



BoA-D-2023-02

**DECISION**

given by

the  
**BOARD OF APPEAL  
OF THE EUROPEAN SUPERVISORY AUTHORITIES**

on  
a plea of inadmissibility

in the appeal case brought by

Euroins Insurance Group AD  
[Appellant]

against

The European Insurance and Occupational Pensions Authority (EIOPA)  
[Respondent]

**Board of Appeal**

Michele Siri (President and Co-Rapporteur)  
Christos Gortsos (Vice President)  
Gerben Everts  
Geneviève Helleringer  
Margarida Lima Rego  
Carsten Zatschler (Co-Rapporteur)

Place of this decision: Paris

**Date: 19 July 2023**

## **Summary**

The Appellant, Euroins Insurance Group AD (hereinafter “Euroins”), challenged an EIOPA Report containing EIOPA’s assessment regarding the valuation of some technical provisions for the motor third party liability portfolio of Euroins Romania, an insurance company controlled by Euroins.

Euroins requested the Board of Appeal to annul the EIOPA Report as, according to Euroins, EIOPA acted in excess of its regulatory powers and infringed Euroins Romania’s rights as well as the principles of proportionality, independence, objectivity, and transparency.

The Board of Appeal finds that the EIOPA Report does not have binding legal effects and is therefore not an act that can be challenged by way of an action for annulment in EU law. To the extent that the EIOPA Report is relied upon in the context of decisions by national authorities, it is in the context of a challenge to those decisions in front of national courts that the findings of the EIOPA Report may be contested, if necessary, seeking a reference to the Court of Justice. The Board accordingly dismisses the application as inadmissible.

## **Euroins v EIOPA – Admissibility**

- 1 This is the decision of the Board of Appeal of the European Supervisory Authorities on the appeal filed by the appellant Euroins Insurance Group AD (“Euroins” or “appellant”) pursuant to Article 60 of the EIOPA Regulation.<sup>1</sup>
- 2 By its appeal, Euroins challenges EIOPA’s Report (EIOPA-23-149) of 28 March 2023, entitled “EIOPA’s assessment of the valuation of technical provisions gross and net of reinsurance for the motor third party liability portfolio of Euroins Romania Asigurare-Reasigurare” (the “EIOPA Report”). That report contains EIOPA’s assessment of the valuation of technical provisions gross and net of reinsurance for the motor third party liability (“MTPL”) portfolio of Euroins Romania Asigurare-Reasigurare SA (“Euroins Romania”), an insurance company controlled by Euroins with a direct holding of 98.57% of its shares.

### **I – Background to the dispute**

- 3 The background to the dispute was already set out to a large extent in paragraphs 3-15 of the Decision of the Board of Appeal of 8 June 2023 in relation to suspension requests.<sup>2</sup> It is nevertheless repeated here for ease of reference.
- 4 On 30 January 2023, the Autoritatea de Supraveghere Financiară (the Financial Supervisory Authority, Romania) (“the ASF”) addressed to EIOPA a request for EIOPA’s view on a complex quota share reinsurance treaty which covered Euroins Romania’s MTPL portfolio and on the methodology used by Euroins Romania for the computation of the best estimate of liabilities.
- 5 On 8 February 2023, the Комисия за финансов надзор (Financial Services Commission, Bulgaria) (“the FSC”) informed EIOPA about its concerns regarding the ASF’s supervisory actions in relation to Euroins Romania and proposed an external review of the firm’s technical provisions and reinsurance cover by a recognised independent audit and actuarial firm.
- 6 By letters of 9 and 13 February 2023, EIOPA informed, respectively, the ASF and the FSC, in its capacity as group supervisor, that on the basis of EIOPA’s mandate provided for in the EIOPA Regulation, in particular Article 8(1), point (b) thereof,

<sup>1</sup> Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC (OJ 2010 L 331, pp. 48-83), as most recently amended by Article 2 of Regulation (EU) 2019/2175 (OJ L 334, 27.12.2019, pp. 1-145).

<sup>2</sup> Decision of the Board of Appeal of 8 June 2023, [Euroins v EIOPA \(Interim Measures\)](#), BoA-D-2023-01.

EIOPA would perform an assessment of the aspects described in the ASF's letter with a view to assessing the correct and consistent application of the framework set out in the Solvency II Directive.<sup>3</sup>

