JUDGMENT OF THE COURT

25 January 2024[*]

(*Directive 2009/138/EC – Regulation (EU) No 1094/2010 – Jurisdiction of the Court – Guidelines issued by the European Supervisory Authorities – Reputation of the proposed acquirer – Financial soundness of the proposed acquirer – Prudential assessment – Reasonable grounds*)

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 Board of Appeal 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),

THE COURT,

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

Registrar: Ólafur Jóhannes Einarsson,

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

having considered the written observations submitted on behalf of:

– 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;

having regard to the Report for the Hearing,

having heard oral arguments of A Ltd, represented by Sebastian Auer, attorney; the Liechtenstein Government, represented by Dr Claudia Bösch; ESA, represented by Claire Simpson and Ingibjörg Ólöf Vilhjálmsdóttir; and the Commission, represented by Lorna Armati, at the hearing on 6 September 2023,

gives the following

Judgment

I Legal background

EEA law

1 Article 7 of the Agreement on the European Economic Area ("the EEA Agreement" or "EEA") reads:

> *Acts referred to or contained in the Annexes to this Agreement or in decisions of the EEA Joint Committee shall be binding upon the Contracting Parties and be, or be made, part of their internal legal order as follows:*
>
> *(a) an act corresponding to an EEC regulation shall as such be made part of the internal legal order of the Contracting Parties;*
>
> *(b) an act corresponding to an EEC directive shall leave to the authorities of the Contracting Parties the choice of form and method of implementation.*

2 Directive 2007/44/EC of the European Parliament and of the Council of 5 September 2007 amending Council Directive 92/49/EEC and Directives 2002/83/EC, 2004/39/EC, 2005/68/EC and 2006/48/EC as regards procedural rules and evaluation criteria for the

prudential assessment of acquisitions and increase of holdings in the financial sector (OJ 2007 L 247, p. 1) ("Directive 2007/44") was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 79/2008 of 4 July 2008 (OJ 2008 L 280, p. 7). Constitutional requirements were indicated by Iceland, Liechtenstein and Norway, which were fulfilled by 17 September 2010. Directive 2007/44 entered into force on 1 November 2010. The above-mentioned directives in the field of insurance and reinsurance amended by Directive 2007/44 were repealed from 1 December 2012.

3 Recital 8 of Directive 2007/44 reads:

> *With regard to the prudential assessment, the criterion concerning the 'reputation of the proposed acquirer' implies the determination of whether any doubts exist about the integrity and professional competence of the proposed acquirer and whether these doubts are founded. Such doubts may arise, for instance, from past business conduct. The assessment of the reputation is of particular relevance if the proposed acquirer is an unregulated entity but should be facilitated if the acquirer is authorised and supervised within the European Union.*

4 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) ("Directive 2009/138") was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 78/2011 of 1 July 2011 (OJ 2011 L 262, p. 45) ("JCD No 78/2011") and is referred to at point 1 of Annex IX (Financial services) to the EEA Agreement. Constitutional requirements were indicated by Iceland, Liechtenstein and Norway. The requirements were fulfilled by 23 October 2012 and the decision entered into force on 1 December 2012.

5 Article 1 of JCD No 78/2011 reads, in extract:

> *Annex IX to the Agreement shall be amended as follows:*
>
> *...*
>
> *(3) the following point shall be inserted before new point 1a (Council Directive 64/225/EEC):*
>
> *'1. 32009 L 0138: 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).*
>
> *The provisions of the Directive shall, for the purposes of this Agreement, be read with the following adaptations:*
>
> *...*
>
> *(b) Articles 57 to 63 regarding the prudential assessment of a proposed acquirer shall not apply where the proposed acquirer, as defined in the*

Directive, is situated or regulated outside the territory of the Contracting Parties;

...

