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ORIGINAL

TO THE PRESIDENT AND MEMBERS OF THE EFTA COURT

WRITTEN OBSERVATIONS

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

THE EFTA SURVEILLANCE AUTHORITY

represented by

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Department of Legal & Executive 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*) requests 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, concerning the interpretation and application 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 (Solvency II)* and 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).*

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1 INTRODUCTION AND FACTS OF THE CASE

1. Under EEA legislation, those wishing to acquire an EEA insurance company are first subject to a prudential assessment by the national supervisory authority ("**the NCA**"). The present case raises questions of: (i) interpretation of the criteria for this prudential assessment; and of (ii) whether guidelines, issued jointly in this case by the European Supervisory Authorities ("**the ESAs**"), and applied by the NCA, have a binding effect on national courts.

2. The facts of the case can be briefly stated. A Ltd, a third-country company,[1] wishes to acquire all the shares in a Liechtenstein life insurance company (Z AG). The proposed acquisition was opposed by the Liechtenstein Financial Market Authority ("**FMA**"), because of concerns about the professional competence and financial soundness of A Ltd's ultimate shareholder, Ms C (also resident outside the EEA and with no EEA nationality).

3. In making its opposition decision, the FMA applied national legal provisions which implement the Solvency II Directive[2] and its Delegated Regulation,[3] together with the joint guidelines on the prudential assessment of acquisitions and increases of qualifying holdings in the financial sector ("**the Joint Guidelines**") issued jointly by the ESAs under Article 16 of the EBA Regulation,[4]

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[1] i.e. established under foreign law and not registered in an EEA State. In this case, A Ltd is 100% owned by B Ltd, a third-country company, whose sole shareholder (Ms C) does not have an EEA nationality and is resident outside the EEA.

[2] 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) ("**the Solvency II Directive**" or "**the Directive**"), which was incorporated into the EEA Agreement by Joint Committee Decision No 78/2011 (OJ L 262, 6.10.2011, p.45.) and entered into force in the EEA on 1 December 2012.

[3] 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* ("**the Delegated Regulation**") which was incorporated into the EEA Agreement by Joint Committee Decision No 62/2018 of 23 March 2018 (OJ L 26, 30.1.2020, p. 50) and entered into force in the EEA on 1 August 2019.

[4] Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 *establishing a European Supervisory Authority* (European Banking Authority) ("**the EBA**"), incorporated into the EEA Agreement by Joint Committee Decision No 199/2016 of 30 September 2016 (OJ L 46, 23.2.2017, p. 4) which entered into force 1 October 2016, as adapted and amended by Directive 2010/78/EU of the European Parliament and of the Council of 24 November 2010 amending Directives 98/26/EC, 2002/87/EC, 2003/6/EC, 2003/41/EC, 2003/71/EC, 2004/39/EC, 2004/109/EC, 2005/60/EC, 2006/48/EC, 2006/49/EC and 2009/65/EC *in respect of the powers of the European Supervisory Authority (European Banking Authority), the European Supervisory Authority (European Insurance and Occupational Pensions Authority) and the European*

the EIOPA Regulation[5] and the ESMA Regulation[6] (together, the "**ESAs Regulations**"). A Ltd has appealed the FMA's decision.

4. The appeal raises questions of interpretation of the Directive, the Delegated Regulation, and of the legal effect of the Joint Guidelines.

5. In short, ESA submits that the Joint Guidelines play a significant role in the interpretation of legal provisions in relation to which they are issued and intended to clarify, albeit that they are not binding on national courts. As observed further below, the answers to questions one to three of the national court are clarified where relevant by reference to the Joint Guidelines, together with the legislative history and contextual background, as interpreted in part by relevant case-law.

2 EEA LAW

2.1 The Solvency II Directive

6. Recital 34 of the Solvency II Directive provides (emphasis added):

> *"**All persons that perform key functions**[7] **should be fit and proper**. However, only the key function holders should be subject to notification requirements to the supervisory authority."*

Supervisory Authority (European Securities and Markets Authority) (1), as corrected by (OJ L 170, 30.6.2011, p. 43) and (OJ L 54, 22.2.2014, p. 23) incorporated into the EEA Agreement by Joint Committee Decision No 92/2018 (OJ L 340, 15.10.2020, p. 25) which entered into force 1 January 2020 ("**the Omnibus Directive**").

[5] 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) ("**EIOPA**"), incorporated into the EEA Agreement by Joint Committee Decision No 200/2016 of 30 September 2016 (OJ L 46, 23.2.2017, p. 13), which entered into force 1 October 2016, as adapted and amended by the Omnibus Directive, cited above.

[6] Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 *establishing a European Supervisory Authority* (European Securities and Markets Authority) ("**ESMA**"), incorporated into the EEA Agreement by Joint Committee Decision No 201/2016 of 30 September 2016 (OJ L 46, 23.2.2017, p. 22) which entered into force 1 October 2016, as adapted and amended by the Omnibus Directive, cited above.

[7] Recital 33 records that all functions included in the system of governance are considered to be key functions and consequently also important and critical functions. The Articles of the Directive make clear that those effectively running the undertaking will necessarily have key functions (see e.g. Article 42).

7. Article 42(1) of the Solvency II Directive, on fit and proper requirements for persons who effectively run the undertaking or have other key functions, provides (emphasis added):

> *"1. Insurance and reinsurance undertakings shall ensure that all persons who effectively run the undertaking or have other key functions at all times fulfil the following requirements:*
> ***(a) their professional qualifications, knowledge and experience are adequate to enable sound and prudent management (fit);*** *and*
> ***(b) they are of good repute and integrity (proper)***."

8. Article 57(1) of the Solvency II Directive, on acquisitions, provides that natural or legal persons must notify any proposed acquisition of a qualifying holding to the national supervisory authority.

9. Article 59(1) and (2) of the Solvency II Directive, on the assessment of such a notification, provides (emphasis added):

> *"1. In assessing the notification provided for in Article 57(1) and the information referred to in Article 58(2)* ***the supervisory authorities shall****, in order to ensure the sound and prudent management of the insurance or reinsurance undertaking in which an acquisition is proposed, and* ***having regard to the likely influence of the proposed acquirer*** *on the insurance or reinsurance undertaking,* ***appraise the suitability of the proposed acquirer and the financial soundness of the proposed acquisition against all of the following criteria:***
> *(a) the reputation of the proposed acquirer;*
> *(b) the reputation and experience of any person who will direct the business of the insurance or reinsurance undertaking as a result of the proposed acquisition;*
> *(c) the financial soundness of the proposed acquirer, in particular in relation to the type of business pursued and envisaged in the insurance or reinsurance undertaking in which the acquisition is proposed;*
> *(d) whether the insurance or reinsurance undertaking will be able to comply and continue to comply with the prudential requirements based on this Directive and, where applicable, other Directives, notably, Directive 2002/87/EC, in particular, whether the group of which it will become part has a structure that makes it possible to exercise effective supervision, effectively exchange information among the supervisory authorities and determine the allocation of responsibilities among the supervisory authorities;*
> *(e) whether there are reasonable grounds to suspect that, in connection with the proposed acquisition, money laundering or terrorist financing within the meaning of Article 1 of Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing (33) is being or has been committed or attempted, or that the proposed acquisition could increase the risk thereof.*

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

2.2 The EIOPA Regulation[8]

10. Recital 25 of the EIOPA Regulation provides:

> *"In areas not covered by regulatory or implementing technical standards, the Authority[9] should have the power to issue guidelines and recommendations on the application of* [EEA][10] *law. In order to ensure transparency and to strengthen compliance by national supervisory authorities with those guidelines and recommendations, it should be possible for the Authority to publish the reasons for supervisory authorities' non-compliance with those guidelines and recommendations."*

11. Recital 53 of the EIOPA Regulation provides:

> *"As a general rule, the Board of Supervisors should take its decisions by simple majority in accordance with the principle where each member has one vote. However, for acts of a general nature, including those relating to regulatory and implementing technical standards, guidelines and recommendations, for budgetary matters as well as in respect of requests by a Member State to reconsider a decision by the Authority to temporarily prohibit or restrict certain financial activities, it is appropriate to apply the rules of qualified majority voting as laid down in Article 16(4) of the Treaty on European Union and in the Protocol (No 36) on transitional provisions annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union.*[…]*."*

12. Article 16(1) and (3) of the EIOPA Regulation, on guidelines and recommendations, provides:

> *"1. The Authority shall, 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, issue guidelines and recommendations addressed to competent authorities or financial institutions.*
> […]
> *3. The competent authorities and financial institutions shall make every effort to comply with those guidelines and recommendations.*
> *Within 2 months of the issuance of a guideline or recommendation, each competent authority shall confirm whether it complies or intends to comply with that guideline or recommendation. In the event that a competent*

[8] The EBA Regulation and the ESMA Regulation are cited above in footnotes 4 and 6. The ESAs were all designed according to the same institutional template and the ESAs Regulations are largely identical.
[9] The EIOPA Regulation is cited above.
[10] Original "*Union*".

authority does not comply or does not intend to comply, it shall inform the Authority, stating its reasons.
The Authority shall publish the fact that a competent authority does not comply or does not intend to comply with that guideline or recommendation. The Authority may also decide, on a case-by-case basis, to publish the reasons provided by the competent authority for not complying with that guideline or recommendation. The competent authority shall receive advanced notice of such publication.
If required by that guideline or recommendation, financial institutions shall report, in a clear and detailed way, whether they comply with that guideline or recommendation."

