Nordic Implementation of EU Financial Rules
Nordic Implementation of EU Financial Rules

Protecting the Employees

Report
Nordic Council of Ministers

Nordic Financial Unions

Copenhagen Business School
## Contents

1.  **INTRODUCTION** ................................................................................................................................. 6

1.1.  **Scope of the Report:** ......................................................................................................................... 7

1.1.1.  EU Financial Rules ............................................................................................................................... 8

1.2.  **Rationales for the Report** .................................................................................................................. 9

1.3.  **Methodology** ..................................................................................................................................... 10

2.  **EU QUEST FOR HARMONIZATION OF FINANCIAL REGULATION** ................................................. 11

2.1.  Financial Services Action Plan & Lamfalussy Process ........................................................................... 12

2.2.  **Regulating Corporate Governance** .................................................................................................. 13

2.2.1.  International level .................................................................................................................................. 14

2.2.2.  2008 Larosière Report ........................................................................................................................ 15

2.2.3.  Green Paper 2010 ................................................................................................................................ 16

2.3.  Economic and Legal Consideration of the Change: Position of Employees ........................................... 16

3.  **SPECIFICS OF THE NORDIC CORPORATE GOVERNANCE** ......................................................... 17

3.1.  A Brief Insight into the Development .................................................................................................... 18

3.2.  Position of Employees ............................................................................................................................. 20

4.  **NORDIC IMPLEMENTATION OF THE EU FINANCIAL RULES: CHECKS & BALANCES** .............. 21

4.1.  **Role of the Board of Directors** ........................................................................................................ 21

4.1.1.  Representation of Employees: Composition & Diversity ..................................................................... 22

4.1.2.  Remuneration & Short-termism ........................................................................................................... 25

4.1.3.  Liability .............................................................................................................................................. 27

4.2.  **Employees** ....................................................................................................................................... 27

4.2.1.  Consultation with Employees ............................................................................................................... 28

4.2.2.  Collective Bargaining ........................................................................................................................... 29
4.2.4. Competence and Training

4.2.5. Whistle-blowers’ protection

4.3. Risk Management: Employee – Consumer Relationship

4.4. European Deposit Insurance Scheme

4.5. Conclusions & Recommendations
1. Introduction

One of the fundamental objectives of the European Union (EU) is to form a single internal market with the free movement of goods, services, people and capital. Financial services form a significant part of the internal market. A properly integrated financial services market is a market where capital can move freely through the entire area and can be freely raised in any place (Article 3(3) TEU). The free movement of capital includes the possibility of moving capital from one place to another without any kind of restriction or barrier; it implies the possibility of investing capital anywhere investors prefer within the internal market. In addition, the investment services shall be generally available everywhere and investors shall be entitled to choose a service provider they prefer, irrespective of their residence or citizenship.

Following the global financial crisis in 2007 and 2008, the EU put forward a series of reforms to restore financial stability, public confidence in financial system and enhance EU’s corporate competitiveness. In addition to the global financial instability at the time, politicians, scholars and other commentators around the world have questioned the value that the financial service creates. In the light of the broadcasted misbehaviour of the financial industry and its leaders, also the EU representatives became concerned and decided to improve the legal framework within which the financial institutions operate.

After the after-financial crisis regulation adopted by the EU, the DG for Financial Stability, Financial Services and Capital Markets Union (DG FISMA) published in September 2015 an action plan on the Capital Market Union (CMU). In the CMU, a package of key measures was outlined, in order to achieve a true single market for capital in Europe. The CMU represents one of the current initiatives of the European Commission, which is a key pillar of Investment Plan. The aim of this plan to unlock funding for capital markets and find new ways for investors and corporate sector. The Commission expects, by the end of 2017, to have finalised and implemented the first phase of CMU measures.

The ultimate aim of the Commission is to achieve and operate a healthy and well-functioning financial system with safe, stable and resilient financial institutions that are carefully and responsibly regulated, managed and supervised. Only under these conditions can the financial system effectively contribute to growth and benefit EU citizens, companies and society as a whole.

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1 Until 1986, the EU official treaties and materials referred to a term “common market”.
1.1. Scope of the Report:

The European Union aims to form and operate a functioning common capital market. The EU regulation has a profound impact on the Nordic financial industry, financial intermediaries, corporations and greater society. When the EU adopts new rules, depending on the form in which they have been adopted, they might be directly applicable, without a need for further transposition or they become transposed into national law or thirdly, they might represent binding recommendations for Nordic financial institutions, including banks, insurance companies, investment companies and pension funds. Financial services regulation should contribute to an environment that protects consumers, promotes market integrity and supports investment, growth and jobs. Following the outbreak of the financial crisis the EU put forward an unprecedented series of reforms to restore financial stability and public confidence in the financial system. These reforms include:

- new rules to strengthen financial supervision;
- new tools for bank recovery and resolution;
- more effective deposit protection; and
- improved regulatory framework for banks, insurance, securities markets and other sectors.

Laws have also been adopted to tackle excessive volatility in financial markets, including new rules on hedge funds, short selling, credit rating agencies and derivatives. Overall, these reforms have made the financial system more stable and resilient. However, the transformation in the light of new agenda continues.

At the same time, it is important to monitor the reforms introduced after the crisis, in order to check whether they are delivering as intended and to assess whether the new rules have any unintended consequences. It is a continuous process of fine-tuning the financial services regulatory framework with the adoption of targeted follow-up actions.

The aim of this report is to address and analyse the way in which certain key areas of EU’s financial legislation are being implemented and analyse the effects on the Nordic labour model. The report shows whether the EU financial directives and regulations regarding banks, insurance companies and investment firms, were transplanted by Nordic countries.

Given that the ultimate focus of this report is the standing of employees, this report assesses whether the EU’s financial legislation when implemented in Nordic countries, has respected the position of collective agreements and the rights of employees and trade unions as accepted in Nordic countries. Furthermore, this report aims to assess how the position of employees has changed within the greater corporate governance of financial intermediaries and in relation to their role as levers for consumer protection. The financial intermediaries analysed in this report are i) banks, ii) insurance companies and iii) investment companies.
This report analyses five jurisdictions in Nordic Europe, including countries that are Member States of the European Union as well as those of European Economic Area (EEA). The five jurisdictions are:

- Finland,
- Iceland,
- Denmark,
- Norway, and
- Sweden.

This report has been prepared in collaboration with Nordic Financial Unions, which supports the agenda to create sustainable and long-term oriented sectors through regulation, while continuing to support the Nordic model and employees’ rights. It is the NFU’s task to influence the development of the regulatory framework in order to maintain sustainable and prosperous financial sectors benefiting employees, consumers, and the wider society.

1.1.1. EU Financial Rules

This report addressed EU financial markets regulation and the national regulation that either adopted the EU rules or transposed. It considers the harmonized rules which govern the corporate governance of three groups of financial intermediaries: (i) banks, (ii) insurance companies and (iii) investment companies and regulate the position of employees. It does not, accordingly, address specific rules outside of the above described scope.

The analysed EU legislation is the following:

- BRRD\(^3\)
- Capital Requirements Regulation (CRR)\(^4\)
- Capital Requirements Directive (CRD IV)\(^5\)
- Single Resolution Mechanism (SRM)\(^6\)


Together with the set of the above Directives and Regulations, the relevant national law will be analysed. In addition to these financial acts, it has to be emphasized that there is a clear indication of a new EU rulebook, through which the EU seeks to impose its regulatory policies internationally by linking third country access to the single market to mandatory ‘equivalence’ requirements that in fact demand that third country regulation and supervision reflects EU requirements. Thus, even if Norway and Iceland have not within their treaties agreed to adopt or transpose any specific regulation, they will de facto have to. However, it is important to stipulate that the Single Resolution Mechanism (SRM) has not affected directly the Nordic countries in the EU and neither has been incorporated into the EEA agreement.

1.2. Rationales for the Report

The primary objectives of the project is to map and analyse the way in which key areas of the EU’s financial legislation are being implemented in Nordic countries that include both EU and EEA Member States. Given that the position of employees is in the heart of this report, it is of our inquiry to assess whether and to what extent did the EU regulatory framework has affected the Nordic labour model. The rights of the employees and trade unions in the Nordic countries are elemental for the corporate governance system in the Nordic countries. It is the purpose of this report to assess whether these continue to be respected and protected by the financial intermediaries.