6 Recitals 1, 74 and 75 of Directive 2009/138 read:

(1) A number of substantial changes are to be made to First Council Directive 73/239/EEC of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance; Council Directive 78/473/EEC of 30 May 1978 on the coordination of laws, regulations and administrative provisions relating to Community co-insurance; Council Directive 87/344/EEC of 22 June 1987 on the coordination of laws, regulations and administrative provisions relating to legal expenses insurance; Second Council Directive 88/357/EEC of 22 June 1988 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and laying down provisions to facilitate the effective exercise of freedom to provide services; Council Directive 92/49/EEC of 18 June 1992 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance (third non-life insurance Directive); Directive 98/78/EC of the European Parliament and of the Council of 27 October 1998 on the supplementary supervision of insurance undertakings in an insurance group; Directive 2001/17/EC of the European Parliament and of the Council of 19 March 2001 on the reorganisation and winding-up of insurance undertakings; Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance; and Directive 2005/68/EC of the European Parliament and of the Council of 16 November 2005 on reinsurance. In the interests of clarity those Directives should be recast.

(74) The legal framework has so far provided neither detailed criteria for a prudential assessment of a proposed acquisition nor a procedure for their application. A clarification of the criteria and the process of prudential assessment is therefore needed to provide the necessary legal certainty, clarity and predictability with regard to the assessment process, as well as to the result thereof. Those criteria and procedures were introduced by provisions in Directive 2007/44/EC. As regards insurance and reinsurance those provisions should therefore be codified and integrated into this Directive.

(75) 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 42 of Directive 2009/138, 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).

2. Insurance and reinsurance undertakings shall notify the supervisory authority of any changes to the identity of the persons who effectively run the undertaking or are responsible for other key functions, along with all information needed to assess whether any new persons appointed to manage the undertaking are fit and proper.

3. Insurance and reinsurance undertakings shall notify their supervisory authority if any of the persons referred to in paragraphs 1 and 2 have been replaced because they no longer fulfil the requirements referred to in paragraph 1.

8 Article 57(1) of Directive 2009/138, entitled "Acquisitions", reads:

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). Member States need not apply the 30 % threshold where, in accordance with Article 9(3)(a) of Directive 2004/109/EC, they apply a threshold of one third.

9 Article 58 of Directive 2009/138, entitled "Assessment period", reads, in extract:

1. The supervisory authorities shall, promptly and in any event within two working days following receipt of the notification required under Article 57(1), as well as following the possible subsequent receipt of the information referred

to in paragraph 2, acknowledge receipt thereof in writing to the proposed acquirer.

The supervisory authorities shall have a maximum of 60 working days as from the date of the written acknowledgement of receipt of the notification and all documents required by the Member State to be attached to the notification on the basis of the list referred to in Article 59(4) (the assessment period), to carry out the assessment provided for in Article 59(1) (the assessment).

The supervisory authorities shall inform the proposed acquirer of the date of the expiry of the assessment period at the time of acknowledging receipt.

2. The supervisory authorities may, during the assessment period, if necessary, and no later than on the fiftieth working day of the assessment period, request any further information that is necessary to complete the assessment. Such request shall be made in writing and shall specify the additional information needed.

For the period between the date of request for information by the supervisory authorities and the receipt of a response thereto by the proposed acquirer, the assessment period shall be interrupted. That interruption shall not exceed 20 working days. Any further requests by the supervisory authorities for completion or clarification of the information shall be at their discretion but shall not result in an interruption of the assessment period.

3. The supervisory authorities may extend the interruption referred to in the second subparagraph of paragraph 2 up to 30 working days if the proposed acquirer is:

(a) situated or regulated outside the Community; or

(b) a natural or legal person not subject to supervision under this Directive, Council Directive 85/611/EEC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS), Directive 2004/39/EC, or Directive 2006/48/EC.

4. If the supervisory authorities, upon completion of the assessment, decide to oppose the proposed acquisition, they shall, within two working days, and not exceeding the assessment period, inform the proposed acquirer in writing stating the reasons. Subject to national law, an appropriate statement of the reasons for the decision may be made accessible to the public at the request of the proposed acquirer. This shall not prevent a Member State from allowing the supervisory authority to make such disclosure in the absence of a request by the proposed acquirer.

