Translation of a Request for an Advisory Opinion from
Oslo tingrett
Registered at the EFTA Court under Case E-8/16-1
27 June 2016
Original language: Norwegian

OSLO TINGRETT

EFTA Court
1 rue de Fort Thüngen
L-1499 Luxembourg
Luxembourg

Doc 47

Your reference	Our reference	Date
	15-072169T VI-OTIR/01	21 June 2016

Netfonds Holding ASA and Others – the Norwegian Government represented by the Ministry of Finance

REQUEST FOR AN ADVISORY OPINION

1. INTRODUCTION

1. Oslo District Court (*Oslo tingrett*) hereby requests an advisory opinion in Case 15-072169TVI- OTIR/01 between the plaintiffs Netfonds Holding ASA ('Netfonds Holding'), Netfonds Bank AS ('Netfonds Bank') and Netfonds Livsforsikring AS ('Netfonds Livsforsikring'), and the Norwegian Government represented by the Ministry of Finance (the 'State') as the defendant.

2. The national case concerns the plaintiffs' claim for compensation on the grounds of an alleged breach by the Government of Article 31 EEA on the freedom of establishment, Article 36 EEA on the rules on services, and Article 40 EEA on the right to free movement of capital. The basis for the claim is that the plaintiffs have been granted only a limited licence as a commercial bank and a life insurance company; see Section 8 first paragraph of the Commercial Banks Act and Section 2-1 first paragraph of the Insurance Activity Act. The plaintiffs claim compensation for the loss of income they have allegedly suffered by not being able to engage in ordinary banking and insurance activities from the time that a general licence should have been granted.

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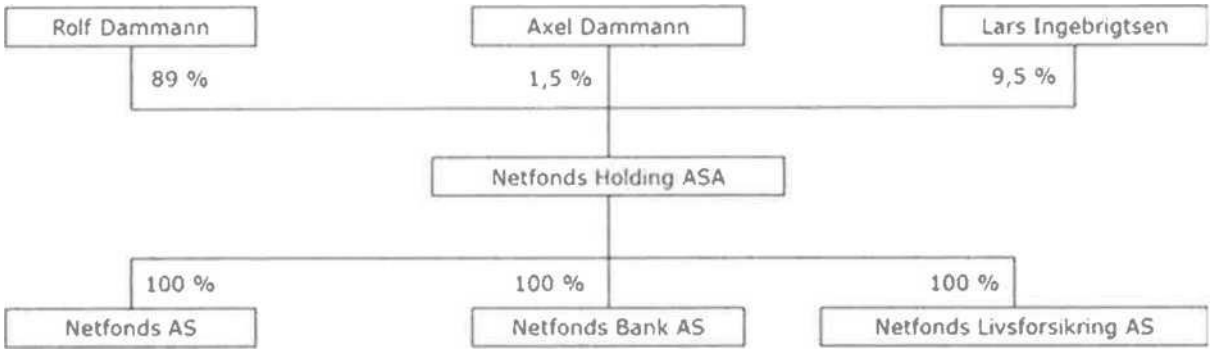
3. The reference to the EFTA Court relates to the plaintiffs' plea in law that the failure to grant them a full banking and insurance licence constitutes a breach of EEA law. The limitations imposed on the authorisations in question may also be referred to as licence conditions. The essential and recurring conditions that are claimed to be invalid are the authorities' requirement that, in order to be granted a full banking and insurance licence, three quarters or more of the share capital must be dispersed through a capital increase or sale effected without any preferential or pre-emption right for shareholders or others, or that, as an alternative to a dispersion sale, only a limited licence for banking and insurance activity (referred to as niche activity) is issued. The question is whether the limitations/conditions constitute restrictions pursuant to Article 31 EEA on the freedom of establishment, Article 36 EEA on the rules on services, or Article 40 EEA on the right to free movement of capital, and, if they constitute restrictions, whether they pursue legitimate objectives, are suitable for attaining these objectives and are necessary for achieving the relevant level of protection.

2. THE FACTUAL BACKGROUND TO THE CASE

2.1 Brief description of the Netfonds group

4. Net Fonds ASA was formed on 1 June 1996. The original activities consisted of offering securities trading on the internet. Prior to that date, the company held a licence as an investment firm pursuant to the Securities Trading Act of 1997 (now repealed and replaced by the Securities Trading Act of 2007).

5. As described below, the group has subsequently extended its activities to include limited activity as a commercial bank and a life insurance company. This has in turn led to a reorganising of the company structure. The current structure can be illustrated as follows:



6. Netfonds Holding is owned by Rolf Dammann (89 per cent) and his father Axel Dammann (1.5 per cent). The remaining 9.5 per cent of the shares are owned by Lars Ingebrigtsen, the Netfonds group's IT manager.

7. Netfonds Holding is licensed as parent company of a financial group pursuant to Section 2a-2(d) of the Financial Institutions Act. As shown in the above illustration, the company has three subsidiaries: Netfonds AS ('Netfonds'), Netfonds Bank and Netfonds Livsforsikring (collectively referred to as 'the Netfonds companies' or 'the Netfonds group').

8. Netfonds Bank provides common services, including IT solutions, to the Netfonds group. The company holds a limited licence as a commercial bank pursuant to Section 8 of the Commercial Banks Act. Netfonds Bank also holds a licence as an investment firm under the Securities Trading Act for providing investment services pursuant to Section 2-1(1) points

1 to 6 of the same Act, and certain related services. The case does not concern the investment firm licence.

9. Netfonds Livsforsikring is a life insurance company pursuant to Section 2-1 of the Insurance Activity Act, and it holds a limited licence for offering individual unit-linked endowment insurance and is authorised to take over individual annuity and pension insurance contracts on certain specified terms.

