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Memorandum

To: Fixrate AS

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Fixrate.se – Regulatory outsourcing analysis

1 Summary

- 1.1 The mere access to, and presence on, the Marketplace (as defined below) does not constitute outsourcing from Institutions to Fixrate (as defined below). The same applies with respect to the functionality on the Marketplace that allows Depositors (as defined below) to store and share pre-registered know-your-customer information to Institutions.
- 1.2 However, the functionality on the Marketplace where Fixrate provides a service that allows Institutions and Depositors to electronically sign deposit agreements and other relevant documentation through the Marketplace would be at risk to be considered regulatory outsourcing from Institutions to Fixrate.

2 Background

- 2.1 Fixrate AS, present in Sweden through its subsidiary Fixrate AB, (“**Fixrate**”), is the operator of the website fixrate.se (the “**Marketplace**”). The Marketplace is a digital platform that brings together Swedish businesses seeking to deposit funds (“**Depositors**”) with Swedish banks (Sw. *bank*), credit market companies (Sw. *kreditmarknadsbolag*) or Swedish branches of foreign undertakings authorised to conduct such operations in Sweden (together “**Institutions**”) seeking to receive deposits (Sw. *inlåning*) from Depositors. Deposits refers to traditional deposits *i.e.* funds placed into an account with a fixed or floating interest rate – not a so-called structured deposit linked to the performance of an underlying asset. The functionality of the Marketplace is further described in Section 3 (*The Marketplace*) below.
- 2.2 Gernandt & Danielsson Advokatbyrå KB (“**we**”) has been asked by Fixrate to assess whether Institutions participating on the Marketplace, or

using any of the functionalities on the Marketplace, would constitute a regulatory outsourcing arrangement (Sw. *uppdragsavtal*) with Fixrate from the perspective of Institutions. We present our analysis in this memorandum.

- 2.3 This memorandum is limited to the fact pattern set out herein and is not to be read as extending by implication to any other facts, matters or points in time. We assume no obligation to update this memorandum or to inform any person of any matters to our knowledge occurring after the date hereof which may affect the contents in any respect. The recipient of this memorandum may share this memorandum with third parties for information purposes only. Any other person than Fixrate may not rely upon the memorandum.

3 The Marketplace

3.1 The functionalities

3.1.1 The Marketplace offers the following functionalities:

- (a) advertising – enables Institutions to publish adverts for deposits to be seen by Depositors, setting out the terms on which an Institution is willing to accept a deposit (*e.g.* term, minimum deposit, interest rate);
- (b) communication – facilitates exchange of standardised messages between Institutions and Depositors regarding, *inter alia*, customer due-diligence information, electronic signing of agreements provided through a solution by Signicat AS, transfer of financial information; and
- (c) archiving – allows Institutions and Depositors to exchange documents and other information relevant to their deposits sourced through the Marketplace. The Depositors store such documents and other information using the Marketplace functionality. Institutions can access documents which they have sent to or received from Depositors through the Marketplace. The documents can be accessed while the Depositor has an agreement in force with Fixrate. If a Depositor terminates its agreement with Fixrate, the Institutions will no longer be able to access documents for that specific Depositor. The Marketplace does not offer archiving services to the Institutions.

3.1.2 Institutions and Depositors register at the Marketplace and enter into user agreements with Fixrate. These agreements set out the terms and conditions for using the Marketplace. The user agreements are described

in more detail in Section 3.2 (*The parties: Institutions*) and Section 3.3 (*The parties: Depositors*).

