REPORT FOR THE HEARING

in Case E-2/23

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 Appeals Board of the Financial Market Authority (*Beschwerdekommission der Finanzmarktaufsicht*), in the case between

A Ltd

and

the Financial Market Authority (*Finanzmarktaufsicht*),

concerning the interpretation of Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) and Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority) ("EIOPA").

I Introduction

1. By letter of 23 March 2023, registered at the Court on 24 March 2023, the Appeals Board of the Financial Markets Authority ("the Appeals Board") requested an Advisory Opinion in the case pending before it between A Ltd and the Financial Market Authority (*Finanzmarktaufsicht*) ("the FMA").

2. The case before the Appeals Board concerns an appeal brought by A Ltd against a decision of the FMA of 22 December 2022 to oppose the proposed acquisition by A Ltd of all the shares in Z AG, a Liechtenstein life insurance company ("the contested decision").

II Legal background

EEA law

3. Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (OJ 2009 L 335, p. 1) ("the Solvency II Directive") was incorporated into the Agreement on the European Economic Area ("the EEA Agreement" or "EEA") by Decision of the EEA Joint Committee No 78/2011 of 1 July 2011 (OJ 2011 L 262, p. 45) and is referred to at point 1 of Annex IX (Financial services) to the EEA Agreement. Constitutional requirements were indicated by Norway, Iceland and Liechtenstein. The requirements were fulfilled by 23 October 2012 and the decision entered into force on 1 December 2012.

4. Recital 33 of the Solvency II Directive reads:

> *The functions included in the system of governance are considered to be key functions and consequently also important and critical functions.*

5. Recital 34 of the Solvency II Directive reads:

> *All persons that perform key functions should be fit and proper. However, only the key function holders should be subject to notification requirements to the supervisory authority.*

6. Recital 75 of the Solvency II Directive reads:

> *Maximum harmonisation throughout the Community of those procedures and prudential assessments is therefore critical. However, the provisions on qualifying holdings should not prevent the Member States from requiring that the supervisory authorities are to be informed of acquisitions of holdings below the thresholds laid down in those provisions, so long as a Member State imposes no more than one additional threshold below 10 % for that purpose. Nor should those provisions prevent the supervisory authorities from providing general guidance as to when such holdings would be deemed to result in significant influence.*

7. Article 24(1) of the Solvency II Directive, entitled "Shareholders and members with qualifying holdings", reads:

> *1. The supervisory authorities of the home Member State shall not grant to an undertaking an authorisation to take up the business of insurance or reinsurance before they have been informed of the identities of the shareholders or members, direct or indirect, whether natural or legal persons, who have qualifying holdings in that undertaking and of the amounts of those holdings.*

Those authorities shall refuse authorisation if, taking into account the need to ensure the sound and prudent management of an insurance or reinsurance undertaking, they are not satisfied as to the qualifications of the shareholders or members.

8. Article 42(1) of the Solvency II Directive, entitled "Fit and proper requirements for persons who effectively run the undertaking or have other key functions", reads:

1. Insurance and reinsurance undertakings shall ensure that all persons who effectively run the undertaking or have other key functions at all times fulfil the following requirements:

(a) their professional qualifications, knowledge and experience are adequate to enable sound and prudent management (fit); and

(b) they are of good repute and integrity (proper).

9. Article 57(1) of the Solvency II Directive, entitled "Acquisitions", reads, in extract:

1. Member States shall require any natural or legal person or such persons acting in concert (the proposed acquirer) who have taken a decision either to acquire, directly or indirectly, a qualifying holding in an insurance or reinsurance undertaking or to further increase, directly or indirectly, such a qualifying holding in an insurance or reinsurance undertaking as a result of which the proportion of the voting rights or of the capital held would reach or exceed 20 %, 30 % or 50 % or so that the insurance or reinsurance undertaking would become its subsidiary (the proposed acquisition), first to notify in writing the supervisory authorities of the insurance or reinsurance undertaking in which they are seeking to acquire or increase a qualifying holding, indicating the size of the intended holding and relevant information, as referred to in Article 59(4).
…

10. Article 59(1), (2) and (4) of the Solvency II Directive, entitled "Assessment", reads:

1. In assessing the notification provided for in Article 57(1) and the information referred to in Article 58(2) the supervisory authorities shall, in order to ensure the sound and prudent management of the insurance or reinsurance undertaking in which an acquisition is proposed, and having regard to the likely influence of the proposed acquirer on the insurance or reinsurance undertaking, appraise the suitability of the proposed acquirer and the financial soundness of the proposed acquisition against all of the following criteria:

(a) the reputation of the proposed acquirer;

(b) the reputation and experience of any person who will direct the business of the insurance or reinsurance undertaking as a result of the proposed acquisition;

(c) the financial soundness of the proposed acquirer, in particular in relation to the type of business pursued and envisaged in the insurance or reinsurance undertaking in which the acquisition is proposed;

(d) whether the insurance or reinsurance undertaking will be able to comply and continue to comply with the prudential requirements based on this Directive and, where applicable, other Directives, notably, Directive 2002/87/EC, in particular, whether the group of which it will become part has a structure that makes it possible to exercise effective supervision, effectively exchange information among the supervisory authorities and determine the allocation of responsibilities among the supervisory authorities;

(e) whether there are reasonable grounds to suspect that, in connection with the proposed acquisition, money laundering or terrorist financing within the meaning of Article 1 of Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing is being or has been committed or attempted, or that the proposed acquisition could increase the risk thereof.

2. The supervisory authorities may oppose the proposed acquisition only if there are reasonable grounds for doing so on the basis of the criteria set out in paragraph 1 or if the information provided by the proposed acquirer is incomplete.

…

4. Member States shall make publicly available a list specifying the information that is necessary to carry out the assessment and that must be provided to the supervisory authorities at the time of notification referred to in Article 57(1). The information required shall be proportionate and adapted to the nature of the proposed acquirer and the proposed acquisition. Member States shall not require information that is not relevant for a prudential assessment.

11. Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC (OJ 2010 L 331, p. 48) ("the EIOPA Regulation") was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 200/2016 of 30 September 2016 (OJ 2017 L 46, p. 13) and is referred to at point 31h of Annex IX (Financial services) to the EEA Agreement. The decision entered into force on 1 October 2016.

12. Recital 25 of the EIOPA Regulation reads:

In areas not covered by regulatory or implementing technical standards, the Authority should have the power to issue guidelines and recommendations on the application of Union law. In order to ensure transparency and to strengthen compliance by national supervisory authorities with those guidelines and recommendations, it should be possible for the Authority to publish the reasons for supervisory authorities' non-compliance with those guidelines and recommendations.

13. Recital 53 of the EIOPA Regulation reads, in extract:

As a general rule, the Board of Supervisors should take its decisions by simple majority in accordance with the principle where each member has one vote. However, for acts of a general nature, including those relating to regulatory and implementing technical standards, guidelines and recommendations, for budgetary matters as well as in respect of requests by a Member State to reconsider a decision by the Authority to temporarily prohibit or restrict certain financial activities, it is appropriate to apply the rules of qualified majority voting as laid down in Article 16(4) of the Treaty on European Union and in the Protocol (No 36) on transitional provisions annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union. ...

14. Article 16 of the EIOPA Regulation, entitled "Guidelines and recommendations", reads, in extract:

1. The Authority shall, with a view to establishing consistent, efficient and effective supervisory practises within the ESFS, and to ensuring the common, uniform and consistent application of Union law, issue guidelines and recommendations addressed to competent authorities or financial institutions.

...

3. The competent authorities and financial institutions shall make every effort to comply with those guidelines and recommendations.

Within 2 months of the issuance of a guideline or recommendation, each competent authority shall confirm whether it complies or intends to comply with that guideline or recommendation. In the event that a competent authority does not comply or does not intend to comply, it shall inform the Authority, stating its reasons.

The Authority shall publish the fact that a competent authority does not comply or does not intend to comply with that guideline or recommendation. The Authority may also decide, on a case-by-case basis, to publish the reasons provided by the competent authority for not complying with that guideline or

recommendation. The competent authority shall receive advanced notice of such publication.

If required by that guideline or recommendation, financial institutions shall report, in a clear and detailed way, whether they comply with that guideline or recommendation.

…

15. Article 44(1) of the EIOPA Regulation reads, in extract:

> *1. Decisions of the Board of Supervisors shall be taken by a simple majority of its members. Each voting member shall have one vote.*
>
> *With regard to the acts specified in Articles 10 to 16 and measures and decisions adopted under the third subparagraph of Article 9(5) and Chapter VI and by way of derogation from the first subparagraph of this paragraph, the Board of Supervisors shall take decisions on the basis of a qualified majority of its members …*

16. Commission Delegated Regulation (EU) 2015/35 of 10 October 2014 supplementing Directive 2009/138/EC of the European Parliament and of the Council on the taking-up and the pursuit of the business of Insurance and Reinsurance (OJ 2015 L 12, p. 1) ("the Delegated Regulation") was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 62/2018 of 23 March 2018 (OJ 2020 L 26, p. 50) as point 1b of Annex IX (Financial services) to the EEA Agreement and entered into force in the EEA on 1 August 2019.

