EUROPEAN COMMISSION

Brussels, 26 June 2023
sj.a(2023)6766179

TO THE PRESIDENT AND MEMBERS OF THE EFTA COURT

OBSERVATIONS

submitted pursuant to Article 20 of the Statute of the EFTA Court by the

EUROPEAN COMMISSION

represented by Helene TSEREPA-LACOMBE, Lorna ARMATI and Corneliu HÖDLMAYR, Members of the Legal Service acting as agents, with an address for service at: *Service Juridique, Greffe contentieux, BERL 1/093, 1049 Bruxelles* and consenting to service by e-EFTA,

in Case E-2/23

A Ltd v Finanzmarktaufsicht

in which the *Beschwerdekommission der Finanzmarktaufsicht* (Appeals Board of the Financial Markets Authority, Liechtenstein) has requested 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 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) (OJ L 335 of 17.12.2009, p. 1), incorporated into the EEA Agreement by Decision No 78/2011 of the EEA Joint Committee of 27 November 2012.

TABLE OF CONTENTS

I. INTRODUCTION

1. This request for an advisory opinion of the EFTA Court concerns the assessment that must be made by a national competent authority of a proposed acquisition of an undertaking engaged in the insurance business pursuant to rules put in place to ensure adequate protection of policy holders and beneficiaries, financial stability and fair and stable markets.

2. That assessment is provided in Article 57 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 of 17.12.2009, p. 1), incorporated into the EEA Agreement by Decision No 78/2011 of the EEA Joint Committee of 27 November 2012.

3. Those rules include, in particular, detailed criteria for a prudential assessment of a proposed acquisition and a procedure for their application. Maximum harmonisation throughout the EEA of those procedures and prudential assessments is critical (recital 75 to the Solvency II Directive).

4. The request is made in the course of proceedings in which the proposed acquisition of an undertaking engaged in the insurance business by the appellant was opposed by the Financial Markets Authority in Liechtenstein (the FMA). In reviewing that decision, the *Beschwerdekommission der Finanzmarktaufsicht* (Appeals Board of the Financial Markets Authority, Liechtenstein) has decided that a request for 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 SCA) is necessary in order to allow it to resolve the dispute before it. ([1])

([1]) The Commission notes the reference, at point 4.1. of the Request for an Advisory Opinion, to Article 78(3) of the Constitution of Liechtenstein. It will be for the EFTA Court to ascertain the status, for the purposes of Article 34 SCA, of the Appeals Board.

II. LAW

II.1. EEA law

5. The relevant provisions of Union law are set out in the Request for an Advisory Opinion. The Commission will cite those provisions and the relevant reference in the section of the reasoning dealing with a specific point.

II.2. National law

6. The relevant provisions of national law are set out in the Request for an Advisory Opinion. In the observations below, the Commission will refer to those provisions as described by the Appeals Board.

III. FACTS AND THE QUESTIONS ASKED

7. By decision of 22 December 2022, the FMA opposed the proposed acquisition of all the shares in Z AG by A Ltd.

8. The following elements, drawn from the Request for an Advisory Opinion, provide the factual background to the dispute.

9. Z AG is a joint stock company established under Liechtenstein law. It is authorised to operate a life insurance business.

10. A Ltd is a joint stock company established outside the EEA. B Inc, also established outside the EEA, is the sole shareholder in A Ltd. Ms C is sole shareholder in B Inc and is managing director of both B Inc and A Ltd. She is not an EEA national and does not reside in the EEA.

11. The FMA was required to assess the proposed acquisition. The outcome of that assessment led to the decision, contested in the underlying national proceedings, to oppose the acquisition. The following elements were part of that assessment:

- the criteria were assessed with reference to Ms C;

- the criterion of “suitability and personal integrity” covers the professional competence, both managerial and technical, of the proposed acquirer;

- the nature of Ms C's assets – exclusively shares – had a bearing on the assessment of "financial soundness" of the proposed acquirer.

12. An appeal against the decision to oppose the acquisition was brought on the grounds that the professional competence of Ms C should not have been part of the assessment and that her financial soundness should not have been cause for concern.

