Nordic Implementation of EU Financial Rules

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Report

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Executive Summary

This report was commissioned by the Nordic Council of Ministers to examine the position of employees in the Nordic financial sector in the light of the EU's financial legislation. 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 EU financial system. This series of reforms in the area of financial market regulation have had a profound impact on the **Nordic** financial industry, financial intermediaries, corporations, and employees. Hence, a need for a review and analysis of the possible change of the position of employees in the light of the recent changes has been recognised. An additional part of the report is formed by an analysis on the EU deposit insurance scheme.

Methods of analysis include qualitative research methods of relevant EU financial regulations, directives, recommendations and national legal acts and rules together with existing quantitative research. The description and translation of the national legislative provisions was prepared by Kromann Reumert (Denmark), Gernandt & Danielsson (Sweden), Krogerus Attorneys (Finland), Advokatfirmaet Tommessen (Norway) and Logos (Iceland).

The **report finds** that the transposition of the EU Directives has been relatively homogeneous in all Nordic jurisdictions. There are certain discrepancies between the EEA and EU Member States. Nevertheless, the EEA Member States are also in the process of implementing the changes introduced by the EU financial legislation. This report uncovers areas within which the EU has not adopted a coordinated approach and thus leaves room for regulation regarding the level of employee protection for the Member States. It is thus important to undertake further steps towards a coherent framework in the Nordics. Finally, there are several recommendations in regard to the employee consultation and collective bargaining as well as whistleblower protection. Ultimately, some of the EU regulatory framework has not been yet implemented and therefore the effect of the EU regulation is only to be seen in the upcoming years.

1. Introduction

One of the fundamental objectives of the European Union (EU) is to operate a single internal market, comprising the key elements of free movement for goods, services, people and capital.[1] Financial services form a significant part of that internal market. A properly **integrated financial services market** is one where capital can be freely raised in any place (Art. (3(3) TEU), can move freely throughout the entire area, and which offers free competition. 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 opportunity for investing capital anywhere investors prefer within the internal market. In addition, the investment services shall generally be available everywhere and investors shall be entitled to choose a preferred service provider, 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 the financial system and enhance the EU's corporate competitiveness. In addition to the global financial instability at the time, politicians, scholars and other commentators around the world have cautioned against an overreliance on the financial services, and argued for stronger regulatory standards. In light of the **broadly** perceived misbehaviour of the financial industry and its leaders, many EU policymakers became concerned and thus decided to improve the legal framework within which the financial institutions operate.

Accordingly, for several years following the Crisis, vast amounts of new EU legislation covered large grounds to impose more stringent regulation for the financial services industry. It took several years until the general direction of EU activity changed course again: in September 2015, the EU Commission proposed an action plan on **Capital Market Union** (CMU).[2] This project comprises a package of key measures 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 the Investment Plan.[3] The aim of this plan is to unlock funding for capital markets and find new ways for investors and the corporate sector. The Commission expects, by the end of 2017, to have finalised and implemented the first phase of CMU measures.

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[1] Until 1986, the EU official treaties and materials referred to the term "common market".
[2] For a political assessment, see Wolf-Georg Ringe, 'Capital Markets Union for Europe: a commitment to the Single Market of 28' (2015) 9 Law & Financial Markets Review 5.
[3] 'Action Plan on Building a Capital Markets Union', Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM (2015) 468 final from September 30, 2015. Available online at: < http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52015DC0468>.

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.

1.1. Scope of the Report:

This report analyses the position of the employees of the financial intermediaries in the light of the EU Regulations and Directives in Nordic countries. The entirety of EU activity in the area of financial market regulation has a profound impact on the Nordic financial industry, financial intermediaries, corporations, and employees. When the EU adopts new rules, depending on the legal form in which they have been adopted, they may be directly applicable, without a need for further transposition. Alternatively, they will be transposed into national law, or, thirdly, they might represent non-binding recommendations for Nordic financial institutions, including banks, insurance companies, investment companies and pension funds. The regulation of financial services 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, including:

- new rules to strengthen financial supervision
- new tools for bank recovery and resolution
- more effective deposit protection
- an 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 aim to build a more stable and resilient financial system. At the same time, it is important to monitor the reforms introduced after the Crisis, in order to determine 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 understand the scope and the extent to which these reforms have affected the position of employees in the Nordic financial sector. Further research is, however, necessary to assess the effect of the regulatory framework on other stakeholders.

The aim of this report is to address and analyse the position of employees in the Nordic financial sector in the light of the recent EU financial legislation.

The report firstly shows whether the EU financial directives and regulations regarding banks, insurance companies and investment firms were transplanted by Nordic countries and secondly, by focusing on those provisions affecting the employees.

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 the Nordic countries has respected the position of collective agreements and the rights of employees and trade unions, as accepted in the Nordic region. 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** Nordic jurisdictions, 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
- Sweden

This report covers EU financial market regulation and the corresponding national regulation that either adopts or transposes the EU rules. It considers the harmonised rules that govern the corporate governance of three groups of financial intermediaries: (i) banks, (ii) insurance companies, and (iii) investment firms and regulate the position of employees. It does not, accordingly, address specific rules outside of the scope described above.

The analysed EU legislation comprises:

- BRRD[4]
- Capital Requirements Regulation (CRR)[5]

[4] Directive 2014/59/EU of the European Parliament and of the Council of May 15, 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1039/2010 and (EU) No 648/2012, of the European Parliament and of the Council.

[5] Regulation (EU) no. 575/2013 of the European Parliament and of the Council of June 26, 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) no 648/2012.

- Capital Requirements Directive (CRD IV)[6]
- Single Resolution Mechanism (SRM)[7]
- UCITS V[8]
- MiFID II[9]
- MiFIR[10]
- MAR[11]
- Insurance Distribution Directive (IDD)[12]

Together with the above Directives and Regulations, the relevant national law will be analysed. In addition to these financial acts, it has to be emphasised 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 third-country regulation and supervision to mirror EU requirements.[13] Norway and Iceland are part of the European Economic Area (EEA), the purpose of which is to extend the EU's internal market to include the countries in the European Free Trade Area (EFTA). Hence, many EU regulations and directives in the area of financial services, except the economic and monetary union (EMU), will be

[6] Directive 2013/36/EU of the European Parliament and of the Council of June 26, 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC.
[7] Regulation (EU) No 806/2014 of the European Parliament and of the Council of July 15, 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010.
[8] Directive 2014/91/EU of the European Parliament and of the Council of July 23, 2014 amending Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) as regards depositary functions, remuneration policies and sanctions.
[9] Directive 2014/65/EU of the European Parliament and of the Council of May 15, 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/65/EU.
[10] Regulation (EU) No 600/2014 of the European Parliament and of the Council of May 15, 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012.
[11] Regulation (EU) No 596/2014 of the European Parliament and of the Council of April 16, 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC.
[12] Directive 2002/92/EC of the European Parliament and of the Council of December 9, 2002 on insurance mediation. Even though a new directive has been adopted – Directive (EU) 2016/97 of the European Parliament and of the Council of January 20, 2016 on insurance distribution; this directive is only to be transposed by February 23, 2018. Therefore, this directive is outside of the scope of this report.
[13] This is the case for rating agencies, alternative investment funds, and agencies trading with derivatives. In addition, 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.

relevant and also applicable to Norway and Iceland.[14] Furthermore, it is important to note that the Single Resolution Mechanism (SRM) has affected only one of the Nordic countries, Finland.

1.2. Rationales for the Report

The first objective of the project is to map and analyse the ways in which key areas of the EU's financial legislation have been implemented in the Nordic countries that include both EU and EEA Member States. It has been of a concern of certain stakeholders that their position might have changed due to the EU's legislation. This report aims to address one particular stakeholder group – employees. Accordingly, our inquiry secondly assesses whether, and to what extent, the EU regulatory framework has affected the position of employees in the Nordic countries. The rights of the employees and trade unions in the Nordic countries are essential for their corporate governance system. It is the purpose of this report to assess whether these continue to be respected and protected by the regulation governing financial intermediaries.

