

PRIVATE OWNERSHIP RESTRICTIONS IN NORWEGIAN FINANCIAL INSTITUTIONS



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1 Introduction

The last decades have been characterised by financial liberalisation and internationalisation of financial markets. Still, the financial sector has remained more tightly regulated than most others. Due to financial institutions', and especially banks', crucial position within financial markets and their systemic nature, financial liberalisation has walked hand in hand with stricter industry regulation.¹

In the EU a certain overall level of harmonisation is sought in all Member States, also within the financial sector, extending to Norway through its EEA Membership and the EEA Agreement. An important part of this harmonisation, although often set aside in favour of the more pressing questions of capital adequacy and liquidity ratios, is the regulation of the taking-up of businesses and pursuit of holdings within the financial sector. Through a long line of Internal Market directives the European Commission has attempted to provide harmonised prudential assessment regulation and authorisation practices for the taking up and pursuit of businesses within the sector.

This article discusses Norwegian private ownership regulation in regards to the taking up and pursuit of the businesses of credit institutions and (life) insurance undertakings and its legitimacy under EEA law. In chapters 2 and 3 we review the legal method of interpretation and the relevant regulatory scenery. Subsequently, chapter 4 discusses Norwegian assessment practice relating to pursuit of the business of financial institutions, while chapter 5 discusses the assessment practice relating to the taking up of these businesses, as well as the Norwegian public offering rules for credit institutions and insurance undertakings.

¹ Cranston (1997), p. 68-84

2 Legal method of interpretation

EC law constitutes an extraordinary form of legal framework. Its foundation and nature is public international law² in as far as it is established through multilateral treaties between autonomous states.³ Still it is unique in its structure and authority due to its characteristic supra-nationality⁴, rendering it more forceful than common public international law.⁵ The political aspect of the cooperation between the Community countries is strong, and the dynamic legal and political integration in the EC has often been referred to as “integration through law”⁶, an integration which is slowly taking on the form of a “constitutionalization of the treaty system”⁷. Supra-nationality in the form of upward transfer of governmental decision-making authority to EC Authorities is not imposed on the EFTA States as they are not part of the EU. However, these Authorities’ presence is felt also in EFTA Countries, largely through their obligation to implement EC law constructed at a Community level.

In the attempt to provide a thorough examination of the ownership restriction rules in Norway, this article draws on legal sources of the three main jurisdictions involved; namely Norway, the EEA and the EU.

When interpreting the provisions of the EEA Agreement, this article conforms to established standards for legal interpretation. However, due to the special legal nature of EC law, and the specific connection established between Norway and the EU through the EEA Agreement, it is necessary to quickly review the authority and relevance of both EEA law and EU law in terms of our current topic.

² Craig (1999) p. 69

³ *EØS-rett* (2004) p. 82

⁴ The Free Dictionary (2001)

⁵ *EØS-rett* (2004) p. 41

⁶ Vauches (2008)

⁷ Sweet (2005) p. 4

The provisions of the EEA Agreement are a reflection of the EC Treaty anno 1992.⁸ Norway signed the EEA Agreement 2 May 1992, and the agreement came into force commencing 1 January 1994.⁹ Since then Norway has been an integrated part of the internal market; or at least as integrated as is possible without actually joining the EU. This affiliation with the internal market brought on the obligation to loyally implement EEA law into domestic law.¹⁰

With the EEA Agreement being the formal connection to the internal market, establishing EEA law as a separate legal discipline, EU law is not directly relevant to matters falling within the ambit of EEA jurisdiction. However, the core objective embodied in the Agreement is to create homogeneity across the European Economic Area.¹¹ This is expressed through its main operating principle of interpretation, as described in Article 6:

Article 6

“Without prejudice to future developments of case law, the provisions of this Agreement, in so far as they are identical in substance to corresponding rules of the Treaty establishing the European Economic Community ... and to acts adopted in application [thereof], shall, in their implementation and application, be interpreted in conformity with the relevant rulings of the Court of Justice of the European Communities given prior to the date of signature of this Agreement.”

As seen in Article 6, the Agreement establishes the European Court of Justice’s case law as a relevant legal source when employing EEA law, and therefore also partly EU law itself. The scope of this Article is clearly not unlimited, which becomes apparent through its explicit reference to the date of signature. The intersection was made in order not to grant the ECJ extensive jurisdiction to single-handedly decide the legal development in the EEA.¹² On the other hand, the reservation taken for “future developments of case law” is meant to allow EEA law to evolve alongside EU law in coherence with the principles of

⁸ The EEA Treaty has not been amended since its ratification, except for the incorporation of new EU member states.

⁹ *EØS-rett* (2004) p. 34

¹⁰ EEA art 3, EC art 10

¹¹ EEA art 1(1)

¹² *EØS-rett* (2004) p. 203

homogeneity and dynamic development¹³, albeit only within areas of law already covered by the Agreement.¹⁴ This means that ECJ rulings pronounced *after* 1992 are relevant to EEA law. In terms of the EFTA Court's practice of EEA law, this method of interpretation is proscribed directly in the Surveillance and Court Agreement¹⁵, but this peculiarity has proven not to be a practical problem in domestic law either.¹⁶

In the next chapter we will provide a detailed overview of the regulatory landscape relating to ownership restrictions in credit institutions and insurance companies in Norway. Banks and insurance companies will collectively be referred to as 'financial institutions'.

¹³ *ibid.*, p. 177 – 178

¹⁴ EEA art 102

¹⁵ Surveillance and Court Agreement art 3(2)

¹⁶ Rognstad (2001) p. 448 – 449; Bull (2002) p. 80-81

3 The regulatory scenery

3.1 The financial sector as part of the EU Internal Market

The financial sector is part of the EU's single European market agenda.¹⁷ This entails the harmonisation of laws and practice between all Member States in order to achieve the EC Treaty's core single market objectives of freedom of establishment¹⁸, supply of services¹⁹ and movements of capital²⁰ within the Union.²¹ In the market for financial services, this harmonisation promotes the removal of internal barriers to cross-border provision of services and the establishment of branches anywhere in the EU, by a financial institution situated elsewhere in the Union.²² These goals are extended to the EEA through the EEA Agreement.

The harmonisation is facilitated by means of "mutual recognition" and the so-called "single licence" practice. The mutual recognition provides a "passport" for financial institutions, allowing them to establish branches and/or provide services cross-border in all areas of the EU. This means that only one single licence is needed – in other words, a financial institution only requires authorisation in one State, automatically making it allegeable to do business in all other Member States as well.²³ However, domestic host State regulation will apply to the conduct of business and provision of services within its jurisdiction, which can vary from State to State.

This procedure is based on the "home country control principle". This principle bestows upon the competent authorities of a financial institution's Home Member State²⁴ the primary role of its authorisation and prudential supervision.²⁵ This means that any host

¹⁷ Cranston (1997) p. 470

¹⁸ EEA art 31; EC art 43

¹⁹ EEA art 36; EC art 49

²⁰ EEA art 40; former EC art 67(1)

²¹ Cranston (1995) p. 26

²² Cranston (1997) p. 470

²³ *ibid.*, p. 470-471

²⁴ The Member state in which a credit institution has been authorised in accordance with Directive 2006/48/EC art 6 to 9, 11 to 14

²⁵ European Commission, White Paper (1985) p. 28 para. 103

Member State²⁶ in which a credit institution would choose to set up a branch or provide services is granted a complementary role. Ever since the first introduction of the internal market programme in 1985, this has been the prevailing method for regulating cross-border financial services within the EU and later the EEA, even following an abundance of directive amendments and recasts.²⁷

However, for Member States to agree to the mutual recognition procedure, there obviously needs to be some minimum harmonisation of national regulatory standards for financial institutions.²⁸ The EC has been able to achieve detailed harmonisation in many discrete areas of law where strong consensus was obtainable. This has not proven to be the case more generally for the financial services sector, thus Member States have retained a high level of competence. To overcome this obstacle to harmonisation, focus has been on identifying the respective roles of the EC law-making institutions versus the Member States, and to harmonise the law and practice of Member States as far as possible through a variety of directives.²⁹ The “home country control principle” has prevailed as a means of dividing competence between Member States in the financial services sector.

In the areas of banking and insurance, a long line of minimum harmonisation directives have been given. In the following chapters we will focus on the most recent Directives 2002/83/EC (“Insurance Directive”), Directive 2006/48/EC (“Banking Directive”) and 2007/44/EC (“Qualifying Holdings Directive”); more specifically their regulation of ownership control in credit institutions and insurance companies. The remainder of this chapter is descriptive in nature; the specific analyses will follow in chapters 4 and 5.

²⁶ The Member State in which a credit institution has a branch or in which it provides services, Dir 2006/48/EC art 4(8)

²⁷ See current Dir 2006/48/EC and Dir 2002/83/EC

²⁸ Lomnicka (2002) p. 298

²⁹ *ibid.*, p. 296

3.2 The regulation of ownership control in financial institutions in the EEA

Ownership control in credit institutions and insurance companies is regulated through secondary legislation in the form of Directives. The substantive legitimacy of this legislation is derived from the EC Treaty's and the EEA Agreement's main provisions regarding the right of establishment (Art 31 EEA), provision of services (Art 36 EEA) and the free movement of capital (Art 40 EEA). Part III of the Main Part of the EEA Agreement regulates these rights between EC Member States and EFTA States and the provisions are found in chapters 2, 3 and 4 respectively. The respective Articles will be discussed in more detail in chapter 5. First we will have a look at the relevant EC Directives and the guidelines for prudential supervision provided by the Level-3 Committees.

3.2.1 Directives 2002/83/EC, 2006/48/EC and the amendment of 2007/44/EC

Three EC Directives are of most importance to our current topic. The first is Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance. The second is Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions. Both of these Directives regulate the taking up and the pursuit of business within their respective fields. The main consideration of the Directives is the necessity to complete the internal market in the field of credit institutions and direct life assurance, from the point of view of both the right of establishment and the freedom to provide services.³⁰ In accordance with the earlier mentioned harmonisation problems within the financial sector, the Directives' Preambles underline the importance of only effecting the essential harmonisation necessary and sufficient to secure mutual recognition.³¹ The tone is set by the very first Article of Title II ("Requirements for access to the taking up and pursuit of the business of credit institutions") of the Banking Directive, which gives the Member State the right to lay down the requirements for authorisation

³⁰ Dir 2006/48/EC Recital 3; Dir 2002/83/EC Recital 3

³¹ Dir 2006/48/EC Recital 7; Dir 2002/83/EC Recital 7

within its jurisdiction.³² The Directives regulate the granting of initial business authorisations and ownership control prior to such authorisation or a proposed acquisition or increase in holdings in financial institutions.

Directive 2007/44/EC of the European Parliament and of the Council of 5 September 2007 is an amendment directive amending Council Directive 92/49/EC and Directives 2002/83/EC, 2004/39/EC, 2005/68/EC and 2006/48/EC as regards procedural rules and evaluation criteria for the prudential assessment of acquisitions and increase of holdings in the financial sector. The Directive addresses the lack of detailed criteria for the prudential assessment of acquisitions and the procedure for their application, standing in the way of a closer harmonisation within the financial sector.³³ Thus, the amendment Directive provides a clear set of limited criteria of a strictly prudential nature for the assessment of potential acquirers and an administrative procedure, without allowing the Member States to lay down stricter rules.³⁴ Note, however, that the 2007 Directive only amends the regulations relating to the pursuit of holdings in financial institutions, not the initial authorisation process at the taking up of these businesses.

3.2.2 Guidelines on prudential supervision

Three European Supervisory Authorities have been established within the EU's financial sector, specialising within the fields of banking, securities regulation, and insurance and occupational pensions. These are EBA (European Banking Authority, previously CEBS - Committee of European Banking Supervisors)³⁵, ESMA (European Securities and Markets Authority, previously CESR - Committee of European Securities Regulators)³⁶ and EIOPA (European Insurance and Occupational Pensions Authority, previously CEIOPS -

³² Art 6

³³ Recital 2

³⁴ Recital 3 and 6

³⁵ EBA replaced CEBS as of 1 January 2011

³⁶ ESMA replaced CESR as of 1 January 2011

Committee of European Insurance and Occupational Pensions Supervisors)³⁷, collectively referred to as the Level-3 Committees of European Financial Supervisors.

