EFTA Court

1 rue du Fort Thüngen

L-1499 Luxembourg

Vaduz, 27 November 2023

To the President and Members of the EFTA Court

Written Observations

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

Government of the Principality of Liechtenstein

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

in Case E-10/23

X v Finanzmarktaufsicht

in which the Appeals Board of the Financial Market Authority (*Beschwerdekommission der Finanzmarktaufsicht*; hereinafter referred to as the 'Board of Appeals') has requested the EFTA Court to give an advisory opinion pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice.

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

I. Questions referred to the EFTA Court

The Board of Appeals has stayed its proceedings in order to refer the following questions to the EFTA Court:

I.

1. Is the EFTA Court competent to interpret the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice of 2 May 1992 (SCA)?

2. If Question 1 is answered with "yes":

   Must Article 34 SCA be interpreted as meaning that a request to the EFTA Court for an advisory opinion is permitted also where, although the referring court considers the question on the interpretation of the EEA Agreement necessary in order to give its decision, this legal question has, however, in an earlier set of proceedings in the same procedure already been answered, in accordance with national procedural law, by a higher-ranking court with binding effect?

3. If Question 2 is also answered in the affirmative:

   Is information which is the subject of formal and also informal exchanges of information between the competent authorities of the Member States as provided for in Article 4(1) of Directive 2013/36/EU subject to the obligation of professional secrecy within the meaning of Article 53 of this Directive?

4. If Question 3 is also answered with "yes":

   Must the cooperation between competent authorities as provided for in Article 24 of the Directive mentioned be regarded as an exchange of information which pursuant to Article 53 of this Directive is subject to an obligation of professional secrecy?

5. If finally Question 4 is also answered with "yes":

   May the obligation of professional secrecy set out in the first subparagraph of Article 53(1) of the Directive mentioned be breached only in the cases listed in Article 53(1) (second subparagraph: cases covered by criminal law; third subparagraph: disclosure in civil or commercial proceedings where a credit institution has been declared bankrupt or is being compulsorily wound up)? If this question is answered in the negative: Is a breach permissible also on grounds of national law, for example, by reason of a law that grants any person asserting a legitimate interest access to official documents unless precluded by overriding public or private interests?

II. If one of Questions I/1 to I/4 is answered with "no" or the main question in Question I/5 is answered in the negative, but the supplementary question in the affirmative:

   Does the cooperation between competent authorities provided for in Article 4 of the Directive mentioned and thus the exchange of information that takes place between these authorities and the possibility to keep this partly or wholly secret constitute an appropriate particular measure, within the meaning of Article 3 of the EEA Agreement of 2 May 1992, to ensure fulfilment of the obligations arising out of this Agreement, and in particular to ensure the effective functioning of the system for supervision of the activities of credit institutions and investment firms and also the normal functioning of financial markets?

II. Factual background of the case

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

2. The Liechtenstein Government would like to note that the appellant solely had a preliminary conversation with the competent authority in Luxemburg (hereinafter referred to as 'CSSF') concerning the proposed acquisition, but the appellant did not file a formal application for the proposed acquisition.

3. The appellant refrained from filing a formal application for the proposed acquisition after having received negative feedback from the CSSF.

4. The CSSF provided the appellant with negative feedback on the proposed acquisition for several reasons.[1] The negative feedback by the CSSF was not only based on the information provided by the Liechtenstein Financial Market Authority.

5. With the CRD the European Legislator created very detailed rules on the procedure for the exchange of information between national competent authorities and the disclosure of information as well as professional secrecy. [2]

6. Pursuant to the rules of the CRD, the appellant would have had the opportunity to proceed with their formal application in Luxemburg, present their arguments in formal proceedings and receive a formal decision on the proposed acquisition.

7. In this case, the procedural rules set out in Regulation (EU) No. 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities ('SSM

[1] The appellant's lawyers in Luxembourg used the wording "in particular" in their notification to the appellant about the preliminary conversation with the CSSF.

[2] See in particular in Title VII Section II of the CRD.

Framework Regulation')[3] and in Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions[4] would have applied.