5. If the supervisory authorities do not oppose the proposed acquisition within the assessment period in writing, it shall be deemed to be approved.

6. The supervisory authorities may fix a maximum period for concluding the proposed acquisition and extend it where appropriate.

7. Member States shall not impose requirements for the notification to and approval by the supervisory authorities of direct or indirect acquisitions of voting rights or capital that are more stringent than those set out in this Directive.

...

10 Article 59(1), (2) and (4) of Directive 2009/138, 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) ("Regulation 1094/2010") 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) ("JCD No 200/2016") and is referred to at point 31h of Annex IX (Financial services) to the EEA Agreement. Pursuant to Article 4 of JCD No 200/2016, the decision entered into force on 1 October 2016.

12 Article 16 of Regulation 1094/2010, entitled "Guidelines and recommendations", as adapted by JCD No 200/2016, 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.

4. In the report referred to in Article 43(5) the Authority shall inform the European Parliament, the Council and the Commission, the Standing Committee of the EFTA States and the EFTA Surveillance Authority of the guidelines and recommendations that have been issued, stating which competent authority has not complied with them, and outlining how the Authority intends to ensure that the competent authority concerned follow its recommendations and guidelines in the future.

National law

13 Directive 2009/138 was transposed into Liechtenstein law by the Act of 12 June 2015 on the Supervision of Insurance Undertakings (*Gesetz vom 12. Juni 2015 betreffend die Aufsicht über Versicherungsunternehmen*) (LGBl. 2015 No 231) ("the Insurance Supervision Act").

14 Article 93(5) of the Insurance Supervision Act, entitled "Assessment period", reads:

> *Where the FMA [Financial Market Authority] opposes the acquisition, it shall, within two working days of completing the assessment, but in any event within the assessment period, inform the proposed acquirer in writing stating the reasons. If the FMA does not oppose the acquisition within the assessment period, the acquisition shall be deemed approved.*

15 Article 94 of the Insurance Supervision Act, entitled "Substantive assessment of participations", reads:

> *1) 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; and

2. the group of which the insurance undertaking will become part as a consequence of the acquisition has a structure that makes it possible to exercise effective supervision, to reasonably allocate responsibilities, and to effectively exchange information among the FMA and the other competent supervisory authorities;

e) whether there are reasonable grounds to suspect that, in connection with the proposed acquisition, money laundering or terrorist financing is being or has been committed or attempted, or that the proposed acquisition could increase the risk thereof.

2) 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.

3) Where two or more proposals to acquire or increase qualifying holdings in the same insurance undertaking have been notified to the FMA, the FMA shall treat the proposed acquirers in a non-discriminatory manner.

16 Article 179 of the Insurance Supervision Act, entitled "Convergence of supervisory tools and practices in the EEA", reads:

1) In the exercise of its duties, the FMA shall have regard to the convergence in respect of supervisory tools and practices in the EEA.

2) It shall have regard to the activities, guidelines, and regulations of EIOPA [European Insurance and Occupational Pensions Authority].

17 Annex 2 to the Insurance Supervision Act entitled "Classes of life insurance" reads:

1. Life insurance
…

II Facts and procedure

18 A Ltd is a joint-stock company established under the law of a third country with a share capital of USD 100. Its registered office is outside of the EEA. Its sole shareholder is B Inc, a company established under the law of a third country. B Inc's registered office is also outside of the EEA.

19 Ms C is the sole shareholder of B Inc. She is the sole managing director of both A Ltd and B Inc. Ms C does not reside in an EEA State, and does not hold the nationality of an EEA State.

20 A Ltd proposed 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 Liechtenstein Financial Market Authority (*Finanzmarktaufsicht*) ("the FMA") to operate life insurance business, inter alia, in class 1, as referred to in Annex 2 to the Insurance Supervision Act.

