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Hamar, 21.06.2016_____
Case no.
6607_____
SM_____/JHL_____
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_____

Writ of summons

in a class action

to

Oslo District Court

Complainant: Shareholders of the securities fund DNB Norge
Represented by the Consumer Council of Norway in the person of its chair

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ADVOKATFIRMAET MAGELI

1. Table of Contents

2. Introduction

The case relates to claims by the shareholders of the securities fund DNB Norge for repayment and compensation on the grounds that DNB Asset Management has managed the funds DNB Norge, DNB Norge (I) and Avanse Norge (I) passively, despite the fact that the funds have been marketed and priced as actively managed funds. The case is being brought as a class action, cf. Chapter 35 of the Norwegian Disputes Act, and pursuant to the opt-out alternative stipulated in s

35-7. It seems most expedient to present the procedural conditions for a class action after a presentation has been given of the factual and legal aspects of the case. Questions relating to the class action are dealt with in Chapter 10.

3. Brief presentation of the action's core issue

The Consumer Council of Norway (Consumer Council) hereby files this claim against DNB Asset Management (DAM) on behalf of the shareholders of the securities fund DNB Norge. Grounds for the claim are that DAM, as fund manager, has not managed the fund (along with two other funds which have subsequently been merged into DNB Norge, to wit DNB Norge (I) and Avanse Norge (I)), in line with the framework set out in the funds' prospectuses, articles of association and key information.

DAM offers funds that are managed completely passively, so-called index funds, whose management rests on copying the composition of a selected index of shares. For such management, the shareholders are charged an annual fee of 0.3% of the fund's capital assets. DNB Norge, DNB Norge (I) and Avanse Norge (I) have been marketed and sold as actively managed funds, with the expressed objective of providing a better return than the benchmark index. The funds encompassed by this action have, during the period to which the action relates, been charged an annual management fee of 1.8%.

A precondition for achieving a better return than the benchmark index is that the funds' share portfolio deviates from the share portfolio in the benchmark index. Otherwise, the fund's development will be the same as the index's. If a fund which should have been managed actively is nevertheless managed in the same way as an index fund – or very similarly – the shareholders of the actively managed fund will receive the same or practically the same return as shareholders of the index fund, while having to part with 1.5% per annum more of their capital in management fees than those who have invested in the index fund.

In this present case, the Consumer Council contends that, over a long period of time, the composition of DNB Norge, DNB Norge (I) and Avanse Norge (I) has been almost identical to their benchmark index, and that they have therefore not been managed as actively as they should have been in accordance with the prospectuses, articles of association and key information. On average, over five years from 1 January 2010 until 31 December 2014, only around 12% of the funds' capital was invested in shares deviating from the composition of the index (active share). Correspondingly, therefore, approx. 88% of the capital was managed in exactly the same way as the benchmark index. Apart from index funds, DNB Norge, DNB Norge (I) and Avanse Norge (I) are the Norwegian securities funds that deviate by far the least from the benchmark index. Funds which are marketed and priced as actively managed funds, but which largely copy the composition of their benchmark index are called "closet index funds" and have recently become the focus of considerable attention in the western world's financial markets.

The Consumer Council is basing its case on the contention that the shareholders have, in reality, paid DAM for a service they have not received or have only partially received. On 2 March 2015, the Financial Supervisory Authority of Norway (FSAN) ordered DAM to bring its management of DNB Norge into line with practices characteristic of active management and the fund's prospectus and management fee. Grounds for the order largely concur with the grounds for the claims being submitted in this case. In a letter dated 11 May 2015, DAM notified the shareholders that changes would be made in the management of DNB Norge in order to comply with the FSAN's order.

The Consumer Council is of the opinion that the funds in question have been managed too passively for a long period of time. The action relates to the management of the funds during a five-year period from 1 January 2010 until 31 December 2014. Management in the period before 2010 will to some extent be used to illustrate a long-term pattern in DAM's management practices.

On behalf of the shareholders, reimbursement of the difference between the management fee charged and the fee which reflects the management service received is being requested. In addition, compensation in an amount corresponding to the return the shareholders would have received if the difference had remained in the fund and followed the fund's actual change in value is also claimed.

This side has calculated that the shareholders are collectively entitled to reimbursement of NOK 536,481,754. Losses associated with the non-reinvestment in the funds of the reimbursed amount come to NOK 154,279,359. The total claim for the shareholders collectively is calculated at NOK 690,761,112. We will present the basis for the calculations and how the individual shareholder's loss must be worked out in Chapter 9 of this statement of claim.

4. Securities funds and the management thereof

In s 1-2 of the Securities Funds Act, securities funds are defined as "an independent pool of assets which has arisen through capital contributions from an undefined range of persons against the issuance of units in the fund and which consists essentially of financial instruments and/or deposits in a credit institution". In other words, a securities fund may be described as the joint management of the capital belonging to a number of shareholders.

Shares in a securities fund may not be marketed or sold without the fund's articles of association being approved by the FSAN, cf. s 4-1 of the Securities Funds Act. The funds are managed by fund management companies, which must also be approved by the FSAN, cf. s 2-1 of the same act. A securities fund is presumed to be an autonomous legal entity, but has no bodies or decision-making authority of its own. Securities funds are therefore, for all practical purposes, entrusted to the fund management company, cf. s 2-14 of the Securities Funds Act.

Securities funds may take a number of different forms, with the most common being bond funds, interest rate funds and share funds. A number of funds may also be found which combine the various main forms of fund management. In this case, the matter relates to share funds, where the fund's capital is invested in the stock market. Within this category, too, there are several subcategories and funds which invest in specific market segments, etc. One main difference is between so-called index funds and active funds.

An index is a theoretical portfolio of shares whose purpose is to mirror developments in the stock market or a specified part of the stock market. The various indexes are made up of different shareholdings which collectively are presumed to reflect a representative selection of the shares available in the market.

The purpose of index funds is to copy or shadow a selected index, such that each fund's composition is almost identical to the composition of its benchmark index. Thus, the shareholder will achieve a return that will largely coincide with the general movement in the stock market or a specific portion thereof. This is also referred to as "passive" management, because the management company does not make its own assessment of which investments will provide the greatest returns. The management company's task is merely to copy the benchmark index. Passive management is not particularly labour intensive, and the fee paid by the shareholder is correspondingly low, often 0.2–0.3% of the capital per year.

The opposite of index funds or passive funds are funds where the management company's objective is to provide shareholders with a return on capital which is higher than a selected benchmark index, so-called excess return. In that case, the management company will invest the capital irrespective of the composition of the benchmark index and based on its own analyses and assessments of which shares it presumes will develop better than the market in general. The activity may also involve either an overweighting or underweighting of various shareholdings in the portfolio compared with that on which the benchmark index rests. Such management practices are frequently referred to as "active management". Active management is more time consuming than passive management, and the management companies therefore charge a considerably higher fee for the management of such funds, often between 1 and 2% of the capital per annum.

No one investing in a fund has any prior guarantee that an actively managed fund will provide a better return than a passively managed fund. The extent to which an actively managed fund provides a better return than an index fund rests on numerous factors, two of which are crucial: Firstly, a necessary, but insufficient, precondition is that the fund's capital is actually invested in a way that deviates from the benchmark index. If the capital is managed in the same way as the benchmark index, the return will be neither better nor worse than the index, before the deduction of costs. Secondly, the return achieved will depend on the skill of the manager. In other words, the extent to which the management company succeeds in identifying shares which develop better than the shares in the benchmark index or shares which should be overweighted/underweighted compared with the index.

In this case, the first of these factors is fundamental. The Consumer Council contends that DAM has invested too small a proportion of the capital in DNB Norge, DNB Norge (I) and Avanse Norge (I) in shares that deviate from the benchmark index. By investing the capital in shares that match very closely the composition of the benchmark index, DAM has in reality not performed the management task for which the shareholders have paid, and which is a necessary precondition for achieving the excess return which was the shareholders' objective for their investment.

5. The securities funds DNB Norge, DNB Norge (I) and Avanse Norge (I)

5.1 Introduction

DNB Norge (ISIN no. NO0010338064) is currently the name of a securities fund which has existed since 1995. Until 11 November 2011, it was called Postbanken Norge. DAM has disclosed that the fund currently has around 137,000 shareholders and capital assets of approx. NOK 8 billion.

The funds DNB Norge (I) (ISIN no. NO0005259705) and Avanse Norge (I) (ISIN no. NO0003603607) were merged into DNB Norge with effect from 24 March 2014. As of today, DNB Norge thus has shareholders who initially invested in Postbanken Norge, DNB Norge (I) and Avanse Norge (I).

