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Judgment in Joined Cases E-26/15 and E-27/15 *Criminal Proceedings against B* and *B* v *Finanzmarktaufsicht*

THE APPLICATION BY HOST EEA STATES OF THEIR NATIONAL LEGISLATION CONCERNING MONEY LAUNDERING AND TERRORIST FINANCING TO THOSE WHO OPERATE IN THEIR TERRITORY UNDER THE FREEDOM TO PROVIDE SERVICES

In a judgment delivered today, the Court answered the questions referred to it by the Princely Court of Appeal of the Principality of Liechtenstein (*Fürstliches Obergericht*) ("the referring court") and the Appeals Board of the Financial Market Authority (*Beschwerdekommission der Finanzmarktaufsicht*) ("the Appeals Board), in cases pending before them concerning the interpretation of Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing ("the Directive").

Mr B ("the defendant") is an Austrian national who lives in the United Kingdom. He acts as a director for three companies, which are A Ltd and B Ltd, both registered in the United Kingdom, and CA Inc., registered in the British Virgin Islands. The defendant acts as the sole director, on behalf of third parties, in relation to all the companies in return for remuneration. The defendant carried out individual administrative activities on behalf of these three companies in Liechtenstein.

In Case E-26/15, following an appeal by the defendant, the referring court has to review a judgment by the Princely Court of Justice (*Fürstliches Landgericht*) handed down on 13 July 2015. In that judgment, the defendant was convicted pursuant to Article 30(1)(a) of the Law of 11 December 2008 on professional due diligence to combat money laundering, organised crime and terrorist financing (*Sorgfaltspflichtgesetz, LR 952.1*) ("SPG") and sentenced to a suspended fine. That court found that the defendant had failed wilfully to identify and verify the identity of the contracting party and to carry out afresh such identification and verification in Liechtenstein, in particular in relation to the three companies.

In Case E-27/15, the defendant has brought a complaint to the Appeals Board challenging the Financial Market Authority's (*Finanzmarktaufsicht*) order of 31 July 2015. Pursuant to the contested order the defendant was found guilty of an administrative offence under Article 31(1)(e) of the SPG and ordered to pay a fine. According to that order, the defendant, as a person under an obligation to carry out due diligence measures in relation to the business relationships with the three companies concerned, had failed in the period 1 February 2013 until at least 14 February 2014 in a total of three separate cases to compile the profile of the business relationship as required under Article 8 of the SPG.

In answering whether the national legislation of a host EEA State may be applied in such manner to service providers in the position of the defendant, the Court held that the Directive must be interpreted as not precluding a host EEA State from making a trust and company service provider operating in its territory under the freedom to provide services subject to due diligence requirements laid down in its national legislation. However, in so far as such legislation gives rise to difficulties and additional costs for activities carried out under the rules governing the freedom to provide services and is liable to be

additional to the controls already conducted in the home EEA State of the trust and company service provider, thus dissuading the latter from carrying out such activities, it constitutes a restriction on the freedom to provide services. Article 36 of the Agreement on the European Economic Area must be interpreted as not precluding such legislation provided that it is applied in a non-discriminatory manner, justified by the objective of combating money laundering and terrorist financing, suitable for securing the attainment of that aim and does not go beyond what is necessary in order to attain it. In particular, for national supervisory measures of the host EEA State to be considered proportionate, there should be no general presumption of fraud, leading to full, systematic checks of all those who are established in other EEA States and provide services on a temporary basis in the host EEA State. Furthermore, the host EEA State must, when requesting information, such as documents, located in the EEA State of establishment, grant the service provider a reasonable period of time to provide that information, e.g. by handing over copies of documents. In this regard, the appropriate length of the notice will depend on the volume of documents requested and the medium on which they are stored.

The Court added that these findings do not differ where the company to which administrative services are provided is not incorporated in an EEA State.

The full text of the judgment may be found on the Internet at: www.eftacourt.int.