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TENTH EDITION

Editor
Jan Putnis

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THE

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PREFACE

Banking regulation continues to confound the idea that views about how banks should be regulated will eventually settle down to an orthodoxy broadly accepted throughout the world.

Few global banking groups ever considered that a time would come when they would face consistent systems of regulation across the world, and still less that regulators would coordinate their activities in a way that would make life easy for those groups. Legal and compliance professionals who have worked in or with the industry since long before the financial crisis of 2007 to 2009 are generally not surprised by the examples of banking regulation diverging in many jurisdictions: in some ways it marks a return to a time when there can be no certainty that governments and regulators are all facing the same way and pulling in the same direction.

Running a global banking group continues to be a tough exercise, and the possibility of further fragmentation of approaches to regulation around the world risks adding further to the cost bases of these groups. As predicted since the UK electorate voted to leave the European Union in 2016, Europe in particular looks set to become a less cost-efficient and more complex place in which to run a cross-border banking franchise. Indeed this is already the case for the banking groups that have largely completed their Brexit reorganisations, establishing or expanding EU subsidiaries. While this has stimulated banking groups to consider cost cutting and other efficiency measures in connection with their Brexit planning, in many cases these measures scarcely compensate for the inherent inefficiency of requiring additional licensed legal entities through which to conduct business in Europe.

Aside from the largely regional challenge of Brexit, this tenth edition of *The Banking Regulation Review* is published in the midst of a number of industry developments that are challenging regulators and banks alike in all major banking centres.

The challenges are far-reaching and have no central theme, ranging from the continuing revolution in finance stimulated by emerging technologies and the related exploitation of the value of data on the one hand, to the continual revelations of the widespread use of banks for money laundering on the other.

While it is too early to say that the remarkable global consensus that emerged about prudential regulation following the financial crisis is fracturing, it is certainly eroding around the edges, with liberalising tendencies in the United States and even in the European Union.

All of these factors make work as a legal, compliance or risk professional in the sector both more interesting and more perilous than ever before: more interesting because there is so much going on, and more perilous because there seems to be more that can go wrong within banks nowadays, from misallocation of capital to business units that struggle, to whistleblowing and money laundering problems, to catastrophic IT outages.

Money laundering issues have been particularly prominent in banking in the past year, suggesting that the industry still has a long way to go to tackle this problem. Many of the issues uncovered are legacy in nature, but the industry has much to do to convince regulators and governments that those issues will not recur.

IT problems have led to an increasingly intense debate about what can be done to improve the operational resilience of banks. This is not simply a continuation of the somewhat sterile debate about the incompatibility of many legacy banking IT systems with attempts to modernise risk management and the customer experience. Regulators have realised that operational resilience is a subject that can only be tackled effectively by making two significant changes to the way that this subject has traditionally been viewed. First, operational resilience should be considered in a holistic way, looking not only at banks' own systems but also across the whole of the financial sector at the resilience of the inter-connections between banks, financial market infrastructure and other market participants. Secondly, work on operational resilience achieves little unless it is considered with customers and other end users of services in mind. The resilience of a bank's systems is not a meaningful concept unless it delivers an acceptable level of service to customers and incorporates tolerances for the levels of inconvenience that customers may suffer in the event of extreme disruption, recognising that disruption could originate outside the bank itself.

More immediately, IT challenges in banks expose the need for effective crisis management capabilities. Recovery and resolution planning has helped some banks to develop this expertise, but has been less helpful in this respect than might have been hoped. There is no substitute for more detailed planning for crises than many banks have so far included in their recovery planning. Those who disagree with this view should consider how many banks have performed poorly when crises have hit them, and how many of those banks would have argued beforehand that their systems were adequate to cope with a range of foreseeable adverse scenarios.

Conduct risk remains high up the agenda of most banks. The final report of the Royal Commission into misconduct in the banking, superannuation and financial services industry in Australia was notable outside that country for the familiarity of almost all of its findings. Whatever the ultimate legislative and regulatory response to that report, it is a reminder that banking remains vulnerable to poor conduct unless senior management make good conduct a cornerstone of their strategy and ensure that it is embedded in the incentive arrangements for all staff who have a material influence on customer outcomes.