By mapping recent EU financial legislation and its impact on employees, the idea is to gain knowledge regarding three specific aspects:

a) Potential differences in employee protection between the Nordic countries – differences that would undermine the idea of a level playing field.
b) The ways in which the spirit and intention of the EU legislators have been transferred into the national rules.
c) What the potential consequences of the new rules will be on both the burden of the 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 analyse the implementation of the new rules on documentation and information for front office staff working with consumer advice on banks and insurance companies.

[14] Agreement on the European Economic Area, OJ. No. L. 1, 2.1.1994 as amended by the Agreement between the European Union, Iceland, Liechtenstein and Norway on an EEA Financial Mechanism 2014-2012 (OJ L 141, 28. 5.2016) and the EEA Annex IX and XIX.

The rules on documentation of customer meetings and advice are to foster customer protection and, provided that they fulfil their intention, can, as such, be beneficial for both customers and employees.

Lastly, this report aims to contribute to the debate regarding 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 and trustworthy role.

1.3. Methodology

The report aims to provide a comparative legal analysis that applies diverse qualitative research methods. The **qualitative research** has primarily been conducted by following doctrinal research and analysis combined with policy research. Doctrinal legal methodology provides an analysis and comparison of relevant EU financial regulations, directives, recommendations and national legal acts and rules that are transplanting and implementing the EU regulatory framework on a national level. The sources that are used for this report are primarily drawn from EU Directives and Regulations, Commission Staff Working Documents and Commission Communications (sec. 1.1.).

On the national level, the report is based on a regulatory **matrix** prepared by Kromann Reumert. This matrix provides the review of the transposed relevant EU directives as per January 7, 2017 for Denmark, Sweden, Finland and Norway and as per April 18, 2017 for Iceland. Furthermore, this report builds on executive orders and procedures which were adopted by national legislative bodies as well as on national corporate governance codes and doctrinal literature. Where appropriate, references to national practice are included. Furthermore, this report draws on the analyses and studies that have been performed by other recognised organisations at the international level (OECD, Basel Committee, etc.) as well as at the European (EU, CEBS) and national levels.

2. EU Quest for Harmonisation of Financial Regulation

As stipulated in the introduction, one of the fundamental objectives of the EU is to form a properly **integrated financial services 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 also implies the possibility of investing capital anywhere investors desire within the internal market. In addition, the investment services shall be generally available everywhere and investors shall be entitled to choose the service provider they desire, irrespective of their residence or citizenship.

The EU has implemented several forms and methods on how to reach the single internal market since its foundation in 1957. However, its formation had been long postponed. Only the Single European Act clearly set the date for establishing the single internal market by the **end of 1992**.[15] Nonetheless, this plan ultimately proved overly ambitious, and the EU has continued to struggle with finalising the internal market – if is can ever be achieved.[16] Chiefly, the EU has been using two primary regulatory tools:

- positive, and
- negative integration.[17]

2.1. Financial Services Action Plan and Lamfalussy Process

In 1999, the European Commission adopted the Financial Services Action Plan (FSAP), a policy programme aiming to **complete** the single financial market after the introduction of the Euro and establishment of **monetary union**.[18] The FSAP was a plan for adopting all necessary legislative

[15] Section II, Art. 13 of the Single European Act O.J. EC No. L. 169/1 (Single European Act).
[16] Mario Monti, in his report on the relaunch of the single market, clearly stated that "achieving a deep and efficient single market is a key factor determining the EU's overall macroeconomic performance." *See* Report by Mario Monti to the President of the European Commission: 'A New Strategy for the Single Market' (June 9, 2010) 9. *See also* the Single Market Act I and II, *available online at:* < http://ec.europa.eu/internal_market/smact/index_en.htm>.
[17] See Giandomenico Majone, Positive and Negative Integration, in *Dilemmas of European Integration: The Ambiguities and Pitfalls of Integration by Stealth* (Oxford University Press, 2005).
[18] European *Commission, Financial Services: Implementing the Framework for Financial Markets: Action Plan (COM (1999) 232).*

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.[19]

It is unquestionable that the FSAP contributed towards the integration of securities market in the EU.[20] 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 as being 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 harmonisation eliminated Member State self-regulation,[21] affecting, in particular, certain countries whose 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).[22] The difference between the FSAP and the **Lamfalussy Committee** was that the FSAP set out a roadmap on substantive harmonisation, while the Lamfalussy Committee assessed the legislative process in the EU and proposed a new law-making process – the "Lamfalussy process". In February 2001, the Lamfalussy Committee submitted their final report (the Lamfalussy Report).[23] The Lamfalussy Report pointed to the inability of the EU to adopt quickly and effectively all necessary measures.[24]

The outcome of the Lamfalussy Report was a new and reformed **architecture** of legislative process with four layers. It divided legislation into two groups: on the one hand the "high-level framework provisions," and on the other the more detailed "implementing measures".[25] Ultimately, the

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[19] 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. the empirical Financial Integration Monitor, first published in 2003, which tracked progress towards financial integration under the FSAP.

[20] *See* Dan Prentice & Arad Reisbeg, Corporate Finance Law in the UK and EU 398 (Oxford University Press, 2011) and Niamh Moloney, 'Financial Market Regulation in the Post-Financial Services Action Plan Era', 55 INT'L & COMP. L. Q. 982, 982-983 (2006).

[21] *See* Jean-Pierre Casey & Karel Lannoo, *The MiFID Revolution,* 200 (Cambridge University Press, 2009).

[22] 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.

[23] Final Report of the Committee of Wise Men on the Regulation of European Securities Market, *available online at*: <http://ec.europa.eu/internal_market/securities/docs/lamfalussy/wisemen/final-report-wise-men_en.pdf>.

[24] *Id,* at 17-18.

[25] At Level 1, the "high-level framework provisions" are adopted (in form of directives or regulations). Level 2 should adopt detailed technical "implementing measures", which are adopted under accelerated delegated

Lamfalussy Report was officially endorsed by March 2001 by the Stockholm European Council. At the time, it also received a favourable reception from the financial industry participants as well as the regulatory organisations, 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. Besides the prudential regulatory framework, the Council suggested that the balanced development of the EU financial system required regulatory reform and greater financial integration.[26] One of the regulatory reforms aimed at improving the corporate governance standards of the financial intermediaries.

2.2. Regulating Corporate Governance

Corporate governance is ‘the system by which companies are directed and controlled’.[27] This definition was accepted and developed by the Cadbury Report in the United Kingdom in 1992 for the sake of company and code reform. A more economic and widely referred definition states that corporate governance ‘deals with the ways in which suppliers of finance to corporations assure themselves of getting a return on their investment.’[28] In 1997, the Organisation for Economic Cooperation and Development (OECD) issued a set of corporate governance standards and guidelines to assist governments in their efforts to regulate their national corporate governance. However, since then, global financial systems have undergone marked structural changes as a result of various forces including deregulation, technological innovation, financial scandals or market collapses. Nowadays, the definition would be broader and, in addition to companies, it would include banks, insurance companies, investment firms and other financial institutions, while having regard to the interests of other stakeholders, such as employees, creditors, the general public and the government.[29] It soon

legislative procedure by the European Commission. At Level 3, the implementation process by national authorities would take place, while Level 4 represents the enforcement by the European Commission together with the Member States.

[26] Commission, European Financial Stability and Integration Report 2010 (2011) (SEC (2011) 89) (2010 EFSIR) 5.

[27] Adrian Cadbury, ‘Report of the Committee on the Financial Aspects of Corporate Governance’ (London, December 1992).

[28] Andrei Shleifer & Robert W. Vishny, ‘A Survey of Corporate Governance’, 52 Journal of Finance 737 (1997) at 737.

