THE BANKING REGULATION REVIEW

NINTH EDITION

Editor
Jan Putnis

THE LAW REVIEWS

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This article was first published in May 2018
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Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK
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Enquiries concerning editorial content should be directed
to the Publisher – tom.barnes@lbresearch.com

ISBN 978-1-912228-30-0

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

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ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

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ADVOKATFIRMAET BAHR AS

ADVOKATFIRMAN VINGE

AFRIDI & ANGELL

ALLEN & GLEDHILL

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PREFACE

Banking regulation is a never-ending quest to balance the three major policy objectives of financial stability, consumer protection and the needs of developed economies for reliable services involving the provision and intermediation of finance. It is safe to say that the relative importance of these factors to policymakers will never be constant. Driven by events – whether political, economic or financial – governments and regulators will move their centre of focus from one objective to another as circumstances require, while continuing to pay lip service to the need to balance all three. For their part, banks have to maintain the right quantity and quality of resources to react to policy shifts and, hopefully, to ensure that they can communicate their views clearly to the authorities before those shifts take place.

But what happens when there are developments that leave everyone – governments, regulators and banks alike – unsure of how to react, or even, in some cases, unsure of whether or not there are serious concerns to address? That is what we now face with the rise of technology in banking. Is technology simply an opportunity for banks to improve their service or does it present threats to customers and ultimately to financial stability? If there are threats, do these go beyond the much-publicised cyber risks?

Starting with the opportunity, the position is not quite what many new so-called fintech banks would have you believe. Their orthodox view of the world is that large, established banks will be supplanted by nimbler upstarts, particularly those new firms that are not actually banks and are relatively unburdened by regulation (or think they are). Particularly in the area of payments, those upstarts aim to appropriate banks' customer relationships, not by shutting banks out of payment transactions entirely, but by relegating them to mere infrastructure in payment clearing. I refer to this view as 'orthodox' because it ignores at least four important and fast-developing features of the way that technology is revolutionising many major, established banks:

a The ability of banks to fight back and the vast resources that large, established banks have to throw at this effort if they are minded to do so and have sufficient strategic focus to stick to the task.

b The capacity of technology to cut the costs and improve the efficiency of established banks.

c The strategy (and ability) of some banks to follow an inorganic approach to acquiring technology and new ideas; while cultural differences and other integration challenges often mean that banks do not realise the full benefits of acquiring newer technology-focused firms, if only a small proportion of these acquisitions succeed then much of the apparent hype around some start-up firms pursuing novel fintech strategies could evaporate as large, established banks become the principal means by which new ideas hatched by the founders of start-ups are put into practice.

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d Legal and regulatory changes in some parts of the world to open up banking, and payment services, to increased competition and therefore innovation – particularly PSD2 in the European Union – are pushing banks to adopt new technologies and are starting to foster a more creative and entrepreneurial culture in some banks.

Commentators frequently write that banks that fail properly to capitalise on the opportunities that technologies present will fail. This has become a truism as technologies once thought to be novel – contactless payments, for example – have become commonplace in many parts of the world. In other words, new technology has become such a pervasive feature of both wholesale and retail banking in most of the world that to say that banks have to use it effectively to survive has become little different from saying that banks will fail if they don't run their businesses effectively. That said, a proportion of banks will fail on this simple ground, and may therefore fail in business terms as others with a better understanding of the power of technology to improve and expand services and increase efficiency forge ahead. Many banks have also, so far, failed to create the right sort of creative environment in which genuinely new business ideas originate. There are a number of reasons for this that exist to varying degrees in all large banks, including complex and bureaucratic management structures, which can stifle innovation; a necessary preoccupation with legacy issues and structural reform; an understandably risk-averse approach to business development; and the opportunities that exist for talented and creative staff outside the banking sector. It would be entirely wrong, however, to assume that these issues simply cannot be overcome in any large, established banks.

So much for the opportunities; what about the threats? Cyber risk remains a very significant concern for regulators, perhaps the single most important area of bank regulatory concern worldwide at present. But there is another challenge that banks must face from technology, which is simply that more will be expected of them by regulators and customers alike once technology makes banking more transparent. So, from a front office perspective, technology does not just offer ways of providing better services to customers; it also raises their expectations, and banks will have to be ready to live up to those expectations, or they will simply lose customers. From a back-office perspective, technology is beginning to provide banks with innovative ways of understanding better the risks they have taken and their relationships with providers of funding, hedging services and other counterparties. For example, machine learning has now advanced to a level where it can provide real assistance to banks in understanding very quickly, in a very detailed way, the terms of the agreements to which they are party, how they interrelate with each other and how they would perform in a crisis. One of the lessons of the financial crisis was that recovery and resolution planning is a very resource-intensive exercise when done by means of a manual review of documents. Machine learning will eventually allow many of these review processes to be done in almost real time and for banks to verify the application of policies and procedures to documents and customer relationships as they develop, rather than retrospectively. Once these capabilities are developed to a usable level, which is likely to be in the next few years, it will not be surprising if regulators begin to expect banks to apply them. The fact that it might take a bank several months to review 100,000 documents manually will then no longer be a complete excuse for not having fairly immediate answers to regulators' straightforward questions about the nature of the risks on a bank's balance sheet; the bank should either know the answers or will be expected to have the means to find out quickly.

