JUDGMENT OF THE COURT
9 August 2024*

(*Directive 2013/36/EU – Article 53 – Obligation of professional secrecy – Effective judicial protection – Surveillance and Court Agreement – Article 34 SCA – Jurisdiction in advisory opinion cases*)

In Case E-10/23,

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by the Board of Appeals of the Financial Market Authority (*Beschwerdekommission der Finanzmarktaufsicht*), in the case between

X

and

the Financial Market Authority (*Finanzmarktaufsicht*),

concerning the interpretation of Article 53 of Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms,

THE COURT,

composed of: Páll Hreinsson, President, Bernd Hammermann and Michael Reiertsen (Judge-Rapporteur), Judges,

Registrar: Ólafur Jóhannes Einarsson,

having considered the written observations submitted on behalf of:

* Language of the request: German. Translations of national provisions are unofficial and based on those contained in the documents of the case.

- X, represented by Karl Mumelter, advocate;

- the Government of the Principality of Liechtenstein, represented by Dr. Andrea Entner-Koch, Romina Schobel and Dr. Claudia Bösch, acting as Agents;

- the EFTA Surveillance Authority ("ESA"), represented by Hildur Hjörvar, Claire Simpson, Michael Sánchez Rydelski and Melpo-Menie Joséphidès, acting as Agents; and

- the European Commission ("the Commission"), represented by Dimitrios Triantafyllou and Corneliu Hödlmayr, acting as Agents,

having regard to the Report for the Hearing,

having heard oral arguments of X, represented by Karl Mumelter; the Liechtenstein Government, represented by Dr. Claudia Bösch; the Norwegian Government, represented by Marie Munthe-Kaas, acting as Agent; ESA, represented by Hildur Hjörvar; and the Commission, represented by Dimitrios Triantafyllou and Corneliu Hödlmayr, at the hearing on 27 February 2024,

gives the following

J U D G M E N T

I LEGAL BACKGROUND

EEA law

1 Article 3 of the Agreement on the European Economic Area ("the EEA Agreement" or "EEA") reads:

> *The Contracting Parties shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Agreement.*
>
> *They shall abstain from any measure which could jeopardize the attainment of the objectives of this Agreement.*
>
> *Moreover, they shall facilitate cooperation within the framework of this Agreement.*

2 Article 108(2) EEA reads:

> *2. The EFTA States shall establish a court of justice (EFTA Court).*

The EFTA Court shall, in accordance with a separate agreement between the EFTA States, with regard to the application of this Agreement be competent, in particular, for:

(a) actions concerning the surveillance procedure regarding the EFTA States;

(b) appeals concerning decisions in the field of competition taken by the EFTA Surveillance Authority;

(c) the settlement of disputes between two or more EFTA States.

3 Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("SCA") reads, in extract:

The EFTA Court shall have jurisdiction to give advisory opinions on the interpretation of the EEA Agreement.

Where such a question is raised before any court or tribunal in an EFTA State, that court or tribunal may, if it considers it necessary to enable it to give judgment, request the EFTA Court to give such an opinion.

...

4 Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ 2013 L 176, p. 338) ("Directive 2013/36" or "the Directive") was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 79/2019 of 29 March 2019 (OJ 2019 L 321, p. 170) ("JCD No 79/2019"), and is referred to at point 14 of Annex IX (Financial Services) to the EEA Agreement. Constitutional requirements were indicated by Iceland, Liechtenstein and Norway. The requirements were fulfilled by 27 November 2019, and the decision entered into force on 1 January 2020.

5 Recitals 2, 5, 6, 28, 29 and 32 of Directive 2013/36 read:

(2) This Directive should, inter alia, contain the provisions governing the authorisation of the business, the acquisition of qualifying holdings, the exercise of the freedom of establishment and of the freedom to provide services, the powers of supervisory authorities of home and host Member States in this regard and the provisions governing the initial capital and the supervisory review of credit institutions and investment firms. The main objective and subject-matter of this Directive is to coordinate national provisions concerning access to the activity of credit institutions and investment firms, the modalities for their governance, and their supervisory framework. Directives 2006/48/EC and 2006/49/EC also contained prudential requirements for credit institutions and investment

firms. Those requirements should be provided for in Regulation (EU) No 575/2013, which establishes uniform and directly applicable prudential requirements for credit institutions and investment firms, since such requirements are closely related to the functioning of financial markets in respect of a number of assets held by credit institutions and investment firms. This Directive should therefore be read together with Regulation (EU) No 575/2013 and should, together with that Regulation, form the legal framework governing banking activities, the supervisory framework and the prudential rules for credit institutions and investment firms.

(5) This Directive should constitute the essential instrument for the achievement of the internal market from the point of view of both the freedom of establishment and the freedom to provide financial services in the field of credit institutions.

(6) The smooth operation of the internal market requires not only legal rules but also close and regular cooperation and significantly enhanced convergence of regulatory and supervisory practices between the competent authorities of the Member States.

(28) The smooth operation of the internal banking market requires not only legal rules but also close and regular cooperation and significantly enhanced convergence of regulatory and supervisory practices between the competent authorities of the Member States. To that end, consideration of problems concerning individual credit institutions and the mutual exchange of information should take place through EBA. That mutual information procedure should not replace bilateral cooperation. Competent authorities of the host Member States should always be able, in an emergency, on their own initiative or on the initiative of the competent authorities of the home Member State, to check that the activities of a credit institution established within their territories comply with the relevant laws and with the principles of sound administrative and accounting procedures and adequate internal control.

(29) It is appropriate to allow the exchange of information between the competent authorities and authorities or bodies which, by virtue of their function, help to strengthen the stability of the financial system. In order to preserve the confidential nature of the information forwarded, the list of addressees should be strictly limited.

