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ESA | EFTA Surveillance Authority

Brussels, 27 November 2023
Case No: 90981
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ORIGINAL

IN THE EFTA COURT

WRITTEN OBSERVATIONS

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

THE EFTA SURVEILLANCE AUTHORITY

represented by
Hildur Hjörvar, Claire Simpson,
Michael Sánchez Rydelski and Melpo-Menie Joséphidès,
Department of Legal & Executive Affairs,
acting as Agents, in

CASE E-10/23

X

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 obligation of professional secrecy under Article 53 of Directive 2013/36/EU on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms.

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1 INTRODUCTION

1. The present case concerns the interaction between transparency and confidentiality, in the context of cooperation between competent authorities in the field of financial services in EEA States, within the framework of Directive 2013/36/EU.[1]

2. The facts of the case are described on pages 4-9 of the request for an advisory opinion ("**the Request**"). In short, in 2022, the appellant, a majority shareholder and then chair of the board of directors of a Liechtenstein bank, sought to acquire a qualifying holding in a bank established in Luxembourg. This triggered an exchange of information between the Financial Market Authority of Liechtenstein ("**FMA**") and the Commission de Surveillance du Secteur Financier ("**CSSF**") in Luxembourg.[2]

3. According to the appellant, the CSSF, in a conversation with his lawyers, expressed strong reservations about the proposed acquisition, preliminarily indicating it would render a negative opinion to the European Central Bank, likely resulting in the latter's refusal to grant the acquisition. According to the appellant, the CSSF's concerns were based, in particular, on informal exchanges with the FMA and referred to an FMA administrative order prohibiting the appellant from exercising his role as a member of the supervisory body of the Liechtenstein bank.[3]

4. According to the appellant, these negative preliminary indications led to the appellant's counterparty withdrawing from the planned sale of the holding in the Luxembourg bank. The appellant, in light of these developments, made several requests to the FMA in July 2022:

    I. Full access to and a copy of the file(s) in relation to which the FMA provided facts and information to the CSSF related to the appellant's proposed acquisition of the qualifying holding.

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[1] 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: see further paragraph 11 and footnote 9 below.
[2] See page 4 of the Request.
[3] See pages 4-5 of the Request.

II. Disclosure of information on which FMA entities or staff members provided information to the CSSF.

III. Disclosure of the specific facts and information provided to the CSSF, verbatim.

IV. Disclosure and a copy of personal data processed by the FMA in its dealings with the CSSF.[4]

5. The FMA responded positively to part IV of the appellant's request (disclosure of personal data). It rejected the appellant's other requests by an administrative decision in September 2022. The Appeals Board of the Financial Market Authority upheld that administrative decision in October 2022.[5]

6. Subsequently, the Administrative Court of the Principality of Liechtenstein granted the appellant's appeal against the FMA's administrative decision.[6]

7. The Administrative Court held that the FMA and the Appeals Board had failed to carry out a sufficiently detailed examination motivating the refusal to grant access. The Administrative Court held that information exchanged in the framework of international mutual assistance was not *per se* excluded from the principle of public access to information under the relevant national legislation, and that granting public access to documents exchanged with a foreign authority within the framework of international mutual assistance did not *per se* negatively affect the exchange of information. Finding that exceptions from transparency had to be individually reasoned, the Administrative Court set aside the FMA's administrative decision and remitted the case for fresh examination.

8. Subsequently, the FMA issued an identical decision in June 2023, refusing the appellant's request once again.[7] This decision led to the appellant's appeal to

[4] See page 6 of the Request.
[5] See pages 6-7 of the Request.
[6] See pages 7-9 of the Request.
[7] See page 9 of the Request.

the Appeals Board of the Financial Market Authority ("**the Referring Court**"), in the context of which the present request for an advisory opinion was made.[8]

2 EEA LAW

9. Article 108 of the Agreement on the European Economic Area ("**EEA**") provides, insofar as relevant:

> *"[...]*
>
> *2. The EFTA States shall establish a court of justice (EFTA Court).*
>
> *The EFTA Court shall, in accordance with a separate agreement between the EFTA States, with regard to the application of this Agreement be competent, in particular, for:*
>
> *(a) actions concerning the surveillance procedure regarding the EFTA States;*
>
> *(b) appeals concerning decisions in the field of competition taken by the EFTA Surveillance Authority;*
>
> *(c) the settlement of disputes between two or more EFTA States."*

10. Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice ("**SCA**") provides:

> *"The EFTA Court shall have jurisdiction to give advisory opinions on the interpretation of the EEA Agreement.*
>
> *Where such a question is raised before any court or tribunal in an EFTA State, that court or tribunal may, if it considers it necessary to enable it to give judgment, request the EFTA Court to give such an opinion.*
>
> *An EFTA State may in its internal legislation limit the right to request such an advisory opinion to courts and tribunals against whose decisions there is no judicial remedy under national law."*

11. 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 ("**the Directive**" or "**Directive 2013/36/EU**")

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[8] The Appeals Board of the Financial Market Authority is a "court or tribunal" within the meaning of Article 34 SCA, see, for example, Case E-4/09 *Inconsult Anstalt*, [2009-2010] EFTA Ct. Rep 86, paragraph 24.

was incorporated into the EEA Agreement by Decision 79/2019 of the EEA Joint Committee of 29 March 2019, which entered into force on 1 January 2020.[9]

12. Recital 29 to the Directive provides:

> *"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."*

13. Recital 32 to the Directive provides:

> *"Exchanges of information should be authorised between the competent authorities and central banks and other bodies with a similar function in their capacity as monetary authorities and, where necessary for reasons of prudential supervision, prevention and resolution of failing institutions and in emergency situations, if relevant, other public authorities and departments of central government administrations responsible for drawing up legislation on the supervision of credit institutions, financial institutions, investment services and insurance companies, and public authorities responsible for supervising payment systems."*

14. Article 4(1) of the Directive, entitled "Designation and powers of the competent authorities", provides:

> *"Member States shall designate competent authorities that carry out the functions and duties provided for in this Directive and in Regulation (EU) No 575/2013. They shall inform the Commission and EBA thereof, indicating any division of functions and duties."*

15. Article 24 of the Directive, entitled "Cooperation between competent authorities", provides, insofar as relevant:

> *"1. The relevant competent authorities shall fully consult each other when carrying out the assessment if the proposed acquirer is one of the following:*
>
> *[...]*
>
> *(c) a natural or legal person controlling a credit institution, insurance undertaking, reinsurance undertaking, investment firm*

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

> *or UCITS management company authorised in another Member State or in a sector other than that in which the acquisition is proposed.*
>
> *2. The competent authorities shall, without undue delay, provide each other with any information which is essential or relevant for the assessment. In that regard, the competent authorities shall communicate to each other upon request all relevant information and shall communicate on their own initiative all essential information. A decision by the competent authority that has authorised the credit institution in which the acquisition is proposed shall indicate any views or reservations expressed by the competent authority responsible for the proposed acquirer."*

16. Article 53, entitled "Professional secrecy" (as adapted), provides, insofar as relevant:

> *"1. Member States shall provide that all persons working for or who have worked for the competent authorities and auditors or experts acting on behalf of the competent authorities shall be bound by the obligation of professional secrecy.*
>
> *Confidential information which such persons, auditors or experts receive in the course of their duties may be disclosed only in summary or aggregate form, such that individual credit institutions cannot be identified, without prejudice to cases covered by criminal law.*
>
> *Nevertheless, where a credit institution has been declared bankrupt or is being compulsorily wound up, confidential information which does not concern third parties involved in attempts to rescue that credit institution may be disclosed in civil or commercial proceedings.*
>
> *2. Paragraph 1 shall not prevent the competent authorities from exchanging information with each other or transmitting information to the ESRB, EBA, or the European Supervisory Authority (European Securities and Markets Authority) ("ESMA") […] or, as the case may be, the EFTA Surveillance Authority, […]. That information shall be subject to paragraph 1.*
>
> *[…]"*

17. Article 56 of the Directive, entitled "Exchange of information between authorities", provides, insofar as relevant:

> *"Article 53(1) and Article 54 shall not preclude the exchange of information between competent authorities within a Member State, between competent authorities in different Member States […].*

> *The information received shall in any event be subject to professional secrecy requirements at least equivalent to those referred to in Article 53(1)."*

3 NATIONAL LAW

18. Directive 2013/36/EU was transposed in Liechtenstein by way of the Act of 21 October 1992 on banks and investment firms (**"the Banking Act"**).[10]

19. Pursuant to Article 26a(6) of the Banking Act, when assessing the acquisition or the increase of a holding, the FMA shall cooperate with the competent authorities of the other EEA States. The cooperation shall in particular include an exchange of all information relevant to assessing the acquisition or increase of a holding.