2.2 The processing of the licence application from the Netfonds companies

10. In a letter of 7 February 2005, Net Fonds ASA (which has subsequently changed its name to Netfonds Bank) applied for a licence to establish a financial group and a commercial bank. The company intended to offer customers of its security trading business the opportunity to make deposits, and to otherwise continue its existing activity related to securities trading on the internet. These deposits could in turn be used to extend credit to those of the company's customers who wished to finance purchases of financial instruments through the company. The application for a licence was thus made with a view to accepting interest-bearing deposits from customers of the investment firm.

11. Net Fonds ASA was of the opinion that the activities in question did not require a banking licence, but nonetheless chose to apply for a licence because the Financial Supervisory Authority of Norway ('the FSA') was of a different opinion. In a letter of 21 February 2005, the FSA pointed out that the company would not be able to accept deposits from its customers until the processing of the application for a banking licence had been completed.

12. In a letter of 15 March 2005 to Net Fonds ASA, the FSA raised the issue of the relationship with the rules on control of ownership in the Financial Institutions Act and the rules on issue without preferential rights in Section 4 of the Commercial Banks Act. Concerning the rules on control of ownership, the following was stated in the letter:

> 'With reference to the considerations underlying the former ownership limitation rules, which are upheld in the current ownership control rules and in administrative practice related to the ownership control rules, the FSA finds that it cannot recommend to the Ministry of Finance that authorisation be granted for the establishment of a financial group as requested in the application. [...]'

13. Concerning Section 4 first paragraph second sentence of the Commercial Banks Act, the following is stated in the letter:

> 'Even though it follows from Section 4 third paragraph (of the Commercial Banks Act) that the first paragraph does not impose any limitations on a commercial bank's right to be part of a financial group, the requirement for public subscription cannot be avoided by choosing a solution whereby the bank is owned by a holding company. [...] The above means that any recommendation from the FSA to the Ministry of Finance concerning consent to commence banking activities etc., would include a requirement for dispersion of three quarters or more of the share capital, either through a capital increase or through a sale effected without any preferential or pre-emption right for shareholders or others.'

14. Furthermore, the FSA noted that 'if the application is not amended with respect to the size of holdings in the holding company, the FSA will forward the application to the Ministry with a recommendation for rejection.' It was also added 'that the maximum holding that can

be expected to be approved is 25 per cent, provided that ownership is otherwise sufficiently dispersed [...].'

15. In a letter of 22 March 2005, Net Fonds ASA contested the legal grounds for the FSA's position in its letter of 15 March 2005.

16. The FSA's recommendation concerning the application from Net Fonds ASA was made in a letter of 24 May 2005 to the Ministry of Finance, where it was recommended that Net Fonds ASA be granted a limited commercial banking licence pursuant to Section 8 first paragraph of the Commercial Banks Act. However, the FSA was of the opinion that the licence could not be applied until the 'promoters of Net Fonds Holding ASA have reduced their aggregate holdings to below one quarter; see Section 4 of the Commercial Banks Act'. The FSA referred to 'the wish to prevent private financier activities and the risk that too close ties between the financial institutions and their owners would contribute to weakening trust in the financial services.'

17. In a letter of 6 June 2005, the Netfonds group contested that there was a basis for making the granting of a banking licence conditional on a dispersion sale.

18. On 5 August 2005, the Ministry of Finance granted Net Fond ASA's application to conduct limited banking activity pursuant to Section 8 first paragraph of the Commercial Banks Act.

19. One of the conditions for the authorisation was that the company could not accept deposits other than free funds from the client accounts belonging to customers of the securities trading business (licence condition no 7). This was in accordance with the application. No requirement was laid down for a dispersion sale. It is stated in the decision that when considering whether to make a dispersion sale in Net Fonds Holding ASA a condition, substantial weight was given to Net Fonds ASA's authorisation being for limited banking activity only, both with respect to receiving deposits and extending credit. On that basis, the Ministry of Finance found that Net Fonds ASA's activities did not have the same public interest implications in relation to, for example, business and credit policy as more traditional banking activities might have. The reason for granting authorisation while accepting the ownership structure in question was thus that the activity was regarded as a niche activity. A number of other conditions were imposed, including that the bank could not accept deposits from or extend credit to Netfonds Holding, its shareholders or enterprises in which the latter had a material influence, or any closely associated customers of these parties. Thus, the Ministry of Finance did not make dispersion sale a condition as recommended by the FSA in its letters of 15 March and 24 May 2005. It is made clear in the letter, however, that 'a dispersion sale would have been made a condition had the bank's activities been different, having regard to the information provided in the application and to the imposed conditions.'

20. The Netfonds group was established on 13 March 2006. Net Fonds ASA changed its name to Netfonds Bank ASA (which on 13 October 2010 became Netfonds Bank AS). Netfonds Holding was the parent company, with Netfonds Bank as an operational subsidiary with limited investment firm and commercial banking licences as described above.

21. In a letter of 27 March 2006, Netfonds Bank notified the FSA of cross-border activity. The company stated that it wished to offer its services in Sweden and Germany. In a letter of 23 August 2007, Netfonds Bank also gave notification of cross-border activity with Denmark, Finland, Iceland, Estonia, Lithuania and Latvia. The company received authorisation to

conduct such cross-border activity, limited however to the activities for which the company held a licence in Norway; see letters of 28 March 2006 and 3 September 2007.

22. On 6 December 2006, an application was submitted for the establishment of a life insurance company (Netfonds Livsforsikring) pursuant to Section 2-1 of the Insurance Activity Act and for the establishment of a new subsidiary of Netfonds Holding, see Section 2a-3 of the Financial Institutions Act. The application was exclusively for a licence to offer unit-linked endowment insurance.

23. The FSA submitted its recommendation to the Ministry of Finance on 26 March 2007. In brief, it was recommended that authorisation for the establishment of Netfonds Livsforsikring with the range of services mentioned in the application be made conditional on a dispersion sale. The FSA saw it as 'doubtful that the group, given the intended range of activities, can be seen to be engaged in niche activities.' The FSA had 'therefore concluded that there were no special considerations as mentioned in Section 15-8 third paragraph of the Insurance Activity Act and (...) that there were therefore no grounds for exemption pursuant to Section 2-1 first paragraph last sentence of the Insurance Activity Act '(requirement for dispersion sale).