[29] Klaus J. Hopt and Gottfried Wohlmannstetter (eds), *Handbuch Corporate Governance von Banken* p. 28 ff (Vahlen, C.H.Beck, 2011).

became clear that corporate governance of financial institutions differentiates from the non-financial one. This has been also re-emphasised by the recent Financial Crisis. In the case of financial institutions, improper corporate governance can lead to economy-wide ramifications. However, it has primarily been after the Financial Crisis that the focus on corporate governance of banks, of pension funds and other financial intermediaries gained 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.[30] 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',[31] the Walker Review on corporate governance in UK banks of 2009,[32] and the European Commission's Green Paper on corporate governance in financial institutions and remuneration policies in 2010.[33] Additionally, the OECD also issued 'Guidelines on Insurer Governance' in 2011.[34] In addition to these, there were also several national reports.[35]

One of the most important contributions is the report of the Basel Committee from 2010,[36] which substantially changed the previous Basel report from 2006. It contains 14 principles (instead of 8), which should serve as a guidance for banking practices, whereas 4 address the board practices, 1 senior management, 4 focus on risk management and internal control 2 address compensation, 2 concern bank structure and 1 disclosure and transparency. The guidelines were directed to assist supervisors in the promotion of sound corporate governance practices, with the belief that 'through sound corporate governance bank supervisors can have a collaborative working relationship with bank management, rather than an adversarial one.' Ultimately, the Basel recommendations have been

[30] 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 >.
[31] OECD, 'Corporate Governance and the Financial Crisis: Key Findings and Main Messages' (Paris, June 2009) [hereinafter '2009 OECD Findings and Messages'].
[32] Walker Review, A review of corporate governance in UK banks and other financial industry entities, Final recommendations, November 26, 2009.
[33] European Commission, Green Paper on Corporate governance in financial institutions and remuneration policies, June 2, 2010, COM (2010) 284 final. In addition to the Green Paper, *see also* Commission Staff Working Document, Corporate Governance in Financial Institutions: Lessons to be drawn from the current Financial Crisis, best practices, Accompanying document to the Green Paper, June 2, 2010 SEC (2010) 669.
[34] OECD Guidelines on Insurer Governance, 2011.
[35] Countries like UK, Germany or Switzerland have adopted these. For the UK, see Financial Reporting Council, The UK corporate Governance Code, June 2010.
[36] Basel Committee on Banking Supervision, Principles for enhancing corporate governance, October 2010.

also accepted by the EU as the leading study.[37] These will be further described and analysed in the following sections.

2.2.1. International level

On the international level, the 2014 Basel Committee Guidelines and the 2009 OECD Findings and Messages, together with the OECD Principles have attracted the greatest interest.[38] The OECD Findings and Messages provide an outcome of an in-depth analysis into the reasons behind the failure of the major financial institutions. The study stipulates that the greatest failure of corporate governance lay in weaknesses in remuneration, risk management, board practices and the exercise of shareholder rights.[39] Accordingly, it called for a review of the OECD Principles. 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 publically 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 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 Guidelines revise the former 2010 version for enhancing corporate governance, in which the Committee reflected on 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 the resulting peer review recommendations. The main relevance of the 2014 Basel Committee Guidelines lies in the fact that they 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

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[37] Klaus J. Hopt, 'Corporate Governance of Banks after the Financial Crisis', in *Financial Regulation and Supervision* 340 (Eddy Wymeersch et al. eds, OUP, 2012).
[38] OECD, G20/OECD Principles of Corporate Governance, 2015, available online at: <http://www.oecd-ilibrary.org/docserver/download/2615021e.pdf?expires=1506347532&id=id&accname=guest&checksum=4ABE353AB62B89D032547A71E988CD2E>.
[39] *See* 2009 OECD Findings and Messages, at 7-10.

members of the Committee, and the 2014 Principles are expected to affect the conduct by banking authorities in both member and non-member jurisdictions, and, consequently, also the EU's adherence to them.

2.2.2. The 2008 de 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 a High Level Group on Supervision formed by eight internationally recognised independent specialists. The Group published in February 2009 a report focusing on the **causes and policy and regulatory repairs** of the Financial Crisis.[40] In this report, corporate governance was highlighted as **one of the most important failures** which caused the Crisis.[41] 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 the poor 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.[42] In such an environment, the financial intermediaries, employees as well as shareholders, become accustomed to ever-increasing revenues and returns, triggering herd behaviour. Ultimately, among the 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[43]

After the Larosière Report, the Commission published a **specific report on the state of corporate governance in the financial sector** - Green Paper 2010. This Green Paper should be read in conjunction with the Commission Staff Working Paper.[44] 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, similar to the Larosière Report, highlighted the inability of boards and senior management of financial institutions to understand highly complex financial products and their

[40] The High-Level Group on Financial Supervision in the EU, Chaired by Jacques de Larosière, Brussels, February 25, 2009, available online at: <http://ec.europa.eu/internal_market/finances/docs/de_larosiere_report_en.pdf>.
[41] *Ibid,* at 29.
[42] *Ibid*, at 10.
[43] Commission, Green Paper: Corporate governance in financial institutions and remuneration policies, Brussels, June 2, 2010, COM (2010) 284 final [hereinafter as 'Green Paper 2010'].
[44] Commission Staff Working Document, 'Corporate Governance in Financial Institutions: Lessons to be drawn from the current financial crisis, best practices', Brussels, June 2, 2010.

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 members. The risk management function was also weak and lacking in independence and the remuneration structures were effectively inadequate as they supported the excessive risk-taking and short-termism.[45] 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

It has been argued that the financial intermediaries' regulation should focus on the protection of systemic stability, the prevention of individual institution's collapse, and strengthening the market discipline.[46] The concept of market discipline is the most relevant for this report, but and it has been lacking a precise definition.[47] If broadly defined and in 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.[48] All these are assumed to have the ability and incentives to monitor bank (financial intermediary) behaviour.[49] All this clearly translates into the heightened corporate governance trend after the global Financial Crisis, which directly reflects upon the issues of board representation, remuneration policies, competence, and conflicts of interest, as well as risk management. Of these factors, many have been directly mentioned and considered in the recent EU regulation. Nevertheless, one component continues to be missing – the greater considerations for the employees of financial intermediaries and the ultimate impact of regulation on them.

The EU Commission Staff Working Document (WD 2014), analysed the Financial Crisis and suggested the reform of financial institutions.[50] The Commission's aim was to emphasise 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, where the two might not necessarily be

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[45] Green Paper 2010, at 3.
[46] Ross Cranston, *Principles of Banking Law* (OUP, Oxford 2002, 2nd ed.). See also Charles Goodhart et al., *Financial Regulation: Why, How and Where Now?*, (Routledge, London, 1998).
[47] David T. Llewellyn, 'Inside the "Black Box" of Market Discipline' (2005) 25 Economic Affairs 41.
[48] David T. Llewellyn and David G. Mayes, 'What is Market Discipline?' in George G. Kaufman, *Market Discipline in Banking: Theory and Evidence* (Elsevier, 2003), 186-189.
[49] Emilios Avgouleas, 'The Global Financial Crisis and the Disclosure Paradigm in European Financial Regulation: The Case for Reform' 459.
[50] Commission Staff Working Document: Economic Review of Financial Regulation Agenda, Brussels May 15, 2014, COM (2014) 279 final.

interconnected.[51] This statement by itself is questionable. Nonetheless, the important finding for this report was the Commission's 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, all other stakeholders, i.e. customers, creditors, taxpayers etc., were to be found. There is, naturally, a rationale for why the Commission perceives the two groups to be 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 both sides of equation. Later, also stipulated by the report by the EBA Banking Stakeholder Group, it was important to stress that the greatest proportion of employees in the financial sector do not receive excessively large bonuses or other forms of variable remuneration which give rise to systemic issues.[52] This indicates 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 overlooked that, also in case of financial intermediaries, employees belong to the more vulnerable group of stakeholders.

2.4. European Deposit Insurance Scheme in the Nordic Countries[53]

European Deposit Insurance Scheme (EDIS) is the third pillar of the banking union after a single supervisory mechanism (SSM) and a single resolution mechanism (SRM). Logically, it seems reasonable to have an EU deposit insurance system to protect depositors since the banks are supervised in daily operations and managed in resolution process if there is a default situation. Conceptually, it is just a necessary process of establishing a banking union.

Originally, the banking union gradually emerged due to the consequences of the dependence of the banking system and sovereign depth crisis in some EU countries during the financial crisis in Europe.