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Much of this would suggest that the adoption of new technology may ultimately have more profound effects on large banks than post-crisis structural reform. Apart from customer services, I would expect these effects to manifest themselves in reductions in staff numbers, particularly in front-office roles, risk management and compliance. It is apparent that even the most sophisticated and well-resourced banking regulators around the world are still behind the curve in realising the true impact of these developments: just as the banks have an enormous challenge in devising profitable and prudent ways of applying technology, regulators have an almost equal challenge in understanding the risks as well as the benefits.

Away from technology, the past year has failed to produce the destructive earthquake in international regulatory initiatives that some commentators predicted following the election of Donald Trump as President of the United States. Nevertheless, further and deeper international regulatory cooperation now looks significantly less likely than it did two years ago and regulators should be trying to work out what this will mean in a future banking crisis. For their part, the Basel Committee on Banking Supervision and other international organisations that promulgate bank regulatory reform will no doubt be wary of proposing ideas that do not receive widespread support from major banking jurisdictions.

In Europe, the preparations that banks are making for the UK's departure from the European Union in 2019 continue apace, even as the progress towards a political agreement and related transitional arrangements remains, at the time of writing, slow and fraught with difficulty. Almost whatever the nature of this agreement, the legal and regulatory barriers to cross-border banking and securities business that will be erected between the United Kingdom and the European Union when, as currently planned, the UK leaves the EU single market, are expected to make Europe as a whole a more expensive region for global banks. As a result, many of these banks are reconsidering their participation in certain less profitable business lines and some geographical markets in Europe. It remains to be seen whether smaller EU banks with a domestic or a regional focus can capitalise on these developments. Meanwhile, attempts to strengthen and deepen the eurozone's banking union continue, albeit very slowly. The move of some business from London to mainland Europe as a result of Brexit is unlikely to achieve the natural desire of many European politicians and central bankers for the eurozone to have its own, genuinely global financial centre.

In Asia it remains, as ever, as foolish as it is difficult to generalise about developments across such a diverse and fast developing region. However, the continuing growth of wealth management services is still of great interest to many banks in the region and beyond. It remains to be seen whether all the most important bank regulators in the region can keep up with understanding and monitoring the increased risks associated with this development, from investor protection to money laundering.

In the United States, we saw tangible proposals for regulatory reform during 2017, although at the time of writing it is not yet clear what the outcome will be.

This ninth edition of *The Banking Regulation Review* contains chapters provided by authors in 35 countries and territories in March and April 2018, as well as the usual chapters on International Initiatives and an overview of the European Union.

My thanks go once again to the authors, who thankfully find this subject sufficiently interesting and profitable both to continue to advise clients on it as well as to write about it in their spare time. However, I remain conscious of the fact that spare time has been in very short supply to many of the authors during the past year, and I am therefore very grateful for their dedication in contributing to this book.

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The team at Law Business Research have continued to tolerate the work schedules of the authors, and more particularly the editor, with their usual compassion, tolerance and sympathy, and to apply their usual high standard of professionalism to the production of this book. I would like to thank them for once again making this process look easy when it is anything but.

Thank you also to the partners and staff at Slaughter and May in London and Hong Kong for indulging the project that this book is, and for seeing value in it. Particular thanks are due this year to Ben Kingsley, Nick Bonsall, Peter Lake, Emily Bradley, Tim Fosh, Emily Garside, Tolek Petch, Jocelyn Poon, David Shone and Moonar Tsoi.

Jan Putnis
Slaughter and May
London
April 2018

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Chapter 23

NORWAY

Richard Sjøqvist, Markus Nilssen and Harald Trosdahl[1]

I INTRODUCTION

The Norwegian banking industry has developed in cycles during the past 200 years. From a minimal start, the number of banks increased rapidly until nearly each small municipality had at least one bank. During the recession in the late 1920s, many banks had to close but subsequently reopened. In the 1930s there were around 700 banks in Norway, of which 630 were savings banks. This continued until around 1970, when a rapid consolidation started. Today, there are 100 savings banks and 22 commercial banks incorporated in Norway. This includes subsidiaries (but not branches) of foreign banks. Some 44 credit institutions have opened branches in Norway; however, only a few operate as full-service banks, and many specialise in equipment financing, typically automobiles. Some 406 credit institutions from EEA Member States have provided notification in respect of cross-border services; however, probably only a minority of these regularly provide services in Norway.