- 3.1.3 When a Depositor identifies an offer for a deposit that it wants to pursue, it can submit an inquiry to the Institution through the Marketplace. Upon receiving the inquiry, the Institution has the discretion to initiate the processing of the inquiry with the aim of establishing a customer relationship with the Depositor and subsequently opening a deposit account in the Depositor's name.
- 3.1.4 As part of the Institution establishing a customer relationship with the Depositor, it is incumbent upon the Institution to conduct customer due diligence in accordance with its internal procedures. To streamline this process the Depositor upon registration on the Marketplace creates and stores certain standardised know-your-customer information which the Depositor furnishes the Institution with upon submitting an inquiry to make a deposit. The Institution does not task Fixrate to gather this information from the Depositors, the information provided to the Institution by the Depositor is not tailored to the individual Institution on the Marketplace, and Fixrate is not involved in the customer due diligence procedure with the Institution. Instead, the Institution remains in charge of its own customer due diligence procedure, and it is free to ask the Depositor for additional information. Consequently, it is also within the Institution's discretion to onboard or deny the customer relationship with a specific Depositor.
- 3.1.5 Upon successfully onboarding the Depositor with the Institution, the Depositor enters into a deposit agreement with the Institution, reflecting the terms outlined in the relevant advert on the Marketplace and in the order document which is provided as part of the inquiry from the Depositor. This deposit agreement is electronically signed by both parties through the Marketplace and transmitted through the Marketplace platform. Subsequently, the agreement and other communication and information are archived and made available to both parties on the Marketplace. Fixrate is not a party to the deposit agreement between the parties and does not have any influence over the legal relationship between the Institution and the Depositor.
- 3.1.6 In connection with signing the deposit agreement, a deposit account for the Depositor is opened with the Institution. The deposit of funds is thereafter executed directly from the Depositor to the Institution. Upon receipt of the deposit, the Institution sends a confirmation to the Depositor through the marketplace platform. The deposited funds remain

in the deposit account until the account is closed, at which point the funds are returned to the Depositor. Fixrate is not involved in the transfer of funds.

- 3.1.7 Throughout the duration of a deposit, both Institutions and Depositors have access to documents and other information relevant to their deposits sourced through the Marketplace. Fixrate also conducts independent calculations of outstanding deposits, accrued interest, and account reports based on the information available on the Marketplace and presents this information to the parties. When the Institution provides Depositors with account statements and annual reports through the Marketplace, Depositors assign Fixrate – through their user agreement – to review the information received by the Institution and address any inaccuracy directly with the Institution on behalf of the Depositor.

3.2 The parties: Institutions

- 3.2.1 Institutions participate on the Marketplace by way of entering into a user agreement with Fixrate (the “**Institution Agreement**”). Only Institutions are eligible to register as “Institutions” on the Marketplace.

- 3.2.2 Under the Institution Agreement, the Institution assumes responsibility for financial services provided to the Depositor on the basis of a direct legal relationship with that Depositor, acting as the sole financial service provider in relation to the Depositor. Consequently, the Institution enters into a legal relationship directly with the Depositor, similar to any other customer relationship directly established with the Institution. Fixrate’s service to the Institution is limited to the provision of functions on the Marketplace.

- 3.2.3 The Institution Agreement allows the Institution to use the functionalities of the Marketplace, in particular to:

- (a) publish adverts for deposits to be seen by Depositors;
- (b) use Fixrate’s communication functionality to answer inquiries for deposits, receive know-your-customer information from Depositors, communicate with potential and current Depositors, sign agreements with Depositors, and provide Depositors with financial information relating to their deposits with Institutions, *etc.*; and
- (c) access documents they have sent to or received from the Depositors through the Marketplace.

- 3.2.4 Under the Institution Agreement, the Institution undertakes to perform specific actions, primarily including:
- (a) to receive inquiries for deposits in relation to adverts published by the Institution on the Marketplace;
 - (b) to conduct an independent customer due diligence assessment before onboarding or denying a customer relationship with a Depositor;
 - (c) to use the communication function on the Marketplace to enter into deposit agreements directly with the Depositor; and
 - (d) to provide certain financial information about ongoing deposits to the Depositor via the Marketplace.
- 3.2.5 The Institutions compensate Fixrate for its participation on the Marketplace under the Institution Agreement. The compensation amounts to a fixed monthly fee plus an additional fee based on outstanding deposits sourced from the Marketplace.
- 3.3 The parties: Depositors**
- 3.3.1 Depositors participate on the Marketplace by way of entering into a user agreement with Fixrate (the “**Depositor Agreement**”). Only legal persons established in Sweden can register as Depositors on the Marketplace. The natural person registering the Depositor may either (i) have formal signatory rights on behalf of the company, or (ii) use a power of attorney (in a format provided by Fixrate) to grant the relevant person the authority to manage the Depositor’s business on the Marketplace.
- 3.3.2 Under the Depositor Agreement, the Depositor acknowledges that any financial services provided to it are rendered by the Institution based on a direct legal relationship with that Institution, with the Institution acting as the sole financial service provider in relation to the Depositor. Consequently, the Depositor enters into a legal relationship directly with the Institution, similar to any other customer relationship directly established with the Institution. Fixrate’s service to the Depositors is limited to the provision of functions on the Marketplace.
- 3.3.3 The Depositor Agreement allows the Depositors to use the functionalities of the Marketplace, in particular to:
- (a) view adverts for deposits published by Institutions;
 - (b) use Fixrate’s communication functionality to send inquiries for deposits, share know-your-customer information registered in the Depositor’s profile on the Marketplace with Institutions,

