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EUROPEAN COMMISSION

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To The President and members of the EFTA Court

Observations

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

EUROPEAN COMMISSION

represented by: Dimitrios TRIANTAFYLLOU and Corneliu HOEDLMAYR, Members of the Legal Service acting as agents, with an address for service at: *Service Juridique, Greffe contentieux, BERL 1/093, 1049 Bruxelles* and consenting to service by e-EFTA,

in Case E-10/23

X c/ Finanzmarktaufsicht

in which the *Beschwerdekommission der Finanzmarktaufsicht* (Appeals Board of the Financial Markets Authority, Liechtenstein) has requested an advisory opinion pursuant to Article 34 of the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice concerning the interpretation of Directive 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, (OJ 2013, L 176, p. 338), usually quoted as "CRD", incorporated into the EEA Agreement by Decision No 79/2019 of the EEA Joint Committee of 29 March 2019.

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1. INTRODUCTION

1. This request for an advisory opinion of the EFTA Court concerns the limits provided for in the CRD with regard to the public access granted to citizens on the basis of national rules of Liechtenstein to information exchanged between financial supervisory authorities held by the national administrations.

2. LAW

2.1. EEA law

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

2.2. National law

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

3. FACTS AND THE QUESTIONS ASKED

4. The Luxembourg Commission de Surveillance du Secteur Financier ("CSSF") issued a negative opinion with regard to a request to authorize the acquisition of a qualifying holding in a bank established in the Grand-Duchy of Luxembourg by a majority shareholder and chair of the board of directors of a bank established in Liechtenstein (also referred to as "the appellant").

5. Such negative opinion of the CSSF is likely to determine a negative decisions of the European Central Bank ("ECB") as regards the authorisation of the acquisition.

6. The CSSF obtained information from the Liechtenstein Financial Market Authority ("FMA") which the appellant alleges to have been relevant for the adoption of the CSSF negative opinion and for the withdrawal of the Luxembourg seller of the qualifying holding from the transaction.

7. Based on the Liechtenstein Information Act, the applicant sought to obtain access to all information exchanged between the FMA and CSFF. The FMA refused access to all such information except for the appellants personal data that it had processed. It

justified this refusal by referring in general to the public interest in an effective supervision of financial intermediaries requiring a confidential exchange of information between supervisory authorities. The Appeals Board of the Financial Market Authority of the Principality of Liechtenstein ("FMA AB") confirmed that decision.

8. On further appeal, the Verwaltungsgerichtshof (Administrative Court of the Principality of Liechtenstein, "VGH") concluded that, based on the national Information Act, the appellant has a right to obtain further information from the FMA. The national Information Act regulates the transparency of the actions of public authorities and provides that each person who can claim to have a legitimate interest has a right to access official documents unless this is specifically precluded by overriding public or private interests. The VGH therefore referred the case back for decision to the FMA. The FMA again refused access to the information in question with the same justification as before. The request was then again appealed to the FMA AB.

9. By Order of 17 August 2023 the FMA AB stayed its appeal proceedings and referred following questions to the EFTA Court based on Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and of a Court of Justice ("SCA"):

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?

4. ANALYSIS

4.1. Preliminary considerations and interpretation of questions one and two

10. The FMA AB sees itself in a situation, where it would be bound to follow the ruling of the national higher-ranking court VGH on the interpretation of the Liechtenstein Information Act, if that ruling would not be somehow made subject to an opinion of the EFTA Court pursuant to Article 34 SCA. Therefore, in its first two questions the FMA AB requests advice from the EFTA Court on whether the EFTA Court is competent to determine the effects of its advisory opinion upon higher ranking rulings of national courts as a matter of interpretation of Article 34 SCA.

11. The Commission has difficulty understanding this approach. It is clear from the presentation of the facts that the VGH has ruled on the interpretation of the Liechtenstein Information Act, which constitutes a national law on freedom of information without direct correspondence in the EEA Agreement. ([1]) While such

([1]) In this context it is important to note that while the question of access to documents as such is only regulated at Union level for the European Union Institutions pursuant to Regulation (EU) 1049/2001, which has not be incorporated into the EEA Agreement, mechanisms of protection of confidential information under Union law such as the CRD are incorporated and applicable as part of the EEA

national rules, as a matter of norm hierarchy, cannot be interpreted in contradiction to the obligations under the EEA Agreement, nothing in the facts presented by the FMA AB indicates that the VGH would have contradicted the EEA Agreement in its ruling: The VGH only concluded that further access may have to be granted to the information exchanged between the FMA and the CSFF but that such access can be precluded by overriding public interests. Furthermore, the VGH referred the matter back to the FMA and allowed for a new assessment of the access rights, provided that it is taken into consideration that the efficiency of the supervisory system cannot be considered a general justification for the refusal of access. The exclusion of a general refusal does, however, not entail the exclusion of any refusal to access based on a more specific reasoning related to the concrete information concerned. (2) It appears that such more concrete assessment can still be undertaken and be potentially subject to a new appeal procedure before the VGH.