The Norwegian banking industry is dominated by two large commercial banks (DNB Bank ASA and Nordea Bank AB (publ), filial i Norge) and two groups of independent savings banks (Eika group and SpareBank 1 group). Each savings bank operates independently, but both Eika Group and SpareBank 1 Group have certain joint operations and a common brand. Foreign banks, through branches or cross-border activities, are active, and hold a significant market share of business within the shipping, oil or offshore and mainland industries.

The five largest banks in the Norwegian market (excluding those owned by a public body) measured by balance sheet value are:

a DNB Bank ASA;
b Nordea Bank AB (publ), filial i Norge (a branch of Nordea Bank AB (publ));
c Danske Bank (a branch of Danske Bank A/S);
d Handelsbanken (a branch of Svenska Handelsbanken AB (publ)); and
e SpareBank 1 SR-Bank.

1 Richard Sjøqvist is partner, Markus Nilssen is a senior associate and Harald Trosdahl is an associate at Advokatfirmaet BAHR AS.

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II THE REGULATORY REGIME APPLICABLE TO BANKS

i General

Norway is not a member of the European Union, but through the EEA agreement, it is committed to implementing the relevant directives for the finance industry. This means that the free establishment rule applies for EEA institutions wishing to provide services in Norway, and for Norwegian institutions wishing to offer their services within the EEA.

The combination of accepting deposits and providing credit triggers a requirement for a banking licence under Norwegian law. The main regulation applicable to banks can be found in the Act on Financial Undertakings and Financial Groups 2015 (Financial Undertakings Act). The Financial Undertakings Act is an attempt to consolidate the main financial regulations, which were previously scattered in various pieces of legislation, into one comprehensive act (implementing, *inter alia*, the Capital Requirements Directive (CRD IV) and the Capital Requirements Regulation (CRR)). The Act regulates the following financial undertakings:

a banks and other credit institutions;
b finance companies;
c holding companies in financial groups;
d payment institutions;
e electronic money institutions; and
f insurance and pension institutions (not within this chapter).

Banks providing investment services or investment fund services are also subject to the Securities Trading Act 2007 (implementing, *inter alia*, the Markets in Financial Instruments Directive (MiFID II)) or the Investment Fund Act 2011 (implementing, *inter alia*, the Undertakings for Collective Investments in Transferable Securities Directives). Further, Norway has implemented the third Anti-Money Laundering Directive through the enactment of the Anti-Money Laundering Act 2009, but the EFTA Court has in separate matters on 2 December 2013 and 16 November 2016 declared that Norway had failed to correctly implement the Directive. Furthermore, Norway received criticism when evaluated by the Financial Action Task Force standards in 2014. There is an ongoing legislative process on this matter in Norway, and the purpose is to bring the Norwegian legislation on anti-money laundering in line with international standards, and in particular the fourth Anti-Money Laundering Directive. In December 2016, a committee appointed by the Ministry of Finance (MOF) presented a proposal for the required updates of the Norwegian legislation, but this has not been followed up by the Ministry yet. Finally, all financial undertakings are subject to the Financial Supervision Act 1956.

The main regulator is the Financial Supervisory Authority of Norway (FSAN). The FSAN's resources come from fees paid by the institutions it supervises. Its main purpose is to promote financial stability and a well-functioning market.

The FSAN's instruments are:

a supervision and monitoring;
b licensing;
c regulatory development; and
d information and communication.

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ii Deposit taking

Norwegian financial undertakings that wish to take deposits from the public must have a licence as a bank. Non-banking credit institutions may receive repayable funds from the public (other than deposits) by issue of bonds or other comparable securities. EEA credit institutions providing services in Norway based on their home state licence (passporting) may take deposits in Norway if their home state licence allows them to do so.

iii Lending

Lending is a regulated activity, and a licence or a passport is needed. Norwegian financial undertakings without a banking licence may grant loans based on a licence as a non-banking credit institution or as a finance company, and will normally fund themselves in the bond market. Typical today are mortgage credit institutions operating in the 'covered bond' market. These are normally owned by banks or savings bank groups, and acquire loan portfolios from the banks.

Investment firms need a separate licence to provide loans in connection with their investment activities.

iv Foreign exchange

Spot foreign exchange trading can be carried out by banks, payment institutions, electronic money institutions and finance companies as well as by foreign passported credit institutions, payment institutions and electronic money institutions, all subject to having an appropriate licence to do so.

Dealings in foreign exchange derivatives can only be carried out by an institution with an investment firm licence.

v Payment services

The Payment Services Directive (PSD1) was fully implemented in Norwegian legislation in 2010. It is expected that PSD2 will be implemented in Norway, but the time frame for this is currently unclear. The MOF and the Ministry of Justice and Public Security sent out draft proposals on 28 April 2017 and 7 September 2017, respectively, to get input from relevant parties regarding the proposed regulations.

vi Investment services

Licences to provide investment services may be granted to banks or limited liability companies.

Banks may obtain licences in their own names or through their subsidiaries. Foreign passported firms may also provide investment services in Norway; see subsection viii.

vii Legal structure of banks

There are two legal structures of banks available: commercial and savings.

