ORIGINAL

Registered at the EFTA Court under N° E-10/23-13
30th day of November 23

TO THE PRESIDENT AND MEMBERS OF THE EFTA COURT

The EFTA Court Registry
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WRITTEN OBSERVATIONS

submitted, pursuant to Article 20 of the Statute of the EFTA Court, by the

COMPLAINANT

represented by Dr. Karl Mumelter, LL.M., Attorney at Law,
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in

CASE E-10/23

In accordance with the request of the EFTA Court dated 25 September 2023, Case E-10/23-03, and in accordance with Article 20 of the Statute and Article 97 of the Rules of Procedure of the EFTA Court, the Complainant herewith lodge the following

WRITTEN OBSERVATIONS

with the EFTA Court:

1 FACTS OF THE CASE

1. With regard to the facts of the present request for referral, reference can essentially be made to the statements of the Complaints Commission of the Financial Market Authority ("FMA-BK") in FMA-BK 2023/2, ON 12. As explained by the referring court, the Complainant was the majority shareholder and Chairman of the Board of Directors of a bank domiciled in Liechtenstein, which had been granted a licence by the FMA in accordance with the Liechtenstein Banking Act.

2. The Complainant has no criminal or regulatory (supervisory) record. From a regulatory (supervisory) point of view, there are 2 decisions concerning the Complainant in Liechtenstein: On the one hand, an administrative decision by the FMA prohibiting the Complainant from acting as a member of the Board of Directors of the above-mentioned bank was **repealed** by the FMA-BK. On the other hand, the FMA issued a decision in which it ordered the bank (not the Complainant) to restore the legal situation (inter alia) to the effect that the Complainant would no longer be involved in the bank either as a member of the Board of Directors or as a shareholder; in these proceedings concerning the second decision, the Complainant had no party status and for this reason the FMA-BK ruled with legally binding effect that this second decision could not have any binding effect on any subsequent proceedings. Accordingly, it was expressly stated in the latter decision of the FMA-BK that this second decision in particular **may not have any consequences for the assessment of the *Fit & Proper* status of the Complainant at another supervised company**. The Complainant has therefore, from Liechtenstein's perspective, **no convictions in regulatory (supervisory) terms**.

3. The Complainant intended to acquire a qualified participation of more than 10% in a bank domiciled in Luxembourg in 2022. The facts described in relation to the exchange of information between the Liechtenstein FMA and the Luxembourg *Commission de Surveillance du Secteur Financier* (CSSF) concerned this planned acquisition of a shareholding, whereby the CSSF had already effectively and informally refused to authorise this acquisition of a shareholding on the grounds that the CSSF had received negative information about the Complainant from the Liechtenstein FMA.

4. Accordingly, from the Complainant's perspective, it must be made clear that, with regard to the facts of the case at hand, it is not a matter of information that directly and primarily concerns the Liechtenstein or Luxembourg bank (see Art 53(1) Directive 2013/36/EU: "*individual credit institutions*"), but rather it is exclusively a matter of information that directly and immediately concerns the **person** of the Complainant.

5. Since the FMA and the FMA-BK emphasise that the present case would correspond to precisely those cases that the European legislator assumed or wanted to have regulated when adopting the provisions to be interpreted, in particular the duty of confidentiality within the meaning of Article 53(1)(1) of Directive 2013/65/EU, it is important to highlight the following differences:

6. In this case, the Complainant is not requesting that the Liechtenstein FMA disclose or forward information that it has received from other authorities, but (merely) wishes to receive information about **what the FMA itself has collected and forwarded about him**. It is therefore not clear to the Complainant how, within the system of official information exchange and with regard to the fact that authorities must maintain confidentiality in the sense of the principle of loyal cooperation for the disclosure of appropriate and reliable information, a national authority can invoke this with regard to information that it itself has provided.

2 NATIONAL AND EUROPEAN LEGAL FRAMEWORK

7. With regard to the national and European legal framework, the Complainant also essentially refers to the presentation of the referring FMA-BK, and may additionally contribute as follows:

8. Insofar as reference is made to the principle of loyal cooperation, which is laid down in secondary law in Art 6 of Directive 2013/36/EU and Decision No 79/2019 of the EEA Joint Committee, and it is stated that the competent authorities should cooperate in a spirit of trust and full mutual respect and, in particular, ensure the disclosure of appropriate and reliable information to each other and to other participants in the ESFS, **European transparency provisions must** also be taken into account in the interpretation:

9. In particular, Article 10(3) TEU stipulates that "*all citizens shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen.*" This regulation, which is entitled "*Provisions on democratic principles*", is similar in its programme to the national law of 19 May 1999 on information for the population (Information Act; LR 172.015), which aims to make the activities of state bodies transparent in order to promote the free formation of public opinion and trust in the activities of state bodies with regard to the exercise of democratic rights.