Under the SSM, the ECB directly supervises the largest banks, while the national supervisors continue to monitor the remaining banks. The SRM applies to banks covered by the single supervisory mechanism. So, both SSR and SRM applies to big, often multinational banks, which is consistent with the initiatives of the banking union.

"The EDIS proposal builds on the system of national deposit guarantee schemes (DGS) regulated by Directive 2014/49/EU. This system already ensures that all deposits up to €100 000 are protected

[51] *Ibid*, at. 192-195.
[52] EBA Banking Stakeholder Group, 'Proportionality in Bank Regulation: A Report by the EBA Banking Stakeholder Group', June 30, 2014, at 40.
[53] This section is authored by Therese Strand and Caren Yinxia Nielsen.

through national DGS all over the EU. EDIS would apply to deposits below €100 000 of all banks in the banking union. "[54]

Then, it appears that the EDIS covers all banks, which is different from the SSM and SRM, and it aims to provide a more uniform degree of deposit insurance in the euro area. Since all nations are different, a uniform deposit insurance for all banks could naturally result in risk-taking and moral hazard of nations with weaker banking systems. So, it's crucial to design EDIS in way that minimizes moral hazard, and ensures ECB acts as the last resort after the national central banks. But the final stage of the EDIS is full insurance instead of re-insurance. Although contributions by banks to EDIS would be risk-based, it cannot prevent banks from excessive risk-taking locally, at a Nordic level or internationally.

Due to the uniform EDIS, banks are encouraged to set up branches abroad instead of subsidiaries. This would indeed help to break the link of banks and sovereigns, but also loose the supervision and monitoring of banks by locally.

EDIS might trigger differences in how to handle diverse loan levels, non-performing loans risks etc on the national level. Conceptually, the risks are unequal from the start, while the current proposal appear more targeted at a vision on how it should be (somewhat) equal at the end. It is should also be investigated more systematically what are the ultimate consequences of such a proposal, if banking is becoming more cross boarder inside the Euro zone countries

The modifications of the proposal that EDIS can be used only after national protection measures has been exercised to maximum extend aim to handle this. But could trigger a system towards a weak compromise. It doesn't solve the fact that different countries have different prerequisites/protection systems from start either, which was the main critic (from Germany among others).

The following sections are describing mainly from an economic and legal perspective what is the current status of EDIS in the Nordic countries.

Sweden

Sweden is not a part of the Banking union and is thus not covered by the EC proposal. The Swedish government decided last summer to make a new investigation of whether Sweden should join the banking union, likely triggered by Nordea's move to Finland . In the past the position was "Sweden was not interested in joining EDIS even if it remained open for the other EU none Euro member states.

[54] Available online at: <https://ec.europa.eu/info/business-economy-euro/banking-and-finance/banking-union/european-deposit-insurance-scheme_en#overview>.

However, the governments want to have the possibility to join later if they so wish. The national guarantee schemes (2014/49/EC) will remain the basis for all the EU member states.

Sweden position is that EDIS needs to be a trustworthy construction and a healthy incentive structure to decrease the moral hazard of a joint risk-sharing system as that may result in higher risk-taking. Sweden will put this position forward in any coming negotiations. In parallel, other measures are taken to increase financial stability which are considered as important.

There would be no direct implications of EDIS on Swedish legislation at the moment unless Sweden, as mentioned, would decide to join the euro.

Finland

Finland is the only Nordic country that is part of the Banking Union, meaning it would ultimately be obligatory for Finland to join EDIS. The proposal would as result have impact on Finnish legislation as well as its institutions, especially "*Verket för finansiell stabilitet*" which currently oversees the national deposit guarantee scheme. However, its tasks won't decrease as it would still be in charge of the practicalities of the system in Finland and remain as the contact to depositors and credit institutions.

Finland has stressed that the risk levels among the member states of the Banking Union differ a lot, resulting in that the probability of actual use of the fund also differ among the states. The costs and benefits with EDIS can therefore be argued as not being equal within the Banking Union.

Finland has a very concentrated bank sector and strong connections to the other Nordic countries. The balance sheets of the three largest banks in Finland correspond to the 80 % of the entire Finnish bank sector. Even though the national guarantee scheme in Finland is considered as well funded it would today only manage pay-outs in cases with small banks, not it there are problems with several banks or big banks. Finland would therefore, under the right circumstances, support a joint deposit guarantee scheme as it could minimize risks for the state in the future.

Finland supports a system that breaks the dependence between bank and state. However, Finland means that if a transition to a joint deposit system is to be made, it has to be on equal grounds for transition. It is not in Finland's interest to join EDIS until risk reducing measures have been taken in the Banking Union and questions the tight time plan for implementing EDIS. Many issues are still considered to be unclear and it important that the national guarantee schemes (DGSD) function in all the Member States before entering EDIS.

From depositors' perspective, as an example the Finnish deposit insurance scheme will then take over responsibility of Nordea after the move from Sweden to Finland.

Denmark

Denmark is not a part of the Banking Union and would therefore not be covered by EDIS. The Danish government however stresses that it wants to be covered by all the elements of the Banking Union if Denmark would join in the future. It is considered important that all EU MS are a part of the development of EDIS and that they can join as well if they wish and fulfil the criteria of the Banking Union. That all EU MS implement BRRD and the DGSD correctly is emphasised as something not to be forgotten when starting the work on EDIS. Denmark supports and finds it central to have risk based payments of the credit institutions to the guarantee scheme.

No direct consequences of EDIS are expected as long as Denmark does not join the Banking Union. If Denmark enters the Banking Union and thus EDIS it is important for the government to ensure that the Danish deposit guarantee scheme may continue to cover deposits and investors that are currently covered, including full coverage of pension plans.

Iceland

Currently, Iceland is also not a part of the Banking Union and would therefore not be covered by EDIS. The official position isn't know at the moment, and especially if Iceland will at later stage change its position and thereby de-facto become covered by all or parts the elements of the Banking Union, including EDIS.

3. Specifics of the Nordic Corporate Governance

Focusing on the employees, the Nordic countries have, in recent years, attracted substantial attention. The Nordic countries have been perceived as welfare states with large governments, strong labour unions, balanced income redistribution, and high taxes.[55] Even though in recent years the Nordic model has attracted attention, limited attention has been paid to the Nordic Corporate Governance model. Nonetheless, all this changed after the Financial Crisis and in the EU's endeavour for more stable, transparent and fair markets, as the attention has been shifted towards the Nordic Corporate Governance model, which, in its core, maintains the interests of multiple stakeholders.[56] 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 the representation of diverse stakeholders.[57] As a consequence, regulatory and scholarly attention has focused on "better" corporate governance solutions, including those applied in the Nordic countries.[58]

In the corporate governance models of the Nordic countries, corporate ownership remains somewhat concentrated, while the private benefits of control are reportedly relatively low. It has been suggested that there are several reasons for the relative equilibrium within the corporate governance models, including high level tax compliance, the non-pecuniary nature of control benefits, the higher monitoring of controlling shareholders, as well as the fact that, in Nordic countries, the applied corporate governance models are a result of the interaction between political and market structures. In other words, the corporate governance regulation reflects the interests of dominant corporate constituencies.[59] Nonetheless, in addition to the corporate constituencies, in Nordic countries, the important role is played by **tripartism**.[60] Social dialogue together with tripartism on different levels represents an important part of the industrial relations system in the Nordic countries.

There are numerous reasons for the inclusion of **employees** into the greater discussions in the Nordic countries and their corporate governance. Firstly, corporate governance and the structure of corporate ownership are closely related. Secondly, both represent a result of specific historical,

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[55] Steen Thomsen, 'The Nordic Corporate Governance Model', Management and Organizational Review*,* 12 (1) (2016), 189-204.

[56] See, in particular, Per Lekvall (ed.), The Nordic Corporate Governance Model (2014).

[57] Lynn Dallas, 'Short Terminism, the Financial Crisis and Corporate Governance', 37 J. CORP. L. 264 (2011).

[58] Described in Steen Thomsen, 'The Nordic Corporate Governance Model', 12 MNG. & ORG. REV. 189 (2016).