24. The application was granted by the Ministry of Finance's decision of 17 July 2007. It was made clear that the authorisation was limited to offering unit-linked endowment insurance, which was what had been applied for. Hence the authorisation included neither group insurance nor annuity or pension insurance schemes. As in the case of the licence granted to Netfonds Bank, conditions were imposed, including that the company could not enter into insurance contracts with or extend credit to Netfonds Holding, its owners or enterprises in which the latter had a material influence, or any of their closely associated parties.

Unlike the FSA, the Ministry did not find grounds for imposing a requirement for a dispersion sale. As stated in the decision, in assessing whether the ownership structure was acceptable or whether to make a dispersion sale a condition, weight was given to the fact that the life insurance activity for which authorisation was granted would be more limited than more traditional life insurance activities and that dispersed ownership considerations were therefore of less relevance. The reason for granting authorisation while accepting the ownership structure in question was thus that the activity was regarded as a niche activity.

25. In a letter of 14 August 2007, Netfonds Livsforsikring requested that the Ministry of Finance amend its decision of 17 July 2007, so that the company would also be able to offer individual annuity and pension insurance contracts. By a decision of 28 May 2008, authorisation was granted to extend the scope of the licence; such, however, that the licence was limited to apply to 'individual annuity and pension insurance contracts taken over from other insurance companies in connection with the taking over of portfolios of individual unit-linked endowment insurance contracts.' It was made clear in the decision that 'Netfonds Livsforsikring AS is not authorised to market or offer individual pension insurance contracts or individual annuities.'

26. Netfonds Livsforsikring was then formed on 3 February 2009.

27. One and a half years later, on 27 May 2010, Netfonds Livsforsikring submitted an application to have the scope of the company's licence extended, this time in order to be able to offer mandatory company pension schemes under the Act of 21 December 2005 No 124 relating to mandatory occupational pensions (the Mandatory Occupational Pensions Act).

28. On 8 July 2010, the FSA submitted its recommendation to the Ministry of Finance, recommending that the Ministry reject the application for an extension of the scope of the licence. In the overall assessment, 'weight was given to the parent company's ownership structure and the change in the company's risk exposure that would follow if the company were to offer group pension insurance.'

29. The application was rejected by the Ministry of Finance by a decision of 16 December 2010. The Ministry was of the opinion that such an extension of the scope of the company's activities could not be authorised given its current ownership structure. Among other things, the following was stated in the decision:

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

30. For authorisation to be granted for an extension of the scope of Netfonds Livsforsikring's licence, a dispersion sale would therefore have to be carried out at the parent company level.

31. The decision was appealed in a letter of 10 January 2011 from Netfonds Livsforsikring. As grounds for the appeal, reference was in particular made to Directive 2007/44/EC. Concerning the Directive's area of application, it was stated that 'Directive 2007/44/EC does not concern ... directly those EEA Directives that apply to the granting of licences and assessment of owners in that connection.' According to the company, the Directive nonetheless had a bearing on the granting of the licence, including on the assessment of owners in that connection, and the company stated the following in that regard:

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

32. On 19 February 2011, Netfonds Bank applied for an amendment of condition no 7 in its commercial banking licence of 5 August 2005. The reason was that the company wished to accept deposits from customers other than its existing customers and not just free client funds from customers of its securities trading business.

33. The application was rejected by the Ministry of Finance by a decision of 20 December 2011, on the grounds that, if it was granted, the plaintiffs would not be engaged in a niche activity, but, on the contrary, in traditional banking, and that the ownership structure at the time was not compatible with such activity (Rolf Dammann and Axel Dammann had holdings of 80 and 15 per cent, respectively). The following was stated about the background for the decision:

> 'When considering whether to make a dispersion sale in Net Fonds Holding ASA a condition, the Ministry gave substantial weight to the (then) Net Fonds ASA having been authorised to engage in limited banking activity only, both with respect to accepting deposits and extending credit. [...]'
>
> Like the FSA, the Ministry of Finance is of the opinion that the right to accept deposits must be said to be the core of banking business, and that accepting deposits from the general public cannot be seen as a niche activity of the kind that Netfonds Bank AS has been engaged in, but rather as traditional banking activity.'

34. The decision was appealed in a letter of 6 January 2012. Netfonds Bank once again argued that, following the implementation of Directive 2007/44/EC, it was no longer legal to make the granting of an activity licence conditional on meeting a maximum permitted ownership requirement.

35. On 4 May 2012, the King in Council rejected both the appeal from Netfonds Bank of 6 January 2012 and the appeal from Netfonds Livsforsikring of 10 January 2011. The grounds were that, in particular considerations related to preventing private financier activities, high concentration of power and confusion of creditors and owners' interests, warranted that, given such a concentrated ownership structure, authorisation for such an expansion of the business should not be granted. According to the Ministry of Finance, any removal of licence condition no 7 would then be conditional on a dispersion sale.

36. The Royal Decree concerning Netfonds Livsforsikring states *inter alia* the following concerning the grounds for the rejection:

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

> The ownership control rules address fundamental considerations related to preventing private financier activity in financial institutions, as explained in chapter 3 above. The dispersed ownership requirement for being granted a licence may only be deviated from by way of exception, and only for undertakings engaged in pure niche activities without the same public interest implications in relation to business and credit policy as more traditional banking and insurance activities. [...]
>
> The Ministry remains of the opinion that there are no grounds for exemption from the dispersed ownership requirement laid down in Section 2-1 first paragraph of the Insurance Activity Act to enable Netfonds Livsforsikring to expand its activities in accordance with the application while maintaining its current ownership structure. If one nonetheless were to conclude that the dispersed ownership requirement should be amended, any such amendment would have to take place by an act of law and not by diluting the requirements through a practice of granting exemptions.'