13. Article 44(1) of the EIOPA Regulation, on decision making, provides:

"1. Decisions of the Board of Supervisors shall be taken by a simple majority of its members. Each member shall have one vote.

With regard to the acts specified in Articles 10 to 16 and measures and decisions adopted under the third subparagraph of Article 9(5) and Chapter VI and by way of derogation from the first subparagraph of this paragraph, the Board of Supervisors shall take decisions on the basis of a qualified majority of its members […]."

3 NATIONAL LAW

14. The Solvency II Directive was transposed into Liechtenstein law by the Act of 12 June 2015 on the Supervision of Insurance Undertakings (*Versicherungsaufsichtsgesetz; VersAG*) ("**the Insurance Supervision Act**"). Article 94(1) of this Act contains the criteria for the prudential assessment of the proposed acquirer of an insurance undertaking. Article 179 of this Act provides that, in the exercise of its duties, the FMA shall have regard *inter alia* to the activities, guidelines and recommendations of EIOPA.

15. The Delegated Regulation was transposed into Liechtenstein law by the Insurance Supervision Regulations (*Versicherungsaufsichtsverordnung*).

4 THE QUESTIONS REFERRED

16. The Referring Court asks the following questions:

"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?"

5 LEGAL ANALYSIS

5.1 Judicial cooperation

17. ESA recalls that the Appeals Board of Liechtenstein's Financial Market Authority ("**the Referring Court**") has already been recognised as a court or a tribunal by this Court in numerous cases.[11] For example, in Case E-4/09 *Anstalt*,

[11] See e.g. judgment of the EFTA Court of 27 January 2010 in Case E-4/09, *Inconsult Anstalt* v *the Financial Market Authority (Finanzmarktaufsicht)* ("***Inconsult Anstalt***"), [2009-2010] EFTA Ct. Rep. 86, judgment of 30 May 2018 in Case E-9/17, *Edmund Falkenhahn AG and The Financial Market Authority (Finanzmarktaufsicht),* [2018] EFTA Ct. Rep. 153, judgment of 25 February 2021 in Case E-5/20, *SMA SA and Société Mutuelle d'Assurance du Bâtiment et des Travaux Publics and Finanzmarktaufsicht Liechtenstein,* not yet reported, and judgment of 18 June 2021 in Case E-10/20, *SMA SA and Société Mutuelle d'Assurance du Bâtiment et des Travaux Publics and Finanzmarktaufsicht Liechtenstein*, not yet reported. ESA notes that the Appeals Commission was the predecessor to the Appeals Board of the FMA (i.e. the predecessor to the Referring Court).

the Court concluded: "[…] *the Court finds that the Appeals Commission exercises a judicial function and qualifies as a court or a tribunal within the meaning of Article 34 SCA.*"[12]

5.2 Admissibility

18. ESA observes that, in the request for the advisory opinion ("**the Request**"), the Referring Court asks how various provisions of Article 59 of the Directive should be interpreted, in circumstances where the proposed acquirer of Z AG is resident in a third country. ESA recalls that Joint Committee Decision No 78/2011 has an adaptation text, stating that Articles 57 to 63 of the Directive do not apply where there is a third country acquirer.[13] Liechtenstein does not however apply this adaptation. In other words, Liechtenstein, *by virtue of its national law*, voluntarily applies the Solvency II Directive in a wider sense than is required by the EEA Agreement, as adapted for the EFTA States. It applies the provisions of Article 59, as implemented in Article 94 of the Insurance Supervision Act, to both EEA and third country acquirers, without distinction.[14] Consequently, it applies the Directive in the same way as the EU Member States.[15]

19. In these circumstances, ESA submits that the Court, in line with its case-law and that of the Court of Justice of the EU ("**CJEU**"), has jurisdiction to answer the questions referred.

20. ESA recalls the settled case-law that where, as here, domestic legislation, in regulating purely internal situations (i.e. those in which the state is not required to comply with EEA law[16]), adopts the same or similar solutions as those adopted in EEA law, it is in the interest of the EEA to forestall future differences

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[12] See Case E-4/09 *Inconsult Anstalt*, cited above, para. 24.

[13] Article 1(3) of Joint Committee Decision 78/2011 provides: "*…The provisions of the Directive shall, for the purposes of this Agreement, be read with the following adaptations:* (*a) […]; (b) Articles 57 to 63 regarding the prudential assessment of a proposed acquirer shall not apply where the proposed acquirer, as defined in the Directive, is situated or regulated outside the territory of the Contracting Parties*" ("**the JCD adaptations**").

[14] This was also done in the contested decision of the FMA in this case.

[15] ESA's understanding is that Iceland and Norway apply the Solvency II Directive in the same way.

[16] ESA observes that these situations can be geographically 'internal' as well as cross-border. The point is that it is an internal legal decision which law to apply: there is no *obligation* to apply EEA law.

of interpretation. Provisions or concepts taken from EEA law should thus be interpreted uniformly, irrespective of the circumstances in which they are to apply. As the jurisdiction of the Court is confined to considering and interpreting provisions of EEA law only, it is then for the national court to assess the precise scope of that reference to EEA law in national law.[17]

21. ESA further recalls the case-law where EU law did not in principle apply (because the facts of the case were within one Member State), but the national legislation applied in the same way to national and EU operators. In such cases the CJEU has also considered that, where the market to which the question relates has a *cross-border interest*, the question will be admissible.[18] In the present case, ESA recalls that Article 59 (and the related Article 57) of the Directive are provisions which are intended to apply to *any* acquirer, irrespective of their country of registration, residence or nationality.[19] Accordingly, an Advisory Opinion of the Court on the interpretation to be given of these provisions will be of relevance and use also for EEA-based proposed acquirers. On this note, ESA observes that the life insurance markets in the EEA (and therefore in Liechtenstein) would appear to be of cross-border interest, and are increasingly integrated. This can be seen from *inter alia* the Directive itself, which aims to harmonise and make more transparent the procedures for cross-border holdings in insurance and reinsurance companies.

22. Finally, ESA recalls the importance of judicial dialogue and the presumption of relevance which questions of EEA law referred by a national court enjoy.[20] Article 34 SCA provides for cooperation between the Court and national courts

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[17] See e.g. judgment of the EFTA Court of 19 April 2023, Case E-9/22, *Verkfræðingafélag Íslands (the Association of Chartered Engineers in Iceland)* v *the Icelandic State* (*"**Verkfræðingafélag Íslands**"*), not yet reported, paras. 21-26 and para. 25 in particular; judgment of 27 October 2017, Case E-21/16 Pascal Nobile [2017] EFTA Ct. Rep. 554, para. 25; judgment of 22 December 2016, Case E-3/16 *Ski Taxi* ("***Ski Taxi***") [2016] EFTA Ct. Rep. 1002, paras. 26-28; and judgments of the CJEU of 31 January 2008, *Centro Europa 7 Sprl* ("***Centro Europa 7***"), C-380/05, EU:C:2008:59 para. 69; of 1 June 2010, *Blanco Pérez and Chao Gómez* ("***Blanco Pérez***"), Joined Cases C-570/07 and C-571/07, EU:C:2008:138, para. 39 ; and of 15 November 2016, *Ullens de Schooten* v *État belge* ("***Ullens de Schooten***"), C-268/15, EU:C:2016:874 paras. 52-53.