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12 This is the case for rating agencies, alternative investment funds, agencies trading with derivatives. Also the 2014 MiFID II/MiFIR regime imposes a new equivalence regime on the provision of investment services by third country investment firms in the EU.
By mapping the new financial legislation from the EU, the idea is to gain knowledge about three specific aspects:

a) Potential differences between the Nordic countries – differences that would undermine the level playing field;

b) In what way the spirit and intention of the EU legislators have been transferred through the ESA Interpretation and further into the national rules; and

c) What the potential consequences of the new rules will be on both the administration burden of Nordic finance employees and for the core aspects of the Nordic labour market model in the financial sectors.

There are two further aspects of the EU’s new finance legislation that have an impact on employees, consumer protection rules and corporate governance. When assessing the consumer protection rules from an employee perspective, the key areas are sales and advice, incentives, remuneration and the right to training for employees. There is also a need to analyze the implementation of the new rules on documentation and information for the front office staff working with consumer advice on banks and insurance companies. The rules on documentation of customer meetings and advice are there to foster customer protection and can as such be beneficial for both customers and employees, provided that they fulfil their intention.

Lastly, this report aims to contribute to the debate about the future direction of the Nordic financial sector, and whether and how it can create lasting value for consumers and the wider society with finance employees playing a central role.

1.3. Methodology

The report aims to provide a comparative legal analysis that applies diverse qualitative research methods. The qualitative research has been conducted mainly by following doctrinal research and analysis combined with policy research. Doctrinal legal methodology provides an analysis and comparison of relevant European Union financial regulations, directives, recommendations and national legal acts and rules that are transplanting and implementing the EU regulatory framework on national level. The sources that are used for this report include mainly EU Directives and Regulations, Commission Staff Working Documents and Commission communications (sec. 1.1.). On the national level, the report analyses national financial laws, executive orders, procedures where adopted, national corporate governance codes and doctrinal literature. Where appropriate, the reference to the national practice is included. Furthermore, this report draws on the analyses and studies that have been performed by other recognized organisations at the international level (OECD, Basel Committee, etc.) as well as European (EU, CEBS) and national.
2. EU Quest for Harmonization of Financial Regulation

One of the fundamental objectives of the EU is to form a single internal market with the free movement of goods, services, people and capital. Financial services form a significant part of the internal market. A properly integrated financial services market is a market where capital can move freely through the entire area and can be freely raised, invested and spent in any place through any financial intermediaries. The free movement of capital includes the possibility of moving capital from one place to another without any kind of restriction or barrier; it implies also the possibility of investing capital anywhere investors prefer within the internal market. In addition, the investment services shall be generally available everywhere and investors shall be entitled to choose a service provider they prefer, irrespective of their residence or citizenship.

The European Union has implemented several forms and methods how to reach the single internal market since its foundation in 1957. However, its formation had been for long postponed. Only the Single European Act clearly set the date for establishing the single internal market by the end of 1992. Yet, this did not take place and the EU has continued to struggle with its longed-for goal. To achieve the single market, the EU has been using two primary regulatory tools:

- Extensive access deregulation – removal of regulatory barriers, and
- Harmonization

The EU decided for the minimum standard method, where the Member States of the EU follow the same general regulatory principles and legal concepts, if adopted on the EU-level. And as a consequence under the mutual recognition principle, each Member State accepts adherence to the other Member State’s rules as sufficient in its own jurisdiction. At the same time, the minimum standard does not prevent other Member States from setting higher standards within their own jurisdiction. Applying the minimum standard method in the EU has enhanced the general competitiveness, while also the poorly regulated markets have incentives to advance their regulatory system in order to gain access to other jurisdictions. At the same time, the minimum standard does not prevent other Member States from setting higher standards within their own jurisdiction. In theory, the EU can reach in a long run a balanced yet innovative system, where Member States continue to compete with one another.

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2.1. Financial Services Action Plan & Lamfalussy Process

In 1999, the European Commission adopted the Financial Services Action Plan (FSAP), a policy program aiming to complete the single financial market after the introduction of the Euro and establishment of monetary union.\(^{15}\) The FSAP was a plan for adopting all necessary legislative measures to support a single, integrated financial market by the year 2005. The FSAP consisted of a set of forty-two measures designed to create a single market in financial services.\(^{16}\)

It is without any doubt that the FSAP contributed towards the integration of securities market in EU.\(^ {17}\) A majority of the FSAP measures took the form of Directives, which required transposition into the national law of each Member State. Some of the Directives replaced earlier ones, which were regarded to be outdated, some were already under negotiation when the FSAP was adopted, and the others revised earlier proposals. Concerning the general effect of the FSAP, the extensive EU harmonization eliminated Member State self-regulation,\(^ {18}\) and thus certain countries, which regulation was self-regulatory in nature, mainly in connection with the enforcement agencies.

Alongside the FSAP, the Committee of Wise Men on the Regulation of European Securities Markets, chaired by Baron Alexandre Lamfalussy was appointed, in order to assess the state of integration of the European securities market (Lamfalussy Committee).\(^ {19}\) The difference between the FSAP and the Lamfalussy Committee was that the FSAP set out a roadmap on substantive harmonization, while the Lamfalussy Committee assessed the legislative process in the EU and proposed a new lawmaking process – the “Lamfalussy process”. In February 2001, the Lamfalussy Committee submitted their final report (Lamfalussy Report).\(^ {20}\) The Lamfalussy Report pointed to the inability of the EU to adopt quickly and effectively all necessary measures.\(^ {21}\)


\(^{16}\) FSAP is far-reaching and includes legislative measures covering securities offerings, taxation, of cross-border occupational pensions, prevention of fraud. After the adoption of the proposed directives and regulation, the EU Commission published a report on the economic evaluation of the FSAP in all of three sectors: banking, securities and insurance. The report is available online at: http://ec.europa.eu/internal_market/finances/docs/actionplan/index/090707_economic_impact_en.pdf >/last visited June 17, 2017. There had been also other reports and inquires carried out, e.g. empirical Financial Integration Monitor, first published in 2003 which tracked progress towards financial integration under the FSAP.


\(^{19}\) The Council (in its Economic and Finance ministers formation (ECONFIN) appointed the committee in July 2000. The establishment of this Committee to look at radical opinions for the development of the single securities market was the brainchild of Laurent Fabius, the French minister of finance, A Ragbag of Reform, ECONOMIST 93, March 3, 2001.


\(^{21}\) Id, at 17-18.
The outcome of the Lamfalussy Report was a new and reformed architecture of legislative process with four layers and divided legislation into two groups: on the one hand the “high-level framework provisions,” and on the other the more detailed “implementing measures”. Ultimately, the Lamfalussy Report was officially endorsed by March 2001 to Stockholm European Council. At the time, it also received a favourable reception from the financial industry participants as well as the regulatory organizations, yet was not in a position to prevent the 2008 financial crisis.

After the 2008 financial crisis, the international reform agenda has been driven by the G20 agenda, as initially agreed in the 2008 Washington Action Plan. The plan was the adoption of a range of regulatory and supervisory standards broadly directed towards prudential regulation and the support of global financial stability and monitors progress. The international standard setter for financial markets, IOSCO, has produced new standards. Beside the prudential regulatory framework, the Council suggested that the balanced development of the EU financial system required regulatory reform and greater financial integration. One of the regulatory reforms was aiming the corporate governance of the financial intermediaries.

2.2. Regulating Corporate Governance

Corporate governance is ‘the system by which companies are directed and controlled’. This definition was accepted and developed by the Cadbury Report in the United Kingdom in 1992 for the sake of company and code reform. Nowadays, the definition would be surely broader and aside of companies, it would include diverse financial intermediaries and institutions, while having regard to the interests of other stakeholders, such as employees, creditors, the general public and the government, notwithstanding the differences between the corporate governance of non-financial companies and financial intermediaries, which have been also reiterated by the recent financial crisis. Among these, the economy-wide ramifications in case of a failure. However, it has been primarily after the financial crisis that the focus on corporate governance of banks, of pension funds and other financial intermediaries gained the momentum.

One of the first institutions to codify minimum requirements for bank governance under the heading ‘corporate governance’ was the Basel Committee on Banking Supervision at the Bank for International Settlements (BIS)
in 1999. After the financial crisis, a new wave of diverse reports, guidelines and research on corporate governance of banks emerged, including the new version of the Basel recommendations, the OECD report of 2009 on ‘Corporate Governance and the Financial Crisis’, the Walker Review on corporate governance in UK banks of 2009, and the European Commission’s Green Paper on corporate governance in financial institutions and remuneration policies in 2010. In addition to these, there were several national reports. Ultimately, the Basel recommendations have been also accepted by the European Union as the leading study. These will be further described and analysed in the following sections.