These Committees are independent EU Authorities, whose mission is to work towards the stability of the European Union's financial system through different measures, one of which is the development of prudential guidelines and recommendations within their fields. Their joint Level-3 operations focus on the development of guidelines and recommendations with the view to establish consistent, efficient and effective supervisory practices within the European System of Financial Supervision, as well as to ensure the common, uniform and consistent application of EU law.³⁸

In line with their agenda, the Level-3 Committees have developed prudential guidelines for the interpretation of Directive 2007/44/EC, namely the "*Guidelines for the prudential assessment of acquisitions and increase of holdings in the financial sector required by Directive 2007/44/EC*"³⁹. According to the introductory statement of the official guidelines, the main goals are (1) to reach a common understanding on the five assessment criteria listed in the Directive, (2) to define appropriate cooperation arrangements between supervisors, and (3) to establish an exhaustive and harmonised list of information that potential acquirers need to include in their notifications to the competent supervisory authorities.⁴⁰ For the purpose of this paper, goal number 1 is of most importance, and will be explored in more detail in chapter 4.

Due to their influence on EU regulation through their prudential guidelines and recommendations, the Level-3 Committees' authoritative guidelines extend to EEA law through the requirement of loyal implementation of EC law. Thus, with implementation of the Directives comes the obligation to follow up the Level-3 Committees' prudential guidelines.

³⁷ EIOPA replaced CEIOPS as of 1 January 2011

³⁸ ESMA (2011)

³⁹ Level-3 Committees (2008)

⁴⁰ *ibid.*, p. 5

3.3 The regulation of ownership in financial institutions in Norway

Ownership control in banks and insurance companies in Norway is mainly regulated through primary legislation in the form of statutes. These are based on the EC Directives above. Before having a closer look at the Norwegian regulation, we will review Norway's obligation to implement EEA law.

3.3.1 Norway's obligation to implement EEA law

Norway, as one of the Nordic EFTA States, practices a dualistic approach to treaties. As a result any treaty entered into must be explicitly integrated in the legal system in order to be accepted as domestic law in line with other nationally developed legislation.⁴¹ Since the EEA Agreement is in fact an international public law treaty, this also applies in its respect. To the extent necessary to secure effective compliance with treaty provisions, public international law requires that treaties be loyally implemented in domestic law.⁴² Many provisions in the EEA Agreement are meant to give individuals certain rights, and in some cases to subject them to certain obligations. Thus the character of the Agreement itself implies an extensive responsibility of loyal implementation.

Within the vocabulary of EEA and EU law, this duty is referred to as the "general principle of loyalty".⁴³ This principle is imbedded in the wording of Article 3 of the EEA Agreement, which requires the proper implementation of EEA law in the domestic legal system.⁴⁴ This entails not only to "*take all appropriate measures ... to ensure fulfilment of the obligations arising out of [the] Agreement*", but also to "*abstain from any measures which could jeopardize the attainment of the objectives of [the] Agreement*". Article 3 has been interpreted to mean that all provisions that grant individuals rights or subject them to obligations must be implemented in domestic law.

⁴¹ *EØS-rett* (2004) p. 185

⁴² *ibid.*

⁴³ EEA art 3; EC art 5

⁴⁴ EC art 10

Furthermore, Article 7 provides the standard for implementation of secondary legislation. According to its text, acts that are referred to or contained in an Annex to the Agreement or in decisions by the EEA Joint Committee are binding upon the parties, and thus have to be made a part of the internal legal order of a State. Article 7 provides that acts that are EEC *regulations* shall be made part of the internal legal order “as such”; while in the case of EEC *directives* it is left to the authorities of the relevant State to choose the form and method of implementation.⁴⁵ The former entails the direct word for word translation of the EEC text, whereas directives are considered implemented as long as domestic substantive legislation conforms to that of the directive.⁴⁶ However, according to ECJ rulings the implementation must take place in such a way that the rights and obligations present themselves to individuals as clear and unambiguous, in a manner allowing them to predict their legal status.⁴⁷

Norway practices two different forms of implementation for public international law, (1) incorporation through reference and (2) transformation through reproduction. In the former case, a single Article is created in domestic law, establishing that a treaty is given status as domestic legislation. In the latter case, the treaty is re-written in accordance with Norwegian legal technique and given a form and appearance consistent with domestic law, either in the form of statutory law or administrative regulation.⁴⁸ For the adoption of the EEA Agreement, both of these techniques are used. The Main Part of the EEA Agreement is incorporated through reference in Article 1 of the EEA Act of 27 November 1992 no. 109 and the EEC regulations are incorporated in statutory law or administrative regulation. The EEC directives on the other hand, which constitute the quantitative larger part of EEA law, are implemented by means of transformation in accordance with the freedom provided in Article 7 of the Agreement.

⁴⁵ Inspired by EC art 249

⁴⁶ *EØS-rett* (2004) p. 187

⁴⁷ *ibid.*, p. 49

⁴⁸ *EØS-rett* (2004) p. 188

3.3.2 The Norwegian legislation on ownership control

The rules on ownership control in credit institutions and insurance companies provided by the Directives are implemented into several statutes, which regulate different aspects of the business of these institutions. In the following we will focus on the three main statutes of importance to our current topic, (1) the Act on Financing Activity and Financial Institutions (Financial Institutions Act)⁴⁹, (2) the Act on Commercial Banks in Norway (Commercial Banks Act)⁵⁰, and (3) the Act on Insurance Activity (Insurance Act)⁵¹.

There is an overlap in the scope of these regulations. The Financial Institutions Act can be viewed as a general regulation, in so far as it covers both commercial banking and insurance activity, as well as other financial activity. In terms of ownership control in financial institutions, the act regulates the *acquisition or increase* of holdings in financial institutions by proscribing a “fit-and-proper” testing of the potential acquirer. The Commercial Banks Act and the Insurance Activity Act on the other hand regulate the *taking up* of these businesses and the initial ownership control in this respect.

The design of the ownership control rules is governed by what we will argue is a political “principle of dispersed ownership”. This principle presents itself in all of the above mentioned legislation and thus in different stages of a financial institutions lifetime. In order to shed some light on this principle and its presence in the legislation, we will provide a short historical overview of the statutes and their adaption to EEA law.

3.3.3 Historical recapitulation

Prior to 2004 the Norwegian rules on ownership in financial institutions where “restriction” rules, not prudential “control” rules. The Financial Institutions Act contained the rule that no one was allowed to hold more than 10 percent of the share capital in a Norwegian

⁴⁹ Act of 10 June 1988 no. 40

⁵⁰ Act of 25 May 1961 no. 2

⁵¹ Act of 10 June 2005 no. 44

financial institution.⁵² However, the EFTA Surveillance Authority argued that the Norwegian rule was in conflict with Article 40 in the EEA Agreement regarding the free movement of capital and pushed for a domestic reform.⁵³ Norwegian competent authorities rejected this view but nevertheless started the process of altering the ownership restriction rule in 2003. The ownership restriction rule was exchanged with prudential ownership control rules for qualifying holdings, with the slight limitation of a built in 25 percent threshold for private ownership; if the authorities were not satisfied that a private owner fulfilled all the legal requirements of a sound and prudent owner they were to refuse his application.⁵⁴

In the preparatory works to that new legislation, the authorities restricted the practical use of the 25 percent limitation by establishing that private owners wanting to acquire holdings above 25 percent were only to be acknowledged in as far as the acquisition object only engaged in niche businesses within banking or insurance.⁵⁵ The main motivations behind this rule were (1) to secure independence for financial institutions from private and other economic interests and (2) to avoid concentration of power in the ownership structure of these institutions.⁵⁶ In other words, the political goal of achieving dispersed ownership was a strongly contributing factor.

The authorities' *practice* of the 25 percent guideline became increasingly strict, as they initially accepted private holdings of up to 20 percent and proceeded to lower the threshold to 15 percent in one case.⁵⁷ The written 25 percent rule was abandoned in legislation in 2009; however the authorities may seem to continue to practice what can be called a 25 percent, or lower, ownership *restriction* rule on private holdings in financial institutions.

⁵² Former section 2-2

⁵³ See Ministry of Finance (2002)

⁵⁴ Former section 2-3

⁵⁵ Ot.prp.nr. 50 (2002-2003) p. 24 – 26

⁵⁶ *ibid.*, p. 12-13

⁵⁷ Bergo (2011)

Simultaneously with the regulatory change from ownership restriction to ownership control in 2004, new Sections 4 and 2-1 were implemented in the Commercial Banks Act and the Insurance Act respectively. These rules are still intact, and demand that more than three-quarters of an institution's share capital is subscribed in connection with a capital increase effected without any pre-emption rights for shareholders or others, at the initial taking up of the business. Thus, "the principle of dispersed ownership" was made a decisive factor also at the initial establishment of an institution, in addition to already existing prudential control rules of the initial shareholders.

The preparatory works to the 2004 reform clearly identify the connection between the ownership control rules and rules governing ownership at the initial formation of a financial institution, although not directly saying that the dispersed ownership rules were established in order to make up for the loss of the 10 percent restriction rule.⁵⁸

Today the "principle of dispersed ownership" can be seen in three different aspects: Firstly, through the "three-quarters rule" at the establishment of a financial institution, secondly through the "fit-and-proper" testing of shareholders at the initial taking up of the business, which could lead to either full authorisation, authorisation on certain terms, or dismissal, and lastly through the "fit-and-proper" testing of proposed acquirers of holdings in a financial institution after its establishment.

In the following chapters we will review these regulations in reversed order, because the harmonisation with EU law has come the farthest in the area of "fit-and-proper" testing of potential acquirers, while there is still a long way to go in the area of initial licensing and ownership control at the taking up of the business of financial institutions.

⁵⁸ NOU 2002:3 p. 19; Ot.prp.nr. 50 (2002-2003) p. 45

4 The pursuit of investments in credit institutions and insurance companies in Norway

4.1 Background

On 12 September 2006 the European Commission presented its formal proposal for the amendment of Community rules relating to the prudential assessment of proposed acquisitions in the financial sector applicable to credit institutions, investment firms, and insurance and reinsurance companies (financial institutions). The purpose was threefold; to harmonise the conditions under which a proposed acquirer of a holding in a financial institution had to notify relevant authorities of his intent to acquire a holding, to define a clear and transparent procedure for the prudential assessment by competent authorities of the proposed acquisition, and to specify a set of clear and limited criteria of a strictly prudential nature for competent authorities to abide by in their assessment process.⁵⁹ Through these measures, the EC was hoping to achieve maximum harmonisation within these fields in all Member States. The efforts concluded in the 2007 Qualifying Holdings Directive (QHD), which were to be implemented by Member States within 21 March 2009.⁶⁰ The relevant rules regarding the pursuit of investments in credit institutions and insurance companies in Norway are incorporated in the Financial Institutions Act (FIA) chapter 2.

4.2 The “principle of dispersed ownership” in domestic assessment practice

Norwegian competent authorities practice a private ownership restriction in their assessment of proposed acquisitions in the financial sector. This provides for unequal treatment of investors according to whether they are a financial institution or a private acquirer. In effect, private acquirers, either individuals or undertakings, are consistently denied acquisition in financial institutions of more than 25 percent of the share capital, unless they are acquiring a holding in a niche financial institution. This practice is based on

⁵⁹ Level-3 Committees (2008) p. 4

⁶⁰ Integrated in the EEA Agreement 4 July 2008 by the EEA Committee’s resolution no. 79/2008

political motivations, first and foremost a wish to control structural conditions in financial institutions. The goal is to provide a dispersed ownership structure in institutions in order to obtain division of power and to secure the independence of financial institutions from other economic interests, especially in consideration of the risks relating to moral hazard and conflicts of interest.⁶¹ This assessment practice is documented in several administrative decisions.⁶² In a recent case, although relating to an expansion of the licence of a life insurance company to other insurance categories, authorities denied expansion solely on the grounds of ownership dispersal.⁶³

With the introduction of the QHD the scope of competent authorities' discretionary assessment became more constricted, however Norwegian authorities have not changed their authorisation practice notably. This calls into question the legitimacy of Norwegian assessment practices. Against this background we will assess whether Norwegian assessment practice is in conflict with the Banking and Insurance Directives as amended by the Qualifying Holdings Directive. The essential question is whether the new provisions allow Norwegian practice to go unchanged.