[18] C-380/05 *Centro Europa 7*, paras 65-67; Joined Cases C-570/07 and C-571/07 Blanco Pérez, para. 40, and C-268/15 *Ullens de Schooten*, paras. 50-51.

[19] Article 57(1) of the Directive provides (emphasis added): "*Member States shall require **any** natural or legal person or such persons acting in concert (the proposed acquirer)* … [to notify the relevant supervisory authority of the proposed acquisition]."

[20] See e.g. E-9/22 *Verkfræðingafélag Íslands,* para. 23.

and tribunals. That cooperation is an important factor in ensuring the homogenous interpretation of EEA law, by providing assistance to the courts and tribunals in the EFTA States in cases in which they have to apply provisions of EEA law.[21]

5.3 The Questions of the Referring Court

23. As the guidance provided in the Joint Guidelines is relevant also for the answers to the first, second and third questions, ESA considers that it is most useful to consider the fourth question first.

5.3.1 Question 4 – the Effect of the Joint Guidelines

24. The Court has, to ESA's knowledge, never been requested to answer whether guidelines issued by the ESAs and adopted at the EU level have a binding effect on the national courts of the EFTA States. ESA will provide an overview of (i) the ESAs and their main role, (ii) guidelines in general, and (iii) the Joint Guidelines, their applicability and ESA's conclusion.

(i) The ESAs and their main role

25. In the aftermath of the financial crisis, proposals were made to strengthen European supervisory structure, with the aim of establishing a more efficient, integrated and sustainable European system of supervision. The proposals materialised in *inter alia* the establishment of the three previously mentioned agencies: ESMA, EBA and EIOPA. According to the ESAs Regulations,[22] the objective of the ESAs shall be to protect the public interest by contributing to the short, medium and long-term stability and effectiveness of the financial system, for the economy of the [EEA], its citizens and businesses.[23]

26. ESA recalls that the ESAs' Regulations were incorporated into the EEA Agreement in 2016. Prior to this, in October 2014, the EFTA States signed a

[21] Judgments of 23 November 2021 of the EFTA Court in Case E-16/20, *Q and Others and the Norwegian Government represented by the Immigration Appeals Board*, not yet reported, paragraph 33 and in Case E-9/22, *Verkfræðingafélag* Íslands, para. 22.
[22] ESA recalls that the ESAs' Regulations are to a large extent identical.
[23] See e.g. Article 1(6) of the EIOPA Regulation, the ESAs Regulations are to a large extent identical.

Joint Declaration with the EU *on the incorporation of the EU ESAs Regulations into the EEA Agreement*.[24] That Declaration *inter alia* emphasised the importance of swift incorporation and application of the outstanding legislation in the financial services field, in order to ensure a level playing field throughout the EEA.

27. The tasks of the ESAs are set out in Articles 8 of the ESAs Regulations. They consist of *inter alia* contributing to "*the establishment of high-quality common regulatory and supervisory standards and practices,* […] *by developing guidelines,* […] *which shall be based on legislative acts referred to in Article 1(2)"*;[25] and "*the consistent application of legally binding* [EEA][26] *acts, in particular by contributing to a common supervisory culture, ensuring consistent, efficient and effective application of the acts referred to in Article 1(2),"* […] and "*to organise and conduct peer review analyses of competent authorities, including issuing guidelines* […]*, in order to strengthen consistency in supervisory outcomes*." To achieve the tasks set out in Article 8(1), the ESAs shall have the powers to *inter alia "issue guidelines* […]*, as laid down in Article 16."*[27]

28. The ESAs Regulations provide that the NCAs of the EEA are to be responsible for the day-to-day supervision, but where greater harmonisation and coherent application of rules for financial institutions and markets across the EEA should also be achieved, the ESAs are responsible.[28]

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[24] See the declaration via the link: https://www.stjornarradid.is/media/fjarmalaraduneyti-media/media/frettir2014/Sameiginleg-yfirlysing-fjarmalaradherra-EES-og-EFTA-rikjanna-(a-ensku).pdf .

[25] For the sake of completeness, see Article 1(2) of the EIOPA Regulation: "2. *The Authority shall act within the powers conferred by this Regulation and within the scope of Directive2009/138/EC with the exception of Title IV thereof, of Directives 2002/92/EC, 2003/41/EC, 2002/87/EC, 64/225/EEC, 73/239/EEC, 73/240/EEC, 76/580/EEC, 78/473/EEC, 84/641/EEC, 87/344/EEC, 88/357/EEC, 92/49/EEC, 98/78/EC, 2001/17/EC, 2002/83/EC, 2005/68/EC and, to the extent that those acts apply to insurance undertakings, reinsurance undertakings, institutions for occupational retirement provision and insurance intermediaries, within the relevant parts of Directives 2005/60/EC and 2002/65/EC, including all directives, regulations, and decisions based on those acts, and of any further legally binding Union act which confers tasks on the Authority."*

[26] Originally "*Union*".

[27] Article 8(1) (a), (b) and (e) and (2)(c).

[28] See e.g. Recital 8 to the EIOPA Regulation. ESA recalls that the ESAs Regulations are to a large extent identical.

29. Each of the ESAs works within its respective field of banking, securities markets and insurance. All of them have the role of protecting public values, such as the stability of the financial system, the transparency of markets and financial products. The ESAs Regulations define their legally binding powers towards NCAs and market operators, but the real empowerment of each of the ESAs is in the sectoral legislation.

30. ESMA's mission is to enhance investor protection, protect public values such as the integrity and stability of the financial system, the transparency of markets and financial products.[29] The EBA's role is described as improving the functioning of the internal market, in particular by ensuring a high, effective and consistent level of regulation and supervision taking account of the varying interests of all Member States and the different nature of financial institutions and the protection of depositors and investors.[30]

31. EIOPA's responsibilities include improving the functioning of the internal market, ensuring a high, effective and consistent level of regulation and supervision, and protecting public values, such as "*the protection of policyholders, pension scheme members and beneficiaries*."[31]

32. In its work programme, EIOPA has elaborated on its mission of protecting consumers, integrating also sustainable finance; while by strengthening regulation, supervision and harmonisation, it also pursues the development of a common supervisory culture.[32] Guidelines are addressed to the NCAs and/or to financial institutions, and their aim is to assist in harmonising the prudential supervision of insurance and occupational pensions.[33]

(ii) Generally, on guidelines

33. The issuing of guidelines is one of the powers of the ESAs provided for in Articles 16 of the ESAs Regulations, which state that the ESAs shall, with a view

[29] Recital 11 to the ESMA Regulation.
[30] Recital 11 to the EBA Regulation.
[31] Recital 10 and 11 to the EIOPA Regulation.
[32] See EIOPA work programme 2023-2025 at link https://www.eiopa.europa.eu/about/work-programme-2023-2025_en .
[33] See link to EIOPA guidelines, link https://www.eiopa.europa.eu/document-library/guidelines_en .

to ensuring the common, uniform and consistent application of EEA law, issue guidelines addressed to NCAs or financial institutions.[34] Guidelines may be issued in areas not covered by regulatory or implementing technical standards.[35] The ESAs shall furthermore, where appropriate, conduct open public consultations regarding the guidelines.[36]

34. Article 16(3) provides that the NCAs and financial institutions shall make every effort to comply with the guidelines, and that each NCA shall confirm within two months[37] of the issuance of the guidelines whether it intends to comply or complies with them. If the NCA does not comply or does not intend to comply, it must inform the relevant ESA and state its reasons. [38] This is the so-called '*comply or explain*' procedure.

35. ESA submits that such confirmation of compliance could been seen as creating expectations in relation to the NCAs of the EEA States. In accordance with Article 16(3) of the ESAs Regulations, NCAs and financial institutions shall make every effort to comply with the guidelines; accordingly it could be deduced from that confirmation that the relevant NCA will make every effort to comply with them.