2.2.1. International level

On the international level, the greatest regard have received the 2014 Basel Committee Guidelines and the 2009 OECD Findings and Messages together with the OECD Principles. The OECD Findings and Messages provides an outcome of an in-depth analysis into the reasons behind the failure of the major financial institutions. It stipulates that the greatest failure of corporate governance laid in weaknesses in remuneration, risk management, board practices and the exercise of shareholder rights. They called for a review of the OECD Principles as a reaction. The OECD Principles, originally developed in 1999, following the OECD Findings and Messages, were updated in September 2015. The Principles represent concise and understandable principles of corporate governance for financial and non-financial companies, which are publicly traded. The principles are presented in six different chapters: a) Ensuring the basis for an effective corporate governance framework; b) The rights and equitable treatment of shareholders and key ownership functions; c) Institutional investors, stock markets and other intermediaries; d) The role of stakeholders; e) Disclosure and transparency and f) The responsibilities of the board. Each chapter introduces a single principle, which is subsequently

26 Basel Committee on Banking Supervision, Enhancing Corporate Governance for Banking Organizations, September 1999. Most recent version was adopted in October 2014, available online at: <http://www.bis.org/publ/bcbs294.pdf>.
27 OECD, Corporate Governance and the Financial Crisis: Key Findings and Main Messages (Paris, June 2009) [hereinafter ‘2009 OECD Findings and Messages’].
30 Countries like UK, Germany or Switzerland have adopted these. For the UK, see Financial Reporting Council, The UK corporate Governance Code, June 2010.
31 See Klaus J. Hopt, Corporate Governance of Banks after the Financial Crisis, in Financial Regulation and Supervision 340 (Eddy Wymeersch et al. eds, OUP, 2012).
33 See 2009 OECD Findings and Messages, at 7-10.
supported by sub-principles and commentary that aims to help understand the rationale and aim of the
principles.

In October 2014, the Basel Committee on Banking Supervision of the Bank for International Settlements issued
its consultative Guidelines [on] Corporate governance principles for banks (the 2014 Basel Committee
Guidelines). The 2014 Basel Committee Guidelines revise the Committee’s 2010 version for enhancing
corporate governance, in which the Committee reflected on the lessons learned by many central banks and
national bank supervisors from the 2008 financial crisis, in particular with regard to risk governance practices
and supervisory oversight at banks. The 2014 Basel Committee Guidelines incorporated corporate governance
developments in the financial services industry since the 2010, including the Financial Stability Board’s 2013
series of peer reviews and resulting peer review recommendations. The rationale, why the 2014 Basel
Committee Guidelines as of relevance is due to the fact that the Guidelines were developed to guide the actions
of the boards of directors, senior management and risk, compliance and internal control functional heads of
financial institutions. Central banks and/or banking supervisors of nearly thirty of the world’s largest
economies are members of the Committee, and the 2014 Principles can be expected to affect the conduct by
banking authorities in both member and non-member jurisdictions. Thus, also the EU’s adherence to them.

2.2.2. 2008 Larosière Report

As another consequence of the 2008 financial crisis, the President of the European Commission, José Manuel
Barroso, requested Jaques de Larosière (a former governor of the Bank of France and director of IMF) to set
up High Level Group on Supervision formed by eight internationally recognized independent specialists. The
Group published in February 2009 a report focused on the causes and policy and regulatory repairs of the
financial crisis.34 In this report corporate governance was enumerated as one of the most important failures
which caused the crisis.35 The report states that failures in risk assessment and risk management were
aggravated by the fact that the checks and balances of corporate governance failed. Many board members and
senior management of financial intermediaries did not understand the complex products or the aggregate
exposure due to bad quality of management and shareholders, inadequate remuneration and incentive schemes.
Furthermore, the remuneration and incentive schemes within financial institutions contributed to excessive
risk taking by rewarding the short-term expansion of the risky trades rather than the long-term profitable
investments.36 In such an environment, the financial intermediaries, employees as well as shareholders become
accustomed to ever increasing revenues and returns, triggering the herd behaviour. Ultimately, among the

34 The High-Level Group on Financial Supervision in the EU, Chaired by Jacques de Larosière, Brussels, February 25,
36 Ibid, at 10.
recommendations of the report was the re-assessment of the remuneration policies and principles for both employees and board members.

2.2.3. Green Paper 2010

After the Larosière report, the Commission published a specific report on the state of corporate governance in financial sector - Green Paper 2010. This Green Paper should be read in conjunction with the Commission Staff Working Paper. Even though the Green Paper 2010 includes in its title all financial institutions, its primary focus is banks and life insurance companies. The Green Paper 2010, similarly to Larosière report, highlighted the inability of boards and senior management of financial institutions to understand highly complex financial products and their unawareness of the aggregate exposure and entailed risk. Furthermore, among other findings of the Green Paper 2010, it stipulated the limitations of the independency, expertise and time commitment of non-executive board member. The risk management function was also weak and lacked in independence and the remuneration structures were effectively inadequate as they supported the excessive risk taking and short-termism. The Green Paper 2010 ultimately suggests key findings and best practices in regard to board, risk management, shareholders, supervisors and external auditors.

2.3. Economic and Legal Consideration of the Change: Position of Employees

Moreover, it has been argued that the financial intermediaries’ regulation should focus on the protection of systemic stability, prevention of individual institution collapse and strengthening the market discipline. The concept of market discipline is the most relevant for this report and it has been lacking a precise definition. If broadly defined and deducing from literature covering banks’ market discipline, market discipline encompasses the discipline imposed by shareholders and the market for corporate control on bank (or any other financial intermediary) management and discipline imposed by subordinated short-term creditors, other creditors, customers and employees. All these are assumed to have the ability and incentives to monitor bank (financial intermediary) behaviour. All this clearly translates in to the heightened corporate governance trend after the global financial crisis, which reflects directly on the issues of board representation, remuneration

policies, competence, conflicts of interest as well as risk management. Many of which have been directly mentioned and considered in the recent EU regulation. Nevertheless, one component continues to lack and it is the greater considerations for the employees of financial intermediaries.

The EU Commission Staff Working Document (WD 2014), analysed the financial crisis and suggested the reform of financial institutions. The Commission’s aim was to emphasize the areas that needed greater regulatory attention. In the WD 2014, a line between the costs to financial intermediaries (“private”) versus wider “societal” costs was drawn, whereas the two might not necessarily be interconnected. This statement by itself is questionable. Yet, the important finding for this report was the Commission’ conclusion that, when regarding the impact of financial regulation, the employees were considered to belong to the “private” side of the equation together with the shareholders, whereas on the other side of equation were all other stakeholders, with customers, creditors, taxpayers. There are naturally rationales, why the Commission perceives the two groups structured in this way. However, it is important to maintain that employees also belong the wider society and whether considering the impact of regulatory reforms or generally the structure of the reforms, the employees belong to the both sides of equation. Later, also stipulated by the Report by the EBA Banking Stakeholder Group, was important to stress the greatest proportion of employees in the financial sector does not receive excessively large bonuses or other kinds of variable remuneration, which give rise to systemic issues. Indicating the need for distinguishing between employees and management of financial institutions when assessing the regulatory burden to the financial industry and developing the framework. It is often disregarded, that also in case of financial intermediaries, employees belong to the vulnerable group of stakeholders.

3. Specifics of the Nordic Corporate Governance

Focusing on the employees, the Nordic countries have in recent years attracted attention. The Nordic countries have been perceived as welfare states with large governments, strong labour unions, income redistribution together with high taxes. Even though in recent years the Nordic model has attracted attention, limited spotlight was provided to the Nordic Corporate Governance model. Yet, all changed after the financial crisis and in the EU endeavour for more stable, transparent and fair markets, the attention has been shifted towards the Nordic Corporate Governance model, which in its core maintains the interests of multiple stakeholders.