4.3 The scope of the provisions

The domestic rules regulating the notification, assessment and subsequent authorisation of proposed acquisitions only apply to 'qualifying holdings'. The FIA section 2-2(1) provides that an acquisition of a qualifying holding in financial institutions may only take place after notification to the Financial Supervisory Authority of Norway and in accordance with authorisation given pursuant to the rules in Chapter 2. The same applies to acquisitions whereby a qualifying holding reaches or exceeds 20, 30 or 50 percent, respectively, of the capital or voting rights in the institution, and to any other acquisitions which provide controlling influence as mentioned in the Private Limited Companies Act section 1-3 and the Public Limited Companies Act section 1-3. It further states that a 'qualifying holding'

⁶¹ NOU 2002:3 p. 156; Ot.prp.nr. 50 (2002-2003) p. 45

⁶² See e.g. Ministry of Finance (2004)

⁶³ Bergo (2011) p. 3

means a holding which represents 10 percent or more of the capital or voting rights in a financial institution or which makes it possible to exercise significant influence on the management of the institution and its business.⁶⁴ This means that acquisitions below these thresholds may be acquired without prior notification and without being subjected to prior authorisation. These rules are consistent with Article 19 in the Banking Directive and Article 15 in the Insurance Directive, as amended.

4.4 Does Norwegian assessment practice conflict with the amended Directives?

The QHD required changes to the Norwegian prudential assessment legislation and commencing 1 July 2009 the Financial Institutions Act was amended to suit the new directive provisions in the Banking Directive (BD) Article 19a and Insurance Directive (ID) Article 15b. However, the new regulation was not implemented through a direct word for word translation; instead the Norwegian legislators prepared their own version of the directive provisions to embody the new regulatory requirements.⁶⁵ This is not a problem in itself, as Article 7 EEA leaves it up to the Member State to decide on the form of implementation, as long as the *material* aspects of a provision are effectively implemented. The new provisions regarding both credit institutions and insurance companies are implemented in the Norwegian FIA section 2-4. Still, as FIA section 2-4 is not a mirror image of ID Articles 15b and BD 19a, it raises certain difficulties relating to Norwegian assessment practice.

To assess whether an unchanged Norwegian prudential assessment practice conflicts with the Banking and Insurance Directives after the 2009 revision, we need to determine what the Qualifying Holdings Directive demands of domestic assessment practices. In the following we will only assess the amendment to the Banking Directive, as the Insurance Directive is amended correspondingly.

⁶⁴ FSA (2004)

⁶⁵ See Financial Institutions Act section 2-4

4.4.1 The “fit-and-proper” testing of proposed acquirers

The new Articles 19a BD and 15b ID introduced by the Qualifying Holdings Directive provide clear and detailed criteria for the prudential assessment of proposed acquirers.

Article 19a(1) BD provides the following:

“In assessing the [proposed acquisition] the competent authorities shall, in order to ensure the sound and prudent management of the credit institution in which an acquisition is proposed, and having regard to the likely influence of the proposed acquirer on the credit institution, appraise the suitability of the proposed acquirer and the financial soundness of the proposed acquisition against all of the following criteria:

- (a) the reputation of the proposed acquirer;*
- (b) the reputation and experience of any person who will direct the business of the credit institution as a result of the proposed acquisition;*
- (c) the financial soundness of the proposed acquirer, in particular in relation to the type of business pursued and envisaged in the credit institution in which the acquisition is proposed;*
- (d) whether the credit institution will be able to comply and continue to comply with the prudential requirements based on this Directive, and where applicable, other Directives, ..., in particular, whether the group of which it will become a part has a structure that makes it possible to exercise effective supervision, effectively exchange information among the competent authorities and determine the allocation of responsibilities among the competent authorities;*
- (e) whether there are reasonable grounds to suspect that, in connection with the proposed acquisition, money laundering or terrorist financing within the meaning of Article 1 of Directive 2005/60/EC is being or has been committed or attempted, or that the proposed acquisition could increase the risk thereof.”*

Article 19a specifies five criteria that competent authorities have to take into account when assessing a proposed acquisition. The text provides that all of these criteria have to be taken into consideration in each evaluation. Although new in writing, these are criteria that have been relevant for national authorities also under previous assessment practices.⁶⁶ It has been debated to which extent these are the only criteria that competent authorities are allowed to consider, and the answer to this question is essential to the fate of Norwegian assessment practice.

⁶⁶ NOU 2008:13 p. 25

Article 19a(1) does not in itself regulate this matter, thus further guidance must be sought in other considerations. An essential point is that the QHD is a maximum harmonisation Directive, intended to establish harmonised assessment criteria and procedural rules in all Member States, against the backdrop of the essential freedom of movement of capital.⁶⁷ In general this indicates a narrowing of competent authorities' discretionary privileges. According to recital 2 the main objective is to establish detailed criteria for a prudential assessment of proposed acquisitions and a procedure for their application, which is needed in order to provide the necessary legal certainty, clarity and predictability in the assessment process.⁶⁸ This supports a limitation to the material scope of national authorities' competence, however not in clearly defined terms.

The strongest indication that Article 19a provides the only accepted assessment criteria, to the detriment of Norwegian practice, is found in the preamble's recital 3, which states: *"The role of the competent authorities in both domestic and cross-border cases should be to carry out the prudential assessment within a framework of a clear and transparent procedure and a limited set of clear assessment criteria of strictly prudential nature."* The referral to a *limited set* of criteria strongly suggests that only the five criteria in Article 19a are relevant, which is also in keeping with the maximum harmonisation of assessment practices across the Community. Article 19a(2) points in the same direction, stating that competent authorities may only oppose a proposed acquisition if there are *"reasonable grounds for doing so on the basis of the criteria set out in paragraph 1 .."*. The preamble's recital 9 further supports the argument, as it provides that Member State shall provide a list of information that may be requested for the purpose of the assessment, strictly according to the criteria set out in the Directive.

The Directive also establishes a prohibition of Member States laying down stricter rules

⁶⁷ Recital 6, 13 and 14; NOU 2008:13 p. 13 and 28

⁶⁸ See recital 13 and 14

than proscribed in the Directive.⁶⁹ This is stated in the preamble at recital 6, as well as amended Articles 19(8) BD and 15a(7) ID. This is a general prohibition, which also applies to the criteria in Article 19a, c.f. Article 15b ID. Seeing as additional criteria in an assessment process would most likely amount to *stricter rules* to those being assessed, this is another indication that other criteria do not represent legitimate interests in the assessment procedure. Additionally, recitals 12 and 13 refer to procedures for future adjustments of the assessment criteria in accordance with developments in market conditions. This explicit referral to a formal procedure also suggests to a certain degree that the assessment criteria may not be supplemented unless officially adopted. On this background it seems that the prudential assessment is strictly limited to the criteria set out in Article 19a. This would mean that Norwegian authorities are not allowed to consider additional criteria such as structural considerations and private ownership limitations.

Because the implementation of the Directive is quite recent, there is no ECJ case law on the matter so far. The only rulings relating to the QHD are regarding Member States' failure to adopt the Directive within the time limit⁷⁰ or failure to adopt all of the regulatory changes⁷¹.

Prior to implementation of the QHD, Norwegian authorities discussed the implications of the impending legislative changes. In the initiating preparatory works by the Banking Law Commission, it was pointed to different facts indicating that relevant criteria could not unconditionally be restricted to those listed in Article 19a(1).⁷² The argument is based on Recitals 8 and 9, the former of which facilitates the emphasis on whether the acquirer is an *unregulated entity* in the assessment process and the latter of which states that required information should be proportionate and adjusted to the nature of the acquisition, especially

⁶⁹ Member States are still allowed to require that competent authorities be notified of acquisitions below the threshold stated in the Directive, so long as the Member State imposes no more than one additional threshold below 10 percent for this purpose.

⁷⁰ See Case C-233/10 *Commission v Netherlands* p. 16; Case C-248/10 *Commission v Hellenic Republic* p. 26; Case C-208/10 *European Commission v Portuguese Republic* p. 24

⁷¹ See Case C-232/10 *Commission v Republic of Poland* p. 21; Case C-233/10 *European Commission v Kingdom of the Netherlands* p. 13

⁷² NOU 2008:13 p. 26

if the proposed acquirer is an *unregulated entity*. However, from their context it seems that these considerations are mere elaborations of the rules in Article 19a and do not present additional elements to the assessment process.⁷³ The preparatory works also point to the fact that Banking Directive Article 12(3) contains supervisory rules not embodied within the criteria of Article 19a.⁷⁴ This argument is obviously beside the point, as Article 12 regulates the taking up of the business of credit institutions, which is not affected by the QHD.

The follow-up preparatory works by the Ministry of Finance are somewhat ambiguous. Introductory they provide that the new rules cause a narrowing of the authorities' discretion and that although the prudential assessment must be exercised in accordance with "*an exhaustive list of criteria*", there will still be some room for discretion within the sphere of these criteria.⁷⁵ In a subsequent part of its paper, the Ministry claims that the criteria listed in Article 19a *cannot* be considered an exhaustive list of criteria, but that they pose certain *limits* to which other criteria may be assessed. This is not only inconsistent with its initial statement but also seemingly in conflict with the explicit intentions of the Directive. It is also discrepant from the recommendation by the Ministry of Foreign Affairs regarding the approval of the EEA Committee's decision to incorporate the QHD in the EEA Agreement. In its recommendation the Ministry states that the QHD provides an exhaustive list of assessment criteria, but that the criteria themselves open for some degree of discretion.⁷⁶ As there are presented no durable arguments to support an assessment more detached from directive requirements, it seems rather unlikely that the QHD grants competent authorities such opportunities.

⁷³ See art 19a(4)

⁷⁴ NOU 2008:13 p. 26

⁷⁵ Ot.prp.nr. 80 (2008-2009) p. 8

⁷⁶ St.prp. nr 83 (2007-2008) p. 2

4.4.2 Guidelines for the prudential assessment of proposed acquisitions

The guidelines developed by the Level-3 Committees for the prudential assessment of acquisitions and increase of holdings in the financial sector required by the QHD do not outright discuss the issue of additional assessment criteria, but the introductory statement supports a strict interpretation of the QHD amendments. The guidelines highlight the introduction of identical evaluation criteria in all Member States. They also identify the main objectives of the QHD as specifying clear criteria of a strictly prudential nature to be applied by all competent authorities.⁷⁷ This is in line with Recital 3 of the QHD.

Furthermore it is pointed out that the Directive is based on the principle of maximum harmonisation throughout the European Community, effecting identical provisions in all of the three covered financial sectors.⁷⁸ On the basis of a promotion of convergence in supervisory practices, the Level-3 Committees identify one of their main goals in the guidelines as reaching *“a common understanding of the five assessment criteria laid down by the Directive, as a prerequisite for convergent supervisory practices”*.⁷⁹ It is followed by a thorough examination of each of the five criteria. The total absence of other considerations suggests that the Level-3 Committees have viewed the criteria laid down by the Directive as exhaustive.