20. Pursuant to Article 31a of the Banking Act, entitled "Official secrecy", the bodies charged with implementing this Act, any persons consulted by such bodies, as well as all representatives of the authorities shall be subject to official secrecy without a time limit as regards the confidential information that becomes known to them during their official activities.[11] The provision furthermore provides, insofar as relevant:

> *"(1a) The bodies and persons referred to in paragraph 1 who receive confidential information may use it in the performance of their tasks only for the following purposes:*
>
> *a) to check that the licensing conditions for banks or investment firms are met;*
>
> *b) to monitor the performance of activities on an individual or consolidated basis, in particular with regard to the solvency, large exposures, administrative and accounting organisation, internal control mechanisms, and liquidity of banks and investment firms, as well as branches of banks, financial institutions, and investment firms;*
>
> *c) to monitor the proper functioning of trading venues;*
>
> *d) to impose sanctions;*

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[10] *Bankengesetz; BankG*; LR 952.0, Act of 21 October 1992.

[11] Infringement of the obligation of official secrecy within the meaning of Article 31a(1) of the Banking Act falls under section 310(1) of the Liechtenstein Criminal Code, which criminalises violations of official secrecy.

e) in appeals against decisions by the FMA in accordance with Article 62; or

f) in the extrajudicial mechanism for investors' complaints provided for in Article 62a.

(2) Confidential information as set out in paragraph 1 may be transmitted in accordance with this Act and Regulation (EU) No 575/2013.

(2a) The FMA is authorised to transmit information to the external audit offices that is necessary for the fulfilment of its responsibilities.

(3) If bankruptcy or winding-up proceedings have been initiated against a bank or investment firm by the decision of a court, confidential information that does not relate to third parties may be disclosed in civil proceedings if this is necessary for the proceedings concerned.

(4) Without prejudice to the requirements of criminal law or tax law, the FMA, all other administrative authorities and bodies, and other natural and legal persons may use confidential information that they receive in accordance with this Act only for purposes of fulfilling their responsibilities and tasks within the scope of this Act or for purposes for which the information was given, and/or in the case of administrative and judicial proceedings that specifically relate to the fulfilment of these tasks. If the FMA or another administrative authority or office or person providing the information gives their consent, however, the authority receiving the information may use it for other purposes of financial market supervision.

(5) The FMA may transmit confidential information that it received from a non-competent authority of an EEA Member State to the following authorities:

a) the competent authorities of other EEA Member States;

b) the European Supervisory Authorities."

21. Article 30h of the Banking Act, entitled "Exchange of information", provides that the FMA is to transmit to a requesting competent authority of an EEA Member State all information which the latter needs to exercise its duties of supervision, provided that, *inter alia*, the recipients and the persons employed with and instructed by the competent authorities are subject to an obligation of secrecy equivalent to that of Article 31a of the Banking Act.

22. Article 29 of the Act of 19 May 1999 on the Information of the Population ("**Information Act**")[12] provides that any person who can claim to have a legitimate interest has a right to access official documents unless precluded by overriding public or private interests.

23. Article 31(1) of the Information Act provides that overriding interests with respect to the withholding of information exist, *in particular*, where (a) by reason of the premature disclosure of internal working documents, requests, drafts and similar items, decision-making would be significantly impaired, (b) the population would be harmed in a different way, in particular, by threatening public security, or (c) this would entail a disproportionate effort for the authority.

4 THE QUESTIONS REFERRED

24. The Referring Court has asked the EFTA Court the following questions:

> *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?*

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[12] *Informationsgesetz*; LR 172.015.

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?

25. If one of Questions 1/1 to 1/4 is answered with "no" or the main question in Question 1/5 is answered in the negative, but the supplementary question in the affirmative, the Referring Court has furthermore asked the EFTA Court the following additional question:

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?

5 LEGAL ANALYSIS

5.1 First and second questions

26. The premise of the **first and second questions** seems, according to the Request, to be that they must first be answered in order to determine whether the Referring Court is entitled, in the circumstances, to pose the substantive questions (three to five)[13] to the EFTA Court. Thus, by its first and second questions, the Referring Court asks in essence whether the substantive questions are admissible. In ESA's view, since questions three to five clearly concern the interpretation of the EEA Agreement (Directive 2013/36/EU), and have been asked by a national court which considers answers to be necessary for the resolution of the case before it, there is no doubt, under the settled case-law, that the EFTA Court may provide an answer. Nevertheless, for the sake of completeness and with a view to providing as much assistance as possible to the EFTA Court in its guidance to the Referring Court, ESA makes the following submissions in relation to the first and second questions.

