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Date: 20.11.2025
Our ref.: 2025-834
Your ref.: Click here to enter text.

Cc:
Ministry of Finance, Norway
Financial Supervisory Authority of Norway

Assessments of Norwegian equity certificates as CET1-instruments

Finance Norway and the Norwegian Savings Banks Association would like to express our sincere gratitude for the highly insightful discussions during our meeting with the EBA on 17 October 2025. We greatly appreciate the openness shown by the EBA, and by the Chair of the Sub-Group on Own Funds, regarding the assessments of Norwegian equity certificates. Considering some of the questions and considerations raised during the meeting, we hereby submit our written comments to further clarify the issue at hand, which can also be shared with the Sub-Group on Own Funds.

1. Introductory comments on capital structure and ownerless capital items

Based on our understanding of the discussions at the meeting on 17 October, the central issue concerns whether savings banks that have issued equity certificates can be considered to have more than one type of Common Equity Tier 1 (CET1) instrument, cf. CRR Article 28(1)(i). Put differently, a key question is whether the ownerless capital should be regarded as a capital instrument or merely as a capital item. It should be emphasized that the Ministry of Finance, the Financial Supervisory Authority of Norway, the Savings Bank Commission, and Associate Professor Andrea Resti at Bocconi University have all clearly stated that the Norwegian savings banks in question have issued only one form of equity instrument — the equity certificate.[1] Below, we present some initial assessments of this issue, which will be further elaborated from a legal perspective in Chapter 2.

1.1 Historical background – in brief

The first Norwegian savings bank – Christiania Sparebank – was established in 1822, and over the next 75 years, savings banks were founded across the country throughout most municipalities. These banks

[1] See, for example, the letter from the NFSA to the EBA dated 29 April this year, as well as the expert opinion prepared by Associate Professor Andrea Resti and the Savings Bank Commission's report (NOU 2024: 22). Notably, the Commission has clarified the following: In accordance with Article 26(1), second subparagraph of the CRR, the primary fund, the donations fund, and the equalisation fund are all immediately available without restriction to absorb losses as they arise. Since savings banks have not issued any equity instruments other than equity certificates, the equity share capital represented by the equity certificate absorbs the initial and proportionally largest share of losses compared to other issued instruments, in line with the requirement set out in Article 28(1)(i) of the CRR.

were originally ownerless institutions – in the sense that they were self-owned. The characterization of the banks as ownerless or self-owned reflects that, *in summary* of their historical characteristics, their initial equity was provided as donations and contributions from the founders, without granting them rights to dividends, liquidation proceeds, or voting rights in the bank's governing bodies.

In Norway, as in many other countries, savings banks were established with a social and humanitarian purpose. Across Europe, these banks were typically founded by municipalities and local philanthropists.[2] The aim was to provide the general population within a defined geographic area with a secure place to deposit their savings. While some savings banks in continental Europe and the United States accepted only deposits, Norwegian savings banks were modeled on the German system, which also offered credit services.[3]

In other words, the original purpose was to provide basic banking services, and the distribution of gifts from surplus funds was not initially intended. Since the founders had no right to receive surplus funds, profits were retained as equity. Over time, this led to a somewhat aimless accumulation of capital. To address this, Christiania Sparebank decided in 1840 that the portion of its primary capital exceeding one fifteenth of total deposits could be used for donations to charitable causes.

The amendments to Christiania Sparebank's statutes became a model, prompting several other savings banks to adopt similar provisions for donations to various charitable causes. However, the practice of making donations did not establish any connection between the gifts and the bank's founders. Today, recipients of such donations typically include sports clubs, various types of voluntary organizations, local cultural initiatives, heritage conservation efforts, and other similar entities.

In 1988, savings banks were permitted to issue capital instruments – namely, what are now known as equity certificates – granting investors rights to returns and limited representation in the bank's governing bodies. In connection with the proposal to allow such instruments, the Ministry of Finance emphasized that this would not remove the banks' basic status as ownerless institutions.[4] The equity certificate has served as a vital link between the original savings bank concept and the market for external equity, and it has been instrumental in the growth and market positioning of savings banks. Over time, this capital instrument has gained increasing recognition among both Norwegian and international investors.

At present, approximately three-fifths of savings banks have issued equity certificates, whereas slightly less than two-fifths continue to operate as traditional ownerless institutions – i.e. fully self-owned savings banks.[5] Holders of equity certificates are by law entitled to no less than 20 percent and no more than 40 percent of the representatives in the general meeting, thereby precluding them from attaining a majority position. The equity certificate is designed to closely resemble shares, but the inherent limitation on influence is balanced by the fact that certificate holders are less exposed to losses than shareholders – meaning they enjoy a priority advantage.

