PRINCIPALITY OF LIECHTENSTEIN

APPEALS BOARD OF THE FINANCIAL MARKET AUTHORITY

FMA-BK 2023/1

ON 14

Order

At the closed sitting of 23 March 2023, the Appeals Board of the Financial Market Authority (*Beschwerdekommission der Finanzmarktaufsicht*) composed of

Board members:	Dr Wilhelm Ungerank LL.M., President Reinhold Zanghellini, Vice-President Martina Haas, member

in the appeal brought by

appellant:	A Ltd represented by Gasser Partner Rechtsanwälte, Industriering 3, 9491 Ruggell, Principality of Liechtenstein
against:	Decision of the Financial Market Authority of 22 December 2022, Ref. No 7462/307782/2022

concerning: opposition to the proposed acquisition pursuant to Article 94(2) of the Insurance Supervision Act

ruled as follows:

The appeal proceedings are stayed and the following questions are referred to the EFTA Court in Luxembourg pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (SCA) with a request for an advisory opinion:

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 guidelines, here: Joint Guidelines on the prudential assessment of acquisitions and increases of qualifying holdings in the financial sector, JC/GL/2016/01, have a 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?

Grounds

1. Facts

1.1. A Ltd [name anonymised], hereinafter "the appellant", 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 [name anonymised], also established under foreign law. Also the registered office of B Inc is not in an EEA Member State.

Its sole shareholder is Ms C [name anonymised]. Ms C is, in addition, the sole managing director of the appellant and of B Inc. Ms C does not reside in an EEA Member State nor does she have the nationality of an EEA Member State.

1.2. A Ltd proposes to acquire all the shares in Z AG [name anonymised]. Z AG is a joint-stock company established under Liechtenstein law with a registered office in Liechtenstein which has been licensed by the Financial Market Authority Liechtenstein (*Finanzmarktaufsicht Liechtenstein*) (hereinafter "FMA") to operate life insurance business, inter alia, in class 1, as referred to in Annex 2 to the Insurance Supervision Act.

1.3. By the decision of 22 December 2022, which is now under challenge, the FMA opposed within the prescribed period, that is before the period for assessment expired on 23 December 2022 pursuant to Article 93(2), (3) and (4) of the Insurance Supervision Act, the proposed acquisition by A Ltd, the proposed acquirer, of all the shares in Z AG in accordance with Article 93(5) and Article 94(2) of the Insurance Supervision Act.

In support of this decision, it 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 proposed acquirer.

The appraisal 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, JC/GL/2016/01, Chapter 3, Paragraph 10, indicated that Ms C does not comply with this statutory requirement. According to the decision the criteria of suitability and personal integrity also include 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 (JC/GL/2016/01, Chapter 3, Paragraph 10.23 et seq.).

The appraisal 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, JC/GL/2016/01, 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 (JC/GL/2016/01, Chapter 3, Paragraph 12.5), that Ms C also does not comply with this statutory requirement. Her financial soundness depends 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 EEA. 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 the appellant and to produce a

payment commitment from D AG to the appellant is 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 has to be assessed differently to capital securely available to the company for at least three years (JC/GL/2016/01, Chapter 3, Paragraphs 12.1 and 12.2).

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, JC/GL/2016/01, Chapter 3, Paragraph 13, gave rise to serious concerns on the part of the FMA.

1.4. The appellant brought an appeal against this decision in the prescribed form and within the prescribed period to the Appeals Board of the Financial Market Authority. 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.

2. European legal framework

2.1. 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, was incorporated into the EEA Agreement by Decision No 78/2011 of the EEA Joint Committee of 27 November 2012, LGBl. 2012/384.

Pursuant to Article 24(1) thereof ("Shareholders and members with qualifying holdings"), (supervisory) 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. Pursuant to Article 42(1) of this Directive ("Fit and proper requirements for persons who effectively run the undertaking or have other key functions"), 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). Finally, Article 59(1) ("Qualifying holdings") provides that, in assessing the notification provided for in Article 57(1) ("Acquisitions [of qualifying holdings]"), 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; and (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. Pursuant to Article 59(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.