36. ESA submits that guidelines are an important interpretation tool, which contributes to acts being interpreted in a homogenous way. The need for uniform interpretation of EEA law and the principle of equality requires that the terms of a provision of EEA law which makes no specific reference to national law concerning the meaning to be given to it, for the purposes of determining the meaning and scope of that provision, must normally be given an

[34] Within the EU the guidelines by EIOPA are issued in 24 official languages which are addressed to NCAs or insurance undertakings, in accordance with Council Regulation No 1 of 15 April 1958 *determining the languages to be used by the European Economic Community* and to Council Regulation No 1 of 15 April 1958 *determining the languages to be used by the European Atomic Energy Community*, Referred to as Regulation No 1.
[35] Recital 25 and Article 8(2)(c) of the EIOPA Regulation.
[36] Recital 47 and Articles 16(2) of the ESAs Regulations.
[37] According to the Reporting requirements page 8 of the Joint Guidelines: "*In the absence of any notification by this deadline, competent authorities will be considered by the respective ESA to be non-compliant*." See link to the Joint Guidelines https://www.esma.europa.eu/sites/default/files/library/jc_gl_2016_01_joint_guidelines_on_prudential_assessment_of_acquisitions_and_increases_of_qualifying_holdings_-_final.pdf?download=1 .
[38] Article 16(3) of the ESAs Regulations.

autonomous and uniform interpretation throughout the EEA, which must take into account the context of that provision and the purpose of the legislation in question.[39]

37. ESA observes that, with regards to the EFTA States, their NCAs must follow the **exact same procedures** as the NCAs in the EU Member States when it comes to notifying the ESAs about their intention in relation to the guidelines (i.e. comply or explain).

38. The fact that guidelines are not incorporated into the EEA Agreement and that there is no formal legal discussion that takes place within the EFTA Pillar on the content of the guidelines, further to the discussion in which the EFTA States[40] take part within the Board of Supervisors of the ESAs, nevertheless **does not undermine the importance** and the significant role that the guidelines play in the interpretation of acts that they are designed to supplement.[41]

39. ESA agrees with the statement by academics that ESAs' guidelines have been said to have significant quasi-binding effect[42] on the NCAs, given their practices and the market, and this is further strengthened by the fact, as mentioned above, that the Board of Supervisors must adopt such acts by means of qualified majority voting.[43]

40. ESA considers that the NCAs of the EFTA States shall, but for the right to vote, have the same rights and obligations as the NCAs of the EU Member States in the work of the ESAs, their Board of Supervisors and all preparatory bodies of

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[39] See judgment of the CJEU of 19 December 2013, *Fish Legal and Shirley*, Case C-279/12, EU:C:2013:853, para. 42 and judgment of the EFTA Court of 14 December 2021 in Case E-2/21 *Norep AS* v *Haugen Gruppen AS*, not yet reported, paras. 30 and 31.

[40] The EFTA States have the right to participate in the committees where the guidelines are drafted this is evident from the adaptation texts of the Joint Committee Decisions incorporating the ESAs Regulations into the EEA Agreement, *cited above*, footnotes 4, 5 and 6.

[41] See judgment of the CJEU of 25 March 2021 in *BT* v *Balgarska Narodna Banka*, Case C-501/18, EU:C:2021:249, para. 80.

42 See Common Market Law Review 59: 1523–1542, 2022. © 2022 Kluwer Law International. Printed in the United Kingdom; *How to exhort and to persuade with(out legal) force: Challenging soft law after FBF*, authors: Heikki Marjosola, Marloes van Rijsbergen and Miroslava Scholten, page 1533.

[43] See e.g. Recital 53 and Article 44 of the EIOPA Regulation. See Article 4 of the Rules of Procedures of the Board of Supervisors of EIOPA at: https://www.eiopa.europa.eu/system/files/2022-07/bos-rules_of_procedure.pdf .

the ESAs, including internal committees and panels. This is evident from the adaptation texts of the Joint Committee Decisions when the ESAs Regulations were incorporated into the EEA Agreement.[44] Furthermore, as stated above, the NCAs of the EFTA States follow the exact same procedures of *comply or explain* provided for in Article 16(3) of the ESAs Regulations. In this case, the FMA informed EIOPA that it would comply with the Joint Guidelines.[45]

(iii) The Joint Guidelines and their effect

41. Through the Joint Committee of the ESAs,[46] the three ESAs, namely EBA, EIOPA and ESMA, closely and regularly liaise to strengthen cooperation.[47] To foster cross-sectoral consistency, as well as supervisory convergence, they coordinate closely in line with their institutional roles. The three ESAs regularly coordinate through the Joint Committee[48] their activities within the scope of their respective responsibilities to ensure consistency in their practices.[49]

42. The Joint Guidelines at issue in this case are issued pursuant to Article 16 of the ESAs Regulations. Since they are Joint Guidelines, they are issued jointly by the Joint Committee of the ESAs and approved by the Board of Supervisors of all the ESAs. They are aimed at clarifying the procedural rules and the assessment criteria to be applied by national supervisory authorities for the prudential assessment of acquisitions and increases of qualifying holdings in the financial sector.[50] ESA submits that it is important to note here that the

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[44] See Joint Committee Decisions No 199, 200 and 201/2016, *cited above,* in footnotes 5, 6, and 7.
[45] See the Joint Guidelines https://www.esma.europa.eu/sites/default/files/library/jc_gl_2016_01_joint_guidelines_on_prudential_assessment_of_acquisitions_and_increases_of_qualifying_holdings_-_final.pdf?download=1 and a link to the confirmation of compliance from the Liechtenstein FMA at p. 15: https://www.eiopa.europa.eu/system/files/2020-10/jc-gl-2017-27-qualifying-holdings-guidelines-compliance-table.pdf . FMA confirmed compliance as of 3 October 2017.
[46] Article 54 of the ESAs Regulation on the establishment of the Joint Committee of the ESAs.
[47] The European Commission and the European Systemic Risk Board ("**ESRB**") also participates in the Joint Committee.
[48] See the Rules of Procedures of the Joint Committee of the ESAs https://www.esma.europa.eu/sites/default/files/library/jc_2022_30_joint_committee_rop.pdf .
[49] See link to the 2023 work programme of the Joint Committee of the European Supervisory Authorities https://www.eba.europa.eu/sites/default/documents/files/document_library/About%20Us/Governance%20structure/JC/work%20programme/1039948/Joint%20Committee%20Work%20Programme%202023.pdf
[50] Point 1 of Title 1 of the Joint Guidelines, *cited above*.

legislation which the Joint Guidelines are meant to clarify and supplement is subject to maximum harmonisation.

43. The Joint Guidelines became applicable from 1 October 2017. Their main objective is to provide the necessary legal certainty, clarity and predictability regarding the assessment process contemplated in the sectoral Directives[51] and Regulations. The requirements of these Joint Guidelines build on the sectoral requirements regarding the procedural rules and evaluation criteria for the prudential assessment of acquisitions and increases of holdings in the financial sector, without prejudice to and without duplication of these requirements.[52]

44. The Joint Guidelines set out the ESAs' view of appropriate supervisory practices within the European System of Financial Supervision or of how EEA law should be applied in a particular area. NCAs to which the Joint Guidelines apply should comply by incorporating them into their supervisory practices as appropriate (e.g. by amending their legal framework or their supervisory procedures), including where the Joint Guidelines are directed primarily at financial institutions.[53] [54]

45. Hence, ESA submits that once the FMA confirmed, pursuant to Article 16(3) of the ESAs Regulations, that it would make every effort to comply with the Joint Guidelines, this could have created expectations that the FMA would interpret and apply the relevant EEA law in accordance with the Joint Guidelines. This also seems relevant in this case as, from the confirmation made by

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[51] See 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 increases in holdings in the financial sector* (OJ L 247, 21.9.2007, p.1). Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 *relating to the taking up and pursuit of the business of credit institution*s (recast) (OJ L 177/1, 30.6.2006). Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 *on markets in financial instruments* amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC (OJ L 145/1, 30.4.2004) and the Solvency II Directive.

[52] See pages 3 – 4 of the Joint Guidelines, *cited above*.

[53] *Ibid*, p. 8.

[54] Liechtenstein implemented the Joint Guidelines into its national legislation. Links to the implementing legislation: https://www.fma-li.li/files/list/fma-mitteilung-2013-1-mit-set-1.pdf (3.11 on page 8/10) and: https://www.fma-li.li/files/list/fma-wegleitung-2017-20-aufsichtsrechtliche-beurteilung-von-qualifiziertenbeteiligungen.pdf.