III. Legal framework

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

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

EEA Agreement and Surveillance and Court Agreement (SCA)

10. The Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (hereinafter referred to as 'Surveillance and Court Agreement')[5] lays down the tasks and competences of the EFTA Surveillance Authority and the EFTA Court. The first two questions of the Board of Appeals concern in particular Article 34 of the Surveillance and Court Agreement.

11. With its last question, the Board of Appeals touches upon Article 3 of the EEA Agreement and thus the general principle of loyalty and sincere cooperation under EEA law.

Directive 2013/36/EU (CRD)

12. 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

[3] OJ L 141, 14.5.2014, p. 1.
[4] OJ L 287, 29.10.2013, p. 63.
[5] OJ L 344, 31.1.1994, p. 3.

Directives 2006/48/EC and 2006/49/EC[6] (hereinafter referred to as 'CRD') was incorporated into Annex IX of the EEA Agreement by Decision of the EEA Joint Committee No 79/2019 of 29 March 2019[7].

13. Recitals 28 and 29 CRD are relevant. The Liechtenstein Government considers these recitals further in its analysis of the questions referred below.

14. The present request for an advisory opinion concerns the cooperation and the exchange of information between the competent authorities of the EEA States under Article 24 CRD and the professional secrecy under Article 53 CRD.

15. All Articles in Title VII Section II of the CRD refer back to the general rule on professional secrecy in Article 53 (1) CRD. In particular, Article 56 CRD explicitly allows for the exchange of information between competent authorities in the discharge of their supervisory functions. According to the last paragraph of Article 56 CRD, information received shall in any event be subject to professional secrecy.

Corresponding provisions in MiFID II and Solvency II

16. Corresponding provisions to Articles 24 and 53 CRD are included in Articles 11 and 76 of Directive 2014/65/EU on markets in financial instruments (hereinafter referred to as 'MiFID II')[8] for the securities sector and Articles 60, 64 and 65 of Directive 2009/138/EC on the taking-up and pursuit of the business of Insurance and Reinsurance (hereinafter referred to as 'Solvency II')[9] for the insurance and reinsurance sector.

17. The content of the relevant provisions in MiFID II and Solvency II is identical to the content of the provisions with which we are concerned in the present case, namely

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[6] OJ L 176, 27.6.2013, p. 338.

[7] OJ L 321, 12.12.2019, p. 170.

[8] Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, OJ L 173, 12.6.2014, p. 349; incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 78/209 of 29 March 2019.

[9] 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, OJ L 335, 17.12.2009, p. 1; incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 78/209 of 29 March 2019.

Articles 24 and 53 CRD.

18. Moreover, particularly relevant for the case at hand is recital 153 MiFID II, which highlights the importance of the cooperation and exchange of information between competent authorities and the need for professional secrecy.

IV. Legal analysis

First Question: Jurisdiction of the EFTA Court to interpret the SCA

19. With its first question, the Board of Appeals asks whether the EFTA Court is competent to interpret the SCA.

20. In the view of the Liechtenstein Government, the question whether the EFTA Court in general has the competence to interpret the SCA as a whole is too undifferentiated and general and has no relevance for the specific case at hand.

21. *Inter alia*, in its Judgement in Case E-11/12 the EFTA Court stated that it '*is to contribute to the administration of justice in the EEA States and not to give opinions on general or hypothetical questions.*'[10]

22. Furthermore, Liechtenstein Government is of the opinion that the first question exclusively serves as preliminary question for the second question. The first question has no independent purpose, which further underlines its general and hypothetical nature.

23. In addition, the answer to the first question is not necessary to enable the Board of Appeals to render its judgement.

24. Hence, the Liechtenstein Government kindly advises the EFTA Court to consider the first question inadmissible.

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[10] Judgement by the EFTA Court of 13 June 2013, *Swiss Life*, E-11/12, paragraph 51; see also the Judgement by the EFTA Court of 27 June 1997, *Tore Wilhelmsen AS*, E-6/96, paragraphs 39 and 40.