- 7 In the meantime, with a request first submitted on 3 February and reiterated on 6 and 14 February, the appellant informed the respondent that it was concerned about the ASF's supervisory actions towards Euroins Romania. Euroins requested an extraordinary supervisory college meeting and proposed an external review of Euroins Romania's economic balance sheet by an internationally recognised team of actuarial and accounting experts.
- 8 By letter of 13 February 2023, EIOPA gave its feedback on Euroins' request. It underlined that, based on the European Union ("EU") legal framework, day-to-day (direct) supervision is the exclusive competence and responsibility of the national supervisory authorities. In the same letter, EIOPA also informed the appellant that an extraordinary supervisory college meeting had taken place on 7 February 2023, aiming at ensuring that cooperation, exchange of information and consultation processes among the members and participants of the college are granted.
- 9 The supervisory college comprised, besides EIOPA, the FSC, the ASF, the Bank of Greece (as the competent supervisory authority in Greece) and the Insurance Supervision Agency of North Macedonia.
- 10 By Decision No 262 of 17 March 2023, the ASF withdrew the operation license of Euroins Romania and having ascertained its insolvency, filed a request for Euroins Romania's bankruptcy.
- 11 According to Euroins, ASF Decision No. 262 was made despite assurances from the FSC that Euroins had ensured its solvency thanks to the reinsurance contract Euroins Romania entered with EIG Re, whose solvency was confirmed by the FSC itself.
- 12 On 28 March 2023, EIOPA produced the EIOPA Report and shared it with the ASF and the FSC, giving its assessment of the valuation of technical provisions gross and net of reinsurance for the motor third party liability portfolio of Euroins Romania.
- 13 The EIOPA Report itself records, in the section entitled "1. Background", at page 8, the following about its genesis:

*"on the basis of EIOPA's mandate provided for in the [EIOPA] Regulation, in particular Article 8(1)(b) thereof, EIOPA decided to perform an own technical*

<sup>3</sup> Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (recast), OJ L 335, 17.12.2009, pp. 1-155, as in force as most recently amended by Regulation (EU) 2019/2177 (on the latter, see below).

*assessment regarding Euroins Romania's technical provisions gross and net of reinsurance, with a view to assess the correct and consistent application of the Solvency II framework and ensure proper protection of policyholders and beneficiaries.”*

14



15 Neither the EIOPA Report, nor the preparatory steps EIOPA took to prepare it, were disclosed to Euroins or Euroins Romania.

16 On 11 April 2023, Euroins Romania challenged the ASF Decision No 262 before the Curtea de Apel București (Court of Appeal, Bucharest, Romania). Euroins and Euroins Romania also filed on the same date and before the same court a request to immediately suspend the effect of the ASF Decision No 262 until the termination of the main proceedings. According to Euroins, they and Euroins Romania first learned about the Report and some of its conclusions from the statement of defence filed by the ASF in the context of the national court proceedings for the suspension of the ASF Decision No 262. According to EIOPA, Euroins had already filed a first request to access the Report on 6 April 2023, based on leaks in the Romanian media that reported confidential information from the Report. This request was, in any event, reiterated on 19 and 20 April 2023. By letters of 20 and 24 April 2023, EIOPA responded to these requests. It informed Euroins that it had performed a technical assessment concerning the valuation of technical provisions gross and net of reinsurance for the MTPL portfolio of Euroins Romania. EIOPA also specified that such an assessment had been provided on a confidential basis to the ASF and the FSC as competent national supervisory authorities. Furthermore, EIOPA pointed out that the Report had been drafted for supervisory purposes and, therefore, Euroins' requests should be addressed to the ASF or the FSC.

17 On 28 April 2023, Euroins requested the FSC to grant it access to the EIOPA Report, which was denied. On 16 May 2023, upon request by the FSC filed on 10 May 2023, EIOPA gave its consent to share the EIOPA Report with Euroins.

## **II – Legal framework**

18 In accordance with Article 60(1) of the EIOPA Regulation, any natural or legal person, including competent authorities, may appeal to the Board of Appeal against a decision of the Authority referred to in Articles 17, 18 and 19 of that Regulation and any other decision taken by the Authority in accordance with the Union acts referred to in Article 1(2), which is addressed to that person, or against a decision which,

although in the form of a decision addressed to another person, is of direct and individual concern to that person.

- 19 Article 8 of the EIOPA Regulation, entitled “Tasks and powers of the Authority”, contains the following provisions:

“1. *The Authority shall have the following tasks:*

*[...]*

*(b) to contribute to the consistent application of legally binding Union acts, in particular by contributing to a common supervisory culture, ensuring consistent, efficient and effective application of the legislative acts referred to in Article 1(2), preventing regulatory arbitrage, fostering and monitoring supervisory independence, mediating and settling disagreements between competent authorities, ensuring effective and consistent supervision of financial institutions, ensuring a coherent functioning of colleges of supervisors, and taking actions, inter alia, in emergency situations;”*

- 20 The Solvency II Directive<sup>4</sup> is one of the Union acts referred to in Article 1(2) of the EIOPA Regulation.

### **III – Procedure and forms of order sought**

- 21 By Notice of Appeal lodged by email on 16 May 2023, Euroins challenged the EIOPA Report. It requested the Board of Appeal to issue a decision ascertaining that:

- 1) EIOPA acted in excess of its regulatory powers insofar as its role and involvement in the initiation, drafting and release of the EIOPA Report were concerned;
- 2) EIOPA infringed Euroins Romania’s rights and acted in an excessive and discriminatory manner, by not requesting Euroins Romania’s position with respect to the findings of the EIOPA Report and by not granting Euroins Romania access to the EIOPA Report itself;

<sup>4</sup> Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (OJ 2009 L 335, pp. 1-155).