Since 2005, DNB Norge/Postbanken Norge has been managed as a fund-in-fund, to the extent that almost its entire capital has been invested in the feeder fund DNB Norge (IV). DNB Norge (I) has also been managed through DNB Norge (IV) since 2005. On the other hand, Avanse Norge (I) was managed as a fund-in-fund with Avanse Norge (II) as the feeder fund until it was merged with DNB Norge on 24 March 2014. Since Avanse Norge (II) also invested all its funds in DNB Norge (IV) from 22 May 2013, Avanse Norge (I) has also, in practice, been managed as DNB Norge from this date.

In conclusion, DNB Norge currently comprises – through a series of mergers – shareholders who were previously associated with DNB Norge (I) and Avanse Norge (I). Furthermore, in practice, DNB Norge and DNB Norge (I) have been managed identically since 2005, while Avanse Norge (I) has been managed identically with the others from 22 May 2013.

When the Consumer Council uses the term "the DNB Norge funds" in this statement of claim, it is referring collectively to DNB Norge, DNB Norge (I) and Avanse Norge (I).

5.2 DNB Norge

Details of DNB Norge's investment profile are set out in prospectuses, articles of association and key information. The Consumer Council has requested and received extensive materials from DAM containing, among other things, various versions of prospectuses, articles of association and key information. The wording of the individual versions of these documents may vary slightly, but it is the Consumer Council's understanding that the fund's investment profile has, in reality, been the same throughout the period in question.

Not all versions are dated, but the Consumer Council has taken as its starting point a prospectus for Postbanken Norge (now DNB Norge) which is said to be up to date as at 30 April 2010, which harmonises well with the timeframe for the claims being made in this case.

Exhibit 1: Prospectus for Postbanken Norge as at 30 April 2010 (pp. 1–8)

The fund's investment objectives are described thus:

> "Postbanken Norge is suitable for those who, with respect to saving, put return ahead of security in order to achieve the highest possible return over time."

And moreover:

> "The objective is to invest the fund's assets in the Norwegian stock market, with the bulk in a broad selection of the dominant companies on the Oslo Stock Exchange, in order to achieve the highest possible return for you as a saver in the fund."

Under the section "investment strategy", the starting point for fund management is described in more detail:

> "Our own analyses forms the basis for the investment decisions that are taken. Through a well-defined and structured investment process, the management team analyses macroeconomic trends, sectors and companies, with the aim of generating investment ideas which provide a better return than the benchmark index in general."

The annual management fee is specified at 1.8%.

Postbanken Norge's articles of association are also appended, in a version said to have been updated at the latest on 23 May 2005. In the absence of other information, it is assumed that the articles of association were valid at the start of the period to which the action relates. In addition, articles of association approved on 16 April 2013 are submitted, at which point the fund had changed its name to DNB Norge.

Exhibit 2: Articles of association for Postbanken Norge, version amended no later than 23 May 2005 (pp. 9–16)

Exhibit 3: Articles of association for DNB Norge, version approved 16 April 2013 (pp. 17–19)

As of today, the Consumer Council has key information for DNB Norge only in a version dated 4 May 2015, ie shortly after the conclusion of the period relevant to the case. Since nothing else is known, it is assumed that the information contained in the document largely complies with previous versions, though such that the management fee was reduced to 1.4% with effect from 1 May 2015.

Exhibit 4: Key information for DNB Norge AS, updated as at 4 May 2015 (pp. 19–20)

For the sake of a more complete overview, we also submit a "purchase form" for DAM, which forms the basis for the shareholders' purchase of shares in the fund.

Exhibit 5: Purchase form for DAM (pp. 21–22)

5.3 DNB Norge (I)

The Consumer Council has requested and received prospectuses, key information and articles of association for DNB Norge (I) as well. Not all versions are dated, but the Consumer Council has taken as its starting point a prospectus for DNB Norge (I), which is said to be up-to-date as at 31 December 2009, which is the starting point for the timeframe for the claims being made in this case.

Exhibit 6: Prospectus for DNB Norge (I) as at 31 December 2009 (pp. 23–32)

The fund's investment goals are described thus:

> "The objective is to invest the fund's assets to achieve the largest possible risk-adjusted additional return relative to the fund's benchmark index."

Under the item "investment strategy", the starting point for its management is described in more detail:

> "Our own analyses form the basis for the investment decisions that are taken. Through a well-defined and structured investment process, the management team analyses macroeconomic trends, sectors and companies, with the objective of generating investment ideas which provide a better return than the benchmark index in general."

The annual management fee is specified at 1.8%.

A similar wording is included in the prospectuses updated as at 30 September 2010 and 11 November 2011, while the wording is somewhat altered in a later, undated, prospectus.

Exhibit 7: Prospectus for DNB Norge (I), updated as at 30 September 2010 (pp. 33–40)

Exhibit 8: Prospectus for DNB Norge (I), updated as at 11 November 2011 (pp. 41–48)

Exhibit 9: Prospectus for DNB Norge (I), updated as at 20 October 2012 (pp. 49–56)

The fund's articles of association are included in the prospectus, but are presented separately in a version approved by the FSAN on 16 April 2013.

Exhibit 10: Articles of association for DNB Norge (I), approved 16 April 2013 (pp. 57–58)

Key information for DNB Norge (I) is submitted in four versions provided by DAM, updated as at 3 November 2011, 21 June 2012, 6 March 2013 and 31 January 2014.

Exhibit 11: Key information for DNB Norge (I), updated as at 3 November 2011 (pp. 59–60)

Exhibit 12: Key information for DNB Norge (I), updated as at 21 June 2012 (pp. 61–62)

Exhibit 13: Key information for DNB Norge (I), updated as at 6 March 2013 (pp. 63–64)

Exhibit 14: Key information for DNB Norge (I), updated as at 31 January 2014 (pp. 65–66)

Under "Goals" in the key information – which in this respect is the same for all the versions submitted – the following is stated:

> "The fund's goal is maximum return on the fund's investments in the medium to long term without taking any more risk than necessary."

And under "Investment process":

> "The manager invests, on the basis of their own analyses, in shares which could rise in value over time."

5.4 Avanse Norge (I)

The Consumer Council has also received prospectuses, articles of association and key information with respect to the fund Avanse Norge (I).

For the sake of good order, we submit all six versions of the relevant prospectus for Avanse Norge (I) for the period in question:

Exhibit 15: Prospectus for Avanse Norge (I), updated as at 31 December 2009 (pp. 67–74

Exhibit 16: Prospectus for Avanse Norge (I), updated as at 18 November 2010 (pp. 75–82)

Exhibit 17: Prospectus for Avanse Norge (I), updated as at 30 June 2011 (pp. 83–90)

Exhibit 18: Prospectus for Avanse Norge (I), updated as at 11 October 2012 (pp. 91–98)

Exhibit 19: Prospectus for Avanse Norge (I), updated as at 22 May 2013 (pp. 99–104)

The wording with respect to investment goals and strategy is the same as in the prospectuses for DNB Norge and DNB Norge (I), cited above. In the later versions, the wording is slightly different, without this – in the view of the Consumer Council – altering the core of the fund's investment goals or strategy.

The management fee with respect to Avanse Norge I was also 1.8% per annum throughout the relevant period.

The articles of association for Avanse Norge (I) are submitted in a version approved by the FSAN as at 16 April 2013.

Exhibit 20: Articles of Association for Avanse Norge (I), approved 16 April 2013 (pp. 105–106)

We submit four versions of the key information for Avanse Norge (I) which we have received from DAM, updated as at 3 November 2011, 21 June 2012, 6 March 2013 and 31 January 2014.

Exhibit 21: Key information for Avanse Norge (I), updated as at 3 November 2011 (pp. 107–108)

Exhibit 22: Key information for Avanse Norge (I), updated as at 21 June 2012 (pp. 109–110)

Exhibit 23: Key information for Avanse Norge (I), updated as at 6 March 2013 (pp. 111–112)

Exhibit 24: Key information for Avanse Norge (I), updated as at 31 January 2014 (pp. 113–114)

The relevant wording is also in this connection identical to the wording in the key information for DNB Norge (I) above.

5.5 Summary

The Consumer Council contends that all three DNB Norge funds have been marketed and sold as active funds. A key issue in this case is whether DAM has in practice managed the funds as actively as investors were led to believe.

6. Parameters for measuring a fund's activity – when is a fund actively managed?

Several parameters have been developed to measure a fund's level of activity.

In connection with the present case, the Consumer Council has asked Professor Petter Bjerksund and Associate Professor Trond Døskeland from the Norwegian School of Economics and Business Administration (NHH) to analyse and present relevant measurements for the active management of a share fund. This endeavour led to an opinion dated 1 June 2015 "Mål på aktiv forvaltning av aksjefond" [Measuring the active management of share funds].