Second Question: Interpretation of Article 34 SCA

25. With its second question, the Board of Appeals asks whether Article 34 SCA must be interpreted as meaning that the present request to the EFTA Court for an advisory opinion is permitted, even though the Board of Appeals considers that this legal question has – in an earlier set of proceedings in the same procedure – already been answered, in accordance with national procedural law, by a higher-ranking court with binding effect.

26. Against the background of the first question, the Liechtenstein Government would like to highlight that the EFTA Court has interpreted Article 34 SCA in order to evaluate whether it has jurisdiction to give an advisory opinion on a question raised by a national court.

27. In this regard, the EFTA Court has assessed whether a question put before it is of general or hypothetical nature[11] or whether the interpretation of EEA law has no connection whatever with the circumstances or purpose of the main proceedings[12].

28. With regard to the second question, the Liechtenstein Government sees the need to clarify the following:

29. An 'answer by a higher-ranking court with binding effect' does not exist in the present case, as the Administrative Court as the higher-ranking court has not decided on any of the questions put before the EFTA Court.

30. Rather, the Administrative Court has solely set aside the decisions of the lower instances, namely the Financial Market Authority and the Board of Appeals, in an earlier set of proceedings and referred the case back to the Financial Market Authority with the instruction to issue a new decision.

31. In terms of content, the Administrative Court has merely concluded that the

[11] See the Judgement by the EFTA Court of 13 June 2013, *Swiss Life*, E-11/12, paragraph 51.
[12] See the Judgement by the EFTA Court of 27 June 1997, *Tore Wilhelmsen AS*, E-6/96, paragraphs 39 and 40.

Information Act[13] must be applied to the case at hand.[14]

32. The request for an advisory opinion, however, concerns the interpretation of the CRD, in particular Article 53 of the CRD. The judgement of the Administrative Court does not deal with the CRD at all.

33. It results from these considerations that the second question of the Board of Appeals has no connection with the circumstances of the main proceedings and must hence be considered purely hypothetical and not necessary to enable the Board of Appeals to render its judgement.

34. Accordingly, the Liechtenstein Government kindly advises the EFTA Court to consider the second question inadmissible as well.[15]

Preliminary Remarks with regard to questions three to six

Relevance of questions three to five

35. The Liechtenstein Government would like to emphasize that the answers to questions three to five as well as to the sixth question of the Board of Appeals are definitely relevant with regard to the case at hand and therefore not purely hypothetical.

36. Consequently, although it is of course for the EFTA Court to decide on its jurisdiction and competence, in the view of the Liechtenstein Government the inadmissibility of the first and second question does not negate the competence and possibility of the EFTA Court to assess and answer the remaining questions.

37. The Liechtenstein Government is convinced that the competence of the EFTA Court to give an advisory opinion on questions three to five as well as on the sixth question of

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[13] Act of 19 May 1999 on the information of the public (hereinafter referred to as 'Information Act'), LGBl.-Nr 1999.159.

[14] See request of the Board of Appeals for an advisory opinion, pages 7 to 9.

[15] Article 96(3) Rules of Procedure of the EFTA Court; see also the Judgement of the EFTA Court of 30 May 2002, *Karlsson*, E-4/01, paragraph 11; the Judgement of the European Court of Justice of 3 June 2008, *Intertanko and Others*, C-308/06, ECLI:EU:C:2008:312, paragraph 32; Judgement of the European Court of Justice of 10 March 2009, *Hartlauer*, C-169/07, ECLI:EU:C:2009:141, paragraph 25; Judgement of the European Court of Justice of 8 September 2010, *Winner Wetten GmbH*, C-409/06, ECLI:EU:C:2010:503, paragraphs 37 and 38.

the Board of Appeals is undisputed.

Relevance of the judgement of the EFTA Court for all three financial sectors

38. As established above, identical provisions to Articles 24 and 53 CRD are included in Articles 11 and 76 MiFID II for the securities sector and Articles 60, 64 and 65 Solvency II for the insurance and reinsurance sector.

39. The target of the European Legislator was to provide for a harmonised and uniform legal framework on the exchange of information and professional secrecy in all three financial sectors, namely the banking sector, the insurance and reinsurance sector and the securities sector.