(32) Exchanges of information should be authorised between the competent authorities and central banks and other bodies with a similar function in their capacity as monetary authorities and, where necessary for reasons of prudential supervision, prevention and resolution of failing institutions and in emergency situations, if relevant, other public authorities and departments of central government administrations responsible for drawing up legislation on the supervision of credit institutions, financial

institutions, investment services and insurance companies, and public authorities responsible for supervising payment systems.

6 Article 4(1) of Directive 2013/36, entitled "Designation and powers of the competent authorities", reads:

Member States shall designate competent authorities that carry out the functions and duties provided for in this Directive and in Regulation (EU) No 575/2013. They shall inform the Commission and EBA thereof, indicating any division of functions and duties.

7 Article 6 of Directive 2013/36, entitled "Cooperation within the European System of Financial Supervision", reads, as adapted by JCD No 79/2019, in extract:

In the exercise of their duties, the competent authorities shall take into account the convergence in respect of supervisory tools and supervisory practices in the application of the laws, regulations and administrative requirements adopted pursuant to this Directive and to Regulation (EU) No 575/2013. For that purpose, Member States shall ensure that:

(a) the competent authorities, as parties to the European System of Financial Supervision (ESFS), cooperate with trust and full mutual respect, in particular when ensuring the flow of appropriate and reliable information between them and other parties to the ESFS, in accordance with the principle of sincere cooperation set out in Article 4(3) of the Treaty on European Union;

The competent authorities of the EFTA States cooperate with trust and full mutual respect, in particular when ensuring the flow of appropriate and reliable information between them and the parties to the ESFS and with the EFTA Surveillance Authority. Competent authorities of the EU Member States shall cooperate with the competent authorities of the EFTA States in the same manner.

...

8 Article 24 of Directive 2013/36, entitled "Cooperation between competent authorities", reads, in extract:

1. The relevant competent authorities shall fully consult each other when carrying out the assessment if the proposed acquirer is one of the following:

...

(c) a natural or legal person controlling a credit institution, insurance undertaking, reinsurance undertaking, investment firm or UCITS

management company authorised in another Member State or in a sector other than that in which the acquisition is proposed.

2. The competent authorities shall, without undue delay, provide each other with any information which is essential or relevant for the assessment. In that regard, the competent authorities shall communicate to each other upon request all relevant information and shall communicate on their own initiative all essential information. A decision by the competent authority that has authorised the credit institution in which the acquisition is proposed shall indicate any views or reservations expressed by the competent authority responsible for the proposed acquirer.

9 Article 50(1) of Directive 2013/36, entitled "Collaboration concerning supervision", reads:

The competent authorities of the Member States concerned shall collaborate closely in order to supervise the activities of institutions operating, in particular through a branch, in one or more Member States other than that in which their head offices are situated. They shall supply one another with all information concerning the management and ownership of such institutions that is likely to facilitate their supervision and the examination of the conditions for their authorisation, and all information likely to facilitate the monitoring of institutions, in particular with regard to liquidity, solvency, deposit guarantee, the limiting of large exposures, other factors that may influence the systemic risk posed by the institution, administrative and accounting procedures and internal control mechanisms.

10 Article 53 of Directive 2013/36, entitled "Professional secrecy", reads, as adapted by JCD No 79/2019:

1. Member States shall provide that all persons working for or who have worked for the competent authorities and auditors or experts acting on behalf of the competent authorities shall be bound by the obligation of professional secrecy.

Confidential information which such persons, auditors or experts receive in the course of their duties may be disclosed only in summary or aggregate form, such that individual credit institutions cannot be identified, without prejudice to cases covered by criminal law.

Nevertheless, where a credit institution has been declared bankrupt or is being compulsorily wound up, confidential information which does not concern third parties involved in attempts to rescue that credit institution may be disclosed in civil or commercial proceedings.

2. Paragraph 1 shall not prevent the competent authorities from exchanging information with each other or transmitting information to the ESRB, EBA,

or the European Supervisory Authority (European Securities and Markets Authority) ('ESMA') established by Regulation (EU) No 1095/2010 of the European Parliament and of the Council or, as the case may be, the EFTA Surveillance Authority in accordance with this Directive, with Regulation (EU) No 575/2013, with other Directives applicable to credit institutions, with Article 15 of Regulation (EU) No 1092/2010, with Articles 31, 35 and 36 of Regulation (EU) No 1093/2010 and with Articles 31 and 36 of Regulation (EU) No 1095/2010. That information shall be subject to paragraph 1.

3. Paragraph 1 shall not prevent the competent authorities from publishing the outcome of stress tests carried out in accordance with Article 100 of this Directive or Article 32 of Regulation (EU) No 1093/2010 or from transmitting the outcome of stress tests to EBA for the purpose of the publication by EBA of the results of Union-wide stress tests.

11 Article 54 of Directive 2013/36, entitled "Use of confidential information", reads:

Competent authorities receiving confidential information under Article 53 shall use it only in the course of their duties and only for any of the following purposes:

(a) to check that the conditions governing access to the activity of credit institutions are met and to facilitate monitoring, on a non-consolidated or consolidated basis, of the conduct of such activity, especially with regard to the monitoring of liquidity, solvency, large exposures, and administrative and accounting procedures and internal control mechanisms;

(b) to impose penalties;

(c) in an appeal against a decision of the competent authority including court proceedings pursuant to Article 72;

(d) in court proceedings initiated pursuant to special provisions provided for in Union law adopted in the field of credit institutions.

12 Article 56 of Directive 2013/36, entitled "Exchange of information between authorities", reads, in extract:

Article 53(1) and Article 54 shall not preclude the exchange of information between competent authorities within a Member State, between competent authorities in different Member States or between competent authorities and the following, in the discharge of their supervisory functions:

…

The information received shall in any event be subject to professional secrecy requirements at least equivalent to those referred to in Article 53(1).

National law

13 Directive 2013/36 was transposed into Liechtenstein law by the Act of 21 October 1992 on banks and investment firms (*Bankengesetz*) (LGBl. 1992 No 108) ("the Banking Act").