Exhibit 25: Mål på aktiv forvaltning av aksjefond, Professor Bjerksund and Associate Professor Døskeland, 1 June 2015 (pp. 115–116)

Bjerksund and/or Døskeland will be called as the Consumer Council's expert witness in the case, and will present and explain in greater depth the substance of this opinion. Their conclusion is that "active share" and "tracking error" together provide a good indication of active management. In addition, R^2 ("R-squared") is often used as a measure of activity. Other measures of activity also exist, and these will be presented to the necessary degree during the main hearing.

"Active share" means the proportion of the fund's capital assets that deviate from the composition of the benchmark index of shares. Any deviation will be relevant, whether it relates to investments in different shares or investments in the same shares but involving a greater or lesser proportion of the capital (weighting) than in the benchmark index. If the entire capital is placed in the same shares underpinning the index, with the same weighting (proportion of the capital), the active share will equal 0%. Correspondingly, if the entire capital is invested in ways that differ from the benchmark index, the active share will equal 100%. In slightly simpler terms: the higher the "active share", the more actively the fund is being managed.

What is measured in connection with "tracking error", are those fluctuations in the fund's return over time that cannot be explained by corresponding fluctuations in the benchmark index (active return). Where active share measures the composition of the share portfolio directly, tracking error takes the size of the return as its starting point. If the fund's return over time corresponds

very closely to the benchmark index's (theoretical) return, it will be an indication that the portfolio's composition is the same as that of the benchmark index. Correspondingly, substantial deviations over time will indicate differences between the fund's composition and that of the benchmark index. Tracking error is specified as a percentage, which indicates the difference between the return for the fund and the return for the benchmark index over a given period of time. Again, a simplified explanation would be: the higher the tracking error, the more actively the fund is being managed.

R^2 measures how large a proportion of the variation in the fund's return can be explained by the return on the benchmark index. R^2 is specified as a figure between 0 and 1, where 1 means that the entire return is due to the return on the benchmark index, while 0 means that none of the return is attributable to the index's return. In other words, the closer R^2 is to 1, the less actively the fund is being managed.

Below, we will analyse the level of activity in the DNB Norge funds largely on the basis of these parameters.

7. The FSAN's analysis of Norwegian share funds – rectification order

In June 2014, the FSAN initiated an investigation into several securities funds which it suspected of having a low level of activity compared with the way they were marketed and priced.

The FSAN's analyses led to DAM being asked to give a more detailed account of the relationship between DNB Norge's investment profile and the actual management of the fund.

Exhibit 26: Letter from the Financial Supervisory Authority of Norway to DAM, dated 12 June 2014 (pp. 167–168)

In its analyses, the FSAN concentrated primarily on low "tracking error" and the fact that there was a modest discrepancy between the fund's returns for the past three years and the returns on the benchmark index. This was deemed to indicate that the fund was being managed closely in line with the index. In a letter to the FSAN dated 15 August 2014, DAM refuted the FSAN's claims that DNB Norge was being managed in practically the same way as an index fund.

Exhibit 27: DAM's letter to the FSAN, dated 15 August 2014 (pp. 169–171)

In its reply, DAM claimed that DNB Norge was being managed in line with its investment mandate, and that it was more relevant to take into account a period of at least five years.

The FSAN did not change its opinion as a result of DAM's feedback. On 28 November 2014, the FSAN notified DAM of its intention to issue a rectification order. Having given an account

of its views regarding the actual and legal issues raised by the case, the FSAN concludes its letter thus (page 6):

> "It is the opinion of the Financial Supervisory Authority of Norway that the actual management of DNB Norge has, for a long period of time, deviated substantially from the manner presumed in the fund's articles of association and prospectus, and the way in which the investors have been led to believe. The fund is managed practically passively, but offered and priced by DNB as an actively managed fund. The undertaking has in this way charged for something which it has not delivered. In the assessment of the FSAN, the way in which the undertaking has organised the management of DNB Norge has not safeguarded the shareholders' interests, as is required under the Securities Funds Act's rules relating to good business practice."

The FSAN issued a notice ordering DAM to either organise its management in accordance with the practices characterising active management or adjust its pricing and marketing materials such that the investment strategy was made plain.

Exhibit 28: Letter from the FSAN to DAM, dated 28 November 2014 (pp. 172–178)

In a new letter, dated 23 January 2015, DAM maintained its opinion that DNB Norge had been managed sufficiently actively. DAM's objections related to the FSAN's alleged exaggerated use of active share and tracking error as measures of activity. In addition, DAM objected to the figures on which the analyses were based.

Exhibit 29: DAM's letter to the FSAN, dated 23 January 2015 (pp. 179–183)

The FSAN maintained its opinion and ordered DAM to rectify its practices in a letter dated 2 March 2015.

Exhibit 30: Rectification order issued by the FSAN, dated 2 March 2015 (pp. 184–192)

The FSAN's reasoning is practically identical to that specified in the initial notice. In a letter to the FSAN dated 14 April 2015, DAM gave notice that the order would not be appealed. DAM complied with the rectification order by increasing the active share to over 30%, the tracking error to over 3% and by changing its investment and other instructions.

Exhibit 31: Letter to the FSAN from DAM containing revised internal instructions, dated 14 April 2015 (pp. 193–205)

In a letter to shareholders dated 11 May 2015, DAM provided information about the FSAN's rectification order and the changes DAM had made in the management of the fund.

Exhibit 32: Letter to shareholders from DAM, dated 11 May 2015 (pp. 206)

The FSAN's topical audit with respect to share fund management did not lead to rectification orders being issued to other management companies, although Nordea Funds Ltd was criticised for its management of the fund Nordea Avkastning.

Exhibit 33: The FSAN's press release on topical audits, dated 21 May 2015 (pp. 207–208)

Exhibit 34: The FSAN's letter to Nordea Funds Ltd, dated 19 May 2015 (pp. 209–214)

8. Management of DNB Norge, DNB Norge (I) and Avanse Norge (I)

8.1 Introduction

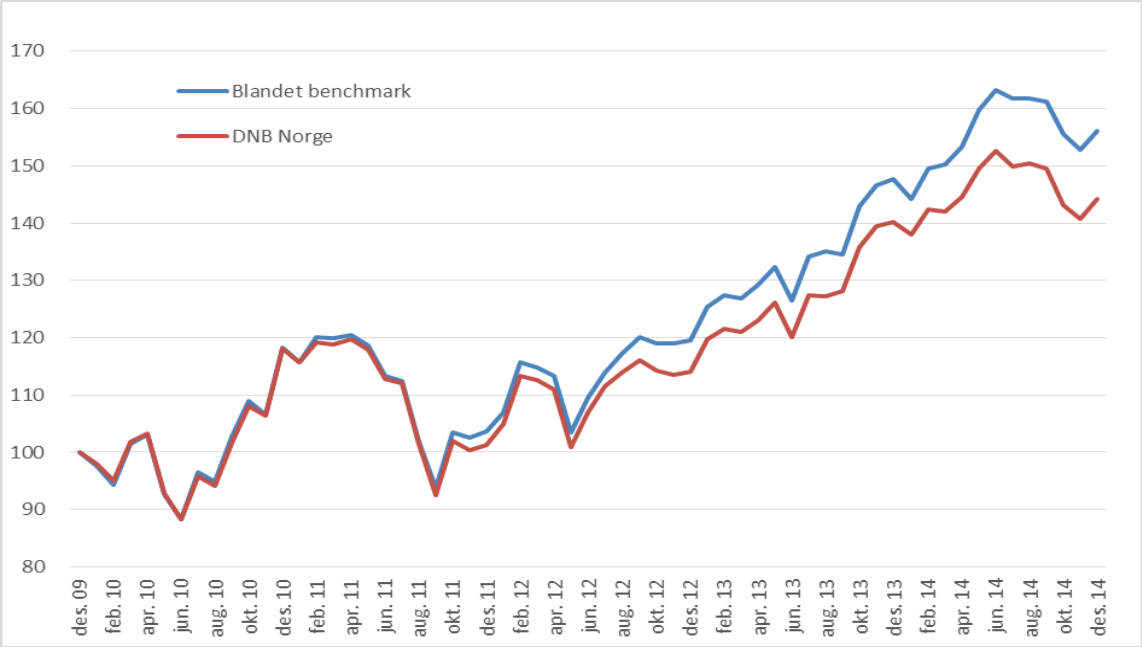
The key issue in this case is the extent to which DNB Norge, DNB Norge (I) and Avanse Norge (I) have been managed as actively as the shareholders were led to believe in the respective prospectuses, articles of association and key information. This raises questions about the parameters which should be used to measure a fund's activity, how active the funds have been with respect to these parameters and, in that case, the extent to which the activity performed is sufficient to fulfil DAM's obligations to the shareholders.