The limitation on ownership control applies irrespective of the total ownership share held by equity certificate holders, and this restriction serves as an effective safeguard against takeovers. At the same

[2] Cf. Prieg, L. and Greenham, T., 2012. *Stakeholder banks: Benefits of banking diversity*. London: New Economics Foundation.
[3] Cf. NOU 2024: 22 (The Savings Bank Commission's report).
[4] Stated in a proposition to the Parliament, Ot.prp. no. 73 (1986–87), and referred to in NOU 2024: 22.
[5] Today, there are just under 80 savings banks in Norway, while there are currently 45 savings bank foundations.

time, the donation practice plays an important role in enabling these banks to stabilize the ownership fraction over time. We wish to remind the EBA that there is a clear and tangible connection between the capital structure of Norwegian savings banks – particularly the takeover protection mechanisms – and the overall structure of the Norwegian banking sector.

1.2 Ownerless and owned equity – our perspective

With reference to the EBA's view that ownerless capital possesses instrument-like characteristics and, under the CRR, should be regarded as a capital instrument (cf. the meeting on 17 October), we consider this interpretation inconsistent with the actual characteristics and historical background of such capital. There has never been a contract-based ownership interest, and there is simply no legal or natural person who owns the ownerless capital. The self-owned capital, mainly represented by the primary capital fund, is generally referred to in the accounts as «the savings bank's fund».[6]

The ownerless nature of this capital is clearly reflected in legislation. In the event of the liquidation of a savings bank with both owned and ownerless equity, the ownerless capital is excluded from the order of priority, reflecting the fact that no legal or natural person holds a claim to it. Consequently, holders of equity certificates are subordinated to all other claims in a liquidation scenario. If surplus funds remain after all claims from creditors and equity certificate holders have been settled, the law stipulates that one or more savings bank foundations shall be the appropriate recipients of such residual funds. This does not, however, confer ownership of the ownerless capital upon the foundations; rather, they have only been designated as the most suitable recipients of any remaining funds.[7]

The original savings banks necessarily had both governing bodies and equity, but the contributed ownerless capital did not confer any rights of representation and was largely composed of gifts from founders, without any entitlement to shares of the bank's profits. Similarly, today's traditional and entirely ownerless – or self-owned – banks have governing bodies and typically generate profits, which are partly distributed, primarily in the form of donations to charitable causes. Does the presence of ownerless capital in such banks, combined with governance structures and profit distribution, imply the existence of an ownerless capital instrument?

Finance Norway and the Norwegian Savings Banks Association wish to emphasize the following: A holder of a specific capital instrument generally possesses ownership rights, including representation and entitlement to a share of distributed profits. However, can one reasonably infer the reverse — that the mere existence of governing bodies and profit distribution necessarily implies the presence of a capital instrument? Furthermore, should initial contributions to the ownerless capital be considered equivalent to paid-in capital that confers ownership rights? In our view, the EBA appears to apply this

[6] In addition to the primary fund, the ownerless capital consists of the compensation fund and the donations fund. However, it is the primary fund that constitutes the original and principal component, although today it mainly consists of retained earnings. The initial capital injections are generally today of very limited size or practically zero. No legal entity or individual holds any entitlement to the ownerless capital — including foundations.

[7] According to Section 10-20 of the Financial Institutions Act, any remaining equity capital after full settlement of all creditors shall be proportionally distributed among the holders of equity certificates. Any surplus remaining after all obligations have been met and equity certificate capital has been allocated under Section 10-20 shall be transferred to one or more savings bank foundations, cf. Sections 12-11 and 12-12.

line of reasoning in practice, whereby the existence of governance structures, profit distribution, and capital contributions made upon the establishment of self-owning institutions is used to substantiate the existence of an ownerless capital instrument.

If the ownerless capital in today's savings banks that have issued equity certificates is to be characterized as a capital instrument, then by the same logic, the ownerless capital in the original savings banks established in the 19th century must also have constituted a capital instrument. Consequently, even today's savings banks that have not issued equity certificates would – somewhat surprisingly – be deemed to hold equity that includes or constitutes a capital instrument, based on precisely the same reasoning. Has the EBA sufficiently freed itself from the implicit assumption that all capital must necessarily have owners?

If the EBA's reasoning is followed, it would imply that equity composed solely of ownerless capital items cannot coexist with governance structures and profit distribution. Finance Norway and the Norwegian Savings Banks Association consider this interpretation to lack historical foundation, reflect a flawed line of reasoning – one that Norwegian authorities should not endorse – and represent a view the EBA ought to reconsider.

We also wish to highlight the following: Different stakeholder groups are represented in the general meeting, as regulated by law and supplemented by individual bank statutes. However, representation is not determined by ownership shares. Moreover, the ownerless capital is not associated with any legal or natural person who can assert claims – neither in a going concern nor in a gone concern scenario. In other words, there is no direct link between the originally contributed capital, current representation in governing bodies, or entitlement to returns.

We therefore emphasize that the EBA's approach rests on a premise which, if accepted, would imply that the Norwegian savings bank sector has maintained a capital structure including an ownerless capital instrument throughout its 200-year history. Based on the factual considerations outlined above, and the legal analysis provided in Chapter 2, we consider such a conclusion unfounded.

