



E-10/20-18

## REPORT FOR THE HEARING

in Case E-10/20

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by the Appeals Board of the Financial Market Authority (*Beschwerdekommision der Finanzmarktaufsicht*), in the case between

**ADCADA Immobilien AG PCC in Konkurs**

and

**the Financial Market Authority (*Finanzmarktaufsicht*),**

concerning the interpretation of Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC, and in particular point (b) of Article 1(4) and Article 2(d) thereof.

### **I Introduction**

1. By letter of 29 July 2020, registered at the Court on 5 August 2020, the Appeals Board of the Financial Market Authority (*Beschwerdekommision der Finanzmarktaufsicht*) (“the Appeals Board”) requested an Advisory Opinion in the case pending before it between ADCADA Immobilien AG PCC in Konkurs (“ADCADA”) and the Financial Market Authority (*Finanzmarktaufsicht*) (“the FMA”).

2. The case before the Appeals Board concerns an appeal brought by ADCADA against a decision of the FMA of 3 June 2020 to prohibit the offer to the public of a bond issued by ADCADA in Liechtenstein and to make public the prohibition of the offer to the public and the absence of a prospectus for the offer (“the contested decision”).

## II Legal background

### *EEA law*

3. Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC (OJ 2017 L 168, p. 12) (“the Regulation”) was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 84/2019 of 29 March 2019 (OJ 2019 L 235, p. 5), and is referred to at point 29bd of Annex IX (Financial Services) to the EEA Agreement.

4. Recital 3 of the Regulation reads:

*Disclosure of information in cases of offers of securities to the public or admission of securities to trading on a regulated market is vital to protect investors by removing asymmetries of information between them and issuers. Harmonising such disclosure allows for the establishment of a cross-border passport mechanism which facilitates the effective functioning of the internal market in a wide variety of securities.*

5. Recital 7 of the Regulation reads:

*The aim of this Regulation is to ensure investor protection and market efficiency, while enhancing the internal market for capital. The provision of information which, according to the nature of the issuer and of the securities, is necessary to enable investors to make an informed investment decision ensures, together with rules on the conduct of business, the protection of investors. Moreover, such information provides an effective means of increasing confidence in securities and thus of contributing to the proper functioning and development of securities markets. The appropriate way to make that information available is to publish a prospectus.*

6. Recital 14 of the Regulation reads:

*The mere admission of securities to trading on a MTF or the publication of bid and offer prices is not to be regarded in itself as an offer of securities to the public and is therefore not subject to the obligation to draw up a prospectus under this Regulation. A prospectus should only be required where those situations are accompanied by a communication constituting an ‘offer of securities to the public’ as defined in this Regulation.*

7. Recital 15 of the Regulation reads:

*Where an offer of securities is addressed exclusively to a restricted circle of investors who are not qualified investors, drawing up a prospectus represents a*

*disproportionate burden in view of the small number of persons targeted by the offer, thus no prospectus should be required. That would apply for example in the case of an offer addressed to a limited number of relatives or personal acquaintances of the managers of a company.*

8. Article 1(4) of the Regulation, headed “Subject matter, scope and exemptions”, reads, in extract:

*The obligation to publish a prospectus set out in Article 3(1) shall not apply to any of the following types of offers of securities to the public:*

...

*(b) an offer of securities addressed to fewer than 150 natural or legal persons per Member State, other than qualified investors;*

...

9. Article 2 of the Regulation, headed “Definitions”, reads, in extract:

*For the purposes of this Regulation, the following definitions apply:*

...

*(d) ‘offer of securities to the public’ means a communication to persons in any form and by any means, presenting sufficient information on the terms of the offer and the securities to be offered, so as to enable an investor to decide to purchase or subscribe for those securities. This definition also applies to the placing of securities through financial intermediaries;*

...