40. Thus, the case law on the interpretation of either MiFID II, Solvency II or the CRD must be considered equally relevant for all the provisions mentioned.

41. The same applies to the case law on Directive 2004/39/EC on markets in financial instruments (hereinafter referred to as 'MiFID')[16], as the wording of the relevant provision in MiFID, Article 54, has not been amended with regard to Article 76 MiFID II.

42. In light of these considerations, the Liechtenstein Government is convinced that even though the request for advisory opinion solely concerns the CRD and hence the banking sector, the judgement of the EFTA Court in this present case is going to be equally relevant also for the interpretation of the corresponding provisions in the insurance and reinsurance sector and the securities sector.

Multilateral memoranda of understanding (MMoU)

43. The exchange of information between supervisory authorities in the banking, securities and insurance sectors is also subject to the procedures and strict confidentiality

[16] 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/EE, OJ L 145, 30.4.2004, p. 1; incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 65/2005 of 29 April 2005.

requirements stipulated in MMoU drafted and implemented by the International Organization of Securities Commissions (IOSCO)[17] and the International Association of Insurance Supervisors (IAIS)[18], the global standard-setting bodies in the area of financial market supervision.

44. The Liechtenstein Financial Market Authority is a signatory to both the IOSCO MMoU and the IAIS MMoU.[19]

45. While the IOSCO MMoU and the IAIS MMoU do not create legally binding obligations, they do reflect the global consensus between supervisory authorities in the banking, securities and insurance sectors on the appropriate procedures and minimum confidentiality requirements for exchanging supervisory information (see in particular paragraphs 10 and 11 of the IOSCO MMoU as well as Article 5 and Annex B of the IAIS MMoU).

46. Compliance with these procedures and minimum requirements is of highest importance for the reputation of supervisory authorities and the financial markets they represent, as well as the functioning and effectiveness of global cross-border supervision

47. The Liechtenstein Government is convinced that the judgement of the EFTA Court will be relevant for the future application and interpretation of the IOSCO MMoU and the IAIS MMoU in the EEA EFTA States as well as the ability of the EEA EFTA States' supervisory authorities in the banking, securities and insurance sectors to comply with the procedures and minimum confidentiality requirements set out in these global standard-setting agreements.

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[17] Multilateral memorandum of understanding concerning consultation and cooperation and the exchange of information (IOSCO MMoU): https://www.iosco.org/library/pubdocs/pdf/IOSCOPD386.pdf.

[18] Multilateral Memorandum of Understanding on Cooperation and Information Exchange (IAIS MMoU): https://www.iaisweb.org/uploads/2023/11/IAIS-MMoU-October-2023.pdf.

[19] See https://www.iosco.org/about/?subSection=mmou&subSection1=signatories and https://www.iaisweb.org/about-the-iais/mmou/.

Third Question: Interpretation of Article 53 CRD

48. With its third question, the Board of Appeals asks whether the information, which is subject of formal and also informal exchanges of information between the competent authorities of the EEA States, as provided for in Article 4 (1) CRD, is subject to the obligation of professional secrecy within the meaning of Article 53 CRD.

49. Article 53 (1) CRD states that EEA States have to ensure that all persons working for or who have worked for the competent authorities and auditors or experts acting on behalf of the competent authorities are bound by the obligation of professional secrecy.

50. Pursuant to Article 53 (2) CRD, the obligation of professional secrecy according to Article 53 (1) CRD does not prevent the competent authorities from exchanging information with each other.

51. According to the last sentence of Article 53 (2) CRD, this information is subject to the professional secrecy under Article 53 (1) CRD.

52. Hence, it becomes clear solely from the wording of Article 53 CRD that any exchange of information – be it formal or informal – between the competent authorities is subject to the obligation of professional secrecy within the meaning of Article 53 CRD.

53. The same result is achieved when looking at the system of the exchange of information based on professional secrecy established in Title VII Section II of the CRD. All Articles in Title VII Section II of the CRD refer back to the general rule on professional secrecy in Article 53 (1) CRD.