1.3 The priority advantage and the financial value for owners

The priority advantage of equity certificate holders has traditionally been linked to their limited influence. In 2009, the (government-appointed) Banking Law Commission emphasized that this limited influence warrants maintaining the principle that statutory equity share capital should have better priority in covering losses than the ownerless primary capital.[8]

In our view as well, the current order of priority for loss absorption must be considered in light of the legal limitations on the influence of equity certificate holders – regardless of the ownership ratio. The priority advantage granted to holders of equity instruments clearly carries financial value. This value stems directly from the fact that the ownerless capital – albeit to varying degrees across savings banks – partially shields equity certificate holders from losses. This does not, of course, imply that the equity

[8] Cf. NOU 2009: 2, page 85. In Norwegian: «Banklovkommisjonen mener at det neppe er tilrådelig å forlate prinsippet om at vedtektsfestet eierandelskapital har bedre prioritet ved dekning av underskudd enn grunnfondskapitalen. Dette er motstykket til at eierandelskapitalens eierinnflytelse vil være begrenset». Translated: «The Banking Law Commission considers it hardly advisable to abandon the principle that equity capital stipulated in the articles of association should have higher priority in covering losses than the ownerless capital. This is the counterpart to the fact that equity certificate holder's influence will be limited».

share capital is protected from losses irrespective of their magnitude. Its loss-absorbing capacity applies fully in accordance with the established ranking, and there are no concealed features in the capital structure that diminish its ability to absorb losses.[9]

If the priority advantage of equity certificate holders is removed, and a pari passu ranking is imposed between the equity share capital and the ownerless capital, this will eliminate the financial value for equity certificate holders that follows from the current order of priority. The elimination of this financial value will occur regardless of the exact way the priority advantage is removed, cf. the Savings Bank Commission's alternatives 2, 3, and 4 in Chapter 15 of the report.[10]

Alternative 2 eliminates the existing priority structure within the current regulatory and capital framework.[11] Alternative 3, which is the Commission's recommended model, entails restructuring the ownerless primary capital to mirror the equity share capital, thereby establishing equal priority and loss absorption for both types of equity capital.[12] Alternative 4 converts all ownerless capital in the bank into equity share capital, which is then transferred to a savings bank foundation. This effectively removes the priority advantage of equity certificate holders by leaving the bank with a single type of equity capital – namely, equity share capital. The ownership ratio thereby becomes 100 percent, while the owners' influence remains limited to a maximum of 40 percent under current regulations. In essence, this results in a shareholding model without the control rights typically associated with such a structure and has therefore been considered less relevant by the Savings Bank Commission.

All three alternatives thus entail the elimination of a central advantage of the equity certificate, which may, over time, lead to a widespread transition to the ordinary shareholding model – rendering the equity certificate effectively obsolete. The fact that the current capital structure and order of priority in Norwegian banks with equity certificates is unique – i.e., without clear parallels in other EU/EEA jurisdictions – warrants considerable caution in applying purposive interpretations of the regulations when these are not based on a concrete legal source. This is particularly important when the capital and priority structure aligns with the wording of the regulations (cf. CRR Articles 26 and 28), given that the ownerless capital is composed exclusively of capital items.

1.4 Societal benefits of a diverse banking sector

The Norwegian savings bank sector currently consists of joint-stock savings banks, traditional ownerless savings banks, and banks with a combination of ownerless capital and equity share capital.[13] The latter group represents the majority and is widely regarded as well-functioning, as it combines the original characteristics of savings banks with access to external equity markets. This has

[9] Put differently, the equity certificates do not possess features which would cause the condition of the bank to be weakened as a going concern during periods of stress.
[10] Alternative 1 reflects the EBA's assessment (09.06.22) of the size of the equalisation fund, which is not recommended by the Savings Bank Commission because the solution does not entail pari passu loss coverage.
[11] Alternative 2 modifies the current framework so that loss absorption would be determined based on the ownership proportion between owner-based and ownerless capital.
[12] The Savings Bank Commission has proposed that parts of the primary capital should be formalised in the articles of association under the designation «statutory primary capital». To mirror the structure of the equity share capital, the statutory primary capital must be converted into «primary capital shares».
[13] Only two banks are joint-stock savings banks.

enabled savings banks to play a vital role in the broader banking market and has contributed to a structurally diverse banking landscape.

