PRINCIPALITY OF LIECHTENSTEIN

APPEALS BOARD OF THE FINANCIAL MARKET AUTHORITY

FMA-BK 2023/2

ON 12

Order

At the closed sitting of 17 August 2023, the Appeals Board of the Financial Market Authority (*Beschwerdekommission der Finanzmarktaufsicht*) composed of

Board members:	Dr Wilhelm Ungerank LL.M., President Reinhold Zanghellini, Vice-President Martina Haas, member

in the appeal brought by

appellant:	Mr X (name anonymised) represented by Rechtsanwälte Dr Karl Mumelter und Kollegen, Landstrasse 60, 9490 Vaduz, Principality of Liechtenstein
against:	Decision of the Financial Market Authority of 5 June 2023, Ref. No 1722/22/22
concerning:	access to the file, information and facts

ruled as follows:

The appeal proceedings are stayed and reference is made to the EFTA Court in Luxembourg pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (SCA) with the following request for an advisory opinion:

I.

1. Is the EFTA Court competent to interpret the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice of 2 May 1992 (SCA)?

2. If Question 1 is answered with "yes":

Must Article 34 SCA be interpreted as meaning that a request to the EFTA Court for an advisory opinion is permitted also where, although the referring court considers the question on the interpretation of the EEA Agreement necessary in order to give its decision, this legal question has, however, 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?

3. If Question 2 is also answered in the affirmative:

Is information which is the subject of formal and also informal exchanges of information between the competent authorities of the Member States as provided for in Article 4(1) of Directive 2013/36/EU subject to the obligation of professional secrecy within the meaning of Article 53 of this Directive?

4. If Question 3 is also answered with “yes”:

Must the cooperation between competent authorities as provided for in Article 24 of the Directive mentioned be regarded as an exchange of information which pursuant to Article 53 of this Directive is subject to an obligation of professional secrecy?

5. If finally Question 4 is also answered with “yes”:

May the obligation of professional secrecy set out in the first subparagraph of Article 53(1) of the Directive mentioned be breached only in the cases listed in Article 53(1) (second subparagraph: cases covered by criminal law; third subparagraph: disclosure in civil or commercial proceedings where a credit institution has been declared bankrupt or is being compulsorily wound up)? If this question is answered in the negative: Is a breach permissible also on grounds of national law, for example, by reason of a law that grants any person asserting a legitimate interest access to official documents unless precluded by overriding public or private interests?

II. If one of Questions I/1 to I/4 is answered with “no” or the main question in Question I/5 is answered in the negative, but the supplementary question in the affirmative:

Does the cooperation between competent authorities provided for in Article 4 of the Directive mentioned and thus the exchange of information that takes place between these authorities and the possibility to keep this partly or wholly secret constitute an appropriate particular measure, within the meaning of Article 3 of the EEA

Agreement of 2 May 1992, to ensure fulfilment of the obligations arising out of this Agreement, and in particular to ensure the effective functioning of the system for supervision of the activities of credit institutions and investment firms and also the normal functioning of financial markets?

Grounds

1. Facts:

The appellant was the majority shareholder and chair of the board of directors (official body) of a bank established in Liechtenstein, which had been granted a licence, as provided for in the Liechtenstein Banking Act (Bankgesetz (BankG; LR (collection of Liechtenstein law) 952.0; available online in the same way as all Liechtenstein legislation at www.gesetze.li)), by the Financial Market Authority Liechtenstein (FMA).

In 2022, he proposed to acquire a qualifying holding (more than 10%) in a bank established in the Grand-Duchy of Luxembourg.

Between the FMA and the competent Luxembourg authority, the CSSF (Commission de Surveillance du Secteur Financier (Financial Sector Supervisory Commission)) an exchange of information took place in relation to the proposed acquisition.