[59] John Armour, Henry Hansmann & Reiner Kraakman, *Agency Problems and Legal Strategies,* in *The Anatomy Of Corporate Law, A Comparative And Functional Approach* 35 (Kraakman et. al, 2017).

[60] Marting Iversen and Lars Thue, Creating Nordic Capitalism: The Business History of a Competitive Periphery, *in Creating Nordic Capitalism* 1-19 (Susanna Fellman, et al., eds., 2008).

political, economic and industrial development.[61] This report does not aim to elaborate in detail on the various factors that have influenced the corporate governance in Nordic countries.[62] 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 beyond 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, in order for the reader to envision the rationales for the Nordic Corporate Governance model. The Nordic region has been known for its **concentrated ownership**, which remains relatively high, on average from 23.5-44.8% for the top five shareholders together.[63] Alongside the concentrated ownership, the **control enhancing mechanisms** have been present in order to support the control of incumbent shareholders.[64] These mechanisms include tools such 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% of the capital and close to 30% of the voting rights, are supported by employees and labour unions.[65] In order for these large shareholders to retain their control, they are in need of support from labour unions and employees.

Historically, it was 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.[66] 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.[67] The prevalence of concentrated ownership has been based on a political bargain between capital and labour resulting in a corporatist society with private

[61] See, in general, Randal K. Morck ed., *A History of Corporate Governance around the World: Family Business Groups to Professional Managers* (National Bureaus of Economic Research, University of Chicago Press, 2007).
[62] For this purpose see in general Klaus R. Ilmonen, 'A Political Narrative in Nordic Corporate Governance: Shareholders, Stakeholders and Change of Control, European Company and Financial Law Review, 12(4), (2015).
[63] Johan E. Eklund, 'Corporate Governance and Investments in Scandinavia – Ownership Concentration and Dual-class Equity Structure (CESIS Electronic Working paper series, 2007) 9.
[64] Klaus R. Ilmonen, 'A Political Narrative in Nordic Corporate Governance: Shareholders, Stakeholders and Change of Control, European Company and Financial Law Review, 12(4), (2015) 495.
[65] Johan E. Eklund, 'Corporate Governance and Investments in Scandinavia – Ownership Concentration and Dual-class Equity Structure (CESIS Electronic Working paper series, 2007) 28.
[66] Hans Sjörgen, Welfare Capitalism: The Swedish Economy, 1850 – 2005*, in Creating Nordic Capitalism* 22, 22-30 (Susanna Fellman, et al, eds., 2008).
[67] Peter Högfeldt, The History and Politics of Corporate Ownership in Sweden*, in A History of Corporate Governance around the World: Family Business Groups to Professional Managers* (Randall K. Morck ed., 2005) 538-549.

concentrated ownership and strong labour unions and strong employee protection.[68] Moreover, from the perspective of capital market construction, Högfeldt argues that the social democrats have pursued policies that supported bank ownership of equity, while providing tax advantages to retained earnings and borrowing over equity.[69] Concentrated ownership and control enhancing mechanisms have also been 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 and later by internal conflicts with the labour movement.[70] Nevertheless, protecting employees was an important factor that has greatly supported political stability.[71] Later, the specific issue for the Finnish business environment has been the lack of financing. Until the 1980s, large shareholders in listed companies were typically Finnish financial institutions and the government, and later pension funds.[72] According to Andresen and Thue, the development in Denmark and Norway in the 20th century has included similar phenomena as in Sweden and Finland, whereas, notoriously, for Denmark, it was the significance of the agricultural industry and, for Norway, the geographical factors which have influenced the development of a locally driven self-reliant economic structure.[73]

3.2. Position of Employees

When assessing the position of employees through the lens of the general corporate governance in the Nordic countries, the claim of Höpner might well prove true. He stipulates that the 'countries with organised labour market institutions tend to have a high degree of organisation of corporate governance, and vice versa'.[74] The union density across the Nordic countries reaches 70%. It is highest in Iceland, at over 80%[75] in Finland it reaches 74%, third is Sweden, at 70%, fourth Denmark, at 67%,

[68] *Ibid.*
[69] *Id.* at 560.
[70] Susanna Fellman, 'Growth and Investment: Finnish Capitalism, 1850-2005, 159 in *Creating Nordic Capitalism* 1-19 (Susanna Fellman, et al., eds., 2008).
[71] *Ibid.*
[72] Klaus R. Ilmonen, 'A Political Narrative in Nordic Corporate Governance: Shareholders, Stakeholders and Change of Control, European Company and Financial Law Review*,* 12(4), (2015) 499.
[73] 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.
[74] Höpner, Martin, 'What Connects Industrial Relations and Corporate Governance? Explaining Institutional Complementarity, *Socio-Economic Review* (3) (2005) 334.
[75] Data on Iceland were collected from the Icelandic Confederation of Labour, available online at: < http://www.asi.is/engpol>.

and, lowest in the Nordics, is Norway, at 52%.[76] Overall, these numbers indicate that the labour unions are particularly powerful and hold a strong position in the corporate governance structure.

In the Nordic countries, the following tools are present in corporate governance for employee protection. First is **employee representation** as a long-established practice on the boards of many Nordic banks, which represents a German approach. The precise regulation varies between the countries, yet is closely connected to the presence of strong unions.[77] Employees of companies of a certain size (above a specific number of employees), have a statutory right to elect a certain number of directors (employee directors) to the board. Where employee board representation is practised, usually one third of the board of directors consists of employees. However, the board representation is a right of the employees, not an obligation. Thus, according to the *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 for other benefits, e.g. in the form of special co-determination procedures and/or information-sharing committees. The employee representation is not only present in the 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 companies, the number of employees on the boards may rise to 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 the Nordic corporate governance models.[78]

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

[76] Data provided by the European Trade Union Institute, available online at: https://www.worker-participation.eu/National-Industrial-Relations/Across-Europe/Trade-Unions2#_ftn1.
[77] Steen Thomsen, 'The Nordic Corporate Governance Model', Management and Organizational Review, 12 (1) (2016), 194.
[78] *Ibid,* at. 200.

4. Nordic Implementation of the EU Financial Rules: Checks and Balances

The corporate governance system is represented by a complex set of written and unwritten rules, norms and practices. In this section the report will first describe the importance of the individual tools or the practice and subsequently, focus on the existing EU regulatory framework and its transposition or implementation in the Nordic countries. The EU regulatory framework will be explained and subsequently followed by a 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 jointly 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 it 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 emphasises the relevant sector.

In regard to the differences between the Member States of the EU and EEA, please see Annex 1, which shows the transposition status of all five jurisdictions. CRD IV has been transposed by all jurisdictions, whereas MiFID II has not yet been incorporated into the EEA agreement, thus it has not yet been transposed by Norway,[79] or by Iceland. The 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 being discussed in Norway. In Iceland, a committee under the auspices of the Ministry of Finance and Economic Affairs published a report on MiFID II and MiFIR in June 2016. However, a draft proposal regarding the implementation of MiFID II into Icelandic law has not yet been published. Moreover, by the time this report was finalised, Finland had also not yet transposed MiFID II into its national law and Sweden has only partially done so.[80] The IDD is supposed to be transposed by February 23, 2018 and none of the jurisdictions have yet transposed the directive or have adopted any relevant legislative measures.

[79] See the press release of the Norwegian Financial Supervisory Authority (Finanstilsynet) on November 3, 2017, available online at :< https://www.finanstilsynet.no/en/news-archive/press-releases/2017/implementation-of-mifid-ii-and-mifir-in-norway--temporary-regulations/ >.

[80] See Annex 1.