Research suggests that institutional diversity within the banking sector has a positive impact on overall economic activity. This effect may be particularly pronounced in the case of Norway – a geographically elongated country with a relatively small population of 5.6 million and a dispersed settlement pattern compared to, for example, Sweden. Notably, analytical studies emphasize that savings banks represent a critical source of financing for small and medium-sized enterprises (SMEs), especially in rural and regional areas where these banks maintain a substantial market share and play a pivotal role in supporting local economic development.[14]

The economic benefits of a diverse and nationwide savings bank sector may stem from the fact that challenges arising from asymmetric information (between lenders and borrowers) are mitigated by local banks' informational advantages due to their local knowledge. Considering the various significant economic disruptions Norway has experienced over the past two decades, evidence clearly indicates that the lending practices of Norwegian savings banks play a stabilizing role during economic downturns.[15] For a small, open economy where business cycles are typically driven by external shocks, the composition of the banking sector – comprising numerous local and regional savings banks alongside a limited number of nationwide actors – has likely contributed to enhanced financial and macroeconomic stability.

In our view, each savings bank should retain the strategic freedom to determine its own organizational model. The acquisition protection, embedded in the representation rules of the equity certificate structures, as well as the unique protection inherent in the self-owned capital of fully ownerless banks, provides these banks with genuine autonomy, and ensures that consolidation takes place on a voluntary basis. We also note that Norwegian authorities have historically placed strong emphasis on the ownerless component of the savings bank sector.[16]

In our assessment, weakening a specific advantage of the equity certificate – from an investor's perspective – relative to other equity instruments, and without introducing new compensatory benefits, may significantly undermine its relevance. This could, in turn, prompt a shift toward the joint-stock model, driven by investor preferences, and pave the way for significant structural changes in the Norwegian banking market. For Norway, this could entail profound and long-term adverse consequences that warrant careful consideration in this context.

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[14] Cf. Menon 119/2024 - Sparebankenes bidrag til verdiskaping (only in Norwegian) and Menon 21/2013 - Lokale sparebankers betydning for norsk næringsliv (only in Norwegian). See also the expert opinion by Associate Professor Andrea Resti, including the references cited therein — notably Prieg and Greenham (2012).

[15] Cf. for instance Norges Bank Economic Commentaries No. 3 2017 and chart 7 in this report (only in Norwegian) from the NFSA. See also Ferri, G., Kalmi, P., & Kerola, E. (2014). Does bank ownership affect lending behavior? Evidence from the Euro area. *Journal of Banking & Finance, 48*, 194–209, and several other references cited in the expert opinion by Associate Professor Andrea Resti.

[16] For example, in a proposition to the parliament (Stortinget) - Ot.prp. nr. 75 (2008–2009) - the Ministry of Finance stated that it concurred with the Banking Law Commission's assessment that the distinctive nature of savings banks and the role of the savings bank sector in the financial market would be difficult to maintain over time unless the vast majority of existing savings banks either retained their traditional fully ownerless organizational form or adopted a model combining self-owned and owned capital.

In our view, the demonstrable contribution of a structurally diverse banking sector to both financial and macroeconomic stability constitutes a key consideration that the EBA ought to acknowledge and weigh carefully. This consideration should carry substantial weight in any evaluation of whether to reclassify a long-standing ownerless capital item as an instrument.

2. Legal analysis of the categorization of ownerless capital

2.1 Introduction

As stated in Chapter 1 above, a key question is whether the ownerless capital should be regarded as a capital instrument or merely as a capital item.

Article 26(1) of CRR divides CET1 items into two distinct categories. The first category consists of capital instruments (point a) and related share premium accounts (point b). The second category comprises "other items": retained earnings (point c), accumulated other comprehensive income (point d), other reserves (point e), and funds for general banking risk (point f).

This distinction is fundamental. Capital instruments under point (a) must comply with the detailed requirements set out in Article 28 or, where applicable, Article 29. By contrast, the items listed in points (c) to (f) are subject to only one requirement: they must be available to the institution for unrestricted and immediate use to cover risks or losses as soon as these occur.

In order to substantiate that the ownerless capital in Norwegian savings banks does not constitute a capital instrument, it is necessary to provide a thorough account of the regulatory framework governing the capital and governance structure of these institutions. This includes the rules applicable to repayment and return on capital, allocation of surplus, dividend distribution, and the distribution of assets upon winding-up.

Savings banks are currently regulated by the Act No. 17 of 10 April 2015 on Financial Institutions and Financial Groups (the "**FIA**") and the Regulations No. 1502 of 9 December 2016 on Financial Institutions and Financial Groups (the "**FIR**"). The FIA replaced Act No. 1 of 24 May 1961 on Savings Banks (the "**1961-Act**") and Act No. 40 of 10 June 1988 on Financing Activity and Financial Institutions, both of which regulated the equity capital in savings banks. The current regulatory framework is a continuation of the historical regulation of savings banks, with necessary amendments reflecting that savings banks may have equity certificate capital in addition to the ownerless capital. The current framework must therefore be seen in light of previous regulations, a point that to some extent will be explored further below.

The FIA distinguishes between financial institutions organised as a private limited company or public limited company and financial institutions that are not organised as a private limited company or public limited company. The latter category comprises savings banks. The term "*financial institution*" is defined in the FIA Section 1-3 and includes, i.a. banks (point a).