10. **Freedom of information** is also expressly enshrined as a fundamental right in EU law in Art. 11 of the Charter of Fundamental Rights (GrC) alongside freedom of expression.

11. Even if the EEA Agreement itself does not contain a catalogue of fundamental rights modelled on the GrC, the EFTA Court also refers in its practice to the case law of the ECJ on fundamental rights (Art. 6 EEA Agreement; see also EFTA Court 01.07.2008, E-9/07 [*L'Oréal*] para. 28).

12. Especially since the EEA Agreement itself is based on the conviction that the EEA will contribute to democracy and the EFTA Court itself has consistently held that the Agreement must be interpreted in the light of internationally recognised fundamental rights (EFTA Court 12.12.2003, E-2/03 [*Ásgeirsson*] para. 23; 28.06.2011, E-12/10 [*EFTA Surveillance Authority/Iceland*] para. 60), the questions of interpretation referred to the EFTA Court by decision of the FMA-BK 2023/2, ON 12, will also have to be assessed in terms of a requirement of transparency under EU law.

13. In line with these considerations, reference is made to the last-instance ruling of the Liechtenstein Administrative Court ("VGH") of 3 March 2023, VGH 2022/090, in which it stated that effective supervision of financial intermediaries and cooperation between national supervisory and oversight authorities in the sense of the principle of loyal cooperation and the associated confidentiality of the individual provision of information

does not conflict with the interest asserted by the Complainant in the present proceedings, which the VGH qualified as a legitimate interest. Accordingly, international cooperation and assistance in administrative matters - both formal and informal - cannot be exempted from the principle of publicity. In particular, the VGH stated that this does not have a negative impact *per se* on the exchange of information. The granting of individual insights to a private individual, especially if this act directly concerns a private individual, cannot and need not be secret under any circumstances.

3 ON THE QUESTIONS REFERRED

14. **Question I.1.** concerns a pure question of jurisdiction relating to the possibility of interpretation by the EFTA Court of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (SCA), which does not directly concern the Complainant.

15. According to the FMA-BK's comments on **Question I.2.,** the questions referred by it are only relevant if, in the opinion of the EFTA Court, it is permissible to deviate from the legal opinion expressed in the judgement of the VGH.

Art. 29 of the Liechtenstein Information Act precisely governs the right to inspect official documents, and it is inherent in official documents that they are subject to a certain degree of confidentiality and secrecy. With regard to the general duty of confidentiality in particular, the Liechtenstein Information Act introduces a change of paradigm and establishes the principle of "**publicity** with reservation of confidentiality"; however, it does not completely abolish confidentiality obligations. European confidentiality obligations can also exist in national freedom of information law, but transparency is to be favoured, provided there are no overriding public or private interests to the contrary or abusive requests for access.

Accordingly, in answer to question I. 2., it should be pointed out that even if information relating to the formal but also informal exchange of information between the competent authorities of the Member States within the meaning of Article 4(1) of Directive 2013/65/EU is subject to the obligation of secrecy within the meaning of Article 53 of this Directive, the judgement of the VGH may continue to apply, especially since an interest in information may nevertheless be given preference over an obligation of secrecy in a necessary balancing of interests under national law.

16. The Complainant has already pointed out that, in his view, the **answer to question I. 3.** is not decisive for the outcome of his request for information under national law, specifically under Art. 29 of the Information Act, since the right of access also exists if there are confidentiality interests; these may simply not outweigh the legitimate interest of the Complainant under Art. 31 of the Information Act.

Moreover, question I. 3. refers to the informal exchange of information between the authorities, i.e. to any interest in confidentiality on the part of the authority providing the information, which would have to be protected by the authority receiving the information through any confidentiality obligations. In this case, however, the authority (FMA) invokes the confidentiality of its own information, which is why, according to the view of the Complainant, it is precisely these facts that are not subject to the confidentiality obligation of Art 53 of the Directive.

Both, Art. 53 and the related provision of Art. 54 of the Directive refer to "*information received*". However, as this concerns information provided to another authority, the

scope of the confidentiality obligation does not apply in this case. The purpose of the duty of confidentiality is to protect authorities providing information from the unfiltered disclosure of this information by the authorities receiving it. In line with the principle of loyal cooperation, this stipulates that supervisory authorities should be more "loyal" to each other than the national authority is to its national intermediaries. The aim is to prevent information that a national authority has received from another authority from being passed on to intermediaries based in its own country, thereby undermining the European standard of protection. The authority providing the information is protected from (unauthorised) disclosure by the authority receiving the information; national authorities are not protected with regard to their own collection and provision of information.