13. The Appeals Board considers that the proceedings before it raise a number of questions of interpretation of EEA law.

14. The Appeals Board therefore refers 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?

IV. ANALYSIS

IV.1. Preliminary considerations

15. The Solvency II Directive has been incorporated into the EEA Agreement. The Commission notes that the Joint Committee Decision upon which that incorporation is based also agrees to the inclusion, at point 1(b) of Annex IX to the EEA Agreement, of an adaptation text. In essence, that adaptation makes Articles 57 to 63 of the Solvency II Directive applicable only in relation to proposed acquirers situated or regulated within the territory of an EEA State.

16. It is evident from the description of the facts put forward by the Appeals Board that this is not the case in the proceedings before it, i.e. all of A Ltd, the holding company B Inc and the ultimate owner Ms C "*are situated or regulated outside the territory of the Contracting Parties*". ([2])

17. That said, it would appear from the Request for an Advisory Opinion that the national rules applicable to the case at hand apply not only to proposed acquirers established in an EEA State, as required by point 1 of Annex IX to the EEA Agreement, but also to those established outside that area.

18. The Appeals Board is clearly of the view that the Opinion of the EFTA Court, on the questions of interpretation with which it is confronted, would be useful in resolving the dispute before it.

19. Under Article 34 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. Indeed, 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. For that reason, 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

([2]) EEA Agreement, Annex IX, point 1(b).

which is not a matter for the Court to determine, enjoy a presumption of relevance. ([3])

20. On that basis, and notwithstanding the adaptation text included at point 1(b) of Annex IX to the EEA Agreement, the Commission does not, at this stage of proceedings, see any reason to suppose that the EFTA Court should not answer the questions put in the Request for an Advisory Opinion.

21. Directive 2009/138 (Solvency II) is a recast of a number of existing directives in the field of insurance, including in relation to direct insurance other than life insurance (Directive 92/49), life assurance (Directive 2002/83), and reinsurance (Directive 2005/68). Those three directives had been amended by the so-called "Qualifying Holdings Directive" (Directive 2007/44) specifically with a view to ensuring a high degree of cross-sectoral consistency as regards procedural rules and evaluation criteria for the prudential assessment of acquisitions in the financial sector. ([4]) Much of the wording on such issues was carried over in almost identical terms to the Solvency II Directive and interpretations or explanations of those previous acts will therefore often remain relevant when interpreting the Solvency II Directive.

22. Indeed, recital 74 of that Directive states as much:

> "[t]he 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".

---

(3) Judgment of 10 May 2016 in joined cases E-15/15 and E-16/15, *Franz-Josef Hagedorn v Vienna-Life Lebensversicherung AG* and *Rainer Armbruster v Swiss Life (Liechtenstein) AG*, paras 25 and 26.

([4]) 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 L 247 of 21.9.2007, p. 1.

23. That same approach to prudential assessment has also been adopted in the related financial services sectors: see for example, Article 23 of the Capital Requirements Directive ([5]) and Article 13 of the FMI Directive ([6]). The wording of those two provisions is almost identical to the wording of the provision with which we are concerned in the present case, Article 59 of the Solvency II Directive.

24. The Commission will take that intention to ensure consistency across all related sectors into consideration in the observations below.

IV.2. Question one

25. By its first question, the Appeals Board is asking for guidance in relation to the interpretation of the terms "suitability" and "reputation" as used in Article 59(1)(a) of the Solvency II Directive. In particular, the Appeals Board seeks clarification as to whether those terms are intended to refer only to the integrity of the proposed acquirer, or also professional suitability.

26. Article 59 of the Directive deals with the assessment that a supervisory authority must carry out when it receives notification of a proposal to acquire a qualifying holding. ([7]) It lays down the objective: "*to ensure the sound and prudent management of*" the insurance company that is the target of the acquisition. It also stipulates what the supervisory authority must do in order to achieve that objective: "*appraise the suitability of the proposed acquirer and the financial soundness of the proposed acquisition*". It then lists a number of criteria against which those two elements (suitability of the acquirer and financial soundness of the acquisition) should be measured; the first of those is the reputation of the proposed acquirer.

([5]) 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 of 27.6.2013, p. 338.

([6]) 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 (recast), OJ L 173 of 12.6.2014, p. 349.

([7]) What constitutes a "qualifying holding" is not in dispute in the present case. It is clear that acquisition of 100% of the shares in the target satisfies the definition laid down in Article 13(21) of the Directive: 'qualifying holding' means a direct or indirect holding in an undertaking which represents 10% or more of the capital or of the voting rights or which makes it possible to exercise a significant influence over the management of that undertaking.