The requirements for the founding of savings banks are set out in the FIA Section 7-7. The memorandum of association shall include, among other elements, a specification of the amount(s) each founder commits to contribute to the financial institution's ownerless capital or other forms of equity capital.

Requirements for the articles of association for savings banks are set out in section 7-8(1) and shall include provisions on the size of the bank's ownerless capital, and if applicable, the rules on repayment of, and return on contributions to, the ownerless capital that shall apply (point d). As further described in Section 2.2 and 2.3 below, these alternatives are of no practical relevance. Moreover, it shall include whether the bank shall have the right to issue tradable equity certificates (point g) and how profit is to be employed, and deficits covered, and rules for determining dividend if the bank is to be able to pay dividend on the ownerless capital (point h).

The savings banks can be, and have so far always been, established with ownerless capital only. None of the existing savings banks were established under the FIA. The most recent savings bank was established in 2003.

2.2 The equity capital in savings banks

2.2.1 The capital structure

The equity capital of a savings bank comprises capital which, in accordance with the articles of association, has been paid-in as ownerless capital and, if relevant, owner capital (equity certificate capital), along with retained earnings, cf. the FIA Section 10-1.

Savings banks with equity certificates have both ownerless capital and equity certificate capital. According to the FIA Section 10-2, the two categories of capital consist of the following:

- The ownerless capital comprises paid-up capital that is not owner capital, to which is subsequently added return or profit, and other capital assigned to the ownerless capital, including any donations fund and compensation fund.
- The owner capital comprises paid-up capital which according to the articles of association refers to equity certificates conferring proprietary rights over the entity to which is subsequently added return or profit, and any dividend equalisation fund and equity premium reserve.

The law states clearly that proprietary rights are granted only to the equity certificate capital, while no such rights are granted to the ownerless capital.

2.2.2 The existing ownerless capital in Norwegian banks

Before the introduction of equity certificates, the equity of savings banks consisted of the contributions to the initial capital upon establishment of the bank and retained profits that were subsequently added to the initial capital.[17] The initial funding of Norwegian savings banks was intended to cover the expenses of establishing and operating the bank in its early period and otherwise to serve as cover for possible losses.[18] The initial capital was established through payments from municipalities and private individuals, either as donations or as contributions that could be claimed for repayment under certain conditions and possibly also accrued interest.[19]

[17] NOU 2024: 22 page 81.
[18] Ot.prp. nr. 5 (1960-61) page 8.
[19] NOU 2024: 22 page 81.

In a proposition to the Parliament, Ot.prp. No. 31 (1984-85) page 2, it is stated the following:

"*The initial capital may bear interest and be repaid in accordance with the provisions in the articles of association. Most contributions to the initial capital have now been repaid. In some savings banks, there are still contributions that are not donations and that have not been repaid. This concerns approximately 25 banks that collectively owe initial capital contributors around 500,000 kroner.*

The ownerless capital in the savings banks is a part of the banks' own funds. Given that the initial capital has largely been repaid, the initial contribution is of little significance. The most important part of the savings banks' own funds consists of the funds that have been built up through allocations of the ongoing operating surplus."

This means that for all practical purposes, the ownerless capital in the existing savings banks consists of accumulated profits assigned to the ownerless capital.

A savings bank may increase its ownerless capital by amendment to its articles of association, cf. the FIA Section 7-12. In Ot.prp. No. 31 (1984-85) page 3 the following is stated about an increase of the ownerless capital: "*Previously, an established savings bank could not increase the ownerless capital through new subscription of capital. Following an amendment to the law in 1977, the ownerless capital may be increased through new contributions subject to the consent of the Ministry of Finance, cf. the Savings Banks Act section 2 first paragraph final sentence. This option has not yet been utilised by the savings banks*."

This possibility has not been utilised at any later point either. If a savings bank is to raise equity, the only applied alternative has been to establish or increase the equity certificate capital. The equity certificate capital can be increased according to the FIA Section 10-22, mainly pursuant to the rules applicable to capital increases in public joint stock companies. An increase of the equity requires approval from the Financial Supervisory Authority of Norway, cf. the FIA Section 10-4. In the event that a bank intends to increase the ownerless capital in the future, it would not be permissible to grant the contributor any ownership rights to the paid-in capital.

2.3 Option of repayment of the ownerless capital – the initial capital

The FIA contains no specific provision on the repayment or write-down of ownerless capital, other than the requirement that such actions must be approved by the Financial Supervisory Authority of Norway, cf. Sections 10-4 and 10-8. The articles of association shall state any provisions concerning repayment of, and return on contributions to, the ownerless capital, cf. the FIA Section 7-8(1) point d. The common regulation in savings banks' articles of association is that the contribution to ownerless capital has been repaid or that the bank is not obliged to repay the contribution.[20]

The possibility of repayment or of interest on the initial capital should be assessed in light of previous regulation. The Savings Banks Act of 1887 set out the conditions under which the King could grant the approval of a bank. These included, among others, that any interest payments and repayment of the fund were subject to specific provisions, and that the founders, guarantors or stakeholders were prohibited from receiving dividends or any share of the operating surplus. More detailed statutory regulations were later introduced with the 1961-Act, which stated in section 2 that contributions to the bank's initial capital may, if stipulated in the articles of association, receive annual interest of up

[20] NOU 2024: 22 page 125.

to 3 per cent. However, such interest could not be credited or paid out until the savings bank had built up its own fund which, after deduction of the interest, was at least as large as the own funds (the ownerless capital) and amounted to at least one-tenth of the savings bank's total liabilities. The initial capital could also be repaid if this was provided for in the articles of association, but only when the savings bank's own fund was at least as large as stated in the preceding sentence.