17. Article 273 of the Delegated Regulation, entitled "Fit and proper requirements", reads:

> *1. Insurance and reinsurance undertakings shall establish, implement and maintain documented policies and adequate procedures to ensure that all persons who effectively run the undertaking or have other key functions are at all times fit and proper within the meaning of Article 42 of Directive 2009/138/EC.*
>
> *2. The assessment of whether a person is fit shall include an assessment of the person's professional and formal qualifications, knowledge and relevant experience within the insurance sector, other financial sectors or other businesses and shall take into account the respective duties allocated to that person and, where relevant, the insurance, financial, accounting, actuarial and management skills of the person.*
>
> *3. The assessment of whether members of the administrative, management or supervisory body are fit shall take account of the respective duties allocated to individual members to ensure appropriate diversity of qualifications, knowledge*

and relevant experience to ensure that the undertaking is managed and overseen in a professional manner.

4. The assessment of whether a person is proper shall include an assessment of that person's honesty and financial soundness based on evidence regarding their character, personal behaviour and business conduct including any criminal, financial and supervisory aspects relevant for the purposes of the assessment.

National law

18. The Solvency II Directive was transposed into Liechtenstein law by the Act of 12 June 2015 on the Supervision of Insurance Undertakings (*Versicherungsaufsichtsgesetz*) (LGBl. No 2015/231) ("Insurance Supervision Act").

19. Article 94 of the Insurance Supervision Act corresponds to Article 59 of the Solvency II Directive.

20. Article 94(1) of the Insurance Supervision Act entails, inter alia, that the FMA shall, in order to ensure the sound and prudent management of the insurance undertaking in which an acquisition is proposed, and having regard to the likely influence of the proposed acquirer on the insurance undertaking, appraise the suitability of the proposed acquirer and the proposed acquisition against all the following criteria: (a) the personal integrity of the proposed acquirer; (b) the personal integrity and experience of any person who will direct the insurance undertaking as a result of the proposed acquisition; (c) the financial soundness of the proposed acquirer, in particular in relation to the type of business pursued and envisaged in the insurance undertaking in which the acquisition is proposed; (d) whether: 1. the insurance undertaking will be able to comply and continue to comply with the relevant prudential requirements.

21. Article 94(2) of the Insurance Supervision Act provides that the FMA may oppose the proposed acquisition if there are reasonable grounds for doing so on the basis of the criteria referred to in Article 94(1) or if the information or documents to be submitted are incomplete.

22. Article 179(1) of the Insurance Supervision Act provides that, in the exercise of its duties, the FMA shall have regard to the convergence of supervisory tools and practices in the EEA. Article 179(2) of the Insurance Supervision Act provides that the FMA shall have regard to the activities, guidelines and recommendations of EIOPA.

III Facts and procedure

23. A Ltd is a joint-stock company established under foreign law with a share capital of USD 100. Its registered office is not in an EEA Member State. Its sole shareholder is B Inc, a company also established under foreign law. B Inc's registered office is not in an EEA Member State.

24. Ms C is the sole shareholder of B Inc. She is also the sole managing director of both A Ltd and B Inc. Ms C does not reside in an EEA Member State, nor does she have the nationality of an EEA Member State.

25. A Ltd proposes to acquire all the shares in Z AG, a joint-stock company established under Liechtenstein law with a registered office in Liechtenstein. Z AG has been licensed by the FMA to operate life insurance business, inter alia, in class 1, as referred to in Annex 2 to the Insurance Supervision Act.

26. By the contested decision, the FMA opposed the proposed acquisition by A Ltd, the proposed acquirer, of all of the shares in Z AG in accordance with Article 93(5) and Article 94(2) of the Insurance Supervision Act.

27. Pursuant to Article 179 of the Insurance Supervision Act, the FMA also relied, in support of the contested decision, on the Joint Guidelines on the prudential assessment of acquisitions and increases of qualifying holdings in the financial sector, issued by EIOPA on 20 December 2016, issued pursuant to Article 16 of the EIOPA Regulation ("the Guidelines").