27. As regards the **first question**, ESA submits that the EFTA Court is competent to interpret the SCA, and that it can do so in proceedings brought under Article 34 SCA wherever it is relevant for the Court to be able to answer questions addressed to it by national courts.

28. *Firstly*, the purpose of Article 34 SCA is to ensure the uniform application of EEA law, to preserve homogeneity, and to enable the EFTA Court to provide assistance to the courts and tribunals of the EFTA States in cases in which they have to apply provisions of EEA law.[14]

29. The SCA is foreseen in Article 108 EEA and forms an integral part of EEA law. The EFTA Court has held that its role in advisory opinion cases is to interpret provisions of EEA law, giving all the elements of interpretation of EEA law which may be of assistance to the national court.[15] Here, the Court is guided by the spirit of

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[13] And the related additional question.
[14] See Joined Cases E-26/15 and E-27/15 *Criminal proceedings against B* [2016] EFTA Ct. Rep. 740, paragraph 52, and Case E-8/19 *Scanteam AS* v *The Norwegian Government*, judgment of 1 July 2020, paragraph 41.
[15] See Case E-2/95 *Eidesund* [1995-1996] EFTA Court Report 3, paragraph 14, and Case E-4/19 *Campbell*, judgment of 13 May 2020, paragraph 45.

cooperation with national courts, which leads it to provide the latter with all the guidance that the EFTA Court deems necessary, in order to provide a useful answer.[16]

30. *Secondly*, in providing that assistance in interpreting EEA law, the Court has not strictly limited itself to interpreting only the EEA Agreement itself but has, also in advisory opinion proceedings, interpreted unwritten general principles of EEA law, including fundamental rights.[17] Moreover, the Court has on numerous occasions interpreted its own case-law, and that of the Court of Justice of the EU, neither of which constitute provisions of the EEA Agreement, but both of which undoubtedly form part of EEA law.

31. *Finally* and more importantly, the Court has on numerous occasions interpreted and applied the SCA, where it was relevant in order to determine its jurisdiction and to answer an advisory opinion request. This includes the Court's case-law on the meaning of the concept "*any court and tribunal*" in Article 34, second paragraph, SCA,[18] the Court's case-law on independence and impartiality under Article 30, fourth paragraph, SCA,[19] the Court's case-law on what constitutes a "*necessary*" question within the meaning of Article 34, second paragraph, SCA,[20] and the Court's case-law on its competence to determine the limits of its own jurisdiction.[21]

32. As regards the **second question**, ESA submits that the Referring Court is undoubtedly entitled under Article 34 SCA to request the EFTA Court's advisory opinion in the circumstances of this case.

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[16] See Case E-2/12 *HOB-vín ehf.* [2012] EFTA Ct. Rep. 1092, paragraph 38.
[17] See, for example, Case E-9/97 *Sveinbjörnsdóttir* [1998] EFTA Ct. Rep. 95, paragraphs 62-63, Case E-1/20 *Kerim*, judgment of 9 February 2021, paragraph 43, and Case E-12/20 *Telenor*, judgment of 5 May 2022, paragraph 75.
[18] See, for example, Case E-1/94 *Restamark* [1994–1995] EFTA Ct. Rep. 15, paragraphs 25-26, and Joined Cases E-8/94 and E-9/94 *Mattel and Lego* [1994–95] EFTA Ct. Rep. 113, paragraphs 12-16.
[19] See, for example, Case E-21/16 *Pascal Nobile*, decision of 14 February 2017, paragraphs 5 and 16-22, and Case E-1/18 *ESA* v *Norway*, judgment of 13 December 2019, paragraph 41.
[20] See, for example, Case E-11/12 *Koch* [2013] EFTA Ct. Rep. 272, paragraph 50.
[21] See, for example, Case E-6/96 *Wilhelmsen* [1997] EFTA Ct. Rep. 53, paragraphs 39-40, Case E-11/12 *Koch* [2013] EFTA Ct. Rep. 272, paragraphs 50-52, and Case E-14/22 *Amann*, judgment of 19 October 2023, paragraph 21.