14 Pursuant to Article 26a(6) of the Banking Act, which transposed Article 24(2) of Directive 2013/36, the Financial Market Authority ("FMA") shall cooperate with the competent authorities of the other EEA States when assessing the acquisition or the increase of a holding. The cooperation shall include, in particular, an exchange of all information relevant for assessing the acquisition or increase of a holding.

15 Pursuant to Article 31a of the Banking Act, entitled "Official secrecy", the bodies charged with implementing this Act, any persons consulted by such bodies as well as all representatives of the authorities shall be subject to official secrecy without a time limit as regards the confidential information that becomes known to them during their official activities.

16 Article 31a of the Banking Act reads, in extract:

> *(1a) The bodies and persons referred to in paragraph 1 who receive confidential information may use it in the performance of their tasks only for the following purposes:*
>
> *a) to check that the licensing conditions for banks or investment firms are met;*
>
> *b) to monitor the performance of activities on an individual or consolidated basis, in particular with regard to the solvency, large exposures, administrative and accounting organisation, internal control mechanisms, and liquidity of banks and investment firms, as well as branches of banks, financial institutions, and investment firms;*
>
> *c) to monitor the proper functioning of trading venues;*
>
> *d) to impose sanctions;*
>
> *e) in appeals against decisions by the FMA in accordance with Article 62; or*
>
> *f) in the extrajudicial mechanism for investors' complaints provided for in Article 62a.*
>
> *(2) Confidential information as set out in paragraph 1 may be transmitted in accordance with this Act and Regulation (EU) No 575/2013.*
>
> *(2a) The FMA is authorised to transmit information to the external audit offices that is necessary for the fulfilment of its responsibilities.*

(3) If bankruptcy or winding-up proceedings have been initiated against a bank or investment firm by the decision of a court, confidential information that does not relate to third parties may be disclosed in civil proceedings if this is necessary for the proceedings concerned.

(4) Without prejudice to the requirements of criminal law or tax law, the FMA, all other administrative authorities and bodies, and other natural and legal persons may use confidential information that they receive in accordance with this Act only for purposes of fulfilling their responsibilities and tasks within the scope of this Act or for purposes for which the information was given, and/or in the case of administrative and judicial proceedings that specifically relate to the fulfilment of these tasks. If the FMA or another administrative authority or office or person providing the information gives their consent, however, the authority receiving the information may use it for other purposes of financial market supervision.

(5) The FMA may transmit confidential information that it received from a non-competent authority of an EEA Member State to the following authorities:

a) the competent authorities of other EEA Member States;

b) the European Supervisory Authorities.

…

17 According to Article 30h of the Banking Act, entitled "Exchange of information", the FMA shall transmit to a requesting competent authority of an EEA State all information which the latter needs to exercise its duties of supervision, provided that, inter alia, the recipients and the persons employed with and instructed by the competent authorities are subject to an obligation of secrecy equivalent to that of Article 31a of the Banking Act.

18 According to Section 310(1) of the Liechtenstein Criminal Code (*Strafgesetzbuch*) (LGBl. 1998 No 37), any official or former official who discloses or exploits a secret that was entrusted or became accessible to him exclusively by virtue of his office and the disclosure or exploitation of which is capable of violating public or legitimate private interests shall be punished with imprisonment of up to three years. Infringement of the obligation of official secrecy within the meaning of Article 31a(1) of the Banking Act falls under Section 310(1) of the Criminal Code. In accordance with point (4) of Section 74(1) of the Criminal Code, persons employed by the FMA are officials.

19 It follows from the request that the purpose of the Liechtenstein Act of 19 May 1999 on the Information of the Population (*Informationsgesetz*) (LGBl. 1999 No 159) ("the Information Act") is to govern the principles and procedure by which the population may be informed with respect to activities of the authorities, in particular the right to information and of access to the file. It is intended to encourage the freedom of the population to form opinions and confidence in activities of the authorities.

20 Article 2(2) of the Information Act provides that "authorities" for the purposes of that act means State bodies and establishments and foundations under public law.

21 Article 29 of the Information Act provides that any person who can claim to have a legitimate interest has a right to access official documents unless precluded by overriding public or private interests.

22 Article 31(1) of the Information Act provides that overriding interests with respect to the withholding of information exist, in particular, where (a) by reason of premature disclosure of internal working documents, requests, drafts and similar items decision making would be significantly impaired, (b) the population would be harmed in a different way, in particular, by threatening public security, or (c) this would entail a disproportionate effort for the authority.

II FACTS AND PROCEDURE

23 X was the majority shareholder and chair of the board of directors (official body) of a bank established in Liechtenstein, which had been granted a licence, as provided for in the Liechtenstein Banking Act, by the FMA.

24 In 2022, X proposed to acquire a qualifying holding (more than 10%) in a bank established in the Grand-Duchy of Luxembourg. The FMA and the competent Luxembourg authority, the Financial Sector Supervisory Commission (*Commission de Surveillance du Secteur Financier*) ("CSSF"), exchanged information in relation to the proposed acquisition. According to the request, X contends that his Luxembourg lawyers notified him that the CSSF had expressed an unambiguously negative view of the planned transaction indicating that (i) the CSSF took a negative stance on X's proposed holding; (ii) the CSSF would officially deliver a negative opinion to the European Central Bank ("ECB") in the framework of the authorisation procedure, which the ECB was likely to follow and hence oppose the acquisition; (iii) the negative appraisal was based in particular on the CSSF's informal exchanges with the FMA and an administrative order by the FMA in relation to X, which provides for a prohibition on X exercising the activity of a member of the supervisory body of the Liechtenstein bank; and (iv) if X continued with the transaction and was dissatisfied with the outcome of the ECB decision, it would be possible to lodge an internal administrative appeal with the ECB and ultimately to challenge the decision before the Court of Justice of the European Union.