54. This conclusion is furthermore supported by the recitals of the CRD:

55. According to recital 28 of the CRD, the smooth operation of the internal banking market requires not only legal rules but also close and regular cooperation and significantly enhanced convergence of regulatory and supervisory practices between the competent authorities.

56. Pursuant to recital 29 of the CRD, it is appropriate to allow the exchange of information between the competent authorities and authorities or bodies which, by virtue of their function, help to strengthen the stability of the financial system. In order to preserve the confidential nature of the information forwarded, the list of addressees should be strictly limited.

57. With regard to the corresponding provision in MiFID, recital 63 MiFID and recital 153 MiFID II state clearly that in the exchange of information, strict professional secrecy is needed to ensure the smooth transmission of that information and the protection of particular rights.

58. Furthermore, the above conclusion is supported by the legislative history of Article 53 CRD:

59. The obligation of professional secrecy in the banking sector was first introduced into Article 12 of the First Council Directive 77/780/EEC on the coordination of the laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions[20], a predecessor directive to the CRD.

60. Equal to Article 53 CRD, Article 12 (1) of Directive 77/780/EEC has regulated professional secrecy and imposed professional secrecy on the competent authorities. According to Article 12 (2) of this Directive, professional secrecy shall, however, not prevent the exchange of information between competent authorities and such information shall be subject to the obligation of professional secrecy.

61. It results from the relevant clarifications in the Commission Proposal that the target of this provision was to solve any problem arising from the fact that persons employed by the competent authorities are on the one hand bound by the obligation of professional secrecy and on the other required to collaborate across frontiers and, in certain cases,

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[20] First Council Directive 77/780/EEC of 12 December 1977 on the coordination of the laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions, OJ L 322, 17.12.1977, p. 30; Part of the EEA Agreement at the time of signing in 1992.

to exchange information.[21]

62. Lastly, the above conclusion is supported by the settled case law of the Court of Justice of the European Union (hereinafter referred to as 'European Court of Justice'):

63. The European Court of Justice has acknowledged several times that if the exchange of information between competent authorities in the EEA States is to function properly, it is absolutely necessary to protect professional secrecy.[22]

64. In Case C-140/13, *Altmann,* Advocate General Jääskinen has emphasized that the communications and transmissions of information between the various competent authorities are subject to a "prudential secrecy".[23]

65. According to the European Court of Justice, the effective implementation of the prudential supervision regime for credit institutions, through supervision within an EEA State and the exchanging of information by the competent authorities of several EEA States, requires that both the supervised credit institutions and the competent authorities can have confidence that the confidential information provided will remain confidential.[24]

66. The absence of such confidence is liable to compromise the smooth transmission of the confidential information that is necessary for prudential monitoring.[25]

67. If there was no duty to keep confidential information secret, the obligatory exchange

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[21] See the Proposal for a Council Directive on the coordination of laws, regulations and administrative provisions governing the commencement and carrying on of the business of credit institutions, COM(74) 2010 final, page 13.

[22] See the Judgement by the European Court of Justice of 11 December 1985, *Hillegom,* C-110/84, ECLI:EU:C:1985:495, paragraph 27; Judgement by the European Court of Justice of 12 November 2014, *Altmann*, C-140/13, ECLI:EU:C:2014:2362, paragraph 33; Judgement by the European Court of Justice of 19 June 2018, *Baumeister,* C-15/16, ECLI:EU:C:2018:464, paragraph 33.

[23] Opinion of Advocate General Jääskinen of 4 September 2014, *Altmann,* C-140/13, ECLI:EU:C:2014:2168, paragraph 38.

[24] Judgement by the European Court of Justice of 13 September 2018, *Buccioni,* C-594/16, ECLI:EU:C:2014:2168, paragraph 27; Judgement by the European Court of Justice of 19 June 2018, *Baumeister,* C-15/16, ECLI:EU:C:2018:464, paragraph 31; Judgement by the European Court of Justice of 12 November 2014, *Altmann*, C-140/13, ECLI:EU:C:2014:2362, paragraph 31.