2.2. Commission Delegated Regulation (EU) 2015/35 of 10 October 2014 supplementing 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) was incorporated into the EEA Agreement by Decision No 62/2018 of the EEA Joint Committee of 23 March 2018, LGBl. 2020/77.

Pursuant to Article 273 thereof ("Fit and proper requirements"), 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 (Article 273(2)) and 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 (Article 273(4)).

2.3. 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, was incorporated into the EEA Agreement by

Decision No 200/2016 of the EEA Joint Committee of 30 September 2016, LGBl. 2016/303.

Pursuant to Article 16 thereof ("Guidelines and recommendations"), with a view to establishing consistent, efficient and effective supervisory practices within the ESFS [European System of Financial Supervision], and to ensuring the common, uniform and consistent application of Union law, the [European Insurance and Occupational Pensions] Authority [EIOPA] shall issue guidelines and recommendations addressed to competent authorities or financial institutions (Article 16(1)) and the competent authorities and financial institutions shall make every effort to comply with those guidelines and recommendations and, to this end, each competent authority shall confirm within 2 months of the issuance of a guideline or recommendation whether it complies or intends to comply with that guideline or recommendation (Article 16(3)).

On 20 December 2016, Joint Guidelines on the prudential assessment of acquisitions and increases of qualifying holdings in the financial sector, JC/GL/2016/01, were adopted by the Joint Committee of the three European Supervisory Authorities and thus also by EIOPA.

In this connection, the FMA confirmed, in accordance with Article 16(3) of Regulation (EU) No 1094/2010, that it complies with Joint Guidelines JC/GL/2016/01 (JC/GL/2016/72 Appendix 1; https://www.eiopa.europa.eu/system/files/2020-10/jc-gl-2017-27-qualifying-holdings-guidelines-compliance-table.pdf).

3. National legal framework

3.1. In the Principality of Liechtenstein, the Directive mentioned was transposed into national law by the Act of 12 June 2015 on the Supervision of Insurance Undertakings (Insurance Supervision Act (*Versicherungsaufsichtsgesetz; VersAG*) Liechtensteinisches Landesgesetzblatt (LGBl.) 2015/231; available online together with all other Liechtenstein legislation at www.gesetze.li).

Pursuant to Article 94(1) thereof ("Substantive assessment of participations"), 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 financial soundness of the proposed acquisition against all of 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. Paragraph 2 of this provision 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 paragraph 1 or if the information or documents to be submitted are incomplete.

Pursuant to Article 179 ("Convergence of supervisory tools and practices in the EEA"), in the exercise of its duties, the FMA shall have regard to the convergence of supervisory tools and practices in the EEA (Article

179(1)) and shall have regard to the activities, guidelines and recommendations of EIOPA.

3.2. Regulations incorporated into the EEA Agreement are directly applicable in Liechtenstein.

4. Request for an advisory opinion

4.1. Courts and tribunals, which under Article 78(3) of the national constitution include appeals boards in the Principality of Liechtenstein, are entitled, pursuant to Article 34 SCA, to request the EFTA Court to give an advisory opinion. Under national law, a question concerning the interpretation of EEA law must be referred to the EFTA Court for a preliminary ruling wherever the legal situation is unclear and the point of law at issue is relevant to the decision (Constitutional Court (*Staatgerichtshof*, StGH) 2013/172, published in LES (= *Liechtensteinische Entscheidungssammlung* = Liechtenstein Collection of Judgments) 2014, 148).

4.2. In the present case the decision on the appeal depends first on whether the appraisal of the "suitability of the proposed acquirer" in relation to the criterion of "reputation" (*Zuverlässigkeit*) as referred to in Article 59(1)(a) of Directive 2009/138/EC must be interpreted as including the professional suitability of that person or only their integrity. Namely, whereas here only "reputation" (*Zuverlässigkeit*) is mentioned and in Article 273(4) of Delegated Regulation (EU) 2015/35 this [i.e. "*ob eine Person zuverlässig ist*", in English: "whether a person is proper"] is defined as "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", Article 42(1) [of Directive 2009/138/EC] expressly distinguishes "fit" ("*fachliche Qualifikation*") (point (a)) from "proper" ("*persönliche Zuverlässigkeit*") (point (b)). Whether a person is fit is defined in Article 273(2) of Delegated Regulation (EU) 2015/35 as "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".