25 X further claims that the negative information provided by the FMA to the CSSF led X's counterparty to step back from the planned sale of the holding.

26 By letter of 29 July 2022, X made a number of requests to the FMA:

> *I. The FMA shall grant the applicant access in full to the file (or files) of the FMA, in relation to which the FMA provided facts and information to the CSSF (Commission de Surveillance du Secteur Financier (Financial Sector*

Supervisory Commission)) Luxembourg concerning the applicant's proposed holding in [the bank] established in Luxembourg and to provide the applicant with a full copy of this file (these files).

II. The FMA shall disclose to the applicant which bodies (staff members) of the FMA provided facts and information to the CSSF (Commission de Surveillance du Secteur Financier (Financial Sector Supervisory Commission)) Luxembourg concerning the applicant's proposed holding in [the bank] established in Luxembourg.

III. The FMA shall disclose to the applicant the specific facts and information (faithful to the original wording and verbatim) that the FMA provided to the CSSF (Commission de Surveillance du Secteur Financier (Financial Sector Supervisory Commission)) Luxembourg concerning the applicant's proposed holding in [the bank] established in Luxembourg.

IV. The FMA shall disclose to the applicant which personal data it has processed in its dealings with the CSSF (Commission de Surveillance du Secteur Financier (Financial Sector Supervisory Commission)) Luxembourg and, in accordance with Article 15(2) GDPR, provide a copy of this information together with all the additional information listed in Article 15 GDPR.

27 By letter of 26 August 2022, in response to point IV of X's request, the FMA provided X with the personal data that it processed. However, by order (administrative decision) of 14 September 2022, the FMA rejected requests I, II and III concerning access to the file, information and facts. By decision of 27 October 2022, the Board of Appeals of the Financial Market Authority ("Appeals Board") rejected an appeal brought by X.

28 By judgment of 3 March 2023, in case VGH 2022/090, the Administrative Court of the Principality of Liechtenstein (*Verwaltungsgerichtshof des Fürstentums Liechtenstein*) set aside the decisions of the lower instances and instructed the FMA to take a new decision. According to the request, the Administrative Court held that X, on the basis of the Liechtenstein Information Act, had the right to obtain further information from the FMA. The Administrative Court held that X had a legitimate interest in the documents from the FMA and that neither the FMA nor the Appeals Board had correctly applied the test to determine whether overriding reasons precluding such a right existed.

29 On 5 June 2023, the FMA reached a decision identical to that of 14 September 2022, refusing X's claims for access to information.

30 On 15 June 2023, X lodged an appeal against the new decision before the Appeals Board.

31 Against this background, the Appeals Board decided to stay the proceedings and referred the following questions to the Court:

I.

1. *Is the EFTA Court competent to interpret the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice of 2 May 1992 (SCA)?*

2. *If Question 1 is answered with "yes":*

   Must Article 34 SCA be interpreted as meaning that a request to the EFTA Court for an advisory opinion is permitted also where, although the referring court considers the question on the interpretation of the EEA Agreement necessary in order to give its decision, this legal question has, however, in an earlier set of proceedings in the same procedure already been answered, in accordance with national procedural law, by a higher-ranking court with binding effect?

3. *If Question 2 is also answered in the affirmative:*

   Is information which is the subject of formal and also informal exchanges of information between the competent authorities of the Member States as provided for in Article 4(1) of Directive 2013/36/EU subject to the obligation of professional secrecy within the meaning of Article 53 of this Directive?

4. *If Question 3 is also answered with "yes":*

   Must the cooperation between competent authorities as provided for in Article 24 of the Directive mentioned be regarded as an exchange of information which pursuant to Article 53 of this Directive is subject to an obligation of professional secrecy?

5. *If finally Question 4 is also answered with "yes":*

   May the obligation of professional secrecy set out in the first subparagraph of Article 53(1) of the Directive mentioned be breached only in the cases listed in Article 53(1) (second subparagraph: cases covered by criminal law; third subparagraph: disclosure in civil or commercial proceedings where a credit institution has been declared bankrupt or is being compulsorily wound up)? If this question is answered in the negative: Is a breach permissible also on grounds of national law, for example, by reason of a law that grants any person asserting a legitimate interest access to official documents unless precluded by overriding public or private interests?

II. *If one of Questions I/1 to I/4 is answered with "no" or the main question in Question I/5 is answered in the negative, but the supplementary question in the affirmative:*

   Does the cooperation between competent authorities provided for in Article 4 of the Directive mentioned and thus the exchange of information that takes

place between these authorities and the possibility to keep this partly or wholly secret constitute an appropriate particular measure, within the meaning of Article 3 of the EEA Agreement of 2 May 1992, to ensure fulfilment of the obligations arising out of this Agreement, and in particular to ensure the effective functioning of the system for supervision of the activities of credit institutions and investment firms and also the normal functioning of financial markets?

32 Reference is made to the Report for the Hearing for a fuller account of the legal framework, the facts, the procedure and the proposed answers submitted to the Court. Arguments of the parties are mentioned or discussed hereinafter only insofar as is necessary for the reasoning of the Court.

III ANSWER OF THE COURT

Question 1

33 By its first question, the referring body asks whether the EFTA Court is competent to interpret the SCA. Although the referring body explicitly asks whether the Court is competent to interpret the SCA, the first question must be understood as asking whether the Court has jurisdiction to give an advisory opinion on the interpretation of the SCA pursuant to the first paragraph of Article 34 SCA given that that provision only explicitly refers to the EEA Agreement.

34 As the Court held in the very first case referred to it for an advisory opinion, it is competent to interpret its own jurisdiction (see the judgment of 16 December 1994 in *Restamark*, E-1/94, paragraphs 7 to 31). It follows from the structure and logic of the SCA that the Court is endowed with the competence to interpret the SCA, which, inter alia, lays down the Court's jurisdiction and includes the Statute of the Court as its Protocol 5.