[25] Judgement by the European Court of Justice of 13 September 2018, *Buccioni,* C-594/16, ECLI:EU:C:2014:2168, paragraph 28 with reference to the Judgement by the European Court of Justice of 19 June 2018, *Baumeister,* C-15/16, ECLI:EU:C:2018:464, paragraph 32.

of information between the competent authorities would be jeopardized because the authority of an EEA State could not be sure that the confidential information it provides to an authority in another EEA State will remain confidential.[26]

68. Furthermore, the European Court of Justice has held that the disclosure of confidential information might have damaging consequences not only for the credit institution directly concerned but also for the banking system in general.[27] The obligation to maintain professional secrecy is not only necessary in order to protect the specific interests of the credit institutions directly concerned, but also the public interest linked, in particular, to the stability of the financial system.[28]

69. Consequently, in light of the above considerations, information which is the subject of formal and also informal exchanges of information between the competent authorities of the Member States as provided for in Article 4 (1) CRD, is subject to the obligation of professional secrecy within the meaning of Article 53 CRD.

70. The negation of the third question by the EFTA Court would have an impact on the stability of the financial system and would contradict the aims of the relevant EEA Law. Trusting cooperation between competent authorities in the EEA would no longer be possible. Such cooperation is however crucial to ensure an effective and proper supervision, which is essential for the stability of the financial system.

Fourth Question: Exchange of information and cooperation under Article 24 CRD

71. With its fourth question, the Board of Appeals asks the EFTA Court whether the cooperation between competent authorities as provided for in Article 24 CRD must be regarded as an exchange of information which pursuant to Article 53 CRD is subject to an obligation of professional secrecy.

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[26] Judgement by the European Court of Justice of 11 December 1985, *Hillegom*, C-110/84, ECLI:EU:C:1985:495, paragraphs 27-29.

[27] Judgement by the European Court of Justice of 11 December 1985, *Hillegom*, C-110/84, ECLI:EU:C:1985:495, paragraph 27.

[28] Judgement by the European Court of Justice of 13 September 2018, *Buccioni*, C-594/16, ECLI:EU:C:2014:2168, paragraph 29; Judgement by the European Court of Justice of 12 November 2014, *Altmann*, C-140/13, ECLI:EU:C:2014:2362, paragraph 33.

72. Article 24 CRD governs the cooperation and exchange of information between competent authorities in the assessment of a proposed acquisition of a qualifying holding in a credit institution.

73. As noted above, Article 53 (2) CRD states as a general rule that professional secrecy under Article 53 (1) CRD shall not prevent the competent authorities from exchanging information with each other in accordance with this Directive.

74. The last sentence of Article 53 (2) CRD clarifies that any information, which is exchanged between competent authorities in accordance with the CRD is subject to professional secrecy under Article 53 (1) CRD.

75. Article 53 (2) CRD does not provide for any exemptions to the exchange of information under the CRD which would not be covered by Article 53 (2) CRD. Article 53 (2) CRD hence covers all types of information exchanges under the CRD.

76. Accordingly, the obligation of professional secrecy applies to all types of information exchanges under the CRD.

77. This clearly includes information exchanged under Article 24 CRD, which is an information exchanged in accordance with the CRD.

78. This conclusion is supported by the interpretation of the objectives of the relevant provisions:

79. The aim of Article 53 (2) is to enable an exchange of information between competent authorities in accordance with the CRD, as otherwise an exchange of information would be prohibited due to the obligation of professional secrecy under Article 53 (1) CRD.

80. The exchange of information between competent authorities is of vital importance. The effective functioning of the internal market for financial services requires close and frequent cooperation.[29] Thus, enabling the exchange of information between

[29] See Recital 6 CRD.

competent authorities and entities that contribute to the stability of the financial system by virtue of their role is necessary.[30]

81. The safeguarding of the confidentiality of transmitted information is crucial for ensuring trustful and good cooperation between the competent authorities.

82. The European Court of Justice has confirmed this in his Judgement C-594/16 *Buccioni,* by stating that 'absence of such confidence is liable to compromise the smooth transmission of the confidential information that is necessary for prudential monitoring'[31].