Commercial banks have to be organised either as public limited liability companies or private limited liability companies. Pursuant to the Financial Undertakings Act, banks established after 1 January 2016 must be organised as public limited liability companies; however, those established as subsidiaries in a financial group may be organised as private limited liability companies.

Savings banks were originally organised as independent entities without external owners. Hence, their equity capital historically consisted mainly of retained profits from

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earlier years. Since 1987, savings banks have been entitled to bring in external equity by issuing equity instruments, called equity certificates. These differ from shares in that they do not give holders ownership of the bank's entire equity capital. Moreover, holders have limited voting rights to a maximum of two-fifths in total in the bank's highest body, the general meeting. Around 30 savings banks, including several of the largest ones, have issued such instruments.

All banks must have a total of share capital and other equity capital of at least €5 million.

viii Branches and cross-border services

Foreign banks established within the EEA may establish branches in Norway in accordance with the EU or EEA banking directives. The prime regulator of a foreign branch is its home state regulator, but branches of foreign banks are also regulated by Norwegian rules to a certain extent, pursuant to, *inter alia*, the Financial Undertakings Act and supervised by the FSAN pursuant to, *inter alia*, Regulation No. 1257 of 28 December 1993.

Foreign banks established within the EEA may also provide cross-border services in Norway pursuant to EU or EEA passporting rules. Foreign banks providing cross-border services in Norway are to a lesser degree regulated and supervised by the FSAN.

Banks established outside the EEA must have a Norwegian licence to provide banking services in Norway through a branch. A licence to provide cross-border services is not available.

III PRUDENTIAL REGULATION

i Relationship with the prudential regulator

Entities under supervision file various reports with the FSAN on which it may comment or raise questions. Communication between the FSAN and an entity under supervision will normally be in the form of written correspondence. The FSAN also has the power to give specific directives to an institution, but this is rarely done, as the supervised entities will normally follow the FSAN's guidance.

From time to time, the FSAN will conduct a physical inspection of a bank, normally with a couple of weeks' notice. The focus of an inspection varies from bank to bank, but an evaluation of the bank's ability to monitor risks will normally be a main area of interest, as will money laundering routines. The FSAN divides risks into four categories: credit, market, liquidity and operational.

The instruments available to the FSAN are listed under Section II. Its main purpose, according to its strategy document for the period 2015–2018, published early in 2016, are to promote and secure financial stability and a well-functioning market through five sub goals:

- *a* solid and liquid finance institutions;
- *b* robust infrastructure, securing satisfactory payments, trade and settlement systems;
- *c* investor protection;
- *d* consumer protection through good information and advice; and
- *e* efficient crisis management.

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In its strategy, the FSAN has identified the following supervisory priorities:

a solvency supervision of banks and pension funds;
b macroeconomic supervision;
c supervision of infrastructure, payment, trade and settlements systems; and
d supervision of advisory services and trading of pension savings schemes, collective investment vehicles and other financial instruments.

ii Management of banks

The promulgation of the Financial Undertakings Act implies a modernisation and coordination of the corporate governance requirements of banks, which, *inter alia*, means that the Norwegian requirements are brought in line with international developments. Previously required management structures, such as a committee of representatives and a control committee, have now been abandoned.

Commercial banks are organised either as public limited liability companies or (if established prior to 2016) as private limited liability companies, and are as such required to have a board of directors and a chief executive officer (CEO). Note, however, that a bank established as a subsidiary in a financial group may still be organised as a private limited liability company.

The general meeting is the highest body of both savings and commercial banks. The general meeting of a commercial bank is governed by the ordinary company laws. In savings banks, at least three-quarters of the members of the general meeting shall be persons who are not employed by the company. The details regarding election of members to the general meeting in a savings bank shall be set out in the company's articles of association.

Banks with more than 200 employees might have a corporate assembly, if so agreed between the bank and a majority of the employees. The corporate assembly will have tasks such as to elect members of the board of directors and the chair of the board of directors, to supervise the board, the management and the bank's operations, and to decide in cases regarding major investments.

Banks must, as a main rule, have an audit committee, a compensation committee and a risk committee, consisting of members of the board of directors. The purpose of the audit committee is to support and advise the board of directors with respect to, for example, internal control systems, risk management and auditing of the bank's financial statements. The purpose of the risk committee is to support and advise the board in its role as supervisor and governing body of risk and risk control.

In addition, for banks with securities listed on a regulated market in Norway, the Norwegian Code of Practice for Corporate Governance will apply.[2] The Code is based on 'the comply-or-explain principle', whereby companies must comply with the Code of Practice or explain why they have chosen an alternative approach.

Banks operating in Norway through a branch are not subject to the regime described above, but must nevertheless register a CEO or similar contact person with the Norwegian Business Register and the FSAN, and may also choose to have a Norwegian board of directors.