- 3) EIOPA infringed the principles of proportionality, independence, objectivity, and transparency by withholding EIOPA Report from Euroins and Euroins Romania; and
  - 4) the EIOPA Report was rendered null and void as of the date of such decision.
- 22 By separate document, lodged on 24 May 2023, Euroins also brought a request for interim measures, in which it requested the Board of Appeal to suspend the application of the EIOPA Report pending the settlement by the Board of Appeal of Euroins' appeal and to order an immediate and interim suspension of the EIOPA Report for a period sufficient to permit full discussion and settlement of the suspension request.
  - 23 On 26 May, the President of the Board of Appeal invited the parties to submit their observations on the requests for suspension and for immediate and interim suspension. On 30 May, the parties complied with that invitation, filing their observations.
  - 24 EIOPA raised a plea of inadmissibility in the context of its observations of 30 May 2023 on the application for interim measures presented by Euroins.
  - 25 Euroins was invited to present its observations on the plea of inadmissibility, which it duly did on 7 June 2023.
  - 26 The Board of Appeal decided on the requests for suspension and for immediate and interim suspension on 8 June 2023, with its decision BoA-D-2023-01.<sup>5</sup>
  - 27 On 29 June 2023, a hearing was held by video link on the admissibility of the appeal. In accordance with the reasoned requests from both parties, the Board of Appeal decided on the basis of Article 18.5 of its Rules of Procedure (as in force<sup>6</sup>) that the hearing would not be public given the commercially sensitive nature of the content of the EIOPA Report. For the purposes of the hearing, the parties were in particular requested to address whether the EIOPA Report constitutes a challengeable act. In that context, they were requested to take a position as regards the relevance, for the purposes of the present case, of the judgment in *VodafoneZiggo Group v Commission*,<sup>7</sup> paragraphs 45-54, and the order in *Inox Mare Srl v Commission*,<sup>8</sup> paragraphs 12-16, and the case-law cited therein.

<sup>5</sup> Decision of the Board of Appeal of 8 June 2023, [Euroins v EIOPA \(Interim Measures\)](#), BoA-D-2023-01.

<sup>6</sup> BoA 2020 01.

<sup>7</sup> Judgment of 25 February 2021, [VodafoneZiggo Group v Commission](#), C-689/19 P, EU:C:2021:142.

<sup>8</sup> Order of 21 June 2017, [Inox Mare Srl v Commission](#), T-289/16, EU:T:2017:414.

## IV – Legal Argument

### *Arguments of the parties*

#### EIOPA

- 28 EIOPA contests the admissibility of the Appeal on three bases. First, it argues that the EIOPA Report does not constitute a challengeable act. Secondly, it considers that the EIOPA Report was not adopted under EIOPA's decision-making powers, and thus falls outside the jurisdiction of the Board of Appeal. Thirdly, it challenges the standing of Euroins, which it considers lacking both direct and individual concern.
- 29 As to the first point, EIOPA notes that the EIOPA Report is a quantitative analysis concerning the technical provisions and reinsurance recoverables for the MTPL line of business of Euroins Romania and does not make or suggest any decision or provide any guidance or recommendation of any kind.
- 30 Hence, EIOPA points out that its Report is merely a preparatory act which sheds light on the correct and consistent application of the Solvency II framework and provides an independent assessment to the ASF and the FSC as they explicitly requested from EIOPA. Therefore, an internal, preparatory act without immediate legal effects *vis-à-vis* the Appellant such as the EIOPA Report cannot be interpreted in any way as a challengeable decision.
- 31 EIOPA also recollects that it has no direct supervisory powers over financial institutions, and that the day-to-day supervision is the exclusive competence and responsibility of the national supervisory authorities. Therefore, in EIOPA's view, the EIOPA Report had no effect on the ASF's supervisory actions, including its withdrawal of Euroins Romania's authorisation since that decision was taken before the EIOPA Report was finalised and shared with the ASF.
- 32 As to the second point, EIOPA stresses that, for a decision to be appealed under Article 60 of the EIOPA Regulation, it must either be a decision referred to in Article 17 (Breach of Union law), 18 (Action in emergency situations), or 19 (Settlement of disagreements) of the same Regulation, or be a decision taken in accordance with Union acts referred to in article 1(2). EIOPA also recalls that, under the relevant case law, the scope of Article 60 must be construed narrowly. EIOPA notes, in this regard, that it did not adopt any decision under Articles 17-19 of the EIOPA Regulation, nor under any other provision of that Regulation.
- 33 As to Articles 17-19 of the EIOPA Regulation, EIOPA recalls that the EIOPA Report concerned EIOPA's assessment of the valuation of technical provisions gross and net of reinsurance for the MTPL portfolio of Euroins Romania. It was issued on the basis of EIOPA's mandate provided for in the EIOPA Regulation, in particular Article 8(1),



point (b), with a view to assessing the correct and consistent application of the Solvency II framework.

