or consists of one or more legal or natural persons, which acts as an employer or in a self-employed capacity or any combination thereof and which pays contributions into an institution for occupational retirement provision;"*

It is not clear to the Government that Article 20 deals with supervisory powers in relation to the establishments of financial groups. Rather, it appears that the Article only deals with cross-border provisions of pension scheme operations, and is as such not relevant to the issue involving the establishment of financial groups.

Directive 2003/41 contains minimum harmonisation rules, and does not provide for any comprehensive set of rules covering all situations involving pension scheme operators. However, it does underline that competent authorities in the home State must have the powers appropriate and necessary to prevent or remedy any irregularities prejudicial to the interests of the members and beneficiaries. In the Government's opinion, the Directive does not prevent competent authorities, in accordance with the principle of home State supervision, to require supervised entities to have in place notification measures to ensure assessments of the appropriateness of group establishments involving entities operating pension schemes that are subject to supervision in that State.

4.4 Directive 2007/64/EC (Payment institutions) and Directive 2009/110/ (e-money institutions)

Directive 2007/64/EC (PSD) applies to payment services provided within the EEA States. In the EU, Directive 2007/64/EC has been replaced by Directive (EU) 2015/2366 (PSD II). That Directive has not yet been incorporated in the EEA Agreement.

Activity as a payment institution requires the authorisation from the competent authorities of the home Member State of that institution, according to Article 5. The Directive contains several prudential requirements for payment institutions, such as initial capital (Article 6) and own funds requirements (Articles 7 and 8), and requirements to safeguard the funds of clients of the service provider (Article 9).

Article 10 of the Directive states the procedure for granting authorisations when the requirements under Article 5 are satisfied. Article 10 does not provide for a consultation mechanism between competent authorities.

Article 12 provides that competent authorities may withdraw authorisations in certain specified situations, including if the payment institution "*would constitute a threat to the stability of the payment system by continuing its payments services business*", or if the institution "*falls within one of the other cases where national law provides for withdrawal of an authorisation*".

Article 14 states that:

> *"Where any change affects the accuracy of information and evidence provided in accordance with Article 5, the payment institution shall without undue delay inform the competent authorities of its home Member State accordingly."*

One of the types of information required under Article 5 is, pursuant to paragraph (g), the following:

> "*a description of the applicant's structural organisation, including, where applicable, a description of the intended use of agents and branches and a description of outsourcing arrangements, and of its participation in a national or international payment system*;"

This provision shows that the Directive directly envisages that the home State supervisor is entitled to know about structural changes in the supervised entity.

Regarding the supervision of payment institutions, Article 20 paragraph 2 states that:

> *"Member States shall ensure that the competent authorities designated under paragraph 1 possess all the powers necessary for the performance of their duties."*

Article 21 states that the competent authorities, in order to check compliance with the requirements for authorisation,

> *"shall be entitled to take the following steps, in particular:*
>
> *(a) to require the payment institution to provide any information needed to monitor compliance;*
> *(b) to carry out on-site inspections at the payment institution, at any agent or branch providing payment services under the responsibility of the payment institution, or at any entity to which activities are outsourced;*
> *(c) to issue recommendations, guidelines and, if applicable, binding administrative provisions; and*
> *(d) to suspend or withdraw authorisation in cases referred to in Article 12."*

Taken into consideration together, these abovementioned provisions strongly suggest that it is appropriate for the competent authorities to require to be informed of the setting up of subsidiaries and potential structural changes to a group, and that such information should allow the competent authorities to assess the prudential effect those changes may have. There is nothing in Directive 2007/64/EC that indicate that such a notification requirement would be contrary to the principle of prudential supervision.

According to Directive 2009/110/EC (the E-money Directive), all of the abovementioned Articles of Directive 2007/64/EC apply mutatis mutandis to e-money institutions. In addition, Paragraph 3 of Article 3 of the E-money Directive provides rules on the process for assessments of acquisitions of qualifying holdings in an e-money institution. Similar to Article 10 of Directive 2007/64/EC, Article 3 of the E-money Directive does not include a consultation mechanism.

4.5 Conclusions

In the discussions above, the Government has illustrated that the EEA secondary legislation requires that the competent authority of the home State of a financial institution must have at its disposal the tools necessary to perform adequate entity supervision, in order to ensure sound and prudent operations in such entities, which in turn protects the financial stability in that State.