35 The first paragraph of Article 34 SCA provides that the Court shall have jurisdiction to give advisory opinions on the interpretation of the EEA Agreement. It follows from settled case law that the purpose of Article 34 SCA is to establish cooperation between the Court and national courts or tribunals. The special means of judicial cooperation under Article 34 SCA is intended to contribute to ensuring a homogeneous interpretation of EEA law by providing assistance to the courts and tribunals in the EFTA States in cases in which they have to apply provisions of EEA law. It also follows from settled case law that the Court may, in the spirit of cooperation with national courts and tribunals, provide them with all the guidance that it deems necessary. Thus, it is incumbent on the Court to give as complete and as useful a reply as possible and it does not preclude the Court from providing the referring courts with all the elements of interpretation of EEA law which may be of assistance in adjudicating in the cases pending before them (see the judgment of 23 May 2024 in *Gylfason and Gröndal* v *Landsbankinn and Sverrisdóttir and Sigurðsson* v *Íslandsbanki*, Joined Cases E-13/22 and E-1/23, paragraph 67 and case law cited, and the judgment of 16 July 2020 in *Tak*

– *Malbik ehf.*, E-7/19, paragraphs 39 and 45 and case law cited).

36 The SCA constitutes an integral part of EEA law, without which the institutional framework of the EFTA pillar of the EEA would not function as intended and the obligations which the EFTA States have undertaken under the EEA Agreement would not be fulfilled. Article 108(2) EEA provides that the EFTA States shall establish such a separate agreement between the EFTA States. The recitals of the SCA affirm that the SCA was concluded between the EFTA States in order to fulfil their obligations under Article 108 EEA.

37 The SCA and its protocols contain a wide variety of binding rules of EEA law, including rules which lay down obligations for national courts. Furthermore, national courts may be faced with questions regarding the interaction between the rules of the EEA Agreement and the SCA in proceedings before them (see, inter alia, the judgment of 15 December 2016 in *Synnøve Finden AS*, E-1/16, paragraphs 47 and 48; and the Decision of the Court of 14 February 2017 in *Pascal Nobile*, E-21/16, paragraphs 16 and 22). Were the Court to lack jurisdiction to provide an advisory opinion on the interpretation of the SCA to a national court or tribunal, the homogenous interpretation and application of EEA law would be jeopardised. Such a result would be contrary to the objective of Article 34 SCA and would result in the advisory opinion procedure under that article being incomplete.

38 It follows from the foregoing that the Court has jurisdiction to give an advisory opinion on any question of EEA law, including one which relates to the interpretation of the SCA, referred to it by a national court or tribunal pursuant to the first paragraph of Article 34 SCA. However, while questions concerning the interpretation of EEA law referred by a national court enjoy a presumption of relevance, the Court may refuse to rule on a question referred by a national court where it is obvious that the interpretation of EEA law that is sought bears no relation to the actual facts of the main action or its purpose where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions referred (see the judgment in *Gylfason and Gröndal* v *Landsbankinn and Sverrisdóttir and Sigurðsson* v *Íslandsbanki*, Joined Cases E-13/22 and E-1/23, cited above, paragraph 62 and case law cited).

39 In its request, the referring court considers the interpretation of the SCA to be relevant as a basis for its second to fifth questions. Thus it is incumbent on the Court to give as complete and as useful a reply as possible. Any other conclusion would in this case undermine the purpose of the judicial dialogue envisaged by Article 34 SCA and the presumption of relevance of the questions referred.

40 Accordingly, the answer to the first question must be that the Court is competent to give an advisory opinion on the interpretation of the SCA in accordance with Article 34 SCA.

Question 2

41 By its second question, the referring body asks whether Article 34 SCA must be interpreted as meaning that a request to the Court for an advisory opinion is permitted where the same legal question has, in an earlier set of proceedings in the same procedure, already been answered, in accordance with national procedural law, by a higher-ranking court with binding effect.

42 At the outset, the Court recalls that under Article 34 SCA any court or tribunal in an EFTA State may refer questions on the interpretation of the EEA Agreement to the Court if it considers an advisory opinion necessary to enable it to give judgment.

43 It is solely for the national court or tribunal before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for an advisory opinion in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court (see the judgment of 28 September 2012 in *Irish Bank*, E-18/11, paragraph 55 and case law cited).

44 In its case law, the Court has reiterated that it is of substantial importance to the uniform interpretation and effective application of EEA law and to the realisation of the objective of the EEA Agreement of a homogenous European Economic Area that questions on the interpretation of EEA law are referred to the Court under the procedure provided for in Article 34 SCA if the legal situation lacks clarity (see the judgment of 20 March 2013 in *Stig Arne Jonsson*, E-3/12, paragraph 60 and case law cited).

45 The Court recalls that it is inherent in Article 3 EEA and Protocol 35 EEA that, in the event of conflict between implemented EEA rules and national statutory provisions, individuals and economic operators must be entitled to invoke and to claim, at the national level, any rights that can be derived from provisions of the EEA Agreement as being, or having been made, part of the respective national legal order, if they are unconditional and sufficiently precise (see the judgment of 4 July 2023 in *RS*, E-11/22, paragraph 40 and case law cited).

46 In accordance with Article 3 EEA, it is the responsibility of national courts and tribunals, in particular, to provide the legal protection individuals derive from the EEA Agreement and to ensure that those rules are fully effective. In that respect, it must be recalled that it is inherent in Protocol 35 EEA that national courts and tribunals must give full effect to implemented EEA rules, which are unconditional and sufficiently precise, and disregard any national rule or case law maintaining the legal effects of legislation that infringes such implemented EEA rules, as such a limitation is not compatible with EEA law (see the judgment in *RS*, E-11/22, cited above, paragraphs 44 and 50 and case law cited).