Liechtenstein, it seems that the Joint Guidelines were implemented into national law.[55]

46. The Joint Guidelines are set by the ESAs, but they do not go through the same legislative process as binding acts.[56] As stated by *AG Bobek* with regards to recommendations in *Case C-16/16 Belgium* v *Commission*, first they are "*neither binding, nor are they allowed to produce any legal effects. They accordingly cannot create any rights or obligations, for the* [EEA States][57] *or for individuals*,"[58] and second "*a recommendation,* […]*, is simply a unilateral, non-binding statement of the opinion of an institution*" [59] The CJEU in *Case C-911/19 FBF* stated that since the recommendations did not have binding force, they could not be the subject of an action for annulment.[60] In the *Opinion of AG Bobek in Case C-16/16* where recommendations in the gambling sector were being debated the AG stated: "[…] *they are not binding in the traditional sense* […]".[61]

47. The fact that guidelines do not produce binding effects does however not indicate that they are without legal effect, as stated in *Case C-322/88 Grimaldi*. There, the CJEU found that the measures in question "*are true recommendations, that is to say measures which, even as regards the persons to whom they are addressed,* ***are not intended to produce binding effects***."[62]

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[55] See link to the confirmation of compliance of the FMA of Liechtenstein (p.15): https://www.eiopa.europa.eu/system/files/2020-10/jc-gl-2017-27-qualifying-holdings-guidelines-compliance-table.pdf Compliance as of 3 October 2017. See link to the implementing legislation The FMA complies as of 3 October 2017. See footnote above links to the implementing legislation.
[56] See the Opinion of Advocate General ("**AG**") Bobek of 12 December 2017 in *Kingdom of Belgium v The European Commission* ("***Belgium* v *Commission***"), Case C-16/16, EU:C:2017:959, on soft law in para. 81: "*There is a wide array of instruments in (not only) EU law, under various names and forms (guidelines, communications, codes of conduct, notices, recommendations, opinions, interinstitutional agreements, conclusions, statements, resolutions and so on), that are generically referred to as 'soft law'.* ".
[57] Originally Member States.
[58] See the Opinion of AG Bobek in Case C-16/16 *Belgium* v *Commission*, cited above, paras. 168 and 169.
[59] *Ibid*, para. 169.
[60] See the judgment of the CJEU of of 15 July 2021 in, *Fédération bancaire française (FBF) v Autorité de contrôle prudentiel et de résolution (ACPR),* Case C-911/19, EU:C:2021:599, paras. 42 and 45 and paragraph 39 regarding the criteria to determine whether an act produces binding legal effects.
[61] See the Opinion of AG Bobek in Case C-16/16, *Belgium v Commission,* cited above, para 86 and with regards to the legislative process see para. 169.
[62] See the judgment of the CJEU of 13 December 1989 in *Salvatore Grimaldi, and Fonds des maladie professionnelles*, Case C-322/88, EU:C:1989:646, para 16 (emphasis added). In its judgment of 24 January 2023, in Case E-5/22, *Christian Maitz and Liechtensteinische Alters- und Hinterlassenenversicherung, Liechtensteinische Invalidenversicherung, and Liechtensteinische Familienausgleichskasse*, not yet reported, paras. 54–61 the EFTA Court answered a question with

Nevertheless, the CJEU further held in paragraph 18 that: "*it must be stressed that the measures in question* ***cannot*** […] ***be regarded as having no legal effect***." It held that national courts "*are bound to take recommendations into consideration in order to decide disputes submitted to them, in particular where they cast light on the interpretation of national measures adopted in order to implement them or where they are designed to supplement binding Community provisions*."[63] This view has also been confirmed by the *Opinion of the Advocate General in Case C-16/16.*[64]

48. In relation to the effect which national courts should give to the Joint Guidelines, ESA submits that this is clear from *Case C-911/19 FBF*, where the CJEU found that "[I]*t is also for the national courts to take into consideration EBA Guidelines in order to resolve the disputes submitted to them* […]."[65] In the *Opinion of AG Bobek* in *Case C-16/16 Belgium* v *Commission* it is furthermore noted that national courts may take recommendations into consideration, but they are not obliged to do so.[66]

49. ESA submits that the Joint Guidelines in the main proceedings should, *by analogy* with the abovementioned case-law, merely be used as interpretation tools, to clarify the procedural rules and the assessment criteria to be applied by the NCAs for the prudential assessment of acquisitions and increases of qualifying holdings in the financial sector.

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regards to a recommendation indicating that a special type of a form was needed, the Court concluded that a recommendation could not have the prescriptive effect of requiring EEA State institutions to adopt a particular form of documentation when fulfilling their obligations under Article 19(2) of Regulation 987/2009. Hence the individual in the case was not deprived of his rights laid out in the Regulation. See Judgment of the EFTA Court of 14 December 2021 in Case E-1/21, *ISTM International Shipping & Trucking Management GmbH and Liechtensteinische Alters- und Hinterlassenenversicherung, Liechtensteinische Invalidenversicherung, and Liechtensteinische Familienausgleichskasse,* paras. 19 and 25 where the Court stated that while the Practical Guide may be a useful tool for interpretation, "[…] *it is not legally enforceable and is, therefore, not binding in the interpretation of those regulations* […]".

[63] Case C-322/88, *Grimaldi, cited above*, para. 18 (emphasis added).

[64] Opinion of AG Bobek of Case C-16/16 *Belgium* v *Commission*, cited above, para. 97. The CJEU in its judgment in Case C-16/16, *Kingdom* of *Belgium v The European Commission*, did not consider this point, as their focus was on whether the recommendation did have binding legal effects, with the result that it could not be classified as a challengeable act for the purpose of Article 263 TFEU, see para. 37.

[65] Case C-911/19, *FBF*, *cited above*, para. 71.

[66] Opinion of AG Bobek, Case C-16/16, *Belgium v Commission, cited above,* para. 170.

50. ESA submits that, even though guidelines issued by the ESAs are not considered legally binding on the national courts, a national court should, in any case where a NCA has confirmed compliance with such guidelines, make every effort to use the guidelines, where available, as a means of interpretation of the relevant legal provisions.

51. ESA submits, based on the above assessment, that the answer to question four should be the following:

> *Guidelines issued by the European Insurance and Occupational Pensions Authority under 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), do not have binding legal effect on the national courts of the EFTA States.*

5.3.2 Question 1: Article 59(1)(a) of the Directive – professional suitability/competence must also be assessed

52. By its first question, the Referring Court asks how the terms "*suitability*" and "*reputation*" must be interpreted for the purposes of Article 59(1)(a) of the Solvency II Directive. In particular, it asks whether the terms refer only to the integrity or also to the professional suitability/competence of the proposed acquirer.

53. "*Suitability*" and "*reputation*" are not further defined, albeit that the use of "*reputation and experience*" in Article 59(1)(b) would tend to suggest that reputation is not the same thing as experience. ESA has reviewed the different language versions of the terms, but these do not shed much light on matters.[67]

54. Given that the literal interpretation of Article 59(1)(a) is not conclusive,[68] ESA has, in line with settled case-law, also considered the provision's context, the

[67] In relation to the interpretation of "*reputation*" in the similar prudential assessment provision of Article 23(1) of Directive 2013/36, see the Opinion of 25 May 2023 of Advocate General Kokott, *Pilatus Bank* v *ECB*, C-750/21 P, EU:C:2023:431, at paras. 126 (different language versions) and 127-130.

[68] The dictionary definition of "reputation" is "*the opinion that people in general have about someone or something, or how much respect of admiration someone or something receives, based on past behaviour or character*", while "*suitability*" is defined as "*the fact of being acceptable or right for*

objectives and purpose of the act of which it forms part (the Solvency II Directive) and the legislative history.[69]

55. In terms of **legislative context**, ESA observes that a key requirement of the Solvency II Directive is that persons who effectively run the insurance undertaking or have other key functions are at all times "fit and proper".[70] In other words, their professional qualifications, knowledge and experience must be adequate to enable sound and prudent management (fit), while they are of good repute and integrity (proper): Article 42.[71] Article 26 of the Directive also reflects this. It provides for consultation between supervisory authorities *inter alia* on the fit and proper requirements of persons exercising key functions prior to the granting of an authorisation for certain (re)insurance, credit or investment undertakings.

