EFTA Court

1 rue du Fort Thüngen

L-1499 Luxembourg

Vaduz, 26 June 2023

To the President and Members of the EFTA Court

Written Observations

submitted, pursuant to Article 20 of the Statute and Article 97 of the Rules of Procedure of the EFTA Court, by the

Government of the Principality of Liechtenstein

represented by Dr. Andrea Entner-Koch, Director of the EEA Coordination Unit (*Leiterin der Stabsstelle EWR der Regierung des Fürstentums Liechtenstein*), Romina Schobel, Deputy Director of the EEA Coordination Unit *(Stellvertretende Leiterin der Stabsstelle EWR der Regierung des Fürstentums Liechtenstein)* and Dr. Claudia Bösch, Legal Officer of the EEA Coordination Unit *(Juristische Mitarbeiterin der Stabsstelle EWR der Regierung des Fürstentums Liechtenstein)*, acting as agents of the Government of the Principality of Liechtenstein,

in Case E-2/23

A Ltd v Finanzmarktaufsicht

in which the Appeals Board of the Financial Market Authority (*Beschwerdekommission der Finanzmarktaufsicht*; hereinafter referred to as the 'Board of Appeals') 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.

The Government of the Principality of Liechtenstein (hereinafter referred to as the 'Liechtenstein Government') has the honour to submit the following observations:

I. Questions referred to the EFTA Court

The Board of Appeals has stayed its proceedings in order to refer the following questions to the EFTA 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 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. Factual background of the case

1. As regards the facts of the case at hand, the Liechtenstein Government would like to refer to the summary of the facts provided by the Board of Appeals in its request for an advisory opinion.

III. Legal framework

2. As regards the legal framework applicable to the case at hand, the Liechtenstein Government would like to refer to the summary of the legal framework relevant to answer the questions referred for a preliminary ruling as laid down by the Board of Appeals in its request for an advisory opinion.

3. In its following written observations, the Liechtenstein Government will refer to the following legal acts:

EEA Law

Directive 2009/138/EC

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[1] (Solvency II; hereinafter referred to as 'Solvency II') was incorporated into Annex IX of the EEA Agreement by Decision of the EEA Joint Committee No 78/2011 of 1 July 2011[2].

5. Solvency II requires insurance and reinsurance companies in the EEA to hold sufficient financial resources and sets out governance, risk management, transparency and supervisory rules.

6. The case at hand concerns mainly Article 59 of Solvency II, which stipulates the criteria and the process for the prudential assessment of a proposed acquisition of a qualifying holding in an insurance or reinsurance undertaking. The target of these provisions is to ensure the sound and prudent management of the insurance or reinsurance undertaking, in which the acquisition is proposed.

7. Aim of said assessment is to appraise the suitability of the proposed acquirer and the financial soundness of the proposed acquisition against all of the criteria defined in Article 59 of Solvency II.

8. The thorough prudential assessment of acquirers of qualifying holdings in an insurance or reinsurance undertaking fulfils a critical gatekeeper function for the entire EEA, considering that qualifying shareholders exercise ultimate control over the insurance or reinsurance undertaking and its business activities, both in its home market as well as in all EEA States where the insurance undertaking decides to exercise its freedom of services, including its strategy, its system of governance, its capitalisation and risk appetite and its insurance products and conduct vis-à-vis policyholders and other stakeholders. Accordingly, Recital 75 of Solvency II states that

[1] OJ L 335, 17.12.2009, p. 1.
[2] OJ L 262, 6.10.2011, p. 45.

maximum harmonisation of those procedures and prudential assessments is critical.

Directive 2007/44/EC

9. 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 (hereinafter referred to as 'Directive 2007/44/EC') was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 79/2008 of 4 July 2008[3].

10. Directive 2007/44/EC has introduced the first comprehensive legal framework for a prudential assessment of a proposed acquisition, the criteria therefore and the procedure for their application.

11. In 2014, Directive 2007/44/EC was repealed by Directive 2014/65/EU (hereinafter referred to as 'MiFID II')[4] and its provisions were incorporated into the relevant new sectoral Directives and Regulations. The pertinent provisions as regards insurance and reinsurance of Directive 2007/44/EC were codified and integrated into Articles 59 et seq. of Solvency II[5].