47 Thus, a rule of national law whereby a court is bound on points of law by the rulings of a superior court cannot prevent a national court, where appropriate, from using its discretion to request an advisory opinion from the Court (compare the judgment of 5

April 2016 in *PFE*, C-689/13, EU:C:2016:199, paragraph 32 and case law cited).

48 In the light of the foregoing, the answer to the second question must be that a national court or tribunal is permitted under Article 34 SCA to request an advisory opinion from the Court, although a legal question, which is the subject of the request for an advisory opinion, has already been answered in an earlier set of proceedings by a higher-ranking national court with binding effect in accordance with national procedural law.

Questions 3 to 5

49 By its third to fifth questions, which it is appropriate to examine together, the referring body seeks, in essence, guidance on the interpretation of Article 53 of the Directive in order to establish whether information exchanged between the competent authorities of EEA States, as provided for in Articles 4(1) and 24, falls within the scope of the obligation of professional secrecy outlined in Article 53.

50 Under Article 53 of the Directive, all persons working or having worked for a competent authority shall be bound by the obligation of professional secrecy regarding confidential information they receive in the course of their duties. Articles 53 to 61 provide for specific admissible uses of confidential information.

51 However, neither Article 53 nor any other provision of the Directive states explicitly which information held by competent authorities is to be classified as "confidential" and, consequently, subject to the obligation of professional secrecy (compare the judgment of 19 June 2018 in *Baumeister*, C-15/16, EU:C:2018:464, paragraph 22).

52 The Court recalls that the interpretation of a provision of EEA law requires account to be taken not only of its wording, but of its context and the objectives and purpose pursued by the act of which it forms part. The legislative history of a provision of EEA law may also reveal elements that are relevant to its interpretation. Moreover, where a provision of EEA law is open to several interpretations, preference must be given to the interpretation which ensures that the provision retains its effectiveness (see the judgment of 25 January 2024 in *A Ltd* v *Finanzmarktaufsicht*, E-2/23, paragraph 43 and case law cited).

53 The Court observes that, in particular, Article 76 of Directive 2014/65/EU, which replaced Article 54 of Directive 2004/39/EC, and Article 102 of Directive 2009/65/EC contain similar provisions on obligations of professional secrecy. Those directives form part of the legal framework on financial services incorporated into the EEA Agreement, along with Directive 2013/36. Accordingly, case law on the definition of professional secrecy or on the scope of the concept of "confidential information" in the context of other directives in the field of the supervision of the financial markets is relevant for the interpretation of Article 53 of Directive 2013/36.

54 Further, the wording of Article 53 of the Directive refers to "confidential information" and not, generically, to "information". This implies that a distinction must be drawn between confidential information and information that is not confidential which the

competent authorities hold in connection with the exercise of their functions (compare the judgment in *Baumeister*, C-15/16, cited above, paragraph 25).

55 Moreover, it is apparent from recital 2 of the Directive that its main objective is to coordinate national provisions concerning access to the activity of credit institutions and investment firms, the modalities for their governance, and their supervisory framework (compare the judgment of 13 September 2018 in *Buccioni*, C-594/16, EU:C:2018:717, paragraph 21). As is set out in recitals 28 and 29, the smooth operation of the internal banking market requires close and regular cooperation, including exchanges of information, and significantly enhanced convergence of regulatory and supervisory practices between the competent authorities of EEA States.

56 To that end, Article 4(2) and (3) of the Directive provides that EEA States are to ensure both that the competent authorities monitor the activities of credit institutions so as to assess compliance with the requirements of that directive and that appropriate measures are in place to enable the competent authorities to obtain the information necessary to assess whether those institutions comply with those requirements. According to Article 4(5), EEA States are to require, inter alia, that credit institutions provide the competent authorities of their home State with all the information necessary for the assessment of their compliance with the rules adopted in accordance with that directive (compare the judgment in *Buccioni*, C-594/16, cited above, paragraph 24).

57 Specifically, regarding authorisation for acquiring a qualified shareholding in a credit institution, Article 24(1) and (2) of the Directive provides that the relevant competent authorities shall fully consult each other when carrying out the assessment of the suitability of the proposed acquirer and the financial soundness of the proposed acquisition, and, without undue delay, provide each other with any information which is essential or relevant for the assessment.

58 Finally, Article 50(1) of the Directive prescribes that the competent authorities of the EEA States concerned shall collaborate closely in order to supervise the activities of credit institutions operating, in particular through a branch, in one or more EEA States other than that in which their head offices are situated. They are to supply one another with all information concerning the management and ownership of such institutions that is likely to facilitate their supervision and the examination of the conditions for their authorisation, and all information likely to facilitate the monitoring of institutions, in particular with regard to liquidity, solvency, deposit guarantee, the limiting of large exposures, other factors that may influence the systemic risk posed by the institution, administrative and accounting procedures and internal control mechanisms (compare the judgment in *Buccioni*, C-594/16, cited above, paragraph 26).

59 The effective implementation of the prudential supervision regime for credit institutions, established by the legislature when adopting the Directive, through supervision within an EEA State and the exchange of information by the competent authorities of several EEA States, requires that both the supervised credit institutions and the competent authorities can have confidence that any confidential information provided will remain confidential. The absence of such confidence is liable to

compromise the smooth transmission of the confidential information that is necessary for prudential monitoring. Therefore, in order to protect not only the specific interests of the credit institutions directly concerned, but also the public interest linked, in particular, to the stability of the financial system within the EEA, Article 53(1) of the Directive imposes, as a general rule, the obligation to maintain professional secrecy (compare the judgment in *Buccioni*, C-594/16, cited above, paragraphs 27 to 29 and case law cited).