83. Furthermore, the interpretation of the context of the relevant provisions confirms that Article 53 CRD includes information exchanged under Article 24 CRD:

84. Articles 53 CRD governs, among other things, the permissibility and conditions of the exchange of information and professional secrecy and is part of Title VII Section II CRD, which deals with the exchange of information and professional secrecy in general.

85. Article 53 (2) CRD refers explicitly to any exchange of information between competent authorities in accordance with the CRD. This provision is to be seen as a general and overarching rule concerning the cooperation of competent authorities.

86. Consequently, the Liechtenstein Government sees no reason to doubt that the cooperation and exchange of information between competent authorities under Article 24 CRD must be considered an exchange of information in accordance with the CRD and hence falls under the general rule of Article 53 CRD.

87. Thus, the obligation of professional secrecy under Article 53 (1) CRD must be applied to the cooperation and exchange of information under Article 24 CRD.

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[30] Recital 29 CRD.

[31] Judgement by the European Court of Justice of 13 September 2018, *Buccioni,* C-594/16, ECLI:EU:C:2014:2168, paragraph 29.

Fifth Question: Exhaustive list of exemptions in Article 53 (1) CRD

88. By its fifth question, the Board of Appeals seeks to ascertain whether the obligation of professional secrecy set out in the first subparagraph of Article 53 (1) CRD may be breached only in the cases listed in Article 53 (1).

89. The wording of said provision indicates clearly that the exemptions of the professional secrecy are listed exhaustively in Article 53 (1) third paragraph CRD.

90. This conclusion was confirmed by the European Court of Justice, who clearly stated in his Judgement C-594/16 *Buccioni* that Article 53 (1) CRD exhaustively lists the specific cases in which the general rule that disclosure of confidential information held by the competent authorities is prohibited.[32]

91. Accordingly, information exchanged between competent authorities is only to be disclosed in the cases explicitly set out in the Directive.

92. With regard to the corresponding provision in the securities sector, Article 54 MiFID, the European Court of Justice has emphasized in his Judgements C-140/13 *Altmann* and C-15/16 *Baumeister* that there are no other exceptions to the general prohibition on divulging confidential information other than those specifically provided for in Article 54 MiFID.[33]

93. The European Court of Justice has referred in his Judgement C-594/16 *Buccioni* (CRD) *by analogy* to his Judgement C-15/16 *Baumeister* (MiFID).[34]

94. It clearly follows from these considerations that the obligation of professional secrecy set out in the first subparagraph of Article 53 (1) CRD does solely not apply in the cases

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[32] Judgement by the European Court of Justice of 13 September 2018, *Buccioni,* C-594/16, ECLI:EU:C:2014:2168, paragraph 30 with reference to the Judgement by the European Court of Justice of 19 June 2018, *Baumeister,* C-15/16, ECLI:EU:C:2018:464, paragraph 38.

[33] Judgement by the European Court of Justice C-140/13, *Altmann*, ECLI:EU:C:2014:2168, paragraphs 34 and 35 and Judgement by the European Court of Justice of 19 June 2018, *Baumeister,* C-15/16, ECLI:EU:C:2018:464, paragraph 38.

[34] See the Judgement by the European Court of Justice of 13 September 2018, *Buccioni,* C-594/16, ECLI:EU:C:2014:2168, paragraph 30.

explicitly listed in Article 53 (1) CRD.

95. A breach of the obligation of professional secrecy on grounds of national law, for example, by reason of a law that grants any person asserting a legitimate interest access to official documents unless precluded by overriding public or private interests, is not permitted.

96. As a matter of course, national courts may not grant access to said information on the basis of any other provision of national law.

97. In the same manner as the national competent authorities, national courts are bound by the obligation of professional secrecy set out in the first subparagraph of Article 53 (1) CRD.

98. Any other conclusion would undermine the orderly functioning and integrity of the system of the CRD and jeopardize the effective and proper supervision and hence the stability of the financial system. Trusting cooperation between competent authorities in the EEA would no longer be possible, as they would have to fear that information will be disclosed in proceedings before the national courts.