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Following the crisis, one of the discussions surrounded the perceived “short-termism” of financial institutions as well as of large multinational corporations. It has been argued that corporate governance models are failing due to inadequate monitoring and representation of diverse stakeholders.\textsuperscript{48} As a consequence, regulatory and scholarly attention has focused on “better” corporate governance solutions, including those applied in Nordic countries.\textsuperscript{49}

In the corporate governance models in the Nordic countries, corporate ownership remains somewhat concentrated, while where private benefits of control are reportedly relatively low. It has been suggested that there are several reasons of relative equilibrium within the corporate governance models, including high level tax compliance, non-pecuniary nature of control benefits, higher monitoring of controlling shareholders as well as that in Nordic countries the applied corporate governance models are results of the interaction between political and market structures. In other words, the corporate governance regulation reflects the interests of dominant corporate constituencies.\textsuperscript{50} Yet, in addition to the corporate constituencies, in Nordic countries, the important role is played by tripartism.\textsuperscript{51} Social dialogue together with tripartism on different levels represent an important part of the industrial relations system in the Nordic countries.

There are numerous reasons for including employees into the greater discussions in the Nordic countries and their corporate governance. Corporate governance and the structure of corporate ownership are first of all closely related. Secondly, both of them represent a result of specific historical, political, economic and industrial development.\textsuperscript{52} This report does not aim to elaborate in detail on the various factors that have influenced the corporate governance in Nordic countries.\textsuperscript{53} Nevertheless, it is the belief of the author of this report that it is necessary to provide the reader with the necessary understanding of the environment, in which the Nordic Corporate Governance has emanated, as it is without any doubt that legal notions only reflect and react to the environment’s realities.

### 3.1. A Brief Insight into the Development

In this section the key political and economic factors together with corporate realities will be described, for a reader to envision the rationales for the Nordic Corporate Governance model. Nordic has been known for its

\textsuperscript{48} Lynn Dallas, \textit{Short Termism, the Financial Crisis and Corporate Governance}, 37 J. CORP. L. 264 (2011).

\textsuperscript{49} Described in Steen Thomsen, \textit{The Nordic Corporate Governance Model}, 12 MNG. & ORG. REV. 189 (2016).


\textsuperscript{53} For this purpose see in general Klaus R. Ilmonen, ‘\textit{A Political Narrative in Nordic Corporate Governance: Shareholders, Stakeholders an Change of Control}, \textit{European Company and Financial Law Review}, 12(4), (2015).
concentrated ownership, which remains relatively high, in average between 23.5 to 44.8 per cent for the top five shareholders together. Alongside the concentrated ownership, the control enhancing mechanisms have been present in order to support the control of incumbent shareholders. These mechanisms include tools as multiple share classes, voting caps, pyramid ownership structures or small boards. In addition, the large shareholders, who according to Eklund, hold on average more than 20 per cent of the capital and close to 30 per cent of the voting rights, are supported by employees and labour unions. In order for these large shareholders to retain their control, they are in need for support from labour unions and employees.

Historically, it were the industrial structures of the first decades of the 20th century that have modelled the corporate ownership and control. In Sweden, the industry was represented by large corporations involved in machinery and in the refinement of raw materials. Large family corporations dominated the market. As Högfeldt has described, labour unions have cooperated with large shareholders and supported them in return for job security. The prevalence of concentrated ownership has been based on a political bargain between capital and labour resulting in a corporatist society with private concentrated ownership and strong labor unions and strong employee protection. Moreover, from perspective of capital market construction, Högfeldt argues that the social democrats have pursued policies that supported bank ownership of equity, while providing tax advantage to retained earnings and borrowing over equity. Concentrated ownership and control enhancing mechanisms have been also characteristic for Finland, due to Sweden’s influence as well as political instabilities during the 20th century. In Finland, the position of employees has been weakened by the Finish civil war of 1918 and later by internal conflicts with the labor movement. Nevertheless, protecting employees was an important factor that greatly supported political stability. Later, the specifics of Finish business environment has been the lack of financing. Until the 1980’s large shareholders in listed companies were typically Finnish financial institutions and the government, later pension funds. According to Andresen and Thue, the development in Denmark and Norway in the 20th century have included similar phenomena as in Sweden and Finland, whereas notorious for Denmark was the significance of the agricultural industry and for

59 Ibid.
60 Id. at 560.
62 Ibid.
Norway the geographical factors which have influenced the development of a locally driven self-reliant economic structure.64

3.2. Position of Employees

When assessing the position of employees through the lens of the general corporate governance in Nordic countries, the claim of Höpner might prove true. His claim has been that the ‘countries with organized labour market institutions tend to have a high degree of organization of corporate governance and vice versa’. 65

In Nordic countries, the following tools are present in corporate governance for employees’ protection. First is the employee representation as a long-established practice in many Nordic company boards, which represent a German innovation. The exact regulation varies between the countries, yet is closely connected to the strong unions.66 However, the employees of companies of certain size (above specific number of employees), have a statutory right to elect a certain number of directors to the board. Where employee board representation is practice, usually one third of the board directors consists of employees. However, the board representation is a right of the employees, not an obligation. Thus, according to Lekvall Report, in more than half of the listed companies in Denmark and Sweden, the employees have chosen not to exercise this right in exchange of other benefits, e.g. in the form of special co-determination procedures and/or information-sharing committees. The employee representation is present not only in Nordic countries, but also in Germany, Austria, France and other EU Member States. However, employees in Nordic countries are not provided with more than one third of the board seats. Whereas in larger German countries, the number of employees in the boards may rise up to a half of the board, which might represent impediments for boards’ efficiency. The employee representation on company boards is most presumably the best direct expression of social democracy in Nordic Corporate Governance models.67

Other tools applied in corporate governance in order to protect employees include the right to form a union, the subsequent ability of collective bargaining, workplace representation in diverse committees, including a health and safety representation. Furthermore, employees have also benefited from economic rights, as financial participation. All of these are also present in one form or another in Nordic countries. Ultimately, due to the established corporate practices and strength of labour unions, employees in Nordic countries have

64 Martin Jens Iversen and Steen Andersen, ‘Co-operative Liberalism: Denmark from 1857 to 2007, in Creating Nordic Capitalism (Fellman et al., 2008) at 265 ; Lars Thue,’Norway: A Resource-based and Democratic Capitalism, in Creating Nordic Capitalism (Fellman et al. (2008) at 394.


67 Ibid, at. 200.
enjoyed high levels of job protection, including higher levels of employee compensation, social program and unemployment benefits.


The corporate governance system is represented by a complex sets of written and unwritten rules, norms and practices. In this section the report will first describe the importance of the tool or the practice for the corporate governance from the policy perspective and then focus on the existing EU regulatory framework and its transposition in the Nordic countries. Governing EU regulatory framework will be explained and afterwards followed by discourse on the Nordic transposition. Unless, there are discrepancies among the form and content in which the Nordic jurisdictions have transposed the relevant EU rules, the report will refer to Nordic transposition or practice. In case any of the jurisdictions did not transpose the EU rule or transposed it in a different way or there are certain specificities relevant for this report, this report will indicate accordingly. Where applicable, the existing self-regulation, which has a long-standing tradition in many aspects of societal life in the Nordic countries, will be presented. Moreover, due to the investigation into three sectors in the financial industry, (i) banking, (ii) insurance and (iii) investment, the text within each subsection emphasized the relevant sector.

In regard to the differences between the Member States of the EU and EEA, in most of the cases both Norway and Iceland as shown below, both jurisdictions have already transposed CRD IV into their national legal systems. However, it should be indicated that the CRD IV has not been yet incorporated into the EEA agreement. Concerning the MiFID II, it has not been incorporated into the EEA agreement, thus it has not been transposed neither by Norway, nor by Iceland. Current status of MiFID II in Norway is that the act is marked as EEA relevant by the EU and under scrutiny for incorporation into the EEA Agreement by Iceland, Liechtenstein and Norway. The draft proposal is currently discussed in Norway. In Iceland, a committee under the auspices of the Ministry of Finance and Economic Affairs published in June 2016 a report on MiFID II and MiFIR. However, there has not been published a draft proposal regarding the implementation of MiFID II into Icelandic law. Moreover, neither Finland has transposed MiFID II into its national law.

4.1. Role of the Board of Directors

The financial crisis clearly uncovered demonstrated that boards of directors in financial institutions did not fulfil their key role as a principal decision makers, lacking often control, knowledge and ability to properly assess risks, both product and institution connected. The European legislative measures aimed to address these issues and in a more cohesive and specific way stipulate the duties and liabilities of the board. At the same
time, in various legislative acts, the character and composition of financial institutions’ boards is expressed. In general, a board of directors has various functions, but in theory they fall into three basic categories: (i) management, (ii) oversight, and (iii) service. Looking at the Nordic boards, in general they are relatively small and the roles of chair and CEO are always separated. At the same time, the boards maintain a strict separation of duties and responsibilities between the board and the CEO. Nordic boards are independent bodies that are strictly subordinate and accountable to the general meeting.