33. As discussed above, the advisory opinion procedure is an instrument of cooperation between the EFTA Court and the national courts.[22] In accordance with settled case-law, Article 34 SCA is intended as a means of ensuring the homogenous and uniform interpretation of EEA law and to assist national courts where they have to apply provisions of EEA law.[23] To that end, the provision explicitly makes available to *any* national court or tribunal a means of eliminating difficulties which may be occasioned by the requirements of giving implemented EEA law its full effect within the framework of the judicial system of an EFTA State.

34. Consequently, ESA submits that, in order to preserve the effectiveness of the cooperation between the EFTA Court and the national courts established by Article 34 SCA, the setting aside by a higher court of a previous ruling in a case and the instruction of the lower court to take a new decision, should not deprive the latter of its discretion under Article 34 SCA, or deter it from using that discretion, to refer to the EFTA Court questions concerning the interpretation of EEA law relevant to the case.[24]

35. Indeed, both the EFTA Court and the Liechtenstein judiciary seem to have viewed the avenue of a request for an advisory opinion as an open one, regardless of previous rulings of higher courts on the subject matter. This is evidenced, for example, by the situation which was present in Case E-11/22 *RS*[25] and also, to some extent, the situation which was present in Case E-14/22 *Amann*.[26] In the former case, the Liechtenstein Constitutional Court (*Staatsgerichtshof*) had found a provision of national law to be incompatible with EEA law, but deferred the annulment of that law by one year. Subsequent to that judgment, the Administrative Court of the Principality of Liechtenstein (*Verwaltungsgerichtshof des Fürstentums Liechtenstein*), in a parallel set of proceedings concerning a different plaintiff, sought the EFTA Court's opinion in respect of the legality of the same national

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[22] See Case E-14/15 *Holship* [2016] EFTA Ct. Rep. 240, paragraph 37.
[23] See Case E-1/94 *Restamark* [1994–1995] EFTA Ct. Rep. 15, paragraph 25, Joined Cases E-26/15 and E-27/15 *Criminal Proceedings against B* [2016] EFTA Ct. Rep. 740, paragraph 52, and Case E-19/16 *Thue* [2017] EFTA Ct. Rep. 880, paragraph 25.
[24] See, for example, judgment of 22 February 2022, *RS*, C-430/21, EU:C:2022:99, paragraphs 64 and 65, and compare the situation in Case E-14/22 *Amann*, judgment of 19 October 2023, in particular paragraphs 14-17 and 19.
[25] Case E-11/22 *RS*, judgment of 4 July 2023.
[26] Case E-14/22 *Amann*, judgment of 19 October 2023.

measure, and the consequences of that (il)legality. Neither the EFTA Court, nor the parties, nor the referring national court questioned the ability of the national court to request the EFTA Court's advisory opinion, even though the Liechtenstein Constitutional Court had already ruled on the matter, and the referring court was the lower-ranking Administrative Court.

36. This approach aligns with the principle that national procedural rules on the relationship between higher and lower courts and the binding force of the former's rulings cannot undermine the effectiveness of EEA law at the national level, as well as with the principle of effective judicial protection.[27] National courts must ensure the full effectiveness of the EEA Agreement, and this obligation applies to all instances of the judiciary.[28]

37. Additionally, ESA notes that the advisory opinion mechanism constitutes an important component of procedural safeguards. In the context of the preliminary rulings mechanism, the failure to reason a refusal to make such a referral has been considered a violation of the right to a fair trial under Article 6(1) of the European Convention on Human Rights ("**ECHR**").[29] The European Court of Human Rights has implied that the same principle applies to the advisory opinion mechanism.[30] EEA nationals are entitled to the effective judicial protection of their rights, both in the EU and EFTA pillars.[31] In light of the important role which these mechanisms play in the correct, effective, and homogenous application of EEA law, effective

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[27] On the principle of effectiveness in the context of national procedural rules, see, for example, Case E-11/12 *Koch* [2013] EFTA Ct. Rep. 272, paragraph 121. On the principle of effective judicial protection, see, for example, Case E-15/10 *Posten Norge* [2012] EFTA Ct. Rep. 246, paragraphs 85 and 86, Case E-12/20 *Telenor*, judgment of 5 May 2022, paragraph 75, and judgment of 13 March 2007, *Unibet*, C-432/05, EU:C:2007:163, paragraph 37.

[28] See, for example, Case E-11/22 *RS*, judgment of 4 July 2023, paragraphs 40-41.

[29] See, for example, judgment of the European Court of Human Rights of 20 September 2011 in Case *Ullens de Shooten and Rezabek v. Belgium*, application nos. 3989/07 and 38353/07, paragraph 58.

