THE BANKING REGULATION REVIEW

Twelfth Edition

Editor
Jan Putnis

THE LAWREVIEWS

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PREFACE

The past year in banking regulation has been dominated, in most parts of the world, by the severe economic effects of the coronavirus pandemic. Governments and regulators have taken unprecedented steps to support businesses and individuals through the crisis. In financial terms, much of this support has been channelled through banks, and banks have had to work hard to continue to lend and to serve their customers in this difficult period.

Despite the human suffering and long-term economic damage that the pandemic has caused, there has been no significant banking crisis in the past year and, in most countries, no real sign that banks are failing to weather the storm so far. While there are of course exceptions, this is in large part a consequence of the relatively strong capital and liquidity position that banks around the world were in before the pandemic struck, which was itself a position that would not have arisen in many countries without the comprehensive prudential regulatory reforms that followed the global financial crisis of 2007–2009. Indeed, some regulators have commented that the pandemic is proving to be the first real test of those reforms and that, at least so far, the rules and institutional frameworks for banking regulation that were created after the global financial crisis have proven their worth.

As in all ongoing crises, there are causes for both pessimism and optimism. A pessimistic assessment with which it is hard to argue in many parts of the world is that we are still at an early stage in the economic damage that the pandemic has caused. The gradual withdrawal of government support programmes for businesses and the consequent further increases in non-performing loans with which banks have to deal will pose a further severe test for the banking systems of many countries at a time when governments will be relying on banks to support economic recovery. In some countries the strong links between bank viability and the ability of governments to issue sovereign debt at sustainable interest rates may re-emerge as a significant problem.

The optimistic assessment is necessarily a longer-term one given the challenges that the pandemic continues to present. The pandemic has undoubtedly provided the banking sector with an opportunity to show that it can be a force for financial stability and economic renewal at a time of crisis, in marked contrast to the blow to confidence that the sector suffered following the global financial crisis. This opportunity is closely linked to moves by many banks to consider their corporate purpose, the sustainability of their activities in environmental and social terms, and the quality, and in many cases the diversity, of their governance. This somewhat disparate collection of objectives, referred to as ESG in many parts of the world, is increasingly dominating discourse between banks and their regulators and investors. Whether this would have happened in quite the way it has without the pandemic is impossible to know, but it does not seem much of an exaggeration to suggest

that in many countries the banking sector that will emerge from the pandemic will have a series of cultural and business objectives that are quite different to those that existed before.

Regulators have become more assertive on these matters, particularly with regard to environmental objectives, and we will increasingly see a harder edge to the expectations that they are forming of banks' adherence to policies designed to address climate change. The repricing of many risks that is expected to take place as opinion settles on the pace at which transition to a low carbon economy should take place will have a profound effect on the balance sheets of many banks. Shareholder pressure will force change in some banks; and banks with significant exposures to the petroleum economy will have to consider radical changes to their business models.

On social matters, financial inclusion and fair treatment of vulnerable customers are motivating legal and regulatory reform in many countries. There is a strong link between financial inclusion and the adoption of new technologies and business models, particularly in payment services. Many of the businesses that are contributing to the adoption of these technologies are not banks but rely on banks (or payment systems that are owned or controlled by banks) in order to operate. Allied to this are the increasingly serious and well-resourced attempts by firms using distributed ledger technologies to develop new means of payment, including stablecoins.

Regulators struggle to keep pace with these developments, but they hold back at their peril on addressing the implications for banks. The concept that the same or similar services and activities should be regulated in the same way is proving to be difficult to apply in practice, not least because there is a fundamental difference in financial stability terms between institutions that take deposits and those that do not. But the challenge of how to supervise banks and non-bank payment firms and lenders on a level playing field is one that must surely be addressed, and addressed soon, by regulators in a coordinated way around the world. The time for regulators to congratulate themselves on the effectiveness of financial sector reform following the global financial crisis has come to an end. It is now time to think hard about where risks lie and how risks will develop in the emerging tech-enabled financial system, and the possible causes of the next financial crisis.