Before starting to analyse specific provisions governing the board of directors, the EU legislative measures governing the board of directors of credit institutions and investment firms, namely, CRD IV and MiFID II, acknowledge different governance structures across Member States (Preambles, Art. 55 and the existing diversity among the board composition and the division of powers and tasks (CRD IV, Preamble, Rec. 56; MiFID II, Preamble, Rec. 53). Thus, in general, neither the CRD IV nor the MiFID II do not anyhow direct the Member States towards any of the existing board models. Nevertheless, CRD IV clearly emphasizes the responsibility of a board and management in general for overall strategy of the firm and its risk profile. In the light of CRD IV and MiFID II, Member States should introduce principles and standards to ensure effective oversight by the management body, promote a sound risk culture at all levels (Preambles, Rec. 54). MiFID II clearly stipulates the task of a board in the Art. 9, including the organisation of the firm, policy as to services, remuneration policy as well as the implementation of strategic objectives of the firm. According to Article 88(2), a nomination committee shall periodically, and at least annually, assess the structure, size, composition, performance, skills and experience of individual members of the management body and make recommendations.

4.1.1. Representation of Employees: Composition & Diversity

CRD IV and MiFID II leave up to the Member States what legal construct of their financial intermediaries they decide to follow. However, CRD IV calls for non-executive members in the management board that would constructively challenge the strategy of the institution and thus contribute to institution’s development, scrutinising the performance of management and achieving agreed objectives (Preamble, Rec. 57). Diversity should be also undertaken by financial institutions in order to avoid group thinking (CRD IV Preamble, Rec. 60). The nomination committee shall in regard to diversity prepare a policy how to increase the number of the underrepresented gender in the management board (CRD IV, Art. 88).

CRD IV in recital 60 addresses the diversity issue of the board and stipulates that employee representatives could add a key perspective and genuine knowledge of the internal workings of institutions that would ultimately enhance the institution’s diversity. The same is stated in the Recital 53 MiFID II’s Preamble. However, except Art. 91(13) CRD IV, providing specific provision on board’s corporate governance, which states that Art. 91 shall be without any prejudice to provisions on the representation of employees in the
management body as provided for by national law. In other words, CRD IV or MiFID II do not require boards to appoint an employee representative, as long as Member States’ national laws do not stipulate such obligation.

In the Nordic countries, the employee-appointed directors to the boards of large corporations, irrespective of a sector, has been for years a widespread practice. The employees of companies above certain number of employees in Denmark, Norway and Sweden have a statutory right to elect a certain number of directors to the board. In Denmark and Sweden, board representation is a right of the employees, but not an obligation and according to accumulated data, more than in half of these companies, employees have chosen not to use this right. Employee representation in governing bodies, contributes to sound and effective corporate governance as it is in the best interest of the employees for the institution to achieve sustainable and long-term performance.

All Nordic jurisdictions have in place provisions governing the composition and diversity of their respective boards.

Pursuant to Section 79a of the Danish Financial Business Act, the board of directors of listed or larger financial undertaking and financial holding company shall set target figures for the percentage of the under-represented gender in the board of directors, and prepare a policy to increase the percentage of the under-represented gender in the other management levels of the undertaking. Furthermore, the Danish Recommendations on Corporate Governance by the Committee on Corporate Governance states that the board of directors should ensure diversity in the board of directors, including age, international experience and gender. The guidelines represent soft law, however, they show the best practice within corporate governance.

The Swedish legislator has introduced employees’ representation into the management board through the Finansinspektionen’s Regulation and General Guidelines. However, this should not affect the right of employee organisations to appoint employee representatives in accordance with Private Sector Employees (Board Representation) Act (1987:1245).

In Finland, pursuant to Section 2(2) of the Finnish Credit Institutions Act, the board of directors of a credit institution shall approve a policy to promote diversity in the composition of the board of directors as well as set a target regarding the representation of both genders in the board of directors and prepare an action plan in order to meet and maintain such target. In addition, as regards companies listed on Nasdaq Helsinki, the Finnish recommendations on Corporate Governance by the Finnish Securities Markets Association contain soft law

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68 See The Nordic Corporate Governance Model, per Lekvall ed, at 78.
70 The matrix refers to chapter 2, section 13, but I cannot even see that provision in the 2014:1 Act. Could you please check? 2014:1 chapter 2 §13 only says that the board should take a broad set of competencies into account and have a policy advocating board diversity (AA 171101)
72 Act on Credit Institutions no. 610 of August 8, 2014. Laki luottolaitostoiniminnasta, 610/2014, August 8, 2014 (AA 171101)
recommendations providing that the board of directors should ensure the diversity of the members of the board of directors in terms of age, experience and gender. It is emphasized that the board of directors should include members of both genders. In practice, the directors appointment by employees is based on agreement between the employees and the company. However, is very rarely used in practice.\(^7\)

The [Norwegian](#) legislator has transposed the Article 91 on employee representation in the board through section 8 of the Act on Financial Undertakings,\(^7\) which requires that the board of directors shall be diverse in its composition. This ‘diversification’ nature of the board is however not further qualified. Nevertheless, Norwegian regulatory stipulation is specific in regard of procedure. In undertakings with at least 15 employees, a majority of the employees may request that one board member and one observer is appointed by the employees. According to the section 8-4(5), in financial undertakings with at least 50 employees that does not have a "foretaksforsamling" (particular management body known to Norwegian financial undertakings with more than 200 employees), a majority of the employees may request that at least two of the board members at minimum, and a third of the board members at maximum, are appointed by the employees. If the undertaking is a part of a financial group, than the total number of employees of the group shall be counted for the purpose of this criterion. In case of a financial intermediary of more than 200 employees, the board in agreement with the majority of its employees or trade unions that represent two thirds of the employees, may decide to establish a "foretaksforsamling". Two thirds of the members of the "foretaksforsamling" is elected by the shareholders meeting. The remaining third of the members of the "foretaksforsamling" is elected by the employees. The "foretaksforsamlings" principal authority is to appoint the board members of the undertaking, and to supervise the management of the undertaking.

Part of Article 91 of the CRD IV has been implemented into the [Icelandic](#) Financial Undertakings Act.\(^7\) The preparatory works to the Icelandic Financial Undertakings Act directly mention Article 91(1) of the CRD IV. Article 52(4) of the Financial Undertaking Act is based on Article 91(1) and (7) of the CRD IV, stipulating that the board shall in whole enjoy sufficient knowledge, skills and experience to understand the activity of a financial undertaking and the risks. Similarly to Finland, the Icelandic recommendations on Corporate Governance by Iceland Chamber of Commerce, Nasdaq Iceland and Organization on Economy, contain soft law recommendations providing that the board of directors should ensure the diversity of the members of the board of directors in terms of age, experience and gender.

Similarly, to CRD IV, also [MiFID II](#) in Recital 53 of the Preamble stipulates that the board structure is important to corporate governance, as it affects the nature and extent of directors’ powers, influence, and responsibilities and may also affect the ability of boards to hold its managers accountable for their decisions. Diversity should also be addressed in firms’ recruitment policy more generally. This approach of greater

\(^7\) See The Nordic Corporate Governance Model, per Lekvall ed, at 78.

\(^7\) Number and day of adoption of this act?

\(^7\) Act on Financial Undertakings no. 161 of December 20, 2002.
diversification of a board should avoid group thinking and facilitate independent opinions and critical challenge, management bodies should therefore be sufficiently diverse as regards age, gender, geographic provenance and educational and professional background to present a variety of views and experiences. Article 45 lays down specific requirements for the board, including the good reputation, sufficient knowledge, skills and experience to perform its duties. Similarly to CRD IV, the nomination committee should be in place in order to identify and recommend proper candidates for the board as well as annually reflect on the composition and performance of the board.

In **Denmark**, the Article 45 of MiFID II is expected to be transposed into Danish law through the Capital Markets Act, which transposed MiFID II into Danish law generally, and which requires the board of directors of the market operator to ensure diversity (without gold-plating). The Capital Markets Act does not impose a direct diversity requirement in respect of the management body in a data reporting service provider. In section 64 it stipulates that the board of a regulated market operator shall establish a diversity policy in the Board that promotes sufficient diversity in qualifications and competencies among members of the Boards.