37. The Royal Decree concerning Netfonds Bank states *inter alia* the following concerning the grounds for the rejection:

> 'The right to accept deposits must be said to be the core of banking business. As a point of departure, accepting deposits from the general public cannot be regarded as a niche activity, but rather as a traditional banking activity. Even if Netfonds Bank AS does not intend to engage in ordinary banking business, for example ordinary lending activity, any deposits activity whereby the bank can accept deposits from the general public, will mean that the bank can no longer be deemed to be engaged in a niche activity [...]
>
> The Ministry remains of the opinion that there are no grounds for granting an exemption from the dispersed ownership requirement in Section 4 of the Commercial Banks Act. If one nonetheless were to conclude that the dispersed ownership requirement should be amended, any such amendment would have to take place by an act of law and not by diluting the requirements through a practice of granting exemptions.'

38. On 19 July 2012, Netfonds Bank applied for an extension of the scope of its licence to cover pure savings accounts and occupational pensions pursuant to the Act of 21 November 2000 No 81 on defined contribution occupational pensions (the Defined Contribution Occupational Pension Act). Subsequently, in a letter of 31 October 2012, Netfonds Livsforsikring applied for authorisation to market and offer individual pension insurance.

39. The Ministry of Finance rejected Netfonds Bank and Netfonds Livsforsikring's applications by decisions of 17 April 2013 and 28 January 2014, respectively. In both cases, the Ministry of Finance held that such extensions of the scope would imply that the company could no longer be regarded as engaging in a niche activity, which, in the Ministry of Finance's opinion, would require a dispersion sale.

40. The decision of 28 January 2014 was appealed in a letter of 18 February 2014. It was *inter alia* stated that the Ministry 'by free choice and at its own discretion [may] grant a licence when warranted by special considerations.'

41. In a letter of 16 December 2014 (cf. a letter of 22 September 2014), Netfonds Holding applied for authorisation to take over all the shares in the Lithuanian bank Bankas Finasta

AB, and to change the structure of the Netfonds group. The application was rejected by the Ministry of Finance by a decision of 24 March 2015, on the grounds that the acquisition of a bank with full banking licences would imply that the business would no longer be a niche-like activity:

> 'The Ministry considers that the acquisition of a bank with full banking licences (without any limitation on activity) would imply that the group's business can no longer be regarded as a niche-like activity. Authorisation for the acquisition that has been applied for would therefore be contrary to the premises on which the licences to Netfonds Livsforsikring AS and Netfonds Bank AS are based, even though the application to acquire the bank was made by the holding company. [...]
>
> The Ministry does not agree that a rejection of the application for authorisation to change the group structure would be in contravention of EEA law. The Ministry's rejection of the application is based on considerations related to the licensed activities in Norway and not considerations related to the Latvian [*sic*] bank.'

42. On 24 February 2015, Netfonds Livsforsikring again applied for an extension of the scope of the licence in order to be able to offer several specified services, alternatively such services as Nordnet Livsforsikring, one of the company's competitors, was authorised to provide on 20 May 2014. The case is now being considered by the Ministry.

3. RELEVANT NORWEGIAN LEGISLATION

3.1 The requirement for activity licences and the right to attach conditions to licences

43. Regulation of the Norwegian financial markets is based on a fundamental public licensing requirement for certain forms of activity. The licence system is a tool intended to ensure that the fundamental organisational and structural conditions in the sector are satisfactory and adequate. The reasoning behind the system is that these institutions play a very important role in society in that they offer financing, transact payments and redistribute risk. Banks and insurance companies receive and manage a large part of the public's savings, and reinvestment of these funds often forms the financial basis for other business activity.

44. Section 1 of the Act of 10 April 2015 No 17 on financial undertakings and financial groups (the Financial Undertakings Act) includes a separate provision on the purpose of the Act, which reads as follows:

> 'The purpose of the act is to contribute to financial stability, including to ensure that financial undertakings function in an appropriate and satisfactory manner. Financial stability means that the financial system is sufficiently robust to receive and pay out deposits and other repayable funds from the general public, channel funds, transact payments and redistribute risk in a satisfactory manner.'

45. The purpose stated in the Financial Undertakings Act is almost identical to the purpose provided for in Section 1-1 of the Financial Institutions Act.

46. The licence requirements for the financial sector currently follow from Chapter 2 of the Financial Undertakings Act. The requirement for a licence follows from Section 2-1, which reads as follows: 'Financing activity may only be conducted by banks, credit undertakings and financial undertakings that are authorised pursuant to this act to conduct such activity within the realm ...'

47. Moreover, Section 3-2 (1) of the Financial Undertakings Act provides that 'conditions may be set for the authorisation, approval or consent, including that the activity must be conducted in a certain manner or within a certain framework, or other conditions in accordance with the purpose of the legislation on financial undertakings.' It follows from Section 3-2(2) of the Financial Undertakings Act that authorisation shall be refused if statutory requirements are not met, or if the activity will come into conflict with the law or public order. It also follows that, when considering this, substantial weight shall be given to whether the undertaking's capital situation and financial solidity are satisfactory, including whether the initial capital is reasonable in relation to the planned activity, and whether the organisational and operating plans are satisfactory in relation to the activity that will be conducted. Substantial weight shall also be given to any unfortunate effects that such authorisation may have for the financial undertaking's customers or groups of customers.

48. The Financial Undertakings Act only entered into force on 1 January 2016. Before that date, commercial banks were regulated by the Act of 24 May 1961 No 2 on commercial banks (the Commercial Banks Act), while insurance companies were regulated by the Act of 10 June 1988 No 39 on insurance activity (the Insurance Activity Act of 1988) and subsequently by the Act of 10 June 2005 No 44 on insurance activity (the Insurance Activity Act of 2005). In the following, reference will be made to these acts as they applied at the time of the decisions, unless otherwise indicated.