10. Article 3(1) of the Regulation, headed “Obligation to publish a prospectus and exemption”, reads:

*Without prejudice to Article 1(4), securities shall only be offered to the public in the Union after prior publication of a prospectus in accordance with this Regulation.*

11. Article 5(1) of the Regulation, headed “Subsequent resale of securities”, reads:

*Any subsequent resale of securities which were previously the subject of one or more of the types of offer of securities to the public listed in points (a) to (d) of Article 1(4) shall be considered as a separate offer and the definition set out in point (d) of Article 2 shall apply for the purpose of determining whether that resale is an offer of securities to the public. The placement of securities through financial*

*intermediaries shall be subject to publication of a prospectus unless one of the exemptions listed in points (a) to (d) of Article 1(4) applies in relation to the final placement.*

*No additional prospectus shall be required in any such subsequent resale of securities or final placement of securities through financial intermediaries as long as a valid prospectus is available in accordance with Article 12 and the issuer or the person responsible for drawing up such prospectus consents to its use by means of a written agreement.*

12. Article 31(1) of the Regulation, headed “Competent authorities”, reads:

*Each Member State shall designate a single competent administrative authority responsible for carrying out the duties resulting from this Regulation and for ensuring that the provisions of this Regulation are applied. Member States shall inform the Commission, ESMA and the competent authorities of other Member States accordingly.*

*The competent authority shall be independent from market participants.*

#### *National law and practice*

13. Article 9(1) of the Act of 10 May 2019 implementing Regulation (EU) 2017/1129 of 14 June 2017 on the prospectus to be published when securities are offered to the public or are admitted to trading on a regulated market (*Gesetz vom 10. Mai 2019 zur Durchführung der Verordnung (EU) 2017/1129 über den Prospekt, der beim öffentlichen Angebot von Wertpapieren oder bei deren Zulassung zum Handel an einem geregelten Markt zu veröffentlichen ist*; LR 954.2) (“the Implementing Act”), headed “Competent authority”, reads:

*The FMA is the competent authority for Liechtenstein in accordance with Article 31(1) of Regulation (EU) 2017/1129 and performs the duties and applies the powers assigned to a competent authority under Regulation (EU) 2017/1129 and this Act.*

14. Article 10(2) of the Implementing Act reads, in extract:

*2) The FMA is empowered in particular:*

...

*f) to prohibit an offer of securities to the public or admission to trading on a regulated market where it finds that there has been an infringement of Regulation (EU) 2017/1129 or this Act, or there are reasonable grounds for suspecting that there would be an infringement of these regulations;*

...

*i) to make public the fact that an issuer, an offeror or a person applying for admission to trading on a regulated market is failing to comply with his/her obligations;*

...

### III Facts and procedure

15. ADCADA is a public limited company (protected cell company) governed by Liechtenstein law and has its registered office in Ruggell, Liechtenstein. It is the issuer of the bonds “adcada.money fixed interest” (*adcada.money Festzins*) and “adcada.money mortgage interest” (*adcada.money Hypozins*). By letter of 7 January 2021, the Appeals Board informed the Court about the initiation of insolvency proceedings against ADCADA by order of 4 December 2020 of the Court of Justice of the Principality of Liechtenstein.

16. The offer “adcada.money fixed interest” was promoted on the website <https://adcada.money/> as follows:

The screenshot shows the ADCADA website homepage. At the top, there is a navigation bar with 'HOME', 'ADCADA', and 'BLOG'. The main content area features two large promotional banners. The top banner is for 'Festzins' (fixed interest) with a rate of '5,50% p.a.' and a '100% erstrangig' (first mortgage) guarantee. Below it is a banner for 'Hypozins safe' (mortgage interest) with a rate of '2,50% p.a.' and a 'zu 110% besichert' (secured to 110%) guarantee. Both banners include a red button labeled 'HIER INFORMIEREN' (Inform here). Below the banners, there is a section titled 'Entscheiden Sie sich für die Geldanlage mit banküblichen Sicherheiten!' (Decide for your investment with bank-standard securities!) and a paragraph of text explaining the benefits of the investment. At the bottom, there is a footer with the text 'ADCADA – der verlässliche Zinspartner'.

