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Reykjavík, 26 June 2023

TO THE PRESIDENT AND MEMBERS OF THE EFTA COURT

WRITTEN OBSERVATIONS

submitted pursuant to Article 20 of the Statute of the EFTA Court and Article 90 of the Rules of Procedure of the EFTA Court by

THE GOVERNMENT OF ICELAND

Represented by

Ms. Inga Þórey Óskarsdóttir, Legal Adviser, Ministry for Foreign Affairs,

Mr. Hendrik Daði Jónsson, Legal Adviser, Ministry for Foreign Affairs, and

Ms. Elísabet Júlíusdóttir, Specialist, Ministry of Finance and Economic Affairs,

acting as Agents in

Case E-2/23

A Ltd

v

Finanzmarktaufsicht

in which the Appeals Board of the Financial Market Authority of Liechtenstein (Beschwerdekommission der Finanzmarktaufsicht) has requested the EFTA Court to give an advisory opinion pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice on the interpretation of points (a) and (c) of paragraph 1 and paragraph 2 of Article 59 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 (the "Solvency II Directive") and of paragraph 3 of Article 16 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), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC (the "EIOPA Regulation"). The Government of Iceland has the honour of lodging the following written observations.

I. INTRODUCTION

1. With an order dated 23 March 2023, the Appeals Board of the Financial Market Authority of the Principality of Liechtenstein (the "Appeals Board") requested the EFTA Court to give an advisory opinion pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, on four questions concerning the interpretation of the EEA Agreement relevant to an appeals proceeding before it.

2. In the Court's letter of 26 April 2023, the Government of Iceland was invited, pursuant to Article 35 of the Rules of Procedure, to lodge written observations within two months from the date of the notification, i.e. by Monday, 26 June 2023, cf. Article 90(1) of the Rules of Procedure.

3. The appeals proceeding concerns the decision of the Financial Market Authority Liechtenstein (hereinafter the "FMA") to oppose the plaintiff's acquisition of all shares in Z AG, a Liechtenstein based joint stock company which has been licensed by the FMA to operate a life insurance business. In reaching its decision, which the plaintiff has challenged before the Appeals Board, the FMA has applied criteria to assess the plaintiff's suitability as a proposed acquirer of a life insurance business, including "reputation" and "financial soundness" to conclude there are reasonable grounds to oppose the proposed acquisition, which follow from Article 59 of the Solvency II Directive. The FMA has also made reference to the Joint Guidelines on the prudential assessment of acquisitions and increases of qualifying holdings in the financial sector JC/GL/2016/01 (the "joint guidelines") issued by the European Supervisory Authorities ("ESAs"), including the European Insurance and Occupational Pensions Authority ("EIOPA").

4. For further details on the factual background of the case, the Government of Iceland refers to the request for an advisory opinion.

5. The questions posed to the EFTA Court are:

   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?

II. OBSERVATIONS BY THE GOVERNMENT OF ICELAND

General Remarks

6. The Government of Iceland restricts its written observations to the fourth question referred by the Appeals Board to the EFTA Court. As the first three questions referred to the EFTA Court concern the interpretation of provisions of Article 59 of the Solvency II Directive, the Government of Iceland submits the following observations on the applicability of that provision under the EEA Agreement.

7. The Solvency II Directive was incorporated into point 1 of Annex IX to the EEA Agreement by Decision of the EEA Joint Committee No 78/2011 of 1 July 2011, which entered into force on 1 December 2012. In addition to the applicable horizontal adaptations in Protocol 1 to the EEA Agreement, the provisions of the Solvency II Directive are to be read with several specific adaptations set out in point 1 of Annex IX to the Agreement, which address *inter alia* the applicability of the Directive to direct life and non-life insurance undertakings which are registered or situated outside the territory of the Contracting Parties to the Agreement. Of relevance to the first three questions referred to the EFTA Court, adaptation (b) specifies that "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."

8. In this regard, the Government of Iceland refers to paragraph 1.1 of the request for an advisory opinion which states that the plaintiff and its sole shareholders are both companies established under "foreign law" with a registered office outside the territory of the Contracting Parties to the EEA Agreement. The sole shareholder of the plaintiff's own sole shareholder is a natural person who is neither a resident nor a national of any Contracting Party to the EEA Agreement. Based on the facts of the case as presented, the plaintiff would appear to fall within the meaning of adaptation (b) to the Solvency II Directive as a "proposed acquirer … situated or regulated outside the territory of the Contracting Parties." In such a case, the proposed acquisition of an EEA insurance undertaking would not be subject to Article 59 of the Solvency II Directive.

Legal relevance of non-binding instruments under the EEA Agreement

9. The fourth question referred to the EFTA Court asks whether a declaration by an EEA competent authority affirming its intention to comply with guidelines from an ESA has a binding effect on the national courts of the Contracting Parties, thereby obliging them to make every effort to comply with the guidelines. In consideration of the fourth question, the Government of Iceland submits the following observations.

10. In referring the question of the legal relevance of the joint guidelines in an EEA legal context to the EFTA Court, the Appeals Board highlights the fact that the joint guidelines "have neither been incorporated into the EEA Agreement nor the subject of national (here: Liechtenstein) legislative procedure". In this regard, the Government of Iceland recalls that

all legal obligations arising from the EEA Agreement must stem from provisions thereof which, pursuant to Article 2(a), includes the main Agreement, its Protocols and Annexes as well as the acts referred to therein. Pursuant to Article 7 of the Agreement, the Contracting Parties are bound by the acts referred to or contained in the Annexes to the Agreement or in the decisions of the EEA Joint Committee which shall be, or be made, part of their internal legal order. In an EEA legal context, any rights or obligations of the Contracting Parties must be derived from a provision of the EEA Agreement within the meaning of Article 2(a) or pursuant to Article 7.