In **Sweden**, the MiFID II has been transposed only partially. The full transposition shall take place from January 3, 2018. Finland has not yet transposed the MiFID II into its national law. However, in the light of the Prime Minister Sipilä's Government Programme, the government aims to avoid gold-plating in the future implementation of EU legislation. In particular, the Programme states that Finland will seek less but better and lighter regulation on the EU level and will not introduce such gold-plating that would be detrimental to Finland's competitiveness in the national implementation of EU legislation.

Only Denmark has fully transposed MiFID II and has referred to the “employee representation” in management bodies as a way of enhancing diversity.

4.1.2. Remuneration & Short-termism

Regarding credit institutions, the CRD IV in recitals 62-69 of the Preamble stipulates the necessity of **discouraging** those remuneration policies that support excessive risk-taking behaviour and thus undermine sound and effective risk management. A board should periodically review the remuneration policies in place. This policy is further detailed in Article 92 and 94 of CRD IV laying down more specific provisions on the remuneration policies and risk aversion as well as variable elements of remuneration. According to Art. 94 CRD IV, the individual’s variable remuneration is based on a combination of assessment of the individual, its

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76 Consolidated Act no. 650 of June 8, 2017.
business unit as well as the overall results of the institution. Furthermore, the variable component shall not exceed 100% of the fixed component of the total remuneration for each individual, whereas the Member States may set a lower percentage.

In connection with the board, the CRD IV in Art. 95 stipulates that financial institutions that are significant in terms of their size, internal organisation and the nature, the scope and the complexity of their activities establish a remuneration committee. The remuneration committee shall be part of the board, while not performing executive function. As long as the national law provides for employee representatives in the board, there should be also an employee representative in the remuneration committee. Financial institutions should disclose their remuneration policies online.

**Denmark** has transposed the rules governing the remuneration committee in the Danish Financial Business Act, in the section 77c. Denmark obliges only the significant financial institutions to establish a remuneration committee. According to this section, as long as there is employee representation in a financial undertaking, a financial holding company or an insurance holding company, at least one of the employee representatives has to be a member of the remuneration committee. Also **Sweden** has transposed the obligation as to the establishing remuneration committee by the Finansinspektionen’s Regulations and General Guidelines. Chapter 3 Section 3 of FFFS 2011:1 stipulates that the members of the remuneration committee shall be members of the management body, while not being the employees of the financial institution. This does not apply to employee representatives appointed in accordance with Private Sector Employees Act (Board Representation). However, Swedish law does not include an express requirement that an employee representative shall be a member of the remuneration committee. It only stipulates that employee representatives are not barred from the remuneration committee despite being employed in the company. Thus, it could be argued that Sweden did not fully transpose the Article 95(2) CRD IV into Swedish law.

In **Norway**, the Financial Undertaking Regulation section 15-3 stipulates that a remuneration committee shall, when the undertaking is required to establish a remuneration committee, include at least one employee representative. In our view, this requirement does not gold-plate CRD IV art. 95 (2). The rules of the CRD IV on remuneration committees have been transposed into **Finnish** law by way of Chapter 8, Section 5 of the Finnish Credit Institutions Act. Pursuant to Section 5(2), if the members of the board of directors include a person or persons representing the employees, at least one such employee representative shall be appointed to

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78 Pursuant to Art. 77c-(1), financial undertakings, financial holding companies and insurance holding companies the holdings of which have been admitted to trading on a regulated market, or which, in the two most recent financial years at the balance sheet date, on average have employed 1,000 or more full-time employees, shall set up a remuneration committee. Yet, according to (FFFS 2011:1) Full name and date of the act? “Finansinspektionens föreskrifter om ersättningsssystem i kreditinstitut, värdepappersbolag och fondbolag med tillstånd för diskretionär portföljförvaltning”, 2011-03-01 (AA 171101) Private Sector Employees Act no. 1245 of 1987.
the remuneration committee. Hence, the Finish transposition fully follows the *dictum* of the CRD IV. In regard to significant financial institutions and consolidated groups or consortium of deposit banks, the Finnish Credit Institutions Act requires a remuneration committee at the parent company level.83

Finally, **Iceland** intended to implement the rules of CRD IV on remuneration policies in Chapter 7 of the Icelandic Financial Undertaking Act in 2015. However, the Icelandic Government decided to *postpone* the implementation on rules that concern remuneration policies. To the knowledge of the authors, there has not been published another draft regarding the implementation of remuneration policies into Icelandic law. Therefore, the implementation of CRD IV’s provisions on remuneration committees remains open.

### 4.1.3. Liability

According to the Article 88 CRD IV, the Member States shall ensure that the board oversees and is accountable for the implementation of the governance arrangements that ensure effective and prudent management of an institution, including the segregation of duties and prevention of conflicts of interest. The same has been stated in MiFID II. In the light of Art. 9 MiFID II, Member States shall ensure that a board of an investment firm *defines, oversees and is accountable* for the implementation of the governance arrangements that ensure effective and prudent management of the investment firm, including the segregation of duties in the investment firm and the prevention of conflicts of interest.

**There was nothing in the matrix, do we have any additional documents in this regard?**

### 4.2. Employees

Employees not only represent one of the key stakeholders in the corporate governance theory, but also the means of achieving the goals of any financial institution. Since 1989 Community Charter of the Fundamental Social Rights of Workers has emphasized the desirability of promoting employee participation through proper information and consultation procedures. Currently, there are numerous directive in place that govern the right of workers to be informed and consulted at national level on a number of important issues relating to institution’s economic performance, financial soundness and future development. In this section, the analysis will focus on how the financial regulatory framework embraces these rights of employees and what tools are offered.

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83 Number, and name of the act Laki luottolaitostojiminnasta, 610/2014, August 8, 2014 (AA 171101)**
4.2.1. Consultation with Employees

This section analyses the existing provisions of the EU financial regulation that provides the employees with the right to be informed. Irrespective of the sector, the general national labour law provides employees and workers in the European Union with the right to information, consultation and participation. The focus of the following section will be on the BRRD and SRD.

According to Recital 35 BRRD, Recovery and resolution plans should include procedures for informing and consulting employee representatives. Where applicable, collective agreements, or other arrangements provided for by social partners, as well as national and Union law on the involvement of trade unions and workers’ representatives in company restructuring processes, should be complied with in that regard. This provision has been further built in Article 34(5) BRRD, which stipulates that when applying the resolution tools and exercising the resolution powers, resolution authorities shall inform and consult employee representatives where appropriate. Similarly, Recital 48 of the SRD stipulates that resolution plans should include procedures for informing and consulting employee representatives throughout the resolution processes where appropriate. However, the SRD has not affected directly the Nordic countries in the EU and neither has been incorporated into the EEA agreement.

In Denmark, the Article 34(5) BRRD has not been directly implemented in Danish law. Most likely this is because the directive has direct horizontal effect on authorities, and accordingly, no specific Danish regulation is necessary. Sweden neither directly implemented the Article. However, in Chapter 12 Section 8 of the Swedish Resolution Act it is regulated that when the Swedish Resolution Authority (which is the National Debt Office, Riksgäldskontoret) takes a resolution action that directly affects employees, the authority should inform and consult with the employee representatives. Furthermore, in the preparatory works in connection with the implementation of the BRRD, the Swedish legislator highlighted that there is no reason to implement the specific provisions governing the relationship with employees, as the Resolution Authority is obliged to enforce collective agreements since the employer is still bound by collective agreements.

The article has not been directly implemented in Finnish law, also due to the horizontal effect of the directive. However, Section 3 of the Finnish Ministry of Finance Regulation no. 1284/2014 includes a provision according to which resolution plans should include a report on the impact of the resolution plan on the

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84 This has been established by several directives that provide the workers with the right to be informed and consulted on those issues that would affect their employment. Among these are, Council Directive 75/129/EEC of 17 February 1975 on collective redundancies, Council directive 2001/23/EC of 12 March 2001 on the safeguarding of employees’ rights in the event of transfers of undertakings, businesses or parts of undertakings of businesses and Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community, which lays down minimum procedural standards protecting the right of the employees to be informed and consulted on the economic and employment situation affecting their workplace.