The screenshot shows a detailed offer for 'adcada.money Festzins'. At the top, there is a navigation bar with 'HOME', 'ADCADA', and 'BLOG'. The main content area features a large promotional banner with the text 'Entscheiden Sie sich für die Unternehmensanleihe, die Ihr Kapital zu 100 % erstrangig absichert!' (Decide for the corporate bond that secures your capital 100% first mortgage). Below the banner, there is a section titled 'adcada.money Festzins' with a sub-heading '100% erstrangige Unternehmensanleihe'. The text describes the investment opportunity, highlighting the '4,25% bis 5,50% p.a.' interest rate and the '100% erstrangig' guarantee. Below the text, there is a form titled 'Unverbindlich informieren' (Non-binding information) with fields for 'Vorname' (First name), 'Nachname' (Last name), 'PLZ & Ort' (Postal code and location), 'Straße & Nummer' (Street and number), 'E-Mail', and 'Telefon'. There is also a dropdown menu for 'Liechtenstein' and a text input field for 'Schreiben Sie zusätzliche Informationen an ADCADA:'. At the bottom of the form, there is a checkbox for 'Ich stimme der Datenschutzerklärung zu.' (I agree to the privacy policy) and a button labeled 'HIER Unterlagen unverbindlich anfordern' (Request documents here).

17. The offer “adcada.money fixed interest” was also promoted on the website <https://die.investments/> as follows:

The screenshot shows the ADCADA website interface. At the top, it says "4,25 % Festgeld-Alternative". Below this, there is a section titled "Sichern Sie sich auch in Krisenzeiten attraktive Zinsen." with a list of bullet points: "4,25 % Zinsen pro Jahr", "ab 10.000 EUR Anlagebetrag", "vierteljährliche Zinsauszahlung", "kein Agio, keine Gebühren", "Ihr verlässlicher Partner seit 2015", "Schluss mit Negativzinsen", and "auch in Krisenzeiten". To the right is a registration form titled "Unverbindlich informieren" with fields for "Vorname", "Nachname", "PLZ & Ort", "Straße & Nummer", "E-Mail", and "Telefon". There is also a field for "Ihr Anlagebetrag" with a value of "50000". Below the form is a "Kostenlos informieren" button. At the bottom, there is a "MUSTER-BERECHNUNG" table.

Anlagebetrag	Laufzeit	Zinsen p.a.	Auszahlungsbetrag	Gewinn in 12 Monaten
50.000,-	12 Monate	4,25 %	52.125,-	2.125,-

Below the table, it says "Die Fachpresse empfiehlt: Festverzinsliche Geldanlagen" and lists "FOCUS MONEY", "SPIEGEL ONLINE", "WELT ONLINE", and "ZEIT ONLINE".

This screenshot shows a different view of the ADCADA website, featuring an "Impressum" (legal notice) pop-up window. The background still shows the "4,25 % Festgeld-Alternative" and "Unverbindlich informieren" sections. The "Impressum" window contains the following information: "ADCADA International AG", "Industriering 40", "9491 Ruggell", "Liechtenstein", "Telefon: 00423-3770 200", "Telefax: 00423-3770 201", "E-Mail: office@adcada.li", "www.adcada.li", "Geschäftsführer / CEO: Benjamin Kühn", "Registereintrag: FL-0002 600 350-5", and "Bilderrechte: © Vayal Fotolia, © CPN Fotolia". Below the "Impressum" window, the "MUSTER-BERECHNUNG" table is visible, showing the same data as in the first screenshot.

18. By the contested decision, the FMA prohibited the offer to the public of the bond “adcada.money fixed interest” in Liechtenstein and made public the prohibition of the offer to the public and the absence of a prospectus. At the time of the contested decision, a prospectus for the offer to the public of “adcada.money fixed interest” had not been approved nor had any notification of a prospectus been recorded.