12. It will be argued in the following observations tha,t while the CRD offers far reaching protection disclosure to information exchanged between supervisory authorities, such information must be qualified as confidential on a case-by-case basis rather than *en-bloc* and generally for all supervisory information.

13. Since the interpretation of the level of protection from disclosure of information exchanged between supervisory authorities awarded by the CRD is the key question addressed by this request for an advisory opinion, the Commission sees no need to further discuss the question of whether Article 34 SCA is open to an interpretation by the EFTA Court and on the interplay of its opinion with rulings of the VGH. Since the CRD is incorporated under the EEA Agreement, the question on which an advisory opinion is sought is only one of interpretation of the EEA Agreement for which Article 34 SCA clearly attributes jurisdiction to the EFTA Court. Once this question is answered, it is for the national institutions to ensure that the advisory opinion is respected and information is disclosed in conformity with the obligations under the EEA Agreement. The Commission therefore proposes to reformulate questions 1 and 2 of the request of the advisory opinion accordingly as seeking to

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Agreement. Overall, the question of access to documents in the financial sector is therefore not outside the scope of the EEA Agreement and fully subjects to its rules and limitations.

(2) The relevant passage in the request for advisory opinion on page 9 describing the ruling of the VGH reads: "*As the FMA has not examined which specific public or private interests preclude the access to its documents, as sought by the appellant, the contested decisions must be set aside and the administrative matter remitted to the FMA for a new decision.*"

establish the effects of the advisory opinion regarding the level and extent of confidentiality protection form disclosure granted by the CRD on the further proceedings before the referring court and the VGH.

4.2. Question one

14. By the first question the FMA AB seeks an advisory opinion of the EFTA Court on whether the interpretation of Article 34 SCA falls within the EFTA Courts own jurisdiction.

15. Since Articles 4(1), 24 and 53 of the CRD have been incorporated into Annex IX to the EEA Agreement through Decision No 79/2019 of the EEA Joint Committee of 29 March 2019, pursuant to Article 2(a) of the EEA Agreement they form an integral part of the EEA Agreement. It follows, that the interpretation of these provisions falls without doubt within the jurisdiction of the EFTA Court as postulated in Article 34 SCA. Therefore, there is neither a need nor room to interpret Article 34 SCA with regard to the request for an advisory opinion on the level of protection from disclosure of information covered by these provisions.

16. As explained above, the Commission would propose to re-interpret this question as one of the effects of an interpretation of the CRD by the EFTA Court on the further judicial proceedings in Liechtenstein.

17. With regard to the re-interpreted question, the Commission would make reference to the EFTA Court's consistent and comprehensive jurisprudence on the primacy of the EEA Agreement recently re-stated in Case E-11/22, where the EFTA Court reaffirmed that Courts are to not apply any provision of national law that is contrary to a provision of the EEA Agreement, which is or has been made part of the respective national legal order, if the provision of EEA law in question is unconditional and sufficiently precise. ([3])

18. The Commission is of the view that the case at stake requires an interpretation of Articles 4(1), 24 and 53 of the CRD. The referring court itself has deemed necessary to receive an opinion on the interpretation of these provisions to enable it to give judgement on a new decision as regards the access to documents request of the

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([3]) Case E-11/22 RS v. Fiscal Authority of the Principality of Liechtenstein (Steuerverwaltung des Fürstentums Liechtenstein), para 41.

appellant. These provisions of the CRD are, furthermore, of sufficient precision and clarity with regard to the case law quoted above, in particular as regards the determination of the level of protection of confidential information. It would therefore follow, that an advisory opinion establishing the correct interpretation of these provisions would have binding character upon the national courts involved in this dispute.

4.3. Question two

19. By its second question, the referring court is asking essentially whether it can submit the same question that has been decided by a higher-ranking national tribunal for a request of advisory opinion by the EFTA Court.