It is perhaps surprising, given all the disruption caused by covid-19, that some countries have managed to push through significant legal and regulatory reforms in banking in the past year. These measures have included significant overhauls of the whole bank regulatory regime in some countries, and in other countries further moves to implement Basel III standards. We have already seen some important changes of policy and emphasis in the United States under the new Biden administration. Legal and regulatory reform has continued in the European Union, albeit many initiatives have been delayed by the pandemic. The final departure of the United Kingdom from the European Union single market on 31 December 2020 and the resulting decoupling of London as a major banking centre from the European Union legal framework will continue to have reverberations and structural implications for banks operating in Europe. The long-term implications of Brexit for banks remain hard to predict; in particular, whether it will be a prelude to further fragmentation in banking regulation around the world.

This edition of *The Banking Regulation Review* covers 37 countries and territories in addition to the usual chapters on International Initiatives and the European Union. My thanks go to the authors for continuing to prepare informative chapters in the difficult and uncertain conditions in which many of them have been working over the past year. They

continue to make this book the useful overview and guide to banking regulation around the world that it is.

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Jan Putnis
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NORWAY

Markus Nilssen, Vanessa Kalvenes and Marcus Cordero-Moss[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 every 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 129 banks incorporated in Norway: around 100 of these are savings banks, while the rest are commercial banks. This includes subsidiaries (but not branches) of foreign banks. Around 40 credit institutions have opened branches in Norway; however, only a few operate as full-service banks, and many specialise in equipment financing, typically automobiles. Many credit institutions from European Economic Area (EEA) Member States have provided notification in respect of cross-border services; however, probably only a minority of them regularly provide services in Norway.

The Norwegian banking industry is dominated by two large commercial banks (DNB Bank ASA and Nordea Bank ABP) 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 ABP, Filial i Norge (a branch of Nordea Bank ABP);
c Danske Bank (Norge) (a branch of Danske Bank A/S);
d Handelsbanken (a branch of Svenska Handelsbanken AB (publ)); and
e SpareBank 1 SR-Bank ASA.

1 Markus Nilssen is a partner, Vanessa Kalvenes is a senior associate and Marcus Cordero-Moss is an associate at Advokatfirmaet BAHR AS.

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 all 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 (the Financial Undertakings Act). The Financial Undertakings Act transposes into national law EU rules on capital requirements and resolution, including the Capital Requirements Directive (CRD) IV, the Capital Requirements Regulation (CRR) and the Bank Recovery and Resolution Directive (BRRD). The Act applies to 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 discussed in this chapter).

Banks providing investment services or investment fund services are also subject to the Securities Trading Act 2007 (implementing, inter alia, the second Markets in Financial Instruments Directive), the Alternative Investment Fund Act 2014 (implementing, inter alia, the Alternative Investment Fund Managers Directive) or the Investment Fund Act 2011 (implementing, inter alia, the Undertakings for Collective Investments in Transferable Securities Directives).

A new Anti-Money Laundering Act, enacted on 15 October 2018, transposed the EU's fourth Anti-Money Laundering Directive into national law and took in recommendations of the Financial Action Task Force.

A widely discussed subject related to this area is trade with cryptocurrencies. Legislation adopted in 2018 has provided some clarification concerning how the anti-money laundering and anti-terror financing regulations will affect this trade. The Norwegian legislation is aiming to address this, in particular by imposing a duty to notify the Financial Supervisory Authority of Norway (FSAN) before conducting such business, and that providers are subject to supervision by the FSAN. Furthermore, the Ministry of Finance (MOF) has sent on public hearing a proposal on amendments to the anti-money laundering legislation for implementation of the fifth Anti-Money Laundering Directive. The deadline for submitting comments to the proposal was 23 March 2020. No formal legislative proposal has yet been submitted to Parliament.