- 34 As to Union acts referred to in Article 1(2) of the EIOPA Regulation, EIOPA argues that the EIOPA Report was prepared by EIOPA on its own initiative taking into account the requests of the ASF and the FSC and the complaints of Euroins. The EIOPA Report is therefore without prejudice to the ASF's competence for the direct supervision of Euroins. Therefore, according to EIOPA, the Report cannot be considered as the outcome of a decision-making procedure provided for EIOPA in one of the acts referred to in Article 1(2) of the EIOPA Regulation.
- 35 As to the third point, EIOPA recalls that, pursuant to Article 60 of the EIOPA Regulation, only the direct addressee or the persons which are directly and individually concerned by a decision may submit an appeal, and that the established case-law interprets these criteria narrowly. EIOPA also notes that a natural or legal person is individually concerned by an act which is not addressed to that person only if that act affects that person by reason of certain attributes which are peculiar to that person or by reason of circumstances in which that person is differentiated from all other persons and by virtue of those factors distinguishes that person individually just as in the case of the person addressed.

#### Euroins

- 36 Euroins firstly argues that EIOPA exceeded its powers in issuing the EIOPA Report. It notes that EIOPA agreed to prepare the report at a time when the Balance Sheet Review of the Romanian insurance sector had already been completed. Euroins considers that EIOPA, by acceding to ASF's request and preparing the EIOPA Report, in effect interfered in and jointly assumed the supervisory competence vested in the ASF, when it had no power to do so. Euroins moreover surmises, in particular from the fact that EIOPA continued compiling its Report after ASF had already withdrawn Euroins' licence, and moreover authorised ASF to share its report for the purposes of court proceedings, that EIOPA did not act in a neutral and impartial way when preparing its report.
- 37 In more detail, Euroins grounds its claim that EIOPA did not act in a neutral and impartial way on a comparative analysis of EIOPA's conduct *vis-à-vis* the three entities that engaged it on the EIOPA Report: (i) the ASF, which requested EIOPA "to join actions" to "*ensure an adequate response*" against Euroins Romania for the benefit of ASF; (ii) the FSC, which expressed concerns regarding the ASF's supervisory actions in relation to Euroins Romania and requested an external review of the firm's technical provisions and reinsurance cover by a recognised independent audit and actuarial firm; and (iii) Euroins and Euroins Romania, which expressed concerns on the action of ASF and requested an independent assessment of Euroins Romania's financial data.

- 38 Euroins asserts that a comparison among the three different requests demonstrates EIOPA's lack of neutrality and impartiality as EIOPA decided to accede only to ASF's request, while ignoring the requests of the FSC and Euroins, and because EIOPA did not make any specific request for information to Euroins.
- 39 From this, Euroins deduces that EIOPA intended the EIOPA Report to produce effects towards Euroins Romania: seeing that the EIOPA Report was issued after the withdrawal of Euroins Romania's licence, and after ASF filed for bankruptcy of Euroins Romania, the only purpose of the Report could have been to support ASF's position in court. In this regard, Euroins highlights that on 4 April 2023, EIOPA sent a letter to the ASF whereby it explicitly permitted ASF to disclose the EIOPA Report to the national Romanian courts in the proceedings involving the challenge against the license withdrawal decision and the bankruptcy procedure, while still not disclosing this EIOPA Report to the company under investigation.
- 40 Secondly, Euroins contends that, for the purposes of Article 60 of the EIOPA Regulation, the EIOPA Report is a decision taken in accordance with the Union acts referred to in Article 1(2) of that Regulation which, although addressed to another person, is of direct and individual concern to Euroins. It points out that the EIOPA Report itself states that it is prepared on the basis of the mandate provided for in the EIOPA Regulation, in particular Article 8(1), point (b) thereof, which in turn refers to the aim of ensuring consistent, efficient and effective application of the acts referred to in Article 1(2) of the EIOPA Regulation – in this instance the Solvency II Directive, which is one of those acts.
- 41 To the extent that EIOPA argues that the EIOPA Report does not constitute a decision under any of the acts referred to in Article 1(2) of the EIOPA Regulation, Euroins submits that this is at odds with EIOPA's own position that the EIOPA Report was issued in view of ensuring consistent and effective application of the Solvency II Directive, which is one of the acts referred to in Article 1(2) of the EIOPA Regulation.
- 42 The fact that EIOPA does not identify the precise provision of the Solvency II Directive on the basis of which the EIOPA Report was based on should not permit it to argue that the report in fact does not constitute a decision under the Solvency II Directive. Euroins acknowledges that at first glance the EIOPA Report, on the basis of its very denomination ("report"), does not appear to qualify as one of the "decisions" referred to in Articles 17-19 of the EIOPA Regulation, but it argues that the EIOPA Report constitutes as a matter of fact a decision taken by the EIOPA in accordance with the Union acts referred to in Article 1(2) of the EIOPA Regulation. Therefore, Euroins highlights that the EIOPA Report satisfies the requirement for an act of the European Supervisory Authorities (the "ESAs"), including the EIOPA, to

be subject to appeal according to the interpretation of the General Court in *SV Capital v. EBA*.<sup>9</sup>