19. In the contested decision, the FMA found that there was an offer of a security to the public. The FMA considered that, in principle, a broad interpretation of the definition contained in Article 2(d) of the Regulation was to be assumed, but that not every communication constituted an offer to the public. Rather, in the view of the FMA, an investor had to be enabled to make an investment decision. The FMA considered that that would be the case if an investor merely had to agree or was able to make a purchase offer to that effect on the basis of information in a communication, but that this also necessitated an actual purchase opportunity. A link was therefore required between a promotional communication and a purchase opportunity. The FMA considered that a communication thus had to present sufficient information on the terms of the offer of the securities, that is, the principal conditions of the security. This would include at least the object of purchase, the price or price structure, the term, and the currency.

20. The FMA considered that the description of the bond “adcada.money fixed interest” on the website <https://adcada.money> mentioned the relevant information, in particular the minimum investment, the term and the interest rate, as follows:

*100% top-tier business investment  
4.25 to 5.50% annual fixed interest rate  
minimum term from 12 months  
quarterly interest payments  
investment possible from EUR 10 000  
no premium  
no agency fees*

21. In the contested decision, the FMA found that a contact point was also indicated. Thus, in the view of the FMA, the link between the promotional communication and the purchase opportunity was established. The FMA considered that an investor would therefore be able to decide to purchase and to contact the issuer or sister or parent companies to process the transaction. Furthermore, the FMA considered that information on the bond “adcada.money fixed interest” was available without any restriction on the internet, in particular at [adcada.money](#) and [die.investments](#), such that the offer for that bond was addressed to an unlimited number of possible investors, including in Liechtenstein. Therefore, the FMA found that the conditions for relying on the exception under point (b) of Article 1(4) of the Regulation were not met. An exception to the obligation to draw up a securities prospectus therefore did not apply, and a prospectus should have been drawn up. Consequently, the FMA concluded that the offer of the bond “adcada.money fixed interest” to the public had to be prohibited in Liechtenstein and the fact that an issuer was failing to comply with its obligations had to be made public.

22. ADCADA lodged an appeal against the contested decision with the Appeals Board. In its appeal, ADCADA disputes the existence of an offer to the public and, additionally, relies on the exception provided for in point (b) of Article 1(4) of the Regulation.

23. Against this background, the Appeals Board decided to stay the proceedings and refer the following questions to the Court:

**1. On the basis of what criteria is it to be assessed, whether in accordance with Article 2(d) of Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, sufficient information on the terms of the offer and the securities to be offered has been issued, so as to enable an investor to decide to purchase or subscribe for those securities?**

**2. Is it significant for the assessment whether an offer to the public exists within the meaning of Article 2(d) of that regulation if the promotion includes the clearly visible direction ‘HIER INFORMIEREN’ (‘GET FURTHER INFORMATION HERE’) or ‘Unverbindlich informieren’ (‘Get further**

information without obligation’) and the full bond terms are not accessible online or otherwise generally available?

**3. Is it significant for the purposes of Article 1(4)(b) of that regulation if the offeror takes appropriate measures to ensure that the full terms of the bond are communicated to prospective buyers only upon request, whilst at the same time it is ensured that the communication is made only to a maximum of 149 natural or legal persons per Member State, which are not qualified investors?**

**4. Is it significant for the purposes of Article 1(4)(b) of that regulation that the offer is disseminated in a Member State through various media? If so, under what conditions is the offer presented in various media to be regarded as a consolidated offer of the same security to the public and under what conditions is there a new offer? It is possible to fall below the number of 150 natural or legal persons per Member State by dividing the offer across different media?**

#### **IV Written observations**

24. Pursuant to Article 20 of the Statute of the Court and Article 97 of the Rules of Procedure, written observations have been received from:

- ADCADA Immobilien AG PCC, represented by Dr Florian Scheiber, Advocate;
- the Liechtenstein Government, represented by Dr Andrea Entner-Koch and Dr Claudia Bösch, acting as Agents;
- the Norwegian Government, represented by Simen Hammersvik, Kine Sverdrup Borge and Lotte Tvedt, acting as Agents;
- the German Government, represented by Johannes Möller and Dr David Klebs, acting as Agents;
- the EFTA Surveillance Authority (“ESA”), represented by Claire Simpson, Romina Schobel, Carsten Zatschler and Catherine Howdle, acting as Agents; and
- the European Commission (“the Commission”), represented by Tibor Scharf and Joan Rius, acting as Agents.