86 Government Bill 2015/16:5 p. 481.

87 Finnish Ministry of Finance Regulation no. 1284/2014.s
employees, the estimated costs relating thereto and an outline of the procedures for consultation with the employees during the resolution process (which procedures shall take into account the arrangements relating to by social partners).

In regard to **Iceland**, the BRRD has not yet been transported into Icelandic legislation. The Icelandic government has not published a draft proposal for the implementation of BRRD, but according to the Ministry of Finance and Economic Affairs the aim is to implement BRRD into Iceland Law during 2017. The same is applicable to **Norway**, where the BRRD has not been yet implemented into Norwegian law.

4.2.2. Collective Bargaining

Collective bargaining is as a right guaranteed in all Nordic jurisdictions to the trade unions. The basis of collective bargaining is that trade unions and employers’ organisations have **the established** a right to agree on shared concerns between themselves, without interference from the EU or national governments. It is argued that the unions are the most suitable to decide on numerous issues, including wages, pensions, working time, continuing training, **benefits** and other core labour market conditions (**what others??**). During the contractual period of collective agreements, a “peace obligation” is also often present, under which employees lack the **right to strike**. Moreover, collective bargaining often represents the necessary foundation for enhancement of any other employees’ rights. **Due to the high unionisation rates in the Nordic countries and the broad impact of collective bargaining outcomes**, labour market relations between unions and employers have over time evolved into a central factor for determining the Nordic countries’ competitiveness and economic growth. This also means that the labour market parties are forced to take the interests of the broader economy and society into account, as the consequences of reckless wage demands would be damaging for all, including the organisations’ own members, especially given the Nordic countries’ high dependency on exports and foreign trade.

The recent EU legislative acts have emphasized the position of the collective bargaining in the structure. Namely, the **CRD IV in the recital 69**, aside of emphasizing that remuneration represents a fundamental right, as guaranteed by Article 153(5) TFEU, stipulates that the concluded collective agreements shall be enforced in accordance with national law and customs. The same is stipulated in Recital 10 of **UCITS V**. However, what is important to emphasize is the fact that neither of the EU regulations or directives emphasize **the role** of the collective bargaining. They only stipulate that, where in accordance with national law and customs, the remuneration policies have to respect the collective agreements.

Collective bargaining and its role are not articulated on the EU level and is only perceived as one of the considerations for remuneration policies in financial institutions.
4.2.4. Competence and Training

Training is to the forefront of the Europe-wide employment debate in 1998, and continuing vocational training during working life is widely seen as a means by which both the "employability" of workers and the competitiveness of companies and financial institutions can be enhanced. Since 1976, at the EU level the CEDEFOP has been involved in promoting training, including continuing training - special attention has been paid to the role of the social partners in the promotion of continuing training. The 1989 Community Charter of the Fundamental Social Rights of Workers stated that "every worker of the European Community must be able to have access to vocational training and to benefit therefrom throughout his working life" and underlines the necessary involvement of the competent public authorities, companies and social partners. This approach has been very important in Union policy on continuing training. At the special European Council Employment Summit held in Luxembourg in November 1997, continuing training was also referred to and the social partners were urged in the summit conclusions to accept specific commitments. The November 1997 EU "Employment Summit" reflected this interest, urging the social partners to conclude agreements increasing the possibilities for training, work experience and traineeships, and to focus on lifelong training. Currently, across the EU, there is a great diversity in this area, with differing roles in national training systems for the social partners, public authorities and individual employers and employees. In this regard, in Nordic countries, the collective bargaining has an extremely important position, given that the continuing training system is based on the agreements between employers’ organisations and trade unions, which share the responsibility in the management of training.

In the area of the EU financial regulation, only the MiFID II and IDD reflect directly on the issues of employees’ competence and training. In Recital 79, MiFID II states that given the complexity of investment products and the continuous innovation in their design, it is also important to ensure that staff who advise on or sell investment products to retail clients possess an appropriate level of knowledge and competence in relation to the products offered. Investment firms should allow their staff sufficient time and resources to achieve that knowledge and competence and to apply it in providing services to clients. In addition to this recital, in Recital 54, the MiFID II states that it is the management body that should assume clear responsibilities across the business cycle of the firm, in the areas of the identification and definition of the

strategic objectives, risk strategy and internal governance of the firm, of the approval of its internal organisation, including criteria for selection and training of personnel [...]. This provision should in our understanding provide sufficient incentives for all institutions governed by MiFID II to undertake necessary action.

Further, in the text of the Directive, the MiFID II in Article 25, section 1 and 9 lays down the specifics of this obligation. According to Article 25(1), the Member States shall require investment firms to ensure and demonstrate to competent authorities on request that natural persons giving investment advice or information about financial instruments, investment services or ancillary services to clients on behalf of the investment firm possess the necessary knowledge and competence to fulfil their obligation under Article 24 and this Article. Furthermore, it is stipulated that the Member States’ obligation to publish the criteria to be used for assessing such knowledge and competence. However, ESMA issued already Guidelines for the assessment of knowledge and competence,\(^{91}\) which should provide assistance to the Member States. It is also important to emphasize that Member States shall ensure that an infringement of the Article 25(1) shall be regarded as an infringement of the MiFID II or of MiFIR.\(^{92}\) This means that the Member States need to introduce mechanism to assess whether the investment firms have fulfilled their obligation to ensure that their employees possess the knowledge and competence.

The IDD stipulates the importance of high level of professionalism and competence among insurance, reinsurance and ancillary insurance intermediaries and their employees in its Recital 28. Further, in Recital 29, it emphasizes that continuing training and development should be ensured. Notably, the Recital continues with enumerating possibilities for training and development of various types of facilitated learning opportunities, including courses, e-learning and mentoring. Nevertheless, the issues of form, substance and required certificates are left for the Member States to regulate, which might contribute to diversity in the necessary level of knowledge and skills in insurance industry across the European Union. The IDD in Article 10 further specifies the individual obligations of Member States. They shall ensure that insurance and reinsurance distributors and employees of insurance and reinsurance undertakings carrying out insurance or reinsurance activities possess appropriate knowledge and ability in order to complete their tasks and perform their duties. Furthermore, the Member States shall ensure that the undertakings comply with continuing professional training and development requirements (of minimum 15 hours per year) in order to maintain an adequate level of performance corresponding to the role they perform. Similarly to MiFID II, Member States shall have in place and publish mechanisms to control and assess employees’ knowledge and competence.


\(^{92}\) Article 70(3) MiFID II.
In regard to the implementation of the MiFID, as already stipulated above, only Denmark has fully transposed the MiFID II, whereas Sweden’s law should be enforceable from 2018. However, Finland has not yet transposed MiFID II and neither Norway nor Iceland have, given that the MiFID II has not been incorporated into the EEA agreement. Concerning the IDD, this report may not assess the transposing legal acts in any of the Nordic countries as they either have not been adopted yet or they are not part of the EEA agreement.

In Denmark, the requirements regarding knowledge and competences of employees have been already in place. They have been implemented by a form of a Competence Requirements Executive Order. According to this Executive Order, the investment company shall ensure that its employees who provide investment advice or disseminate information about investment products, must have 6 months of documented full-time experience with the necessary knowledge in i) relevant legislation, ii) investment products and iii) economic understanding. Furthermore, the employees should pass a test provided and approved by the Danish Financial Supervisory Authority. Moreover, the Executive Order in its annexes more detailed requirements. The report does not reflect upon the test and its content.

Swedish transposition of MiFID II will be effective from the beginning of the year 2018. According to the Act 2016/17:162, chapter 8, section 15, an investment firm shall ensure and, at the request of the Swedish Supervisory Authority (Finansinspektionen) show that the employees who provide investment advice or information about financial instruments, investment services or additional services have the required knowledge and skills according to this Act. Further, the Act no 2016/17:162 stipulates that the government may issue further regulations regarding the requirements for knowledge and competence of employees. For further specifications on the knowledge and competence, the Swedish government has stated that they are considering the ESMA guidelines before further actions.