12. Corresponding provisions are included in other sectoral financial market regulation, in particular Articles 10 et seq. of MiFID II and Articles 14, 22 et seq. of Directive 2013/36/EU (hereinafter referred to as 'CRD')[6].

[3] OJ L 280, 23.10.2008, p. 7.

[4] Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ L 173, 12.6.2014, p. 349); incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 78/2019 of 29 March 2019 (OJ L 279, 31.10.2019, p. 143).

[5] Recital 74 of Solvency II.

[6] Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L 176, 27.6.2013, p. 338); incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 79/2019 of 29 March 2019 (OJ L 321, 12.12.2019, p. 170).

Regulation (EU) No 1094/2010

13. 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 Regulation; hereinafter referred to as 'EIOPA Regulation') was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 200/2016 of 30 September 2016[7].

14. Pursuant to Article 16 of EIOPA Regulation, the European Insurance and Occupational Pensions Authority (hereinafter referred to as 'EIOPA') shall issue guidelines and recommendations addressed to competent authorities or financial institutions. Thereby, consistent, efficient and effective supervisory practices within the European System of Financial Supervision and a common, uniform and consistent application of EEA law shall be achieved.

15. On 20 December 2016, Joint Guidelines on the prudential assessment of acquisitions and increases of qualifying holdings in the financial sector[8] (hereinafter referred to as 'Joint Guidelines') were adopted by the Joint Committee of the European Supervisory Authorities, which consists of the three European Supervisory Authorities (European Banking Authority ('EBA'), European Securities and Markets Authority ('ESMA') and EIOPA; hereinafter referred to as 'European Supervisory Authorities').

16. According to Article 16 (3) of EIOPA Regulation, competent authorities and financial institutions shall make every effort to comply with those guidelines and recommendations and each competent authority shall confirm within two months of the issuance of a guideline or recommendation whether it complies or intends to comply. The Liechtenstein Financial Market Authority (hereinafter referred to as 'Financial Market Authority') has confirmed to make every effort to comply with the Joint Guidelines as of 3 October 2017.[9]

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[7] OJ L 46, 23.2.2017, p. 13.
[8] JC/GL/2016/01.
[9] See the Compliance Table published by the Joint Committee of the European Supervisory Authorities and Publications 2013/1 and 2017/20 by the Financial Market Authority.

Liechtenstein Law

Insurance Supervision Act

17. Solvency II was implemented into Liechtenstein Law *inter alia* by the Act of 12 June 2015 on the Supervision of Insurance Undertakings (*Versicherungsaufsichtsgesetz*; hereinafter referred to as 'Insurance Supervision Act').[10]

18. Article 59 (1) and (2) of Solvency II have been implemented in Article 94 of the Insurance Supervision Act in the chapter 'Substantive assessment of participations'.

19. The Insurance Supervision Act specifically refers to supervisory tools and practices of EIOPA as well as guidelines and regulations of EIOPA:

    Pursuant to Article 179 Paragraph 1 of the Insurance Supervision Act ('Convergence of supervisory tools and practices in the EEA'), the Financial Market Authority shall, in the exercise of its duties, have regard to the convergence in respect of supervisory tools and practices in the EEA. According to Paragraph 2, the Financial Market Authority shall have regard to the activities, guidelines and regulations of EIOPA.

20. Furthermore, Article 5 (5) of the Act of 18 June 2004 on the Financial Market Authority (*Finanzmarktaufsichtsgesetz*; hereinafter referred to as 'Financial Market Authority Act')[11] explicitly requires that the Financial Market Authority has due consideration for convergence in respect of supervisory tools and procedures in the EEA when applying the Financial Market Authority Act and the laws referred to in Article 5 (1) of the Financial Market Authority Act, including the Insurance Supervision Act.

IV. Legal analysis

21. The questions referred to the EFTA Court by the Board of Appeals concern Section 4 of Solvency II on qualifying holdings, in particular Article 59 (1) and (2) of Solvency II.

[10] LGBl.-Nr 2015.231.
[11] LGBl-Nr 2004.175.