21 By a decision of 22 December 2022, which is the subject of a challenge in the main proceedings before the Board of Appeal of the Financial Market Authority (*Beschwerdekommission der Finanzmarktaufsicht*) ("the Appeals Board"), the FMA opposed the proposed acquisition by A Ltd, the proposed acquirer, of all the shares in Z AG in accordance with Articles 93(5) and 94(2) of the Insurance Supervision Act.

22 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 of 20 December 2016 (JC/GL/2016/01) ("the Joint Guidelines"), issued by the European Insurance and Occupational Pensions Authority ("EIOPA") pursuant to Article 16(1) of Regulation 1094/2010.

23 In support of its 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.

24 The FMA's appraisal of Ms C's suitability and personal integrity, pursuant to Article 94(1) and Article 94(1)(a) of the Insurance Supervision Act, as well as paragraph 10 of Chapter 3 of the Joint Guidelines, 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 regard, the FMA considered that 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. It referred in that respect to paragraph 10.23 of Chapter 3 of the Joint Guidelines.

25 The FMA's appraisal indicated that Ms C's financial soundness does not comply with the statutory requirements in Article 94(1)(c) of the Insurance Supervision Act, as well as paragraph 12 of Chapter 3 of the Joint Guidelines, having regard to the rigorous standard necessary in the present case of a proposed acquisition of all the shares in Z AG. In the FMA's assessment, her financial soundness depended exclusively on shares which she holds by way of D AG, a joint-stock company incorporated under the law of a third country 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 A Ltd and to produce a payment commitment from D AG to A Ltd, was not suitable to eliminate the FMA's concerns. The FMA considered that 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 and referred to paragraphs 12.1 and 12.2 of Chapter 3 of the Joint Guidelines.

26 Finally, the FMA had serious concerns as to whether Z AG is able to comply and will continue to comply with the relevant prudential requirements with Ms C (indirectly) as sole shareholder, as provided for in point 1 of Article 94(1)(d) of the Insurance Supervision Act, in accordance also with paragraph 13 of Chapter 3 of the Joint Guidelines.

27 A Ltd appealed the decision of the FMA to the Appeals Board. A Ltd disputes 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.

28 Against this background, the Appeals Board decided to stay the proceedings and to request an Advisory Opinion from the Court. The request, dated 23 March 2023, was registered at the Court on the following day. The Appeals Board referred 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?*

29 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

Admissibility

30 As has been pointed out by the Icelandic Government, Liechtenstein Government, ESA and the Commission in their written observations, JCD No 78/2011 included adaptations to Directive 2009/138 when that directive was incorporated into the EEA Agreement. Article 1 of that decision provides that Directive 2009/138 shall be read with an adaptation providing that Articles 57 to 63 of that directive regarding the prudential assessment of a proposed acquirer shall not apply where the proposed acquirer, as defined in that directive, is situated or regulated outside the territory of the Contracting Parties to the EEA Agreement.

31 It follows from the request that A Ltd, the proposed acquirer, and B Inc, the sole shareholder of A Ltd, are incorporated under the law of a third country and their registered offices are outside of the EEA. Ms C, the sole shareholder of B Inc, does not reside in an EEA State nor does she hold the nationality of an EEA State.

32 Accordingly, a situation such as that at issue in the main proceeding does not come within the scope of Articles 57 to 63 of Directive 2009/138 as incorporated into the EEA Agreement.

33 At the hearing, A Ltd submitted that, given that the situation at issue fell outside the scope of Directive 2009/138, the Court lacked jurisdiction to answer the questions referred. In contrast, the Commission, ESA and the Liechtenstein Government submitted that it follows from the Court's settled case law that the Court has jurisdiction in the present case.

34 Under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("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. The purpose of Article 34 SCA is to establish cooperation between the Court and the national courts and tribunals. It is intended to be a means of ensuring a homogenous interpretation of EEA law and to provide assistance to the courts and tribunals in the EFTA States in cases in which they have to apply provisions of EEA law (see Case E-9/22 *Verkfræðingafélag Íslands and Others*, judgment of 19 April 2023, paragraph 22 and case law cited).