60 However, it cannot be inferred from the wording of Article 53 of the Directive, or from the context of that Article, nor from the objectives pursued by the Directive, that all information relating to the proposed acquisition and all statements of the competent authorities must be treated as confidential information by default. It follows from the above considerations that the general prohibition on the disclosure of confidential information laid down in Article 53(1) applies to information held by the competent authorities (i) which is not public and (ii) the disclosure of which is likely to affect adversely the interests of the natural or legal person who provided that information or of third parties, or the proper functioning of the system for monitoring the activities of credit institutions and investment firms that the legislature established in adopting the Directive (compare the judgment in *Baumeister*, C-15/16, cited above, paragraphs 34 and 35).

61 Moreover, according to settled case law, Article 53(1) of the Directive imposes on the competent authorities the obligation to refuse, as a general rule, to disclose confidential information in other forms than in summary or aggregate form, such that individual credit institutions cannot be identified, and lists exhaustively the specific cases where, exceptionally, their communication or use is not precluded, which should be narrowly construed (compare the judgment in *Buccioni*, C-594/16, cited above, paragraphs 30 and 37 and case law cited).

62 Since the sole aim is to impose on the competent authorities the obligation to refuse to disclose confidential information, EEA States remain free to decide to extend the protection against disclosure to the entire contents of the supervision files of the competent authorities or, conversely, to permit access to information that is in the possession of the competent authorities which is not confidential information within the meaning of Article 53(1) (compare the judgment in *Baumeister*, C-15/16, cited above, paragraph 44).

63 Accordingly, it is necessary to carry out, on a case-by-case basis, a specific and individual assessment of whether the information held by competent authorities, whose disclosure is sought, qualifies as “confidential information” under Article 53(1) of the Directive, and, if so, whether any specific derogations from the obligation of secrecy apply.

64 Regarding X’s argument that the scope of the confidentiality obligation outlined in Articles 53 and 54 of the Directive does not, in general, extend to the FMA’s own information, as opposed to information received from other authorities, that argument must, in principle, be rejected provided that the referring body establishes that the

disclosure requested concerns confidential information.

65 The wording of the Directive does not differentiate between confidential information obtained by the competent authority itself or received from the competent authority of another EEA State. According to the first subparagraph of Article 53(1) of the Directive, the obligation of secrecy is placed upon "all persons working for or who have worked for the competent authorities and auditors or experts acting on behalf of the competent authorities". The second subparagraph specifies that this obligation extends to confidential information "which such persons, auditors or experts receive in the course of their duties". Consequently, the obligation of professional secrecy encompasses all confidential information received by individuals subject to this obligation in the course of their duties, regardless of whether the information is provided for by the competent authority itself or by the authority of another EEA State.

66 This interpretation finds support in Article 53(2) of the Directive, which enables competent authorities of different EEA States to exchange information without prejudice to the general prohibition on the disclosure of confidential information laid down in Article 53(1). Further, Article 54 specifies how the receiving authority shall use this information, while the last sentence of Article 56 provides that the "information received shall in any event be subject to professional secrecy requirements at least equivalent to those referred to in Article 53(1)". The specific provisions facilitating information exchanges would thus be rendered redundant if information obtained directly by the competent authority itself were excluded from the scope of the obligation of secrecy.

67 With regard to the objectives pursued by the Directive, the Court recalls that effective prudential monitoring, in principle, requires both the supervised credit institutions and the competent authorities to have confidence in the confidentiality of information provided. Point (a) of Article 6 of the Directive, as adapted by JCD No 79/2019, provides that the competent authorities of the EFTA States cooperate with trust and full mutual respect, in particular when ensuring the flow of appropriate and reliable information between them and the parties to the European System of Financial Supervision (ESFS) and with the EFTA Surveillance Authority. Competent authorities of the EU Member States shall cooperate with the competent authorities of the EFTA States in the same manner.

68 For the same reasons, X's argument that Article 53 of the Directive does not, in general, apply to information about the person seeking its disclosure must be rejected. The Court observes that confidential information may include not only information concerning the relations between the supervised undertakings and their clients and contractors as well as their business secrets, but also, inter alia, the methods of supervision adopted by the competent authorities, communications and transmissions of information between the various competent authorities, and between those authorities and the supervised entities, and all other non-public information as to the state of the supervised markets and the transactions made on those markets (compare the opinion of Advocate General Jääskinen of 4 September 2014 in *Altmann and Others*, C-140/13, EU:C:2014:2168, points 35 to 39).

69 However, the fact that the request concerns information about the person seeking its disclosure is a relevant factor in the overall assessment the referring body must undertake in order to ascertain whether the conditions for classifying this information as confidential are met, including, inter alia, the age of the information, the time at which the request is made, and the nature and type of interests at stake. In this respect, as observed by the Liechtenstein Government, the referring body must assess the actual harmful consequences which may result from disclosing the information exchanges in question, in particular, the potential impact on the full and mutual trust between the competent authorities.

70 Moreover, having regard to X's argument that such access is crucial for a potential compensation claim, the Court recalls that effective judicial protection is an essential element in the EEA legal framework and a general principle of EEA law. The principle of effective judicial protection of the rights which individuals derive from EEA law comprises various elements, inter alia, the rights of the defence, the principle of equality of arms, the right of access to a court or tribunal and the right to be advised, defended and represented (see the judgment of 9 August 2024 in *Låssenteret AS* v *Assa Abloy Opening Solutions Norway AS*, E-11/23, paragraph 51; the judgment of 18 April 2012 in *Posten Norge*, E-15/10, paragraph 86 and case law cited; the judgment of 13 June 2013 in *Koch and Others*, E-11/12, paragraph 117 and case law cited; the judgment of 10 December 2020 in *Adpublisher AG* v *J & K*, Joined Cases E-11/19 and E-12/19, paragraphs 50 and 55; the judgment of 5 May 2022 in *Telenor ASA and Telenor Norge AS* v *EFTA Surveillance Authority*, E-12/20, paragraph 75 and case law cited; and compare the judgment of 18 October 2018 in *E.G.*, C-662/17, EU:C:2018:847, paragraph 48 and case law cited).