## V Proposed answers submitted

### ADCADA

25. ADCADA proposes that the questions referred be answered as follows:

*In view of these circumstances, there is no public offer through the website entries identified by the authorities, so that the prohibition of the public offer is unlawful.*

### The Liechtenstein Government

26. The Liechtenstein Government proposes that the questions referred be answered as follows:

#### *Question 1:*

*According to Article 2 lit b of Regulation (EU) 2017/1129, a “public offer” means “a communication to persons in any form and by any means, presenting sufficient information on the terms of the offer and the securities to be offered, so as to enable an investor to decide to purchase or subscribe for those securities.” To guarantee a high level of investor protection, the main purpose of Regulation (EU) 2017/1129, the abovementioned provision requires a broad interpretation and the qualitative requirements for the existence of an “offer of securities to the public” may not be set too high. Therefore, it is sufficient if the investor is informed about the “essentialia negotii” (object of purchase, the price or the price frame and the currency).*

#### *Question 2:*

*It is not significant for the assessment whether an offer to the public exists within the meaning of Article 2(d) of that regulation if the promotion includes the clearly visible direction ‘HIER INFORMIEREN’ (‘GET FURTHER INFORMATION HERE’) or ‘Unverbindlich informieren’ (‘Get further information without obligation’) and the full bond terms are not accessible online or otherwise generally available if the “essentialia negotii” have already been published.*

#### *Question 3:*

*It is not significant for the purposes of Article 1(4)(b) of that regulation if the offeror takes appropriate measures to ensure that the full terms of the bond are communicated to prospective buyers only upon request, whilst at the same time it is ensured that the communication is made only to a maximum of 149 natural or legal persons per Member State, which are not qualified investors if the “essentialia negotii” have already been published.*

*Question 4:*

*It is not significant for the purposes of Article 1(4)(b) of that regulation that the offer is disseminated in a Member State through various media and it is not possible to fall below the number of 150 natural or legal persons per Member State by dividing the offer across different media.*

*The Norwegian Government*

27. The Norwegian Government proposes that the questions referred be answered as follows:

*Question 1:*

*The assessment under Article 2(d) of the Prospectus Regulation regarding whether the communication contains sufficient information on the terms of the offer and the securities to be offered, so as to enable an investor to decide to purchase or subscribe for those securities, shall be based on an individual assessment by the competent authorities, in which the communication must concern an actual investment opportunity and should include the information which in general is fundamental for an investor when deciding to purchase or subscribe for the securities to be offered. It is not a requirement that the communication must contain the information necessary for an investor to make an informed investment decision.*

*Question 2:*

*It is immaterial for the purposes of Article 2(d) of the Prospectus Regulation that the communication contains a visible direction, such as those in the main proceedings, which provides that the full terms of the securities to be offered may be obtained upon request and without obligation.*

*Question 3:*

*If an offer has been made to a number of non-qualified investors exceeding the limitations set forth in Article 1(4)(b) of the Prospectus Regulation, it is immaterial for the purposes of that provision that the offeror takes appropriate measures to ensure that the full terms of the bond are communicated upon request to a maximum of 149 non-qualified investors, be it legal or natural persons, per EEA State.*

*Question 4:*

*It is not significant for the purposes of Article 1(4)(b) of the Prospectus Regulation that the offer is disseminated in a Member State or an EEA EFTA State through*

*various media, as the communications made at any rate should be consolidated and considered as one offer.*

### *The German Government*

28. The German Government proposes that the questions referred be answered as follows:

#### *Question 1:*

*A "public offer" within the meaning of Art. 2 lit. d of the Regulation 2017/1129 is to be assumed within the framework of an overall assessment and a broad interpretation of the term if sufficient information such as the purchase price and the basic characteristics of a security are stated, which moreover need not be available to the investor at the same time but can also be made fully accessible at a later date.*