Additionally, a broad interpretation of the QHD gives rise to other inconsistencies; an assessment practice more restrictive than provided for by the QHD will cause problems in relation to a proposed acquirer who is already acknowledged in another Member State. Namely, under the analysis of the first assessment criterion the Level-3 Committees note that *“the integrity requirements should generally be presumed to have been met if the acquirer is a natural or legal person already considered to be ‘of good repute’ in his capacity as a significant shareholder of another financial institution which is supervised by the same competent supervisor or by another competent supervisor in the same country or in another Member State”*.⁸⁰ It would not promote a harmonised assessment practice if

⁷⁷ Level-3 Committees (2008) p. 4

⁷⁸ Credit institutions, investment firms and insurance and reinsurance undertakings

⁷⁹ *ibid.*, p. 5

⁸⁰ *ibid.*, p. 13 - 14

other criteria were to interfere with the explicit presuppositions of the Committees.

4.4.3 Limits of circumvention

The line between EEA imposed legislation and national authority is in any case difficult to draw. The Banking Law Committee holds that competent authorities will always have the right and duty to assess the provided information according to criteria and considerations that they would normally take into account to secure the sounds and prudent management of a financial institution.⁸¹ Naturally we can't exclude the possibility that competent authorities on occasion may need to assess a proposed acquisition more freely depending on the information provided by the acquirer. However, this should not present an opportunity for competent authorities to sneak in other motives that they deem important. It seems natural that the line must be drawn at considerations which are not connected to a typical "sound-and-prudent" assessment but appear to be of a different nature, such as considerations relating to the ownership structure of financial institutions and distinction of shareholders based on their institutional or non-institutional characteristics.

Under the last adaption to EEA rules in 2004 when the 10 percent ownership restriction was deleted from the FIA and ownership control rules were introduced, the Norwegian authorities held that there was no need to keep in place a rule in the CBA requiring a minimum of ten founders. The reasoning was that the motives behind this rule could be secured through the new ownership control rules.⁸² With the introduction of detailed assessment criteria in 2009, this can no longer be the case. Thus, based on the discussion above there are strong indications that Norwegian authorities' assessment practice is in conflict with EEA secondary legislation and needs to undergo a formal change to properly adapt to the new requirements.

⁸¹ NOU 2008:13 p. 26

⁸² NOU 1998:14 p. 160; Innst.O. nr. 88 (2002-2003) p. 18

5 The taking up of the business of credit institutions and insurance companies in Norway

5.1 Introduction

In this chapter we discuss the legitimacy of the competent authorities' authorisation practice for establishment of financial institutions and explore the potential conflict between the Norwegian three-quarters public offering rule and Norway's obligations under the EEA Agreement. None of these issues have so far been raised from political or authoritative circles. However, taking into account that both rest on the same political motivations as the assessment practice relating to subsequent proposed acquisitions, there is reason to believe that private investors will challenge both practice and legislation as competent authorities continue to restrict the size of private acquisitions in financial institutions. Initially we will review the rules on prudential assessment and public offering as part of authorisation practice.

5.1.1 Prudential assessment as part of the authorisation process

The domestic rules on authorisation of banks and insurance companies are found in the Commercial Banks Act (CBA) and the Insurance Act (IA) respectively. They implement the relevant provisions of the Banking Directive and the Insurance Directive in domestic law.

The CBA is restricted to commercial banks, which are defined as “... *all institutions which fund their activity by accepting deposits from an unrestricted range of depositors.*”⁸³ The IA applies to both insurance companies and pension funds, including activity by such companies.⁸⁴ Due to the different nature of insurance classes available, section 1-3 provides for a legal separation of insurance classes. Commercial banks may only be formed as

⁸³ Section 1

⁸⁴ Section 1-1

private limited companies or public limited companies, while insurance companies additionally may be formed as mutual companies.⁸⁵

As a prerequisite, institutions may not carry on banking or insurance activity without prior authorisation by the King⁸⁶, whose authority is delegated to the Ministry of Finance⁸⁷ and further delegated to the Financial Supervisory Authority of Norway (“*Finanstilsynet*”). As part of the authorisation process, the FSA needs to perform a prudential assessment of the institutions relating to their capital adequacy and the soundness of persons critical to the business. The prudential assessment criteria are equally designed in CBA section 8a(2) and IA section 2-1(2). Section 8a(2) is worded accordingly:

“Authorisation pursuant to section 8, first and second paragraphs, shall be refused if the bank fails to comply with the provisions of this Act, if the bank’s capital is not deemed to be in reasonable proportion to the business the bank intends to carry on, or if the board members, managing director or other person directly in charge of the business:

- 1. cannot be deemed to have the experience necessary to fill the post of the office,*
- 2. has been convicted of a criminal offence, and the offence committed gives reason to assume that the person in question would not discharge the position or the post in a satisfactory manner, or*
- 3. in his post or in the performance of other office has displayed conduct that gives reason to assume that the person in question would not discharge the position in a satisfactory manner.”⁸⁸*

In 2003 a third paragraph was added to Section 8a, stating that authorisation shall be refused unless the King is *convinced* that owners of qualifying holdings are suited to own such holdings and to exercise such influence in the bank as their holdings give rise to, c.f. IA section 2-1(1).⁸⁹ The term “qualifying holding” confers to the use of the same term in the FIA, Section 2-2, as explained in chapter 4.

⁸⁵ Commercial Banks Act section 3; Insurance Act section 3-1

⁸⁶ Commercial Banks Act section 8; Insurance Act section 2-1

⁸⁷ Res. 20 juni 2003 nr. 735; res. 30. Juni 2006 nr. 777

⁸⁸ FSA (2004)

⁸⁹ Not updated in the 2004 translation of the Act

5.1.2 The statutory foundation of the “Principle of Dispersed Ownership”

In regards to ownership control at the time of establishment of a financial institution, the “principle of dispersed ownership” is not only a principle, but actually expressed directly through statutory law in both the Commercial Banks Act and the Insurance Act. The CBA section 4(1) second sentence is worded accordingly:

“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 pre-emption rights for shareholders and others.”⁹⁰

The IA section 2-1(1) final sentence is worded correspondingly.⁹¹ Basically, this rule presents a 24.99 percent limitation on ownership in regard to *any* investor, but in certain cases the authorities exempt applications from the three-quarters public offering rule if they only pertain the taking up of a niche business within banking or insurance.⁹² More importantly, authorities often exempt financial institutions from these rules, allowing them to own as much as 100 percent of another financial institution.⁹³ The practice is based on an evaluation of the business’ relative importance within the sector.⁹⁴

Literature on the coming into existence of the public offering rule is sparse. Before 2004 the CBA contained a rule only proscribing public offering without a quantitative requirement, while the IA had no such rule. Simultaneously with the abolishment of the 10 percent ownership restrictions in the FIA, the above-cited rule was written into both Acts.⁹⁵

The close link between the apparent loosening of the ownership restriction rules into ownership control rules and the related introduction of the three-quarters public offering rules indicates a common set of political justifications for their content and existence. The

⁹⁰ FSA (2004)

⁹¹ Not updated in the 2004 translation of the Act

⁹² See Commercial Banks Act section 4(2), Insurance Act section 15-8(3)

⁹³ See e.g. Ministry of Finance (June 2008)

⁹⁴ See e.g. Ministry of Finance (2005)

⁹⁵ Steen (2008), Note (7)

preparatory works to the regulatory changes in 2004 state that the rules regarding ownership restrictions and the establishment of commercial banks have to be viewed collectively, because both set of rules are motivated by the main goals of achieving division of power and the need to secure independent institutions.⁹⁶ Additionally, the follow-up preparatory works leading up to the subsequent regulatory changes underline that the rules on public offering are meant to secure that a financial institution is subject to dispersed ownership from the outset.⁹⁷

5.2 Does Norwegian authorisation practice conflict with the Directives?

The rules in the Commercial Banks Act and the Insurance Act proscribing public offering of shares and the rules regarding the prudential assessment of owners refer to slightly different aspects of the initial evaluation in the authorisation process. While the three-quarters rule is stated as a formal requirement for authorisation, the latter demands a discretionary evaluation. However, these rules are closely linked through the competent authorities' authorisation practice.

The motivations behind the three-quarters public offering rules are a great influence on the authorities' sound and prudent assessment of owners, and have over time resulted in a 24.99 percent or lower ownership restriction threshold for private non-financial initial founders, similar to the practice for subsequent proposed acquisitions.⁹⁸ This is in spite of the fact that a private owner would be considered "sound and prudent" to own more than the relevant percentage of the institution if the prudential assessment criteria were practiced on their own.

Exceptions are made for niche businesses, on the grounds that they do not play an equally important role within industrial and credit policy. This means that individuals or non-financial institutions that want to start up a new business with niche characteristics within

⁹⁶ NOU 2002:3 p. 156

⁹⁷ Ot.prp.nr. 50 (2002-2003) p. 45

⁹⁸ See e.g. Ministry of Finance (2002); Ministry of Finance (July 2005); Bergo (2011)

banking or insurance avoid forced changes to their ownership structure through “dispersal sales”, resulting in holdings above 25 percent in the niche business.⁹⁹

Neither the Banking Directive nor the Insurance Directive contain rules equivalent to the Commercial Banks Act Section 4 and the Insurance Act Section 2-1.

5.2.1 Interpretive presuppositions

When analysing a directive, the method of interpretation is similar to Norwegian interpretation practice.¹⁰⁰ The natural point of departure is the text itself, including its wording and context. Additionally, the main purpose of the directive as expressed through its text is of great importance.¹⁰¹ However, the Preamble of a directive cannot always be cohesively interpreted in EU and EEA law, as the Preamble is written in consideration of the EU cooperation and not adjusted for the EEA. The interpretive significance of the Preamble is regulated in the EEA Agreement’s Protocol 1, Section 1, which states: “[*The preambles*] are relevant to the extent necessary for the proper interpretation and application, within the framework of the Agreement, of the provisions contained in such acts.” We will observe these guidelines in the following. However, due to the lack of supporting authoritative texts to the specific directive provisions, emphasis is put on the Directive’s text, its purpose and the motives stated in the Preamble. In the following we focus on the Banking Directive, as the Insurance Directive contains largely corresponding regulation.

5.2.2 Minimum harmonisation in the Banking Directive

The provisions regarding requirements for access to the taking up of the business of credit institutions are found in Articles 6 to 18 of the Banking Directive. In terms of ownership control regulation Articles 6, 8, 11 and 12 are central.

⁹⁹ See e.g. Ministry of Finance (2005); Ministry of Finance (2007) and Ministry of Finance (2008)

¹⁰⁰ Andenæs (2010) p. 1

¹⁰¹ *EØS-rett* (2004) p. 205

Article 6 delegates to the Member State the responsibility of laying down the requirements for obtaining authorisation within its jurisdiction. This appears to be a fairly liberal regulation, providing Norwegian Authorities with broad discretion to decide which requirements must be met in order to obtain a licence. However, it is cohesive with the wide powers awarded to the Home Member State and the general implications of a minimum harmonisation directive. As a point of departure, this could indicate a freedom to decide whether a certain ownership threshold must be met for an authorisation to go through. However, Article 6 only provides a general indication of a Member State's freedom, in as far as it must be read "*without prejudice to Articles 7 to 12*"¹⁰², which provide further guidance on the obligations of the Member State.

Article 12 describes the prudential assessment of shareholders or members prior to authorisation. It is the only provision regulating the initial assessment of owners necessary to decide for or against authorisation of a credit institution. Therefore, it provides the foundation for what a Member State is obliged to consider, focusing on sufficient information, sound and prudent shareholders and effective supervision. Article 11 is of less importance in this aspect, as it regulates the prudential assessment of persons who will direct the business. Article 12 paragraphs 1(1), 2 and 3(1) are reproduced below:

1. *The competent authorities shall not grant authorisation for the taking-up of the business of credit institutions unless they have been informed of the identities of the shareholders or members, whether direct or indirect, natural or legal persons, that have qualifying holdings, and of the amounts of those holdings.*
2. *The competent authorities shall not grant authorisation if, taking into account the need to ensure the sound and prudent management of a credit institution, they are not satisfied as to the suitability of the shareholders or members.*
3. *Where close links exist between the credit institution and other natural or legal persons, the competent authorities shall grant authorisation only if those links do not prevent the effective*

¹⁰² Dir 2006/48/EC art 6

exercise of their supervisory functions.