Second, it follows from the review of secondary legislation that the procedure for assessments of establishments or acquisitions by supervised entities is not specifically regulated in the Directives the Authority relies on in its reasoned opinion. In contrast, the procedure from the other viewpoint – the establishment of or an acquisition in an entity – is harmonised in these Directives.

The Government therefore holds that the Directives do not provide for exhaustive harmonisation of all situations involving the establishment of a financial group, and there is consequently room for home State supervision of a financial institution prior to or at the point of establishment of a group structure, from the group perspective, provided that the national regulation complies with the fundamental freedoms of the EEA Agreement.

The Government cannot see that the Directives discussed above suspends or annuls those supervisory powers in cases where a supervised entity is in the process of establishing a financial group. The ordinary supervisory powers of the Directives should therefore apply, and be equally available to home State supervisors of prospective parent undertakings in the case of potential group establishments.

5. THE FINANCIAL UNDERTAKINGS ACT SECTION 4-1 IS NOT IN BREACH OF EEA ARTICLE 31

Article 31 EEA reads as follows:

> *"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."*

However, according to settled case-law, a restriction on the four freedoms (i.a. the freedom of establishment), may be objectively justified if it pursues overriding reasons relating to the general interest and is suitable for attaining the objectives pursued. Furthermore, the restriction must not go beyond what is necessary for attaining that objective.

First, as regards the *legitimate aim* of the measure, the prior authorisation measure aims at safeguarding financial stability, by way of ensuring the ability of the competent authorities to perform prudential supervision of its entities, also in the case of group

establishments. The EFTA Court has acknowledged financial stability, in particular the protection of the functioning and good reputation of the financial services sector and the promotion of the well-functioning and efficiency of the financial markets, as a legitimate aim.[10] In paragraph 88 of its letter of formal notice, the Authority acknowledged "that the objective of the Norwegian measure may in principle reflect overriding reasons in the general interest, but it must still […] be suitable and necessary". Consequently, the Authority and the Government agrees that the authorisation measure has a legitimate aim, and thus is a restriction that may be justified by overriding reasons in the public interest relating to financial stability.

Second, as regards *suitability*, the Government maintains that the authorisation requirement is suitable to obtain the legitimate aim of financial stability because it gives the group supervisor the means to ensure that financial groups with subsidiaries in other EEA States are organised in such a way that it does not undermine the effective supervision of, or the soundness, solidity or stability of the group as a whole. It is important for the financial stability that the group supervisor is able to assess the prudential soundness of its supervised entities in evolving circumstances, as is the case when a financial undertaking establishes or acquires subsidiaries (either domestically or in another EEA State). The authorisation scheme in Section 4-1, paragraph 1 of the FUA ensures that potentially unsuitable group structures are assessed prior to their establishment, and thus clearly contributes to the Norwegian Government's legitimate goal of safeguarding financial stability in Norway.

Concerning the *necessity* of the measure, the Government would like to highlight that especially in the context of acquisitions of qualifying holdings that result in the acquired undertaking becoming a subsidiary, the competent authorities supervising the acquiring and the acquired entity, respectively, may have different perspectives on the acquisition and consider very different aspects of that proposed action. In cases where the prospective subsidiary is in a financially weak position and in urgent need of capital injections, the competent authority of the subsidiary will consider the parent undertaking's ability to support the subsidiary, and thus with a view to safeguard the financial stability in their market. On the other hand, the competent authority of the prospective parent undertaking must assess whether the expansion necessitates prudential measures towards the undertaking, or if the acquisition could pose a threat to financial stability in their market. Accordingly, it is necessary to supplement the supervision carried out by the competent authority of the subsidiary in order to ensure that the financial stability of the home market of the prospective parent undertaking is properly assessed.

As the Government has previously stated in its letter of 21 September 2018, the consultation mechanism of for instance the CRD IV alone does not provide for a sufficient degree of prudential supervision at the level of the parent undertaking, because the

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[10] See Case E-8/16 *Netfonds Holding,* paragraph 113.

consultation mechanism concerns assessments to be made from the perspective of the subsidiary. Thus, the authorisation requirement is a vital supplement to the consultation mechanism, in order to safeguard the financial stability of the home market of the prospective parent undertaking.