49. Authorisation in order to conduct commercial banking activity and insurance activity was also required under Section 8 first paragraph of the Commercial Banks Act of 1961 and Section 2-1 first paragraph of the Insurance Activity Act of 1988, respectively. In both cases, conditions could be attached to the licence, and this was expressly stated in Section 2-1 first paragraph of the Insurance Activity Act. Section 8 first paragraph first sentence of the Commercial Banks Act provided as follows: 'A commercial bank may not be registered until the King has authorised it to carry on banking activity'. Section 2-1 first paragraph of the Insurance Activity Act provided as follows: 'An insurance company may not carry on activity without authorisation from the King, who may attach conditions to the licence.' The possibility for the licensing authorities to attach conditions to an authorisation is otherwise in accordance with a general principle of administrative law ("vilkårslæren"). For financial undertakings in general, this also followed from Section 3-3 first paragraph of the Financial Institutions Act.

50. It follows from Section 3-2 second paragraph of the Financial Undertakings Act that authorisation 'shall be refused' if statutory requirements are not met, or if the activity will come into conflict with the law or public order. Similarly, it followed from Section 3-3 third paragraph of the Financial Institutions Act, and the corresponding provisions in Section 8a second paragraph of the Commercial Banks Act and Section 2-1 second paragraph (cf. Section 7-3 third paragraph and Section 8-2 third paragraph) of the Insurance Activity Act, that authorisation shall be denied if the statutory conditions are not met.

51. Two of these sets of rules are relevant in the present case, as they have been cited as grounds for the licensing decisions. What are known as the 'issue rules' in Section 4 of the Commercial Banks Act and Section 2-1 of the Insurance Activity Act are discussed in more detail in section 3.2 below, while what are known as the 'ownership control rules' in Section 2-2 ff. of the Financial Institutions Act are discussed in section 3.3 below.

52. In the following, references will primarily be to these acts as they applied at the time of the decisions, unless otherwise indicated. Concerning the applicable rules of law in the

present case, however, the Financial Undertakings Act introduced no material amendments, and reference will therefore sometimes be made to that act.

3.2 The issue rules

53. Before the court, the plaintiffs have invoked administrative practice as grounds for their claim. This practice is discussed below in section 5.1 on the plaintiffs' pleadings, paragraphs 72 and 73. The defendant does not agree with the plaintiffs' understanding of administrative practice. Question 3 to the EFTA Court is based on the plaintiffs' description of this practice.

54. The issue rules in Section 4 first and third paragraphs of the Commercial Banks Act read as follows: 'Authorisation under Section 8 of this Act shall be refused unless more than three quarters of the commercial bank's share capital is subscribed in connection with a capital increase effected without any preferential rights for shareholders or others. [...] The first and second paragraphs imply no restriction of the right of a commercial bank to form part of a financial group pursuant to the Financial Institutions Act section 2a-6.'

55. The issue rules for insurance companies laid down in Section 2-1 first paragraph last sentence of the Insurance Activities Act provided as follows: 'A licence shall be refused unless more than three quarters of the insurance company's share capital is subscribed in connection with a capital increase without any preferential rights for shareholders or others.' However, under Section 15-8 of the Act, exemptions from the provisions of the Act may generally be made in 'special cases'.

56. The issue rules constitute an instrument for attaining the legislator's objective of dispersed ownership. In that sense, there is an indirect relationship between the issue rules and the ownership control rules, which are discussed in the following paragraphs.

3.3 Ownership limitation rules/(ownership control rules)

57. The historical background to the rules on dispersed/(control of) ownership is that, until 2004, (as a rule) nobody could own more than ten per cent of the share capital of a financial institution – referred to as the 'ownership limitation rule'; see Section 2-2 of the Financial Institutions Act. This applied equally to ownership by financial institutions and private individuals. The reasoning behind the limitation on ownership of financial institutions by other financial institutions was the risk that interwoven ownership could weaken competition. For owners other than financial institutions, the reasoning has related in particular to considerations concerning dispersion of power and the wish to prevent individuals and individual enterprises from controlling financial institutions and thereby the possibility of unfortunate granting of credit etc. to their business associates. For private shareholders, there has been a wish to prevent private financier activity because the financial institutions have a function in society. As an example, reference is made to Section 4.2 of Proposition No 50 (2002-2003) to the Odelsting, where the following is stated under point 4.2.4:

> 'At the outset, the Ministry would like to stress the important function that financial institutions have for the general economy. The special legal requirements that apply to financial institutions in all countries that have a well-developed economy, must be seen in light of this. Such regulation is intended partly to safeguard the institutions' relationship with their customers and partly to safeguard the role of these institutions generally in economic life. One special aspect of the role of these institutions in the general economy is their function as

managers of savings and other capital assets. Both banks and insurance companies manage large assets, and therefore have a big influence on the rest of the economy. Such influence is exercised through the institutions' "ownership power" as well as through their granting of credit.

…

In addition, the Ministry believes that the regulations should ensure the financial institutions' independence in relation to other business and industry and in relation to owners that could conceivably use their influence for their own benefit or for the benefit of their business or private associates by granting favourable loans, guarantees etc. Having control of, for example, a large financial group confers great influence in relation to other business and industry. One should therefore continue to seek to prevent non-financial owners from gaining a disproportionately big influence on other business and industry through holding significant ownership interests in Norwegian financial institutions, as this will entail a risk of actions being motivated by extraneous considerations. One must also continue to seek to prevent non-financial owners from using their position for the benefit of themselves or their business or private associates (for example, cheap credit, including credit that would otherwise not have been extended on account of the risk involved being too high). Such conflicts of interest are also an incentive to imposing particularly stringent conditions on customers who, for example, compete with the business of the influential owner in question. If dealings are not based on purely commercial considerations, this can be to the detriment of other customers of the financial institution in question and the profitability of the financial institution, and hence also to the detriment of the other owners. In the worst case scenario, the financial institutions will have to be bailed out by others. Moreover, the general economy may suffer a loss if the funds are not channelled to the most well-founded projects.'