20. As mentioned above, in the preliminary remarks and in reply to question one, the Commission would submit in this regard that the VGH does not appear to have taken a decision on the concrete interpretation of Articles 4(1), 24 and 53 of the CRD addressed by the questions 3-5 of the request for advisory opinion, but rather expressed itself on the procedure by which the FMA had refused the request generally based on a reference to the efficiency of the financial supervision mechanisms without taking account of the type of information concerned and its confidentiality. It would therefore appear that the question submitted for advisory opinion by the EFTA Court and the decision of the VGH do not deal with the same questions and leave room for the application of the interpretation of the relevant provisions of the EEA Agreement though the EFTA Court.

21. Furthermore, by referring the matter back to the FMA for a new decision, the VGH has opened-up a possibility to take into account the advice provided by the EFTA Court in the course of the proceedings before the FMA AB.

22. The question of whether the interpretation given to the provisions of the EEA Agreement by the EFTA Court would be followed or not through the national authorities of Liechtenstein (irrespective of whether these are courts or administrations) would in any case be one of enforcement surveillance and dispute resolution under the EEA Agreement and not one of interpretation of Article 34 SCA.

4.4. Question three

23. The third question of the Appeals Board reads as follows: Is information which is subject of formal and of 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?

24. Article 53 of the CRD provides that all persons working or having worked for the competent authority shall be bound by the obligation of professional secrecy, regarding confidential information which such persons receive in the course of their duties. Articles 53 to 62 provide for specific admissible uses of confidential information.

25. Moreover, while Article 53(2) and 56 of the Directive specifically provide that professional secrecy shall not preclude the exchange of information between the competent authorities in the discharge of their supervisory functions, such confidential information exchanges between the competent authorities are explicitly subject to professional secrecy.

26. Of course, the application of this provision implies that the information in question is indeed confidential. For such a qualification, a case by case analysis is necessary, while a categorization of documents cannot excluded for that purpose. Indeed, as a matter of principle, general presumptions which apply to certain categories of documents can be established, as considerations of generally similar kind are likely to apply to requests for disclosure relating to documents of the same nature. According to the *Baumeister* jurisprudence about the similar case of investment firms, "*all information relating to the supervised entity and communicated by it to the competent authority and all statements of that authority in its supervision file, including its correspondence with other bodies, do not constitute, unconditionally, confidential information that is covered, consequently, by the obligation to maintain professional secrecy laid down in that provision*"; but, the Court goes on to positively defining the scope of confidentiality protection as applying to "*information held by the authorities established in established by the Member States to perform the functions laid down by that directive that is information i) which is not public and ii) the disclosure of which is likely to affect adversely the interests of the natural or level person who provided that information or of third parties, or the*

proper functioning of the system for monitoring the activities of investment firms that the EU legislature established in adopting Directive 2004/39". ([4])

27. In the case at hand, while there is no indication that a verification of the conditions provided for by this confidentiality definition has been undertaken in a specific way, it is likely that such verification would lead to the protection of a large part of the supervisory information that has been exchanged. It would pertain to the national courts to verify, however, specifically which information is indeed covered by the concept of confidentiality as defined by the Court of Justice.

28. Therefore, it can be assumed that information subject to formal or 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, provided that it is "confidential", what the referring court has to verify.

4.5. Question four

29. (if question 3 is answered affirmatively): 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?

30. Article 24 of the Directive deals with the cooperation between the competent authorities when carrying out the assessment of proposed acquisitions of a qualifying shareholding. Article 24(2) provides that the competent authorities should provide each other and communicate to each other any information which is essential or relevant for the assessment. This is clearly an exchange of information between the competent authorities in relation to the exercise of their tasks and duties, which is subject to the professional secrecy under Article 53 CRD and Article 56 CRD which refers back to the former and the caveats relating thereto (see previous answer). This is without prejudice to the motivation obligation imposed by Article 24 (2) on the competent authority that has authorised the credit institution in which the acquisition is proposed.

([4]) Case C-15/16, *Bundesanstalt für Finanzdienstleistungsaufsicht v Ewald Baumeister* (ECLI :EU:C:2018:464), paras 46 and 35.

31. Therefore, cooperation between competent authorities as provided for in Article 24 of Directive 2013/36/EU must be regarded as an exchange of information, which, pursuant to Articles 56 and 53 of this Directive, is subject to the obligation of professional secrecy concerning confidential information, without prejudice to the motivation obligation imposed on the competent authority that has authorised the credit institution in which the acquisition is proposed.

4.6. Question five

32. (if question 4 is answered affirmatively): 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 subpara: cases covered by criminal law; third subpara: disclosure in civil or commercial proceedings where a credit institution has been declared bankrupt or is being compulsorily wound up?)