In its letter of formal notice[11] and, by way of reference[12], its reasoned opinion, the Authority puts great emphasis on the fact that the EEA secondary legislation for many financial undertakings provide rules on solvency and minimum capital requirements. To be clear, Norway supports the existence of minimum capital requirements in the relevant secondary legislation that aims to ensure that financial undertakings in the EEA are solvent and capitalised at the same minimum levels. The Government recalls that Regulation (EU) 575/2013 (CRR) provides uniform prudential requirements for credit institutions within the EEA, and that the CRR entered into force in Norway on 31 December 2019. What is central to the Government is that these rules in and of itself are not enough to secure financial stability in relation to group establishments – the existence of the minimum capital requirements does not ensure compliance with them by credit institutions. Therefore, effective and continuous supervision is crucial, in accordance with the main principle of home State supervision, and the group supervisor must also have the tools necessary to efficiently supervise and make assessments of whether financial groups actually comply with the prudential requirements, already from the point of inception of that group. Furthermore, minimum capital requirements are only one of many elements essential to the sound and prudent operation of a financial group. For instance, the group must have robust systems in place to ensure compliance with anti-money laundering and terrorist financing rules. Close monitoring of financial groups from the point of establishment of that group is essential to ensure a sufficiently broad assessment and potential identification of risk factors that must be mitigated by supervisory guidance and action. To sum up, the secondary legislation on solvency and minimum capital requirements is not an adequate substitute to the authorisation requirement.

In paragraph 103 of the letter of formal notice, the Authority states that "Norway also cannot impose its level of protection on other EEA States". The Government understands this to mean that high level of protection of financial stability chosen by Norway can only be maintained for entities under the supervision of the Norwegian competent authorities. The Government underlines that the freedom for EEA States to choose its own level of protection of legitimate aims should implicitly imply that the potentially *lower* protection levels of other states should not affect Norway. This is why, for instance, the consultation mechanism of the CRD IV is not considered as a sufficient in the view of the Government, because that assessment is ultimately not made with Norwegian financial stability in mind. It should also be noted that in the example referenced by the Authority in paragraph 103 of the letter of formal notice, the FSA was in a position to impose several conditions on the parent (acquiring) company at the point of and prior to the completion

[11] See Parts 5.2 and 5.3.3.3. of the letter of formal notice.
[12] See Part 4 of the reasoned opinion.

of the acquisition precisely because of the prior authorisation scheme. This ensured that the acquisition could proceed in an orderly manner, where the acquirer already had complete clarity on what the acquisition demanded in terms of additional prudential safeguards.

The Authority furthermore presents the possibility of the competent authorities to withdraw an entity's banking authorisation as an alternative to the prior authorisation scheme, as a solution to the establishment of inappropriate group structures. Because of the severe effects such a measure could have on the banking group and its customers, the Government views the withdrawal of a banking license as a measure that should not be used lightly. Withdrawing the bank authorisation of an entity that, save for an inappropriate and unsuitable acquisition, would not have to cease its operations, seems disproportionate. In the Government's view, imposing conditions on or opposing an unsuitable acquisition would be less intrusive and more proportional than withdrawing the banking authorisation altogether.

In conclusion, the Government maintains that the prior authorisation scheme in Section 4-1 of the FUA is suitable and necessary to achieve the high level of protection of financial stability chosen by Norway and thus is in line with Article 31 EEA.

6. PROPOSAL FOR AMENDMENTS TO THE FINANCIAL UNDERTAKINGS ACT SECTION 4-1

6.1 Overview of the working group's proposal for a notification procedure

As mentioned in its letter of 2 March 2020 to the Authority, the Ministry of Finance has asked a working group lead by the FSA to assess whether it is possible to achieve the same high level of protection of financial stability regarding financial groups, through other less restrictive measures than the current authorisation scheme. The working group's main task was to suggest regulatory changes in Norwegian legislation in order to implement the EU "banking package" (CRR2/CRD5/BRRD2).