This edition covers 37 countries and territories in addition to our usual chapters on international initiatives and the European Union. Thanks are due to all of the authors who continue to devote time to this project despite busy schedules. There must be a feeling among many of the authors that banking regulation is a subject that will never settle down; that it will never return to being the rather duller subject that it was before it became a political issue more than 10 years ago.

Thank you also to the partners and staff of Slaughter and May in London and Hong Kong for supporting this book, and in particular to Nick Bonsall, Ben Kingsley, Peter Lake, Emily Bradley, Tolek Petch, Jocelyn Poon, Tamara Raoufi and David Shone.

Finally, the team at Law Business Research deserve as much credit for their patience this year as for their usual work as the publishers of this book. Thank you in particular to Gavin Jordan and Katie Hodgetts. The uncertainties that Brexit has thrown up have left a number of authors wondering what the best time to publish would be, before the realisation dawned that Brexit is likely to be a more protracted process than many envisaged and that therefore

no one publication date would be better than any other. The other issues noted above look set to run in some form indefinitely.

Perhaps by the time the next edition of this book is published, all will be much clearer, but those of us who are endlessly fascinated by the subject of banking regulation know all too well just how unlikely that is.

Jan Putnis
Slaughter and May
London
April 2019

Chapter 21

LIECHTENSTEIN

Mario Frick and Nils Vogt[1]

I INTRODUCTION

Liechtenstein, which is located in the heart of Europe, is known to be a niche player for financial services. Many investors and advisers know about its liberal company system, including the company limited by shares, Anstalt,[2] foundation and the Anglo-Saxon style trust. Liechtenstein banks support these companies by delivering the necessary banking services.

Over the years, there have been quite considerable changes in the financial and banking system of Liechtenstein. The turning point for Liechtenstein's banking and financial market system was seen in the mid-1990s. With internet technology, and especially through entering the European Economic Area (EEA), Liechtenstein left its principle of highest confidentiality and blocking of information in exchange for free access to the European market. In the ensuing years, this led to a situation in which cooperation in tax issues and in other aspects of international cooperation grew increasingly important. Today, Liechtenstein has 15 banks that mainly concentrate on asset management. In the past, transaction banking, and especially the field of fintech, has grown more important for the Liechtenstein market. Currently, Bank Frick & Co AG is the leading bank in this field.

Of the 15 banks licensed in Liechtenstein today, five are subsidiaries of Swiss, Austrian and Luxembourgian banks.

Liechtenstein banks traditionally focus on private banking. They do not engage in investment banking, and carry comparatively low risks. Thanks to Liechtenstein's participation in the European single market, Liechtenstein banks enjoy full freedom of services, capital, persons and goods throughout the entire EEA. This makes it possible to offer financial products from Liechtenstein that are based on the Swiss franc (Liechtenstein's official currency) and are authorised throughout the entire EU. Thanks to this special status, Liechtenstein offers attractive diversification options to globally orientated investors.

Three of the banks are systemically relevant for the Liechtenstein financial market: LGT Bank AG, Liechtensteinische Landesbank AG and VP Bank AG.

1 Mario Frick is a partner and Nils Vogt is a personal assistant at Advocatur Seeger, Frick & Partner AG.

2 The Anstalt (establishment) is a capital company, which in many respects (organs, field of activity) is quite similar to a joint-stock company. The big difference is that an establishment does not have shares, but rather founders' rights. The establishment is therefore often used when there are only one or perhaps two owners. The establishment also benefits from some administrative simplifications (no obligation to publish the balance sheets).

II REGULATORY REGIME APPLICABLE TO BANKS

Although Liechtenstein is a small country with roughly only 38,000 inhabitants, it has a workforce of approximately 37,000. The majority come from Liechtenstein's neighbouring countries, Switzerland and Austria. Hence, Liechtenstein is dependent on its close neighbours. Every day, 20,000 employees commute from Austria and Switzerland, as well as a few from Germany.[3] Liechtenstein enjoys the best of both worlds in this context: on one hand, there is a longstanding and traditional partnership with Switzerland, which is not a member of the EEA or the European Union; on the other, there is the strong relationship with the EU through Liechtenstein's membership of the EEA since 1995. Below is a brief summary of these aspects.