The provision was later reformulated to state that the contributions to the ownerless capital shall bear interest and be repaid in accordance with the provisions set out in the articles of association. Practically all the initial contributions provided to the banks have been repaid (if that was an obligation), cf. Chapter 2.2.2 above and no banks are paying interest on their ownerless capital.

2.4 Allocation of profits and distribution of surplus funds

2.4.1 Introduction

The rules governing profit allocation in savings banks vary depending on whether the institution is structured with ownerless capital only or also includes equity certificate capital. The annual profit of savings banks that have not issued equity certificates, shall be assigned to the bank's ownerless capital, unless the articles of association provide that net profit shall be distributed, cf. the FIA Section 10-7(1).

The annual profit of savings banks that have issued equity certificates, shall be assigned to the holders of equity certificates and the bank (the ownerless capital) based on the ratio between the owner capital plus the premium reserve and the ownerless capital plus the compensation fund, cf. the FIA Section 10-17 (1). Moreover, annual distributions of surplus funds assigned to equity certificate holders and the ownerless capital shall be based on the same ratio.

Dividends assigned to the owner capital shall be paid to the holders of equity certificates, while the remainder of the profit shall be added to the dividend equalisation fund or constitute other owner capital, cf. the FIA Section 10-17(3). According to the FIA Section 10-17(4), the portion of annual profits assigned to the ownerless capital shall be added to the ownerless capital.

2.4.2 Utilisation of surplus funds assigned to the ownerless capital

For both savings banks with and without equity certificates, the FIA allows distribution of profits that are not allocated to the ownerless capital, provided that it is prescribed in the articles of association. The articles of association may provide that such profits may be used for (i) dividends on contributed ownerless capital, (ii) gifts to non-profit purposes or to a fund for such gifts (a donations fund), (iii) gifts to a foundation for non-profit purposes, or (iv) customer dividends. However, no savings banks have made use of option (i).

Traditionally, a portion of annual profits has been allocated as gifts to charitable purposes, and we refer to the historical background outlined in Chapter 1.1 above. The first regulation of the ownerless capital in the Savings Banks Act of 1887 included conditions stating that the founders, guarantors or stakeholders were not entitled to any dividends or any share of the operating surplus, and that the surplus was to be added to the fund, with the possibility that part of it could be allocated to charitable purposes. Similar regulation remained in force under the 1961-Act up until 2009. The limit on donations of gifts varied over time between 10% and 40% of the surplus. The cap on donations was

abolished in 2009[21], and the limits for donations and distributions for other purposes (including dividends on equity certificates) are now governed by the general provision on dividend levels in the FIA Section 10-6.

In 2009, a modernised regulatory framework for equity certificates was introduced, along with new provisions governing structural and corporate changes, largely corresponding to the current FIA. These changes expanded the flexibility in the distribution of profits allocated to ownerless capital by introducing the options mentioned in point (i) and (iv) above.

The background was an issue related to savings banks having two categories of capital: ownerless capital and equity certificate capital. This structure meant that any form of distribution of surplus and other changes in equity that did not follow the ownership fraction, affected the ratio between the two types of capital (dilution). The dilution issue arose in banks where the ownerless capital, over time, was allocated a larger part of the profit than the equity certificate capital, as dividends were distributed to the equity certificate holders to a greater extent than gifts were distributed to charitable purposes. A removal of the limitation on donations in savings banks was not considered sufficient to counteract dilution[22], and the banks were therefore given significantly greater flexibility in the allocation of surplus funds in order to prevent or minimise dilution. The FIA Section 10-17 stipulates distribution of surplus funds according to the ownership ratio and that the bank should avoid any significant alteration in the ratio between the two types of capital, cf. Section 10-17(4).

No savings banks have made use of the option to distribute parts of the profit as dividends on contributed ownerless capital. As explained in Chapter 2.2.2, the initial capital based on contributions has been repaid or, for all practical purposes, no longer exists. A few savings banks have stipulated in their articles of association that part of the profit may be distributed as customer dividends. It is important to emphasize that these options confer no rights on potential contributors to the ownerless capital or customers, and that customer dividends are not linked to any prior equity capital contribution by the customer.