If a Norwegian branch or subsidiary of a foreign bank is subject to an internal group approval regime, the extent to which the branch or subsidiary may pass on customer information to other members of its company group will depend on the nature of the

2 The Code of Practice is issued by the Norwegian Corporate Governance Board: see www.nues.no.

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information. While Norwegian law does not contain an absolute prohibition against such arrangements, any information sharing will be subject to, *inter alia*, applicable banking confidentiality and data protection rules. Most foreign banks with a presence in Norway operate through a branch, which enables a more efficient flow of information between the branch and its head office. In addition, since banks are subject to strict rules with respect to risk control and capital requirements on a consolidated basis, there is a legitimate need for reporting. The law has been rather unclear on these questions, but the Financial Undertakings Act does explicitly allow for such sharing of information, as set out in Section IV.

As for remuneration policies and practices, new regulations were brought into effect as of January 2015 based on the CRD IV. In accordance with the Directive, it is not possible to award remuneration on more than 100 per cent of the basic salary. CRD IV does, however, open up the possibility in some cases for EU Member States to allow for remuneration up to 200 per cent, and the Norwegian MOF has implemented this approach. The Norwegian remuneration rules are applicable regardless of the size, nature, scope or complexity of the institution. Accordingly, Norwegian regulations are in some ways stricter than those set out in the CRD IV and the European Banking Authority guidelines, where, *inter alia*, the principle of proportionality is included.

iii Regulatory capital and liquidity

Norwegian banks are subject to ongoing capital adequacy requirements, which implement EU directives based on the Basel III regime. Financial groups are considered on a consolidated basis. In line with the recommendations of the Basel Committee on Banking Supervision, the regulatory approach in the Financial Undertakings Act is divided into three pillars:

a Pillar I – calculation of minimum regulatory capital: banks shall at all times fulfil own funds' requirements reflecting credit risk, operational risk and market risk. The current requirement is that own funds shall constitute at least 8 per cent of a calculation basis reflecting such risks. The Common Equity Tier 1 (CET1) capital ratio requirement is at least 4.5 per cent and the Additional Tier 1 capital ratio requirement is at least 6 per cent. Own funds can be in the form of core and supplementary capital. Core capital will typically consist of equity capital, while supplementary capital can be hybrid capital or subordinated loan capital. The capital requirements must be complied with at all times. Banks are obligated to document their fulfilment of the requirements by reporting quarterly to the FSAN;

b Pillar II – assessment of overall capital needs and individual supervisory review: banks must, *inter alia*, have a process for assessing their overall capital adequacy in relation to their risk profile and a strategy for maintaining their capital levels. The FSAN reviews and evaluates these internal capital adequacy assessments and strategies, and may take supervisory action if it is not satisfied with the result of an evaluation process; and

c Pillar III – disclosure of information: banks are required to disclose relevant information on their activities, risk profile and capital situation.

In addition to the minimum capital standards, Norway has adopted the following buffer standards:

a a capital conservation buffer of 2.5 percentage points in addition to the minimum CET1 capital ratio;

b a systemic risk buffer of 3 percentage points in addition to the minimum CET1 capital ratio and capital conservation buffer;

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c if the financial undertaking is defined as systematically important, it has a buffer of 2 percentage points in addition to a minimum CET1 capital ratio, capital conservation buffer and systemic risk buffer; and
d a countercyclical capital buffer of 2 percentage points in addition to the CET1 capital ratio, capital conservation buffer, systemic risk buffer and, if applicable, the buffer for systematically important institutions.

If a financial undertaking does not meet the buffer standards, it is required to develop a plan on how to increase its CET1 capital ratio, and cannot pay dividends or make bonus payments without approval from the FSAN.

The capital requirements for banks and other financial institutions in Norway are described in detail in Chapter 14 of the Financial Undertakings Act (which implements the capital and liquidity rules in the CRD IV and the CRR). For credit risk and market risk, the calculation basis may be found using either risk weights specified in regulations, or in accordance with internal procedures. Operational risk may be calculated using one of three calculation methods: share of average income (basis method), share of income within each business area multiplied by a loss indicator determined by the MOF (template method) or internal measuring methods (foundation or advanced).

The MOF has decided to maintain the 80 per cent Basel I 'floor' for banks that calculate capital on the basis of internal models.

Pursuant to Regulation No. 1097 of 22 August 2014, all Norwegian banks are required to report their liquidity coverage ratio and net stable funding ratio to the FSAN.

Local branches of banks incorporated outside Norway are not subject to this regime, but are primarily subject to the regime in the jurisdiction of the bank.

iv Recovery and resolution

A Norwegian bank cannot be subject to ordinary insolvency proceedings (e.g., bankruptcy) in the same manner as a Norwegian company or private individual. Instead, a special regime of proceedings applies to banks experiencing financial difficulties. These rules are set out in Chapter 21 of the Financial Undertakings Act. According to Section 21-7, a bank must inform the FSAN of a situation in which liquidity or solidity problems may arise. Thus, the duty to inform may arise prior to the possible financial issues becoming a reality. The FSAN could thereafter initiate several measures, including decreasing the bank's subordinated capital.