Although Article 12 clearly states what Member States must consider, it is not clear to which degree it provides *restrictions* on what Member State are *allowed* to consider. Observing the characteristic assessment obligations imposed by Article 12, the important question is whether or not Article 12 at all can be said to regulate the question of the legality of the Norwegian assessment practice, which is of a different nature than a pure “fit-and-proper” assessment.

The text of Article 12 is not sufficient to answer this question, as it appears to give no indication as to the legal status of criteria not naturally included in a “fit-and-proper” assessment of a shareholder. Although this might be an indication in itself, we need to look to other factors of interpretation complementing the wording of Article 12.

The Preamble’s recital 15 is important in this respect, stating that “*The Member States may also establish stricter rules than those laid down in Article ... 12, ... for credit institutions authorised by their competent authorities.*” The term “stricter rules” must be taken also to include domestic administrative practices. In conformity with the above, there is a justifiable need for the use of the Preamble in this situation.

We need to focus on the term “stricter rules” in recital 15 combined with the content of Article 12. As seen from the reproduction of Article 12 above, this provision focuses on sufficiently prudential assessments of the owners of a financial institution, assuring that they are “fit and proper” to own a financial institution.¹⁰³ This goes hand in hand with the acquiring of sufficient information in paragraph 1 and effective supervision in paragraph 3. Thus, the obligations imposed on Norwegian authorities through Article 12 are restricted to assessments closely linked to the suitability of shareholders, and it does not contain any indication of the status of authorisation criteria falling outside this limited scope of criteria.

¹⁰³ Art 12(2)

Accordingly, we need to examine whether or not the domestic practice constitutes such “stricter rules” that can be introduced by Member States through Article 12, c.f. recital 15. From one point of view, with Article 12 being the only provision regulating the initial assessment process, recital 15 opens for a variety of stricter national rules as part of the authorisation process. Additionally, the domestic assessment practice rule must in itself be said to provide “stricter rules”, because it imposes additional requirements on shareholders in the establishment process of a credit institution. These facts support the argument that the domestic rules fall within the ambit of Article 12 and are accepted in conformity with recital 15. We should also take into account the fact that there is no provision directly forbidding this type of national regulation. However the argument is not strong, considering that directives usually are limited to provisions proscribing what a Member State has to do, and rarely what it shall not do.¹⁰⁴

On the other hand, attention should be paid to the essence of Article 12 as a whole. The fact that the Article is so narrowly composed as to its content, draws into question the extent of its application. Although recital 15 opens up for “stricter rules”, it seems more suitable to apply a sober approach as to its meaning. Recital 15 combined with the content of Article 12 suggests that the “stricter rules” have to be along the lines of the already existing ones in Article 12, e.g. by requiring information also about shareholders with non-qualifying holdings or by requiring that competent authorities should be *convinced* as to a shareholders suitability instead of only “satisfied”.

In all, the implications of recital 15 are far from clear. Sadly, there is not much guidance to be drawn from the preparatory works to the Directive, mainly because the rules regarding the assessment for the taking-up of the business of credit institutions are considered rather uncontroversial. Neither the Commission and Council’s initial legislative document¹⁰⁵ nor

¹⁰⁴ *EØS-rett* (2004) p. 210

¹⁰⁵ COM (2004) 0486

the Commission Staff Working Paper¹⁰⁶ or the European Economic and Social Committee's Opinion¹⁰⁷ to the Banking Directive even discuss the provisions of Articles 6-12.

Taking the more cautious interpretative approach, it seems plausible that Article 12 in combination with recital 15 does not regulate the type of rules as expressed through the Norwegian assessment practice. The additional peculiarity of the Norwegian public offering rules standing unmatched in other European countries further supports this argument.¹⁰⁸ Taking into account that the Directive was originally given for the purpose of the EU cooperation, it becomes even more uncontroversial to dismiss the application of Article 12 in this respect.

This leads us back to Article 6. Even though the type of ownership practice enforced by Norwegian authorities was not necessary captured in the minds of the EC legislators, the rules it creates are captured within the wording of Article 6, as they provide “*requirements for such authorisation*”. As seemingly there is no prejudice to Article 12, Article 6 should allow Norwegian Authorities to lay down an ownership criterion for the granting of authorisation. In this respect we especially need to remember that the Banking Directive is a minimum harmonisation directive, leaving a high degree of jurisdiction to the Member States. This is highlighted by the European Commission in its Communication on Intra-EU investment in the financial services' sector.¹⁰⁹ The Commission expresses that the directive establishes some core principles of supervision, like the “fit and proper” requirement, to obtain probity and soundness in financial institutions.¹¹⁰ This is followed by the acknowledgement that this secondary legislation has yet to go beyond a certain level of harmonisation of its specific provisions, which “*enables Member States to apply supplementary rules and administrative practices to the common rules set down in the EU*

¹⁰⁶ SEC (2004) 0921

¹⁰⁷ CE S0244/2005

¹⁰⁸ Bergo (2011) p. 11

¹⁰⁹ European Commission (2005)

¹¹⁰ Chapter 4 para. 1

directives".¹¹¹ Thus, the Commission straight-out confirms the powers of Member States under the Directive.

5.2.2.1 The ban on considering the economic needs of the market

However, Article 8 may impede the simple Application of Article 6, stating: "*Member States may not require the application for authorisation to be examined in terms of the economic needs of the market*". This term is broad and it is not clear which specific motivations it covers. Thus, decisive is to which extent the Norwegian practice is motivated by the "economic needs of the market". According to the Banking Law Commission, the term will generally encompass cases where a licence is denied on grounds that market conditions do not welcome new market players.¹¹² As specified above under 5.2., the main goals behind the practice are to ensure a dispersed ownership structure and to secure independent institutions. These motivations do not seem to fall within the ambit of "economic needs of the market".

More generally, ECJ case law indicates that domestic *legislation* that conflicts with a ban on considering economic needs of the market often directly states that such considerations should be made. See to this effect *Commission v French Republic*, where the Court simply states that "*national legislation which makes the grant of a licence to pursue an activity such as the engagement of performing artists subject to the need to engage performing artists constitutes a restriction in that it tends to limit the number of suppliers of services*" (our underlining).¹¹³

The Norwegian assessment practice does not point to any such considerations, but simply effects an ownership criterion for licensing. This view seems to be mirrored in the Ministry of Finance's evaluation of the necessary changes to the Financial Institutions Act under the QHD. The Ministry stated that a domestic rule proscribing evaluation of competition policy

¹¹¹ Chapter 4 para. 2

¹¹² NOU 2008:13 p. 26

¹¹³ Case C-255/04 *Commission v French Republic* para. 29

and other market conditions needed to be amended due to Article 19a of the Directive, forbidding Member States to consider “the economic needs of the market”.¹¹⁴ It seems there is a prevailing opinion, both nationally and on an EC level, that a provision or practice needs to directly refer to *market needs* in order to conflict with such a prohibition. Therefore, the Norwegian assessment practice most likely does not constitute the type of domestic regulation that would be in direct conflict with Article 8 of the Directive. Observing Article 6, this indicates that the Norwegian practice presumably is not in conflict with the provisions of the Banking Directive.

5.2.2.2 The freedom limitations

However, in spite of the straight-forward wording of Article 6, it is not likely to give Member States the full freedom to lay down stricter rules, by only requiring that they do not conflict with Articles 7-12 of the current Directive. For a complete interpretation, the expressed purpose of the Directive has to be taken into account.

The main purpose of the Banking Directive is stated in recital 3 in the Preamble, which is “*the achievement of the internal market from the point of view of both the freedom of establishment and the freedom to provide financial services, in the field of credit institutions*”. As further stated in recital 3, the Directive constitutes the *essential instrument* to achieving this goal, indicating that the provisions of the Directive itself are meant to be sufficient within their respective field. However, a directive that seeks to implement any of the fundamental freedoms in domestic law needs to be interpreted in the light of the respective Agreement provisions.¹¹⁵ Thus, Articles 31 and 36 EEA should provide guidelines for the interpretation of the Banking Directive. This means that the directive to the farthest extent possible needs to be interpreted in accordance with the EEA Agreement, in conformity with the principle of homogeneity and cohesive interpretation of EU and EEA law.¹¹⁶ There is a clear tendency in ECJ case law towards broad interpretations of

¹¹⁴ Ot.prp.nr. 80 (2008-2009) p. 15

¹¹⁵ Andenæs (2010) p. 3

¹¹⁶ *ibid.*, p. 1

directives, often laying aside the distinct wording of the directive and focusing on the compliance with the EC Treaty and its own case law.¹¹⁷ However, this changes the initial question slightly, turning it into a question regarding EEA Agreement compliance and not directive compliance, although these often can be considered different sides to the same matter. EEA Agreement compliance will be addressed in chapter 5.3.

As far as the Directives go, there is reason to believe that Norwegian authorisation practice is in conformity with the Directive provisions. Firstly, we point to the explicit statements in the European Commission's Communication. Secondly, the Directives only seek minimum harmonisation.¹¹⁸ This means that Member States can provide for regulation and administrative procedures not covered by the directive, and that domestic law which extends beyond the provisions of a directive (or even confer to it) need to be tried in the same way as other domestic legislation directly against the Agreement provisions in a question regarding compliance with any of the freedoms.

As we conclude that Norwegian authorisation practice is not in direct conflict with the Insurance and Banking Directives, and as we presume that the Directives themselves are not in conflict with the EEA Agreement, there is no room for further pursuing the question of whether domestic practice conflicts directly with the Agreement. However, the Norwegian authorisation practice rests on the same political motivations as the Norwegian public offering rules, as they are deeply intertwined. Discussing the potential conflict between these rules and the EEA Agreement in chapter 5.4. might provide further guidance as to the legal status of authorisation practice as well, as seen from an EEA supervisory point of view. Before getting to this, we will discuss whether the QHD has any effect on our preliminary conclusion.

¹¹⁷ See Joined Cases C-34/95, C-35/95 and C-36/95 *Konsumentombudsmannen v De Agostini*; Case C-341/05 *Laval*; Joined Cases E-8/94 and E-9/94 *Forbrukerombudet v Mattel Scandinavia A/S and Lego Norge A/S*; and Rt.2000.1811 *Finanger*

¹¹⁸ Recital 6 and 7

5.2.3 The relevance of the Qualifying Holdings Directive

The Qualifying Holdings Directive amends both the Banking Directive and the Insurance Directive. However it only amends the rules relating to the pursuit of investments in credit institutions and insurance companies and does not affect the Directives' provisions regarding the initial taking up of these businesses.¹¹⁹ In this respect, the question remains as to whether or not the QHD has any relevance to the Norwegian practice regarding the initial assessment of shareholders as part of the authorisation process.

We recall that one of the main differences between the QHD on the one hand and the Banking and Insurance Directives on the other, is the degree of harmonisation sought by the directives. The former is a maximum harmonisation directive, while the two latter are minimum harmonisation directives. This means that if the QHD is of any relevance to the taking up of the business of credit institutions and insurance companies, it will put greater restraints on the authorities' discretionary assessment. Furthermore, it might render the authorities' practice incompatible with Norway's obligations pursuant to the EEA Agreement in spite of our preliminary conclusion above.

As an initial point of departure, we can hold with confidence that the QHD does not *formally* affect the Norwegian authorisation process. This is naturally so because the directive itself does not make changes in the provisions regarding the authorisation process and prudential assessment of initial shareholders. In theory, there should be nothing wrong with sticking to this interpretation.