11. At the outset, the Government of Iceland therefore submits that any act or instrument which itself does not form part of the EEA Agreement cannot be held as being independently binding upon the Contracting Parties, including upon their national courts. Nevertheless, such instruments may, pursuant to acts incorporated into the EEA Agreement, be of relevance and use in the interpretation of those acts.

12. The Government of Iceland submits that it is important to consider the legal value ascribed by the EEA Agreement to the joint guidelines issued by the ESAs. The three ESAs are, in addition to EIOPA, the European Banking Authority (the "EBA") and the European Securities and Markets Authority ("ESMA"), which all form part of the European System of Financial Supervision (the "ESFS"). The ESAs, each within their sector and collectively on a cross-sectoral basis, are tasked with *inter alia* contributing to the establishment of high-quality common regulatory and supervisory standards and practices as well as contributing to the consistent application of legally binding Union acts. To execute these tasks, the ESAs have been ascribed numerous functions, predominantly of an advisory and non-binding nature, including to draft regulatory and implementing technical standards and to issue guidelines and recommendations towards national competent authorities and financial institutions. The ESAs may also, in certain prescribed cases, exercise binding decision-making powers of both general application (such as through product intervention powers), towards competent authorities (such as in the settlement of disagreements between competent authorities in cross-border situations) or towards individual financial institutions where their competent authority does not apply, or compliantly apply, applicable Union law.

13. The regulatory framework establishing the ESFS, including the EIOPA Regulation, was incorporated into the EEA Agreement by Decisions of the EEA Joint Committee No

198/2016, No 199/2016, No 200/2016 and No 201/2016 of 30 September 2016, with specific adaptations introduced in the latter three Decisions which vested all functions of the ESAs to exercise binding decision-making powers in the EFTA Surveillance Authority as regards the EFTA States. The ESAs nevertheless retained their functions to act in an advisory and non-binding capacity vis-à-vis the EFTA States, including through the adoption of guidelines pursuant to Articles 16 of the Regulations establishing the ESAs, including the EIOPA Regulation. Recitals to Decisions No 199/2016, No 200/2016 and No 201/2016 are of interpretive value in clarifying this bifurcation of competences, characterising it as a "balanced solution … taking into account the structure and objectives of the [Regulations establishing the ESAs] and of the EEA Agreement, as well as the legal and political constraints of the EU and the EEA EFTA States." These recitals clarify the inherent legally non-binding nature of any instrument, such as the joint guidelines, adopted and issued by any of the ESAs which is addressed either directly or indirectly, individually or collectively to EFTA competent authorities or undertakings.

14. The Government of Iceland notes that the Regulations establishing the ESAs make clear that guidelines are not to be themselves legally binding but to provide guidance in the interpretation and application of applicable Union law. The ESAs have been assigned the function of issuing guidelines as a means of meeting their tasks of contributing to the establishment of high-quality common regulatory and supervisory standards and practices, pursuant to Articles 8(1)(a) of the Regulations establishing the ESAs. Articles 16(1) of the three Regulations provide that guidelines are issued "with a view to establishing consistent, efficient and effective supervisory practices within the ESFS, and to ensuring the common, uniform and consistent application of Union law". This purpose of the guidelines of providing guidance in interpretation and application of existing Union law, as opposed to creating new legal obligations, is clarified in recital (25) to the EIOPA Regulation, which affirms that the competence of the ESAs to issue guidelines is distinct from and complementary to their regulatory role of drafting regulatory and implementing technical standards. While the guidelines themselves are not binding, the addressees of guidelines are obliged to make every effort to comply with them or inform the relevant ESAs of their decision not to comply and the reasons for it. Such an obligation on competent authorities or undertakings to "comply or explain" is a widely used regulatory tool, including under the EEA Agreement, to contribute to consistency in the interpretation and application of applicable regulatory and supervisory standards. In this vein, the "comply or explain"

obligation supports the effectiveness of the joint guidelines but does not alter their non-binding nature.

15. The Government of Iceland therefore submits that Article 16(3) of the EIOPA Regulation creates no obligation for national courts to apply the joint guidelines, in their own right, as EEA law. Nevertheless, the joint guidelines are of relevance and use to national courts in providing detailed and supplementary guidance on the interpretation of applicable EEA law and should as a result be taken into consideration in such efforts. Likewise, any declaration made by the EEA competent authority that it complies or, as the case may be, does not comply with such guidelines is also of relevance for the interpretation of applicable EEA law.

16. In response to the Appeals Board's question of whether the legal status of the joint guidelines might vary under Union law and EEA law due to differences in their characteristics, the Government of Iceland submits that the non-binding nature of instruments such as the joint guidelines under the EEA Agreement is consistent with the jurisprudence of the Court of Justice of the European Union ("CJEU") about such instruments under Union law. With reference to the judgment of the CJEU of 13 December 1989, *Grimaldi*, C-322/88, EU:C:1989:646, the Court held that non-binding instruments, in that case recommendations of the Commission, were "not intended to produce binding effects" and, consequently, could not "create rights upon which individuals may rely before a national court." Rather, the CJEU has affirmed the interpretative value of such non-binding instruments, including in the recent judgment of 15 July 2021, *Fédération bancaire française*, C-911/19, EU:C:2021:599, where the Court held that national courts should take guidelines issued by EBA "into consideration … in order to resolve the disputes submitted to them, in particular when those guidelines are, like the contested guidelines, intended to supplement binding provisions of European Union law".

VI. ANSWER TO THE QUESTION REFERRED

17. The Government of Iceland respectfully submits that the EFTA Court answer the fourth question from the national court 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."

For the Government of Iceland,

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Agent	Agent	Agent