58. In its reasoned opinion of 30 October 2001, the EFTA Surveillance Authority ('ESA') concluded that the ownership limitation rules constituted an unlawful restriction on the free movement of capital provided for in Article 40 EEA. The Norwegian authorities maintained that the ownership limitation rule was in accordance with EEA law, but nonetheless chose to replace the ownership limitation rule by an ownership control rule, namely a requirement that the licensing authority must be 'convinced that owners of qualifying holdings' (holdings of 10 per cent or more of the capital) were 'suitable to own such holdings and to exercise such influence in the undertaking as is conferred by the holdings'; see Section 8a fourth paragraph first and second sentence of the Commercial Banks Act, and Section 2-1 first paragraph second and third sentence of the Insurance Activity Act. This provision has also been retained in Section 3-3 first paragraph of the Financial Undertakings Act. ESA did not follow up its reasoned opinion after the legislation was amended in 2003.

59. It may also be mentioned that the legal framework was not amended correspondingly for other institutions, for example stock exchanges and other [financial] infrastructure institutions trading in securities. Here, Norway retained a dual-track system with a general limitation on ownership of 20 per cent combined with an exemption rule whereby certain owners (owners of similar infrastructure undertakings) could own more, based on a discretionary assessment. This was at issue before the EFTA Court in Case E-9/11, in which the Court concluded that the 20 per cent limitation on ownership was in contravention of EEA law, and that the introduction of a more discretion-based system for control of ownership

would be at least as effective an instrument for attaining the level of protection

60. Even though a discretion-based system for control of ownership of financial institutions was adopted, it was evident from the preparatory works that the objectives of the legislation remained unchanged, and that the finance industry's independence of individuals and other industries would still be a crucial consideration; see Proposition No 50 to the Odelsting (2002-2003) Section 5.3 on page 24:

> 'The need to ensure an independent finance industry will in any case be among the most important considerations that the authorities must be able to emphasise in a discretion-based system when assessing whether the acquisition can take place. This warrants exercising discretionary judgment in such a way that big owners that are not financial institutions will generally not be accepted. It cannot be excluded however, that in some cases situations may arise in which parties other than financial institutions should be permitted to acquire control of a financial institution, for example in connection with the establishment of small niche enterprises in the field of banking and insurance.'

3.4 Suitability assessment

61. As mentioned above, in addition to carrying out a suitability assessment of the owners in connection with the granting of licences, there are also rules providing for a suitability assessment in connection with authorisations to subsequently acquire holdings in financial institutions that have already been granted an activity licence. The Financial Institutions Act contained more detailed rules for subsequent acquisitions of holdings.

62. Section 2-2 second paragraph of the Financial Institutions Act stated that an acquisition whereby the acquirer would become the owner of a qualifying holding in a financial institution could only be carried out under authorisation granted under Sections 2-4 and 2-5. According to Section 2-4 first paragraph, the Ministry should 'with due regard for the need to assure proper and adequate management of the financial institution and its activities and in consideration of the level of influence the acquirer through the ownership will be able to exercise in the institution after the acquisition, undertake an assessment of the acquirer's suitability as owner of his overall holding after the acquisition, and of whether the acquisition of the holding is financially adequate in relation to the institution's present and future activities.' The second paragraph letters 'a' to 'g' specify the criteria to be considered in particular. The list was not exhaustive, and other considerations could also be relevant.

63. According to Section 2-5 first paragraph, the authorisation shall be granted to the extent the Ministry finds that the acquirer fulfils the relevant criteria for the suitability assessment. The authorisation shall state the size of the holding that may be acquired under the authorisation. According to the second paragraph, the Ministry shall not authorise the acquisition if it finds that there are reasonable grounds for doubting the acquirer's suitability to be the owner of the overall holding after the acquisition, or that there are grounds for doubting that the financial situation will be adequate in relation to the institution's current and future activities. Section 2-5 third paragraph states that conditions may be attached to the authorisation.

64. If follows from the above that a suitability assessment shall be carried out both in relation to the activity licence rules and in relation to the rules on subsequent acquisition of holdings. Up until 2009, these suitability assessments were identical, and Section 8a last paragraph of the Commercial Banks Act and Section 2-1 second and third sentence of the Insurance Activity Act made reference to the rules of the Financial Institutions Act.

65. By the Act of 19 June 2009 No 59 on amendment of the Financial Institutions Act, the Stock Exchange Act, the Securities Register Act, the Securities Trading Act etc. (ownership of financial institutions and infrastructure undertakings in the securities area) the reference to the Financial Institutions Act's rules on a suitability assessment in connection with acquisitions were removed from Section 8 last paragraph of the Commercial Banks Act and Section 2-1 first paragraph of the Insurance Activity Act.

66. The amendment was a consequence of the implementation of Directive 2007/44/EC in Norwegian law. Previously there had been no distinction between suitability assessments in connection with the granting of licences and the acquisition of holdings, respectively. Because Directive 2007/44/EC did not change the rules on ownership control in connection with the granting of licences, only in connection with subsequent acquisitions, the Norwegian authorities chose to introduce a dual-track system for control of ownership, distinguishing between control of ownership in connection with the granting of licences and control of ownership in connection with any subsequent acquisition of holdings in financial institutions that already hold such an activity licence.