The QHD forced regulatory changes upon Norwegian authorities. The preparatory works preceding these changes do not discuss the possible effect that the Directive could have on the authorisation process. Up until that time the evaluation criteria had been identical in the different stages, which was visible through the explicit reference to the ownership control rules in the Financial Institutions Act, in both the Commercial Banks Act and the Insurance Activity Act. The Banking Law Commission's proposal for regulatory changes simply

¹¹⁹ Dir 2007/44/EC recital 1 and 2

acknowledges that the implementation of the QHD represents a separation of these rules.¹²⁰ The only changes proposed to the CBA and the IA were to repeal the linkage to the assessment criteria in the FIA.¹²¹ The subsequent evaluation by the Ministry of Finance only repeats the Commission's statement without further discussion.¹²² From this legislative history it is obvious that the Norwegian authorities (1) focused on the fact that the Directive did not require changes to the authorisation and initial evaluation process, and (2) seemingly did not find it problematic that this would lead to a separation of the rules. Their behaviour is consistent with the obligations imposed by the directive.

However, if acknowledging this point of view, one might question the resulting inconsistency between the authorities' practice at different stages throughout a financial institution's lifetime. It would mean that they would be allowed greater discretion at the licensing stage than in the subsequent sound and prudent-assessments of potential acquirers. In particular, competent authorities' would be allowed to emphasize motives like dispersed ownership, structural considerations and competition aspects as part of the initial assessments of shareholders, but not in the subsequent assessments of shareholders wanting to acquire a holding in a financial institution. At first glance this approach seems unfounded, especially taking into account that the time period between an initial assessment and a following assessment of a proposed acquirer can be very short.¹²³

This leads us to the question of why the QHD only addresses the prudential assessment associated with acquisitions and increases in holdings. The answer lies in the reason why an amendment was proposed in the first place. Around 2004 the Economic and Financial Affairs Council (ECOFIN) became aware that the number of cross-border mergers and acquisitions in the banking sector were lagging behind other (non-financial) sectors and encouraged the European Commission to explore possible obstacles.¹²⁴ This resulted in the review of the Banking Directive's provisions that allow Member States to oppose

¹²⁰ NOU 2008:13 p. 3

¹²¹ NOU 2008:13 p. 9

¹²² Ot.prp.nr. 80 (2008-2009) p. 13

¹²³ Bergo (2011) p. 11

¹²⁴ See SEC (2005) 1398

acquisitions or increases of qualified holdings in credit institutions based on prudential considerations, leading to the adoption of the QHD. Simultaneously the decision was made to equally review the corresponding regulations within the securities and insurance sectors.¹²⁵ Thus, the motivation behind the amendments did not require an additional review of the assessment process relating to the taking up of the business of financial institutions and there was no intention to do so.

Against this background, it is difficult to find good reasons as to why the QHD should be relevant to the initial assessment process of Norwegian authorities. One reason might be to straighten out an inconsistent assessment practice, which of course has an intrinsic value. Also, an inconsistent practice might lead to unjustified restraints, considering that *one* acquirer might be treated differently in an initial evaluation process than in a subsequent evaluation process, limiting his choice of investments.

However, an inconsistency in domestic practice cannot in itself be enough to impose stricter requirements on the authorities' assessment as long as the QHD does not formally address this assessment. One of the particular concerns of the QHD is to avoid that regulatory arbitrage enables individuals and institutions to avoid initial authorisation criteria by instead acquiring a holding in a financial institution.¹²⁶ This implies that the prudential assessment of a proposed acquisition should not differ greatly from the authorisation rules, but it tells nothing specific about the contents of the authorisation rules themselves. Additionally, although supporting the existence of an inconsistent practice, we might argue that the goals of transparency, legal certainty and harmonisation of domestic practice are secured, because authorities still need to abide by QHD provisions when assessing a subsequent acquisition proposal. From a slightly different point of view, commentators have also raised the question of whether a forced parallelism of the rules is at all justified, pointing out that the authorisation rules and rules regarding an acquisition or increase of shareholding do not necessarily need to follow the same pattern and that it would

¹²⁵ Kerjan (2008) p. 5

¹²⁶ Dir 2007/44/EC Recital 3

be legitimate to subject a subsequent acquisition to less stringent constraints than an initial authorisation.¹²⁷ These considerations support the division of rules as perceived by the Norwegian authorities.

Considering the above we stand by the conclusion that the authorities' licensing practice is not in conflict with the Banking Directive or the Insurance Directive.

¹²⁷ Kerjan (2008) p. 54

5.3 Exploring the potential conflict between the Norwegian public offering rules and the EEA Agreement

The European Commission has expressed that *“when national rules are more restrictive than EU secondary legislation, conflicts with the Treaty freedoms may appear. When legislating or creating or enforcing administrative practices, Member States must respect both, the basic freedoms guaranteed by the EC Treaty in addition to ensuring compliance with the directive.”*¹²⁸

On this background, we will discuss the potential conflict between the Norwegian three-quarters public offering requirements for financial institutions and the obligations imposed by the EEA Agreement. We remind the reader that these rules apply to all investors, private or not, unless exceptions are made. Issues arising from these rules have so far been addressed neither by national authorities nor EEA supervisory authorities. Accordingly, we attempt to provide a preliminary evaluation as to the legitimacy of the Norwegian public offering rules. The essential question is whether or not the rules constitute restrictions on any of the essential freedoms in the EEA Agreement.

5.3.1 Right of establishment and free movement of capital connected to intra-EEA investments

The provisions regarding right of establishment and free movement of capital are the two main sets of rules that regulate the intra-EEA investment in the financial sector.¹²⁹ The Banking Directive and the Insurance Directive mention the freedom to provide services as a main goal next to the right of establishment.¹³⁰ The distinction between the freedom of establishment and the freedom to provide services is not always clear, which is discussed in

¹²⁸ European Commission (2005) p. 6; also see Joined Cases C-193/97 and 194/97 *De Castro Freitas and Escallier*, para. 23

¹²⁹ Kerjan (2008) p. 14

¹³⁰ Dir 2006/48/EC Recital 3; Dir 2002/83/EC Recital 3

a quantity of ECJ case law.¹³¹ However, these are issues of main concern to the institutions actually providing the services. For the purpose intra-EU investments in financial institutions, either by individuals or undertakings, the right of establishment is the main focus. On the other hand, none of the directives mention the free movement of capital as a goal in itself. However, the free movement of capital is necessarily closely linked to the freedom of establishment in the case of intra-EEA investments, in as far as any investor will need to move capital in order to make any kind of investment. The complex relationship and certain overlap between the two freedoms has on several occasions driven the ECJ to choose between a cumulative or alternative application of the freedoms.¹³²

As for establishment, this chapter only addresses the issue of primary establishment, which entails the primary establishment of a financial institution in a Member State or the relocation of the entire business to such a State. The issue of secondary establishment applies to the establishment of branches or subsidiaries in another Member State than the home Member State, which is where the “home country control principle” primarily is relevant. Secondary establishment in Norway is regulated by administrative regulation.¹³³

5.3.1.1 Right of establishment

The right of establishment is regulated in Articles 31 to 34 EEA.¹³⁴ Article 31 provides that: *“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 EFTA State in the territory of any other of these States.”*¹³⁵

It further states that: *“Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in*

¹³¹ Lau Hansen (2002) p. 197 - 209

¹³² Kerjan (2008) p. 18 - 20

¹³³ Regulation no. 326 on branches of banks and other credit institutions having their head offices in another state in the European Economic Area, etc.

¹³⁴ EEA Part III – Free Movement of Persons, Services and Capital, Chapter 2 – Right of Establishment

¹³⁵ Para. 1(1)

*particular companies or firms ... under the conditions laid down for its own nationals by the law of the country where such establishment is effected...*¹³⁶

Article 34 provides that companies or firms shall be treated in the same way as natural persons who are nationals of the EC Member States or EFTA States, if they are formed in accordance with the law of any of these States and have their registered office, central administration or principal place of business within the territory of any of these States.¹³⁷ “Companies or firms” means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those that are non-profit-making.¹³⁸

5.3.1.2 Free movement of capital

The rules in the EEA Agreement regarding the free movement of capital mirror those of the EC Treaty prior to the changes effected by the Maastricht Treaty. This means that the regulation of capital movements is not identical in EEA and EU law, but the EC Court has pronounced that the materiel content of the rules is in fact the same.¹³⁹ For the purpose of the EEA cooperation the rules regarding capital movements are provided in the EEA Agreement Articles 40 to 45¹⁴⁰ and Directive 88/361/EEC (“Capital Movements Directive” (CMD))¹⁴¹.

Article 40 EEA is the main article and states that: *“Within the framework of the provisions of this Agreement, there shall be no restrictions between the Contracting Parties on the movement of capital belonging to persons resident in EC Member States or EFTA States and no discrimination based on the nationality or on the place of residence of the parties or on the place where such capital is invested.”*

¹³⁶ Para. 1(2)

¹³⁷ Para. 1

¹³⁸ Para. 2

¹³⁹ Case C-452/01 *Ospelt*, para. 28

¹⁴⁰ Part III – Free Movement of persons, services and capital, Chapter 4 - Capital

¹⁴¹ Council Directive of 24 June 1988 for the implementation of Article 67 of the Treaty

Additionally, Article 1 first sentence of the CMD states that: “*Without prejudice to the following provisions, Member States shall abolish restrictions on movements of capital taking place between persons resident in Member States.*” The ECJ has confirmed that this provision establishes a prohibition against restrictions on capital movements.¹⁴²

The term ‘capital movement’ is not defined in the EEA Agreement but it has traditionally been interpreted to entail a unilateral value transfer between two States, effecting a separation between capital movements and payments, the latter of which is regulated in Article 41 EEA.¹⁴³ However, according to ECJ case law a transfer of equity shares and other financial instruments issued by a company are considered capital movements and covered by Article 40.^{144 145}

5.3.2 A cumulative or alternative application of the two freedoms

Before discussing whether or not the public offering rules constitute restrictions, and thus possibly a conflict with EEA law, we will examine which of the two freedoms is applicable in this situation. This is a difficult distinction to draw in the case of cross-border investments.

In the case *Holböck* the ECJ stated: “*As regards the question whether national legislation falls within the scope of one or other of the freedoms of movement, it is clear from what is now well established case-law that the purpose of the legislation concerned must be taken into consideration.*”¹⁴⁶ Similar statements appear in a list of other judgments.¹⁴⁷ To this effect Advocate General Kokott expressed in the case *Geurts and Vogten* that “*only the*

¹⁴² See Joined Cases C-367/98 *Commission v Portugal*

¹⁴³ *EØS-rett* (2004) p. 461

¹⁴⁴ Bull (2002) p. 117 - 118

¹⁴⁵ See also EEA art 124

¹⁴⁶ Case C-157/05 *Holböck*, para. 22

¹⁴⁷ See also Case C-492/04 *Lastertec*, para. 19; Case C-196/04 *Cadbury Schweppes and Cadbury Schweppes Overseas*, paras. 31 - 33; Case C-452/04 *Fidium Finanz*, paras. 34, 44 - 49; Case C-374/04 *Test Claimants in Class IV of the ACT Group Litigation*, paras. 37 - 38; Case C-446/04 *Test Claimants in the FII Group Litigation*, para. 36; and Case C-524/04 *Test Claimants in the Thin Cap Group Litigation*, paras. 26 - 34

fundamental freedom which is the main focus as regards the substance of the matter should be applied”.¹⁴⁸ In several cases the Court has used this procedure to decide between an application of right of establishment and movement of capital, or whether to apply both freedoms. Thus, when evaluating which freedom will be applicable to the Norwegian public offering rules, we need to establish the main purpose of this legislation. As we have explained in chapter 5.2. above, the main goals behind these rules are to achieve division of power through a dispersed ownership structure and to secure independent institutions. In itself this does not provide much guidance as to whether right of establishment or movement of capital is the main focus. But knowing that the rules are directed at the initial establishment process of a financial institution by laying down an ownership criterion provides a sound indication that the rules at least fall within the scope of ‘right of establishment’.