2.5 Winding-up of the bank

Contributors to the initial ownerless capital hold no entitlement to the ownerless capital in the event of the winding-up of the savings bank.

When a savings bank is wound up, all the creditors shall be paid in full, before any remaining capital is distributed. If the bank has issued equity certificate capital, the portion of the equity certificate capital and premium reserve that remains after all creditors have been paid in full, shall be distributed on a pro rata basis among the holders of equity certificates, cf. the FIA Section 10-20. The portion of the ownerless capital remaining after all obligations have been met shall be transferred to one or more savings bank foundations, cf. the FIA Section 12-12. Contributors to the initial capital have no claim to any remaining capital.

In 2009, legislation introduced the possibility of establishing savings bank foundations. These foundations have served as a mechanism for managing ownerless capital in relation to structural changes within the savings bank sector. In case of mergers, the assigning bank may establish a savings

[21] Act of 19 June 2009 No. 46 on amendments to the Financial Institutions Act and certain other acts
[22] Report for the Banking Law Commission, NOU 2009: 2, page 80.

bank foundation to receive the merger consideration in the form of equity certificates in the merged bank, and possibly cash, cf. the FIA Section 12-3 and 12-4. A savings bank may also convert ownerless capital to equity certificate capital and issue the equity certificates free of charge to a savings bank foundation, cf. the FIA Section 10-9(3). Savings bank foundations are regulated in the FIA Chapter 12, IV and V, and are subject to supervision by the Financial Supervisory Authority of Norway. The articles of association of a savings bank foundation shall require the foundation to continue the savings bank traditions and to pursue a purpose of long-term, stable ownership of the savings bank, cf. the FIA Section 12-25.

Despite this, savings bank foundations have no conferred right to the ownerless capital. In the event of winding-up, it was considered preferable to transfer the remaining ownerless capital to a savings bank foundation. This was considered a better alternative than using it to promote savings bank activities in the relevant municipality, which was the option under the 1961-Act prior to 2009, or to use it for the public good or for the institution's customers, which is the alternative for other financial institutions not organised as a limited liability company, cf. the FIA Section 12-11.

2.6 The governance structure of savings banks

The general meeting in savings banks consists of members elected from different stakeholder groups, mainly depositors, employees and, where applicable, equity certificate holders.

According to the FIA Section 8-2 (1), the general meeting shall be composed, and its members elected, pursuant to further provisions of the articles of association. At least three quarters of the members shall be persons who are not employed by the bank. Emphasis shall be given to ensuring that the elected members in aggregate reflect the bank's customer structure and other stakeholder groups as well as its societal role.

In savings banks having issued equity certificates, the articles of association shall contain provisions conferring upon the holders of equity certificates the right to exercise at least one fifth and not more than two fifths of the votes of the general meeting, cf. the FIA Section 10-11. In practice, the holders of the equity certificates are not represented directly in the general meeting, but they elect members to the general meeting. In this election, each equity certificate confers one vote.

Where holders of equity certificates are entitled to elect members to the general meeting, the articles of association shall prescribe detailed provisions governing such elections. These provisions shall include rules on voting rights, eligibility for election, terms of office and cessation thereof, alternate members, the electoral system, and the resolution of disputes arising from elections, cf. FIA Section 10-11(3).

The number of members and alternate members of the general meeting that shall be elected by and from among the bank's depositors, depends on whether the bank has equity certificate capital, cf. the FIR Section 8-1. In banks without equity certificate capital, at least half of the members shall be depositors, while in banks with equity certificate capital, at least one-quarter shall be depositors. Depositors who hold, and for the past six months have held, a deposit with the bank of at least NOK 2,500 are eligible for election and entitled to vote.

One-quarter of the members and alternate members of the general meeting shall be elected by and from among the bank's employees, cf. the FIR Section 8-1.

At least one of the members shall represent the societal role. In many banks, this member is elected in the depositors' election to the general meeting. Some banks have provisions in the articles of association allowing one or several municipal councils and county councils to elect members. Until 2005, the Savings Banks Act required that members be elected by the municipality or the county.

Contributors to the initial capital of the savings bank have never had any right to be represented in the general meeting.

2.7 Assessment of the classification of ownerless capital – summary and conclusion

As stated above, the ownerless capital is not deemed to be a capital instrument pursuant to the CRR. The CRR contains no definition of "*instruments*" as a stand-alone term. Article 4(1) point (50) defines "*financial instrument*", but the CRR Articles 26 to 29 contain no reference to the term "*financial instrument*". It is also clear that the ownerless capital does not qualify as a financial instrument under the CRR. The term "*own funds instruments*" refers to "*capital instruments issued by the institution that qualify as Common Equity Tier 1, Additional Tier 1 or Tier 2 instruments*", cf. CRR Article 4(1) point (119). The definition provides no basis for considering the ownerless capital as a potential capital instrument.