4.1. Role of the Board of Directors[81]

It has been broadly recognised that the primary responsibility for good corporate governance rests with the boards of directors and senior management of financial institutions.[82] The Financial Crisis uncovered that boards of directors in financial institutions, in general, **did not fulfil their key role** as principal risk assessors and decision makers, often lacking the control, knowledge and ability to properly assess risks, both product- and institution-related. The European legislative measures aimed to address these issues and, in a more cohesive, manner, stipulate: i) structure and functioning of the board, including the duties and liabilities of board members, and ii) risk management function and internal control system. 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. 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, it is only CRD IV, IDD and MiFID II that address the issues stated above. However, it has not be noted that 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, Recital 56; MiFID II, Preamble, Recital 53). **Consequently, this leaves the structure, function and power division for the Member States to regulate and does not anyhow direct the Member States towards any of the existing board models**. Nevertheless, the Member States shall identify the bodies or members of the management body responsible in accordance with its national law for the managerial and supervisory functions (CRD IV, Art. 3(2)). Furthermore, CRD IV clearly emphasises 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, Recital 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

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[81] IDD II, CRD IV and MiFID II refer to a 'management body', which means "an institution's body or bodies which are appointed in accordance with national law, which are empowered to set the institution's strategy, objectives and overall direction, and which oversee and monitor management decision-making, and include the persons who effectively direct the business of the institution."

[82] Kern Alexander & Rahul Dhumale, 'Enhancing Corporate Governance for Financial Institutions: The Role of International Standards', ERSC Centre for Business Research, University of Cambridge, Working Paper No. 196.

strategic objectives of the firm. According to Art. 88(2) MiFID II, 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.

The structure, function and power division of the board of directors are left for the Member States to regulate. No governance models are suggested by the EU financial legislation. Nevertheless, in the light of CRD IV and MiFID II, Member States should introduce principles and standards to ensure effective oversight by the management body and promote a sound risk culture at all levels.

4.1.1. Representation of Employees: Composition and Diversity

CRD IV and MiFID II leave it up to the Member States which legal construct of their financial intermediaries they decide to follow. However, CRD IV calls for **non-executive members** in the management board who 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 (Art. 88 CRD IV).

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. This is also stated in the Recital 53 MiFID II's Preamble. However, except Art. 91(13) CRD IV, providing specific provision on boards' corporate governance, 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, employee-appointed directors to the boards of large corporations, irrespective of sector, has been a widespread practice for years. The employees of companies above a 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, in more than half of these companies, employees have chosen not to use this right.[83] Nevertheless, when looking at boards of

[83] See The Nordic Corporate Governance Model, per Lekvall ed, at 78.

financial institutions, the employee representative is a standard. Employee representation in governing bodies contributes to sound and effective corporate governance, as it is in the best interests of the employees for the institution to achieve sustainable and long-term performance.

All Nordic jurisdictions have provisions in place governing the composition and diversity of their boards of directors. However, we should also ask what we understand by diversity itself.

Pursuant to Section 79a of the **Danish** Financial Business Act,[84] the board of directors of a listed or a larger financial undertaking and financial holding company shall set target figures for the percentage of an underrepresented gender in the board of directors, and prepare a policy to increase the percentage of the underrepresented gender in the other management levels of the undertaking. Furthermore, the Danish Recommendations on Corporate Governance by the Committee on Corporate Governance state that the board of directors should ensure diversity in the board, including age, international experience and gender. While the guidelines represent soft law, they nonetheless show the best practice within corporate governance in Denmark.

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).[85]

In **Finland**, pursuant to Section 2(2) of the Finnish Credit Institutions Act,[86] 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 a target. In addition, as regards companies listed on Nasdaq Helsinki, the Finnish Recommendations on Corporate Governance by the Finnish Securities Market Association 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. It is emphasised 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.[87]

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[84] Consolidated Act no. 174 of January 31, 2017.
[85] (*Sw. lagen (1987:1245) om styrelserepresentation för de privatanställda*) (Government Bill 2013/14:228 p. 176).
[86] Act on Credit Institutions no. 610 of August 8, 2014*. Laki luottolaitostoiminnasta*, 610/2014, August 8, 2014 (AA 171101).
[87] See The Nordic Corporate Governance Model, per Lekvall ed, at 78.

The **Norwegian** legislator has transposed the Art. 91 on employee representation in the board through Section 8 of the Act on Financial Undertakings,[88] which requires that the board of directors shall be diverse in its composition. This 'diverse' 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 are appointed by the employees. According to Section 8-4(5), in financial undertakings with at least 50 employees that do 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, then 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*" are elected by the shareholders' meeting. The remaining third of the members of the "*foretaksforsamling*" are 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 Art. 91 of CRD IV has been implemented into the **Icelandic** Financial Undertakings Act.[89] The preparatory works to the Icelandic Financial Undertakings Act directly mention Art. 91(1) CRD IV. Art. 52(4) of the Financial Undertaking Act is based on Art. 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. Similar to Finland, the Icelandic recommendations on Corporate Governance by Iceland Chamber of Commerce, Nasdaq Iceland and the 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.

Similar to CRD IV, **MiFID II** in Recital 53 of the Preamble also 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 their managers accountable for their decisions. Diversity should also be addressed in firms' recruitment policy more generally. This approach of greater diversification of a board should avoid group thinking and facilitate independent opinions and critical challenge, and management bodies should therefore be sufficiently diverse as

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[88] The Act on Financial Undertakings and Financial Groups, which has been in effect since January 1, 2016 (*Lov om finansforetak og finanskonsern)*.
[89] Act on Financial Undertakings no. 161 of December 20, 2002.

regards age, gender, geographic provenance and educational and professional background to present a variety of views and experiences. Art. 45 lays down specific requirements for the board, including the good reputation, sufficient knowledge, skills and experience to perform its duties. Similar 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 upon the composition and performance of the board.

In **Denmark**, Art. 45 of MiFID II has been transposed into Danish law through the Capital Markets Act,[90] 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 to 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.

In **Sweden**, MiFID II has been transposed only partially. The full transposition shall take place from January 3, 2018.[91] **Finland** has not yet transposed MiFID II into its national law. However, in the light of Prime Minister Juha 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.

The provisions of CRD IV in regard to board composition are present in all Nordic jurisdictions. However, in regard to the transposition of MiFID II, 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 and Short-termism

Regarding credit institutions, 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 Art. 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 the assessment of the individual, their business unit as well as the overall results

[90] Consolidated Act no. 650 of June 8, 2017.
[91] Act on New Rules on Financial Instrument Markets (MiFID II and MiFIR) 2016/17:162 of March 30, 2017.

of an 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. Although the IDD also covers the remuneration considerations, it does not require remuneration committees and employee representatives therein.

The CRD IV in Art. 95, in connection with board's duties, 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 an 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 Section 77c. Denmark obliges **only the significant financial institutions** to establish a remuneration committee.[92] 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. In addition, **Sweden** has transposed the obligation as to the establishment of a remuneration committee by the Finansinspektionen's Regulations and General Guidelines.[93] 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 the Private Sector Employees Act (Board Representation).[94] 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. Consequently, it could be argued that Sweden did not fully transpose the Art. 95(2) CRD IV into its national law.

In **Norway**, the Financial Undertaking Regulation Section 15-3 stipulates that a remuneration committee shall,[95] when the undertaking is required to establish a remuneration committee, include at

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[92] 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, have, on average, employed 1,000 or more full-time employees, shall set up a remuneration committee.

[93] (FFFS 2011:1), Finansinspektionens föreskrifter om ersättningssystem i kreditinstitut, värdepappersbolag och fondbolag med tillstånd för diskretionär portföljförvaltning", 2011-03-01 (AA 171101).

[94] Private Sector Employees Act no. 1245 of 1987.

[95] The Act on Financial Undertakings and Financial Groups, which has been in effect since January 1, 2016 (Lov om finansforetak og finanskonsern).

least one employee representative. In our view, this requirement does not gold-plate Art. 95 (2) CRD IV. The rules of CRD IV on remuneration committees have been transposed into **Finnish** law by way of Chapter 8, Section 5 of the Finnish Credit Institutions Act.[96] 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 the remuneration committee. Therefore, the Finish transposition fully follows the *dictum* of 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.[97]

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 best of the author's knowledge, no further draft regarding the implementation of remuneration policies into Icelandic law has been published. Therefore, the implementation of CRD IV's provisions on remuneration committees remains open.

Remuneration policy determinations are stipulated by CRD IV, MiFID II and IDD. However, only CRD IV requires the establishment of a remuneration committee that should include one or more employee representatives, if employee representation in a management body is provided for by national law. All of the Nordic states, except Iceland, follow the provisions of the CRD IV.