On the other hand, if we look to the explicit wording of the rules, the purpose is clearly to control the number of owners of the institution, by imposing a requirement of a more than three-quarters public offering of shares. This rule limits the total amount of shares that may be held and thus the amount of capital that may be invested. Therefore, the rules also reside within the ambit of ‘movement of capital’. The closest we get to relevant case law comparable to these rules are the famous ‘golden shares’ cases.¹⁴⁹ ‘Golden shares’ is a term used to describe shares that grant state control in privatised companies by enabling government authorities to intervene in their share structure or management in various ways.¹⁵⁰ Case law shows that these state prerogatives are mainly proscribed by legislation and more seldom established by the company itself. The ECJ has expressed that the free movement of capital is the ‘main focus’ of the ‘golden shares’ rules.¹⁵¹ Although the Norwegian rules are not a result of state ownership in financial institutions, they have some similarities with the ‘golden shares’ cases in as far as they provide the authorities with the

¹⁴⁸ Case C-464/05 *Geurts and Vogten*, Opinion of A.G. Kokott, para. 24

¹⁴⁹ See Joined Cases C-367/98, C-483/99 and C-503/99 *Commission v Portugal, France and Belgium*; Case C-463/00 *Commission v Spain*; Case C-98/01 *Commission v United Kingdom*; Joined Cases C-282/04 and C-283/04 *Commission v Netherlands*

¹⁵⁰ See Grundmann (2003)

¹⁵¹ Kerjan (2008) p. 19 - 20

right to refuse an investment above a certain percentage. This suggests that movement of capital is an important aspect of the rules, but in lack of any case law discussing rules with closer similarity to the Norwegian rules, it is not enough to tip the scale in favour of movement of capital as a main focus.

Clearly, any form of establishment also requires the movement of capital. Accordingly it is difficult to decide on either right of establishment or movement of capital in this case only by application of the ‘main focus’ test.

Thus, The ECJ has gone further in establishing criteria for the distinction between the two freedoms in the case of investments. The Court has declared that capital movements include both direct investments and portfolio investments.¹⁵² To ascertain whether we are talking about “establishment” or an “investment”, the Court makes use of a criterion of “definite influence”. A typical example is the *Baars* case, where the Court expressed that “*a national of a Member State who has a holding in the capital of a company established in another Member State which gives him definite influence over the company’s decisions and allows him to determine its activities is exercising his right of establishment*”.¹⁵³ The Court further states that “*control or management of the company, ... are factors connected with the exercise of the right of establishment*”.¹⁵⁴ This means that an ownership stake below this threshold falls within the movement of capital. In determining whether or not such definite influence is present in an individual case, the rules of company law in the State in which the company is established should be taken into account.¹⁵⁵ To this effect, guidance can be sought in the Norwegian Private Limited Companies Act section 1-3 and the Public Limited Companies Act 1-3.

Some guidance can also be drawn from a connected field. In a reasoned opinion to Norway dated December 2010, the EFTA Surveillance Authority deemed Norwegian legislation on

¹⁵² See Case C-446/04 *Test Claimants in the FII Group Litigation*, paras. 179-181; and Case C-157/05 *Holböck*, paras. 33-34

¹⁵³ Case C-251/98 *Baars*, para. 22

¹⁵⁴ *ibid.*, para. 20

¹⁵⁵ *ibid.*, Opinion of A.G. Alber, para. 33

ownership in financial services and infrastructure institutions to be in conflict with both Article 31 and 40 EEA. The Surveillance Authority held, as relevant in that case, that shareholdings above 20 percent normally fall within the scope of Article 31, but that in certain cases 20 percent ownership might not give the owner ‘definite influence’ in the company, depending on the ownership structure.¹⁵⁶

The Norwegian rules on public offering of shares are similar to those discussed in the Reasoned Opinion in as far as they lay down a fixed fraction of property rights that cannot be exceeded. The difference is that they only regulate the initial establishment of the institution and that the threshold is slightly higher. As the rules proscribe public offering of more than three-quarters of the shares, it entails in theory that one single founder may own as much as 24.99 percent of the total equity in the institution. We cannot exclude that also a 24.99 percent ownership in some cases could be insufficient to amount to ‘definite influence’. This is supported by the ECJ’s ruling in the case *Commission v Italy*, where it states that “[n]ational legislation ... which applies irrespective of the size of the holding which the shareholder has in a company may fall within the ambit of both Article 43 EC and Article 56 EC”.¹⁵⁷ Therefore we need to examine both freedoms when assessing a potential conflict with the EEA Agreement.

5.3.3 Do the Norwegian rules constitute ownership restrictions in conflict with Articles 31 and 40 EEA?

The fundamental principles of right of establishment and movement of capital entail a general prohibition on restrictions. This is expressed in Articles 31 and 40 EEA, Article 1 of the CMD as well as through a long line of ECJ case law.¹⁵⁸ In the Court’s early case law it ruled that only unequal treatment in the access to markets because of nationality

¹⁵⁶ EFTA Surveillance Authority (2010) p. 10

¹⁵⁷ Case C-326/07 *Commission v Italy*, para. 36

¹⁵⁸ See Joined cases C-282/04 and C-283/04 *Commission v Netherlands*, para. 18; Case C-112/05 *Commission v Germany (Volkswagen)*, para. 17

amounted to unlawful restrictions on the freedoms.¹⁵⁹ The Norwegian rules on public offering do not discriminate on such grounds, as they apply to domestic as well as foreign investors. In more recent case law unequal treatment is not necessary for a domestic rule to constitute a restriction.¹⁶⁰

As regards freedom of establishment, the Court holds that “*all measures which prohibit, impede or render less attractive the exercise of that freedom must be regarded as constituting ... restrictions*”.¹⁶¹ In the case of movement of capital, the Court has expressed itself a bit differently, by stating that “*national measures must be regarded as ‘restrictions’ within the meaning of Article 56(1) EC if they are likely to prevent or limit the acquisition of shares in the undertakings concerned or to deter investors of other Member States from investing their capital*”.¹⁶² To this respect the Court pronounced in *Commission v France* that “*they are therefore liable, as a result, to render the free movement of capital illusory*”.¹⁶³

To recapitulate, the Commercial Banks Act Section 4(1) second sentence states that an authorisation under the 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 pre-emption rights for shareholders or others.¹⁶⁴ A corresponding rule is included in the Insurance Act Section 2-1(1) fifth sentence. This clearly entails a *limitation* on the initial shareholdings in a financial institution.

Section 4(2) of the CBA provides that: “*The King may authorise a commercial bank to be formed by three or more banks without an invitation to subscribe for shares, or without an*

¹⁵⁹ *EØS-rett* (2004) p. 393-408

¹⁶⁰ It started with Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* (“*Cassis de Dijon*”)

¹⁶¹ Case C-298/05 *Columbus Container Services v Finanzamt Bielefeld-Innenstadt*, para. 34

¹⁶² Joined Cases C-282/05 and C-283/05 *Commission v Netherlands*, para. 20; see also Case C-174/04 *Commission v Italy*, paras. 30-31; and Case C-265/04 *Bouanich*, paras. 34-35

¹⁶³ Case C-483/99 *Commission v France*, para. 41; see also Case C-367/98 *Commission v Portugal*, para. 45

¹⁶⁴ FSA (2004)

invitation to the public to subscribe for shares.”¹⁶⁵ A similar rule does not exist in the Insurance Act. The King’s jurisdiction is delegated to the Ministry of Finance.¹⁶⁶

This exception is just a minor derogation from the rule in paragraph one and does not change the main rule significantly. Additionally the exception does not provide a high degree of legal certainty, because it according to its wording grants the authorities full discretion (“may authorise”) and does not provide any indication of the circumstances in which this may happen or the relevant assessment criteria. Furthermore, the exception only applies to *banks* as founders of the financial institution. This means that individual or non-financial institutional investors never will be exempt from the public offering rule, unless they wish to establish a niche financial institution. None of the preparatory works discuss the application of the exception rule.¹⁶⁷

In its Reasoned Opinion to Norway of December 2010, as mentioned above, the EFTA Surveillance Authority emphasised that the rules in question would always make it impossible for individuals, or other companies than the ones listed in the exception, to own more than 20 percent in a stock exchange or securities depository.¹⁶⁸ Almost the opposite is the case for the public offering rules; they only regulate the shareholdings at the establishment of a financial institution. Subsequent acquisitions or increases in holdings are regulated by the provisions in the FIA which do not contain any ownership restrictions, as discussed in chapter 4. Such a transaction can happen at any time following the establishment of the institution. This undoubtedly makes the public offering rules seem less invasive, although still limiting initial shareholdings.

To determine whether the rules constitute restrictions, we need to evaluate whether they still “*prohibit, impede or render less attractive*” or “*limit or prevent the acquisition of*

¹⁶⁵ *ibid.*

¹⁶⁶ Res. 15 June 1990 no. 453

¹⁶⁷ See NOU 1998:14; Ot.prp.nr. 50 (2002-2003); Innst.O. Nr. 88 (2002-2003)

¹⁶⁸ EFTA Surveillance Authority (2010) p. 11

shares ... or .. deter investors .. from investing their capital”, in spite of their limited application.

To an investor who wants to establish a financial institution in a Member State, there is clearly a difference between being able to establish the institution and to acquire a stake in an already existing one. From this point of view a limitation on the size of the shareholding he is allowed to own as the institution is established, can surely at least “*render less attractive*” such an investment in Norway, as well as “*prevent the acquisition of shares*” if he wished to own more than the accepted amount. The fact that an owner may increase his holding almost immediately following the establishment pulls somewhat in the opposite direction. However, even though this is the case in theory, it might not always be possible in practice. There might for example not be any additional shares to purchase or the authorities might not approve the proposed acquisition.

From this point of view, it seems clear that the rules constitute a restriction on the freedom of establishment. A supporting argument to this effect is the abolishment of the 10 percent ownership restriction in the FIA that took place after the EFTA Surveillance Authority rendered it incompatible with Article 40 EEA. The rule was quite similar to the one discussed in the Reasoned Opinion to Norway of December 2010, and was founded on similar considerations as the public offering rule.¹⁶⁹ The fact that the latter was introduced when the former was abolished, and without any clear explanation by the legislators, indicates to a certain degree that the public offering rules were meant to be a substitute for the 10 percent rule, or at least a safeguard to the dispersal of ownership and division of power. Whether or not this was the actual intention, it seems inconsistent that main features of a prohibition can live on in a changed form by formally terminating the ownership restriction rule. In this way the effect of the 10 percent restriction persists, although for a limited time span.

¹⁶⁹ NOU 2002:3 p. 19; Ot.prp.nr. 50 (2002-2003) p. 45

When the EFTA Surveillance Authority demanded a change in Norwegian legislation, Norwegian authorities argued that when assessing whether national legislation is in conflict with EEA law, one needs to take into consideration the alternative regulation – and not compare it to a situation where there is no regulation at all.¹⁷⁰ However, in that particular case there was a clear alternative regulation in the prudential ownership control rules proscribed in the Banking Directive. In the current case, there is no clear alternative to the three-quarters public offering rule in EEA law. Thus, the rules can only be examined in comparison to a situation where such rules do not exist.

In the case of movement of capital the answer might be more nuanced. As described above, there is a fine line between the freedom of establishment and movement of capital, which can be assessed in terms of the size of a shareholding. Seeing as the EFTA Surveillance Authority has indicated an approximation of 20 percent, or a little higher, as a threshold for the separation of establishment from movement of capital, a shareholding which is considered to fall within movement of capital needs to push against this threshold in order for the public offering rules to constitute a *restriction* on such movement of capital. Naturally, a shareholding below 20-25 percent is considered falling within the ambit of movement of capital. However, if it is not large enough to challenge the threshold, there will be no conflict with the right to free movement of capital, as a shareholding below 24,99 is not prohibited by the public offering rules. Thus, as a generalisation, the public offering rules may constitute restrictions on the movement of capital.

Accordingly, the Norwegian public offering rules of shares are likely to constitute restrictions against Articles 30 and 41 EEA in the eyes of EFTA Supervisory Authorities. Now the question remains whether there are possible justifications condoned by EEA law for keeping in place the Norwegian public offering rules.