22. For the sake of completeness, it should be noted that pursuant to Article 1 (3) of the Decision of the EEA Joint Committee No 78/2011, the provisions of Solvency II shall, for the purposes of the EEA Agreement, be read with the following adaptation: '*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.*' This adaptation was agreed upon by the EEA EFTA States and the EU.

23. However, considering the importance of maximum harmonisation of the procedures and criteria for assessing the suitability of proposed acquirers of qualifying holdings in insurance or reinsurance undertakings and to ensure a thorough and uniform prudential assessment of all proposed acquirers of qualifying holdings in Liechtenstein insurance undertakings,[12] the Liechtenstein legislator voluntarily and deliberately decided to implement Solvency II in full.

24. Hence, the Liechtenstein legislator applied the same stringent standards and procedures to all potential acquirers of a qualifying holding in a Liechtenstein insurance or reinsurance undertaking, regardless of whether they are situated and regulated in an EEA State or not.

25. Consequently, Articles 94 and 179 of the Insurance Supervision Act do not distinguish between acquirers situated or regulated outside the territory of the EEA or acquirers situated and regulated in an EEA State.

26. Provided that the EFTA Court is of the opinion that pursuant to the specific circumstances in the case at hand, its answers may be useful for the national court[13] and hence considers it has jurisdiction to give a ruling on the questions referred to it, the Liechtenstein Government submits the following observations:

[12] See Recital 9 of Solvency II.

[13] See for instance Judgment of the European Court of Justice of 31 January 2008, *Centro Europa 7*, C-380/05, ECLI:EU:C:2008:59, paragraph 69; Judgment of the European Court of Justice of 5 March 2022, *Reisch and Others*, Joined Cases C-515/99, C-519/99 to C-524/99 and C-526/99 to C-540/99, ECLI:EU:C:2002:135, paragraph 26.

Preliminary Remarks

27. Solvency II entails a notification obligation for proposed acquirers who intend to acquire, either 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.[14]

28. Article 59 (1) of Solvency II states the criteria according to which national supervisory authorities assess these notifications with the aim to appraise the suitability of the proposed acquirer and the financial soundness of the proposed acquisition.

29. Article 59 (2) of Solvency II states that the national supervisory authority may oppose the proposed acquisition, if there are reasonable grounds for doing so on the basis of the criteria set out in Article 59 (1) of Solvency II.

30. Due to the fact that corresponding provisions are included in other sectoral financial market regulation, in particular MiFID II and CRD, the case at hand and the request for an Advisory Opinion have a direct impact on the suitability assessment of proposed acquirers of qualifying holdings not only in insurance or reinsurance undertakings, but also in other financial intermediaries, such as credit institutions and investment firms, both in Liechtenstein and across the EEA.

31. In this regard, the Liechtenstein Government would like to emphasize the importance of supervisory convergence and uniform application of the harmonised legal framework for the prudential assessment of acquisitions of qualifying holdings in the financial sector, in particular the Joint Guidelines. As already stated, the thorough and uniform prudential assessment of potential acquirers of qualifying holdings in insurance undertakings, credit institutions and investment firms fulfils a critical gatekeeper function for the entire EEA financial market, which is why *inter alia* Recital 75 of Solvency II requires maximum harmonisation.

[14] 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).

32. Against this background, different procedures and assessment criteria for the prudential assessment of acquisitions of qualifying holdings in the financial sector would undermine the financial market, legal certainty and, potentially, financial stability.

Question 1: Interpretation of the terms 'suitability' and 'reputation' for the purposes of Article 59 (1) (a) Solvency II

33. Pursuant to Article 59 (1) (a) Solvency II, national supervisory authorities shall appraise the suitability of the proposed acquirer, considering the reputation of the proposed acquirer.

34. The criteria for the prudential assessment of a proposed acquisition were initially introduced by Directive 2007/44/EC,[15] and then codified and integrated into Solvency II as regards insurance and reinsurance. The wording of Article 15b of Directive 2007/44/EC is identical to the wording used in Article 59 (1) (a) of Solvency II.