[30] By way of accepting a unilateral declaration by the Icelandic Government recognising a violation of the applicant's right to a fair trial and striking the case off the list of cases. See Question no. 2 in the Communication Report of 28 September 2020, in Case *Ingólfur Helgason* v *Iceland*, application no. 30750/17, and the strike-out decision of 26 August 2021 in the same case, both available on the HUDOC database.

[31] See Article 19(1) of the Treaty on European Union, Article 47 of the Charter of Fundamental Rights of the European Union, Articles 6 and 13 of the ECHR, and judgment of 8 December 2011, *KME*, C-272/09, EU:C:2011:810, paragraph 92.

judicial protection can in some circumstances necessitate that use is made of the preliminary ruling or advisory opinion mechanisms.[32]

38. In ESA's opinion, any differences between the Treaty on the Functioning of the European Union's ("**TFEU**") preliminary rulings mechanism and the SCA's advisory opinion mechanism are not determinative for the second question posed in the present case. In the absence of national legislation limiting the right to request an advisory opinion (see Article 34, third paragraph, SCA), which does not appear to apply in the present case, lower national courts in the EFTA States are empowered to seek the EFTA Court's advisory opinion, to assist them in their adjudication, just as lower national courts in the EU Member States are empowered to seek the CJEU's preliminary ruling. These two mechanisms mirror each other in their nature and their purpose: to assist national courts in correctly and effectively applying EEA law. In line with the principle of homogeneity and considerations of equal access to justice, the EFTA Court is therefore competent to interpret EEA law in all types of proceedings before it, independently of the source of that EEA law, be it in general principles, the EEA, or the SCA.[33]

39. Moreover, in ESA's opinion, the absence of an explicit obligation on the highest judicial instances to seek an advisory opinion from the EFTA Court (see, *a contrario*, Article 267(3) TFEU) renders it even more important that judges at lower judicial instances are able to seek the EFTA Court's guidance where they consider it necessary in the independent exercise of their judicial functions. Depending on the legal system in question, a lower court may be in a better position to apply the guidance given by the EFTA Court to the particular facts of the case, thus adjudicating on the matter in a way which ensures the effectiveness of EEA law within a reasonable time.

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[32] See, for example, judgment of 28 March 2017, *Rosneft*, C-72/15, EU:C:2017:236, paragraph 71.
[33] See, for example, Case E-18/10 *ESA v Norway* [2011] EFTA Ct. Rep. 202, paragraph 26, Case E-14/11 *DB Schenker* [2012] EFTA Ct. Rep. 1178, paragraphs 77 and 78, Case E-18/11 *Irish Bank* [2012] EFTA Ct. Rep. 592, paragraph 122, and Case E-15/10 *Posten Norge* [2012] EFTA Ct. Rep. 246, paragraphs 109-110.

5.2 Third and fourth questions

40. By its **third and fourth questions**, the Referring Court in essence seeks to ascertain whether information shared by a national competent authority with another EEA competent authority, within the framework of Article 24 of the Directive, is subject to an obligation of professional secrecy.

5.2.1 Preliminary remarks

41. As a general point on the relationship between transparency and confidentiality, it should be noted that, depending on the information in question, its protection may need to be considered against the background of fundamental rights, for example the right to private life and correspondence under Article 8 of the ECHR or the right to intellectual property as protected by Article 1 of Protocol No. 1 to the ECHR.[34] On the other hand, a right to transparency might also have to be assessed with regard to fundamental rights, including a right of access to information insofar as it is protected by the freedom of expression under Article 10 of the ECHR.[35]

42. ESA notes that the information to which the appellant in the domestic proceedings requested access was apparently not *received by* the FMA, but rather *shared by* the FMA with the CSSF. For the purposes of the following analysis, ESA will refer to a competent authority which shares information with another competent authority as 'the sending authority', and the authority which receives information from another competent authority as 'the receiving authority'.

5.2.2 The Directive's cooperation framework

43. Directive 2013/36/EU, together with other instruments in the field of financial services, provide for a harmonised regulatory framework for financial sector entities, supported by a system of cooperation between the national competent authorities and the EU and EEA institutions. In order to safeguard that system of cooperation, the Directive imposes on competent authorities an obligation to respect the

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[34] See Case E-1/20 *Kerim* judgment of 9 February 2021, paragraph 43 and, *mutatis mutandis*, Case E-14/15 *Holship* [2016] EFTA Ct. Rep. 240, paragraph 85.