In the event of illiquidity, insufficient funds or failure to satisfy capital requirements, the FSAN shall immediately notify the MOF. The MOF may decide that the bank should be placed under public administration, provided that the bank is unable to meet its liabilities as they fall due and that a sufficient financial basis for continued, satisfactory operation cannot be secured.

If this occurs to a parent in a financial group, the MOF may decide that all or parts of the group should be placed under public administration.

The administration board shall be composed of a minimum of three members, and as a general rule the chair will be a lawyer. Its object is to make arrangements as soon as possible so that the bank can either continue to operate, or merge with another enterprise. If neither of these alternatives is feasible, the bank must be liquidated.

If the administration board finds that there is a basis to operate further, it will propose a release of the bank from the administration proceedings, which may also involve reducing the creditors' claims. The final decision in this respect is made by the MOF. However, if, one year

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after the date on which the administration became effective, it is unlikely that the bank can be released from administration, the bank must be liquidated and its assets divided among the creditors according to ordinary Norwegian insolvency principles, which are regulated by the Insolvency Act 1984 and the Creditors' Recovery Act 1984, respectively.

The concept of the 'living will' has not been a familiar one in Norwegian law. As a general rule, Norwegian banks currently have no requirement to create recovery or resolution plans in advance of experiencing financial difficulties. This is expected to change with the future implementation of the Bank Recovery and Resolution Directive (BRRD) in Norway. However, the FSAN has demanded that all banks that are defined as systemically important and other large banks deliver recovery and resolution plans to the FSAN for assessment. At the time of writing, DNB ASA and Kommunalbanken AS are defined as systemically important.

It is common for Norwegian banks to raise 'hybrid capital' in the form of subordinated debt to satisfy equity requirements. The Financial Undertakings Act gives the authorities power to require a mandatory write-down of the debt (but currently no conversion to equity) when certain triggers associated with a bank's failure or expected failures occur. This power, which is normally backed up by the terms of the debt, is not generally regarded as fully satisfactory in relation to the CRD IV and the CRR, and will be tightened in connection with the full implementation of the CRD IV and the CRR in Norway. The bail-in rules of the BRRD have not yet been implemented in Norway. However, as implementation is expected, the current Norwegian rules in this area will need to be amended. One issue that has been discussed by the MOF and the European Union is the size of the deposit guarantee, which is currently 2 million Norwegian kroner per depositor per bank. No final decision has yet been made, but it is likely that the amount will have to be reduced to the EU level after a transitional period.

The BRRD has not yet been included in the EEA Agreement, but the Norwegian Banking Law Commission has proposed amendments to Norwegian law to align it with the BRRD. On 26 October 2016, the Norwegian Banking Law Commission delivered its report regarding deposit guarantee (DGSD)[3] and crisis management (BRRD), and the amendment act is expected to be passed during 2018.

IV CONDUCT OF BUSINESS

The Finance Agreements Act 1999 (which implements the Consumer Credit Directive) imposes certain conduct of business obligations upon banks, especially when dealing with consumers. In short, the Act provides that banks have a general duty to properly inform their clients, often in writing, and to make sure that the client has understood the information it has received. The Act also sets certain limits with respect to the kinds of materials and procedural provisions that can be included in a financial agreement (e.g., a loan agreement). A great number of the Act's provisions can be derogated from the bank's dealings with business customers, but the Act is mandatory with respect to dealings with consumers.

Pursuant to Section 4 of the Finance Agreements Act, trade organisations for banks, insurance companies and other financial institutions in Norway have, with the Norwegian Consumer Ombudsman, established a mediation board for consumer complaints with respect to banks and banking products. However, the mediation board's resolutions are non-binding on the parties.

3 The Deposit Guarantee Schemes Directive (2014/49/EU).

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The Ministry of Justice and Public Security issued a proposal for a new Finance Agreement Act 7 September 2017. The proposal includes the implementation, *inter alia*, of PSD2 in Norwegian legislation. The proposed legislation, which originates directly from the Ministry, has been criticised for not being sufficiently researched and impact-assessed. It is not certain what effect the criticism will have on the proposed legislation.

Norwegian banking confidentiality rules are set out in the Financial Undertakings Act Sections 9-6, 9-7 and 16-2. The main rule is that, in the absence of a statutory exception, any non-public information concerning the bank or its customers that the bank's officers, employees or anyone who carries out an assignment for the bank, such as external auditors and lawyers, gain knowledge about in their position within the bank, is subject to a duty of confidentiality. The confidentiality obligation is directed both at the individual and the bank itself. In principle, the obligation extends to internal disclosure within the bank, but exceptions are available with respect to internal disclosure on a need-to-know basis.