communicate with Institutions, sign agreements with Institutions, and receive financial information relating to their deposits with Institutions, *etc.*; and

- (c) archive documents and other information relevant to deposits sourced to the Institution through the Marketplace.

3.3.4 Under the Depositor Agreement, Depositors can register standardised know-your-customer information to its profile on the Marketplace. Depositors can use the functionality on the Marketplace to share this information with Institutions on the Marketplace when they inquire about a deposit with an Institution through the Marketplace. The Depositor's know-your-customer declaration form is valid for 365 days from the date of signing. Fixrate notifies the Depositor when the validity period is about to expire, encouraging them to update the information by signing a new form. Upon signing the updated form, the Depositor shares it with all Institutions where they hold an existing deposit account or have submitted a still valid inquiry to make a deposit.

3.3.5 In addition, the Depositor Agreement authorises Fixrate to view account statements and other financial information received by the Depositors from the Institution to review these documents. If discrepancies are detected, Fixrate will contact the Institution on behalf of the Depositor to ensure that any discrepancies are corrected.

3.3.6 The Depositors does not compensate Fixrate for its participation on the Marketplace.

4 Regulatory analysis

4.1 Introduction

4.1.1 Institutions are subject to regulatory requirements with respect to outsourcing arrangements.¹ The purpose of these requirements are to ensure that Institutions identify, measure, manage, and control the risks associated with their operations – including the specific risks inherent to outsourcing arrangements.²

4.1.2 In light of this, it is crucial that Institutions can distinguish between arrangements that constitute pure service purchases and those that qualify as outsourcing. This distinction is discussed below.

¹ Cf. Chapter 6, Section 7 of the Banking Act and Chapter 10, Section 1–9 of the Banking Regulation.

² Cf. SFSA, Resolution memorandum (Ref. No. 11-5610), p. 57 and SFSA, *Action plan to strengthen control over outsourced activities* (Ref. No. 22-18123), p. 8.

4.2 The definition of outsourcing

4.2.1 The Swedish Financial Supervisory Authority's (Sw. *Finansinspektionen*) ("SFSA") Regulations and General Guidelines (FFFS 2014:1) regarding governance, risk management and control at credit institutions (Sw. *Finansinspektionens föreskrifter och allmänna råd om styrning, riskhantering och kontroll i kreditinstitut*) (the "Banking Regulation") defines outsourcing as follows.

"a contract between a company and a service provider whereby the service provider performs a process, service or activity that the undertaking would otherwise have performed itself".³ [our underlining]

4.2.2 The definition of outsourcing as tasks that the Institution would *otherwise have performed itself* aligns with guidance from the European Banking Authority ("EBA") and European Securities Market Authority ("ESMA").⁴ For example, EBA defines outsourcing as follows.

"Institutions [...] should establish whether an arrangement with a third party falls under the definition of outsourcing. Within this assessment, consideration should be given to whether the function [meaning any processes, services or activities, our notation] (or a part thereof) that is outsourced to a service provider is performed on a recurrent or an ongoing basis by the service provider and whether this function (or part thereof) would normally fall within the scope of functions that would or could realistically be performed by institutions [...], even if the institution [...] has not performed this function in the past itself".⁵ [our underlining]

4.2.3 Arrangements that encompasses several different processes, services or other activities shall be analysed in a matter where *all aspects of the solution should be considered* when determining whether the arrangement constitutes outsourcing.⁶

4.2.4 When determining which processes, services, or other activities an Institution would have otherwise carried out on its own, a key reference point is its regulatory authorization, including its restrictions and limitations. The Swedish Banking and Financing Business Act (SFS 2004:297) (Sw. *lagen om bank- och finansieringsrörelse*) (the "Banking Act") and the Banking Regulation specifies the processes, services, and activities that are considered to be of substantial importance to the operations of an Institution, suggesting that the Institution would normally perform these tasks internally:

³ Chapter 1, Section 3 of the Banking Regulation.