28. In support of the contested decision, the FMA reasoned, first, that although A Ltd is intended as the immediate acquirer of all the shares in Z AG, by reason of Ms C's exclusive control, the assessment of the proposed acquisition by the FMA against the criteria set out in Article 94(1) of the Insurance Supervision Act has to be carried out in relation to Ms C personally as the proposed acquirer.

29. The appraisal by the FMA of the suitability and personal integrity of Ms C pursuant to Article 94(1), first sentence, and Article 94(1)(a) of the Insurance Supervision Act (the Guidelines, Chapter 3, Paragraph 10), indicated that Ms C does not comply with this statutory requirement. According to the contested decision, the criteria of suitability and personal integrity also includes the professional competence of the proposed acquirer, above all where – as in the present case – it is intended to acquire all the shares in an insurance undertaking. In that connection, professional competence covers not only competence in management but also technical competence in the area of the business activities of the undertaking to be acquired (the Guidelines, Chapter 3, Paragraph 10.23 et seq.).

30. The appraisal by the FMA of the financial soundness of Ms C, in particular with regard to the nature of the actual and planned activities of the insurance undertaking which it is proposed to acquire, pursuant to Article 94(1)(c) of the Insurance Supervision Act, (the Guidelines Chapter 3, Paragraph 12), indicated, having regard to the rigorous standard necessary in the present case of a proposed acquisition of all the shares in Z AG (the Guidelines, Chapter 3, Paragraph 12.5), that Ms C also does not comply with this statutory requirement. It was the FMA's assessment that her financial soundness depended exclusively on shares, which she holds by way of D AG, a joint-stock company under foreign law with a registered office outside of the European Economic Area. This consists of a single, volatile and, moreover, debt financed investment, which constitutes nonetheless a considerable asset. Ms C's declaration, given to the FMA in

writing, indicating her willingness to transfer the amount of CHF 10 million to A Ltd and to produce a payment commitment from D AG to A Ltd was not suitable to eliminate the concerns of the FMA. Capital held in a holding company controlled by a potentially penniless shareholder and a payment commitment from a potentially overindebted company had to be assessed differently to capital securely available to the company for at least three years (the Guidelines, Chapter 3, Paragraphs 12.1 and 12.2).

31. Finally, the assessment of the question whether, with Ms C (indirectly) as sole shareholder, Z AG is able to comply and will continue to comply with the relevant prudential requirements, as provided for in point 1 of Article 94(1)(d) of the Insurance Supervision Act, (the Guidelines, Chapter 3, Paragraph 13), gave rise to serious concerns on the part of the FMA.

32. A Ltd brought an appeal against the contested decision to the Appeals Board. It disputes the argument that the professional competence of Ms C is open to an assessment of any kind and considers the financial soundness of Ms C to be adequate.

33. Against this background, the Appeals Board decided to stay the proceedings and refer the following questions to the Court:

1. **How must the terms "suitability" and "reputation" be interpreted for the purposes of Article 59(1)(a) of Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II), OJ L 335, 17.12.2009, p. 1, incorporated into the EEA Agreement by Decision No 78/2011 of the EEA Joint Committee of 27 November 2012, LGBl. 2012/384? Is it thereby intended to refer only to the integrity or also to the professional suitability of the proposed acquirer?**

2. **In the appraisal of the financial soundness of the proposed acquirer within the meaning of Article 59(1)(c) of the Directive mentioned may it also be taken into account that any necessary supply of funds by that person to the insurance undertaking is ensured through the provision of a bank guarantee or the making available of funds on a trust account which may be drawn on by the insurance undertaking at any time?**

3. **How must the words "reasonable grounds" be interpreted for the purposes of Article 59(2) of the Directive mentioned? Is for these purposes certainty of non-compliance with the statutory requirements necessary or are substantiated doubts sufficient?**

4. **Does a declaration made by the competent authority, here: by the Financial Market Authority Liechtenstein, pursuant to Article 16(3) of Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), OJ L 331, 15.12.2010, p. 48, incorporated into the EEA Agreement by**

Decision No 200/2016 of the EEA Joint Committee of 30 September 2016, LGBl. 2016/303, to make every effort to comply with the guidelines, here: Joint Guidelines on the prudential assessment of acquisitions and increases of qualifying holdings in the financial sector, JC/GL/2016/01, have binding effect on the courts of the Member States so that the latter are also obliged to make every effort to comply with these guidelines?