Banks' handling of personal data is subject to the provisions of the General Data Protection Regulation (GDPR), which was implemented in Norwegian law through the Act on the Processing of Personal Data, effective from 20 July 2018.

Finally, all financial undertakings are subject to the Financial Supervision Act 1956.

The FSAN is the main regulator. It finances its operations from fees paid by the institutions it supervises, and its main purpose is to promote financial stability and a well-functioning market.

The FSAN's main tasks are:

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

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 way of issuing bonds or other debt 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. However, Norway has established rules that allow for crowdlending by private individuals if certain criteria are met. 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 their activities through debt capital markets. Mortgage credit institutions issuing covered bonds are important sources of funding for Norwegian banks. These are typically owned by banks or savings bank groups, and use bond proceeds to acquire loan portfolios from the banks or grant loans directly to end consumers.

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 into Norwegian law in 2010, and regulations implementing the public law parts and the most important private law parts of the PSD2 were implemented on 1 April 2019. Full implementation of PSD2 is expected to happen in connection with the entry into force of a new Finance Agreement Act, as further described in Section IV.

vi Investment services

A licence to provide investment services may be granted to banks and limited liability companies. Banks may obtain a licence in their own name or through subsidiaries. Foreign passported firms may also provide investment services in Norway; see further below.

vii Legal structure of banks

Norwegian banks can be organised as either commercial banks or savings banks.

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 earlier years. Since 1987, savings banks have been entitled to bring in external equity by issuing equity instruments, namely equity certificates. These differ from shares in that they do not give holders ownership of a 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 40 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 CRD IV and the second Markets in Financial Instruments Directive. The main regulator of a foreign branch is its home state regulator, but branches of foreign banks are also subject to 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 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. As of 1 January 2021, this includes UK banks as a result of Brexit. A licence to provide cross-border services is not available for such entities.

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 binding instructions to an institution, but this is rarely done as the supervised entities will normally follow FSAN's guidance. The FSAN bases its supervision and monitoring of the market on global standards.

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

The FSAN's main tasks are listed in Section II. The principal objective of the FSAN, according to its strategy document for the period from 2019 to 2022, is to promote and secure financial stability and a well-functioning market through six sub-goals:

a solid and liquid finance institutions;
b robust infrastructure;
c investor protection;
d consumer protection through good information and advice;
e efficient crisis management; and
f prevention of economic crime.

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

a macroeconomic supervision;
b solvency supervision of financial institutions;
c supervision of the distribution of loans and trading of pension savings schemes, collective investment vehicles and other financial instruments;
d supervision of financial infrastructure, payment, trade and settlements systems; and
e supervision of compliance with the money laundering regulations.

ii Management of banks

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 the 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, all 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 compensation committee draws up proposals and issues recommendations to the board of directors regarding remuneration, and acts generally in an advisory capacity with respect to remuneration and other important personnel-related matters. 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 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, including GDPR. 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 in January 2015 based on the CRD IV. In accordance with the Directive, it is not possible to award variable remuneration in excess of 100 per cent of the fixed remuneration. The CRD IV does, however, allow for remuneration of up to 200 per cent in some cases for EU Member States, and the MOF has implemented the same approach. For the CEO and other members of a bank's senior management team, the variable remuneration may not exceed 50 per cent of the fixed remuneration. The current Norwegian remuneration rules apply regardless of the size and complexity of an institution or the size of the employee's variable remuneration. Accordingly, Norwegian regulations are in some ways stricter than those set out in the CRD IV and the European Banking Authority guidelines, which include, inter alia, the principle of proportionality.

iii Regulatory capital and liquidity

Norwegian banks are subject to ongoing capital adequacy requirements, which implement EU directives and regulations based on the Basel III regime. Financial groups must satisfy the requirements 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, which reflect each bank's exposure to credit risk, operational risk and market risk. A bank shall hold own funds equalling at least 8 per cent of its risk-weighted assets (RWA). At least 4.5 per cent of the own funds requirement must be met with Common Equity Tier 1 (CET1) and at least 1.5 per cent with Additional Tier 1. The remaining 2 per cent may be met with Tier 2. Banks are obligated to report their capital ratios to the FSAN on a quarterly basis;