17. With regard to **question I. 4.** and the question raised by the FMA-BK in this regard as to whether any confidentiality changes if the exchange of information between the FMA and the CSSF pursuant to Article 24(2) of the Directive has taken place, it must be stated that this naturally makes a difference to the Complainant.

The confidentiality provisions of Art. 53 of this Directive are not applicable to situations in which the person seeking information requests information **about himself** from the supervisory authority, given the meaning of the *leg cit* and the purposes it pursues. There is no recognisably overriding need for protection of other authorities in the confidentiality of the exchange of information, as this does not concern information provided by them. The purpose of the corresponding confidentiality provisions is to ensure the protection of information available to the financial supervisory authorities relating to individual market participants or to protect information provided by the other authority. In addition, based on the case law of the ECJ (ECJ 13 September 2018, C-594/16 [*Buccioni/Banca d'Italia*]; C-15/16 [*Baumeister/BaFin*] para. 12 -19), an exception is to be assumed to the effect that cases such as the one in question are not to be considered confidential, as disclosure to the Complainant neither poses a risk of harm to the interests of individual market participants outside the Complainant nor poses a risk to the supervisory activities of the authorities that is worthy of protection.

Following these explanations, the Complainant takes the view that question I. 4. should be answered in the negative with regard to the interested purchaser himself.

18. It is therefore in principle required to address the other questions referred. Nevertheless, the Complainant also states with regard to **question I. 5**. (first part) that the ECJ stated in Case C-358/16 (13.09.2018, *UBS Europe and others*) that the disclosure of various supervisory documents is appropriate if they serve the requirements of the right to an effective remedy, to fair custody and to safeguard the rights of defence of an applicant.[1] This also applies in terms of a defence against supervisory sanctions and the Court stated in this context, with reference to its established case law, that rights of defence must be safeguarded in all proceedings, including administrative assistance proceedings, which may lead to a measure adversely affecting the person concerned and that access to files in this context is "the necessary complement to the effective exercise of the rights of defence".[2] There is therefore a right to disclosure of documents by the supervisory authority that are relevant to the defence and legal action of the person concerned. In this context, access to requested documents cannot be denied with a blanket reference to existing

[1] In C-586/16, para. 54 et seq., the ECJ states that the right to an effective remedy also constitutes **protection against arbitrary or disproportionate interference by public authorities** in the **sphere of private activity of** a natural or legal person and that this constitutes a general principle of Union law and that an administrative subject may invoke this protection against a legal act that burdens him.
[2] ECJ Case C-358/16 (*UBS Europe and others*) para. 60f mwN.

confidentiality obligations under financial market law. Accordingly, in the opinion of the Complainant, question I. 5. (first part) must be answered in the affirmative.

19. With regard to the **second part of question I. 5.,** reference should be made to the previous explanations in these Written Observation and also the introductory remarks on principles of European law with regard to transparency. Such an interference with confidentiality obligations is in line with both European and national fundamental values with regard to the free formation of public opinion and the promotion of trust in the activities of state authorities in relation to the exercise of democratic rights.

20. In summary and in response to question II, it should therefore be noted that neither the exchange of information **between** the competent authorities is jeopardised nor is there any loss of confidence with regard to frictionless transmission; the principle of loyal cooperation is not at risk at all. As explained, this is not an institution-related disclosure of information in the narrower sense, as the information does not concern a supervised bank as a market participant, but the nature of the information concerned is different.

In this case, the Complainant, as an interested purchaser, simply wants to know the reasons why he was denied a supervisory licence. Such an interested purchaser must have the opportunity to know the reasons for a decision by the CSSF, which the CSSF has taken on the basis of incorrect information provided by the FMA. Knowledge of the information communicated by the FMA to the Luxembourg supervisory authority is not only vital for the Complainant's assertion of rights and defence under supervisory law, but also for his professional future and consequently for his economic existence; this incorrect information about him provided by the FAM has not only made his professional advancement massively more difficult, but has in fact made it impossible. The disclosure of information by the FMA to the CSSF is tantamount to an international ban on exercising a profession and a ban on working in the European financial sector to the detriment of the Complainant. The incorrect information provided by the FMA prevented the Complainant from actually participating in a bank in Luxembourg and thus threatens to **thwart** all professional and economic activities of the Complainant in the **regulated supervisory area in the** future. The disclosure of information requested in these proceedings can therefore not violate the principle of loyalty under Art. 3 EWRA for these reasons alone.

Vaduz, 27 November 2023