56. It is unclear from the Request whether Ms C will effectively run A Ltd, or whether she will have another key function. If yes, she would in any event be required to meet the fit and proper requirements, which without doubt would include the assessment of her professional suitability.[72]

57. Leaving this aside however, ESA recalls that the **stated purpose** of Article 59 is to "*appraise the suitability of the proposed acquirer*", "*having regard to the*[ir] *likely influence on the insurance .. undertaking*." In such circumstances, and in the context of the **general purpose of the Directive** to ensure that important persons are "fit and proper", and to ensure the adequate protection of policy

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something or someone" (Cambridge Dictionary online). See also the Judgment of the General Court of 2 February 2022, *Pilatus Bank plc* v *ECB* ("***Pilatus Bank***"), T-27/19, EU:T:2022:46, paras. 76-77, finding that: *"76.* […] *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. 77. Thus, good repute depends not only on a person's conduct, but also on the perception of that conduct by others."*

[69] See e.g. judgment of the CJEU of 25 June 2020, A *and Others (Wind turbines at Aalter and Nevele)*, C-24/19, EU:C:2020:503, para. 37 and the case-law cited; judgments of 15 March 2022, *Autorité des marchés financiers*, C-302/20, EU:C:2022:190, para. 63, and of 12 January 2023, *Österreichische Post (Information regarding the recipients of personal data,* C-154/21, EU:C:2023:3, para. 29.

[70] See similarly Recital 34 of the Directive.

[71] Article 273 of the Delegated Regulation provides further implementing rules for assessing whether a person is fit and proper, which shall include an assessment of the person's professional and formal qualifications, knowledge and relevant experience within the insurance sector, other financial sectors or other businesses and shall e.g. take into account the respective duties allocated to that person.

[72] In line with Article 42 of the Solvency II Directive and Article 273 of the Delegated Regulation.

holders and beneficiaries,[73] it would appear desirable to read the assessment of "*suitability*" and "*reputation*" as including not just the *personal* character and integrity/reputation of the acquirer, but also their professional reputation and suitability. Some support for this can also be found in Article 323(1)(a) of the Delegated Regulation, which provides that the "fit and proper" assessment for shareholders or members having a qualifying holding in a special purpose vehicle should take into account, "*the reputation and integrity of the shareholder*", which suggests that reputation is not merely synonymous with integrity, but can be something broader or different.

58. In terms of the **legislative history** to Article 59, ESA refers to Directive 2007/44/EC[74] (the Qualifying Holdings or "**QH Directive**"). The QH Directive established a fully harmonised legal framework for the prudential assessment of acquisitions of qualifying holdings in credit institutions, assurance, (re)insurance undertakings and investment firms, in the form of Articles 15, 15a, 15b and 15c (or equivalent provisions), which it introduced into the relevant existing EU acts governing each of these types of undertakings.[75]

59. Article 15b(1) and (2) of the QH Directive, which also applied to life insurance,[76] is materially identical to Article 59(1) and (2) of the Directive: it refers also to the "*suitability*" and (in Article 15b(1)(a)) to the "*reputation*" of the proposed acquirer.[77] Recital 8 to the QH Directive sets out how the "*reputation*" criterion is intended to function (emphasis added):

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[73] See e.g. Recital 16, emphasis added: "***The main objective of insurance and reinsurance regulation and supervision is the adequate protection of policy holders and beneficiaries.*** […] *Financial stability and fair and stable markets are other objectives of insurance and reinsurance regulation and supervision which should also be taken into account but should not undermine the main objective*."

[74] 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*, incorporated into the EEA Agreement by Joint Committee Decision No 79/2008 (OJ L 280, 23.10.2008, p.7), with original entry into force on 01 November 2010, no longer in force.

[75] Recital 74 to the Solvency II Directive records that the criteria for the prudential assessment of a proposed acquisition "*were introduced by provisions in Directive 2007/44/EC* [the Qualifying Holdings Directive]. *As regards insurance and reinsurance those provisions should therefore be codified and integrated into this Directive* [the Solvency II Directive]."

[76] See Article 2 of the QH Directive, making amendments to Directive 2002/83/EC on life insurance.

[77] Article 15b provided, emphasis added:

> "***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*."

60. This recital indicates that the legislative intention was that the assessment of the "*reputation*" of the proposed acquirer should include the professional competence and suitability of the acquirer, and not just their integrity. ESA observes that this recital was also found in recital 5 to the Commission proposal for the QH Directive, in very similar terms.[78]

61. None of the recitals to the Solvency II Directive directly address this point. Recital 35 merely provides: "*For the purpose of assessing the required level of competence, professional qualifications and experience of those who effectively*

"*1. In assessing the notification provided for in Article 15(1) and the information referred to in Article 15a(2), the* ***competent authorities shall, in order to ensure the sound and prudent management of the insurance undertaking in which an acquisition is proposed, and having regard to the likely influence of the proposed acquirer on the insurance undertaking, appraise the suitability of the proposed acquirer*** *and the financial soundness of the proposed acquisition against all of the following criteria:*

(a) ***the reputation of the proposed acquirer****;*

(b) the reputation and experience of any person who will direct the business of the insurance undertaking as a result of the proposed acquisition;

(c) the financial soundness of the proposed acquirer, in particular in relation to the type of business pursued and envisaged in the insurance undertaking in which the acquisition is proposed;

(d) whether the insurance undertaking will be able to comply and continue to comply with the prudential requirements based on this Directive and, where applicable, other Directives, notably, Directives 73/239/EEC, 98/78/EC, 2002/13/EC and 2002/87/EC, in particular, whether the group of which it will become a part has a structure that makes it possible to exercise effective supervision, effectively exchange information among the competent authorities and determine the allocation of responsibilities among the competent authorities;

(e) whether there are reasonable grounds to suspect that, in connection with the proposed acquisition, money laundering or terrorist financing within the meaning of Article 1 of Directive 2005/60/EC is being or has been committed or attempted, or that the proposed acquisition could increase the risk thereof.

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

[78] Proposal COM(2006) 507 final, recital 5 (emphasis added): "*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*."

run the undertaking or have other key functions should be taken into consideration as additional factors." Nevertheless, in the light of the above context, purpose and legislative history of Article 59, ESA submits that it would be appropriate to interpret the provision in line with Recital 8 of the QH Directive.

62. This interpretation finds support in the **Joint Guidelines**, which provide in Point 10 of Chapter 3[79] how the reputation of the proposed acquirer should be assessed, and indicate that this assessment "*should cover two elements: (a) his integrity; and (b) his professional competence*." Point 10.29 further provides that where (as here) the proposed acquirer will exercise a strong influence, the need for technical competence will be greater, given that e.g. a controlling shareholder will be able to define and/or approve the business plan and strategies of the financial institution concerned.

63. As considered in relation to question four above, while such Joint Guidelines are not binding on the national court (or this Court), they nevertheless constitute an important and useful source of interpretation, in particular when adopted by the national supervisory authorities. ESA notes that the General Court had recourse to the Joint Guidelines when interpreting the "*reputation*" criterion in Article 23(1) and (2) of Directive 2013/36[80] ("**CRD IV"**), which contains prudential assessment criteria for acquirers of credit institutions, just like under Article 59(1) and (2) of the Directive.[81] The exact point of interpretation in that case was different, in the sense that the relevant question was whether "*reputation*" depended not only on a person's conduct, but also on the perception of that conduct by others. Nevertheless, the case confirms the usefulness of the Guidelines as an interpretative tool, and also contains some analysis useful for consideration of the third question, below.

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[79] See the link to the Joint Guidelines: https://www.esma.europa.eu/sites/default/files/library/jc_gl_2016_01_joint_guidelines_on_prudential_assessment_of_acquisitions_and_increases_of_qualifying_holdings_-_final.pdf?download=1

[80] 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 - CRD IV, incorporated into the EEA Agreement by Joint Committee Decision No 79/2019 (OJ L 321, 12.12.2019, p.170), with entry into force on 1 January 2020.

[81] T-27/19 *Pilatus Bank*, cited above at footnote 68, paras. 75-80. See also the Opinion of 25 May 2023 of Advocate General Kokott in the case on appeal, C-750/21 P *Bank* v *ECB*, para.136, which takes the Joint Guidelines into account.