The working group delivered its report on 9 October 2020. In its report, the working group proposes to amend Section 4-1 of the FUA, and replace the current authorisation scheme with a duty to notify the FSA if a financial undertaking intends to set up or acquire subsidiaries in another EEA state. In addition, the working group proposes that the FSA should be able to object to or set conditions for the proposed group establishment, if the FSA considers that the establishment or acquisition would expose the entity or the group for particular risks, especially in light of the financial situation of the entity or group and the effect on financial stability, or if the establishment or acquisition would impede the supervision of the group. The proposal further specifies that the FSA should receive that notification at least 60 days before changes in a group structure is implemented. The working group proposes that the notification scheme should apply to all Norwegian financial undertakings. However, for the sake of completeness, the Government notes that the working group's proposal does not include specific proposals on all parts of the

design of such a system, e.g. how the FSA should consent or object to a proposed group establishment.

The working group's report and a working translation of the proposed amendment to Section 4-1 of the FUA is enclosed.

6.2 Norway's preliminary assessment of a notification requirement

As set out above, the working group has proposed that the authorisation scheme in Section 4-1 Paragraph 1 of the FUA should be amended to include a notification requirement and a possibility for the FSA to set conditions or object to group establishments. Following the completion of the public consultation process, the Government will assess the proposal, and conclude on whether such an amendment should be proposed to Parliament.

In light of the Government's current exchange of views with the Authority on whether the existing authorisation requirement complies with EEA primary and secondary law, the Government considers it useful to set out its preliminary views on the compatibility of a notification requirement with relevant EEA law. To be clear, the preliminary assessment of a notification requirement set out below is not strictly tied to the specific proposal of the working group, but concerns more generally a notification requirement in the case of group establishments by an entity under the supervision of a competent authority, including the possibility of interventions by the FSA. As already mentioned, the Government would like to discuss the design of a possible a notification requirement with the Authority following the completion of the public consultation process on 6 January 2021.

As a starting point, the Government notes that it follows from our assessment in Part 4 of this letter that the secondary legislation referred to in the reasoned opinion allows for national regulation of home State supervision of their entities in case of their establishment of a group structure, provided that the national regulation complies with the fundamental freedoms. Based on the reasons set out below, the Government will furthermore argue that a notification requirement does not constitute an undue restriction on the freedom of establishment in Article 31 EEA.

First, a notification requirement such as the one proposed by the working group aims at safeguarding *financial stability*, by way of ensuring the ability of the competent authorities to perform prudential supervision of its entities, also in evolving prudential circumstances such as is the case with the establishment of a group. The EFTA Court has acknowledged financial stability, in particular the protection of the functioning and good reputation of the financial services sector and the promotion of the well-functioning and efficiency of the financial markets, as a legitimate aim.[13] Consequently, the Government presumes that there is no disagreement between the Authority and the

[13] See Case E-8/16 *Netfonds Holding,* paragraph 113.

Government on the issue of whether a notification requirement has a legitimate aim, and thus is a restriction that may be justified by overriding reasons in the public interest relating to financial stability.

Secondly, a notification measure would seem to be *suitable* to attain the goal of financial stability. Notification of group establishments involving a Norwegian financial undertaking as a parent undertaking ensures that the competent authorities in those cases are enabled to perform its supervisory tasks as envisaged in the Directives discussed above in Part 4, in a timely and efficient manner. If the proposed group establishment should expose the entity or the group under supervision to any particular risks, the notification could enable the competent authority to make assessments regarding that risk and propose measures to reduce or eliminate that risk. In the absence of such a notification requirement, the Norwegian competent authorities could be placed in a position where a group establishment involving a parent entity under its supervision is able, for instance, to make the financial services sector in Norway less functioning due to its inappropriate conduct or because there are severe failings in a subsidiary.

In terms of *necessity*, the Government notes that early information on all group establishments involving a parent undertaking under supervision of Norwegian competent authorities is crucial to enable the competent authorities to assess whether that evolving circumstances of that entity gives rise to any need for supervisory measures to be taken. Only if Norwegian supervisory authorities are informed of group establishments as they are happening, will they be able to assess whether further information is needed or if the use of supervisory powers are warranted in order to ensure the continued confidence placed by the public on financial undertakings under Norwegian supervision. It is vital that the FSA are able to assess the potential need for risk-reducing measures following such changes in corporate structures of financial undertakings under their supervision as soon as possible, since issues related to the prudential management of a group may materialise relatively quickly if not properly addressed at the outset. Should such problems and the consequences thereof actually materialise, that situation may in itself severely damage the trust in, functioning and good reputation of the financial services sector in Norway. Thus, it is our preliminary assessment that it seems necessary to have some sort of notification requirement both in order to safeguard the financial stability of the market, but also the trust in the ability of Norwegian supervisory authorities to fulfil this task.