4.2.5. Whistle-blowers’ protection

Whistle-blowers provide a valuable service to both their employers and the public. It has been established that whistle-blower protection is essential to encourage reporting of misconduct, fraud, tax evasion and corruption in any institution. The risk of the misbehaviour is significantly heightened in environments where reporting of wrongdoing is not supported or protected. Encouraging and facilitating whistle-blowing, by providing effective legal protection and clear guidance on reporting procedures, also helps Member States and the EU to monitor compliance and detect violation of financial regulation. Thus, there are numerous incentives for both

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93 Executive Order on Competence Requirements for Employees Providing Investment Advice and Providing Information on Certain Investment Products, no. 864, available online at: <https://www.retsinformation.dk/Forms/R0710.aspx?id=192145>.
financial intermediaries and governments to adopt effective whistleblowing protection. Employees are often in a unique position to recognize and report wrongdoing. They can alert their employers to problem before the problem escalates. Yet, if an employer refuses to resolve an issue, employees might often be the only parties capable of reporting the problem to external authorities before a greater harm is to take place. As one court noted, “[w]ithout employees who are willing to risk adverse employment consequences as a result of whistleblowing activities, the public would remain unaware of large-scale and potentially dangerous abuses.”

On the EU level, it was only during the summer 2017 that a public consultation on whistle-blower protection was initiated. Based on this consultation, the Commission will assess the scope for horizontal or further sectorial action at EU level, while respecting the principle of subsidiarity.

In regard to financial regulation, there are numerous EU directives and regulations that directly reflect on whistleblowing protection, even though the term “whistleblowing” is not used directly. Starting with MiFID II, in its Recital 147, it states that the Member States shall establish effective and reliable mechanisms to encourage reporting of potential or actual infringements, including protection of employees reporting infringements within their own institution. These mechanisms should be without prejudice to ensure safeguards of the accused person. This Recital is later elaborated by Article 73 (5) MiFID II on reporting infringements, which requires the Member States to provide their competent enforcement agencies with a mechanisms to enable reporting of potential or actual infringements. Under letter (b) of this Article, reference to appropriate protection for reporting employees of financial institutions is stipulated.

The CRD IV provides for same obligation. In Recital 61 it states that in order to strengthen legal compliance and corporate governance, the Member States shall establish effective and reliable mechanisms to encourage reporting to competent authorities of potential or actual breaches. Specified by Article 71, Member States shall ensure that competent authorities establish effective and reliable mechanisms to encourage reporting of potential or actual breaches, while securing the appropriate protection for employees of institutions who report such breaches. Thus, the provisions are identical. The alike provisions are stipulated also in IDD in Article 35, in MAR Article 32 and its Implementing Directive as well as in UCITS V Article 99d. The repetition is logical given that all of the institutions face the same challenges in regard to possible wrongdoings and require an effective and reliable mechanism to monitor such wrongdoings while protecting the employees. Hence, the obligation is clear, it is for the Member States to establish systems to secure the above and the other requirements connected to personal data protection, confidentiality and report review, as stipulated by the later provisions of the above stated articles. The natural reaction of the Member States would be to adopt one mechanism that would be effective for the employees of all financial institutions. Therefore, in the following section, this report assesses the existence of relevant whistle-blowing mechanisms in general.

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In Denmark, the Danish Financial Supervisory Authority (FSA) has established whistle-blower protection mechanisms in 2014.\textsuperscript{97} In fact, currently, there are two sets of whistle-blowing mechanisms. One mechanism relates to market abuse such as insider trading, unlawful disclosure of inside information and market manipulation under the MAR. This whistle-blowing mechanism has been developed by the Danish Financial Supervisory Authority externally. A whistle-blower is supposed to file a report with the FSA within a contact form which ensures that a report is sent securely and anonymously to the Danish FSA. Other possibility is to file a report through a hotlink that is operated by FSA or by personal meeting with the representatives of FSA. Within this procedure, the whistle-blowers are said to be protected against reprisals, discrimination and other types of unfair treatment, which should be secured by the Danish FSA. Once a person gains a status of a whistle-blower, he/she may not be legally dismissed from an employment or demoted.

The second mechanism is operated by financial institutions by themselves. According to the Danish regulation,\textsuperscript{98} all financial institutions must have an internal whistle-blower scheme. A whistle-blower can freely choose whether to send his/her report to the institution’s internal whistle-blower scheme or to the FSA. The financial undertaking has subsequently the opportunity to forward the notification to the Danish FSA. The financial institutions in Denmark have also numerous obligations regarding the protection of employees as whistle-blowers under non-financial regulations, including Danish Working Environment Act and the Danish Criminal Act. According to the existing Danish legislation, in case employee’s rights have been violated, the employee may be entitle to compensation. This compensation is to be based on the principles that apply to any breach of the Danish anti-discrimination legislation, entitling the employee from six to twelve months’ additional salary.

In regard to CRD IV, the Swedish legislator assessed that the Swedish financial authority’s whistleblowing mechanism fulfils the requirements, while providing specific instructions on how to report actual or potential breach of the financial regulation on its website in accordance to a 2013 law.\textsuperscript{99} More importantly, in 2016, Sweden passed a whistle-blower protection law applicable to employees in all types of businesses, including the financial institutions. This Act should be viewed as a part of a larger whistle-blower protection framework. Thus, there are currently also two whistle-blower protections schemes. The full translated title of the act is the “Act on Special Protection against Victimization of Workers who Sound the Alarm on Serious Wrongdoings,” which entered into force on January 1, 2017.\textsuperscript{100} This act protects employees as well as temporary workers who report serious wrongdoings in their employer’s business from retaliation. Similarly, to Denmark, the institutions and companies are themselves obliged to have a whistleblowing system, which can vary and consist of everything from an indicated telephone number or an email to a more sophisticated systems with technical solutions provided internally or by external suppliers. The act requires employees first to make reports

\textsuperscript{97} Act no. 2013/2014 of....
\textsuperscript{98} Act no. 2013/2014 of....
\textsuperscript{99} Act no. 2013/14:228 name...
\textsuperscript{100} Number of the Act?
internally or to a labor union. If the employer does not take “reasonable measures”, the employee can disclose
the information to authorities or the media.

Due to Finish delay with transposition of MiFID II, only CRD IV and MAR are relevant for the further assessment. Article 71 of CRD IV and Article 32(1)-(3) have been transposed into the Act on the Finnish Financial Supervisory Authority. The Finnish FSA has established an external mechanism to report breaches of the financial regulation under its supervision. In addition, credit institutions, pursuant to Chapter 7, Section 6 of the Finish Credit Institutions Act, are required to have procedures for their employees to report breaches internally through a specific, independent and autonomous channel.

In Norway, also a general whistle-blowing protection act is applicable – the Working Environment Act of 2005, which obliges all employers to establish a whistle-blower protection. It protects employees' right to report any blameworthy activities to the authorities. However, the above stated provisions of financial regulation have either been not included in the EEA agreement or were considered irrelevant due to the existing regulation even though the Norwegian Financial Supervisory Authority is not subject to any regulation or formal guideline that specifically addresses its treatment of whistle-blowers. It is only stipulated within its internal policies to follow-up on reports of breaches regardless of whether the report is made by an employee or the general public.

In Iceland, the only relevant reference is to the CRD IV, which has not been fully transposed into Icelandic regulation and only a draft of the proposed regulation is available. According to the draft proposal, the Article 71 will be implemented by way of amendments to the Act on Financial Undertakings and Act on Official Control of Financial Activity, employee notifications of breach of the activities of financial undertakings and similar notifications to the Icelandic FSA on breach of the entities subject to official control of financial activities. It shall be the obligation of the Icelandic FSA to set up procedures for receiving and following notification on violations of the activities that are supervised by the Icelandic FSA. Yet, the specifics of the procedures and the tools for employees’ protection are only to be seen.

Ultimately, some form of whistle-blower protection regulation is present in all of the Nordic countries. However, it is for a further assessment whether the existing regulation provides an effective protection for the employees.

4.3. Risk Management: Employee – Consumer Relationship

- Understanding its Function

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101 Ac no?
102 Number of the Act?
CRD IV Assessment criteria Art 23

Art 76 CRD IV

Use of highly complex financial products

ARVID – do we have any data on this??? --- the matrix does not elaborate on the article 76 and complex financial products

There is also the issue of part 2 in the matrix dealing with sales and advice rules. Most of the listed provisions in this section are yet to be transposed into national law and cannot therefore be analysed here. But we still need to mention this explicitly, and also reflect on the role of employees in the legislation for producing consumer protection outcomes. This was something that the Council of Ministers expressly asked for, so somehow we need to address it. I guess a lot can be done based on the info already in the matrix? (AA 171101)

4.4. European Deposit Insurance Scheme

*Fill-out by CBS

4.5. Conclusions & Recommendations

Macro perspective on different institutions… and the position of the employees

*to be completed