67. Control of ownership in connection with any subsequent acquisition of holdings is regulated by Section 6-3 of the Financial Undertakings Act (previously Section 2-4 of the Financial Institutions Act), which reads as follows:

> 'In assessing whether authorisation shall be granted under Section 6-1 second paragraph, the Ministry shall, with due regard for the need to assure proper and adequate management of the financial undertaking and its activities and in consideration of the level of influence the acquirer as owner will be able to exercise in the institution after the acquisition, undertake an assessment of the acquirer's suitability as owner of his overall holding after the acquisition, and of whether the acquisition of the holding is financially adequate.'
>
> (2) In the assessment made under the first paragraph, the Ministry shall in particular take into consideration:
>
> > (a) the acquirer's general reputation, professional competence, experience and previous conduct in business relationships;
> >
> > (b) the general reputation, professional competence, experience and previous conduct in business relationships of persons who after the acquisition will form part of the board of directors or management of the institution's activities;
> >
> > (c) whether the acquirer will be able to use the influence conferred by the holding, to obtain advantages for his own or associated activity, or indirectly exert influence on other business activity, and whether the acquisition could result in impairment of the institution's independence ;
> >
> > (d) whether the acquirer's financial situation and available resources are adequate in light of the types of activity in which the institution is engaged or in which it must be assumed that the institution will become engaged after the acquisition, and whether the acquirer and its activities are subject to financial supervision;
> >
> > (e) whether the financial institution is and will continue to be in a position to meet the solvency and prudential requirements and other supervisory

requirements that follow from the financial legislation;

(f) whether the ownership structure of the institution after the acquisition or particular ties between the acquirer and a third party will impede effective supervision of the institution, in particular whether the group of which the institution will form part after the acquisition is organised in a manner that does not impede proper supervision, including effective exchange of information and allocation of supervisory tasks between the supervisory authorities involved;

(g) whether there are grounds for assuming that money laundering or financing of terrorism, or any attempt to commit such an act, is taking place in connection with the acquisition, or that the acquisition will increase the risk of such an act.'

4. GROUNDS FOR SUBMITTING THE QUESTIONS TO THE EFTA COURT

68. In a letter to the parties of 20 November 2015, Oslo District Court decided that the questions concerning interpretation of EEA law would be submitted to the EFTA Court; see Section 51a of the Courts of Justice Act.

69. In this case, the plaintiffs have principally submitted that the administrative decisions in question must be deemed to be invalid on the grounds that they are in contravention of EEA law, both because the Norwegian legal provisions per se are in contravention of EEA law and because the decisions per se, given the ownership limitations on which they were based, are in contravention of EEA law. In its judgment, the District Court will have to assess this plea and hence also the questions of EEA law.

70. As the case stands in connection with the preparation of the case before the District Court, these questions may seem to be so unclear that the District Court finds it necessary to submit the questions of EEA law to the EFTA Court.

5. THE PARTIES' PLEAS CONCERNING EEA LAW

5.1 The plaintiffs' pleas concerning EEA law

71. The plaintiffs' pleas concerning EEA law can be summarised as follows:

72. Both issue rules have been practised as a requirement for a dispersion sale. It is not sufficient that three quarters be subscribed without preferential rights for anyone. As follows from the above presentation of the case, the provisions have been practised so that exemption may be made for smaller enterprises that will engage in niche activities.

73. There is an indirect relationship between this legal rule and the rules on limitation of ownership, which is the second set of rules that is being assessed in the case. The issue rules are an instrument to ensure that no natural or legal person or group that is not a financial institution may have more than a 20 per cent holding in a Norwegian bank or insurance company.

74. The core of the matter is that the Norwegian authorities have continued a restrictive licensing policy for Norwegian financial institutions in contravention of the provisions of the EEA Agreement. The plaintiffs argue that the rules in Section 4 of the Commercial Banks Act and Section 2-1 of the Insurance Activity Act, which require that three quarters of the shares in connection with the establishment of banks and insurance companies must be subscribed in

an issue without preferential rights, as well as the requirement for a dispersion sale that the authorities have deduced from these provisions, are in contravention of the EEA Agreement.

75. It is also argued that the authorities' practice of generally prohibiting private ownership of more than 20 to 25 per cent except in niche cases, is in contravention of the EEA Agreement. A legal basis for this rule concerning limitation on ownership has been sought in the suitability requirements in Section 2-2 of the Financial Institutions Act and in the provisions on control of ownership on establishing new enterprises set out in the Insurance Activity Act and the Commercial Banks Act.

76. The underlying issue rules and administrative practice prohibiting private ownership of more than 20 to 25 per cent except in niche cases, are in contravention of the EEA Agreement.

77. The issue rules and administrative practice amount to an absolute ceiling on private ownership and constitute a restriction within the meaning of the EEA Agreement. The regulatory framework and practice restricts the freedom of establishment under Article 31 EEA, the free movement of capital under Article 40 EEA and the freedom to provide cross-border services under Article 36 EEA.

78. The restrictions are not legitimate according to the conditions developed through the case law of the Court of Justice of the European Union and the EFTA Court; see inter alia the EFTA Court's decision in Case E-9/11 paragraph 83 ff. and the references mentioned there. The Norwegian ownership rules do not meet the conditions for exemption, namely that they must (i) be in pursuance of a legitimate public objective, (ii) be suitable for attaining the objective and (iii) be necessary for attaining the objective.

79. Conserving a Norwegian finance industry without big Norwegian private owners is no longer a legitimate public objective. After the implementation of Directive 2007/44/EC, which regulates *inter alia* control of ownership in connection with the acquisition of qualifying holdings in financial institutions, this consideration cannot be assigned any weight. Since such a consideration can no longer be given weight in connection with the acquisition of already established financial institutions, it can also not constitute a legitimate public objective in connection with the establishment/formation of new financial institutions. It makes little sense to require financial institutions to be established with a certain ownership structure when the structure of the same financial institution could change completely after its formation.

80. This means that special rules concerning dispersion offers, a more restrictive requirement for dispersion sale, or a prohibition on ownership of more than 20 to 25 per cent, are also not suitable for securing a Norwegian finance industry without big private owners. Such rules on the establishment of financial institutions will not prevent private players from subsequently acquiring qualifying holdings in a financial institution.

81. Nor are these restrictions necessary for attaining the public interest objectives they are allegedly in pursuance of. The consideration on which the Norwegian ownership regime is based is a wish to prevent big private owners from having the possibility of abusing their ownership position for the benefit of themselves or their closely related parties or business associates, or in order to weaken their competitors. These objectives can be pursued by less restrictive measures than refusing private ownership, for example by legal provisions and licence conditions prohibiting such unfortunate transactions. As an example, reference is made to licence condition no 9 for Netfonds Bank, which prohibits accepting deposits from and extending credit to Netfonds Holding, enterprises in which Netfonds Holding has a direct

or indirect material influence and the owners of Netfonds Holding.