The appellant contends that his Luxembourg lawyers notified him as follows:

"Dear all, we wanted to report to you on the preliminary conversation with the CSSF which we just had. Regrettably, the CSSF expressed an unambiguously negative view of the planned transaction. We noted the following points:

- The CSSF takes a negative stance on the [appellant's] proposed qualifying holding in [the bank].
- In the framework of the ECB's authorisation procedure, the CSSF will officially deliver a negative opinion. It is highly likely that the ECB will follow this recommendation and oppose the acquisition of a qualifying holding by [the appellant].
- The CSSF's negative appraisal is based in particular on its informal exchanges with the Liechtenstein Financial Market Authority FMA. The CSSF referred to the administrative order issued by the FMA in relation to [the appellant], which provides for a prohibition on exercising the activity as a member of the supervisory body of [the bank established in Liechtenstein]. …
- The CSSF explained further that [the appellant] could decide to continue with the transaction. Were [the appellant] to be dissatisfied with the outcome of the ECB decision, it is theoretically possible to lodge an internal administrative appeal with the ECB. Following the exhaustion of the internal ECB procedure, it is possible to challenge the final decision before the Court of Justice of the European Union. …"

The appellant further claims that the negative information provided by the FMA to the CSSF led to the appellant's counterparty stepping back from the planned sale to the appellant of the holding in the Luxembourg bank.

By letter of 29 July 2022, the appellant made the following requests to the FMA:

I. The FMA shall grant the applicant access in full to the file (or files) of the FMA, in relation to which the FMA provided facts and information to the CSSF (Commission de Surveillance du Secteur Financier (Financial Sector Supervisory Commission)) Luxembourg concerning the applicant's proposed holding in [the bank] established in Luxembourg and to provide the applicant with a full copy of this file (these files).

II. The FMA shall disclose to the applicant which bodies (staff members) of the FMA provided facts and information to the CSSF (Commission de Surveillance du Secteur Financier (Financial Sector Supervisory Commission)) Luxembourg concerning the applicant's proposed holding in [the bank] established in Luxembourg.

III. The FMA shall disclose to the applicant the specific facts and information (faithful to the original wording and verbatim) that the FMA provided to the CSSF (Commission de Surveillance du Secteur Financier (Financial Sector Supervisory Commission)) Luxembourg concerning the applicant's proposed holding in [the bank] established in Luxembourg.

IV. The FMA shall disclose to the applicant which personal data it has processed in its dealings with the CSSF (Commission de Surveillance du Secteur Financier (Financial Sector Supervisory Commission)) Luxembourg and, in accordance with Article 15(2) GDPR, provide a copy of this information together with all the additional information listed in Article 15 GDPR.

In response to point IV of the request, the FMA, by letter of 26 August 2022, provided the appellant with the personal data that it processed in its dealings with the CSSF together with a copy of the processed personal data of the appellant.

By order (administrative decision) of 14 September 2022, the FMA rejected the more extensive requests (I, II and III) of the appellant concerning access to the file, information and facts.

By decision of 27 October 2022, the Appeals Board of the Financial Market Authority rejected the appeal brought by the appellant challenging the order.

By judgment of 3 March 2023, in case VGH 2022/090, the Administrative Court of the Principality of Liechtenstein (*Verwaltungsgerichtshof des Fürstentums Liechtenstein*) granted the appeal brought by the appellant against that decision, set aside the decisions of the lower instances and instructed the FMA to take a new decision. To the extent that it is decisive for the following, the Administrative Court concluded that the information transmitted by the FMA to the CSSF was not client-related but what is known as "institution-related" mutual assistance. The FMA transmitted information to the CSSF concerning the appellant in his function as board member and shareholder of a bank authorised in Liechtenstein, not however information concerning the appellant in his capacity as a bank customer. According to the Administrative Court, the appellant has a right, on the basis of the Liechtenstein Information Act, to obtain further information from the FMA. This Act regulates the principles and procedure for informing the population on the activities of the authorities. In this way, the activities of public authorities are made transparent and action by the State disclosed, unless precluded by overriding public or private interests. Thus each person who can claim to have a legitimate interest has a right to access official documents unless precluded by overriding public or private interests. The condition, provided for in the Information Act, for access to a file containing official documents, namely, that the person concerned must claim "a legitimate interest" does not mean, according to the Administrative Court, that an individual, special interest must exist that goes beyond the interest that everyone generally has in official documents and thus in ensuring trust in the State and its authorities