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

b Pillar II – banks must annually perform a review and assessment of own risks, including the need for capital (ICAAP) and liquidity (ILAAP) to cover such risks. The FSAN shall review and evaluate each bank's ICAAP/ILAAP and the results of these processes and will, on the basis of this review, set an individual Pillar II requirement (P2R) for each bank. The FSAN's practice so far has been to require banks to meet the P2R with CET1; and

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

In addition to the minimum capital requirements under Pillar I and Pillar II, Norway has adopted the following buffer requirements, which must be met with CET1:

a a capital conservation buffer of 2.5 per cent of RWA;

b with effect from 31 December 2020, a new systemic risk buffer of 4.5 per cent of RWA. The systemic risk buffer requirement is based on structural vulnerabilities and other systemic risks in the Norwegian economy and accordingly, only applies to banks' exposures in Norway. A transitional rule provides that small banks, which in this context means banks measuring credit risk on the basis of the standardised approach or the foundation internal ratings-based (IRB) approach, shall continue to apply the previous systemic risk buffer requirement of 3 per cent until 31 December 2022 for all exposures. The intention is for the systemic risk buffer requirement of 4.5 per cent to apply equally to foreign banks' exposures in Norway. To this end, on 2 February 2021, the MOF requested that the European Systemic Risk Board (ESRB) issue a recommendation to other EEA States to reciprocate the Norwegian systemic risk buffer requirement;

c if the financial undertaking is deemed to be systematically important, it will be subject to an additional buffer requirement of either 1 per cent or 2 per cent of RWA, depending on the degree of systemic importance; and

d a countercyclical buffer of 1 per cent of RWA (reduced by 1.5 percentage points from 2.5 per cent to 1 per cent on 13 March 2020 due to the effects of covid-19).

If a financial undertaking fails to meet the buffer requirements, it is required to prepare a plan on how to increase its CET1 capital ratio and is automatically restricted from paying dividends, bonuses or coupons on Additional Tier 1 capital without prior approval from the FSAN.

The capital requirements for banks and other financial undertakings in Norway are described in detail in Chapter 14 of the Financial Undertakings Act and the CRR/CRD IV Regulation of 22 August 2014[3] (which implements the requirements on capital adequacy and liquidity in CRD IV and CRR). This complex framework describes in detail how financial undertakings must calculate RWA for credit risk, market risk and operational risk. The requirements for calculating RWA for credit risk and market risk allow banks to use different approaches, some of which may only be used with the FSAN's approval (IRB).

Since July 2014, all Norwegian banks have been 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 where they reside.

3 No. 1097 (as amended).

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, banks experiencing financial difficulties will be subject to resolution pursuant to the rules of the BRRD as implemented in Chapter 20 of the Financial Undertakings Act. The BRRD was implemented in Norway on 1 January 2019. During 2019 and 2020, the FSAN determined the minimum requirement for own funds and eligible liabilities (MREL) for 14 Norwegian banks. Under the current regime, the recapitalisation amount of MREL shall be met with subordinated liabilities (i.e., non-preferred senior debt or capital of higher quality). The FSAN has decided that, for banks that have received an MREL requirement, the subordination requirement shall be fully complied with from 1 January 2024. On 9 October 2020, a working group commissioned by the FSAN submitted its proposal for Norwegian rules to implement expected EEA legislative acts corresponding to the EU Banking Reform Package (including, inter alia, the BRRD II) . The proposal was subject to a consultation period, which closed on 6 January 2021, and is currently being examined by the MOF. A legislative proposal has also been put forward by the MOF for the transposition of the Bank Creditor Hierarchy Directive[4] into Norwegian law.