27. It may therefore be concluded, from a purely literal reading of the provision in question, that "*reputation*" should inform the assessment of "*suitability*". In other words, the reputation of a proposed acquirer (and in particular, absence of a good reputation) may be one of the grounds on which an authority concludes that it is not satisfied as to the suitability of a proposed acquirer. ([8])

28. However, it should be noted that the General Court has held this criterion to be "*an indeterminate legal concept*"; in other words, it may be difficult to define precisely what "*reputation*" means. ([9])

29. In interpreting a provision of Union law, it is necessary to consider not only its wording but also the context in which it occurs and the object of the rules of which it is part. ([10])

30. The recitals explaining the reasons for a provision of Union law are a natural starting point in such an analysis. In the present case, the guidelines adopted jointly by the relevant European supervisory authorities will also provide useful context.

31. First, recital 8 of Directive 2007/44 reads as follows:

> "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" (emphasis added).

32. As noted above, Directive 2007/44 aimed to establish evaluation criteria for the prudential assessment of qualifying holdings consistently across various sectors. The wording in Article 59 of the Solvency II Directive is almost identical to the corresponding provision inserted into the various pieces of sectoral legislation by

---

([8]) See, to that effect, judgment of 2 February 2022 in *Pilatus Bank and Pilatus Holding v ECB*, T-27/19, EU:T:2022:46, para. 72.

([9]) *Ibid.* para. 73. The Commission notes that in her Opinion in the related appeal, AG Kokott adopts that same term (Opinion of 25 May 2023 in *Pilatus Bank v ECB*, C-750/21 P and C-256/22 P, EU:C:2023:431).

([10]) Judgment of 7 June 2005 in *VEMW and others*, C-17/03, EU:C:2005:362, para. 41.

the 2007 Directive. The explanations in the recital above therefore remain relevant to an interpretation of Article 59 of the Solvency II Directive.

33. It is clear from the wording of the recital that not only "integrity" but also "professional competence" should be considered when assessing the "reputation" of the proposed acquirer pursuant to Article 59(1)(a) of the Directive. Indeed, that is what the General Court concluded when it held that "*in its normal meaning, good repute refers to the suitability of a person who complies with customary standards and rules and to the reputation which that person enjoys with the public as regards that fitness and his or her conduct*". ([11])

34. This interpretation is also supported by the objective of the rules. The General Court has held, in relation to the corresponding rules applicable to credit institutions, that the rules providing for an assessment of a proposed acquisition of a qualifying holding is to ensure the sound and prudent financial management of such undertakings. ([12]) That same objective is pursued, in the insurance sector, by Article 59 of the Solvency II Directive. The General Court found that, in making its assessment in relation to the criterion of 'good repute', the national authority should take into account "*the relevant facts*" and referred, as noted in the preceding paragraph, to compliance with customary standards and rules, which may be understood to be those to which professionals in the relevant field hold themselves. ([13]) It should be noted that since "qualifying holdings" are those that will enable the holder to influence the management of the insurance undertaking being acquired, the objective of ensuring "*sound and prudent*" management is served by verifying the professional competence of that acquirer, in addition to their integrity.

([11]) Judgment of 2 February 2022 in *Pilatus Bank and Pilatus Holding v ECB*, T-27/19, cited above, para. 76.

([12]) *Ibid.* para. 68.

([13]) *Ibid.* paras 73 and 76.

35. Second, this reading is supported by the Joint Guidelines on the prudential assessment of acquisitions and increases of qualifying holdings in the financial sector (the "Guidelines"), adopted by the ESAs on 20 December 2016. ([14]). Those Guidelines were adopted with the stated objective "*to provide the necessary legal certainty, clarity and predictability with regard to the assessment process contemplated in the sectoral Directives and Regulations*". ([15])

36. Indeed, section 10 on the first assessment criterion, i.e. "reputation", begins as follows:

> 10.1 The assessment of the reputation of the proposed acquirer should cover two elements:
>
> (a) his integrity; and
> (b) his professional competence.

37. As noted at the outset, the assessment of reputation is a factor that should feed into the appraisal of suitability; no separate analysis of that term is necessary.