and in increasing the credibility of State actions. Accordingly, the Administrative Court held that the appellant has a legitimate interest for the purposes of the Information Act. It must still be examined, according to the Administrative Court, whether overriding public or private interests preclude the granting of access and provision of information. In this connection, neither the FMA nor the Appeals Board of the Financial Market Authority had carried out a detailed examination but had merely argued in general terms that a public interest in an effective supervision of financial intermediaries and thus in international cooperation between national oversight and supervisory authorities exists such that an effective supervision of financial intermediaries is only ensured when the international supervisory authorities cooperate effectively. Further, they had argued that the principle of sincere cooperation with trust and full mutual respect applies. Also, the information must be exchanged between the authorities without delay. Hence, the exchange of information between supervisory authorities has to remain confidential and the appellant may not be granted access nor provided with information.

The Administrative Court did not follow this reasoning. It held that it cannot be deduced from the principle of sincere and efficient cooperation that action by the FMA as a public authority in the area of international mutual assistance is excluded from the principle of public access to information contained in the Liechtenstein Information Act and instead is secret. Access by a private person, such as the appellant, to the official documents of the FMA in connection with the exchange of information with a foreign authority does not per se have a negative effect on the exchange of information. It does not prevent, delay or render impossible this exchange of information. The legal view taken by the lower instances contradicts almost diametrically the principle of public access to information contained in the Information Act and thus the principle of transparency of State action. The action of the State and its authorities is not a secret matter and must therefore, as a rule, be transparent. Exceptions from transparency must be individually reasoned. It is not at all correct that

the Information Act grants right of access only where access is to further the freedom to form opinions in connection with the exercise of democratic rights. Trust in the actions of the State can only exist if anyone and in full – subject to overriding interests precluding such – has access to public documents without the need to indicate a particular purpose or motive. Merely requests that are an abuse of rights must be refused. As the FMA has not examined which specific public or private interests preclude the access to its documents, as sought by the appellant, the contested decisions must be set aside and the administrative matter remitted to the FMA for a new decision.

The FMA reached an identical decision also in the second set of proceedings; by order of 5 June 2023, the appellant's requests were refused.

It is against that decision that the appellant's appeal of 15 June 2023, raised in good time, addressed to the Appeals Board of the Financial Market Authority, is directed which culminates in the request that the contested decision be amended such that his requests are acceded to in full.

2. European legal framework

Pursuant to Article 3 of the Agreement on the European Economic Area of 2 May 1992, LGBl (Liechtensteinisches Landesgesetzblatt (Liechtenstein Legal Gazette)) 1995 No 68, the Contracting Parties shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Agreement. They shall abstain from any measure which could jeopardize the attainment of the objectives of this Agreement. Moreover, they shall facilitate cooperation within the framework of this Agreement.

Pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice

(SCA) of 2 May 1992, LGBl 1995 No 72, the EFTA Court shall have jurisdiction to give advisory opinions on the interpretation of the EEA Agreement. Where such a question is raised before any court or tribunal in an EFTA State, that court or tribunal may, if it considers it necessary to enable it to give judgment, request the EFTA Court to give such an opinion. An EFTA State may in its internal legislation limit the right to request such an advisory opinion to courts and tribunals against whose decisions there is no judicial remedy under national law.

For the purposes of this Agreement (Article 1(a)), the term "EEA Agreement" means the main part of the EEA Agreement, its Protocols and Annexes as well as the acts referred to therein. Pursuant to Article 2 SCA, the EFTA States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Agreement. They shall abstain from any measure which could jeopardize the attainment of the objectives of this Agreement.

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, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC, OJ L 176, 27.6.2013, p. 338, incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 79/2019 of 29 March 2019, LGBl 2019 No 34, states in recital 23 [translator's note: sic — it appears that recital 29 is meant] that it is appropriate to allow the exchange of information between the competent authorities or bodies which, by virtue of their function, help to strengthen the stability of the financial system. In order to preserve the confidential nature of the information forwarded, the list of addressees should be strictly limited.