- 43 According to Euroins, EIOPA's general claim that the EIOPA Report was issued to foster the correct and consistent application of the Solvency II framework should lead to conclude that, had EIOPA analysed whether ASF had correctly and consistently applied the Solvency II Directive, such an assessment would fall under the provision of Article 17 of the EIOPA Regulation, in which case EIOPA would be bound to issue a decision under that provision.
- 44 Euroins also states that the appeal is admissible because the EIOPA Report is to be regarded as a decision under Article 60(1) of the EIOPA Regulation, interpreted in light of the original intention of the legislator and of recital (58) of the EIOPA Regulation. Euroins stresses that Article 60(1) does not distinguish between assessments carried out by EIOPA in respect of a specific insurance undertaking (as is the case with the EIOPA Report), sanction decisions or regulatory standards. Therefore, in line with the spirit of that recital (58), the EIOPA Report should be subject to review of the Board of Appeal.
- 45 Euroins furthermore takes issue with EIOPA's contention that the EIOPA Report constitutes an internal and preparatory act without immediate legal effects. Euroins argues that a "preparatory act" is an act within a procedure which must be closed by the adoption of a "final decision". Stressing that the EIOPA Report was not issued in the context of any ongoing procedure, Euroins submits that the report cannot be preparatory only – as there is nothing which it is in preparation of. Euroins distinguishes the decision of the Board of Appeal in *Creditreform v EBA*, cited by EIOPA, on the basis that the act in issue in that case was explicitly a proposal for a draft implementing regulation.<sup>10</sup>
- 46 Similarly, Euroins also contests EIOPA's statement that the EIOPA Report is an internal document. In Euroins' view, an internal act is an act pertaining solely to the internal use of an institution, it is created and stored within such institution and is used to support the processes within the said institution. However, EIOPA itself has approved disclosure of the EIOPA Report to all relevant Romanian courts.
- 47 Finally, Euroins contests EIOPA's submission that the EIOPA Report had no immediate legal effects *vis-à-vis* Euroins Romania. First, it argues that the circumstances in which the report was prepared clearly indicate that it was intended to produce effects towards Euroins Romania by aiding ASF to adopt measures towards Euroins Romania. Secondly, it argues that the EIOPA Report in fact produced

<sup>9</sup> Judgment of 9 September 2015, [SV Capital v EBA](#), T-660/14, EU:T:2015:608.

<sup>10</sup> Decision BoA-2019-D-05, [Creditreform Rating AG v EBA](#), paragraph 60.

effects towards Euroins Romania by virtue of its disclosure in court proceedings, and this irrespective of the precise evidentiary value attributed to that report.

- 48 In more detail, amongst the effects the Report produced, Euroins mentions the rejection by the Bucharest Court of Appeal of the request to suspend the FSA Decision No 262. While that Court decided not to accept the EIOPA Report as evidence in the proceeding concerning the suspension request, Euroins believes that the EIOPA Report must have also had an inherent influence on the Court, also because the conclusions of the EIOPA Report leaked to the media. Therefore, Euroins believes that the consequences of the EIOPA Report towards Euroins itself and Euroins Romania are not of non-legal, purely economic or practical nature, but legally affect the activity of the insurer.
- 49 Euroins submits that the principle of proportionality would be infringed if it were possible to interpret the EIOPA Regulation as permitting to adopt types of decisions which are not capable of challenge in front of the Board of Appeal even though these types of decisions directly affect the rights of an undertaking. According to Euroins, these types of decisions would be a creation of EIOPA. Such a creation would run counter to the proportionality principle, as those decisions would neither be within the explicit scope of Articles 17, 18 and 19 of the Regulation, which are subject to appeal, nor belong to the category of preparatory acts, which are not.
- 50 In as far as the direct and individual concern of Euroins is questioned by EIOPA, Euroins submits that the *Plaumann* test<sup>11</sup> is satisfied. In particular, the appellant recalls that, in the case law of the Court of Justice of the European Union, a decision is of “direct and individual concern” to a claimant when two conditions are cumulatively met: first, the contested measure must directly affect the legal situation of the individual and, secondly, it must leave no discretion to its addressees who are entrusted with the task of implementing it. Furthermore, the same case law considers that a decision directly affects the legal situation of the individual when such a decision produces binding legal effects which are such as to affect the interests of the applicant, thereby distinctly altering his legal position. The appellant notices that the EIOPA Report fulfils these requirements.
- 51 Finally, Euroins stresses that the *Plaumann* test is satisfied by Euroins itself because of its position as controlling shareholder of Euroins Romania, because only Euroins holds this position – as opposed to any other third person – and this distinguishes it from any other person who could hold a controlling stake in Euroins Romania.

<sup>11</sup> According to this test, enunciated by the Court of Justice in its judgment of 15 July 1963, *Plaumann v Commission* (25/62, EU:C:1963:17, p. 107), persons other than those to whom a decision is addressed may claim to be individually concerned only if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and, by virtue of those factors, distinguishes them individually just as in the case of the person addressed.