38. What is more, no regard need be had, given the clarity of the elements indicated in the preceding points, to Delegated Regulation 2015/35. ([16])

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

40. As a preliminary remark, the Commission notes that the specific examples given in the question of factors that may be relevant to the appraisal of financial soundness carried out by the supervisory authority do not appear to have been considered by the FMA, nor is there any indication that they were put forward by the appellant during the proceedings before either the FMA or the Appeals Board.

([14]) JG/GL/2016/01 of 20 December 2015, available at https://www.eiopa.europa.eu/system/files/2020-10/jc_qh_gls_en.pdf. The ESAs, or European Supervisory Authorities, are the European Insurance and Occupational Pensions Authority ('EIOPA'), established by Regulation (EU) No 1094/2010, the European Banking Authority ('EBA'), established by Regulation (EU) 1093/2010, and the European Securities and Markets Authority ('ESMA'), established by Regulation (EU) No 1095/2010.

([15]) *Ibid.* p. 3.

([16]) Commission Delegated Regulation (EU) 2015/35 of 10 October 2014 supplementing Directive 2009/138/EC of the European Parliament and of the Council on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II), OJ L 12 of 17.1.2015, p. 1.

41. That said and given, as noted in paragraph 19 above, that questions put to the EFTA Court enjoy a presumption of relevance, the Commission notes the following. The question appears to have been asked on the understanding that if the FMA should have but did not consider less intrusive solutions, then the Appeals Board will be required to quash that decision. The Appeals Board therefore seeks to ascertain whether a bank guarantee or the making available of funds on a trust account could be taken into consideration when assessing financial soundness.

42. In the same way as "*reputation*" is a criterion for the appraisal of suitability pursuant to Article 59(1), so too is "*financial soundness*". The observations made above in relation to the architecture of that provision and its objective therefore apply to the assessment of the second question.

43. As a first point, it must be noted that, like for the criterion of "*reputation*", the Directive gives no definition, or list of factors that inform the meaning of the criterion of "*financial soundness*". It may therefore be concluded that the means to ensure the financial soundness of the proposed acquirer or of the proposed acquisition are not pre-determined and that a case-by-case assessment will be necessary. The consequence of this conclusion must be a certain amount of discretion on the part of the supervisory authority when assessing financial soundness.

44. Second, and in light of the principle of good administration, which is a general principle of EEA law, the supervisory authority must "*when applying indeterminate legal concepts which allow it a broad discretion in making a decision detrimental to the person concerned, examine carefully and impartially all the relevant elements of the situation in question*". ([17]) This general requirement of due diligence and the duty of investigation underpin the principle of good administration enshrined in Article 41 of the Charter of Human Rights and Fundamental Freedoms and the Commission sees no reason to interpret the principle under EEA law any differently.

45. However, as noted at paragraph 40 above, the means by which financial soundness may have been verified were not proposed by the appellant; they appear to be an expression of what the Appeals Board may consider to be factors able, if put in

---

([17]) Opinion of 25 May 2023 in *Pilatus Bank v ECB*, C-750/21 P and C-256/22 P, cited above, para 135.

place, to speak to financial soundness. In those circumstances, it must be determined whether, in not considering of its own motion such possibilities, the FMA failed in its obligation to conduct a thorough and impartial examination of all relevant elements.

46. For the sake of completeness, the Commission notes that the principle of proportionality under Union law would not, in its view, require such an assessment. It is the responsibility of the proposed acquirer to provide, in the context of the notification that it must make pursuant to Article 57 of the Solvency II Directive, all relevant information to allow the supervisory authority to perform the appraisal of suitability laid down in Article 59; the Directive does not go so far as to place on that authority an obligation to explore, of its own motion, alternative measures that the proposed acquirer could potentially put in place in order to favour a positive assessment of the financial soundness of the proposed acquisition.

47. Based on the foregoing considerations, the Commission considers that the answer to the second question should be that an assessment that takes into account all relevant information, including, as the case may be, the provision of a bank guarantee or the making available of funds on a trust account, is not precluded by Article 59(1)(c) of Directive 2009/138.

IV.3. Question three

48. By its third question, the Appeals Board seeks, in essence, to ascertain what is meant by "*reasonable grounds*" for the purposes of Article 59(2) of the Solvency II Directive. In particular, it seeks clarification as to whether certainty of non-compliance with the requirements laid down in the first paragraph of that provision is necessary in order to oppose a proposed acquisition.