Several exceptions apply to this main rule. Disclosure can be made without regard to the confidentiality obligation if:

a the customer consents to disclosure;
b disclosure is needed to fulfil requirements for reporting, control and internal governing within a banking group;
c the disclosure is made to another finance institution pursuant to specific rules in the Financial Undertakings Act;
d the disclosure is required pursuant to the Money Laundering Act 2009 or similar regulations;
e the disclosure is requested by the police or prosecuting authorities;
f the disclosure is made in a civil or criminal court proceeding pursuant to a decision by the court;
g the disclosure is made to certain other authorities, such as tax authorities, competition authorities, the FSAN or the Norwegian stock exchange, and in accordance with specific regulations; or
h to a certain extent, for the purpose of establishing a central client register in a banking group.

This list is not exhaustive and illustrates that the 'main rule' of absolute confidentiality is subject to quite a few exceptions. A breach of the confidentiality obligation is a criminal offence punishable by a fine or, if considered a serious offence, imprisonment for up to three years.

V FUNDING

The main funding sources for Norwegian banks are deposits from customers and the bond market (both domestic and international). A number of Norwegian banks have also established Euro Medium-Term Note programmes.

Another funding source is the raising of regulatory capital (see Section III.iii). Banks also fund themselves through credit lines with domestic or foreign third-party banks.

An increasingly important source of funding is the covered bond market. The Norwegian covered bonds legislation allows banks to set up specialised mortgage credit institutions, which in turn issue covered bonds to investors. The bonds are backed by a pool of specific types of mortgages (usually residential) or public sector loans acquired by the issuing mortgage credit institutions. The mortgage credit institution must be licensed as such,

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but does not necessarily have to be affiliated with the bank from which it has acquired the mortgages. By mid 2017, covered bonds made up approximately 51 per cent of the aggregate long-term funding for Norwegian banks.

As of the third quarter of 2017, customer deposits amounted to 40 per cent of the funding of the banks. That percentage has increased during periods of financial instability, which is likely to be a result of the Norwegian deposit guarantee scheme, which secures up to 2 million kroner per customer in each bank (this is expected to be reduced to €100,000 from January 2019).

Only the largest Norwegian banks have access to the international capital markets, and Norway's largest bank, DNB Bank ASA, is an important source of funding for smaller banks. Norges Bank (the Norwegian central bank) offers certain funding to banks on a secured basis, and also acts as 'lender of last resort'.

VI CONTROL OF BANKS AND TRANSFERS OF BANKING BUSINESS

i Control regime

The shares of a commercial bank and the equity certificates of a savings bank are freely transferable, unless the bank's articles of association state otherwise. There are no limitations under Norwegian law on the rights of non-residents or foreign owners to hold and vote for a commercial bank's shares or a savings bank's equity certificates. The Financial Undertakings Act does, however, contain non-discriminatory ownership control rules. Pursuant to these rules, an acquisition of ownership in a bank that represents 10 per cent or more of the sum of the capital or the votes, or that otherwise gives the right to exercise significant influence on the management of the bank and its business, requires prior authorisation from the FSAN and the MOF. The same rules apply to holding companies of banks.

Ownership by closely committed persons is consolidated, and convertible loans are deemed to be included in a person's holding.

Whether authorisation shall be granted is regulated in the Financial Undertakings Act and pertinent regulations, the main consideration being whether the acquirer is deemed 'fit and proper' to exercise such influence over the financial undertaking as the qualified holding will enable. Additionally, the MOF must make an assessment as to whether the acquisition is sound in light of the financial undertaking's current and future business. The application will contain, *inter alia*, information about the following:

a current and proposed holding of shares;
b the acquirer's other business and available financial resources;
c ownership in other financial undertakings; and
d the purpose of the acquisition. If the financial undertaking in question will become a subsidiary, a plan for the organisation and activities of the group must be submitted.

An application for authorisation shall be decided within 60 business days of the FSAN having confirmed that it has received the application, but this may be prolonged if the MOF or the FSAN deem that additional information is necessary or desirable in connection with the fit and proper assessment.

The above applies not only to acquisitions resulting in a qualified holding, but also to acquisitions increasing an (already) qualified holding to a total holding of more than 20, 30 or 50 per cent, as the case may be.

Banks and other financial undertakings are subject to limitations on their ability to grant security for their assets. As a main rule, the FSAN's permission is necessary for a bank

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to grant security for assets representing more than 10 per cent of its core capital. Exceptions apply to security granted for real estate, as well as security transactions entered into in accordance with market practice and on standard arm's-length terms.

In relation to an acquisition of a commercial bank, the bank will be restricted under Norwegian corporate law from providing capital or security in support of the acquisition.

ii Transfers of banking business

Transfers of customers' deposits would, as a starting point, require the consent of each customer in accordance with ordinary rules relating to the transfer of debtor positions. Even if consent is given, it is at present technically impossible to transfer a customer's unique bank account from one bank to another. This is due to the fact that Norwegian bank account numbers are assigned systematically, and serve a special identification function: for instance, the first four digits of an account number are used to identify the bank with which the account is registered. In other words, the account number 'belongs' to the bank and not to the customer. It has been proposed to enact legislation that would enable customers to retain their account number when changing banks, but this has yet to be resolved.