This appears, at least from the wording, to support the view that in relation to the proposed acquirer it may be appraised only whether the person is proper (*persönliche Zuverlässigkeit*) and not their professional suitability (*fachliche Eignung*).

4.3. Further, it must be examined, in relation to the question of the financial soundness of the appellant and thus, ultimately, of Ms C, whether, for the purposes of Article 59(1)(c) of Directive 2009/138/EC, other possibilities exist, against the background of the contested decision (assets of Ms C consist in a single, volatile and, moreover, debt-financed investment; declaration by Ms C that she is willing to transfer the amount of CHF 10 million to the appellant and payment commitment by potentially overindebted D AG are inadequate), for Ms C to provide capital in an amount still be determined to Z AG for the period of three years argued for by the FMA. Conceivable here is, for example, an unconditional bank guarantee for a limited duration of three years payable on Z AG's first demand by a bank with its registered office in the

EEA (compare the judgment in Case E-10/04 *Piazza* [2005] EFTA Ct. Rep. 76, paragraph 47) or monies to be paid into a trust account held by a lawyer which can be withdrawn at any time by Z AG but not by Ms C. In accordance with the principle of proportionality in Liechtenstein procedural law, an alternative of that kind, because it constitutes a less intrusive measure than raising an opposition, would have to be examined, of the Appeal Board's own motion, in the appeal proceedings.

4.4. Also in need of interpretation is the expression "reasonable grounds" as used in Article 59(2) of Directive 2009/138/EC. Does this establish, in the place of certainty of non-compliance with the statutory conditions, a specific, at best reduced, standard of proof ("substantiated doubts") in favour of the supervisory authority raising its opposition (here: the FMA) or even a reversal of the burden of proof at the proposed acquirer's expense? The answer to this question, too, is relevant to the Appeals Board's decision, given that, on the one hand, the appellant contests the findings of fact made in the contested decision, meaning that these must be reviewed (on the basis of which standard of proof?) and, on the other hand, the contested decision is reasoned, in part, on the basis that the FMA's assessment gave rise to "considerable doubts".

4.5. In its reasoning of the contested decision, the FMA relies, on several occasions, as is evident from section 1.3. above, on the Joint Guidelines JC/GL/2016/01. By reason of the confirmation it has given pursuant to Article 16(3) of Regulation (EU) No 1094/2010, it is obliged to make every effort to comply with these Guidelines. However, these Guidelines do not constitute legal acts that have been incorporated into the EEA Agreement by way of a decision of the EEA Joint Committee or have

otherwise been the subject of national (here: Liechtenstein) legislative procedure. It is well-known, in accordance with the judgment of the Court of Justice of the European Union (CJEU) of 15 July 2021, *Fédération bancaire française*, C-911/19, EU:C:2021:599, that guidelines issued by the European Banking Authority (EBA) do not produce binding legal effects vis-à-vis the competent authorities (paragraph 45). At the same time, however, the CJEU held (paragraph 71) that it is also for the national courts to take into consideration EBA Guidelines in order to resolve the disputes submitted to them. Given the more limited depth of integration in the EEA and the fact that the Joint Guidelines JC/GL/2016/01 at issue here have neither been incorporated into the EEA Agreement nor the subject of national (here: Liechtenstein) legislative procedure, the question arises whether the Guidelines, merely by reason of the confirmation by the FMA that it complies with them, are to be taken into consideration by national courts in the EEA/EFTA States (and as a consequence by the Appeals Board seeking an advisory opinion in the present case) and/or whether national courts have to make every effort to comply with these Guidelines.

5. The appellant and the FMA were given the opportunity to submit observations before the request for an advisory opinion was made.

6. Pursuant to Article 74(1) of the General Administrative Procedures Act (*Landesverwaltungspflegegesetz*), a stay of the main proceedings until the EFTA Court delivers its advisory opinion had to be ordered.

Appeals Board of the Financial Market Authority

Vaduz, 23 March 2023

Dr Wilhelm Ungerank LL.M.

(President)

Notice concerning rights of appeal

No appeal may be brought against this order.