i Currency treaty

For Liechtenstein's financial services sector, the currency treaty with Switzerland[4] is of significance in several respects. The 1980 currency treaty not only declared the Swiss franc to be the official means of payment for Liechtenstein, but also declared certain Swiss legal and administrative provisions to be applicable in Liechtenstein under the currency treaty (see the annexes to the currency treaty). The Swiss National Bank (SNB) acts as the national bank for Liechtenstein. This means that certain financial intermediaries (banks, investment undertakings) have to comply with reporting obligations to the SNB for monetary policy reasons. However, supervision of all financial service providers licensed in Liechtenstein remains exclusively with the competent supervisory authority. The currency treaty is a bilateral treaty under international law that is regularly updated and, if necessary, adjusted.

ii The EEA and the EFTA Convention 2001 (Vaduz Convention)

As a member of the EEA,[5] Liechtenstein – together with Norway and Iceland – participates in the four economic freedoms (services, capital, persons, goods) within the EU. As a result, European guidelines, ordinances and directives concerning banking, alternative investment funds, UCITs, asset management and all the other financial market aspects in Liechtenstein are regulated according to EU legislation. As such, Liechtenstein has a European passport for its financial market companies as well as for its financial market products.

Because Switzerland did not join the EEA, this led to a situation where several transitional periods and solutions had to be implemented. With the signing into force of the Vaduz Convention, most of these problems were solved. Switzerland still does not have the same access to the European market – especially in the field of services – as Liechtenstein and other EEA members. However, the Vaduz Convention[6] helps.

The Vaduz Convention was a complete revision of the European Free Trade Association (EFTA) Convention, which was originally limited to trade in goods. This revision became necessary due to bilateral negotiations between Switzerland and the EU. This brings the contractual relations between Switzerland and the other three EFTA states to a level

3 Details can be found in the yearly report of Amt für Statistik: https://www.llv.li/files/as/fliz-arbeit-und-bildung-2018.pdf.

4 Currency agreement between the Principality of Liechtenstein and the Swiss Confederation. LR 0.951.910.11.

5 For detailed information see the website of EFTA: http://www.efta.int/eea/eea-agreement. EWR Agreement of 2 May 1992 on the European Economic Area. LR 0.110.

6 EFTA Agreement. LR 0.632.310.

comparable to that created by the bilateral agreements between Switzerland and the EU. The Vaduz Convention entered into force on 1 June 2002 at the same time as the seven bilateral agreements between the EU and Switzerland. The EFTA Convention also contains provisions on trade in services and investments. The EFTA states grant each other access to markets that goes beyond WTO standards.

iii Main banking acts and laws

The main acts and laws governing the activities of banks[7] are:

a the Banking Act (BA);[8]
b the Banking Ordinance;[9]
c the Act of 18 June 2004 on Financial Market Supervision;
d the Act of 11 December 2008 on professional due diligence to combat money laundering, organised crime and terrorist financing;
e the Financial Market Stabilisation Institution Act;[10]
f the Restructuring and Winding-up Act;
g the Market Abuse Act;[11]
h the Asset Management Act;[12]
i the Consumer Credit Act of 24 November 2011; and
j the Persons and Companies Act of 20 January 1926 (PGR).

iv Licences

In the past, many new EU rules and regulations have been implemented in Liechtenstein that have made it necessary for market participants to have special licences for payment services, e-money and many other aspects in the field of financial market business.

Banking licences are the most comprehensive licence, putting banks in a special situation: with a full banking licence, they may engage in all of these activities without additional licences[13] as long as they provide the necessary knowledge, employees and organisation to undertake these activities.

Banks engage in activities set out in Article 3 Paragraph 3 BA on a professional basis. Natural and legal persons that are not a bank may not accept deposits or other repayable funds on a professional basis. According to Article 3 Paragraph 3 BA, banking activities are:

> *a) the acceptance of deposits and other repayable funds; in the case of an e-money transaction in accordance with subparagraph (f), the receipt of a sum of money shall not constitute an acceptance of deposits or other repayable funds if the received sum is directly exchanged against e-money;*
> *b) the lending of third-party funds to an indeterminate circle of borrowers;*
> *c) safekeeping transactions;*