49. The first two questions addressed the criteria against which the suitability of the proposed acquirer and the financial soundness of the proposed acquisition must be measured. The third question looks at what happens once that assessment has been made.

50. Article 59(2) provides that supervisory authorities may oppose the proposed acquisition. However, they may do so only if there are reasonable grounds for such a decision, and those grounds must be based on the criteria set out in paragraph 1 (or

if the information provided by the proposed acquirer is incomplete, but that sub-option does not appear relevant to the case at hand).

51. As noted above, in interpreting a provision of Union law, it is necessary to consider not only its wording but also the context in which it occurs and the object of the rules of which it is part.

52. In that respect, it is important to note that the original text of the Commission, when the Qualified Holdings Directive was proposed, was worded differently. The Commission proposal provided that "*the competent authorities may oppose the proposed acquisition only if they find that the criteria set out in paragraph 1 are not met*". ([18]) This text was the subject of amendments by the European Parliament ([19]), and new Article 15b, as contained in Article 2(3) of that Directive, as adopted, read as follows: "*the competent authorities may oppose the proposed acquisition if there are reasonable grounds for doing so on the basis of the criteria set out in paragraph 1*". As is clear, that wording was kept, virtually unchanged, in Article 59(2) of the Solvency II Directive.

53. On the basis of the legislative history of the text, it can be inferred that the amendment was designed specifically to avoid wording that suggested a need to establish actual non-compliance: "criteria…are not met" v "reasonable grounds based on the criteria".

54. What will therefore be crucial in assessing whether Article 59(2) was properly applied is the explanation given for the "reasonable grounds".

55. This will necessarily require a case-by-case assessment of all the relevant information. However, it cannot imply a requirement of evidence of lack of compliance, not least because certain of the criterion, including at least "reputation", include an element of "how the public perceives the proposed acquirer".

56. Indeed, Advocate General Kokott recently stated, with reference to the (similar) criterion of good repute in a related field, that the concept "*does not require that the*

([18]) 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/2006/0507 final.

([19]) See amendments 24, 44, 64, 82 and 104 in the document annexed to the present submission.

perception of market participants reflects the actual qualities of the person in question…[r]ather, the focus is on the (subjective) perception of the public". ([20])

57. On that basis, it does not seem useful to focus on exchanging one broad concept for another (whether the "considerable concerns" expressed by the FMA or the "substantiated doubts" referred to by the Appeals Board).

58. Based on the foregoing considerations, the Commission considers that the answer to the third question should be that Article 59(2) of the Solvency II Directive must be interpreted as meaning that, in order to oppose a proposed acquisition, it is not necessary for a supervisory authority to establish actual non-compliance with one of the criteria listed in paragraph 1 of that provision.

IV.4. Question four

59. By its fourth question, the Appeals Board seeks, in essence, to verify if and to what extent the Guidelines ([21]) are binding on it when interpreting provisions of the EEA Agreement.

60. In order to answer this question the Commission will first outline the effects of the Guidelines in cases before national courts in the Member States - based on an analysis of the case law of the Court of Justice - and will then verify whether such effects also apply to national courts of the EEA EFTA States. A third section will then conclude and propose an answer to the request for advisory opinion.

IV.4.1. Effects of the Guidelines in cases before national courts of the EU Member States

61. Article 16(1) of Regulation (EU) 1094/2010 (the "EIOPA Regulation") provides that EIOPA – the supervisory authority responsible for the insurance sector – 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 Union law*", issue guidelines. The Guidelines, adopted jointly with the other ESAs, are such a document and are

([20]) Opinion of 25 May 2023 in *Pilatus Bank v ECB*, C-750/21 P and C-256/22 P, EU:C:2023:431, opining on Article 23(1)(a) of Directive 2013/36/EU. As noted above, that directive is part of the group of acts in relation to which a harmonised approach to prudential assessment has been adopted.

([21]) See fn 14 above.

addressed, in accordance with Article 16(1) of the EIOPA Regulation, to the competent authorities of the Member States and, by extension, those of the EEA EFTA States.