Pursuant to Article 4(1) ("Designation and powers of the competent authorities"), Member States shall designate competent authorities

that carry out the functions and duties provided for in this Directive and in Regulation (EU) No 575/2013.

Pursuant to Article 6(a) of this Directive, Member States shall ensure that the competent authorities, as parties to the European System of Financial Supervision (ESFS), cooperate with trust and full mutual respect, in particular when ensuring the flow of appropriate and reliable information between them and other parties to the ESFS, in accordance with the principle of sincere cooperation set out in Article 4(3) of the Treaty on European Union. Article 6(a) of this Directive was incorporated into the EEA Agreement by Decision of the EEA Joint Committee No 79/2019 mentioned, by which a subparagraph was added, which is worded as follows:

"The competent authorities of the EFTA States cooperate with trust and full mutual respect, in particular when ensuring the flow of appropriate and reliable information between them and the parties to the ESFS and with the EFTA Surveillance Authority. Competent authorities of the EU Member States shall cooperate with the competent authorities of the EFTA States in the same manner."

In accordance with Article 24 of this Directive ("Cooperation between competent authorities"), the relevant competent authorities shall fully consult each other when carrying out the assessment if the proposed acquirer is, inter alia, a natural person controlling a credit institution authorised in another Member State other than that in which the acquisition is proposed (Article 24(1)(c)). For that purpose, the competent authorities shall, without undue delay, provide each other with any information which is essential or relevant for the assessment. In that regard, the competent authorities shall communicate to each other upon request all relevant information and shall communicate on their own initiative all essential information. A decision by the competent authority that has authorised the credit institution in which the acquisition is proposed shall indicate any views or reservations

expressed by the competent authority responsible for the proposed acquirer (Article 24(2)).

Pursuant to Article 53 of this Directive (“Professional secrecy”), Member States shall provide that all persons working for or who have worked for the competent authorities and auditors or experts acting on behalf of the competent authorities shall be bound by the obligation of professional secrecy (first subparagraph of Article 53(1)). Confidential information which such persons, auditors or experts receive in the course of their duties may be disclosed only in summary or aggregate form, such that individual credit institutions cannot be identified, without prejudice to cases covered by criminal law (second subparagraph of Article 53(1)). Nevertheless, where a credit institution has been declared bankrupt or is being compulsorily wound up, confidential information which does not concern third parties involved in attempts to rescue that credit institution may be disclosed in civil or commercial proceedings (third subparagraph of Article 53(1)). According to Article 53(2), paragraph 1 shall not prevent the competent authorities from exchanging information with each other … in accordance with this Directive, and that information shall be subject to paragraph 1.

According to the final sentence of Article 56 of this Directive (“Exchange of information between authorities”), the information received shall in any event be subject to professional secrecy requirements at least equivalent to those referred to in Article 53(1).

3. National legal framework

Directive 2013/36/EU was transposed in Liechtenstein by way of the Act of 21 October 1992 on banks and investment firms (Banking Act (*Bankengesetz*); BankG; LR 952.0).

Pursuant to Article 26a(6) of the Banking Act, by which Article 24(2) of the Directive mentioned was transposed, when assessing the

acquisition or the increase of a holding, the FMA shall cooperate with the competent authorities of the other EEA Member States. The cooperation shall in particular include an exchange of all information relevant to assessing the acquisition or increase of a holding.

Pursuant to Article 31a of the Banking Act ("Official secrecy"), the bodies charged with implementing this Act, any persons consulted by such bodies as well as all representatives of the authorities shall be subject to official secrecy without a time limit as regards the confidential information that becomes known to them during their official activities (Article 31a(1)). Further paragraphs are worded as follows:

"(1a) The bodies and persons referred to in paragraph 1 who receive confidential information may use it in the performance of their tasks only for the following purposes (underlining added):
a) to check that the licensing conditions for banks or investment firms are met;
b) to monitor the performance of activities on an individual or consolidated basis, in particular with regard to the solvency, large exposures, administrative and accounting organisation, internal control mechanisms, and liquidity of banks and investment firms, as well as branches of banks, financial institutions, and investment firms;
c) to monitor the proper functioning of trading venues;
d) to impose sanctions;
e) in appeals against decisions by the FMA in accordance with Article 62; or
f) in the extrajudicial mechanism for investors' complaints provided for in Article 62a.
(2) Confidential information as set out in paragraph 1 may be transmitted in accordance with this Act and Regulation (EU) No 575/2013.
(2a) The FMA is authorised to transmit information to the external audit offices that is necessary for the fulfilment of its responsibilities.