7 These can be found at www.gesetze.li or www.fma-li.li.
8 Act of 21 October 1992 on Banks and Investment Firms.
9 Regulation of 22 February 1994 on banks and investment firms.
10 Act of 4 November 2016 on the Institution for the Financing of Financial Market Stabilisation Measures.
11 Act of 24 November 2006 on Market Abuse in Trading in Financial Instruments.
12 Asset Management Act of 25 November 2005.
13 Exception: according to Article 30t Paragraph 2 BA, the operation of a multilateral or organised trading facility requires a licence issued by the FMA.

d) *the provision of investment services and ancillary services referred to in Annex 2 Sections A and B [of the BA] as well as the execution of other bank related off-balance-sheet transactions;*

e) *[Repealed];*

f) *the issuance of electronic money pursuant to Article 3(b) of the E-Money Act.*

g) *the assumption of suretyships, guarantees, and other forms of liability for other parties where the obligation assumed is monetary in nature;*

h) *trading of foreign currency for one's own account or on behalf of others.*

Liechtenstein has implemented the rules and regulations according to EU standards; reference is made to the guidelines of the European Banking Authority (EBA).

III PRUDENTIAL REGULATION

i Financial Market Authority

There is only one supervisory authority for Liechtenstein banks: the Financial Market Authority Liechtenstein (FMA).

The FMA has been a regular member of the International Organization of Securities Commissions since April 2011, has had observer status in the EBA and the European Securities and Markets Authority since May 2011, and also has observer status in the European Insurance and Occupational Pensions Authority.

ii Relationship with the prudential regulator

The Banking Division is responsible for supervising banks and investment firms in Liechtenstein, and it monitors compliance with the applicable legal norms. As part of the licensing procedure, submitted documents are reviewed for content and completeness. Ongoing monitoring is ensured with reports banks and investment firms are legally required to submit, as well as through direct and periodic contact with the boards of directors and management of institutions.

Similar to Switzerland, Liechtenstein has implemented the dual supervision model. This means that independent, qualified auditors supervise the fulfilment of a bank's legal duties. Additionally, internal audits are mandatory. Smaller banks often use other independent, qualified auditors for this part of the auditing process as well. The FMA may also carry out its own audits or accompany external audits. Where violations of legal norms or grievances come to the attention of the Banking Supervision Section of the FMA, it undertakes necessary measures to restore a lawful state of affairs.

To ensure transparency as well as to improve the working of the internal banking market, the Capital Requirement Directive[14] (CRD IV) obliges the competent authorities to disclose specific information. The published information should permit a meaningful comparison of the approaches adopted by the competent authorities of the different Member States.

The FMA keeps regular contact with members of boards of directors and management to discuss and address financial market observations and any potential conflicts. The FMA is a proactive financial market player: it not only takes on the role of supervisory authority but also that of researching partner for new developments within the field. For example, it has its own laboratory to research, inter alia, new technologies and new developments. This sandbox

14 Directive 2013/36/EU.

allows financial market players to learn about new developments and approaches within the market, and thereby to not be surprised by them. Additionally, the size of Liechtenstein's financial market system, the accessibility of the authorities and the rapid processing of any potential issues are big advantages for the local market, which gives enterprises a competitive advantage when filing for licences across the EEA.

There are several reports[15] that banks must deliver to the FMA during the course of the year concerning financial stability, liquidity, fulfilment of different tasks and – as previously mentioned – auditors' reports. These reports must fulfil the general legal requirements according to the Basel III agreements (CRD IV and CRR[16]), and are part of the Single Supervisory Mechanism across the EU.

iii Management of banks

Banks are organised as public companies (companies limited by shares or joint-stock companies). Shares normally are registered shares in order to comply with the duty to identify shareholders for fit and proper evaluation (see below).

Pursuant to Article 22 BA, banks and investment firms must be organised in accordance with their business profile and business cases, and require:

a a board of directors responsible for overall direction, supervision and control;
b general management responsible for operations that consists of at least two members who perform their activities with joint responsibility and who may not simultaneously be members of the board of directors;
c an internal audit department that reports directly to the board of directors (see Article 33 of the Banking Ordinance on delegation of the responsibilities of the internal audit department);
d risk management that is independent of management responsible for the operational business;
e an audit committee of the board of directors; and
f appropriate procedures by which employees can report violations of the Banking Act and Regulation (EU) No. 575/2013.