⁴ Cf. EBA, *Guidelines on outsourcing arrangements*, p. 25 and ESMA, *Guidelines on outsourcing to cloud service providers*, p. 25.

⁵ EBA, *Guidelines on outsourcing arrangements*, p. 25.

⁶ Cf. EBA GL, paragraph 27.

- (a) activities listed in Chapter 7, Section 1 of the Banking Act – largely corresponding to Annex I of the Directive (EU) 2013/36 (the “CRD”);
- (b) activities that are naturally linked (Sw. *naturligt samband*) to the above; and
- (c) support functions of the undertaking (*e.g.* the compliance function, or IT-function).⁷

4.2.5 Another important point of reference is the type of outsourcing contracts deemed to pertain to *critical and important functions* of the Institution. Similar to the above, it provides an indication of processes, services, and activities that are essential to the Institution, suggesting that the Institution would normally perform these tasks internally. EBA defines a function as critical and important where a defect or failure in its performance would materially impair:

- (a) compliance with regulatory requirements;
- (b) financial performance; or
- (c) soundness or continuity of the operations.⁸

4.2.6 In addition, EBA has listed some examples it does not consider to constitute outsourcing. These are:

- (a) functions that are legally required to be performed by an external service provider (*e.g.* statutory audit);
- (b) market information services (*e.g.* provision of data by Bloomberg, Moody’s, Standard & Poor’s);
- (c) global network infrastructures (*e.g.* Visa, MasterCard);
- (d) clearing and settlement arrangements between clearing houses, central counterparties and settlement institutions and their members;
- (e) global financial messaging infrastructures that are subject to oversight by relevant authorities;
- (f) correspondent banking services;
- (g) services that would otherwise not be undertaken by the Institution (*e.g.* advice from an architect, providing legal opinion and

⁷ Cf. Chapter 10, Section 1 of the Banking Regulation and SFSA, Resolution memorandum (Ref. No 11-5610), p. 58.

⁸ Cf. EBA, *Guidelines on outsourcing arrangements*, (EBA/GL/2019/02), p. 27.

representation in front of the court and administrative bodies, cleaning, gardening and maintenance of the Institution's premises, medical services, servicing of company cars, catering, vending machine services, clerical services, travel services, post-room services, receptionists, secretaries and switchboard operators); and

- (h) goods (e.g. plastic cards, card readers, office supplies, personal computers, furniture) or utilities (e.g. electricity, gas, water, telephone line).⁹

4.2.7 In addition, the SFSA has briefly stated that a risk assessment is necessary to distinguish between the *purchase of services* and *outsourcing*.

“The line between outsourcing and the purchase of services is dynamic and depends on the specific services involved and how critical these services are to the company's operations. Determining whether a particular agreement constitutes outsourcing or just a purchase of services can only be done with certainty through a risk analysis. Therefore, all activities involving third-party providers should be analysed from a risk perspective and managed in accordance with the outcome of that analysis”.¹⁰ [our underlining]

4.2.8 While Institutions should risk-assess all arrangements with third parties, regardless of whether they constitute outsourcing, the SFSA's basis for emphasizing risk assessment, as a tool for classification is ambiguous. In the absence of further guidance, we interpret the SFSA's statement in light of the purpose behind the regulatory requirements for outsourcing, as well as the provisions of the Banking Act, Banking Regulation, and relevant guidance from EBA and ESMA. From this perspective, outsourcing functions that the Institution would typically perform itself inherently increase the associated risks. This suggests a correlation between the risks of an arrangement and the likelihood that it constitutes outsourcing. In other words, the higher the risks associated with a third-party service arrangement, the stronger the indication that the arrangement constitutes outsourcing.