### *Findings of the Board of Appeal*

- 52 Admissibility is a matter of public policy which the Board of Appeal should consider, of its own motion if necessary, before proceeding to rule on the substance of an appeal.<sup>12</sup> Furthermore, Article 60(4) of the EIOPA Regulation explicitly provides that the Board of Appeal is to examine whether an appeal is well-founded only if the appeal is first found admissible.
- 53 Article 60(1) of the EIOPA Regulation provides that some specific categories of decisions of EIOPA may be challenged in front of the Board of Appeal. Specifically, Article 60(1) limits the scope for challenges to the decisions referred to in Articles 17-19 of the EIOPA Regulation and to any other decision taken by EIOPA in accordance with the Union acts referred to in Article 1(2) of the EIOPA Regulation.
- 54 The notion of “decision” in Article 60(1) is not further defined in the EIOPA Regulation, but in EU law that notion implies binding effects, as notably attested by Article 288 of the Treaty on the Functioning of the European Union (“TFEU”), which states that a decision “*shall be binding in its entirety*”. While it is the substance of the act, rather than its formal description as a “decision”, which matters, an act must be intended to have binding legal effects in order to be capable of forming the object of an action for annulment.<sup>13</sup>
- 55 In addition, as regards actions brought by non-privileged applicants,<sup>14</sup> the applicant also has to demonstrate that it has an interest in bringing proceedings in the sense that the binding legal effects of the challenged act are capable of affecting the interests of the applicant by bringing about a distinct change in its legal position.<sup>15</sup>
- 56 In order to determine whether an act produces binding legal effects, it is necessary, in accordance with the settled case-law of the Court of Justice, to examine the substance of that act and to assess its effects on the basis of objective criteria, such as the act’s content, taking into account, as appropriate, the context in which it was adopted and the powers of the EU institution, body, office or agency which adopted it.<sup>16</sup>

<sup>12</sup> Judgment of 6 October 2020, [Bank Refah Kargaran v Council](#), C-134/19 P, EU:C:2020:793, paragraph 25.

<sup>13</sup> Judgments of 20 November 2018, [Commission v Council](#) (Antarctic MPAs), C-626/15 and C-659/16, EU:C:2018:925, paragraph 59, and of 15 July 2021, [FBF v ACPR](#), C-911/19, EU:C:2021:599, paragraphs 36-37 and case-law cited.

<sup>14</sup> Judgment of 13 October 2011, [Deutsche Post and Germany v Commission](#), C-463/10 P and C-475/10 P, EU:C:2011:656, paragraph 36.

<sup>15</sup> Judgments of 11 November 1981, [IBM v Commission](#), 60/81, EU:C:1981:264, paragraph 9, and of 18 November 2010, [NDSHT v Commission](#), C-322/09 P, EU:C:2010:701, paragraph 45, and the case-law cited.

<sup>16</sup> Judgments of 13 February 2014, [Hungary v Commission](#), C-31/13 P, EU:C:2014:70, paragraph 55; and of 15 July 2021, [FBF v ACPR](#), C-911/19, EU:C:2021:599, paragraph 38, and the case-law cited.

- 57 As regards, in the first place, the content of the EIOPA Report, this is a technical report, making a number of factual findings and estimates. The central conclusions of the EIOPA Report concern the valuation of the gross technical provisions and the valuation of the reinsurance recoverable recognised by Euroins Romania. [REDACTED]
- 58 The EIOPA Report does not make any recommendations as regards actions to be taken and presents the findings as the “assessment” of EIOPA without purporting to be conclusive or definitive. Moreover, it specifies that it “*shall be read without prejudice to the ASF’s competence for the supervision of Euroins Romania*”.<sup>18</sup> Nothing in the EIOPA Report thus suggests that it is to be binding on national authorities, or indeed anyone.
- 59 As regards, in the second place, the context of the EIOPA Report and the powers of its author, namely EIOPA, it should be recalled that, the Report was adopted by EIOPA in accordance with the mandate conferred on it by the EU legislature in Article 8(1), point (b) of the EIOPA Regulation, which tasks EIOPA with contributing “*to the consistent application of legally binding Union acts, in particular by contributing to a common supervisory culture, ensuring consistent, efficient and effective application of the legislative acts referred to in Article 1(2) [...], mediating and settling disagreements between competent authorities, ensuring effective and consistent supervision of financial institutions*”. There is no indication that EIOPA disposes of any powers to adopt binding acts or to otherwise constrain the actions of national authorities when acting under that provision.
- 60 Conversely, the power and duty to grant and withdraw authorisations to insurance undertakings rests, by virtue of, respectively, Articles 14 and 144 of the Solvency II Directive, with the supervisory authorities of the home Member State. Recital (24) of the Solvency II Directive recalls this principle by stating that the authorities of the home Member State should be responsible for monitoring the financial health of insurance (and reinsurance) undertakings – and thus not EIOPA. EIOPA itself does not have any supervisory competence *vis-à-vis* undertakings and does not have the power to adopt binding acts in relation to them.
- 61 EIOPA has further pointed out that Articles 112(3a) and 231(1) of the Solvency II Directive expressly provide for the possibility of EIOPA providing “technical assistance” pursuant to Article 8(1), point (b), of the EIOPA Regulation to (national) supervisory authorities. Those provisions concern applications for approval of full or partial internal models for the calculation of the Solvency Capital Requirement. It is