The distribution of functions between the board of directors and the general management must guarantee proper monitoring of business conduct (Article 22 Paragraph 4 BA). The board of directors is responsible for the overall direction, supervision and control of the bank or investment firm (for details, see Article 23 Paragraph 2 BA).

In addition to the Banking Act, the Law on Persons and Companies (PGR) also applies. Article 261 et seq. of the PGR regulates the basic rules for joint-stock companies, such as rules on the structure of shares, organisation and capital increases.

15 The FMA sends to-do lists to the different banks. Forms and guidelines are published on the FMA-website: https://www.fma-li.li/de/finanzintermediare/bereich-banken/banken-und-wertpapierfirmen/meldewesen/formulare.html.

16 Regulation (EU) No. 575/2013.

Remuneration and bonus system

According to Article 7a Paragraph 6 BA, banks and investment firms shall introduce and permanently maintain remuneration policies and practices that are consistent with sound and effective risk management. The FMA will share this information with the European supervision bodies.

This rule on remuneration was implemented in the wake of the financial crisis, and the bonus discussion with regard to Article 1 (3) of CRD III.[17] A risk-oriented and appropriate remuneration policy for banks and investment firms is stipulated to ensure that their remuneration policies are in line with the long-term interests of banks and investment firms. The details of these remuneration policies and practices, which must subsequently be introduced and maintained by institutions, can be found in Article 92 of Directive 2013/36/EU and in Annex 4.4 to the Banking Ordinance.

Liechtenstein follows the requirements of CRD IV, which gives clear rules concerning the relation between fixed salary and variable components. Most banks in Liechtenstein pay bonuses. Their systems vary: some banks pay bonuses connected to specific goals, while others pay bonuses as a fully discretionary add-on to the salary.

Within the framework of the principle of proportionality, the FMA has determined that certain rules do not apply to small institutions and to employees who receive relatively low variable remuneration compared with other international institutions. These are the provisions concerning:

a the composition of variable remuneration (Annex 4.4 No. 1 Paragraph 2 Subparagraph k Banking Ordinance;

b retention (Annex 4.4 No. 1 Paragraph 2 Subparagraph l Banking Ordinance; and

c the treatment of voluntary retirement benefits in the event of an employee leaving a company (Annex 4.4 No. 1 Paragraph 2 Subparagraph n Sentence 2 Banking Ordinance.

A bank qualifies as a small institution if its assets do not exceed 5 billion Swiss francs.

iv Regulatory capital and liquidity

CRD and CRR

Liechtenstein banks are distinguished by their financial strength and stability. They have solid and high-quality equity capital resources. With an average core capital (Tier 1 ratio) of more than 20 per cent, Liechtenstein banks hold, on average, more than what is required under BASEL III or the EU capital requirements of CRD IV. They are thus among the best-capitalised banks across Europe and worldwide. Since the beginning of the financial crisis, no bank in Liechtenstein has required state aid. Liechtenstein's AAA rating by Standard & Poor‘s underscores the country's reliability and stability.

In its Guidance 2017/10, the FMA defines the obligations with regard to own funds and capital adequacy requirements. In doing so, it relies on CRD, and especially CRR, which is implemented in the Banking Act and the Banking Ordinance. The guidelines ensure that banks have sound, effective and comprehensive strategies and procedures in place with which they can maintain the level, types and distribution of internal capital required under the

17 Directive 2010/76/EU.

Internal Capital Adequacy Assessment Process (ICAAP). The required capital is related to current and possible future risks (Article 7a Paragraph 3 Banking Act). The FMA has issued a special directive on ICAAP.

Capital buffers

Pursuant to Article 7e and 7f Banking Ordinance, the FMA is obliged to conduct an annual analysis to identify other systemically relevant institutions in Liechtenstein, report results to the relevant institutions (A-SRIs) and publish those results. Pursuant to Article 4a Banking Act, such A-SRIs may be assigned an additional capital buffer of up to a maximum of 2 per cent of the total risk amount pursuant to Article 92 of CRR.

v Recovery and Resolution

The Recovery and Resolution Act (RRA), transposing the European Recovery and Resolution Directive (BRRD),[18] provides a framework for solving the too-big-to-fail issue, and hence contributes to strengthening the stability of the Liechtenstein financial system. The BRRD requires EEA Member States to establish a national resolution authority vested with specifically designed resolution powers. The RRA appointed the FMA as Liechtenstein's Resolution Authority. For this function, the FMA is obliged to create a separate organisational unit within its organisational structure. The FMA has to ensure that the Resolution Authority is able to exercise its functions operationally independent from the FMA's other organisational units and to prevent conflicts of interest between the resolution functions and the FMA's other functions. The Resolution Authority assumed its function on 1 January 2017. The Resolution Authority, among other things, is tasked with drawing up resolution plans. With regard to the resolution objectives, it is authorised to apply the resolution tools and to exercise its resolution powers (RAA Article 82).