(3) If bankruptcy or winding-up proceedings have been initiated against a bank or investment firm by the decision of a court, confidential information that does not relate to third parties may be disclosed in civil proceedings if this is necessary for the proceedings concerned.
(4) Without prejudice to the requirements of criminal law or tax law, the FMA, all other administrative authorities and bodies, and other natural and legal persons may use confidential information that they receive in accordance with this Act only for purposes of fulfilling their responsibilities and tasks within the scope of this Act or for purposes for which the information was given, and/or in the case of administrative and judicial proceedings that specifically relate to the fulfilment of these tasks. If the FMA or another administrative authority or office or person providing the information gives their consent, however, the authority receiving the information may use it for other purposes of financial market supervision.
(5) The FMA may transmit confidential information that it received from a non-competent authority of an EEA Member State to the following authorities:
a) the competent authorities of other EEA Member States;
b) the European Supervisory Authorities."

Finally, Article 30h of the Banking Act ("Exchange of information") provides that the FMA shall transmit to a requesting competent authority of an EEA Member State all information which the latter needs to exercise its duties of supervision, provided that, inter alia, the recipients and the persons employed with and instructed by the competent authorities are subject to an obligation of secrecy equivalent to that of Article 31a of the Banking Act.

According to section 310(1) of the Liechtenstein Criminal Code (*Strafgesetzbuch*; StGB; LR 311.0), any official or former official who discloses or exploits a secret that was entrusted or became accessible to him exclusively by virtue of his office and the disclosure or exploitation of which is capable of violating public or legitimate

private interests shall be punished with imprisonment of up to three years. Infringement of the obligation of official secrecy within the meaning of Article 31a(1) of the Banking Act falls under section 310(1) of the Criminal Code. In accordance with point (4) of section 74(1) of the Criminal Code, persons employed by the FMA are officials.

The purpose of the Act of 19 May 1999 on the Information of the Population (Information Act (*Informationsgesetz*); LR 172.015) is to govern the principles and procedure by which the population may be informed with respect to activities of the authorities, in particular the right to information and of access to the file. It is intended that the activities of public authorities are made transparent to encourage the freedom of the population to form opinions and confidence in activities of the authorities. Authorities for the purposes of this Act means State bodies and establishments and foundations under public law (Article 2(2)(a) of the legislation cited).

The Financial Market Authority (FMA) (*Finanzmarktaufsicht*) established by the Act of 18 June 2004 on the Financial Market Authority (Financial Market Authority Act (*Finanzmarktaufsichtsgesetz*); FMAG; LR 952.3) is an independent establishment under public law of that kind with a legal personality of its own.

Pursuant to Article 29 of the Information Act, any person who can claim to have a legitimate interest has a right to access official documents unless precluded by overriding public or private interests. In accordance with Article 31(1) of the Information Act, overriding interests with respect to the withholding of information exist, in particular, where (a) by reason of the premature disclosure of internal working documents, requests, drafts and similar items decision making would be significantly impaired, (b) the population would be harmed in a different way, in particularly, by threatening public security, or (c) this would entail a disproportionate effort for the authority.

4. In accordance with Article 34 SCA, the EFTA Court must be requested to give an advisory opinion because the decision in the present appeal proceedings depends on the interpretation of EEA law.