35. In line with Solvency II the level of competence, professional qualifications and experience of those who effectively run the undertaking or have other key functions are to be taken into consideration as additional factors.[16]

36. It results clearly from Article 59 (1) (a) of Solvency II respectively the now repealed Article 15b of Directive 2007/44/EC – as well as the Joint Guidelines – that when assessing whether the requirement of 'the suitability of the proposed acquirer' is fulfilled, national supervisory authorities do have to consider the reputation of the proposed acquirer.[17]

37. As regards the interpretation of the term 'reputation of the proposed acquirer', Recital

[15] See Recital 74 of Solvency II.
[16] See Recital 35 of Solvency II.
[17] The same conclusion results from recital 47 of MiFID II: As regards investment firms, the criteria and the process of prudential assessment laid down in Directive 2007/44/EC have been transferred to MiFID II. Recital 47 of MiFID II states explicitly that '*competent authorities should appraise the suitability of the proposed acquirer and the financial soundness of the proposed acquisition against all of the following criteria: the reputation of the proposed acquirer*'.

8 of Directive 2007/44/EC clearly stipulates that this implies the determination of whether any doubts exist about the integrity and professional competence of the proposed acquirer and whether these doubts are founded. This is also expressed in the Joint Guidelines.[18]

38. Hence, the term 'reputation of the proposed acquirer' consists of two criteria:

    - the integrity and
    - the professional competence.[19]

39. In view of the Liechtenstein Government it is clear that the reputation of the proposed acquirer implies not just the integrity, but also the professional competence. In line with the principle of proportionality the assessment of professional competence takes into account the influence that the proposed acquirer will exercise over the target undertaking.[20]

Question 2: Possibility of ensuring the necessary 'financial soundness' through the provision of a bank guarantee or funds on a trust account which may be drawn on by the undertaking at any time

40. Article 59 (1) (c) of Solvency II requires that the national supervisory authorities shall appraise the suitability of the proposed acquirer against the criteria of financial soundness of the proposed acquisition, in particular in relation to the type of business pursued and envisaged in the insurance or reinsurance undertaking in which the acquisition is proposed.

41. According to the Joint Guidelines,[21] when assessing the financial soundness of a proposed acquirer, supervisory authorities shall take into account the nature of the

[18] See page 21 of the Joint Guidelines; the requirement to assess the professional competence of a proposed acquirer has also been confirmed in Section 5.2.1 of the Guide on Qualifying Holding Procedures published by the European Central Bank on 23 May 2023.
[19] If the proposed acquirer is a legal person, the requirements must be satisfied by the legal person, as well as by all of the persons who effectively direct its business.
[20] See pages 18 f of the Joint Guidelines.
[21] See pages 18 f of the Joint Guidelines.

proposed acquirer and the degree of influence the proposed acquirer would have over the target undertaking following the proposed acquisition.

42. The assessment of the financial soundness of the proposed acquirer shall also cover the capacity of the proposed acquirer to provide further capital to the undertaking in the midterm, if necessary.

43. Furthermore, the Joint Guidelines state the circumstances which have to be considered by national authorities when assessing whether the criterion of 'financial soundness' can be affirmed.

44. These are, *inter alia*, the financial and business performance of the entities owned or directed by the proposed acquirer or in which the proposed acquirer had or has significant share and any civil lawsuits, administrative or criminal proceedings, large investments or exposures and loans taken out.[22]

45. Apart from these requirements, the Joint Guidelines do not contain any guidance on how exactly the requirement of 'financial soundness' shall be assessed.

46. It follows from this that it must be assessed and decided by the national authorities, respectively the national courts, on a case by case basis whether the requirement of 'financial soundness' is fulfilled in a specific case.

47. Considering the context in which this provision occurs and the objectives pursued by it[23] as well as the Joint Guidelines, the Liechtenstein Government is convinced that national authorities have to apply stringent standards to the assessment of the financial soundness.

[22] See page 26 of the Joint Guidelines.