The resolution objectives are:

a to ensure the continuity of critical functions;
b to avoid a significant adverse effect on the financial system;
c to protect public funds by minimising reliance on extraordinary public financial support;
d to protect covered deposits and investments; and
e to protect client funds and client assets.

The tools for resolution are as follows:

a sale of business tool;
b bridge institution tool;
c asset separation tool;
d bail-in tool.

IV CONDUCT OF BUSINESS

Banks and investment firms may be established only in the legal form of a public limited company or a European company (*societas Europaea*). However, in justified cases, the FMA may permit exceptions (Article 18 Paragraph 1 BA).

18 Directive (2014/59/EU.

The main activity of banks is the management of the risks involved in taking people's money, managing it, and deciding how to invest assets or how to finance endeavours. The manner in which a bank conducts its business must ensure that risk management is carried out correctly, and especially in a manner that protects the interests of consumers and investors and supports financial stability. As such, a bank's organisation, its reporting system (especially concerning risks) and its management of liabilities are crucial.

i Organisation

A bank must have a board of directors that is responsible for the general organisation, strategy and supervision of the activities of the bank. The management of the day-to-day running of the bank must be delegated to a management team responsible for the details of the organisation and all reporting duties.

The following areas, among others, must be available:

a a sufficient number of employees and tools for know your customer and anti-money laundering tasks;

b automated control of the financial behaviour of the bank;

c a compliance department;

d a department for legal affairs; and

e a financial department for own accounting and for reporting to the FMA.

Furthermore, banks must guarantee they are able to undertake the necessary reporting on tax issues. Under various agreements with the EU,[19] the OECD, and other countries[20] and institutions, Liechtenstein reports several data streams concerning the bank accounts of people residing outside Liechtenstein. These common reporting standards (also called the automatic exchange of information on tax aspects) have been in place since 2017. The corresponding laws and duties are very specific, and require a thorough knowledge of clients' private details, hence the rising importance of client data departments.

ii Risk management

Article 7 BA states that banks must provide a risk management framework as well as regulations or internal directives outlining responsibilities and processes for the approval of risky business activities. In particular, banks must detect, mitigate and monitor market, credit, default, residual, settlement, liquidity, concentration, securitisation, counterparty, interest rate, reputational, operational and legal risks, as well as the risk of over-indebtedness.

iii Liability

Banks or the persons acting on their behalf are liable in several respects if they commit a misconduct. For example, if persons or companies are active without a banking licence, this is against the law and triggers liability.

19 AEOI-Agreement Liechtenstein-EU (Legal Gazette 2015 No. 354), which covers the exchange of information upon request and the automatic exchange of information of financial accounts.

20 Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information (Legal Gazette 2016 No. 398).

Criminal and administrative liability

Article 3 ss BA states it is a criminal offence to conduct banking business without a licence. Furthermore, breach of duties by management and the board of a bank, for example reporting duties, will be punished as a criminal offence. As these duties are far-reaching, this puts an enormous amount of pressure on banks and their employees. To mitigate this, Article 63b explicitly states that the principles of proportionality and efficiency must be respected when judging failures of duties. At the same time, Article 64 makes it clear that it will mainly be the persons who acted or should have acted who are responsible together with the legal person, which will be jointly and severally liable for monetary penalties.

Article 64a requires that the FMA has an effective and reliable reporting system through which employees of a bank can observe and report any violations, misconduct or unlawful behaviour of their institution.

Civil liability

In principle, the provisions of the General Civil Code (ABGB) apply. The requirements of Section 1290 ff ABGB also apply to banking law. In principle, therefore, there must be damage caused by unlawful and culpable conduct on the part of the bank, and the bank will have to pay for this damage. A person who violates a contractual obligation is therefore liable to his or her contractual partner for the resulting damages to the extent that those interests are violated. The conduct of an employee in the performance of his or her duties is generally credited to the bank.

