REPORT FOR THE HEARING

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 the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice and 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.

I Introduction

1. By letter of 17 August 2023, registered at the Court on 18 August 2023, the Board of Appeals of the Financial Market Authority ("the Appeals Board") requested an Advisory Opinion in the case pending before it between X and the Financial Market Authority (*Finanzmarktaufsicht*) ("the FMA").

2. The case before the Appeals Board concerns an appeal brought by X against a decision of the FMA of 5 June 2023, by which the FMA refused X's claims for access to files, information and facts exchanged between the FMA and the Luxembourg Financial Sector Supervisory Commission (*Commission de Surveillance du Secteur Financier* "CSSF"), on X's proposed acquisition of a qualifying holding in a bank established in the Grand-Duchy of Luxembourg.

II Legal background

EEA law

3. 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.*

4. Article 108(2) EEA reads:

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

5. 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.*
>
> …

6. 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) ("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) and is referred to at point 14 of Annex IX (Financial Services) to the EEA Agreement. Constitutional requirements were indicated by Norway, Iceland and Liechtenstein. The requirements were fulfilled by 27 November 2019 and the decision entered into force on 1 January 2020.

7. Recital 28 of the Directive reads:

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.

8. Recital 29 of the Directive reads:

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.

9. Recital 32 of the Directive reads:

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.

10. Article 4(1) of the Directive, 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.

11. Article 6 of the Directive, entitled "Cooperation within the European System of Financial Supervision", reads, 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;

...

12. Article 24 of the Directive, 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.

13. Article 53, entitled "Professional secrecy", reads, in extract:

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.

…

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 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.*

14. Article 56 of the Directive, 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

15. The Directive 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").

16. Pursuant to Article 26a(6) of the Banking Act, which transposed Article 24(2) of the Directive, the FMA shall cooperate with the competent authorities of the other EEA Member 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.

17. 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.

18. 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.

…

19. According to Article 30h of the Banking Act, entitled "Exchange of information", the FMA shall transmit to a requesting competent authority of an EEA Member 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.

20. According to Section 310(1) of the Liechtenstein Criminal Code (*Strafgesetzbuch*) (LGBl. 1988 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.

21. 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 that the activities of public authorities are made transparent to encourage the freedom of the population to form opinions and confidence in activities of the authorities.

22. 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.

23. 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.

24. 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 the 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 particularly, by threatening public security, or (c) this would entail a disproportionate effort for the authority.

III Facts and procedure

25. 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.

26. 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 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.

27. 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.

28. 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.

29. 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 Appeals Board rejected an appeal brought by X.

30. 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 Information Act grants each person who can claim to have a legitimate interest a right to access official documents unless precluded by overriding public or private interests. 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 right existed.

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

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

33. 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?

IV Written observations

34. Pursuant to Article 20 of the Statute of the Court and Article 90(1) of the Rules of Procedure, written observations have been received from:

- X, represented by Dr Karl Mumelter, advocate;
- the Liechtenstein Government, 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 Corneliu Hoedelmayr and Dimitrios Triantafyllou, acting as Agents.

V Proposed answers submitted

X

35. X does not propose any specific answers to the questions referred.

36. With regard to Question 1, X, in essence, contends that this is a question that does not directly concern the complainant.

37. In relation to Question 2, X observes that the answer should take account of the fact that even if information relating to the formal but also informal exchange of information between the competent authorities is subject to an obligation of secrecy in accordance with the Directive, the judgment of the VGH may continue to apply, especially since an interest in information may nevertheless be given preference over an obligation of secrecy in a necessary balancing of interests under national law.

38. In relation to Question 3, X asserts that the scope of the confidentiality obligation in Articles 53 and 54 of the Directive cannot apply to the FMA's "own" information.

39. As for Question 4, X argues that Article 53 of the Directive cannot apply to information requests concerning information about X himself.

40. Further, according to X, the first part of Question 5 should be answered in the affirmative.

The Liechtenstein Government

41. The Liechtenstein Government submits that the questions referred should be answered as follows:

1. *In light of the above considerations, the Liechtenstein Government considers that it is not necessary for the EFTA Court to answer this question.*

2. *In light of the above considerations, the Liechtenstein Government considers that it is not necessary for the EFTA Court to answer this question.*

3. *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, is subject to the obligation of professional secrecy within the meaning of Article 53 of this Directive.*

4. *The cooperation between competent authorities as provided for in Article 24 of the Directive mentioned must be regarded as an exchange of information which pursuant to Article 53 of this Directive is subject to an obligation of professional secrecy,*

5. *The obligation of professional secrecy set out in the first subparagraph of Article 53 (1) of the Directive mentioned does not apply 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).*

6. *Considering the proposed answers to the previous questions, the Liechtenstein Government considers that it is not necessary for the EFTA Court to answer this question.*

ESA

42. ESA submits that the questions referred should be answered as follows:

1. *The provisions of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice constitute EEA law which the EFTA Court is competent to interpret in the context of a request for an advisory opinion pursuant to Article 34 of that agreement.*

2. *In light of the principles of effectiveness and effective judicial protection, a national court may refer a question of the interpretation of EEA law for an advisory opinion to the EFTA Court where it considers that such a question is necessary for the resolution of the matters before it, notwithstanding that a higher-ranking national court has previously ruled on the same question.*

3. *Article 53 of Directive 2013/36/EU, read together with Article 24, as well as Article 56 last sentence, requires that competent authorities respect the confidentiality of information which is exchanged between them.*

4. *Article 53 sets out in an exhaustive manner the exceptions permitted to professional secrecy. Those exceptions must be narrowly construed.*

The Commission

43. The Commission submits that the questions referred should be answered as follows:

Answers to Questions 1 and 2:

The authorities of EEA EFTA States are precluded from granting access to information which is subject to the obligation of professional secrecy within the meaning of Article 53 of Directive 2013/36/EU.

Answer to Question 3:

Information subject to formal or informal exchanges of information between the competent authorities of the Member States as provided for in Article 4(1) of Directive 2013/36/EU is subject to the obligation of professional secrecy within the meaning of Article 53 of this Directive, provided that the information is "confidential", what the referring court has to verify.

Information held by the authorities in the context of the performance of the functions laid down by Directive 2013/36/EU is confidential if i) it is not public and ii) its disclosure 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 concerned.

Answer to Question 4:

Cooperation between competent authorities as provided for in Article 24 of Directive 2013/36/EU must be regarded as an exchange of information, which, pursuant to Article 56 and 53 of this Directive, is subject to the obligation of professional secrecy concerning confidential information, without prejudice to the motivation obligation imposed on the competent authority that has authorised the credit institution in which the acquisition is proposed.

Answer to Question 5:

The obligation of professional secrecy set out in the first subpara of Article 53(1) of Directive 2013/36/EU may be breached only in the cases mentioned in Article 53(1).

Michael Reiertsen
Judge-Rapporteur