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:

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

- the Icelandic Government, represented by Inga Þórey Óskarsdóttir, Hendrik Daði Jónsson and Elísabet Júlíusdóttir, acting as Agents;

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

- the European Commission ("the Commission"), represented by Helene Tserepa-Lacombe, Lorna Armati and Corneliu Hödlmayr, acting as Agents.

V Proposed answers submitted

The Liechtenstein Government

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

1. *When assessing whether the requirement of 'the suitability of the proposed acquirer' for the purposes of Article 59(1)(a) of Directive 2009/138/EC (Solvency II) is fulfilled, national supervisory authorities have to consider the reputation of the proposed acquirer. The term 'reputation of the proposed acquirer', however, consists of two criteria: the integrity and the professional competence. In a case like the one at hand, when one undertaking intends to acquire all shares of an insurance undertaking in an EEA State, both criteria have to be applied.*

2. *It depends on the concrete circumstances of the individual case whether for the appraisal of the financial soundness of the proposed acquirer within the meaning of Article 59(1)(c) of Solvency II it may also be taken into account that any necessary supply of funds by that person to the insurance undertaking is ensured through the provision of a bank guarantee or the making available of funds on a trust account which may be drawn on by the insurance undertaking at any time.*

3. *For the purposes of Article 59(2) of Solvency II, the words 'reasonable grounds' must be interpreted as meaning that substantiated doubts are sufficient.*

4. *A declaration made by the competent authority, here: by the Financial Market Authority Liechtenstein, pursuant to Article 16(3) of Regulation (EU) No 1094/2010, to make every effort to comply with guidelines, here: Joint Guidelines on the prudential assessment of acquisitions and increases of qualifying holdings in the financial sector, JC/GL/2016/01, results in the national courts being obliged to take the Joint Guidelines on the prudential assessment of acquisitions and increases of qualifying holdings in the financial sector into consideration with a view to resolving the disputes submitted to them, in particular as they are intended to supplement binding provisions of EEA law.*

The Icelandic Government

36. The Icelandic Government submits that the fourth question should be answered as follows:

> *A declaration made by the competent authority to make every effort to comply with guidelines issued by a European Supervisory Authority does not have a binding effect on a national court so that the latter is also obliged to make every effort to comply with those guidelines. National courts interpreting provisions of the EEA Agreement should take into consideration any available guidelines issued by a European Supervisory Authority where those guidelines may be of relevance and use to the interpretation of those provisions. Furthermore, towards that aim of interpreting applicable provisions of the EEA Agreement, national courts should also take into consideration any declaration by the competent authority confirming its compliance with those guidelines or, as the case may be, its non-compliance and the reasons therefore.*

ESA

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

> *1. For the purposes of Article 59(1)(a) of Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II), the terms "suitability" and "reputation" must be interpreted as referring to the integrity and professional competence of the proposed acquirer.*
>
> *2. In the appraisal of the financial soundness of the proposed acquirer within the meaning of Article 59(1)(c) and (d) of the Directive, the national supervisory authority may take into account the supply of funds by that person to the insurance undertaking through the provision of a bank guarantee or by the*

making available of funds on a trust account which may be drawn on by the insurance undertaking at any time.

3. For the purposes of Article 59(2) of the Directive, the term "reasonable grounds" must be interpreted as not requiring certainty.

4. Guidelines issued by the European Insurance and Occupational Pensions Authority under Article 16(3) of Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), do not have binding legal effect on the national courts of the EFTA States.

The Commission

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

1. Article 59(1)(a) of Directive 2009/138 must be interpreted as meaning that the assessment of the reputation of the proposed acquirer should cover both integrity and professional competence.

2. Article 59(1)(c) of Directive 2009/138 does not preclude national rules according to which an assessment must take into account all relevant information, including, as the case may be, the provision of a bank guarantee or the making available of funds on a trust account.

3. Article 59(2) of the Solvency II Directive must be interpreted as meaning that, in order to oppose a proposed acquisition, it is not necessary for a supervisory authority to establish actual non-compliance with one of the criteria listed in paragraph 1 of that provision.

4. It is for national courts in the EEA EFTA States to take into consideration EIOPA Guidelines in order to resolve disputes before them. This is particularly the case when the national authority of an EEA EFTA State has confirmed its intention to comply with those guidelines.

Páll Hreinsson
Judge-Rapporteur