35 It is settled case law that questions on the interpretation of EEA law referred by a national court, in the factual and legislative context which that court is responsible for defining, and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. Accordingly, the Court may only refuse to rule on a question referred by a national court where it is quite 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 submitted to it (see *Verkfræðingafélag Íslands and Others*, cited above, paragraph 23 and case law cited).

36 Furthermore, it follows from settled case law that where domestic legislation, in regulating purely internal situations not governed by EEA law, adopts the same or similar solutions as those adopted in EEA law, it is in the interest of the EEA to forestall future differences of interpretation. Provisions or concepts taken from EEA law should thus be interpreted uniformly, irrespective of the circumstances in which they are to apply. However, as the jurisdiction of the Court is confined to considering and interpreting provisions of EEA law only, it is for the national court to assess the precise scope of that reference to EEA law in national law (see *Verkfræðingafélag Íslands and Others*, cited above, paragraph 25 and case law cited).

37 In its request, the referring body considers the interpretation of Directive 2009/138 to be relevant for the application of national law given that the provisions of national law implementing Articles 57 to 63 of Directive 2009/138 are also applicable to proposed acquirers situated or regulated outside of the EEA.

38 In the light of the foregoing, the request is admissible.

Question 1

39 By its first question, the referring body asks, in essence, whether in appraising the suitability of a proposed acquirer against the criterion laid down in point (a) of Article 59(1) of Directive 2009/138, the term "reputation" must be interpreted as referring only to the integrity or also to the professional suitability of a proposed acquirer.

40 Article 59(1) of Directive 2009/138 provides that in assessing a notification of acquisition provided for in Article 57(1), and the information referred to in Article

58(2), national supervisory authorities shall, in order to ensure the sound and prudent management of an insurance or reinsurance undertaking in which an acquisition is proposed, and having regard to the likely influence of the proposed acquirer on that undertaking, appraise the suitability of the proposed acquirer and the financial soundness of the proposed acquisition against all of the criteria listed in points (a) to (e) of Article 59(1). One of those criteria, listed in point (a) of Article 59(1), is the reputation of the proposed acquirer.

41 An appraisal of the suitability of the proposed acquirer and the financial soundness of a proposed acquisition under Article 59 in Section 4 of Chapter IV of Title I of Directive 2009/138 on qualifying holdings must be distinguished from an assessment of fit and proper requirements for persons who effectively run the undertaking or have other key functions under Article 42 in Section 2 of Chapter IV of Title I of the Directive on the system of governance. Contrary to the suggestion set out in the request, the wording of Article 42 of Directive 2009/138 cannot have any significance in this case.

42 It is apparent from the different language versions of point (a) of Article 59(1) of Directive 2009/138 that there is a certain divergence as to the word used to refer to the "reputation" of a proposed acquirer. It follows from settled case law that in the case of divergence between the language versions of a legal act, a provision must be interpreted by reference to the purpose and general scheme of the rules of which it forms a part (see Case E-18/11 *Irish Bank* [2012] EFTA Ct. Rep. 592, paragraph 90).

43 It must be recalled that it is settled case law that the interpretation of a provision of EEA law requires account to be taken not only of its wording, but also 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 (compare the judgment in *A and Others*, C-24/19, EU:C:2020:503, paragraph 37). Furthermore, where a provision of EEA law is open to several interpretations, preference must be given to that interpretation which ensures that the provision retains its effectiveness (compare the judgment in *Österreichische Post*, C-154/21, EU:C:2023:3, paragraph 29).

44 A reference to the "reputation" of an individual or entity engaged in a certain type of business, such as the business of insurance and reinsurance regulated by Directive 2009/138, may be understood as referring to both the integrity and the professional competence of that individual or entity. A lack of "professional competence" is as sure to have an impact on the "reputation" of an individual or entity engaged in a certain economic activity as a lack of "integrity".

45 At the hearing, A Ltd argued that the term "reputation", as used in point (a) of Article 59(1) of Directive 2009/138, should be construed more narrowly when read in context with point (b) of the same provision, which refers to reputation "and the experience of any person who will direct the business of the insurance or reinsurance undertaking as a result of the proposed acquisition".