33. Article 53(1) lists the instances in which confidential information subject to professional secrecy may be disclosed. That provision does not leave leeway for the Member States to foresee further derogations for disclosure of such information. This is why the Court of Justice of the EU found that a national supervisory authority can rely on the obligation to maintain professional secrecy against a person who, in a case not covered by criminal law and not in a civil or commercial proceeding of the abovementioned nature, requests it to grant access to information. The Altmann jurisprudence ([5]) about Directive 2004/39/EC on markets in financial instruments ([6]) referred to by the referring court can indeed be transposed in the case at hand.

34. That derogations from the general prohibition to disclose confidential information are exhaustively defined in that directive and that they shall be interpreted <u>strictly</u> has been confirmed even in cases in which disclosure is allowed (e.g. in order to institute civil or commercial proceedings with a view to protecting patrimonial interests), the request for disclosure having to relate to information in respect of

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([5]) Case C-140/13, Altmann a.o. v Bundesanstalt für Finanzdienstleistungsaufsicht, ECLI:EU:C:2014:2362.

([6]) According to that judgment "*in administrative proceedings a national supervisory authority may rely on the obligation to maintain professional secrecy against a person who, in a case covered by criminal law and not in a civil or commercial proceeding, requests it to grant access to information concerning an investment firm which is in judicial liquidation, even where that firm's main business model consisted in large scale fraud and wilful harming of investors' interests and several executives of that firm have been sentenced to terms of imprisonment*"

which evidence plausibly suggests that it is relevant for the purposes of such proceeding, the subject matter of which must be specifically identified (whereas the competent authorities have to weigh up the interest of the applicant in having the information in question and the interests connected with maintaining the confidentiality).(7) This strict approach is due to the specificities of the financial sector and the risks for the good functioning of its supervision, which is paramount for the financial stability as a whole.(8)

35. Therefore, the answer to question 5 should be that the obligation of professional secrecy set out in the first subpara of Article 53(1) CRD may be breached only in the cases mentioned in Article 53(1) CRD.

4.7. Supplementary Question six on whether the cooperation between competent authorities constitutes a particular measure in the sense of Article 3 of the EEA Agreement

36. By its supplementary question 6 the referring court seeks to establish whether the exchange of information between supervisory authorities provided for in Article 4 of the CRD as such constitutes an appropriate particular measure in the sense of Article 3 of the EEA Agreement.

37. In this regard the Commission would first like to make reference to Articles 2(a) and 119 of the EEA Agreement which attribute the same status to the core text of the EEA Agreement as to its Protocols and Annexes.

38. The implementation of the CRD and the effective implementation of the information exchange provided for therein into Annex IX to the EEA Agreement would constitute an emanation of the more general obligation of effectiveness provided for in Article 3 of the EEA Agreement. Should therefore no confidentiality protection emerge from the interpretation of the CRD rules, the interpretation of Article 3 of the EEA Agreement could not provide for any further reaching basis of protection of the information in question from disclosure.

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(7) Case C-594/16, Buccioni v Banca d'Italia (ECLI : 2918:CL425), para 35.

(8) Cf. Recital 29 of the Directive 2013/36/EU.

5. CONCLUSION

39. In the light of the foregoing, the Commission suggests to the Court to answer to the referred questions as follows:

Answers to Questions 1 and 2:

The authorities of an EEA EFTA States are precluded from granting access to information which is subject to the obligation of professional secrecy within the meaning of Article 53 of Directive 2013/36/EU.

Answer to Question 3:

Information subject to formal or 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, provided that the information is "confidential", what the referring court has to verify.

Information held by the authorities in the context of the performance of the functions laid down by Directive 2013/36/EU is confidential if i) it is not public and ii) its disclosure is likely to affect adversely the interests of the natural or legal person who provided that information or of third parties, or the proper functioning of the system for monitoring the activities concerned.

Answer to Question 4:

Cooperation between competent authorities, as provided for in Article 24 of Directive 2013/36/EU, must be regarded as an exchange of information, which, pursuant to Article 56 and 53 of this Directive, is subject to the obligation of professional secrecy concerning confidential information, without prejudice to the motivation obligation imposed on the competent authority that has authorised the credit institution in which the acquisition is proposed.

Answer to Question 5:

The obligation of professional secrecy set out in the first subpara of Article 53(1) of Directive 2013/36/EU may be breached only in the cases mentioned in Article 53(1).

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