In addition, a sufficient degree of information concerning proposed group establishments by an entity under supervision enables the competent authorities to make an assessment, and inform the entity under supervision that the proposed action could result in a decision to withdraw the authorisation, unless the entity takes measures to remedy the circumstances that gave rise to the competent authorities' conclusion that a withdrawal of authorisation was warranted. It would not seem to be in line with the legitimate goal to have a high level of protection of financial stability if competent authorities of an entity under supervision were to passively sit by while that entity takes actions that in turn could

cause an otherwise functioning entity to lose its authorisation, with the disruption to the market that such a withdrawal could also cause.

On this basis, the Government takes the preliminary view that a form of notification requirement does not seem to constitute an undue restriction on the freedom of establishment in Article 31 EEA.

6.3 Timeline for national legislative action regarding the working group's report

The working group's report on implementation of the banking package, including the proposal to amend the Financial Undertakings Act Section 4-1 has been published, and is subject to public consultation until 6 January 2021.[14] Following the conclusion of the public consultation procedure, the Ministry of Finance plans to draft a legislative proposal to be submitted to the Norwegian Parliament by Easter of 2021.

Among several important measures concerning capital requirements and crisis management preparedness[15], the banking package also includes Covid-19-related amendments[16] to the EU capital requirements framework[17]. The Norwegian Government anticipates that Parliament could be able to vote on the legislative proposal in time for the banking package amendments to enter into force already on 1 July 2021. Because the proposal for amending the Financial Undertakings Act Section 4-1 is included in the same legislative package, any amendments to the authorisation scheme in Section 4-1 will follow the same efficient timeline for implementation.

7. FINAL REMARKS

The Government argues that the relevant EEA legal framework, as discussed above, supports the notion that competent authorities should have sufficient supervisory powers in cases where an entity under its supervision plans to establish a group with subsidiaries in other EEA States. Consequently, the Government takes the preliminary view that a notification requirement related to group establishments by Norwegian financial undertakings would be appropriate.

As mentioned, the Ministry of Finance plans to draft a legislative proposal to be submitted to the Norwegian Parliament by Easter of 2021, on the basis of the working group's report on implementation of the banking package, including a proposal to amend the FUA Section 4-1. The Government views the proposed amendment to Section 4-1 in the

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[14] See the public consultation here: https://www.regjeringen.no/no/dokumenter/horing-gjennomforing-av-bankpakken-mv/id2771027/ (in Norwegian only).

[15] Which follows from the amendments to the BRRD in Directive 2019/879/EU (BRRD»).

[16] See Regulation (EU) 2020/873 of the European Parliament and of the Council of 24 June 2020 amending Regulations (EU) No 575/2013 and (EU) 2019/876 as regards certain adjustments in response to the COVID-19 pandemic.

[17] Regulation (EU) 575/2013 («CRR»), as amended by Regulation (EU) 2019/876; Directive 2013/36/EU («CRDIV»), as amended by Directive 2019/879/EU. In addition, the banking package includes significant amendments to Directive 2014/59/EU («BRRD»), as amended by Directive 2019/879.

working group's report as a starting point for the assessment of how a possible notification requirement could be crafted, also in light of any comments received during the current public consultation process.

In the context of the draft legislative process that will commence in the Ministry of Finance following the completion of the public consultation on 6 January 2021, the Norwegian authorities welcome further dialogue with the Authority regarding the details of a notification procedure in cases of group establishments involving subsidiaries in other EEA States. The Government would like to discuss the specifics of possible amendments to Section 4-1 of the FUA with the Authority *ultimo* January 2021, after the Government has considered comments received in the public consultation on the proposed amendments to Section 4-1 of the FUA.

Yours sincerely,

Geir Åvitsland
Director General

Jens Christian Werring-Westly
Acting Deputy Director General

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

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