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Judgment in Case E-2/23 *A Ltd v the Financial Market Authority (Finanzmarktaufsicht)*

APPRAISAL OF THE SUITABILITY OF A PROPOSED ACQUIRER OF AN INSURANCE OR REINSURANCE UNDERTAKING

In a judgment delivered today, the Court answered questions referred to it by the Board of Appeal of the Financial Market Authority (*Beschwerdekommission der Finanzmarktaufsicht*) concerning the interpretation of 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) ("the Directive") and 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 ("EIOPA")) ("the Regulation").

The main proceedings concern an appeal by A Ltd of a decision by the Financial Market Authority ("the FMA"), in which the FMA opposed the proposed acquisition by A Ltd of all the shares in Z AG, a joint-stock company established under Liechtenstein law licensed to operate life insurance business. In particular, the FMA had serious concerns as to whether Z AG would be able to comply and continue to comply with the relevant prudential requirements with Ms C, the ultimate shareholder of A Ltd, indirectly as sole shareholder.

The referring body's first and second questions concerned the interpretation of the criteria set out in points (a) and (c) of Article 59(1) of the Directive, which are relevant to the assessment of a notification of a proposed acquisition. As regards point (a) of Article 59(1), the Court found that the term "reputation" of the proposed acquirer must be interpreted as referring to both the integrity and professional competence of a proposed acquirer. The Court further held that Article 59(1) of the Directive must be interpreted as not precluding a national supervisory authority from taking into account in its assessment with regard to the criterion laid down in point (c), any necessary supply of funds by a proposed acquirer to an insurance undertaking through a bank guarantee or the making available of funds on a trust account, which may be drawn on by the insurance undertaking at any time.

By its third question, the referring body asked how the words "reasonable grounds" in Article 59(2) of the Directive must be interpreted. Having regard to the structure, context and legislative history of that provision, the Court held that the term "reasonable grounds" must be interpreted as not requiring certainty of non-compliance with the criteria set out in Article 59(1).

Furthermore, the referring body sought guidance on whether a declaration by a competent authority, pursuant to Article 16(3) of the Regulation, to make every effort to comply with guidelines has binding effect on the courts of an EEA State so that they are also obliged to make every effort to comply with such guidelines. The Court held that the joint guidelines issued by EIOPA, at issue in the main proceedings, are not a legal act that has been incorporated into the EEA Agreement and, as such, are not binding upon the Contracting Parties. Accordingly, the Court held that declarations pursuant to Article 16(3) of the Regulation do

not have binding effect on the courts of an EEA State. However, it is for the courts of an EEA State to take such guidelines into consideration in order to resolve the disputes submitted to them, in particular when those guidelines are intended to supplement binding provisions of EEA law.

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

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