A notable feature of the Norwegian banking regulations is the generous deposit guarantee scheme, which currently covers deposits of up to 2 million kroner. In connection with the implementation of the BRRD and the Deposit Guarantee Scheme Directive, both in January 2019, the EU has exerted pressure to lower the deposit guarantee scheme coverage to the EU level of €100,000. Nevertheless, the Norwegian guarantee coverage level has been upheld, and the Parliament Standing Committee on Finance and Economic Affairs has requested that the government continues talks with the EU to maintain the Norwegian guarantee level. Hence, it is still uncertain whether the Norwegian guarantee coverage level will be lowered.

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 ensure that a client has understood the information he or she 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 in a 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.

On 18 December 2020, Parliament adopted the new Finance Agreements Act. The Finance Agreements Act 2020 replaces the Finance Agreement Act 1999 and entails a

4 Directive (EU) 2017/2399 of 12 December 2017.

modernisation of the current rules. Among other things, the Act contains new preventive measures to avoid debt servicing issues, particularly among consumers. The Act also introduces new protective measures against fraud and implements changes due to PSD2.

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 a 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 2018 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, the disclosure is 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 two main funding sources for Norwegian banks are deposits from customers (which amount to approximately 45 per cent of banks' total funding) 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, but it does not necessarily have to be affiliated with the bank from which it acquires the mortgages.

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, which transpose Directive 2007/44/EC into national law. 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. Ownership by close associates is consolidated. The same rules apply to holding companies of banks.

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 per cent, 30 per cent or 50 per cent, as the case may be.

In relation to the ownership control rules, the MOF, for many years, has maintained an administrative practice whereby no single shareholder is, as a main rule, allowed to own more than 20 per cent to 25 per cent of the total shares in Norwegian banks. This practice has been followed by the MOF when exercising discretion in its application of the ownership control rules. The government has stated that the administrative practice serves two main purposes: (1) to reduce the risk of misuse of ownership power; and (2) to reduce the excessive risk incentives inherent in banks with concentrated ownership structures. In recent years,

the administrative practice has come under pressure from both the European Free Trade Association surveillance authority (ESA) and the *Netfonds* case. ESA and the court of first instance in the *Netfonds* case[5] concluded that the administrative practice concerning dispersed ownership was incompatible with EEA law and, in particular, the freedom of establishment (Article 31 of the EEA Agreement) or, as the case may be, on the free movement of capital (Article 40 of the EEA Agreement). In its response letter to ESA dated 11 June 2020, the MOF upheld its view that the government's practice does not violate the EEA Agreement. On 3 March 2021, the appeals court[6] ruled in favour of the government, reaching the same conclusion as the MOF and contradicting the court of first instance. At the time of writing, it is unknown whether the court's decision will be appealed to the Supreme Court. Pending a final outcome in the *Netfonds* case, it remains uncertain whether the government's practice in this area will be upheld.

Banks and other financial undertakings are subject to limitations with respect to granting security over their assets. As a main rule, the FSAN's permission is necessary for a bank to grant security over assets representing more than 10 per cent of its core capital. Exceptions apply to security granted over real estate, as well as collateral posted in connection with interest rate swaps or securities lending in accordance with market practice and on arm's-length terms.

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 borrowers' explicit consent only to other financial undertakings (as defined in the Financial Undertakings Act), unless otherwise agreed. Transfers of loans from banks to non-financial undertakings require the borrowers' consent. Until 2015, the Norwegian financial legislation contained special securitisation rules that allowed the transfer of loans from a financial institution to a non-financial institution without the explicit consent of the borrowers in connection with a securitisation transaction. However, these rules were abolished when the Financial Undertakings Act came into effect on 1 January 2016. On 4 December 2020, the MOF published a proposal to implement the EU Securitisation Regulation into Norwegian law. The legislative proposal entails that sale of loans to a special purpose entity as part of a securitisation will be fully exempt from the consent requirement in Section 45 of the Finance Agreements Act.

5 TOSLO-2015-72169.

6 LB-2018-141762.

The Financial Undertakings Act also contains a 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 substantial in light of the involved companies' business, the consent of the MOF is required to effectuate the transfer.