In the absence of a clear definition of capital instruments under the CRR, it appears reasonable to compare the ownerless capital with equity instruments, such as common stocks and equity certificates, which are currently recognised as instruments within the scope of CRR. Both aforementioned capital instruments are also subject to quite similar regulatory provisions under Norwegian law, as the Act No. 45 of 13 June 1997 on Public Limited Liability Companies (the "**Companies Act**") applies to a large degree also to equity certificates.

The share capital in a joint-stock company is divided into one or more shares which carry the rights of the shareholder[23], and the same applies to the equity certificate capital.[24] The rights of the shareholders are generally ownership rights such as voting rights and economic rights.

Both stocks and equity certificates are issued to a holder of the instrument in exchange for capital contribution in money, or in exchange for contribution in kind.[25] This is not the case for ownerless capital, or the initial capital, where no "instrument" was issued to represent the capital contribution.

The shareholders of a joint stock company are entitled to attend the general meeting[26] and each share confers one vote, unless otherwise stipulated by statute or the articles of association.[27] The holders of equity certificates have the right to elect members of the general meeting, and each equity certificate confers one vote. Conversely, contributors to the initial capital are not granted voting rights, nor do they hold any right to attend the general meeting, as set out in Chapter 2.6 above.

A further characteristic of equity capital instruments is that the holder is vested with economic rights in the issuing entity, including rights to dividends[28] and pre-emptive rights to subscribe for new shares

[23] The Companies Act Section 3-1.
[24] The FIA Section 10-2(2).
[25] The Companies Act Section 2-1(2) and the FIA Section 10-3.
[26] The Companies Act Section 5-2.
[27] The Companies Act Section 5-4.
[28] The FIA Section 10-17(3) and the Companies Act Section 8-3.

or equity certificates in proportion to the holder's existing ownership.[29] Contributors to the initial ownerless capital hold no such economic rights under statutory law, although the articles of association may provide for the use of dividends on contributions to the ownerless capital. As mentioned in Chapter 2.4.2 above, no savings banks have made use of the option to distribute parts of the profit as dividends on contributed ownerless capital.

The share capital and equity certificate capital respectively may be reduced, and the resulting amount may be applied for distribution to the respective holders of shares and equity certificates.[30] Historically, some contributors to the initial capital had a right to repayment, but the current ownerless capital in Norwegian savings banks consists of retained earnings.

Furthermore, upon dissolution and liquidation, any remaining assets, after all obligations of a joint-stock company have been fully discharged, shall be distributed to the shareholders.[31] As described in Chapter 2.5 above, this is similar for the portion of the equity certificate capital and premium reserve that remains after all creditors have been paid in full, that shall be distributed on a pro rata basis among the holders of equity certificates. None of the contributors to the ownerless capital have any right to remaining ownerless capital in case of liquidation, as this shall be transferred to a savings bank foundation as the most suitable recipient.[32]

When assessed against equity capital that is represented by instruments (i.e., shares or equity certificates) it becomes clear that the ownerless capital does not display the essential characteristics of a capital instrument as defined under CRR. It lacks a holder, confers no economic or governance rights, and there is no identifiable legal or natural person who could constitute as an issuer-side counterparty. In light of these features, the ownerless capital cannot fall within the scope of an equity capital instrument under the CRR. The alternative to qualifying as a CET1 instrument, is to be recognised as a CET1 item according to CRR Article 26(1).

The condition for qualifying as CET1 items is that the items are available to the bank for unrestricted and immediate use to cover risks or losses as soon as these occur. This condition is clearly fulfilled. According to the FIA Section 10-19, losses shall in the first instance be covered by a pro rata transfer from the ownerless capital, including the donations fund, and equity owner capital in excess of the owner capital stipulated in the articles of association, including the dividend equalisation fund. Any additional losses shall be covered by pro rata transfer from the premium reserve and the compensation fund.

Against this background, the conclusion is that the ownerless capital is not a capital instrument, and the correct legal classification of the ownerless capital is as a CET1 item pursuant to CRR Article 26 (1) (c).

We are of the view that the potential consequences of this conclusion for other institutions are minimal. All banks established in Norway in recent decades have been organised as joint stock companies. The two most recently established savings banks date from 2003 (following the conversion of a co-operative society) and from 1996.

[29] The Companies Act Section 10-4 and the FIA Section 10-10.
[30] The Companies Act Section 12-1 and the FIA Section 10-21.
[31] The Companies Act Section 16-9.
[32] As described in chapter 1.2.

Furthermore, we consider it unlikely that any institution today would seek to establish a CET1 item pursuant to CRR Article 26(1)(c), based on paid-in capital. Ownerless capital in Norwegian savings banks must be assessed considering its historical context, particularly how the founding capital was raised, primarily during the 19th century.

We hope that the analysis set out above provides a clear and accurate description of the Norwegian framework for ownerless capital and equity certificates. Should the EBA or the Sub-Group on Own Funds wish to explore any aspects of this further, we remain at your disposal for additional technical discussions or clarifications.

Yours sincerely

Finance Norway

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