#### *Question 2:*

*The fact that a notice does not assemble all the necessary information at a glance, but invites the reader to click on a link to obtain the rest of the information on another page, does not prevent the notice from qualifying as a "public offer".*

#### *Question 3:*

*The fact that the offeror of a security transmits outgoing information about the public offer, including the exact terms and conditions of the securities, to fewer than 150 retail investors does not lead to the fulfilment of the exemption under Art. 1 para. 4 lit. b Regulation 2017/1129.*

#### *Question 4:*

*The fact that the offer is disseminated in a Member State by means of different media is irrelevant to the existence of the exception under Article 1(4)(b) of Regulation 2017/1129, provided that the communication actually relates to the same offer in different media. By splitting the offer into different media, the number of natural or legal persons per Member State cannot fall below 150.*

ESA

29. ESA submits that the Court should answer the questions referred as follows:

*Question 1:*

*Whether sufficient information on the terms of the offer and the securities to be offered has been provided, so as to enable an investor to decide to purchase or subscribe for those securities within the meaning of Article 2(d) of Regulation (EU) 2017/1129 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, must be assessed on a case by case basis, taking into account the nature and type of securities in question. In any event, “sufficient information” must mean more information than the publication of bid and offer prices, but less information than is required in a prospectus.*

*Question 2:*

*It is relevant for the assessment whether an offer to the public exists within the meaning of Article 2(d) of Regulation (EU) 2017/1129 if the promotion includes the clearly visible direction ‘HIER INFORMIEREN’ (‘GET FURTHER INFORMATION HERE’) or ‘Unverbindlich informieren’ (‘Get further information without obligation’) and the full bond terms are not accessible online or otherwise generally available, as this may indicate, depending on the circumstances of the case, that there is insufficient information for an investor to decide to purchase or subscribe for securities within the meaning of that article. If full bond terms are however communicated, this will constitute an offer to the public within the meaning of that article.*

*Question 3:*

*It is significant for the purposes of Article 1(4)(b) of Regulation (EU) 2017/1129 if the offeror ensures that the full terms of the bond are communicated to no more than 149 natural or legal persons per EEA State who are not qualified investors.*

*Question 4:*

*It is in principle not significant for the purposes of Article 1(4)(b) of Regulation (EU) 2017/1129 that the offer is disseminated in an EEA State through various media. The use of different media does not, of itself, mean that different offers are made. To benefit from the exemption provided by Article 1(4)(b), the offeror must ensure that the offer is communicated to no more than 149 natural or legal persons per EEA State who are not qualified investors.*

*The Commission*

30. The Commission proposes that the questions referred be answered as follows:

*Question 1:*

*Whether sufficient information on the terms of the offer and the securities to be offered has been issued, so as to enable an investor to decide to purchase or subscribe for those securities in accordance with Article 2(d) of Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 has to be assessed taking into consideration all the facts of each individual case.*

*Question 2:*

*It is significant for the assessment whether an offer to the public exists within the meaning of Article 2(d) of that regulation if the promotion includes the clearly visible direction ‘HIER INFORMIEREN’ (‘GET FURTHER INFORMATION HERE’) or ‘Unverbindlich informieren’ (‘Get further information without obligation’) and the full bond terms are not accessible online or otherwise generally available, in so far as these elements may indicate, depending on the circumstances of any given case, that there is insufficient information available for an investor to take an investment decision. As soon as the full terms are communicated, however, this will constitute an offer to the public.*

*Question 3:*

*It is significant for the purposes of Article 1(4)(b) of the Prospectus Regulation if the issuer ensures that the communication of the full bond terms is made only to a maximum of 149 natural or legal persons per Member State, other than qualified investors.*

*Question 4:*

*It is not in principle significant for the purposes of Article 1(4)(b) of the Prospectus Regulation that the offer is disseminated through various media. In addition, to benefit from the exemption of Article 1(4)(b) of the Prospectus Regulation, the issuer has to put special measures in place to ensure that no more than 149 persons per Member State can read the details of the elements that constitute an offer of securities to the public.*

Páll Hreinsson  
Judge-Rapporteur