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<sup>18</sup> Page 7/67 of the EIOPA Report.

in the context of these applications that EIOPA is expressly empowered to provide technical assistance if one of the supervisory authorities concerned so requests. This possibility was inserted into the Solvency II Directive with effect of 30 December 2019 by Directive 2019/2177<sup>19</sup> in order, as stated in recital (7) of the latter, to “*enhance the convergent application of Union law in cases of cross-border insurance activity, especially at an early stage*”. There is no indication that the views expressed by EIOPA in providing this technical assistance would be binding on the requesting supervisory authority, or anyone else. Therefore, not even in a specific case where EIOPA is entrusted with the power to provide technical assistance by an express provision can the law be interpreted as having a binding effect on the acts EIOPA takes in that context. The same applies for a technical assistance of the kind at stake in the present dispute.

- 62 Additionally, concerning the specific context of the EIOPA Report, it is relevant to note that the Report was prepared at the express request of the ASF. In those circumstances, the ASF was, in accordance with the principle of sincere cooperation enunciated in Article 4(3) of the Treaty on European Union (“TEU”) and recalled in Article 2(4) of the EIOPA Regulation, in principle required to take into account the findings of the EIOPA Report. The Board of Appeal in this context notes that the ASF chose to withdraw the operating license of Euroins Romania already on 17 March 2023, and thus nine days before the adoption of the EIOPA Report which the ASF had itself requested. Without it being necessary to explore why the ASF decided to proceed in this way, the fact remains that this temporal sequence of events underlines the fact that the ASF did not consider itself bound by the EIOPA Report.
- 63 The Board of Appeal agrees with Euroins’ argument to the extent that the EIOPA Report was bound to have an effect on national authorities and on national courts in front of which it was disclosed by the ASF with EIOPA’s express authorisation. However, while the EIOPA Report was likely (and clearly intended) to be taken into account in the relevant court proceedings, the fundamental point remains that it was not, and could not have been, legally binding on those courts.
- 64 The Court of Justice has already held that even acts that national authorities were, in carrying out their duties, required to “*take the utmost account of*” by virtue of obligations imposed by EU law, did not entail sufficiently binding legal effects to amount to challengeable acts.<sup>20</sup> The fact that the national courts were bound to take the acts in question into consideration in order to decide disputes submitted to them did not make those acts challengeable.<sup>21</sup>

<sup>19</sup> Directive 2019/2177 of the European Parliament and of the Council of 18 December 2019, OJ L 334, 27.12.2019, pp. 155-163.

<sup>20</sup> Judgment of 25 February 2021, [VodafoneZiggo Group v Commission](#), C-689/19 P, EU:C:2021:142, paragraphs 37 and 53.

<sup>21</sup> *Ibid.*, paragraph 54.

- 65 Moreover, it is apparent from the case-law of the General Court in relation to investigations by the EU's Anti-Fraud Office ("OLAF") that a report which OLAF draws up on the conclusion of its external and internal investigations does not bring about a distinct change in the legal position of the persons who are referred to in it by name, and that the final nature of an OLAF report for the purposes of the procedure governing investigations which that office carries out also does not confer on it the nature of an act having binding legal effects.<sup>22</sup>
- 66 The General Court reached that conclusion having regard to the fact that the findings of OLAF set out in a final report cannot lead automatically to the initiation of judicial or disciplinary proceedings, since the competent authorities are free to decide what action to take and are accordingly the only authorities which have the power to adopt decisions capable of affecting the legal position of those persons in relation to which the report recommended that such proceedings be instigated. While OLAF may, in its report, recommend the adoption of measures having binding legal effects that adversely affect the persons concerned, the opinion which it provides in that regard imposes no obligation, even of a procedural nature, on the authorities to which it is addressed. Likewise, according to the case-law, the forwarding of information by OLAF to the national authorities cannot be regarded as an act adversely affecting the person concerned, since it does not bring about a distinct change in that person's legal position given that the national judicial authorities remain free, within the limits of their own powers, to assess the content and full significance of that information and, therefore, to decide what action should be taken upon it. Consequently, the possible initiation of legal proceedings following the forwarding of information by OLAF, and the subsequent legal acts, are the sole and entire responsibility of the national authorities.<sup>23</sup>
- 67 In a similar vein, the General Court has found that, in the context of a recovery procedure following a financial audit, the audit report is not a challengeable act. An audit report merely takes note of the existence of possible pre-existing irregularities and the debts which arise from them; and thus, it does not modify the legal position of the debtor. Therefore, when adopting a set-off decision definitively laying down its position, the conclusions drawn in an audit report may be relied upon only to the extent that the decision-making body itself regards those conclusions as correct and justified.<sup>24</sup>
- 68 The Board of Appeal considers that similar considerations are also applicable to the EIOPA Report at issue in the present case. While it could indeed have been expected

<sup>22</sup> Order of 21 June 2017, *Inox Mare Srl v Commission*, T-289/16, EU:T:2017:414, paragraph 14, and the case-law cited. See also Judgment of 21 December 2022, *Vialto Consulting Kft. v Commission*, T-537/18, EU:T:2022:852, paragraph 56, currently under appeal in Case C-130/23 P.