4.2. Employees

Employees not only represent one of the key stakeholders in the corporate governance theory, but also the foundation for achieving the goals of any financial institution. Since 1989, the Community Charter of the Fundamental Social Rights of Workers has emphasised the desirability of promoting employee participation through proper information and consultation procedures. Currently, there are numerous Directives in place that govern the right of workers to be informed and consulted at a 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 which tools are offered to facilitate this.

[96] Act on Credit Institutions 8.8.2014/610 (Laki luottolaitostoiminnasta, 610/2014, August 8, 2014 (AA 171101)).
[97] *Ibid*.

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 EU with the right to information, consultation and participation.[98] The focus of the following section will be on BRRD and SRD, given that it is only these two directives that speak of the institution's obligation to consult its employees.

According to the 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 EU law on the involvement of trade unions and workers' representatives in company restructuring processes, should be complied with in this regard. This provision has been further built in Art. 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 directly affected the Nordic countries in the EU and has neither been incorporated into the EEA agreement.

In **Denmark**, Art. 34(5) BRRD has not been directly implemented in Danish law. Most likely this is because the directive has a direct effect on authorities, and, accordingly, no specific Danish regulation is necessary. Neither, for that matter, has **Sweden** directly implemented the Article. However, in Chapter 12 Section 8 of the Swedish Resolution Act[99] 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 BRRD, the Swedish legislator highlighted that there is no reason to implement the specific provisions governing the

[98] 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 February 17, 1975 on collective redundancies, Council directive 2001/23/EC of March 12, 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 March 11, 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.

[99] Lag (2015:1016) om resolution, 2015-10-16 (AA 171101).

relationship with employees, as the Resolution Authority is obliged to enforce collective agreements since the employer is still bound by collective agreements.[100]

Art. 34(5) BRRD has not been directly implemented in **Finnish** law, again due to the direct effect of the directive. However, Section 3 of the Finnish Ministry of Finance Regulation[101] no. 1284/2014 includes a provision according to which resolution plans should include a report on the impact of the resolution plan on the employees, the estimated costs relating thereof 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**, 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 BRRD has not yet been implemented into Norwegian law.

Only BRRD and SRD include provisions that require financial institutions to consult their employees. Art. 34(5) BRRD 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. Even though neither of the Nordic countries have directly transposed the stipulated obligation. Due to existing employee protection measures in the Nordic jurisdictions, such protection measures are in place.

4.2.2. Collective Bargaining

Collective bargaining is as a right guaranteed to the trade unions in all Nordic jurisdictions. The basis of collective bargaining is that trade unions and employers' organisations have the 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 body to decide on numerous issues, including wages, continuing training and other core labour market conditions. Moreover, collective bargaining often represents the necessary foundation for enhancement of any other employees' rights.

The recent EU legislative acts have emphasised the position of the collective bargaining in the structure. Namely, **CRD IV in Recital 69**, aside from emphasising that remuneration represents a fundamental right, as guaranteed by Art. 153(5) TFEU, stipulates that the concluded collective

[100] Government Bill 2015/16:5 p. 481.
[101] Finnish Ministry of Finance Regulation no. 1284/2014.

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 emphasise is the fact that neither of the EU regulations or directives emphasise **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 are perceived as only one of the considerations for remuneration policies in financial institutions.

4.2.3. Competence and Training

Training was at 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, while special attention has been paid to the role of the social partners in the promotion of continuing training.[102] 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 EU policy on continuing training. At the special European Council Employment Summit held in Luxembourg in November 1997,[103] 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, collective bargaining has an extremely important position, given that

[102] EurWORK, *Collective Bargaining and Continuing Vocational Training in Europe*, April 27, 1998, available online at: < https://www.eurofound.europa.eu/observatories/eurwork/comparative-information/collective-bargaining-and-continuing-vocational-training-in-europe>.

[103] Available online at: < https://www.google.dk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwih8__mqPLWAhWiAJoKHe20Dt0QFggoMAA&url=http%3A%2F%2Fg7.europa.eu%2Fen%2Feuropean-council%2Fconclusions%2Fpdf-1993-2003%2FLUXEMBOURG-EXTRAORDINARY-EUROPEAN-COUNCIL-MEETING-ON-EMPLOYMENT-20-21-NOVEMBER-1997%2F&usg=AOvVaw3bBiUDOaCxXdlrEOSmOeXE>.

the continuing training system is based on the agreements between employers' organisations and trade unions, which share the responsibility in the management of training.[104]

In the area of the EU financial regulation, only 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.

Furthermore, in the text of the Directive, the MiFID II in **Art. 25**, Sections 1 and 9 lay down the specifics of this obligation. According to Art. 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 Art. 24 and this Article. Furthermore, it is stipulated that the Member States have an obligation to publish the criteria to be used for assessing such knowledge and competence. However, the ESMA already issued guidelines for the assessment of knowledge and competence,[105] which should provide assistance to the Member States. It is also important to emphasise that Member States shall ensure that an infringement of the Art. 25(1) shall be regarded as an infringement of the MiFID II or of MiFIR.[106] This means that the Member States need to introduce a mechanism to assess whether the investment firms have fulfilled their obligation to ensure that their employees possess the knowledge and competence.

[104] EurWORK, *Collective Bargaining and Continuing Vocational Training in Europe,* April 27, 1998, available online at: < https://www.eurofound.europa.eu/observatories/eurwork/comparative-information/collective-bargaining-and-continuing-vocational-training-in-europe>.
[105] ESMA, Guidelines for the Assessment of Knowledge and Competence, January 3, 2017, available online at: < https://www.esma.europa.eu/sites/default/files/library/esma71-1154262120-153_guidelines_for_the_assessment_of_knowledge_and_competence_corrigendum.pdf>.
[106] Art. 70(3) MiFID II.

IDD stipulates the importance of a high level of professionalism and competence among insurance, reinsurance and ancillary insurance intermediaries and their employees in its **Recital 28**. Furthermore, in Recital 29, it emphasises 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 the insurance industry across the EU. The IDD in Art. 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 our 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 a minimum 15 hours per year) in order to maintain an adequate level of performance corresponding to the role they perform. Similar to MiFID II, Member States shall have in place and publish mechanisms to control and assess employees' knowledge and competence.

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, given that the MiFID II has not been incorporated into the EEA agreement, neither have Norway nor Iceland. Concerning the IDD, this report may not assess the transposing legal acts in any of the Nordic countries as they have either not yet been adopted or they are not part of the EEA agreement.

In **Denmark**, the requirements regarding knowledge and competences of employees are already in place. They have been implemented by a form of a Competence Requirements Executive Order.[107] According to this Executive Order, an 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 gives more detailed requirements in its annexes. The report does not reflect upon the test and its content.

[107] 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>.

Swedish transposition of MiFID II will be effective from the beginning of 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. Furthermore, 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 taking any further action.

Only MiFID II and IDD reflect directly on the issues of employees' competence and training. Given that both Directives are in a majority of the Nordic countries in the middle of transposition or implementation processes, the wording and the nature of specific provisions are only to be seen. However, each of the countries should reflect on securing not only effective, but predominantly substantive education and training.

4.2.4. Whistleblower protection

Whistleblowers provide a valuable service to both their employers and the public. It has been established that whistleblower protection is essential to encourage reporting of misconduct, fraud, tax evasion and corruption in any institution.[108] The risk of the misbehaviour is significantly heightened in environments where the reporting of wrongdoings is not supported or protected. Encouraging and facilitating whistleblowing, by providing effective legal protection and clear guidance on reporting procedures, also helps Member States and the EU to monitor compliance and detect any violation of financial regulation. Consequently, there are numerous incentives for both financial intermediaries and governments to adopt effective whistleblowing protection. Employees are often in a unique position to recognise and report wrongdoings. They can alert their employers to a problem before the problem escalates. Nonetheless, if an employer refuses to resolve an issue, employees might often be the only parties capable of reporting the problem to external authorities before greater harm is to occur. 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."[109]

[108] OECD, G20, Protection of Whistleblowers: Study on Whistleblower Protection Frameworks, Compendium of Best Practices and Guiding Principles for Legislation 4 (2011); available online at: < https://www.oecd.org/g20/topics/anti-corruption/48972967.pdf>.
[109] Dolan v. Cont'l Airlines, 56 N.W. 2d 23, 26 (Mich. 1997).