64. ESA therefore submits that the first question should be answered as follows:

> *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), the terms "suitability" and "reputation" must be interpreted as referring to the integrity and professional competence of the proposed acquirer.*

5.3.3 Question 2: Article 59(1)(c) of the Directive – bank guarantees and loans from trusts may be taken into account

65. ESA recalls that, under Article 57(1) of the Directive, a proposed acquirer is "*any natural or legal person or such persons acting in concert* […] *who have taken a decision either to acquire, directly or indirectly, a qualifying holding in an insurance or reinsurance undertaking*." On the facts of the case, "*acquirer*" would therefore extend to Ms C as ultimate 100% shareholder of A Ltd, together with A Ltd and B Ltd (the intermediate holding company). As neither A Ltd nor B Ltd appear to have any assets, the focus of the FMA's assessment in relation to financial soundness (Article 59(1)(c) of the Directive) and the ability to comply with prudential requirements (Article 59(1)(d)) was on Ms C and any assets held by her.

66. It appears from the Request that the fact that Ms C held shares, by way of D AG, a joint-stock company, and that she had declared her willingness to transfer the amount of CHF 10 million to A Ltd and to produce a payment commitment from D AG to A Ltd was not considered sufficient by the FMA to demonstrate "*financial soundness*" within the meaning of Article 59(1)(c), nor to ensure that the prudential requirements of Article 59(1)(d) would be met on an ongoing basis.[82]

67. Against this background, the second question of the Referring Court appears to ask whether, in the appraisal of the financial soundness of the proposed acquirer (Article 59(1)(c) of the Directive), account should (also) be taken of certain potential alternative sources or forms of funding. While this is not reflected in the question itself, the Request seems to suggest that these alternative 'options'

[82] Request, pp. 5, 6, 12, 13.

should be considered, of the Referring Court's own motion, under the national procedural law principle of proportionality.[83]

68. The Request raises the fact that the necessary supply of funds by the acquirer to the insurance undertaking might (alternatively) be ensured by:
    - the provision of an unconditional bank guarantee for a duration of three years, payable on Z AG's first demand by a bank with its registered office in the EEA; and/or
    - the making available of funds on a trust account which may be drawn on by the insurance undertaking at any time (on the facts of the case, it appears that such monies would be deposited by Ms C, but could only be withdrawn by Z AG).[84]

69. The second question therefore appears to raise two issues, or sub-questions: First, may the provision of a bank guarantee or the making available of funds *generally* be taken into account for the purposes of the assessment of the criteria in Article 59(1)(c)? Second, under the principle of proportionality, must the FMA or the Referring Court itself make an assessment of, or propose, alternative ways of financing, in order to avoid an opposition decision?

70. In respect of the first sub-question, ESA submits that, in respect of the appraisal of the financial soundness of the proposed acquirer, there can be no restriction on the types of assets, funds or financial measures which a supervisory authority may take into account, provided always that they are relevant to the proposed acquisition. ESA refers to the Joint Guidelines, which refer for example to an assessment of "*the financial mechanisms put in place by the proposed acquirer to finance the acquisition*" (point 12.4) and to the use of "*borrowed funds*" (point 12.9). Point 12.9 makes clear that while the use of borrowed funds should not, of itself, lead to the conclusion that the proposed acquirer is unsuitable, the target supervisor should assess whether such indebtedness negatively affects the financial soundness of the acquirer or the target undertaking's capacity to comply with the prudential requirements.

[83] Request, p. 13.
[84] Request, p. 12. It is not clear from the Request whether Ms C is the sole shareholder in D AG, although this appears to be the case.

71. In respect of the second sub-question, it is unclear from the Request whether the "alternative" means of financing were originally proposed to the FMA by the proposed acquirer, or whether they have only been put forward now on appeal.

72. If these alternative means were not part of (or in some way indicated in) the original notification made by the acquirer,[85] ESA submits that they could not reasonably have been assessed by the FMA. It follows from the wording of Article 59(2) of the Directive that the onus is on the *acquirer* to ensure that the information it provides is complete and satisfies the requirements. Similarly, and given the harmonised and highly-structured notification procedure before the national supervisory authorities, ESA submits that, if the information has not been provided at the notification stage, it is not the role of the Referring Court on appeal, of its own motion, or at the request of the acquirer, to seek new, alternative financial 'solutions' on appeal. Such a role is not foreseen in the Directive and would appear to undermine the very purpose of requiring a sufficiently complete original notification to the national supervisory authority under Articles 58 and 59.

73. If the alternative means of finance, set out in paragraph 68 above, were apparent in the original notification, it would seem appropriate, where provided for by national procedural law and by analogy with case-law of the CJEU in relation to authorisation decisions of the European Central Bank,[86] for the Referring Court to consider whether, from the case file before it, it was apparent that the alternative means of financing were indeed *appropriate* measures that were less onerous than the contested opposition decision and *capable of ensuring the objectives* laid down in Article 59(1)(c) and (d).[87] This assessment is for the national court.

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[85] Including any related discussions with the FMA as part of that notification process.

[86] See T-330/19 *PNB Bank AS* v *ECB*, paras. 193 - 201. In the context of prudential supervision under CRD IV, the CJEU held that the assessment of the proportionality of a measure (in that case the opposition decision of the European Central Bank (the "**ECB**") must be reconciled with the broad discretion enjoyed by the ECB at the time the decision was adopted. Where it was not apparent from the case file that there were appropriate less onerous measures than opposing the acquisition, the CJEU held that the applicant was not entitled to submit that the opposition decision infringed the principle of proportionality.

[87] The second question only mentions Article 59(1)(c), but it appears from the facts of the Request and the questions raised in the text of the Request (see e.g. p.6) that there was also an issue in relation to ongoing compliance with Article 59(1)(d).

74. ESA therefore submits that the second question should be answered as follows:

In the appraisal of the financial soundness of the proposed acquirer within the meaning of Article 59(1)(c) and (d) of the Directive, the national supervisory authority may take into account the supply of funds by that person to the insurance undertaking through the provision of a bank guarantee or by the making available of funds on a trust account which may be drawn on by the insurance undertaking at any time.

5.3.4 Question 3: Article 59(2) of the Directive – certainty of non-compliance is not required

75. By its third question, the Referring Court asks whether the words "*reasonable grounds*" in Article 59(2) of the Directive mean that certainty of non-compliance is required, or whether substantiated doubts of non-compliance are sufficient.

76. ESA notes that while the question itself refers to "*substantiated doubts*," (which would seem to imply the need for evidence of some kind), the relevant national law uses, like Article 59(2) of the Directive, the term "*reasonable grounds*." Further, the original German language version of the Request uses the term "*considerable concerns/doubts*."[88] ESA therefore proceeds on the basis that the question asks whether reasonable grounds will suffice, or whether certainty is required.

77. ESA observes that the term "*reasonable grounds*" is not defined. However, some guidance can be found in the **text of the Directive** itself.

78. First, the word "*reasonable*" appears a number of times in the Directive: "*reasonable interpolations and extrapolations*,"[89] "*reasonable assurance to policy holders*,"[90] "*reasonable steps to ensure continuity and regularity*,"[91] "*reasonable period of time*,"[92] "*reasonable time*,"[93] "*reasonable actuarial assumptions*."[94] Accordingly, any interpretation of "reasonable" in Article 59(2)

[88] Request, p. 14, para. 4.4.
[89] Recital 57.
[90] Recital 62.
[91] Article 41(4).
[92] Articles 118 and 254.
[93] Article 159.
[94] Articles 206(2) and 209.

should ideally be consistent with the interpretation to be given to that word elsewhere in the Directive.

79. None of the above uses of "*reasonable*" indicate the need for certainty; rather, they are all consistent with the usual meaning of reasonable: "*as much as is appropriate or fair, moderate; based on or using good judgment and therefore fair and practical*."[95]

80. Second, Article 59(1)(e) contains the fifth assessment criterion (emphasis added):

> "***whether there are reasonable grounds to suspect*** *that, in connection with the proposed acquisition, money laundering or terrorist financing … is being or has been committee or attempted, or that the proposed acquisition could increase the risk thereof*."