8.2 Key measures of activity in the management of DNB Norge, DNB Norge (I) and Avanse Norge (I)

In addition to the report dated 1 June 2015 (exhibit x over), Petter Bjerksund and Trond Døskeland have, at the behest of the Consumer Council, prepared a further report examining the level of activity in DNB Norge, DNB Norge (I), Avanse Norge (I) and Avanse Norge (II) for the period 2010 to 2015.

Exhibit 35: "Grad av aktivt forvaltning for fond i DNB Norge-familien" [Degree of active management of the funds in the DNB Norge family], 24 May, Bjerksund and Døskeland, NHH (pp. 215–251)

On page 6 of the report (fig. 5), Bjerksund and Døskeland have created a visual comparison of developments in DNB Norge and the benchmark index (OSEBX until May 2013, thereafter OSEFX) in the period 31 December 2009 to 31 December 2014.



The figure shows that DNB Norge's developments have closely shadowed developments in the benchmark indexes.

In the relevant period for the present case – from 31 December 2009 until 31 December 2014 – the fund had an active share of 12.38% on average, measured per month (fig. 9 on page 13). As can be seen, the active share in 2010, 2011 and 2012 was below average, for fairly long periods also under 10%, while the active share was higher in 2013 and 2014, particularly right at the end of 2014 after DAM had been notified of the FSAN's intention to issue a rectification order. The active share rose sharply from approx. 17–18% to more than 30% over the course of a very short space of time. Page 12 of the same report shows that the tracking error for the period averaged 1.39%, with more or less the same trend as for the active share, while page 8 of the report shows that R^2 ("R-squared") through the period came to 0.9921. R^2 shows the proportion of the fund's return that is due to the return on the benchmark index, and 1 means that the fund's entire return can be explained by the return on the benchmark index.

The values for DNB Norge (I) and Avanse Norge (I) are – apart from some negligible exceptions – identical to the values for DNB Norge. Reference is made to the report.

8.3 What is the minimum threshold of activity in a fund that is sold as active?

The core question in this case is whether DAM has managed DNB Norge so passively that it constitutes a breach of duty to the shareholders (under the law of obligations and the law of compensatory damages). Thus, the court must identify the minimum acceptable threshold of activity required under the management assignment.

No established, authoritative limit exists for how high an activity share or tracking error a fund must have to be actively managed. Nor are there any binding guidelines for what is otherwise required for a fund to be actively managed. Thus, any assessment of activity in DNB Norge compared with the information in the prospectus, etc, must rest on informed judgement. However, the Consumer Council contends that certain threshold values have been developed through legal and economic theory, which must offer clear guidelines for the court's decision. In the opinion of the Consumer Council, the values relating to DNB Norge indicate that the fund is insufficiently actively managed no matter which parameters are applied as measures of its activity and which threshold values underpin the assessment.

In March 2016, Morningstar published a report (Active Share in European Equity Funds) containing the results of a wide-ranging assessment of the active share of 456 major European (though no Norwegian) securities funds.

Exhibit 36: "Active Share in European Equity Funds", Morningstar 2016 (pp. 252–296)

In the report, Morningstar operates with a 60% active share as the minimum threshold for truly active funds, while funds with a lower active share are referred to as "closet index funds". Certain reservations are made for smaller markets (which Norway would be).

The survey otherwise shows that the average active share among the funds investigated was 69.6% in the period March 2012 to March 2015, and that 20.2% of the funds had an active share of less than 60%. Among all the 456 funds examined, the lowest active share was 19.8% during the three-year period concerned.

On 2 February 2016, the European Securities and Market Authority (ESMA), an independent financial markets supervisory authority under the EU, issued a report on its supervision of potential closet index funds in the EU.

Exhibit 37: "Supervisory work on potential closet index tracking", European Securities and Market Authority, 2 February 2016 (pp. 297–301)

On page 4 of the report, the ESMA operates with a 50% active share and a 3% tracking error as the minimum threshold for potential closet index funds in member states with "relatively small equity markets". We contend that this is relevant for markets like the Norwegian market.

Similar surveys have been carried out of activity in Norwegian funds. In his Master's degree dissertation "Hvor aktive er norske aksjefond? " [How active are Norwegian Share Funds?], Christoffer Knutsen, NHH, 2014, states that the average active share among Norwegian funds marketed as active was 41% in the period 2004–2013, ie somewhat lower than for European funds. Knutsen operates with a minimum threshold for Norwegian closet index funds of 50%, and finds that around 2/3 of Norwegian "active" funds are closet index funds.

Exhibit 38: "Hvor aktive er norske aksjefond?", Knutsen, NHH, 2014 (pp. 302–397)

In fig. 20 (on page 74 of the dissertation), 55 Norwegian active funds are ranked according to average active share in the period 2004–2013. At approx. 15%, the DNB funds which were managed through DNB Norge (IV), like DNB Norge, have the lowest active share of them all. Apart from a Storebrand fund (Storebrand Askje Innland), there are no other funds that are sold as active which have an active share of less than 20%. The Storebrand fund operates (as at 2016) with a management fee of 0.6%. Nordea Avkastning, which has also been under FSAN scrutiny for having insufficiently active management, (Exhibit x above), had an active share of 26.5% in the period.

In table 10 (page 83 of the dissertation), all the funds are ranked from the least to the most active, based on active share, tracking error and R^2. When the three relevant criteria are presented together, DNB Norge comes out as the third least active, marginally ahead of DNB Norge (IV) and DNB Norge (I), which have the same investment strategy. Among the seven funds with the lowest active share, six are DNB funds, all managed by DAM based on a largely similar investment strategy.

Internationally, funds with an active share of less than 50–60%, depending on the size of the national market, seem to be considered "closet index funds", while the corresponding threshold in Norway must probably be set at approx. 50%.

In a Master's degree dissertation from the Norwegian School of Economics and Business Administration (NHH), "Active share i Norsk fondsforvaltning" [Active share in Norwegian fund management] by Smørgrav/Næss (16 December 2011), the authors operate with four different fund categories depending on the active share: Extremely active (70–100%), semi-active (40–70%), near-index (10–40%) and index funds (0–10%). The overview in section 8.2 above shows that, for long periods in 2010, 2011 and 2012, DNB Norge had an active share of less than 10%, right down to 6–7%, ie the same as a pure index fund. On page 61 of the same dissertation, it says that funds with an active share of 0–20% and a tracking error in the interval 0–2% have an average total cost of 0.86%.

Exhibit 39: "Active share i norsk fondsforvaltning", Smørgrav/Næss, NHH, 2011 (pp. 398–471)

In Denmark, the Danish Financial Supervisory Authority (DFSA) operates on the basis that an equity fund is actively managed only when it has an active share in excess of 60%, at the same time as its tracking error is over 4%. Funds with an active share of less than 60% are considered semi-active, while funds with an active share below 20% are deemed to be "passively managed funds".

Exhibit 40: Danish Financial Supervisory Authority (DFSA) – Markedsudvikling [Market developments] 2013 (pp. 472–492)

On behalf of the shareholders, the Consumer Council contends that DNB Norge, DNB Norge (I) and Avanse Norge (I) have been so passively managed that they can, in reality, be compared with pure index funds.

8.4 Summary

The Consumer Council submits that in the period 1 January 2010 to 31 December 2014, the DNB funds were in reality managed as an index fund, or at least as a "closet index fund", despite the fact that the funds were supposed to be actively managed according to their prospectuses, key information and articles of association.

With an active share of approx. 12% and a tracking error of 1.39% through the period in question, the DNB Norge funds were the "active" funds with the lowest level of activity by far in Norway. Whether the minimum threshold for an active fund is defined as an active share of 60% or 50% – or even lower – is not crucial, since the active share in the DNB Norge funds lay substantially below these levels in any case. The findings linked to active share are further reinforced by other measures of activity, such as R^2. No relevant measures substantiate the assertion that DNB Norge was actively managed during the period.

9. The legal aspects of the case

9.1 Introduction

The Consumer Council is taking legal action principally to claim compensation, alternatively to claim a price reduction. In both cases, we are requesting the reimbursement of fees which exceed the correct amount for the management services DAM has actually performed. In addition, compensation is requested for lost profit on the fees which DAM has unjustly received and which would otherwise have been included in the shareholders' capital assets and generated a return in line with the DNB Norge funds' development.