[23] According to settled case-law of the European Court of Justice and this Court, when interpreting a provision in EEA Law it is necessary to consider not only its wording, but also the context in which it occurs and the objectives pursued by it. See the Judgment of the EFTA Court of 25 February 2021, *SMA SA and Société Mutuelle d'Assurance du Bâtiment et des Travaux Publics and Finanzmarktaufsicht Liechtenstein*, E-5/20, paragraph 47; Judgment of the EFTA Court of 15 July 2021, *Liti-Link AG v LGT Bank AG*, E-14/20, paragraph 67; Judgment of the European Court of Justice of 19 September 2000, *Germany v Commission*, C-156/98, ECLI:EU:C:2000:467, paragraph 50; Judgment of the European Court of Justice of 6 July 2006, *Commission v Portugal*, C-53/05, ECLI:EU:C:2006:448, paragraph 20; Judgment of the European Court of Justice of 7 December 2006, *Sociedad General de Autores y Editores de España v Rafael Hoteles SA*, C-306/05, ECLI:EU:C:2006:764, paragraph 34.

48. Therefore, it cannot be generally stated that the requirement of 'financial soundness' could be fulfilled through the provision of a bank guarantee or funds on a trust account which may be drawn on by the undertaking at any time.

49. Rather, the prudential assessment in each specific case will necessarily depend on a number of further factual elements, such as the amount and currency of funds guaranteed or deposited, the counterparty's financial standing and jurisdiction of incorporation, the specific legal and contractual structure and documentation, the law governing the contractual arrangements, the place of venue and practical questions of enforceability.

50. Consequently, the financial soundness must be assessed by national authorities considering the specific circumstances in the individual case.

Question 3: Interpretation of the words 'reasonable grounds' for the purposes of Article 59 (2) of Solvency II

51. According to Article 59 (2) of Solvency II, 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 Article 59 (1) or if the information provided by the proposed acquirer is incomplete.

52. The Board of Appeals has asked the EFTA Court whether this provision must be interpreted as requiring certainty of non-compliance with the statutory requirements necessary or whether substantiated doubts are sufficient.

53. For the following reasons, the Liechtenstein Government is convinced that Article 59 (2) of Solvency II may not be interpreted as requiring certainty of non-compliance with the statutory requirements necessary:

54. In the relevant Commission Proposal for Solvency II[24], the European Commission has

[24] Proposal for a Directive of the European Parliament and of the Council 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 shareholdings in the financial sector, COM (2006) 507.

proposed the subsequent wording:

'The competent authorities may oppose the proposed acquisition only if they find that the criteria set out in paragraph 1 are not met or if the information provided by the proposed acquirer is incomplete.'

55. It was the European Parliament[25], which proposed to amend this wording as follows:

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

56. The European Parliament justified this as follows:

'A general requirement to provide reasons in case of negative decision will, together with a right of appeal, prevent any arbitrary decision. The supervisor of the target shall give an adequate explanation to allow understanding of any negative decision.'

57. Consequently, the term 'reasonable grounds' in Article 59 (2) of Solvency II cannot imply that the supervisory authority must be certain that the statutory requirements are not met.

58. This conclusion is supported by another provision of the uniform, cross-sectoral legal framework for the prudential assessment of acquisitions of qualifying holdings in the financial sector. Article 14 of CRD explicitly requires the competent authorities to refuse an authorisation in case they are 'not satisfied' as to the suitability of the shareholders, effectively imposing the burden of proof for its suitability on the proposed acquirer.

59. Therefore, reasonable doubts by the supervisory authority must be considered sufficient, as long as the authority does provide an explanation for its decision.

[25] Report by the Committee on Economic and Monetary Affairs on the proposal for a directive of the European Parliament and of the Council 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 shareholdings in the financial sector, A6/2007/27.

Question 4: Obligation of the courts in the EEA States to make every effort to comply with guidelines by the European Supervisory Authorities

60. As regards the fourth question submitted to the EFTA Court by the Board of Appeals, the Liechtenstein Government is convinced that a detailed consideration of the participation of the EEA EFTA States in the European System of Financial Supervision is necessary.

61. Hence, the Liechtenstein Government would like to emphasize the following:

62. Pursuant to the EEA Agreement, the EEA EFTA States are fully integrated in the EU's internal market for financial services.

63. Hence, an effective and homogeneous application of common rules and supervisory convergence throughout the EEA is of great interest both to the EU as well as to the EEA EFTA States.