71 Protection against arbitrary or disproportionate intervention by public authorities in the sphere of private activities of any natural or legal person also constitutes a general principle of EEA law. These principles and that protection must be observed in all proceedings initiated against, and may be invoked by, a relevant person in respect of a measure adversely affecting him or her in all situations governed by EEA law (compare, to that effect, the judgment of 13 September 2018 in *UBS Europe and Others*, C-358/16, EU:C:2018:715, paragraph 56 and 60 and case law cited).

72 Furthermore, according to established case law, provisions of EEA law are to be interpreted in light of fundamental rights which form part of the general principles of EEA law. The provisions of the European Convention on Human Rights and the judgments of the European Court of Human Rights are important sources for determining the scope of these fundamental rights. In that regard, it must be noted that the EEA States, in particular their courts, must not only interpret their national law in a manner consistent with EEA law but are also under an obligation to ensure that the interpretation and application of acts incorporated into the EEA Agreement does not result in a conflict with fundamental rights protected by EEA law (see, inter alia, the judgment of 21 March 2024 in *Criminal proceedings against LDL*, E-5/23, paragraph 54 and case law cited).

73 The rights of the defence must be observed in all proceedings initiated against a person

which may well culminate in a measure adversely affecting that person. The right of access to the file is, in turn, a necessary corollary of the effective exercise of the rights of the defence (compare the judgment in *UBS Europe and Others*, C-358/16, cited above, paragraphs 60 and 61).

74 However, it is settled case law that not all fundamental rights enjoy absolute protection and may be restricted, provided that the restrictions in fact correspond to objectives of general interest pursued by the measure in question and that they do not involve, in the light of the objectives pursued, a disproportionate and intolerable interference, impairing the very substance of the right so guaranteed (see the judgment of 9 July 2014 in *Fred. Olsen and Others*, Joined Cases E-3/13 and E-20/13, paragraph 229 and case law cited, and compare the judgment in *UBS Europe and Others*, C-358/16, cited above, paragraph 62).

75 Such restrictions may, in particular, be designed to protect requirements of confidentiality or professional secrecy, which are liable to be infringed by access to certain information and certain documents (compare the judgment in *UBS Europe and Others*, C-358/16, cited above, paragraph 63).

76 Furthermore, a request for disclosure must relate to information in respect of which the applicant puts forward precise and consistent evidence plausibly suggesting that it is relevant for the purposes of the proceedings which are under way or to be initiated, the subject matter of which must be specifically identified by the applicant and without which the information in question cannot be used (compare the judgment in *Buccioni*, C-594/16, cited above, paragraph 38).

77 It follows from the request that X proposed to acquire a qualifying holding in a bank established in Luxembourg. According to the facts set out in the request, X's Luxembourg lawyers notified him that in their preliminary conversation with the competent authority in Luxembourg, that authority had expressed an unambiguously negative view of the planned transaction. Nevertheless, no official decision or measure was adopted *vis-à-vis* X in this regard by the competent authority in Luxembourg. In the light of that information, it must be noted that it appears as if no proceedings were initiated against X which culminated in a measure adversely affecting him, which required observance of his rights of defence. Ultimately, it is for the referring body to determine whether X has been the subject of a measure adversely affecting him and whether granting him access to confidential information is necessary for him to fully exercise, inter alia, his rights of defence.

78 In the light of the foregoing, the answer to Questions 3 to 5 must be that Article 53(1) of the Directive must be interpreted as meaning that all information held by the competent authorities (i) which is not public and (ii) the disclosure of which is likely to affect adversely the interests of the natural or legal person who provided that information or of third parties, or the proper functioning of the system for monitoring the activities of credit institutions and investment firms, is to be classified as confidential information that is covered by the obligation of professional secrecy. Further, Article 53 lists exhaustively the specific cases where, exceptionally, that

general prohibition does not preclude their communication or use. The protection of the confidentiality of the information covered by the obligation of professional secrecy in Article 53(1) must, however, be guaranteed and implemented in such a way as to reconcile it with general principles of EEA law, including the principle of effective judicial protection, the rights of the defence and the protection against arbitrary or disproportionate intervention by public authorities in the sphere of private activities.

IV COSTS

79 Since these proceedings are a step in the proceedings pending before the referring body, any decision on costs for the parties to those proceedings is a matter for that body. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds,

THE COURT

in answer to the questions referred to it by the Appeals Board of the Financial Market Authority hereby gives the following Advisory Opinion:

1. **The Court is competent to give an advisory opinion on the interpretation of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice in accordance with Article 34 of that agreement.**

2. **A national court or tribunal is permitted under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice to request an advisory opinion from the Court, although a legal question, which is the subject of the request for an advisory opinion, has already been answered in an earlier set of proceedings by a higher-ranking national court with binding effect in accordance with national procedural law.**

3. **Article 53(1) of Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms must be interpreted as meaning that all information held by the competent authorities (i) which is not public and (ii) the disclosure of which is likely to affect adversely the interests of the natural or legal person who provided that information or of third parties, or the proper functioning of the system for monitoring the activities of credit institutions and investment firms, is to be classified as confidential information that is covered by the obligation of professional secrecy.**

4. **Article 53 of Directive 2013/36/EU lists exhaustively the specific cases where, exceptionally, that general prohibition does not preclude their communication or use. The protection of the confidentiality of the information covered by the obligation of professional secrecy in Article 53(1) of Directive 2013/36/EU must, however, be guaranteed and implemented in such a way as to reconcile it with general principles of EEA law, including the principle of effective judicial protection, the rights of the defence and the protection against arbitrary or disproportionate intervention by public authorities in the sphere of private activities.**

Páll Hreinsson [sign] | Bernd Hammermann [sign] | Michael Reiertsen [sign]

Delivered in open court in Luxembourg on 9 August 2024.

Ólafur Jóhannes Einarsson
Registrar
[sign]

Páll Hreinsson
President
[sign]