62. Article 71(2)(b) of the Solvency II Directive requires that "*Member States shall ensure that supervisory authorities make every effort to comply with the guidelines […] issued by EIOPA in accordance with Article 16 of Regulation (EU) 1094/2010 and state reasons if they do not do so*". Article 16(3) of Regulation (EU) 1094/2010 sets out the obligation of national authorities to "*make every effort to comply with those guidelines*".

63. The Court of Justice has already had the opportunity to express itself on the effects, in cases pending before national courts of the Member States, of such guidelines in an analogous cases concerning guidelines adopted by EBA. ([22]) The Court recalls that such provisions fall within the category of acts of the Union provided for in the fifth paragraph of Article 288 TFEU, i.e. acts intended to exhort and to persuade, as opposed to acts having binding force. ([23])

64. The Court then finds that while such guidelines cannot give rise to individual rights and obligations ([24]), "*it is for the national courts to take into consideration EBA guidelines 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*". ([25])

65. In the Commission's view, the settled case law relating to the effects of guidelines upon national courts clearly applies to EIOPA guidelines. While the case law quoted above concerns guidelines adopted by the EBA, the legislative framework within which the EIOPA empowerment is exercised, its wording and the purpose of the

---

([22]) Article 16 of Regulation (EU) 1093/2010 establishing the European Banking Authority contains a similar empowerment to that in the EIOPA Regulation.

([23]) Judgments of 25 March 2021 in *Balgarska Narodna Banka*, C-501/18, EU:C:2021:249, para. 79; and of 20 February 2018 in *Belgium v Commission*, C-16/16 P, EU:C:2018:79, para. 26.

([24]) Judgment of 13 December 1989 in *Grimaldi*, C-322/88, EU:C:1989:646, para. 16.

([25]) Judgment of 15 July 2021 in *FBF*, C-911/19, EU:C:2021:599, para. 71 and case law cited.

EIOPA guidelines are, in all relevant respects, equivalent to the situation of the EBA. ([26])

66. On the basis of the foregoing considerations it may be concluded that, in a case such as the one pending before the Appeals Board, national courts in the Member States would be obliged to take the Guidelines into consideration in order to resolve the dispute before them.

IV.4.2. Same effects in national courts in the EEA EFTA States

67. By its question, the Appeals Board seeks to ascertain whether the findings in the previous section would apply in the same way within the institutional framework of the EEA Agreement. In order to answer this question, specific regard must be had to the material and institutional differences between an EU rule and its incorporation in the EEA Agreement.

68. In this context, the first observation of the Commission is that, unlike Article 288 TFEU, Articles 7 and 102 of the EEA Agreement make no reference to the "soft law" instrument of "recommendations" as a mean to achieve the homogeneity objectives set out in Article 1(1) of the EEA Agreement.

69. That said, the Commission notes that all legal acts relevant to the present case have been incorporated into the EEA Agreement. As already indicated above, the Solvency II Directive was incorporated through Joint Committee Decision No 78/2011 of 27 November 2012. ([27]) The changes made to the procedures set up under Article 71 of the Solvency II Directive as a result of the EIOPA Regulation were incorporated into the EEA Agreement through Joint Committee Decision No 247/2018 of 5 December 2018. ([28]) And the EIOPA Regulation itself was

([26]) In this regard it should be noted that the Court of Justice went even further in attributing the same effects as for financial supervision guidelines also to guidelines in the telecommunications sector, where the provisions of Union law setting out the effects of the guidelines are cast in a less binding terms: Case 28/15 *Koninklike KPN* concerned guidelines for which, pursuant to Article 19(2) of Directive 2002/21/EC, "*Member States shall ensure that national regulatory authorities take the utmost account*" (see at para. 41). By contrast, Article 16(3) of Regulation (EU) 1094/2010 and Article 71(2)(b) of Directive 2009/138/EC require that the national authorities "*make every effort to comply*" with the relevant recommendations.

([27]) OJ L 262 of 3.10.2011, p. 45.

([28]) OJ L 337 of 23.9.2021, p. 39.

incorporated through Joint Committee Decision No 200/2016 of 30 September 2016. ([29])

70. None of these three Joint Committee Decisions introduced specific material adaptations to Article 71 of the Solvency II Directive or to Article 16 of the EIOPA Regulation.