[35] See judgment of the European Court of Human Rights of 8 November 2016, *Magyar Helsinki Bizottság v. Hungary* [GC], application no. 18030/11, paragraph 156.

professional secrecy of information thus shared with them.[36] In this way, Article 53 of the Directive read together with Article 24, as well as Article 56 last paragraph, imposes on EEA States an obligation to respect the confidentiality of information exchanged between competent authorities.[37]

44. Outside the scope of the obligation of secrecy imposed by the Directive, EEA States are in general free to either extend the protection against disclosure or to permit access to information in the possession of competent authorities which is not confidential.[38]

45. In this context, and in relation to the **third question**, ESA sees no basis for distinguishing between 'formal' and 'informal' exchanges between competent authorities. The Directive makes no such distinction and ESA notes that 'consultation', 'provision of information', and 'communication of information' are all encompassed by Article 24's cooperation framework. Accordingly, the system of cooperation between competent authorities foreseen by the Directive may naturally entail some informal exchanges or dialogue, in addition to a more formal exchange of information and documents. All such exchanges must respect professional secrecy requirements where the information is confidential.

5.2.3 The scope of professional secrecy requirements

46. As regards the relationship between confidentiality and professional secrecy, ESA notes that the Directive does not explicitly state which information held by the competent authorities is to be classified as 'confidential' and subject, consequently, to the obligation of professional secrecy.[39]

47. This point has however been considered in the context of Directive 2004/39 on markets in financial instruments, which contains a parallel professional secrecy obligation. Here, the CJEU has concluded that the obligation of professional secrecy does not mean that *all* information relating to a supervised entity and

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[36] See judgment of 13 September 2018 in Case C-594/16 *Buccioni*, EU:C:2018:717, paragraphs 27-28.
[37] See judgment of 11 December 1985, *Hillenius*, C-110/84, EU:C:1985:495, paragraph 27.
[38] See judgment of 19 June 2018, *Baumeister*, Case C-15/16, EU:C:2018:464, paragraph 44. This case-law concerns Directive 2004/39/EC but was applied by analogy to Directive 2013/36/EU in judgment of 13 September 2018, *Buccioni*, C-594/16, EU:C:2018:717, paragraph 27.
[39] See judgment of 19 June 2018, *Baumeister*, C-15/16, EU:C:2018:464, paragraph 22.

communicated by it to the competent authority, and all statements of that authority in its supervision file, including its correspondence with other bodies, should be deemed to be confidential.[40] Instead, the CJEU considered that the obligation of professional secrecy applied to information held by the competent authorities (i) which was not public and (ii) the disclosure of which was 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 of investment firms that the EU legislature established in adopting Directive 2004/39.[41]

48. This case-law on Directive 2004/39 has been applied by analogy by the CJEU to Directive 2013/36/EU, where it held that both the supervised credit institutions and the competent authorities must have confidence that confidential information will, in principle, remain confidential.[42] Consequently, ESA submits that, under the latter Directive, not all information which a competent authority holds in its possession is by default confidential. Rather, the confidentiality of such information should be determined on the basis of the two criteria set out at paragraph 47 above and, where such confidentiality exists, professional secrecy requires that it be respected.

49. Accordingly, as regards the **fourth question**, ESA submits that the mere fact of information or documents being exchanged between competent authorities does not automatically render that information or those documents subject to confidentiality. Information does not automatically become confidential by virtue simply of having been *exchanged* with another competent authority. Its confidentiality derives from its very nature (as per the criteria in the case-law in the paragraphs immediately above) and should be protected regardless of any sharing or exchange.

50. ESA therefore considers that there is no *per se* obligation under EEA law on a sending authority to treat as confidential, information, which would otherwise not have been confidential, merely because that information has been shared with another competent authority within the framework of cooperation under the Directive. The receiving authority is likewise not automatically obliged to treat as

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[40] Ibid., paragraph 34.
[41] Ibid., paragraph 35.
[42] Judgment of 13 September 2018, *Buccioni*, C-594/16, EU:C:2018:717, paragraph 27.

confidential all information received from the sending authority, but, where such confidentiality exists, the receiving authority must ensure that the information received is protected by professional secrecy to the standard required by the Directive (Article 56, third paragraph, of the Directive).