46 However, it follows from the chapeau of Article 59(1) of Directive 2009/138 that the specific criteria listed in points (a) to (e) must be read in the light of the overall goal of ensuring the "sound and prudent management" of the insurance undertaking that is the target of the acquisition. Indeed, the goal is to assess, more generally, the "suitability" and "financial soundness" of the acquirer and the acquisition. The isolated wording of specific criteria in points (a) to (e) may, therefore, be of lesser importance.

47 The objective of an assessment pursuant to Article 59(1) of Directive 2009/138 is to ensure the sound and prudent management of an insurance or reinsurance undertaking by appraising the suitability of the proposed acquirer. The "suitability" of the proposed acquirer may be affected by the professional competences of both the acquirer and the people who are in charge of the acquirer. Therefore, an interpretation of point (a) of Article 59(1) in light of its objective supports the conclusion that the term "reputation" encompasses "professional competence".

48 As was noted by the Liechtenstein Government, ESA and the Commission in their written observations, the requirements in Article 59(1) of Directive 2009/138 were first introduced in Directive 2007/44. Recitals 1 and 74 of Directive 2009/138 state that the directive is a recast of earlier directives, prompted by reasons of clarity, and that the provisions introduced by Directive 2007/44 as regards insurance and reinsurance should be codified and integrated into Directive 2009/138. In addition, the provisions on the assessment of qualifying holdings under that directive were incorporated from Directive 2007/44 without any substantive amendment. Therefore, the intention of the legislature was to maintain the relevant provisions of Directive 2007/44.

49 According to recital 8 of Directive 2007/44, with regard to the prudential assessment, the criterion concerning the "reputation of the proposed acquirer" implies the determination of whether any doubts exist about the integrity and professional competence of the proposed acquirer and whether those doubts are founded. Such doubts may arise, for instance, from past business conduct. That recital furthermore states that the assessment of the reputation is of particular relevance if the proposed acquirer is an unregulated entity but should be facilitated if the acquirer is authorised and supervised within the EEA.

50 Accordingly, the term "reputation" of the proposed acquirer refers to both the integrity and professional competence of a proposed acquirer.

51 In the light of the foregoing, the answer to the first question must be that the term "reputation" in point (a) of Article 59(1) of Directive 2009/138 must be interpreted as referring to both the integrity and the professional competence of a proposed acquirer.

Question 2

52 By its second question, the referring body asks whether, in the appraisal of the financial soundness of a proposed acquirer within the meaning of point (c) of Article 59(1) of Directive 2009/138, it may also be taken into account that any necessary supply of funds by that person to an 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.

53 Pursuant to Article 59(1) of Directive 2009/138, it is for the national supervisory authorities to conduct the assessment as to whether a proposed acquisition is compatible with the relevant rules laid down in that directive on qualifying holdings. Article 58(2) provides that national supervisory authorities may, in accordance with the requirements of that provision, request any further information that is necessary to complete their assessment. The financial soundness of the proposed acquirer is one of the criteria in accordance with which that assessment must be conducted according to point (c) of Article 59(1).

54 While the notion of "financial soundness" is not defined in Directive 2009/138, it follows from point (c) of Article 59(1) that the assessment of financial soundness must be made on a case-by-case basis, having regard to all of the relevant facts and taking into account the type of business pursued and envisaged. Furthermore, it follows from Article 59(4) that the information required shall be proportionate and adapted to the nature of the proposed acquirer and the proposed acquisition. Articles 58 and 59 do not restrict the information that national supervisory authorities may take into account in their assessment of a notification of a proposed acquisition.

55 In this regard, it must be noted that the principle of good administration, which is a general principle of EEA law (see Case E-2/05 *ESA* v *Iceland* [2005] EFTA Ct. Rep. 202, paragraph 22), requires administrative authorities to conduct a diligent and impartial examination of all the relevant matters so that they can be sure that, when they adopt a decision, they have at their disposal the most complete and reliable information possible for that purpose. However, under Article 59(2) of Directive 2009/138, national supervisory authorities may oppose a proposed acquisition also if the information provided by a proposed acquirer is incomplete. Accordingly, the provision places the obligation on a proposed acquirer to furnish the national supervisory authority with the necessary information for its assessment under Article 59.