9.2 Issues relating to identification

With the exception of a potential claim based on disclosure liability, cf. below, it will be DNB Norge, DNB Norge (I) and Avanse Norge (I) as such that will be directly entitled to compensation on the grounds previously discussed. The Consumer Council submits that the shareholders are entitled to pursue the fund's claims.

In the preparatory work with respect to the Securities Funds Act, it is a fundamental presumption that securities funds are autonomous legal entities, but a fund exhibits few of the

traditional characteristics of a legal entity. The fund has no management or governing bodies, and is in reality totally entrusted to the management company's performance of its management assignment. It would be completely unreasonable in law if the management company were to have the last word on whether the fund should pursue a claim against the management company.

Even though a securities fund is presumed to be an autonomous legal entity, it will certainly not have the capacity to sue and be sued in civil law, cf. s 2-1(2) of the Disputes Act. This issue is discussed in Filip Truyen's "Kollektive investeringsformer – forholdet mellom verdipapirfond, investeringsselskaper og aksjespareklubber" [Collective forms of investment – the relationship between securities funds, investment companies and investment clubs], Tidsskrift for rettsvitenskap, 2006, pages 268–340. From page 295:

> "With respect to Norwegian law, following the pattern of Swedish law, questions may be asked about whether securities funds have the capacity to sue and be sued. As a rule, the ordinary capacity to sue and be sued presumes that there is a body which can represent the association externally. The management company is not the fund's own body. For that reason, it may be imagined that, as for a registered commonhold scheme, one may entrust the participants with pursuing any claims the management company does not follow up. On the other hand, the typical ownership structure of a securities fund may make such enforcement impractical. The rules governing securities funds rest on it being a form of investment with a large proportion of small investors with limited resources and insight. On this point, however, the rules on class action may help reinforce the consumer protection aspect, see Chapter 35 of the new Disputes Act. The interests of the investment market are therefore taken care of without the securities fund having the capacity to sue and be sued."

Since the fund as such does not have the capacity to sue or be sued, the shareholders must, individually or collectively, take legal action, such as would be the case for a registered commonhold. There is an obvious connection between the individual shareholder and that person's share of the fund's losses, and there is, in practice, no way to pursue the claim other than by the shareholders pursuing the fund's claims through a class action such as this.

9.3 Breach of duty in general

A securities fund is an autonomous legal entity, but the fund has no bodies of its own, and it is the management company which manages the fund and "makes all dispositions" with regard thereto, cf. s 1-3 and s 2-14(1) of the Securities Funds Act. In consideration for this, the management company receives a management fee in accordance with s 4-6 of the Securities Funds Act.

Pursuant to the Securities Funds Act and the Regulations Relating to Securities Funds, it is up to the management company's leadership to organise the operation in a manner which ensures that each fund is managed in line with the investment strategy specified in the fund's prospectus and

articles of association (s 2-11 of the Securities Funds Act and s 2-9 of the Regulations Relating to Securities Funds) and in line with good business practice (s 2-15 of the Securities Funds Act). The shareholders themselves have no real opportunity to protect or exercise control over their interests linked to dispositions relating to the fund's capital or other aspects of the fund's management, and the Securities Funds Act therefore sets strict standards for risk management and internal reporting to ensure that the fund is managed as expected (cf. s 2-11 and s 2-12 of the Securities Funds Act and Chapter IV of the regulations).

The Consumer Council submits that DAM has breached its duty to the shareholders of the DNB Norge funds as they are described in the prospectuses, articles of association, key information and marketing materials, and therefore also its obligations as the management company under the Securities Funds Act. The breach of duty consists of the fact that the DNB Norge funds have, over time, been managed as if they were – or almost as if they were – an index fund, despite the fact that the funds were described, marketed and priced to the shareholders as active funds.

In the correspondence with the FSAN and the Consumer Council, DAM has contended that it is stated in the prospectuses and key information that DAM has "substantial freedom in the management". This is not contested, but the Consumer Council contends that the freedom this refers to applies within the framework of the active investments the management company is supposed to make. It cannot reasonably be taken to mean the freedom not to manage the funds actively, which is the very essence of the management service the shareholders pay DAM to perform. Nor is it relevant – as DAM has pointed out – that four managers have participated in the management of the fund, as long as their analyses have not led to active investment positions in the stock market.

The Consumer Council contends that the breach of duty represents legal grounds for claims by the shareholders, with respect to both the law of obligations and the law of compensatory damages.

9.4 Principal claim: under the law of compensatory damages

9.4.1 Grounds for liability

The Consumer Council is contending principally that DAM is liable under the law of compensatory damages, on two alternative grounds: s 11-1 of the Securities Funds Act and the non-statutory misrepresentation/disclosure liability.

S 11-1(1) of the Securities Funds Act lists the extent of the management company's liability for compensatory damages:

> "A management company shall be liable for losses inflicted on the fund by negligent business conduct."

The details of the provision relating to compensatory damages accord with the ordinary principles of the law of compensatory damages. The question is whether it was negligent of DAM not to comply with DNB Norge's management strategy. The Consumer Council submits that it was. Ensuring that the fund is managed in line with the investment strategy set out in its prospectus, articles of association and key information is a fundamental task for the management company. DAM is a professional fund manager, and the setting aside of entirely fundamental duties to the shareholders – over a long period of time – must be deemed negligent at the very least.

There are clear indications that the passive management of the fund was a deliberate strategy, and that DAM was in any case fully aware that the management of DNB Norge was less active than the norm for active funds would dictate. The Securities Funds Act and the Regulations Relating to Securities Funds set out a number of requirements for management companies that are intended to ensure that the individual fund is managed in accordance with the investment goals, strategy and risk level presented in its prospectus, articles of association and key information.

Furthermore, DAM has received clear signals that the funds have been managed passively, both from the FSAN and its internal auditing function. As long ago as 2007, the forerunner of the today's FSAN (Kredittilsynet) pointed out to DnB Kapitalforvaltning ASA (subsquently DAM) that the management of Postbanken Norge (now DNB Norge), DNB NOR Norge (I) (now DNB Norge (I)), Avanse Norge (I) and several other funds (including the feeder fund DNB NOR Norge (IV), now DNB Norge (IV)) was less active than their prospectuses, articles of association, key information and management fee would indicate.

Exhibit 41: Letter from Kredittilsynet to DnB Kapitalforvaltning ASA (subsequently DAM), dated 28 August 2007 (pp. 493–445)

DnB Kapitalforvaltning ASA replied to the letter on 11 September 2007.

Exhibit 42: Letter from DnB Kapitalforvaltning ASA to Financial Supervisory Authority of Norway, 11 September 2007 (pp. 495)

The letter contains an explanation of the low tracking error during the period the Kredittilsynet had analysed, 1.46% on average over the previous three years. At the end of the letter DnB Kapitalforvaltning ASA writes:

> "We are, however, aware of the issues the analysis raises."

In the period from 2010 to 2014, to which this case relates, the average tracking error was 1.39%, ie even lower than that which was censured by the Kredittilsynet in 2007.

That there was an awareness of the issue inside DAM is also evident from the interim report issued by DNB's group internal auditing function for the second half of 2013, in which it recommends that DAM see to it that "there is a reasonable connection between the exercise of liberty in the management of the individual fund and the customers' commission costs". The report further points out that when: "DNB now offers low-cost index funds, the costs of actively managed funds should be proportional to how actively the risk mandates are exploited".

Exhibit 43: Excerpt from the half-year internal audit report on DAM, 2013 (pp. 496–499)

It is alternatively submitted that DAM's liability for compensatory damages derives from the non-statutory misrepresentation/disclosure liability, cf. the principles set out in Rt. 2008 p. 1078, Rt. 2015 p. 556 and legal literature.

DAM has negligently (at the very least) provided shareholders with misleading information about how the fund is managed, in that they were led to believe it would be managed actively when, in reality, the fund has been managed passively. The misleading information has been provided in a professional context to recipients who have had "reasonable and justifiable grounds to trust in and act according to the information". The ripple effect argument cannot be invoked with respect to those who have in actual fact bought shares in the fund on the basis of misleading information.

9.4.2 Causal connection, and financial loss

As long as grounds for liability exist, the shareholders are entitled to be restored financially to the position they would have been in if the damaging action had not taken place. The easiest and most practical remedy would be for DAM to be ordered to reimburse DNB Norge with an overall amount which devolved to the fund's capital. However, such a solution is not feasible because the shareholder body was not the same throughout the whole period. A shareholder who sold out in 2012 is entitled to compensation for the period 2010 to 2012, but would in reality receive no compensation if the compensation devolved to the fund. DAM must therefore pay compensation to each individual shareholder, based on the number of shares and the period of ownership.