4.3 Functionalities of the Marketplace as an outsourcing arrangement

4.3.1 The primary function of the Marketplace is to match commercial interests concerning deposits. In many ways, its core functionality is similar to other physical and/or digital forums where commercial interests converge and where Institutions typically participate and advertise. The mere

⁹ Cf. EBA, *Guidelines on outsourcing arrangements* (EBA/GL/2019/02), p. 26.

¹⁰ Cf. SFSA, *Questions and answers on outsourced activities*, 23 August 2022.

access to, and presence on, the Marketplace does not in itself involve any assignment to a third party to conduct any tasks Institutions would otherwise have performed themselves. Hence, it does not qualify as outsourcing from Institutions to Fixrate.

4.3.2 Nonetheless, the individual functionalities that Fixrate provides to Institutions through the Marketplace need to be analysed from an outsourcing perspective. We consider the following functionalities to be relevant for such analysis:

- (a) the functionality where Depositors provide Institutions with pre-registered and stored know-your-customer information through the Marketplace;¹¹ and
- (b) the functionality where Fixrate administers electronic signatures for Institutions and Depositor through the Marketplace.¹²

4.3.3 The above two functionalities are analysed in the following.

4.4 Know-your-customer information

4.4.1 The functionality that allows Depositors to store and share pre-registered know-your-customer information to Institutions is not a service provided by Fixrate to Institutions under the Institution Agreement. Hence, there are no formal indications of any duty for Fixrate to procure relevant know-your-customer information to Institutions.

4.4.2 Additionally, the pre-registered know-your-customer information is standardized and not tailored to the needs of individual Institutions. When Depositors provide Institutions with this information, Institutions are free to use it for customer due diligence purposes in accordance with their internal procedures. For clarity, Institutions remain free to supplement or disregard the information. This is similar to situations where customer relationships are established through Institutions' own channels and any know-your-customer information is provided by the customer through such channels instead. In both scenarios, the entire customer due diligence process – from collecting the relevant information to conducting the risk assessment of the customer to onboarding or denying the customer – remains with the Institution. The mere fact that the information has been pre-registered and stored with a third party before being shared by the customer to the Institution does not affect this conclusion. Hence, the nature of the functionality does not indicate that

¹¹ See section 3.3.4 above.

¹² See section 3.1.1(b) above.

the Institution refrains from any function, process, or activity related to the know-your-customer information.

- 4.4.3 The above supports the argument that there is no assignment to a third party to perform any tasks that the Institution would otherwise have carried out itself. Consequently, the functionality that allows Depositors to store and share pre-registered know-your-customer information to Institutions should not be considered outsourcing from Institutions.

4.5 Electronic signatures

- 4.5.1 The functionality where Fixrate provides a service that allows Institutions and Depositors to electronically sign deposit agreements and other relevant documentation through the Marketplace is a service provided by Fixrate to Institutions under the Institution Agreement. This service is solely intended to be used on the Marketplace, *i.e.* it is not a standalone administrative tool licensed by Fixrate to be administrated independently by Institutions. Hence, there are clear indications that Fixrate administrates electronic signatures for Institutions.

- 4.5.2 Considering the above, it is crucial to determine whether Institutions would have to otherwise perform the above task themselves. Administering executed (*i.e.*, signed) legal documents is typically an activity integral to the core operations of an Institution, particularly in connection with deposits. If Fixrate did not administer the signing of relevant documents for Institutions, the Institutions would need to perform this task themselves. Consequently, the functionality where Fixrate administers electronic signatures for Institutions and Depositors through the Marketplace could be perceived as outsourcing by Institutions.

- 4.5.3 We note that the Norwegian Financial Supervisory Authority (No. *Finanstilsynet*) have reached a similar conclusion regarding this functionality.

5 Conclusion

- 5.1 We hold the view that the mere access to, and presence on, the Marketplace does not constitute outsourcing from Institutions to Fixrate.
- 5.2 Furthermore, we hold the view that the functionality on the Marketplace that allows Depositors to store and share pre-registered know-your-customer information to Institutions should not be considered outsourcing from Institutions to Fixrate.

- 5.3 However, the functionality on the Marketplace where Fixrate provides a service that allows Institutions and Depositors to electronically sign deposit agreements and other relevant documentation through the Marketplace would be at risk to be considered outsourcing from Institutions to Fixrate.

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