64. To ensure a strong and coordinated financial supervision and a level playing field throughout the entire internal market, the EU and the EEA EFTA States agreed on the following solution concerning the participation of the EEA EFTA States in the European Supervisory Authorities:[26]

65. In accordance with the two-pillar structure of the EEA Agreement, the EFTA Surveillance Authority shall take binding decisions directly addressed to EEA EFTA competent authorities or market operators in the EEA EFTA States.

66. Every decision of the EFTA Surveillance Authority must be adopted on the basis of a draft prepared by the relevant European Supervisory Authority to safeguard integration of the European Supervisory Authorities expertise and consistency

[26] Regulation (EU) No 1093/2010 establishing the EBA was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 199/2016 (OJ L 46, 23.2.2017, p. 4); Regulation (EU) No 1094/2010 establishing the EIOPA was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 200/2016 (OJ L 46, 23.2.2017, p. 13); Regulation (EU) No 1095/2010 establishing the ESMA was incorporated into the EEA Agreement by Decision of the EEA Joint Committee Decision No 201/2016 (OJ L 46, 23.2.2017, p. 22) (hereinafter referred to as 'European Supervisory Authorities founding Regulations').

between the two pillars.[27]

67. Except for the right to issue binding decisions, all tasks remain with the European Supervisory Authorities.

68. The European Supervisory Authorities perform all actions of a non-binding nature, such as the adoption of guidelines, recommendations and non-binding mediation, also vis-à-vis EEA EFTA competent authorities and market operators in the EEA EFTA States.

69. Representatives of the national authorities in the three EEA EFTA States and of the EFTA Surveillance Authority participate to the fullest extent possible, without voting rights, in the Boards of Supervisors of the European Supervisory Authorities and the preparatory bodies.

70. Thus, supervisory convergence and uniform application of the legislation in the field of financial services throughout the entire EEA can be ensured.

Legal Nature of the Joint Guidelines on the prudential assessment of acquisitions and increases of qualifying holdings in the financial sector

71. The European Supervisory Authorities may adopt Guidelines, building on legally binding EEA Law. These Guidelines are discussed and adopted in the Board of Supervisors.

72. The Joint Guidelines on the prudential assessment of acquisitions and increases of qualifying holdings in the financial sector are based on Article 16 of the European Supervisory Authorities founding Regulations.

73. They have been agreed on by the Joint Committee of the European Supervisory Authorities to provide for legal certainty, clarity and predictability and to ease

[27] Action on either side shall be preceded by, as appropriate, consultation, coordination, or exchange of information between the European Supervisory Authorities and the EFTA Surveillance Authority. To ensure smooth cooperation, the European Supervisory Authorities and the EFTA Surveillance Authority concluded a memorandum of understanding on cooperation, information, exchange and consultation (MMoU): https://www.esma.europa.eu/sites/default/files/library/esas_and_efta_sa_mmou_-_signed.pdf.

cooperation and the exchange of information between national authorities.

74. Moreover, the Joint Guidelines set out the European Supervisory Authorities' view of appropriate supervision within the European System of Financial Supervision and how EEA law should be applied to ensure a consistent application as well as supervisory convergence.[28]

75. The Joint Guidelines are intended to enhance a coherent application as well as a consistency in the interpretation of these provisions[29] in an area where maximum harmonisation of procedures and the prudential assessment throughout the EEA is crucial.[30]

76. Even though such Joint Guidelines issued by the European Supervisory Authorities do not create directly binding legal effects[31], national courts shall take them into due consideration, as will be further elaborated below, and national supervisory authorities in the EEA are obliged to indicate publicly if they intend to comply with the guidelines. If they inform that they intend not to comply, they need to explain the reasons for this.[32]

77. The Liechtenstein Financial Market Authority has confirmed to make every effort to comply with the Joint Guidelines as of 3 October 2017.[33]

Obligation of the national courts to take these Guidelines into consideration

78. According to the settled case law of the European Court of Justice, even if such Guidelines are not intended to have a binding legal effect, national courts are obliged to take them into due consideration with a view to resolving any dispute submitted to