81. The use of "*reasonable grounds*" together with 'suspicion' ("*suspect*") suggests that reasonable grounds are not to be understood as meaning certainty about anything. The Joint Guidelines, Point 14, reflects this: the language used is one of risk assessment.[96] ESA observes that the word "*reasonable*" appears numerous times in the Joint Guidelines. For example: "*reasonable time period*",[97] "*reasonable concerns*",[98] "*reasonable grounds to assume*",[99] "*reasonable grounds to doubt his or her good repute*",[100] "*reasonable grounds to suspect that it is false*",[101] "*reasonable grounds for knowing or suspecting*",[102] and "*should reasonable suspicion subsist*."[103] In none of these cases is there the suggestion that certainty is required.

82. Third, the **legislative history** of Article 59(2) of the Directive indicates that certainty is not required. Article 15b of the QH Directive is, as explained above

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[95] Cambridge Online Dictionary.
[96] See e.g. Point 14.3: "*When assessing whether a proposed acquisition gives rise to an increased risk of money laundering or terrorist financing, the target supervisor should consider…*"
[97] Point 9.2 of the Joint Guidelines.
[98] Point 10.5 of the Joint Guidelines.
[99] Point 10.6 of the Joint Guidelines.
[100] Point 10.9 of the Joint Guidelines.
[101] Point 10.13(d) of the Joint Guidelines.
[102] Point 14.2(a) of the Joint Guidelines.
[103] Point 14.7 of the Joint Guidelines.

at paragraphs 58-59, materially identical to Article 59 of the Directive. The original European Commission proposal for Article 15b(2) of the QH Directive read as follows:

> "*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.*"[104]

83. Such proposed wording implied that the national supervisory authority needed to be sure that the various criteria would not be met, before opposing the acquisition (or at least that a degree of certainty was required). Such wording was not reflected in the version of Article 15b(2) which was adopted. Instead, the wording was removed and replaced with the 'reasonableness' wording:

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

In ESA's submission, this demonstrates that the intention of the legislature was that that certainty was not required.

84. More generally, fourth, ESA notes that the General Court of the EU and Advocate General Kokott have recently considered the **procedural and evidential requirements** for proving lack of a good reputation and the resulting risk. The context was Article 23(1) and (2) of CRD IV, which contains prudential assessment criteria for acquirers of credit institutions. Just like under Article 59(1) and (2) of the Directive, the suitability of the proposed acquirer must be assessed against five criteria, including the reputation of the acquirer. The acquisition may only be opposed if there are *reasonable grounds* doing so (or if the information provided by the acquirer was incomplete). The General Court held that the concept of good repute (i.e. reputation) was an indeterminate legal

[104] Emphasis added. 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 {SEC(2006) 1117} {SEC(2006) 1118} /* COM/2006/0507 final - COD 2006/0166 */, accessible here: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52006PC0507

concept, which did not contain an exhaustive definition of that concept or a list of conduct which may fall within the scope of that concept. Accordingly, the authorities making the assessment were required:

> *"**to examine on a case-by-case basis** whether the criterion of good repute is met by a shareholder seeking to acquire a qualifying holding in a credit institution, **taking into account the relevant facts, the reasons underlying the criterion and the objectives which that criterion is intended to secure**. The principle of legal certainty does not, therefore, preclude those authorities from enjoying a discretion in the application of the criterion in question."*[105]

85. The General Court also took into account the Joint Guidelines, as part of the context of the provision:

> "*In that regard, first, **point 10.9 of the Joint Guidelines** on the prudential assessment of acquisitions and increases of qualifying holdings in the banking, insurance and securities sectors, adopted by the European Banking Authority (EBA), the European Insurance and Occupational Pensions Authority (EIOPA) and the European Securities and Markets Authority (ESMA), **states (i) that a proposed acquirer should be considered to be of good repute if there is no reliable evidence to suggest otherwise and the target supervisor has no reasonable grounds to doubt his or her good repute and (ii) that all relevant information available for the assessment should be taken into account***."[106]

86. This therefore suggests that, procedurally-speaking, an assessment of whether there are "*reasonable grounds*" for opposing an acquisition[107] must take account of all relevant facts, the reasons underlying the relevant concept which is being applied and the objectives it pursues. The judgment of the General Court also implies that it is important to assess the relevant facts *impartially and objectively*.[108] ESA submits that this is consistent with the dictionary definition of "*reasonable*", referred to at paragraph 79 above. In other words, there is the need for a *fair* assessment of the relevant information, and it is only if this assessment could reasonably/fairly lead to the conclusion that e.g. the

[105] T-27/19 *Pilatus Bank*, cited above, para. 73, emphasis added.
[106] T-27/19 *Pilatus Bank*, cited above, para. 75, emphasis added.
[107] e.g. on the basis that one of the five assessment criteria (such as good reputation) is not met.
[108] T-27/19 *Pilatus Bank*, cited above, paras. 103, 112 and 145.

reputation of the acquirer is unsuitable, that the acquisition may be prohibited.[109] In short, the assessment and conclusion must be one which any reasonable supervisory authority would make, faced with the same facts and information.

87. There is no suggestion in the judgment of the General Court that the assessing authority must be "certain" of non-compliance; indeed, the ECB decision which was challenged simply recorded doubts or serious/grave doubts.[110] [111] On the other hand, in respect of the question raised in paragraph 4.4. of the Request, there is no reversal of the burden of proof at the proposed acquirer's expense: the General Court's judgment indicates that if there is no reliable evidence to the contrary, the proposed acquirer will be held to be of good repute.[112]

88. Finally, ESA submits that from both a practical and legal perspective, a standard requiring certainty of non-compliance would be an extremely high one: it exceeds even a typical criminal law standard of "beyond reasonable doubt". In practice, such a standard would pose an immense burden on national supervisory authorities and would be extremely difficult to discharge. The consequence of this would be that most acquisitions would be approved 'by default' (because even reasonable doubts about the ability of the acquirer to meet the assessment criteria would not be enough). ESA submits that this would seem inconsistent with the stated aim of the Directive of protecting policy holders and beneficiaries,[113] and with the goal of ensuring sound and prudent management.[114] For this reason also therefore, such an interpretation should be avoided.

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[109] More generally and by way of completeness, ESA notes the case-law according to which the supervisory authority may oppose the proposed acquisition if there are reasonable grounds for doing so on the basis of only one of the assessment criteria (the opposition decision need not examine all five assessment criteria): Judgment of 7 December 2022, *PNB Bank AS* v *ECB*, T-330/19, EU:T:2022:775, paras. 183-188.

[110] T-27/19 *Pilatus Bank*, cited above, paras. 85, 116, 265.

[111] See also the Opinion of 25 May 2023 of Advocate General Kokott in the case on appeal, C-750/21 P *Bank* v *ECB*, paras. 120, 137, 143 (the Advocate General endorses the judgment of the General Court on this issue; the judgment of the CJEU has not yet been handed down). For the avoidance of doubt, ESA does not suggest that the legal standard is 'grave doubts' rather than reasonable doubts/grounds, it is simply that in that particular case the ECB had serious/grave doubts, which was clearly sufficient (we note that in the present case the FMA entertained "*considerable doubts*": Request, para. 4.4.).

[112] T-27/19 *Pilatus Bank*, cited above, paras. 75.

[113] Recitals 16 and 17 to the Directive.

[114] Articles 24 42, 59 and 62 of the Directive.

89. ESA accordingly submits that the third question should be answered as follows:

> *For the purposes of Article 59(2) of the Directive, the term "reasonable grounds" must be interpreted as not requiring certainty.*

6 CONCLUSION

Accordingly, ESA respectfully submits that the Court should answer the questions of the Referring Court as follows (*in the same order as the questions received*):

1. ***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), the terms "suitability" and "reputation" must be interpreted as referring to the integrity and professional competence of the proposed acquirer.***

2. ***In the appraisal of the financial soundness of the proposed acquirer within the meaning of Article 59(1)(c) and (d) of the Directive, the national supervisory authority may take into account the supply of funds by that person to the insurance undertaking through the provision of a bank guarantee or by 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 the Directive, the term "reasonable grounds" must be interpreted as not requiring certainty.***

4. ***Guidelines issued by the European Insurance and Occupational Pensions Authority under 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), do not have binding legal effect on the national courts of the EFTA States.***

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