56 In the light of the foregoing, the answer to the second question must be that Article 59(1) of Directive 2009/138 must be interpreted as not precluding a national supervisory authority from taking into account in its assessment with regard to the criterion laid down in point (c) of any necessary supply of funds by a proposed acquirer to an insurance undertaking through 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.

Question 3

57 By its third question, the referring body asks how the words "reasonable grounds" in Article 59(2) of Directive 2009/138 must be interpreted. In particular, the referring body asks what standard of proof is required, whether certainty of non-compliance with statutory requirements is necessary, whether substantiated or considerable doubts on the part of the national supervisory authority are sufficient, or whether the burden of proof lies with the proposed acquirer. The referring body outlines the relevance of this

question for the main proceeding in the context of the proposed acquirer contesting the factual basis of the FMA's decision, and that the FMA had stated that the assessment gave rise to "considerable doubts".

58 Article 59(2) of Directive 2009/138 provides that supervisory authorities may oppose a proposed acquisition only if there are reasonable grounds for doing so on the basis of the criteria set out in Article 59(1) or if the information provided by a proposed acquirer is incomplete.

59 The term "reasonable grounds", while being an autonomous concept of EEA law, is not defined in Directive 2009/138. The Court recalls that Article 59(2) of Directive 2009/138 originates from Directive 2007/44. The Commission's proposal for Directive 2007/44 provided that a national supervisory authority could oppose a proposed acquisition "if they find that the criteria set out in paragraph 1 are not met" (COM(2006) 507 final). During the legislative process, this wording was amended to "if there are reasonable grounds for doing so on the basis of the criteria set out in paragraph 1".

60 Accordingly, the legislative history indicates that the final wording of that provision was designed to avoid a legal text which might suggest a need to establish actual non-compliance with the criteria set out in Article 59(1) of Directive 2009/138.

61 Furthermore, it must be observed that most of the criteria set out in points (a) to (e) of Article 59(1) of Directive 2009/138 involve an element of uncertainty and discretion. Imposing a requirement of certainty on national supervisory authorities would significantly undermine the effectiveness of those criteria and, as such, be at variance with the object and purpose of Article 59 of that directive.

62 In that regard, first, the criterion set out in point (a) of Article 59(1) of Directive 2009/138, having regard to recital 8 of Directive 2007/44, implies a determination of whether any doubts exist about the integrity and professional competence of the proposed acquirer and whether these doubts are founded. Such doubts may arise, for instance, from past business conduct. The notion of "doubts" inherently implies uncertainty.

63 Second, a requirement of certainty would run counter to the objectives of Article 59 of Directive 2009/138, which is to ensure the sound and prudent management of an insurance or reinsurance undertaking going forward, and would be incompatible with the application of the criterion set out in point (d) of Article 59(1), which entails an assessment of whether the insurance or reinsurance undertaking will be able to comply or continue to comply with the prudential requirements set out in Directive 2009/138. Requiring an assessment of future conduct, which necessarily entails a degree of uncertainty, to be certain would significantly undermine the effectiveness of that provision.

64 Third, point (e) of Article 59(1) of Directive 2009/138 concerns whether there are reasonable grounds to suspect that money laundering or terrorist financing are being or have been committed or attempted, or that the proposed acquisition would increase the

risk thereof. As such, given the elements of "suspicion" and increase of "risk", the wording of this provision does not require certainty.

65 Accordingly, Article 59(2) of Directive 2009/138 must be interpreted as not requiring certainty of non-compliance with the criteria set out in points (a) to (e) of Article 59(1).

66 In light of the foregoing, the answer to the third question must be that the term "reasonable grounds" in Article 59(2) of Directive 2009/138 must be interpreted as not requiring certainty of non-compliance with the criteria set out in Article 59(1).