It is not possible to calculate losses on the basis of an imagined scenario where the shareholders are restored financially to the position they would have had had the funds been managed actively, as indicated in the prospectuses, articles of association and key information and management fee. Such a calculation rests on many factors which cannot be simulated with a satisfactory degree of certainty.

What the shareholders have been deprived of by DAM's passive management strategy – and which distinguishes passive management from active management – is the possibility of achieving a higher return than that offered by the benchmark index. The loss of this possibility can best be valued as the difference between the fee for de facto active management and passive

management. To some extent the calculation of loss will rest on informed judgement, but the Consumer Council submits that the management performed justifies a management fee of 0.3% per year, corresponding to the amount DNB's index funds charge their customers. In which case, the compensation claimed is the difference between 1.8% per annum and 0.3% per annum for the individual shareholder for the period concerned.

Furthermore, compensation is claimed for the loss the shareholders have suffered from missing out on the return on the capital that was unjustly deducted in management fees. Compensation is claimed for the accumulated return on the difference between 1.8% and 0.3% for the individual shareholder through the period, based on the fund's actual development.

At the behest of the Consumer Council, Bjerksund/Døskeland have calculated the combined loss for the shareholders in the period.

Exhibit 44: Bjerksund/Døskeland, "Fond i DNB Norge-familien: Beregning av tap som følge av for høye honorarer" [Funds in the DNB Norge family: calculation of loss as a result of excessive fees], 10 June 2016 (pp. 500–509)

The combined claim for compensation for the payment of excessive management fees for the period 1 January 2010 to 31 December 2014 totals NOK 536,481,754. The combined lost return for the shareholders as a group totals NOK 154,279,359. The overall claim therefore comes to NOK 690,761,112.

The practical calculation of the loss for the individual shareholder will have to wait until the court has decided the underlying premises therefor. However, it is expected that it will be possible to do this automatically in an Excel spreadsheet. On average, the claim per shareholder comes to approx. NOK 5,000.

In the opinion of the Consumer Council, there is undoubtedly a causal connection between DAM's damaging actions – negligence in the management of DNB Norge – and the loss suffered by the individual shareholder.

9.5 Alternative claim: under the law of obligations

The Consumer Council submits, as an alternative claim, that DAM is liable under non-statutory principles of the law of obligations.

No explicit contract exists between DAM and the individual shareholder with respect to DAM's management assignment, but the management company's rights and duties may be deduced from the Securities Funds Act, supplemented by articles of association, prospectuses and key information documents. A number of contractual rights and duties between the parties can therefore be shown, which substantiate a contract-like relationship. At the very heart of the legal relationship between the shareholders of DNB Norge and DAM is that the latter performs a

specific management assignment on behalf of the fund, in return for a consideration which is partly regulated by law and is partly specified in the articles of association. The content of the services is based on guidelines set out in articles of association, prospectuses and key information issued by the management company to the shareholders prior to the purchase of shares in the fund. The management assignment is established by means of the shareholder signing a "purchase form".

The legal relationship between DAM and the shareholders rests on so many contractual elements that ordinary principles of the law of obligations come into effect.

The Consumer Council submits that the breach of duty by DAM detailed in section 9.2 above constitutes a breach of DAM's obligations under the law of obligations with respect to the shareholders, such that the shareholders are entitled to demand a price reduction and compensation.

The Consumer Council contends that the price reduction must be calculated as the difference between the value of the service the shareholders paid for – active management – and the remuneration that is normal for the service the shareholders actually received – passive/near-index management. Although calculation of the specific price reduction will to some degree rest on informed judgement, the starting point is that the fee charged for purely index management is 0.3%. The Consumer Council submits that the price reduction should be set at the difference between 1.8% and 0.3%, ie 1.5% per annum.

Pursuant to the law of obligations, the Consumer Council will also request compensation for consequential loss in the form of lost future returns on that part of the management fee that the fund was unjustly charged. In accordance with ordinary principles of the law of obligations, default constitutes grounds for compensation for consequential losses – indirect losses – as long as the default is due to negligence. The Consumer Council submits – in line with that specified in sections 9.2 and 9.3.1 above – that DAM acted negligently in managing the DNB Norge funds substantially less actively than that indicated in the prospectuses, articles of association and key information. The consequential loss may be calculated as the return that the individual shareholder would have earned if the amount corresponding to the price reduction had remained in the fund and benefited from the actual return in the DNB Norge funds during the period in question. The calculation of the shareholders' overall loss is presented in section 9.4.2 above.

During preparation of the case, DAM has contended that the complaint has come too late, without any elaboration of this contention. The shareholders of the DNB Norge funds had no real opportunity to uncover DAM's failure to fulfil its obligations before they were informed of the FSAN's rectification order and DAM's actions to comply therewith in DAM's letter of 11 May 2015. DAM was initially made aware that the Consumer Council intended to examine the grounds for taking legal action on behalf of the shareholders in our letter of 6 October 2015.

Exhibit 45: Letter from Advokatfirmaet Mageli ANS to DAM, dated 6 October 2015 (pp. 510–511)

Following further contact between the parties, DAM issued, on 16 November 2015, a statement in which time limitation, complaint and passivity objections were suspended for six months.

Exhibit 46: Statement from DAM, dated 16 November 2015 (pp. 512)

This statement has subsequently been extended, and explicitly made applicable to the funds DNB Norge (I) and Avanse Norge (I).

Exhibit 47: Statements from DAM, dated 11 April 2016 (pp. 513–516)

Since the shareholders of DNB Norge (I) and Avanse Norge (I) as at 16 November 2015 were shareholders in DNB Norge by means of a merger, it is contended that the statement of 16 November 2015 applies to all shareholders of DNB Norge at that point in time, also for that part of the claim associated with the management of DNB Norge (I) and Avanse Norge (I).

The Consumer Council contends principally that a complaint has been filed within a reasonable period of time, taking account of the case's scope and complexity. Alternatively, the Consumer Council contends that DAM is prevented from invoking an overdue complaint because the breach of duty is due to gross negligence.

9.6 Time limitation

9.6.1 Introduction

In its response dated 22 February 2016 to our notification of claim, DAM asserted that limitation had set in for "the bulk of the claim" (at that time in relation to an intimated time period of 2004–2014). No detailed grounds were given for this assertion. The Consumer Council denies that any part of the claim is limited.

9.6.2 Time limitation on claims submitted pursuant to the law of compensatory damages

With respect to claims submitted pursuant to a statutory provision or non-statutory principle relating to compensatory damages – which is the principal foundation for the Consumer Council's action – s 9 of the Claims Limitation Period Act will apply. Claims for damages must be filed no more than three years from "the date on which the injured party obtained or should have obtained necessary knowledge about the damage and the person responsible".

In case law, the presumption is that the creditor has the necessary knowledge when he has sufficient knowledge of the damage and the person responsible that he is "encouraged to file

suit" or "initiate legal proceedings with a view to a positive outcome", cf. Eidsand Kjørven et al, Foreldelse av fordringer [Time limit on receivables], 2011, p. 134. In our case, the matter of when the fund/shareholders obtained or should have obtained "necessary knowledge" about the receivable, ie that the fund was managed differently to what they had been led to believe and differently to what the management fee would indicate, will be crucial.

The Consumer Council submits that the shareholders obtained "necessary knowledge" about the receivable at the earliest when they learned of the FSAN's rectification order in DAM's letter of 11 May 2015, and that this date constitutes the starting point for the time limit on claims under s 9 of the Claims Limitation Period Act. The deadline for claims does not expire until 11 May 2018. By its statement of 16 November 2015, DAM interrupted the limitation period for six months from that date. On 11 April 2016 the statement was extended by three months.

9.6.3 Time limitation on claims submitted pursuant to the law of obligations

The time limit on claims arising from default expires three years from "the day on which the default occurs", cf. s 3(2) of the Claims Limitation Period Act. In the event of successive default in ongoing contracts, the presumption is that each and every default must be assessed separately. The time limit runs from the date the default ceases, and losses caused by previous defaults become time-barred from the date of the previous default. In other words, the time limits on claims for repayment of excessive consideration resulting from inadequate delivery of the management service shareholders had been led to believe would be provided, expire successively after three years.

The Consumer Council submits that the shareholders are entitled to an extension pursuant to s 10(1) of the Claims Limitation Period Act.