82. This also means that the restrictions are disproportionate and in contravention of the requirement for proportionality in EEA law; there are more flexible and equally effective means of regulating potential challenges associated with private ownership than laying down a general prohibition.

The defendant's pleas concerning EEA law

83. The defendant's pleas concerning EEA law can be summarised as follows:

84. Norwegian financial market regulation is based on a licence regime, the objective of which is to ensure that the fundamental organisational and structural conditions in the sector are satisfactory and adequate. The reason for this is the very important role of these institutions in society.

85. The core of the matter is whether it is compatible with EEA law to set as a condition for granting activity licences to financial institutions that they sell off part of their dominant holdings, alternatively that the financial institution is required to limit its activity.

86. The plaintiffs argue that there is a restriction on the freedom of establishment under Article 31 EEA, the free movement of capital under Article 40 EEA and the free movement of services under Article 36 EEA. They also refer to cross-border activity in the form of offering services across national borders having been applied for and authorised. In the Government's view, the written observations should closely examine which of the invoked provisions in the main part of the EEA Agreement are applicable, and to assess this in conjunction with the requirement for relevant cross-border activity.

87. Insofar as a restriction exists on relevant cross-border activity, the Government is of the opinion that the owner/activity limitations inherent in the licence conditions pursue legitimate objectives. Reference is made to the review of these matters in the above presentation of the facts of the case in section 2 and of relevant national legislation in section 3. The parties agree that these objectives are generally legitimate under the main part of the EEA Agreement; see also the EFTA Court's decision in Case E-9/11 paragraphs 84 to 86. The only disagreement between the parties concern whether it follows from Directive 2007/44/EC that these objectives are no longer legitimate. The Government believes that this reasoning clearly cannot succeed, and makes reference to the parties being in agreement that the directive does not regulate the actual granting of licences, but only the subsequent acquisition of holdings in financial institutions that already hold an activity licence. The directive does not entail any limitation of what considerations the licensing authorities may take into account in their assessment of whether a licence should be granted.

88. The Government is also of the opinion that the requirement for suitability is met. Here, too, the Government understands that the parties agree that the requirement would have been met, had Directive 2007/44/EC not been adopted. The only disagreement is also on this point what bearing the directive has on the interpretation of the general rules in the main part of the EEA Agreement, applied to a factual situation that is not regulated by the directive. The Government's view is that it does not follow from the directive that licence conditions in the form of ownership or activity limitations, which would otherwise have been suitable for pursuing the objectives in question, are no longer to be regarded as suitable. The directive does not entail any limitation of what conditions the licensing authorities may set when assessing whether a licence should be granted.

89. Finally, the Government believes that the necessity requirement is met. The necessity test consists of an assessment of whether the legitimate objectives, up to the level of protection chosen by the State, can only be attained through limited licence decisions, or whether other and less restrictive measures would be at least as effective as means of attaining the objective; see, for example, the EFTA Court's decision in Case E-3/06 Ladbrokes, paragraph 58. The Government does not agree that the level of protection could be attained at least as effectively by means of legal provisions and licence conditions that prohibit unfortunate transactions. The Government's view is that an ex ante regulation of the size of individual holdings or the scope of activity is a significantly more effective method of regulation with a view to attaining the level of protection than other, alternative means.

90. This means that the national measures are compatible with EEA law in that they pursue legitimate objectives, are suitable for attaining those objectives, and necessary in order to achieve the level of protection in question.

6. QUESTIONS

91. Oslo District Court hereby submits the following questions to the EFTA Court:

1. Do the issue rules in Section 4 of the Commercial Banks Act and Section 2-1 of the Insurance Activity Act, understood as a requirement that three quarters of the shares in new banks and insurance companies must be subscribed without preferential rights (offered as a public issue), constitute a restriction under Article 31 EEA, Article 36 EEA or Article 40 EEA, provided that the application for a licence is not just for a niche activity?

    a. Assuming that the rules constitute a restriction within the meaning of the EEA Agreement: Do the rules pursue a legitimate public objective?

    b. Assuming that the restriction pursues a legitimate public objective: Is such a restriction suitable within the meaning of EEA law?

    c. Assuming that the restriction pursues a legitimate public objective: Is such a restriction necessary within the meaning of EEA law?

2. Do the issue rules in Section 4 of the Commercial Banks Act and Section 2-1 of the Insurance Activity Act, understood as a requirement that three quarters of the shares in new banks and insurance companies must be subscribed by persons other than the promoters, constitute a restriction under Article 31 EEA, Article 36 EEA or Article 40 EEA, provided that the application for a licence is not just for a niche activity?

    a. Assuming that such rules constitute a restriction within the meaning of the EEA Agreement: Do the rules pursue a legitimate public objective?

    b. Assuming that the restriction pursues a legitimate public objective: Is such a restriction suitable within the meaning of EEA law?

    c. Assuming that the restriction pursues a legitimate public objective: Is such a restriction necessary within the meaning of EEA law?

3. Does an established administrative practice whereby individuals or enterprises are not authorised to own more than 20 to 25 per cent of the shares in financial institutions, except in those cases where the law itself authorises the establishment

of a financial group or where the financial institution will engage in what is referred to a niche activity only, constitute a restriction under Article 31 EEA, Article 36 EEA or Article 40 EEA, provided that the application for a licence is not just for a niche activity?

a. Assuming that such an established administrative practice constitutes a restriction within the meaning of the EEA Agreement: Is the restriction in pursuance of a legitimate public objective?

b. Assuming that the restriction pursues a legitimate public objective: Is such a restriction suitable within the meaning of EEA law?

c. Assuming that the restriction pursues a legitimate public objective: Is such a restriction necessary within the meaning of EEA law?

A premise for all the above questions is that no other circumstances exist that would constitute grounds for rejecting the licence application or for limiting the licence.

Oslo tingrett
(Signature)
Finn Eilertsen
District Court Judge