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 are subject to the consent of the Norwegian regulator.

VII THE YEAR IN REVIEW

Like the rest of the world, Norway was hit hard by covid-19 in 2020. At the same time, oil prices plummeted and worsened the prospects of the Norwegian economy even further. Implementation of strict protective measures has, however, slowed the spread of the virus. Further, emergency support schemes launched by the government have contributed to continued faith in the financial system, as well as to preserving levels of demand and household income. Other measures in the wake of the pandemic during 2020 included the Norwegian Central Bank's reduction of the policy rate to zero per cent and the MOF's decision to reduce the countercyclical capital buffer requirement for banks from 2.5 per cent to 1 per cent.

Generally, Norwegian banks remain solid and hold sufficient capital to absorb losses in the event of a severe downturn. Norwegian banks' capital ratios are high and have increased during the past year. The increase is largely attributed to changes in capital requirements (including removal of the Basel I floor and introduction of the small and medium-sized enterprise support factor) due to implementation of the CRD IV and CRR at the end of 2019. In an attempt to counter the effects of the implementation, the FSAN and MOF have looked at ways to maintain banks' actual levels of capital, which they view to be commensurate with prevailing risk factors in the Norwegian economy, and also contribute to more equal requirements for Norwegian and foreign banks' activities in Norway. These efforts have resulted in, among other things, an increased systemic risk buffer of 4.5 per cent, effective from the end of 2020 for banks using the advanced IRB approach. The buffer requirement applies only to exposures in Norway and the intention is for it to apply equally to foreign banks' exposures in Norway (provided that the other EEA States reciprocate the Norwegian systemic risk buffer requirement as per the MOF's request to the ESRB; see Section III.iii). As the new Norwegian systemic risk buffer requirement applies only to banks' exposures in Norway, Norwegian banks with exposures in other EEA States may benefit from lower or no systemic risk buffer requirements in these jurisdictions. Because the abolishment of the Basel I floor did not reduce the overall capital requirements for smaller banks (i.e., banks using the standardised approach or the foundation IRB approach), a transitional rule provides that these banks shall continue to apply the previous systemic risk buffer of 3 per cent for all exposures until 31 December 2022.

Although Norwegian banks are deemed resilient, they have significant exposures to industries that were badly hit by the pandemic and are vulnerable to fluctuations in the oil price. Norwegian authorities have therefore stressed the need for banks to maintain sufficient capital reserves to buffer against unexpected losses. Similar to other regulators across Europe,

the MOF has announced that due to market uncertainties related to covid-19, it advises banks to exercise extreme prudence on dividends until 30 September 2021. If banks elect to pay out dividends based on a cautious assessment in line with the ESRB recommendations, the MOF expects banks to pay out no more than 30 per cent of the accumulated profit from the financial years 2020 and 2019.

High levels of household debt relative to income combined with continued growth in housing prices and low interest levels represent the biggest risk for financial stability in Norway. Concerns have also been raised over the high outstanding levels of unsecured consumer debt with higher default rates compared to other types of loans. However, stricter rules on consumer lending and the introduction of debt registers, which provide banks and other financial undertakings with aggregate information on loan applicants' debt levels, are expected to result in sounder credit practices.

Finally, Brexit continued to be a hot topic for players in the financial industry during 2020.

VIII OUTLOOK AND CONCLUSIONS

We expect a number of legislative changes, but no major structural changes, to the Norwegian banking industry in 2021.

Among the expected changes is implementation of the Securitisation Regulation into Norwegian law and a legislative proposal from the MOF on the EU Banking Reform Package (including CRD V, CRR II and BRRD II).

Furthermore, we expect that the government's practice in relation to ownership control rules will continue to be a topic of discussion pending a final outcome in the *Netfonds* case.

Finally, green, and environmental, social and governance, bonds and investments continue to attract interest and are expected to remain important areas of focus for issuers and investors alike in the capital markets going forward.

Appendix 1

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