With respect to loans, Section 45 of the Finance Agreements Act provides that banks may transfer loans without the borrower's explicit consent only to other finance undertakings (as defined in the Financial Undertakings Act). Transfers of loans from banks to non-financial undertakings require the borrower's consent. Until 2015, Norwegian financial legislation contained special securitisation rules that allowed for the transfer of loans from a financial institution to a non-financial institution without active consent from the borrower in connection with a securitisation transaction. However, these rules were abolished when the Financial Undertakings Act came into effect on 1 January 2016.

The new Financial Undertakings Act also contains a new provision regarding the transfer of 'substantial' portfolios of loans or other receivables by banks and other financial undertakings. If the portfolio to be transferred is deemed to be 'substantial' in light of the involved companies' business, consent from the MOF is required to effect the transfer. The provision was only introduced in 2016, and the exact scope of its application is yet to be clarified.

If a bank's business is transferred by way of a merger or demerger in accordance with applicable Norwegian company legislation, customer consent will not be necessary with respect to loans or deposits that, as a result of the merger, have been transferred to a new legal entity. The acquiring party in a merger or demerger is considered to automatically assume all rights, obligations and liabilities of the acquired party without the need for customer consent. However, mergers and demergers of banks must be applied for and are subject to the consent of the Norwegian regulator.

VII THE YEAR IN REVIEW

Norwegian banks' results and return on equity increased in 2017 compared to 2016, mainly as a result of reduced losses related to the banks' lending activity. The total losses for Norwegian banks, based on numbers from the third quarter of 2017, amounted to 0.17 per cent of all loans (less than half of the 2016 equivalent). The biggest banks have shown the greatest reduction in losses because their exposure to the offshore oil and gas sector has been reduced.

The consumer loan market was strong in the first three quarters of 2017, with a total growth of 2 per cent as compared to 2016. The high real estate prices and indebtedness of Norwegians makes the economy vulnerable to sudden changes. To stagger the growth in

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housing prices and the increasing indebtedness of Norwegian households, the MOF has, *inter alia*, introduced stricter requirements for mortgage lending and marketing of consumer debt, and introduced a regulation that sets the groundwork for creating a debt register related to consumers. It is too soon to tell whether the measures on household indebtedness will have the desired effect, but house prices fell somewhat during the first three quarters of 2017.

No major changes took place in the Norwegian banking market in 2017. In mid February, DNB Bank and several other banks (*inter alia*, the Sparebank 1 group and Eika group) teamed up to establish the popular mobile payment application Vipps, which was released in 2015, as a separate company. This was approved by the Norwegian Competition Authority, the FSAN and MOF by the end of 2017.

In November 2017, the FSAN endorsed the European Securities and Markets Authority's warning regarding the risks related to, *inter alia*, initial coin offerings (ICOs). The warning was twofold: firms must give careful consideration as to whether their activities constitute a regulated activity and, at the same time, investors must be aware that their protection is limited to activities that are regulated.

VIII OUTLOOK AND CONCLUSIONS

In 2018, we expect to see a number of more detailed regulations in connection with the Financial Undertakings Act, mostly related to the implementation of various relevant EEA directives and regulations, most notably the BRRD and the Deposit Schemes Guarantee Directive, MiFID II and PRIIPs.[4] While these directives will require certain amendments to current Norwegian banking law, we do not expect any radical changes to the current legislative environment for banking activities.

During the next few years, the new equity and liquidity requirements introduced by the CRD IV, Basel IV and appurtenant legislation will continue to have an impact on the activities of Norwegian banks. Some hybrid instruments may have to be refinanced or renegotiated to qualify, and banks continue to use a substantial part of their profits to strengthen equity.

Forthcoming amendments to Norwegian law and the EEA Agreement are expected to result in less 'gold plating' and special Norwegian rules for banks and other financial market participants. Norwegian authorities will need to pay increased attention to EEA-relevant financial markets legislation coming out of the European Union, and will have less freedom to implement bespoke domestic solutions.

New market participants (e.g., Google, Amazon and Facebook) and new techniques for providing financial services (e.g., fintech companies) will challenge current market participants and practices. New techniques also reinforce the need for new regulatory regulations. We expect fintech companies will have a more dominant role in the banking sector in 2018 compared to 2017, and that the MOF will take steps to investigate whether the new technology and business models call for new regulatory regulations.

The FSAN warned consumers in February 2018 about the risks involved with cryptocurrencies. We expect Norway will follow the European Union in terms of legislation regarding the regulation of cryptocurrencies.

4 Regulation (EU) No. 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products.

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Appendix 1

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ISBN 978-1-912228-30-0

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