<sup>23</sup> Order of 21 June 2017, *Inox Mare Srl v Commission*, T-289/16, EU:T:2017:414, paragraphs 15-16, and the case-law cited

<sup>24</sup> Judgment of 3 July 2018, *Transtec v Commission*, T-616/15, EU:T:2018:399, paragraphs 131-132.



that this Report would be taken into account by the national authorities to whom it was addressed, as well as the courts in front of which it was authorised to be produced, it did not affect the legal position of Euroins and could therefore not have any binding legal effects.

- 69 In the light of those considerations, it must be concluded that the EIOPA Report does not constitute a challengeable act for the purposes of Article 60 of the EIOPA Regulation.
- 70 That conclusion is not called into question by the arguments put forward by Euroins invoking its right to an effective remedy as enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and which has also been reaffirmed by Article 47 of the Charter of fundamental rights.<sup>25</sup>
- 71 While an action for annulment may not lie against acts which do not have any binding legal effects, a challenge to the EIOPA Report could be put forward in the context of a challenge against any acts of national authorities or court decisions adopted on the basis that report.
- 72 The national courts would then be able to make a reference for a preliminary ruling to the Court of Justice pursuant to Article 267 TFEU.<sup>26</sup> It must be noted, in this regard, that the whole system of remedies contributes to ensuring the protection of rights in the EU legal framework so that the inadmissibility of an appeal before the Board of Appeal does not, as such, deprive the applicants of other legal remedies. The Court of Justice has held in the context of a reference for a preliminary ruling in the *FBF v ACPR* case that the exercise of powers conferred on the ESAs by their respective founding Regulations must be amenable to stringent judicial review in the light of the objective criteria imposed by the EU legislature in precisely delineating those powers, and this irrespective of whether the acts in question produce any binding legal effects.<sup>27</sup>
- 73 Whether EIOPA has taken a course of action based on specific provisions of a legislative act referred to in Article 1(2) of the EIOPA Regulation (such as the Solvency II Directive), does not constitute by itself a sufficient reason for this action to be considered as a decision that can be subject to the Board of Appeal's review

<sup>25</sup> Charter of fundamental rights of the European Union, OJ 2000 C 364, p. 1) OJ C 326, 26.10.2012, p. 391–407.

<sup>26</sup> Judgment of 15 July 2021, [FBF v ACPR](#), C-911/19, EU:C:2021:599, paragraphs 53-54 (with reference to further jurisprudence).

<sup>27</sup> See, by analogy, concerning the European Banking Authority (EBA), the judgment of 15 July 2021, [FBF v ACPR](#), C-911/19, EU:C:2021:599, paragraphs 67-68.

pursuant to Article 60(1) of the EIOPA Regulation: it would be necessary for this decision to be legally binding.

- 74 Whether such course of action has a (negative) impact on the natural and legal person bringing an appeal against it, does not constitute a sufficient reason for this action to be considered a legally binding decision in the meaning of Article 60(1).
- 75 An incidental effect of that limitation on the Board of Appeal’s jurisdiction is that it is only “decisions” within the meaning of Article 60(1) of the EIOPA Regulation (as well as the other two ESA’s Regulations) which is, within the complete system of legal remedies created by EU law, subject to a full review of underlying complex technical and economic assessments.<sup>28</sup> Review of non-binding acts by the EU judicature is, by contrast, limited to examining whether the exercise of the broad discretion in the assessment of complex scientific, technical and economic facts available to the EIOPA (and the other two ESAs) has been vitiated by a manifest error of appraisal or a misuse of powers.<sup>29</sup>
- 76 In the light of these considerations, the appeal must be dismissed as inadmissible, without it being necessary to address the two other grounds of inadmissibility raised by EIOPA.

## **V – Decision**

**On these grounds, the Board of Appeal unanimously decides to dismiss as inadmissible the action for annulment brought by Euroins Insurance Group AD against EIOPA’s Report SA (EIOPA-23-149) of 28 March 2023, entitled “EIOPA’s assessment of the valuation of technical provisions gross and net of reinsurance for the motor third party liability portfolio of Euroins Romania Asigurare-Reasigurare”.**

<sup>28</sup> Judgment of 9 March 2023, [ACER v Aquind](#), C-46/21 P, EU:C: 2023:182, paragraph 72.

<sup>29</sup> *Ibid.*, paragraph 18.

The original of this Decision is signed by the Members of the Board of Appeal in electronic format and countersigned by hand by the Secretariat.

Michele Siri (President, Co-Rapporteur)  
(SIGNED)

Christos Gortsos (Vice President)  
(SIGNED)

Gerben Everts  
(SIGNED)

Geneviève Helleringer  
(SIGNED)

Margarida Lima Rego  
(SIGNED)

Carsten Zatschler (Co-Rapporteur)  
(SIGNED)

On behalf of the Board of Appeal Secretariat

Adrien Rorive  
(SIGNED)

A signed copy of the decision is held by the Secretariat