The Claims Limitation Period Act's s 10 states that if "the creditor has not asserted the claim because he lacked the necessary knowledge of the claim or of the debtor, the period of limitation shall expire at the earliest one year after the date on which the creditor obtained or should have obtained such knowledge". In practice, the requirement for "necessary knowledge" in the Claims Limitation Period Act's s 10(1) has been interpreted in the same way as the corresponding proviso in s 9, discussed in section 9.6.2 above. The Consumer Council submits that the shareholders are entitled to a one-year extension of the deadline, starting from DAM's letter of 11 May 2015. DAM's statement of 16 November and subsequent extension on 11 April 2016 means that the period of limitation was interrupted on 16 November 2016. No portion of the claim – submitted under the law of obligations – is therefore limited.

10. Procedural issues – class actions

10.1 Introduction

The case is being brought by the Consumer Council as a class action, cf. Chapter 35 of the Disputes Act. The action's form raises numerous procedural and practical questions, which we will attempt to answer in this chapter. In the opinion of the Consumer Council, the conditions required to bring the case as a class action have been fulfilled, and the Consumer Council is entitled to act as the class representative. Bringing the action pursuant to the so-called opt-out alternative, cf. s 35-7 of the Disputes Act, appears to be the most expedient solution.

10.2 Identification of potential class members

Those encompassed by the class action are legal and natural persons who have held shares in DNB Norge, DNB Norge (I) or Avanse Norge (I) in the period 1 January 2010 to 31 December 2014. DNB Norge currently has an estimated 137,000 shareholders and capital assets of approx. NOK 8 billion.

Reference is otherwise made to Chapter 5 above, which gives an account of the development of the funds DNB Norge, DNB Norge (I) and Avanse Norge (I). As shown in Chapter 5 above, the three funds are today combined in DNB Norge following a series of mergers.

The Consumer Council does not have a list of the shareholders, but based on the fund's profile and terms, the shareholders appear to be largely private individuals, so-called small investors. However, it is presumed that DAM will provide the information necessary to enable the shareholders to be identified. Such a duty of activity seems to underlie Proposition No. 51 (2004–2005) to the Odelsting, page 335, which in its discussion of class actions relating to the general raising of interest rates on bank loans states the following on the eventuality that the action succeeds:

> *"In which case, the companies themselves will have an overview of their customers and the knowledge to implement the ruling in relation to the class members."*

Corresponding views must be applied in the present case.

10.3 The class representative

According to s 35-3(1)(b) of the Disputes Act, a class action may be brought by "an organisation, an association or a public body charged with promoting specific interests, provided that the action falls within its purpose and normal scope pursuant to s 1-4".

The Consumer Council is publicly funded, but politically independent of its overarching government ministry (Ministry of Children and Equality), having specific powers, its own board and articles of association promulgated by royal decree.

Exhibit 48: The Consumer Council's articles of association, last updated 5 November 2010 (pp. 516–519)

It lies within the core activities of the Consumer Council to highlight consumer rights and consumer issues. The Consumer Council is mentioned in Schei et al, Tvisteloven, 2. utgave [The Disputes Act, 2nd edition], page 1,273, as an example of a typical class representative. The law thus presumes that the Consumer Council can bring legal action on behalf of a group, as long as the matter relates to consumer interests. This is obviously the case here.

Should the district court find that the conditions for a class action have been met, it is requested that the Consumer Council be appointed as the class representative, cf. s 35-9(3).

10.4 Fundamental conditions for bringing a class action

The conditions under which a class action may be brought are specified in s 35-2(1) of the Disputes Act. The key question is whether the shareholders "have claims or obligations whose factual or legal basis is identical or substantially similar", cf. (a) and whether a class action "is the most appropriate way of dealing with the claims", cf. (c). The other conditions raise no questions in this present case.

The Consumer Council is of the opinion that the conditions for bringing a class action have been met.

Firstly, the factual and legal basis of all the shareholders' claims is the same:

All the supporting factual circumstances in the case relate to the shareholders as a group. The external framework for DAM's management assignment is the same for all the shareholders, in the form of the funds' articles of association, prospectuses and key information. The three funds' investment profile has been the same, and it has not changed through the period concerned. It is therefore less significant that certain linguistic changes have been made in the prospectuses, articles of association and key information during the period. If the objective of the linguistic changes in the investor information had been to change the fund's investment profile, this would also have had to be communicated clearly to the existing shareholders. Whether the individual shareholder has been a shareholder in DNB Norge (formerly Postbanken Norge), DNB Norge (I) or Avanse (I) is therefore of no significance to the assessment of the claim, nor is the individual shareholder's purchase date of significance to the actual grounds on which the claim rests.

The shareholders have also been charged the same management fee.

The shareholders' capital has, furthermore, been managed in the same way or practically the same way during the period. The capital in the funds DNB Norge and DNB Norge (I) has been managed jointly in the feeder fund DNB Norge (IV) for the entire period. Our analyses show that Avanse Norge (I), through the feeder fund Avanse Norge (II) has also been managed in practically the same way. The assessment of whether management of the fund has been sufficiently active, can therefore be performed for the group as a whole.

The legal basis for the claim will also be almost identical for all the shareholders.

The grounds for liability are identical for all concerned. On behalf of the shareholders, it is submitted that the actual management of the funds was not in accordance with the management assignment as it was expressed in the prospectuses, articles of association and key information. The court's decision must rest on an evaluation of whether DAM, in its de facto management of DNB Norge, DNB Norge (I) and Avanse Norge (I), has actually kept within the framework of the management assignment, including the level of activity which is necessary to meet the requirements for active management. Shareholders' individual circumstances will have no relevance for this assessment.

The size of the price reduction and compensation awarded will necessarily have to be determined specifically for each individual shareholder, depending on the size of their holding and the period in which they have held shares in the fund. Although the actual amount in NOK payable to each shareholder must be calculated individually, the calculation will rest on certain key premises which may in part be determined by the court at the class level – such as the determination of the correct fee for the management service DAM has actually performed – and in part by other objectively observable factors, such as the number of shares, relevant period, etc. When the court has come to a conclusion with regard to the overarching issues relating to the case, the actual calculation will not be difficult. It will probably be possible to perform the calculation automatically, eg in an Excel spreadsheet.

Even though loss and price reduction amounts must in principle be calculated for the individual, this does not hinder a class action. In the preparatory work with respect to the Disputes Act, it is presumed that a class action will not be hindered by the necessity of calculating the compensation payable to each class member individually, as long as the dominating aspects of the case apply to issues common to the class members, cf. Proposition No. 51 (2004–2005) to the Odelsting p. 492. We submit that the situation is precisely this in the present case.

In addition, the case will – as a result of the announced objections from DAM – raise certain complaint, passivity and time limitation issues which cannot be considered for the class as a whole. Individual assessment is nevertheless not necessary, since the issue of time limitation will rest largely on the extent to which the shareholders are entitled to an extension pursuant to s 10 of the Claims Limitation Period Act (under the law of obligations) or the starting point for the limitation period pursuant to s 9 (under the law of compensatory damages), a matter which

can be evaluated jointly for the shareholders concerned. Correspondingly, there is no need for individual assessment of any complaint issues arising from the case, because none of the shareholders have, as far as the Consumer Council is aware, filed a complaint on their own account. The question – for all shareholders – is therefore whether the Consumer Council's activities with respect to DAM fulfil the requirements for a complaint.

Class action also appears to be the best – and in practice, the only – way of dealing with the case, cf. s 35-2(c) of the Disputes Act. The extent to which this condition is met rests on a fairly broad assessment, central to which will be whether there is any other practical way to decide the case, see Proposition No. 51 (2004–2005) to the Odelsting, page 492 and section 25.4.5.2. The latter section underlines the need for claims constituting small amounts for the individual but large amounts for the defendant in question to have access to the courts:

> *"In the so-called interest-adjustment case, where the Consumer Council of Norway and the banking sector disagreed over the interpretation of the Financial Contracts Act's rules for the deadline for notifying consumers of a rise in interest rates, according to information received, an amicable settlement was negotiated with several banks, which resulted in the repayment of a total of NOK 53 million to approx. 122,000 bank customers. This is an example of the type of case in which class action would have been relevant if the parties had not arrived at an out-of-court solution. For the individual bank customer, the amount was of such small value that it would not have been expedient to initiate legal proceedings individually. The banks could therefore have achieved a substantial profit at the expense of the consumers. A development where consumers must resign because they do not have the power to win through with their legitimate claims could, in turn, erode confidence in the courts and lead to material rules not being respected."*

On pages 322–323 of Proposition No. 51 (2004–2005) to the Odelsting, the ministry provides examples of the types of cases which could typically be brought as class actions:

> *"Common to the examples is that they encompass situations which could affect a number of legal persons, often consumers, in the same or similar ways:*
>
> - *breaches of contract or rules in ongoing deliveries of goods and service, eg banking and insurance services, telephony and electronic communication services, electricity supply (cf. here the example from Sweden in 25.3.4.2) and various subscription arrangements. For the individual, the consequences of a breach of contract or rules may be small, while for the business operator it could be extremely lucrative."*

The case in point is positioned squarely at the heart of the type of cases the class action arrangement is intended to encompass. Since DAM has ruled out any agreement to the effect that a court ruling in one or more test cases may be given wider legal effect for the other cases, there is in reality no alternative to a class action. In the opposite event, the case would remain

unheard by a court of law, which would contravene the clear motives behind the introduction of the procedural arrangement described above.

