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Judgment in Case E-10/23 X v *Finanzmarktaufsicht*

PROFESSIONAL SECRECY UNDER ARTICLE 53 OF DIRECTIVE 2013/36/EU

In a judgment delivered today, the Court answered questions referred to it by the Board of Appeals of the Financial Market Authority (*Beschwerdekommision der Finanzmarktaufsicht*) concerning the interpretation of Article 53 of Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms (“the Directive”).

X was the majority shareholder and chair of the board of directors of a bank established in Liechtenstein. In 2022, X proposed to acquire a qualifying holding in a bank established in Luxembourg. X was notified by his lawyers that the Luxembourg Financial Sector Supervisory Commission (*Commission de Surveillance du Secteur Financier*) had expressed an unambiguously negative view of the planned transaction after having exchanged information with the Liechtenstein Financial Market Authority (*Finanzmarktaufsicht* “FMA”). X alleges that the negative information provided led his counterparty to step back from the transaction. The FMA later rejected some of X’s requests concerning access to the information exchanges. In a request for an advisory opinion, the Appeals Board submitted five questions.

By its first two questions, the referring body essentially asked whether the Court has jurisdiction to give an advisory opinion on the interpretation of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (“SCA”). The referring body further asked whether Article 34 SCA must be interpreted as meaning that a request for an advisory opinion is permitted where the same legal question has, in an earlier set of proceedings in the same procedure, already been answered, in accordance with national procedural law, by a higher-ranking court with binding effect. Both questions were answered in the affirmative.

By its third to fifth questions, the referring body essentially sought guidance on the interpretation of Article 53 of the Directive. The Court held that the Directive must be interpreted as meaning that all information held by the competent authorities (i) which is not public and (ii) the disclosure of which is likely to affect adversely the interests of the natural or legal person who provided that information or of third parties, or the proper functioning of the system for monitoring the activities of credit institutions and investment firms, is to be classified as confidential information that is covered by the obligation of professional secrecy. Article 53 lists exhaustively the specific cases where, exceptionally, that general prohibition does not preclude their communication or use. The protection of the confidentiality of the information covered by the obligation of professional secrecy must, however, be guaranteed and implemented in such a way as to reconcile it with general principles of EEA law, including the principle of effective judicial protection, the rights of defence and the protection against arbitrary or disproportionate intervention by public authorities in the sphere of private activities.

The full text of the judgment may be found on the Court’s website: www.eftacourt.int.

This press release is an unofficial document and is not binding upon the Court.