Question 4

67 By its fourth question, the referring body asks whether a declaration by a competent authority pursuant to Article 16(3) of Regulation 1094/2010 to make every effort to comply with guidelines has a binding effect on the courts of an EEA State so that those courts are also obliged to make every effort to comply with such guidelines.

68 Article 16(1) of Regulation 1094/2010 provides that EIOPA shall, with a view to establishing consistent, efficient and effective supervisory practices within the European System of Financial Supervision, and to ensuring the common, uniform and consistent application of EEA law, issue guidelines and recommendations addressed to competent authorities or financial institutions.

69 Article 16(3) of Regulation 1094/2010 provides that the competent authorities and financial institutions shall make every effort to comply with those guidelines and recommendations.

70 According to recital 2 of JCD No 200/2016, the incorporation of Regulation 1094/2010 into the EEA Agreement constitutes part of a balanced solution found between the Contracting Parties. It follows from recital 3 of JCD No 200/2016 that, in accordance with the two-pillar structure of the EEA Agreement, ESA will take decisions addressed to the competent authorities and market operators in the EFTA States. However, the European Supervisory Authorities, including EIOPA, will be competent to perform actions of a non-binding nature, such as the adoption of recommendations vis-à-vis the competent authorities of the EFTA States.

71 It follows from the request that, in accordance with Article 16(3) of Regulation 1094/2010, the FMA issued a declaration, which was published by EIOPA, to make every effort to comply with the Joint Guidelines issued by EIOPA.

72 The Joint Guidelines are not a legal act that has been incorporated into the EEA Agreement and, as such, are not binding upon the Contracting Parties pursuant to Article 7 of the EEA Agreement. Therefore, the Joint Guidelines issued by EIOPA cannot be regarded as producing binding legal effects, in and of themselves, as a matter of EEA law. Accordingly, such guidelines do not have a binding effect on the courts of an EEA State. Nevertheless, it is for the courts of an EEA State to take such guidelines into consideration in order to resolve the disputes submitted to them, in particular when

those guidelines are intended to supplement binding provisions of EEA law (compare the judgment in *FBF*, C-911/19, EU:C:2021:599, paragraphs 45 and 71 and case law cited).

73 In the light of the foregoing, the answer to the fourth question must be that a declaration by a competent authority pursuant to Article 16(3) of Regulation 1094/2010 to make every effort to comply with guidelines does not have a binding effect on the courts of an EEA State. However, it is for the courts of an EEA State to take such guidelines into consideration in order to resolve the disputes submitted to them, in particular when those guidelines are intended to supplement binding provisions of EEA law.

IV Costs

74 Since these proceedings are a step in the proceedings pending before the Appeals Board, 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 Board of Appeal of the Financial Market Authority hereby gives the following Advisory Opinion:

1. **The term "reputation" in point (a) of Article 59(1) of Directive 2009/138/EC on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) must be interpreted as referring to both the integrity and the professional competence of a proposed acquirer.**

2. **Article 59(1) of Directive 2009/138/EC must be interpreted as not precluding a national supervisory authority from taking into account in its assessment with regard to the criterion laid down in point (c) of any necessary supply of funds by a proposed acquirer to an insurance undertaking through 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. **The term "reasonable grounds" in Article 59(2) of Directive 2009/138/EC must be interpreted as not requiring certainty of non-compliance with the criteria set out in Article 59(1) of that directive.**

4. **A declaration by a competent authority pursuant to Article 16(3) of Regulation (EU) No 1094/2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority) to make every effort to comply with guidelines does not have a binding effect on the courts of an EEA State. However, it is for the courts of an EEA State to take such guidelines into consideration in order to resolve the disputes submitted to them, in particular when those guidelines are intended to supplement binding provisions of EEA law.**

Páll Hreinsson Bernd Hammermann Michael Reiertsen

Delivered in open court in Luxembourg on 25 January 2024.

Ólafur Jóhannes Einarsson
Registrar

Páll Hreinsson
President