4.1 Pursuant to Article 34 SCA, a request may be made only in respect of the interpretation of the EEA Agreement, which is defined in Article 1(a) SCA as "the main part of the EEA Agreement, its Protocols and Annexes as well as the acts referred to therein". Thus, according to the wording of Article 34 SCA, the EFTA Court does not have jurisdiction also to interpret the SCA. However, in the legal literature, the view is taken that the EFTA Court must also have jurisdiction to interpret Article 34 SCA (Christiansen in Arnesen, Fredriksen, Graver, Mestad and Vedder (Eds.) *Agreement on the European Economic Area – A Commentary* (2018) Article 34 SCA note 5, at the end) or that in the framework of a request for an advisory opinion the EFTA Court must be capable, of its own motion, of interpreting Article 34 SCA, as it is incumbent on it, like all courts, to check whether it has jurisdiction (Fredriksen, *Europäische Vorlageverfahren und nationales Zivilprozessrecht* (2009) 146). The latter position could also be derived from paragraph 51 of the EFTA Court's judgment in Case E-11/12 *Koch*, according to which the Court considers that it may, if need be, examine the circumstances in which the case was referred to it by the national court, in order to assess whether it has jurisdiction.

As there is no express case law of the EFTA Court on this point, an answer to Question I/1 is requested.

4.2 If the EFTA Court has jurisdiction also to interpret the provisions of the SCA, the following question arises in the matter at hand:

Following the ruling by the Administrative Court of the Principality of Liechtenstein, in the judgment of 3 March 2023 mentioned, in case VGH 2022/090, that the Liechtenstein Information Act must be applied in the present case and instructing the lower instances to identify any specific public or private interests that preclude access to the

documents, the lower instances may not, as a matter of national procedural law, question the applicability, in principle, of the Information Act to the request for information lodged by the appellant. This follows from Article 98 of the Act of 21 April 1922 on General Administrative Procedures (Administrative Procedures Act (*Landesverwaltungspflegegesetz*); LVG; LR 172.020) applicable here, which provides that if the procedure suffers from a substantial irregularity, the contested decision must be set aside on this ground, specifying the irregularities that have occurred, and the matter must be remitted … for the elimination of such and, where necessary, for a new decision. This means that the lower instances are bound by the requirements set out by the Administrative Court. That is to say, they may no longer question the decision, but must eliminate the irregularities identified by the Administrative Court, namely, the fact that, in the Administrative Court's view, the lower instances did not examine which specific public or private interests (within the meaning of the Information Act) preclude access to the FMA's documents, i.e. they must specify these grounds in the framework of a new decision. Consequently, the fact that the Information Act must be applied to the present case and thus that the provision of information requested must be assessed in accordance with the conditions determined in that Act may, as a matter of national administrative procedural law, no longer be questioned.

However, rulings of the ECJ exist in relation to (what is now) the second paragraph of Article 267 TFEU, which to this extent – in terms of its wording – resembles Article 34 SCA, according to which the right to request a ruling is "unfettered" and may be restricted neither by the provisions of national law – in particular codes of administrative and judicial procedure – nor by the practice of national courts, and in particular that national provisions whereby a court is bound on points of law by the rulings of a superior court cannot deprive the inferior courts of their power to request a ruling from the ECJ. This also applies even if the legal question concerned, in relation to which a preliminary ruling is sought, is contradicted by a legal opinion reached by the

superior instance in its order to set aside and remit to an inferior instance (Case 166/73 *Rheinmühlen-Düsseldorf*). Consequently, in the present case a request for an advisory opinion in relation to provisions of a directive (Questions I/3 to I/5) may only be made if the case law of the ECJ mentioned is also applicable to the giving of an advisory opinion pursuant to Article 34 SCA – namely, the further questions (I/3 to I/5) are only relevant if it is permitted to depart from the legal view expressed in the judgment of the Administrative Court, according to which assessment must be made in accordance with the Information Act – for which reason this question (I/2) is asked.

4.3 In the present case, an exchange of information between the FMA and the CSSF took place. The question arises whether a formal or also merely an informal exchange of information of that kind relating to the appellant "in his function as a board member and shareholder" in a Liechtenstein bank falls within the notion of confidentiality for the purposes of the first subparagraph of Article 53(1) of the Directive mentioned. It appears that this must be answered in the affirmative, given that, in point 38 of his Opinion delivered on 4 September 2014 in Case C-140/13 *Altmann*, Advocate General Jääskinen expressly referred to the fact that, inter alia, communications and transmissions of information between the various competent authorities are subject to "prudential secrecy", the corresponding obligation being imposed on authorities for the supervision of the financial sector and those working within them. However, as far as it can be determined, there is no case law on this point.