¹⁷⁰ Ministry of Finance (2001)

5.3.4 Possible justifications

The prohibition of restrictions on right of establishment and movement of capital are not absolute. For the right of establishment, this is expressed in Article 33 EEA, which states:

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

This provision only regulates exceptions to restrictions that treat foreign nationals different from nationals and constitute the core exceptions. The chapter regulating capital movements has no corresponding rule at all. In line with its expansion of “restrictions” beyond national regulations which purely discriminate on grounds of nationality, the ECJ has developed a “general good” exception doctrine, which is not restricted to public policy, public security or public health.

There are several cumulative conditions connected to the use of the general good as a barrier to free movement. As a qualifying condition to invoke the general good exception, the relevant domestic restriction must pursue a legitimate objective in the public interest. If this criterion is met, the test consists in determining whether the relevant measure is necessary, proportionate and suitable to achieve the legitimate aim.¹⁷¹ Additionally, the measure must be non-discriminatory and there must be an absence of harmonisation at EC level.¹⁷² We can establish right away that the criterion of non-discrimination is met by the Norwegian public offering rules.

¹⁷¹ See joined Cases C-163/94, C-165/94 and C-250/94 *Sanz de Lera and Others*, para. 23; Case C-54/99 *Association Engleise de Scientologie de Paris and Scientology International Reserves Trust v the Prime Minister*, para. 18; Case C-367/98 *Commission v Portugal*, para. 49

¹⁷² Tison (2002) p. 336

5.3.4.1 A legitimate objective in the public interest

The Norwegian public offering rules must represent a legitimate objective in the public interest. This is a fairly vague term, which has enabled the ECJ to review on a case-by-case basis whether a presented objective fulfils this requirement. On a general basis, the Court has refused to acknowledge motives of an economic nature, such as protection against foreign competitors, reduction of inflation or unemployment.

The aims pursued by the public offering rules, as stated in various preparatory works, is the dispersal of ownership and accordingly a division of power, as well as prevention of so-called “banker-banks”.¹⁷³ This is connected to the need to secure independent financial institutions.¹⁷⁴ These motives are not among those generally accepted by the Court within the financial sector. However, we recall that the Norwegian rules have found no match in other EEA Countries. This suggests that the ECJ so far has had no occasion to evaluate their legitimacy. The Court has however accepted the motive of “financial market integrity” as a legitimate objective under the general good exception. If we view especially the aims of independent financial institutions and prevention of “banker-banks” from a wider market perspective, they may well constitute legitimate objectives in the public interest. Further considering that the legislative motives match those expressed for ownership restrictions in financial services and infrastructure institutions, which have been acknowledged by the EFTA Surveillance Authority as legitimate interest¹⁷⁵, we hold that the public offering rules also pursue such legitimate objectives.

5.3.4.2 Absence of harmonisation at Community level

In areas where secondary legislation is enforced on a Community level, it is viewed as a codification of Member States’ rights under the general good. This means that in these cases there is no room for Member States’ application of the general good exception. However, the ECJ in any case needs to decide whether the relevant harmonisation is

¹⁷³ Ot.prp.nr. 50 (2002-2003) p. 45

¹⁷⁴ NOU 2002:3 p. 156

¹⁷⁵ EFTA Surveillance Authority (2010)

sufficient to completely substitute the Member States' powers.¹⁷⁶ Thus, the Court noted in the *German Insurance* Case that there were several supervisory issues that were not regulated by the Second Non-Life Insurance Directive, which granted the Member State the power to regulate foreign insurers based on the interest of the general good.¹⁷⁷

In the case of both credit institutions and insurance undertakings harmonisation on a Community level is sought through a long line of directives, cumulating in the current Banking and Insurance Directives, as amended by the Qualifying Holdings Directive. Based on the harmonisation criterion, this is a strong indication that there is no room for general good exceptions effected by Member States. In the area of *provision of financial services*, it has been accepted that the Directives provide full mutual recognition of regulatory standards, meaning that the general good can no longer be given as a justification for stricter cross-border applicable rules than the Directives allow.¹⁷⁸

In the case of primary establishment there is no existing mutual recognition, as the establishment of an institution in a Member State is a prerequisite for it to take effect. Even though the rules for the taking up of the business of financial institutions are harmonised through the Directives, we should take into consideration the explicit referral to the general good in the Directives, see e.g. recital 17 in the Banking Directive which states that “*the host Member State should be able ... to require compliance with specific provisions of its own national laws and regulations on the Part of institutions not authorised as credit institutions in their home Member State ... provided that ... such provisions are compatible with Community law and are intended to protect the general good ...*”. As discussed in chapter 5.2. there are indications that the Norwegian public offering rules are not directly covered by the Directives, which suggests an absence of harmonisation in this particular area. This would leave the authorities some powers to give regulations in the interest of the general good. Viewed in connection with Article 6 of the Banking Directive, which explicitly leaves to the Member State to set the conditions for authorisation, it seems likely

¹⁷⁶ Tison (2002) p. 337

¹⁷⁷ Case C-205/84 *German Insurance*, paras. 40-41

¹⁷⁸ Tison (2002) p. 337

that the taking up of the business of financial institutions is not sufficiently harmonised to deny a Member State to invoke a general good exception. To this effect A.G. Mengozzi states in his Opinion in *European Commission v Portuguese Republic* that “*in the absence of such Community harmonisation, it is for each Member State to establish the degree of protection it envisages affording to those legitimate interests and the way in which it is to be achieved ...*”.¹⁷⁹ In the absence of any relevant ECJ case law, we hold that the harmonisation criterion is met in the case of the Norwegian public offering rules.

5.3.4.3 The criteria of suitability, necessity and proportionality

In the case of credit institutions, the Banking Directive Articles 11 and 12 contain provisions relating to the suitability of owners and persons who will direct the business as part of the authorisation procedure. Article 11(1) provides:

“The competent authorities shall grant an authorisation to the credit institution only when there are at least two persons who effectively direct the business of the credit institution. They shall not grant authorisation if these persons are not of sufficiently good repute or lack sufficient experience to perform such duties.”

Article 12(1) subparagraph 1 provides:

“The competent authorities shall not grant authorisation for the taking-up of the business of credit institutions unless they have been informed of the identities of the shareholders or members, whether direct or indirect, natural or legal persons, that have qualifying holdings, and of the amounts of those holdings.” Additionally, paragraph 2 states that: *“The competent authorities shall not grant authorisation if, taking into account the need to ensure the sound and prudent management of a credit institution, they are not satisfied as to the suitability of the shareholders or members.”*

¹⁷⁹ Case C-171/08 *European Commission v Portuguese Republic*, Opinion of A.G. Mengozzi, para. 80.; see also Case C-207/07 *Commission v Spain*, para. 45

According to Articles 11 and 12, rules which require a sound and prudent assessment of owners and managers is not only permitted but explicitly required. These rules are implemented in the Commercial Banks Act section 4 and the Insurance Act section 2-1.

When assessing whether the Norwegian public offering rules are suitable, necessary and proportionate to fulfil their aims, we need to take into account that the current Banking Directive allows the refusal of authorisation if authorities are not satisfied with the suitability of the owners of the institution. The public offering rules are much more restrictive, as they effect a ban on initial ownership above 24.99 percent of the share capital in the financial institution, with limited and unclear exemptions only applicable to banks. The question of suitability seems to be affirmative, seeing as the rules meet their aims and considering Norway's strong battle to keep in place ownership restrictions in general. Thus we need to determine whether the prudential rules would be enough to secure the legitimate objectives, rendering the public offering rules unnecessary and disproportionate.

The aims of achieving independent financial institutions free of moral hazard and conflicts of interests on behalf of owners and managers are connected to the "fitness" and "propriety" of these individuals or institutions, as protected by Articles 11 and 12 through the right to deny acquisitions on prudential grounds. From one point of view, one could argue that as long as a Member State possesses this right, they can safeguard the aims behind the public offering rules through these less restrictive means.

In their response letter to the EFTA Surveillance Authority's Reasoned Opinion, Norway has pointed out that there are no alternative measures to the ownership restriction rules that would grant the same level of protection. They especially state that despite the general suitability of a shareholder, the criterion gives no control over the potential conflicts which might occur within the institution at a later time.¹⁸⁰ The same would be true for a financial institution. From this point of view the argument is that Norwegian authorities have sought a higher level of protection than envisaged by the Directive, and that the public offering

¹⁸⁰ Ministry of Finance (2011) p. 7

rules are necessary to achieve this chosen level of protection.

The public offering rules are seemingly within the measures covered by Article 6 BD. However, even though the Directive does not provide detailed rules on the authorisation procedure and the States are left certain discretion, measures by national authorities still need to be proportionate to their aims.¹⁸¹

As mentioned, the EFTA Surveillance Authority declared in its Reasoned Opinion that Norwegian rules pertaining to ownership restrictions of 20 percent in financial services infrastructure institutions legislation constitute a breach of Articles 31 and 40 EEA. The relevant rules in that case are rules which apply throughout the institutions' lifetime, and not only at the initial establishment, as is the case with the public offering rules. However, there are certain similarities, as both constitute restrictions on ownership in the respective institutions. Therefore some guidance can be drawn from the Surveillance Authority's Opinion. In regard to the general good assessment, the Authority points to the "crucial differences" between the ownership restriction rules and the sound and prudent assessment rules in the MiFID¹⁸². It emphasises that the ownership restriction in effect entails that all other investors than the ones exempt, are excluded from even being considered as suitable acquirers of holdings above 20 percent. It seems that the Authority is pointing to a disproportionality in the Norwegian rules. The Authority holds that "*a ban without the possibility to have the suitability of an owner assessed cannot be considered compatible with the right of establishment and the free movement of capital*".¹⁸³ These points are equally true for the public offering rules.

Even though the answer is far from certain, it seems that against the background of an ever-expanding interpretation by the ECJ of national measures which constitute "restrictions" under EC law, as mirrored by the EFTA Authorities, the Norwegian public offering rules

¹⁸¹ Case C-174/04 *Commission v Italy* paras. 41-43 and 68

¹⁸² Dir 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments

¹⁸³ EFTA Surveillance Authority (2010) p. 15

are likely not to be viewed as necessary, proportionate and suitable to safeguard otherwise legitimate objectives in the public interest. On these grounds, there is reason to believe that the EFTA Authorities, if called upon, would perceive the Norwegian public offering rules as constituting unjustified restrictions within Articles 31 and 40 EEA. If this were to happen, it would accordingly provide for a renewed assessment of the legitimacy of competent authorities' prudential assessment practice as discussed in 5.2.

6 References

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6.1.1 EU/EEA

EEA Agreement	Agreement on the European Economic Area (EEA), Oporto 2 May 1992
EC Treaty	Treaty establishing the European Community, Rome 25 March 1957
Surveillance and Court Agreement	Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice, Oporto 2 May 1992

6.1.2 Norwegian

1961	Commercial Banks Act, 25 May 1961 no. 2
1988	Financial Institutions Act, 10 June 1988 no. 40
1992	EEA Act, 27 November 1992 no. 109
2003	Statute of 20 June 2003 no. 42 (amending the Financial Institutions Act)
2005	Insurance Act, 10 June 2005 no. 44
2009	Statute of 19 June 2009 no. 59 (amending the Financial Institutions Act)

6.2 Secondary/administrative legislation

6.2.1 EU/EEA

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Dir 2002/83/EC	Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance
Dir 2004/39/EC	Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments
Dir 2006/48/EC	Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (recast)
Dir 2007/44/EC	Directive 2007/44/EC of the European Parliament and of the Council of 5 September 2007 amending Council Directive 92/49/EC and Directives 2002/83/EC, 2004/39/EC, 2005/68/EC and 2006/48/EC as regards procedural rules and evaluation criteria for the prudential assessment of acquisitions and increase of holdings in the financial sector
2008	EEA Committee's resolution nr. 79/2008

6.2.2 Norwegian

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