There is a legal liability of a bank towards its clients if the bank fails to fulfil its duties and in this way causes damage to clients.

The basis for claims for damages on the basis of incorrect information is generally speaking to be found in Section 1300 Sentence 1 ABGB, whose conditions of fact are summarised as:

> *incorrect information or advice given to the injured party,*
> *slightly negligent,*
> *by an expert according to § 1299 ABGB within his field of expertise,*
> *in exchange for a reward/fee.*

Specific rules apply in the field of asset management. As long as an adviser follows the business judgment rules, it is not very likely that a bank will be held liable for losses in asset management. An asset manager's investment decisions are subject to the supervisory and civil law duty to safeguard interests. As a rule, the asset manager is responsible for observing due diligence in the management of a client portfolio, but not for the success of the investment. For loss-making investment decisions within the framework agreed upon with the client as the investment strategy, the asset manager has no liability discretion in favour of the client. The burden of proof for damages, amount of damages, causality and the violation of (objective) duties of care as prerequisites for the claim is borne by the investor. The asset manager is not obliged to disclose internal reports and decision processes, or to justify why he or she has made certain investment decisions within the framework of the agreed-upon investment guidelines.

Finally, there is also direct liability of managers towards clients. If a manager acts outside of normal banking activities, he or she will be held liable on a personal basis. This applies explicitly if he or she offers services that a bank no longer offers. For example, if a bank does not offer asset management services and a specific bank manager nevertheless does so, he /or she will be personally liable for any damage.

At the same time, managers are also liable towards the bank. Management and all other employees are liable to the bank for any damage they cause, whether intentionally or negligently (Article 218 ss PGR).

iv Banking secrecy

Article 14 Paragraph 1 BA reads:

> *The members of the governing bodies of banks and their employees as well as any persons otherwise working for such banks shall keep secret all facts that they are entrusted with or that become available to them as a result of business relations with clients. The obligation of secrecy shall apply without any time limit.*

However, this secrecy is not absolute. If a criminal court, the Supervisory Board of the Financial Intelligence Unit or foreign authorities within the framework of international agreements (e.g., common reporting standards, automatic information exchange in tax issues) ask for information, it will be granted. Thus, banking secrecy is no longer as absolute as it used to be.

V FUNDING

The high capitalisation of the Liechtenstein banking sector, healthy liquidity indicators and a very low ratio of non-performing loans simultaneously underscore the stability of the banking sector in Liechtenstein. Liechtenstein is part of the Swiss franc currency area, which means that banks have the same access to refinancing with the SNB as Swiss banks.

Aside from that, classical funding also applies for Liechtenstein banks. This means that they rely on deposits from customers, unsecured and secured capital market products, deposits from other banks and other money market instruments.

VI CONTROL OF BANKS AND TRANSFERS OF BANKING BUSINESS

Every proposed direct or indirect acquisition and every proposed direct or indirect disposal of a qualifying holding in a bank or investment firm must be notified in writing to the FMA by the person or persons interested in the acquisition and the disposal. Every proposed direct or indirect increase and every proposed direct or indirect reduction of a qualifying holding must also be notified if, as a consequence of the increase or reduction:

a the thresholds of 20, 30 or 50 per cent of the capital or voting rights of a bank or investment firm were to be reached or crossed in either direction;

b the bank or investment firm were to become a subsidiary of an acquirer; or

c the bank or investment firm would no longer be a subsidiary of the person disposing of the qualifying holding.

The FMA's Guidance 2017/20 provides guidelines regarding the supervisory assessment of the acquisition, increase or disposal of qualifying holdings in banks, investment firms, asset management companies and insurance undertakings. This guidance defines what must be delivered to make a change of control possible.