On the EU level, it was only during summer 2017 that a public consultation on whistleblower protection was initiated.[110] Based on this consultation, the Commission will assess the scope for horizontal or further sectorial action at the 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 specifically used. 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 in order to ensure safeguards of the accused person. This Recital is later elaborated by **Art. 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 **Art. 71**, Member States shall ensure that competent authorities establish effective and reliable mechanisms to encourage the 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 identical provisions are also stipulated in **IDD in Art. 35**, in **MAR Art. 32** and its Implementing Directive as well as in **UCITS V Art. 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 abovementioned 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.

In **Denmark**, the Danish Financial Supervisory Authority (FSA) established whistleblower protection mechanisms in 2014.[111] In fact, currently, there are two sets of whistleblowing mechanisms. **One**

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[110] European Commission, *Public Consultation on Whistleblower Protection,* available online at: < http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=54254>.

mechanism relates to market abuse such as insider trading, unlawful disclosure of inside information and market manipulation under the MAR. This whistleblowing mechanism has been externally developed by the Danish Financial Supervisory Authority. A whistleblower 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. Another 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 whistleblowers 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 whistleblower, he/she may not be legally dismissed from an employment or demoted.

The **second mechanism** is operated by the financial institutions themselves. According to the Danish regulation,[112] all financial institutions must have an internal whistleblower scheme. A whistleblower can freely choose whether to send his/her report to the institution's internal whistleblower scheme or to the FSA. The financial undertaking subsequently has the opportunity to forward the notification to the Danish FSA. The financial institutions in Denmark also have numerous obligations regarding the protection of employees as whistleblowers under non-financial regulations, including the Danish Working Environment Act and the Danish Criminal Act. According to the existing Danish legislation, in cases where an employee's rights have been violated, the employee may be entitled 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 6-12 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 breaches of the financial regulation on its website in accordance to a 2013 law.[113] More importantly, in 2016, Sweden passed a whistleblower 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 whistleblower protection framework. Consequently, there are currently also two whistleblower protection schemes. The fully translated title of the Act is the "Act on Special Protection against Victimisation of Workers who Sound the Alarm on Serious Wrongdoing", which entered into force on January 1, 2017.[114] This Act protects employees as well as temporary workers who report serious wrongdoings in their employer's business from retaliation. Similar to Denmark, the institutions and companies are themselves obliged to have a whistleblowing system, which can vary

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[111] Act no. 133/2014 of February 7, 2014. The Act introduced the provisions on whistleblower schemes in Sections 75a and 75b of the Danish Financial Business Act (*Lov om finansiel virksomhed*).
[112] *Ibid.*
[113] Act no. 2013/14:228.
[114] Act no. 2106:749.

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 internally or to a labour union. If the employer does not take "reasonable measures", the employee can disclose the information to the authorities or the media.

Due to **Finnish** delays with the transposition of MiFID II, only CRD IV and MAR are relevant for further assessment. Art. 71 of CRD IV and Art. 32(1)-(3) have been transposed into the Act on the Finnish Financial Supervisory Authority.[115] 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 Finnish Credit Institutions Act, are required to have procedures for their employees to report breaches internally through a specific, independent and autonomous channel.

In **Norway**, a general whistleblowing protection act is also applicable – the Working Environment Act of 2005, which obliges all employers to establish whistleblower protection.[116] It protects employees' right to report any inappropriate or possibly illegal activities to the authorities. However, the abovementioned provisions of financial regulation have either been not included in the EEA agreement or were considered to be 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 whistleblowers. 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, Art. 71 will be implemented by way of amendments to the Act on Financial Undertakings and the 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-up on notifications on violations of the activities that are supervised by the Icelandic FSA. However, the specifics of the procedures and the tools for employees' protection are only to be seen.

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[115] Act on the Financial Supervisory Authority no. 878/2008 adopted on December 19, 2008.

[116] The Working Environment Act no. 62 of June 17, 2005, amended last by the Act of June 16, 2017 no. 42 (*Arbeidsmiljøloven*).

The majority of the assessed EU financial legislation stipulates the requirement for effective whistleblowing protection, which indicates the relevance of this tool for the EU financial industry. While some form of whistleblowing protection regulation is present in all of the Nordic countries, it is for further assessment whether the existing regulation provides an effective protection for the employees.

5. Conclusions and Recommendations

Corporate governance of corporations is greatly dependent on the national legal framework. However, in regard to the financial institutions, the situation has become substantially different over the last couple of years.[117] As shown by this report, numerous corporate governance issues became regulated at the EU level. However, when reviewing the EU legislative framework of the financial industry, the corporate governance tools are addressed, in particular, to banks rather than to other financial institutions. This reflects the fact that the banks were in the forefront of the dire developments before and during the Financial Crisis and therefore much of the recent regulations and governance discussions have focused on them. Nevertheless, the corporate governance issues as well as the position of employees should be further reflected upon by non-banking financial regulation. Furthermore, at the time of the preparation of this report, two major Directives, namely MiFID II and IDD, were only in the process of being transposed and properly implemented by the EU and EEA Member States. Therefore, an assessment of their effect on the Nordic jurisdictions would be, for the time being, premature.

This report has shown that, in regard to the already transposed EU financial Directives, the transposition is more or less homogenous and fairly similar comprehensive corporate governance rules are in place across the Nordic jurisdictions. There are continuous differences between the EU and EEA Member States; however, given the general high protection of the employees in the Nordics, the discrepancies in the level of employee protection are not observed. The EU financial legislation laid down several requirements as to the board composition, employee representation, employee consultation, competence and training. Nonetheless, given the form in which the EU adopted these requirements – a Directive – the EU provides sufficient space for the national specificities and preferences to retain.

As for the future recommendations, this report suggests further reflection and research at the Nordic level as well as the EU level in the following areas:

- Diversity of boards of directors, its meaning and application
- Specifics of remuneration committees and policies
- Implementation of provisions governing remuneration and short-termism in MiFID II and IDD;
- Consultation with employees missing in MiFID II and IDD
- Absence of collective bargaining in the EU financial legislation

[117] See, in general, Niamh Moloney, 'EU Financial Market after the Global Financial Crisis: More Europe or More Risk?' Common Market Law Review 47 (2010) 1317.

- Content and efficiency of competency and training requirements under MiFID II and IDD
- Protection of employees in case of whistleblowing

Annexes

Annex 1 – Overview of the transposed and implemented Directives

	BRRD (31/12/2014)	CRD IV (31/12/2013)	MiFID II (03/01/2018)	IDD (23/02/2018)	UCITS V (18/03/2016)
Denmark	Transposed 182/2015	Transposed	Transposed Multiple acts	Not yet transposed	Transposed 11 acts
Sweden	Transposed 19 acts adopted in 2015	Transposed	Partially transposed Multiple acts	Not yet transposed	Transposed Multiple acts 2016:890-893
Finland	Transposed Multiple acts adopted in 2015 and 2015	Transposed	Not yet transposed	Not yet transposed	Transposed Multiple acts
Norway	Draft Joint Committee Decision under consideration (03/05/2017)	Transposed by the Financial Undertakings Act of April 10, 2015.	Adopted act under scrutiny by EEA, EFTA	Adopted act under scrutiny by EEA, EFTA	Draft Joint Committee Decision under consideration (01/04/2014)
Iceland	Draft Joint Committee Decision under consideration (03/05/2017)	Transposed by the Act on Financial Undertakings no. 57/2015 and Act no. 96/2016	Adopted act under scrutiny by EEA, EFTA	Adopted act under scrutiny by EEA, EFTA	Draft Joint Committee Decision under consideration (01/04/2014)

This table provides an overview of the transposed or implemented Directives. The data were collected from EUR.lex, European Commission overview of the transposition status and EEA Lex website on December 6th, 2017.