10.5 The opt-in or opt-out alternative

In ss 35-6 and 35-7, the Disputes Act operates with two different kinds of class action, often called, respectively, the opt-in and opt-out alternatives. The decision falls to the court, cf. s 35-4(2) of the Disputes Act. However, the Consumer Council argues that the best solution in this case is the opt-out alternative, cf. s 35-7 of the Disputes Act.

The conditions for bringing a class action under the opt-out alternative are set out in s 35-7(1)(a) and (b) of the Disputes Act. Firstly, it is a condition that the claims "on their own involve amounts or interests that are so small that it must be assumed that a considerable majority of them would not be brought as individual actions".

As of today, the Consumer Council lacks a complete overview of the shareholders and the individual shareholders' claims. Even though the majority of shareholders are presumed to be small investors, account must be taken of the likelihood that the size of the claims within the group will vary somewhat. Based on the information that there are currently 137,000 shareholders in DNB Norge, and total capital assets of approx. NOK 8 billion, the average shareholder will have invested approx. NOK 75,000 in the fund. In which case, the annual management fee in the period concerned averaged approx. NOK 1,000. The claim in the present case, an overall maximum of approx. NOK 690 million, will on average give each shareholder around NOK 5,000. We are, notwithstanding, talking about such small amounts for the individual shareholder that it would be inconceivable for each one to pursue their claim through separate legal proceedings. In any case, this would apply to the vast majority of the class members, which is the key point. From Proposition No. 51 (2004–2005) to the Odelsting, p. 495:

> *"(1)(a) sets as a condition that the claims individually are not pursuable in law, ie that they relate to such small amounts or interests that it would be impractical to initiate individual legal proceedings for their recovery. The fact that, seen in isolation, certain of the claims, because of their size, are pursuable in law, does not hinder the bringing of a class action, cf. the ministry's additional qualification: "a considerable majority of them". This may be relevant in the types of cases where the claims have the same foundation, but where the calculation of the individual's financial compensation may vary, eg unjust amendment of interest rates, where the claims will vary depending on the size of the loan. The limit for when a claim may be expected to be pursued through individual legal proceedings must be evaluated specifically in each individual case, and it is natural that this will change over time"*

The second condition for applying the opt-out alternative is that the claims "are not deemed to raise issues that need to be heard individually", cf. s 35-7(1)(b) of the Disputes Act. Proposition

No. 51 (2004–2005) to the Odelsting, p. 496, has the following to say with regard to the interpretation of this proviso and the relationship with the basic condition in s 35-2(1)(a):

> "(1)(b) *sets out an enhanced requirement for similarity in relation to the main rule in s 35-2(1)(a). If any of the claims require individual consideration, they cannot be pursued as a class action under this provision. That the outcome for the individual is different when calculating compensation on the basis of the court's decision is not an obstacle to the claim being pursued in accordance with s 35-7."*

Reference is made to the discussion of the basic condition in s 35-2 of the Disputes Act above. In the opinion of the Consumer Council, this case raises no such individual issues as are meant to prevent use of the opt-out alternative. Individual outcome based on joint consideration of the case's factual and legal issues is not an obstacle to the use of the opt-out alternative.

In the provision's preparatory work, the ministry has highlighted the importance in such cases of all consumers being included in the action, also those who would lack the initiative to opt-in. From Proposition No. 51 (2004–2005) to the Odelsting, page 336:

> *"Cases relevant for the opt-out alternative encompass a large number of small claims that spring from ongoing customer or service relationships (banking and insurance, telephony and electronic communications, electricity supply, television and newspaper subscriptions, alarm services, transport, etc). In connection with these types of cases, the defendant can, as a rule, obtain an overview of the numbers a ruling or other decision in a case will have an impact on from his own customer database. In which case, the defendant can also calculate in advance any financial consequences of a ruling against him, and the conduct of a class action will proceed in the same way, irrespective of whether, for example, 2,000 customer opt into the class action or all 4,000 customers are automatically encompassed by it. If the group wins its claim, it would seem unreasonable and incomprehensible to consumers that the ruling should not have an effect for everyone affected in exactly the same way. A key consideration behind class actions for claims that are not pursuable individually is precisely to compensate the disadvantage represented by the fact that it is impractical for individuals to pursue their claims on their own account. In which case, it is natural that the action encompass everyone who is in the same legal position. It is important that the ruling be binding also for those consumers with the least resources, who for various reasons would otherwise have remained passive or ignorant of the class action and not availed themselves of the opportunity to opt in."*

As class representative, the Consumer Council will assume the risk of liability for legal costs pursuant to the opt-out alternative, cf. s 35-14 of the Disputes Act.

Finally, it is underlined that the opt-out alternative appears to be the best for practical reasons too. While the opt-in alternative requires the district court to keep a class register detailing all those who register as members (potentially more than 137,000 people and companies), the court's task in connection with the opt-out alternative will be limited to maintaining a register of those natural and legal persons who have taken the standpoint that they nevertheless do not wish to enter into the class action.

10.6 Delineation of the class

In its ruling on the bringing of a class action, the court shall "describe the scope of the claims that may be included in the class action", cf. s 35-4(2)(a). In the preparatory work to the act, it is presumed that the framework for the claim should be specified "as precisely as possible through objective criteria", cf. Proposition No. 51 (2004–2005) to the Odelsting, page 494. The delineation of the class that the court finds correct shall be specified in the conclusion to the ruling authorising the class action to be brought.

The Consumer Council proposes the following delineation:

> *"The class action encompasses all private individuals and legal persons who, in the period 1 January 2010 to 31 December 2014, were holders of shares in the securities funds DNB Norge (formerly Postbanken Norge), DNB Norge (I) or Avanse Norge (I)."*

11. Preparing the case and other procedural issues

11.1 Notification of claim

On 20 January 2016, the Consumer Council sent a notification of claim to DAM, cf. s 5-2 of the Disputes Act.

Exhibit 49: Letter from the law firm Advokatfirmaet Mageli ANS to DAM, dated 20 January 2016 (pp. 520–527)

A reply to the notification was issued on 22 February 2016.

Exhibit 50: Letter from DNB Bank ASA, Legal Affairs Department, to Advokatfirmaet Mageli ANS, dated 22 February 2016 (pp. 528–533)

11.2 Expert lay judges

This case raises difficult issues relating to the management of securities, and the Consumer Council is of the opinion that the court should sit with expert lay judges, cf. s 9-12 of the Disputes Act. In the opinion of the Consumer Council, the court should sit with one lay judge

with an academic background in the field of finance and securities management and one lay judge with more practical experience of securities management.

11.3 Mediation

Prior to the initiation of legal proceedings, there has been contact between the Consumer Council and DAM, including one meeting, in the hope of finding grounds for an out-of-court settlement. The parties have been unable to reach any such solution. On this basis, the Consumer Council does not consider mediation to be an expedient option, not least because mediation in itself will be extremely resource intensive. Nevertheless, the Consumer Council would not dismiss mediation out of hand, should DAM express the desire for substantive negotiations with respect to an amicable settlement.

11.4 Planning meeting

The Consumer Council presumes that it would be expedient to hold a face-to-face planning meeting with respect to the case, in the hope of clarifying the points at issue ahead of the main hearing.

12. Motion

We submit the following provisional

M O T I O N:

1. That the class action be brought.

2. That DNB Asset Management AS be ordered to pay the shareholders of DNB Norge, DNB Norge (I) and Avanse Norge (I) in the period 1 January 2010 to 31 December 2014 an amount to be determined at the discretion of the court but not to exceed NOK 690,761,112, with the addition of interest on overdue payments accruing from 21 July 2016 until such time as payment is made.

3. That DNB Asset Management AS pay the Consumer Council's costs.

* * *

This statement of claim has been drawn up in six identical versions, two of which are to be sent to the district court, two are to be sent directly to the defendant's legal counsel and two are to be kept here.

Hamar, 21 June 2016
Advokatfirmaet Mageli ANS

Steinar Mageli
Attorney at Law