51. Moreover, confidentiality might apply to the exchange between the competent authorities, in and of itself. Based on the two-fold criteria above, information on *what* was exchanged with another authority might itself be qualified as confidential information, to which professional secrecy obligations must be applied. Thus, in addition to protecting any confidential documents which may have been exchanged, confidentiality might also extend to *what* has been shared with another competent authority, so as not to circumvent the rules on access to documents and information which apply to the receiving authority, or the confidence necessary for the good functioning of the competent authorities' cooperation. As the CJEU held in *Buccioni*, the Directive constitutes "*the essential instrument for the achievement of the internal market in the field of credit institutions, the smooth operation of which requires not only legal rules but also close and regular cooperation and significantly enhanced convergence of regulatory and supervisory practices between the competent authorities*".[43]

52. ESA notes in this context that, where a decision to oppose a proposed acquisition is made, the Directive foresees the divulging of relevant information to the proposed acquirer, including the views and reservations expressed by a competent authority in the context of cooperation under Article 24.[44] That provision aims to enhance *inter alia* transparency.[45] Where no decision, either to oppose or not to oppose a

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[43] Judgment of 13 September 2018, *Buccioni*, C-594/16, EU:C:2018:717, paragraph 22. See also paragraph 72 (relevant actors must be able to have confidence that confidential information will remain confidential).

[44] See Article 22(5) and Article 24(2) of the Directive.

[45] The language used in Article 24(2), second sentence, was first introduced during the legislative process for the Qualifying Holdings Directive, during which the European Parliament's Committee on Economic and Monetary Affairs stated that the relevant amendment "*aims to enhance the cooperation between supervisors and the transparency*". See the Report on the proposal for a directive of the European Parliament and of the Council amending Council Directive 92/49/EEC and Directives 2002/83/EC, 2004/39/EC, 2005/68/EC and 2006/48/EC as regards procedural rules and evaluation criteria for the prudential assessment of acquisitions and increase of shareholdings in the financial sector, 5 February 2007, accessible at https://www.europarl.europa.eu/doceo/document/A-6-2007-0027_EN.html.

proposed acquisition, is ultimately made, EEA law does not require that information to be divulged.

5.3 Fifth question

53. By its **fifth question**, the Referring Court in essence seeks to understand whether the exceptions to the obligation of professional secrecy listed in Article 53(1) of the Directive are exhaustively listed.

54. ESA submits that this question should be answered in the affirmative. This matter was considered by the CJEU in its judgment in the case of *Buccioni*, where it held, at paragraph 30, that:

> "*Finally, the specific cases in which the general rule that disclosure of confidential information held by the competent authorities is prohibited, laid down in Article 53(1) of Directive 2013/36, does not, exceptionally, preclude their communication or use, are exhaustively set out in that directive (see, by analogy, judgment of 19 June 2018, Baumeister, C-15/16, EU:C:2018:464, paragraph 38).*"[46]

55. In that same judgment, the CJEU also held that these exceptions should be narrowly construed.[47] Accordingly, confidential information subject to the obligation of professional secrecy under Article 53(1) may be disclosed only in the exceptional circumstances identified in Article 53, which must be interpreted strictly.

5.4 Additional question

56. Based on ESA's submissions on the questions in the first part, a response to the **additional question** posed in the second part is not necessary.

57. Nonetheless, ESA observes that implementing national measures which properly give effect to the provisions of Directives incorporated into the EEA Agreement constitute appropriate particular measures within the meaning of Article 3 EEA.

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[46] Judgment of 13 September 2018, *Buccioni*, C-594/16, EU:C:2018:717, paragraph 30.
[47] Ibid., paragraph 37.

6 CONCLUSION

Accordingly, the Authority respectfully requests the Court to answer the questions referred as follows:

1. The provisions of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice constitute EEA law which the EFTA Court is competent to interpret in the context of a request for an advisory opinion pursuant to Article 34 of that agreement.

2. In light of the principles of effectiveness and effective judicial protection, a national court may refer a question of the interpretation of EEA law for an advisory opinion to the EFTA Court where it considers that such a question is necessary for the resolution of the matters before it, notwithstanding that a higher-ranking national court has previously ruled on the same question.

3. Article 53 of Directive 2013/36/EU, read together with Article 24, as well as Article 56 last sentence, requires that competent authorities respect the confidentiality of information which is exchanged between them.

4. Article 53 sets out in an exhaustive manner the exceptions permitted to professional secrecy. Those exceptions must be narrowly construed.

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