Thus, also this question (I/3) must be asked.

4.4 Here, as mentioned, the exchange of information between the FMA and the CSSF took place in accordance with Article 24(2) of the Directive mentioned. Consequently, the question arises whether this circumstance changes anything in relation to the answer to be given to Question I/3. Namely, the appellant would have received all the information if he had continued with the proposed acquisition and

subsequently the ECB had issued a negative decision. In that situation, in accordance with the final sentence of Article 24(2) of the Directive mentioned, he would have become aware of all the views or reservations expressed by the competent authority responsible for the proposed acquirer. Whether he may also learn of these views and reservations when he does not continue with the proposed acquisition but – as happened here – abandons it is the subject of Question I/4.

4.5 Finally, the question arises whether – to the extent it is decisive here – in addition to the cases specified in the second and third subparagraphs of Article 53(1) of the Directive mentioned, namely, cases covered by criminal law and in civil and commercial proceedings where a credit institution has been declared bankrupt, there may be further reasons for which the obligation of professional secrecy is set aside. Namely, only in those circumstances would the national legislature have the power, for example, in the framework of freedom of information legislation (here: the Liechtenstein Information Act) to provide for possibilities of access or information. If the list in the Directive mentioned is exhaustive, the Information Act would be entirely inapplicable in cases such as the present. In this connection reference must be made to the case law of the ECJ in relation to Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC (MiFiD I). In relation to the similarly worded provision of Directive 2004/39/EC (in that case, Article 54), the ECJ held by judgment of 12 November 2014 in Case C-140/13 *Altmann* that the specific cases mentioned in Directive 2004/39/EC in which the general prohibition on divulging confidential information covered by professional secrecy does not preclude their transmission or use are set out in detail in that directive, from which it follows that there are no exceptions to the general prohibition on divulging confidential information other than those specifically provided for in Article 54 of Directive 2004/39/EC (paragraphs 34 and 35 of that ruling). It must also

be mentioned that this ruling was delivered in relation to the German Freedom of Information Act.

Thus also the questions arise, as were stated above in Question 1/5.

4.6 If however one of the questions set out in Questions I/1 to 1/4 must be answered with “no” or the main question asked in Question I/5 be answered in the negative but the additional question in the affirmative, the Liechtenstein Information Act would have to be applied and, in accordance with the case law cited of the Liechtenstein Administrative Court, the FMA or the Appeals Board of the Financial Market Authority would have to indicate which specific public or private interests (private interests are, in any event, not discernible) preclude the access to the FMA documents sought by the appellant. On this point, the FMA and Appeals Board already argued in the first set of proceedings, as set out above, that a public interest exists in the effective supervision of financial intermediaries and, therefore, in the international cooperation between national oversight and supervisory authorities, so that an effective supervision of financial intermediaries is only ensured when the international supervisory authorities cooperate effectively and the principle of sincere cooperation with trust and full mutual respect applies, for which reason the exchange of information between supervisory authorities must remain confidential and the appellant cannot be given access and information cannot be provided. As mentioned, this argument did not satisfy the Administrative Court.

Consequently, the question arises whether the reasons mentioned, that is to say, the effective functioning of the system for supervision of the activity (here: of banks), based on supervision within one Member State and the exchange of information between the competent authorities of several Member States, is important, or the absence of such trust could jeopardise the unhindered transmission of confidential information and, thus, if professional secrecy were no longer ensured, the normal functioning of the financial markets is at risk. This could be

derived from Article 3 EEA Agreement ("principle of sincere cooperation").

5. That the appeal proceedings must be stayed when requesting an advisory opinion from the EFTA Court follows from Article 74 of the Administrative Procedures Act.

Appeals Board of the Financial Market Authority

Vaduz, 17 August 2023

Dr Wilhelm Ungerank LL.M.

President