Sixth Question: Article 53 CRD and Article 3 of the EEA Agreement

99. In light of the above presented answers to the previous questions of the Board of Appeals, the sixth question does not necessitate an answer.

100. However, in the event the EFTA Court's assessment leads to a different result, the Liechtenstein Government submits the following observations on the sixth question by the Board of Appeals *in eventu*:

101. To begin with, the Liechtenstein Government would like to emphasize that Article 53 CRD does not leave it up to the competent authorities in the EEA to decide whether information exchanged or the exchange of information itself should be partly or wholly secret.

102. Rather, Article 53 CRD constitutes an obligation of professional secrecy, meaning that competent authorities in the EEA may not choose whether to keep information secret, but they are obliged to do so.

103. Otherwise, as confirmed by the European Court of Justice, if there was no duty to keep confidential information secret, the obligatory exchange of information between the competent authorities would not function properly because the authority of an EEA State could not be sure that the confidential information it provides to an authority in another EEA State will remain confidential.[35]

104. As regards the concrete question of the Board of Appeals, the Liechtenstein Government is convinced that the exchange of information between competent authorities and the obligation of professional secrecy according to the CRD constitute an appropriate particular measure within the meaning of Article 3 of the EEA Agreement.

105. Article 3 of the EEA Agreement describes the general principle of loyalty and sincere cooperation under EEA law. It applies in all fields covered by the EEA Agreement and is linked to all rules and provisions of EEA Law. It is, however, subsidiary to other, more specific EEA rules and will not usually be applied autonomously in a situation covered by another more specific rule governing the situation in question.

106. The exchange of information between competent authorities and the obligation of professional secrecy according to the CRD is exactly that: a specific provision regulating the cooperation of the competent authorities.

107. As emphasized above, it is evident that the confidential exchange of information contributes to the functioning of the financial market and the strengthening of the stability of the financial system.[36] This has been confirmed by the European Court of

[35] Judgement by the European Court of Justice of 11 December 1985, *Hillegom*, C-110/84, ECLI:EU:C:1985:495, paragraphs 27, 28 and 29.
[36] See Recitals 28 and 29 CRD.

Justice several times, who held that the functioning of the system for supervising the activities of credit institutions and investment firms requires confidential cooperation and the confidential exchange of information between authorities.[37]

108. In light of these considerations, the Liechtenstein Government is of the opinion that if the EFTA Court is to answer the sixth question of the Board of Appeals, it must be answered in the affirmative.

V. Conclusions

Following the observations above, the Liechtenstein Government considers that the questions referred to the EFTA Court for an advisory opinion should be answered as follows:

1. In light of the above considerations, the Liechtenstein Government considers that it is not necessary for the EFTA Court to answer this question.

2. In light of the above considerations, the Liechtenstein Government considers that it is not necessary for the EFTA Court to answer this question.

3. Information which is the subject of formal and also informal exchanges of information between the competent authorities of the Member States as provided for in Article 4 (1) of Directive 2013/36/EU, is subject to the obligation of professional secrecy within the meaning of Article 53 of this Directive.

4. The cooperation between competent authorities as provided for in Article 24 of the Directive mentioned must be regarded as an exchange of information which pursuant to Article 53 of this Directive is subject to an obligation of professional secrecy.

5. The obligation of professional secrecy set out in the first subparagraph of Article 53 (1) of the Directive mentioned does not apply only in the cases listed in Article 53 (1) (second

[37] See *inter alia* Judgement by the European Court of Justice of 13 September 2018, *Buccioni*, C-594/16, ECLI:EU:C:2014:2168, paragraph 30 with reference to the Judgement by the European Court of Justice of 19 June 2018, *Baumeister*, C-15/16, ECLI:EU:C:2018:464, paragraph 38.

subparagraph: cases covered by criminal law; third subparagraph: disclosure in civil or commercial proceedings where a credit institution has been declared bankrupt or is being compulsorily wound up).

6. Considering the proposed answers to the previous questions, the Liechtenstein Government considers that it is not necessary for the EFTA Court to answer this question.

On behalf of the Liechtenstein Government

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