[28] See page 8 of the Joint Guidelines.
[29] See page 5 f of the Joint Guidelines.
[30] See Recital 75 of Solvency II.
[31] Judgment of the European Court of Justice of 25 March 2021, *BT v Balgarska Narodna Banka*, C- 501/18, ECLI:EU:C:2021:249, paragraph 80.
[32] Judgment of the European Court of Justice of 15 July 2021, *Fédération bancaire française v Autorité de contrôle prudentiel et de resolution,* C-911/19, ECLI:EU:C:2021:599, paragraphs 42 f, 69.
[33] See the Compliance Table published by the Joint Committee of the European Supervisory Authorities.

them.

79. This shall in particular apply when Guidelines are intended to supplement binding provisions of EEA Law.[34]

80. In the case at hand, the Joint Guidelines build on the sectoral requirements regarding procedural rules and evaluation criteria for the prudential assessment of acquisitions and increases of holdings in the financial sector.

81. As regards the field of insurance law, the sectoral requirements result from Section 4 of Solvency II, in particular Article 59 (1) and (2).

Application of these principles to the national courts in the EEA EFTA States

82. The principles as have been established above, namely

- the 'comply and explain' procedure for national supervisory authorities and
- the obligation of the national courts to take these Guidelines into consideration

apply to the EU States and the EEA EFTA States in the same manner.

83. It is only binding decisions which must be adopted by the EFTA Surveillance Authority.

84. According to the conclusions agreed on by the EFTA Economic and Financial Affairs Council (hereinafter referred to as 'EFTA ECOFIN')[35] and the respective Joint Committee Decisions, the right to issue Guidelines remains with the European Supervisory Authorities.

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[34] Judgment of the European Court of Justice of 13 December 1989, *Salvatore Grimaldi and Fonds des maladies professionnelles (Occupational Diseases Fund), Brussels*, C-322/88, EU:C:1989:646, paragraph 18; Judgment of the European Court of Justice of 11 September 2003, *Altair Chimica SpA and ENEL Distribuzione SpA*, C-207/01, EU:C:2003:451, paragraph 41; Judgment of the European Court of Justice of 25 March 2021, *BT v Balgarska Narodna Banka*, C-501/18, ECLI:EU:C:2021:249, paragraph 80 f; Judgment of the European Court of Justice of 15 July 2021, *Fédération bancaire française v Autorité de contrôle prudentiel et de resolution*, C-911/19, ECLI:EU:C:2021:599, paragraph 71,.

[35] Council Conclusions on the EU and EEA-EFTA Ministers of Finance and Economy, 14 October 2014: https://www.efta.int/sites/default/files/documents/eea/eea-news/2010-10-14-EEA-EFTA-ECOFIN-joint-conclusions.pdf

85. The EFTA ECOFIN acknowledged that the solution for the participation of the EEA EFTA States in the European System of Financial Supervision is based on the extraordinary situation and requirements in the field of financial services as well as the importance to ensure financial stability and the orderly functioning and integrity of the financial market in the entire EEA.[36]

86. Thus, the EEA EFTA States are – in the same manner as the EU States – obliged to 'comply or explain' when it comes to national supervisory authorities and take these Guidelines into due consideration when it comes to the national courts.

87. Any other solution for the EEA EFTA States would have interfered with the principle of homogeneity and would have jeopardized a consistent interpretation of EEA Law.

88. In light of the foregoing considerations, the answer to the fourth question must be that while the Joint Guidelines are not intended to produce directly binding legal effects, national courts are obliged to take them into consideration with a view to resolving the disputes submitted to them, in particular as they are intended to supplement binding provisions of EEA Law.

V. Conclusion

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

2. It depends on the concrete circumstances of the individual case whether for the appraisal of the financial soundness of the proposed acquirer within the meaning of

[36] Council Conclusions, page 3.

Article 59 (1) (c) of Solvency II it may also be taken into account that any necessary supply of funds by that person to the insurance undertaking is ensured through the provision of a bank guarantee or the making available of funds on a trust account which may be drawn on by the insurance undertaking at any time.

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

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

On behalf of the Liechtenstein Government

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