Shareholders with a qualifying holding (10 per cent or more) must be suitable and capable of ensuring the sound and prudent management of the bank or investment firm (Article 17 BA).

i Control regime

If a bank or investment firm forms part of a foreign group working in the financial sector, a licence is granted only if the group is subject to consolidated supervision comparable to Liechtenstein supervision and the supervisory authority of the home country does not object to the establishment of a subsidiary (Article 15(2) BA).

ii Fit and proper requirements

The professional and personal qualities of the persons entrusted with the administration or management of a bank or investment firm must always guarantee sound and proper business operation (Article 19 BA). In particular, according to Article 29(1) of the Banking Ordinance, the persons intended to serve as the following must have sufficient professional qualifications (training or education, or both; previous job experience) for the tasks that are to be assigned to them:

a members of the board of directors;
b the head of the internal audit department;
c members of the risk committee; and
d members of the general management.

iii Change of control

According to Article 26a BA, every proposed direct or indirect acquisition and every proposed direct or indirect disposal of a qualifying holding in a bank or investment firm must be notified in writing to the FMA. This also applies if the thresholds of 20, 30 or 50 per cent of the capital or voting rights of the bank or investment firm would be reached or crossed.

iv Transfers of banking business

There are no specific rules concerning the transfer of banking business from one bank to another: the general provisions of civil law apply. In principle, claims against others may be assigned to new creditors. In the case of assumption of debt by a third party, the consent of the old creditor is required. A special feature applies to the overall assumption of a transaction: anyone who takes over assets or a transaction with assets and liabilities is automatically obliged to the creditors for the associated debts as soon as the transfer has been notified to the creditors by the transferee or has been made public. However, the previous debtor shall be jointly and severally liable with the new debtor for a period of two years, beginning with the notification or termination of the contract in the case of receivables due and payable and with the due date in the case of receivables due and payable at a later date. Moreover, this assumption of debt has the same effect as the assumption of an individual debt.

With respect to banking secrecy, however, it is advisable to give clients the possibility to look for another bank on their own behalf.

With respect to consumer loans, it might be advisable to observe the respective law (consumer and credit law). If a loan is concerned with banking business, it is not possible to transfer anything from a bank to a non-bank. If a bank stops rendering certain services, for example discretionary portfolio management, it cannot transfer this business; rather, it must terminate the respective agreement with the client.

VII THE YEAR IN REVIEW

On 3 January 2018, new securities regulations came into force throughout the EU. The new Markets in Financial Instruments Directive (MiFID II)[21] replaced the Markets in Financial Instruments.[22] In addition to MiFID II, the Markets in Financial Instruments Regulation[23] came into force.

The most important changes include:

a increased investor protection;
b improved cost transparency;
c enforcement of specific rules for algorithmic trading; and
d regulation of non-regulated markets.

The increasing use of new technologies and IT systems is accompanied by numerous advantages, but also risks, in terms of confidentiality, integrity and availability of information. Due to the enormous damage potential, the FMA attaches great importance to cybersecurity. In its Communication 2018/3, the FMA sets out its expectations of financial intermediaries in dealing with these risks.

A few years ago, the FMA opened a laboratory for new regulations in this regard. In June 2018, it was decided that the laboratory will be directly under the management of the FMA. Many interested investors have approached the FMA for advice, especially in the field of fintech and blockchain technology, and to get clarity on what is possible, what is regulated and what is not regulated.

VIII OUTLOOK AND CONCLUSIONS

An important new development in 2019 will be a law on reliable technologies. This draft law is also known as the Blockchain Act. The government has sent the draft Act for consolidation. The Banking Association, lawyers' associations and private persons have all been invited to comment on the draft. The idea is to provide a framework law concerning the use of new technologies, and guidance about the different roles market players might have in that.

The Act is not a financial market act. Nevertheless, the FMA will play a specific role concerning trustworthy technologies, especially when it comes to distributing potential licences and supervising potential market participants. This, however, depends on the nature of the corresponding technological enterprise. The FMA is very interested in monitoring the development of cryptocurrencies and blockchain-based projects, especially when comparisons can be made with already existing legal structures and current frameworks.

It is expected that Parliament will deal with the draft Act in early spring and make it into law in the summer of 2019.

21 Directive 2014/65/EU.
22 Directive 2004/39/EC.
23 Regulation 600/2014/EU.

Appendix 1

ABOUT THE AUTHORS

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Dr Mario Frick, born 1965, joined the law firm as a partner in 2002. Dr Frick provides consultancy on a great variety of legal areas and publishes regularly in legal journals. He began his career in the legal service of the government and was Prime Minister of Liechtenstein from 1993 to 2001. Since 2008, he has been President of the Board of Bank Frick & Co AG.

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