71. Article 1(b) of Joint Committee Decision No 200/2016 provides for the following horizontal adaptation:

> "(b) Notwithstanding the provisions of Protocol 1 to this Agreement, and unless otherwise provided for in this Agreement, the terms "Member State(s)" and "competent authorities" shall be understood to include, in addition to their meaning in the Regulation, the EFTA States and their competent authorities, respectively."

72. Furthermore, Article 1(a) of that Decision No 200/2016 provides for the following institutional adaptation:

> "(a) The competent authorities of the EFTA States and the EFTA Surveillance Authority shall, but for the right to vote, have the same rights and obligations as the competent authorities of EU Member States in the work of the European Supervisory Authority (European Insurance and Occupational Pensions Authority), hereinafter referred to as "the Authority", its Board of Supervisors, and all preparatory bodies of the Authority, including internal committees and panels, subject to the provisions of this Agreement."

73. The Commission is of the view that it follows from these two adaptations and the otherwise unchanged incorporation of the relevant provisions, that the Union system for financial supervision has been extended to the Liechtenstein FMA. The relevant legal acts themselves specifically provide for the adoption of guidelines and recommendations and, like the FMAs in the Member States of the Union, the FMA in an EEA EFTA State must make every effort to comply with those guidelines and recommendations. The FMA in Liechtenstein is subjected to their effect in order to achieve the same level of homogeneity as intra-EU. In particular, Article 16(3) of

([29]) OJ L 46 of 23.2.2017, p. 13.

the EIOPA Regulation applies, via the adaptation in Article 1(b) of Joint Committee Decision No 200/2016, to the FMA in the same manner as it applies to national supervisory authorities of the Member States. The effects of the guidelines and recommendations adopted by EIOPA are the same for the FMA as they are the national authorities of the Member States. Indeed, the national authorities of the EEA EFTA States participate in the drafting of the guidelines and recommendations in accordance with the adaption in Article 1(a) of Joint Committee Decision No 200/2016. It must follow that, in the same way that it is for a national court in a Member State to take the Guidelines into considerations when resolving a dispute before it, it is for the Appeals Board to take those Guidelines into consideration when reviewing the FMA's decisions. This conclusion is reinforced by the fact that the FMA has confirmed its compliance with the Guidelines pursuant to the procedure provided for to that end in Article 16(3) of the EIOPA Regulation.

74. Finally, and in any event, the Commission notes that even in cases in which Union legislation does not require explicitly that guidelines shall adopted and followed, the consistent case law of the Court of Justice deduces a certain binding effect of guidelines from the general principles of equal treatment and protection of legitimate expectations. By adopting guidelines in order to establish the criteria on the basis of which it proposes to assess the compatibility with Union legislation of certain conduct, an administrative authority imposes a limit on the exercise of its discretion and cannot, as a general rule, depart from those guidelines. ([30]) When assessing the conduct of an administration that admits, like in the present case, to have applied certain guidelines to a multitude of cases, the Appeals Board would therefore in any case also have to take into account the fact that the FMA had bound itself to follow the Guidelines in its practice, and would therefore have to have regard to whether the FMA, in compliance with the general principles of equal treatment and legitimate expectations, had properly applied those Guidelines to its assessment of the case at hand.

([30]) Judgments of 31 January 2023 in *Braesch*, C-284/21 P, EU:C:2023:58, para. 90 and case law cited there; of 28 June 2005 in *ABB Asea Brown Boveri v Commission*, C-189/02 P, C-202/02 P, C-205/02 P, C-206/02 P, C-207/02 P, C-208/02 P, C-213/02 P, EU:C:2005:408, para. 211; and of 8 October 2008 in *Carbone-Lorraine v Commission*, T-73/04, EU:T:2008:416, para. 70.

IV.4.3. Conclusion and proposed answer to question four

75. Based on the foregoing considerations, the Commission considers that the answer to the fourth question should be that it is for national courts in the EEA EFTA States to take into consideration EIOPA Guidelines in order to resolve disputes before them. This is particularly the case when the national authority of an EEA EFTA State has confirmed its intention to comply with those guidelines.

V. CONCLUSION

76. In the light of the foregoing, the Commission considers that the questions referred to the EFTA Court by the *Beschwerdekommission der Finanzmarktaufsicht* should be answered as follows:

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

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

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

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

Helene TSEREPA-LACOMBE Lorna ARMATI Corneliu HÖDLMAYR

Agents for the Commission