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Liechtenstein

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Introduction

As of the end of 2020, there were 13 banks licensed in Liechtenstein and subject to the prudential supervision of the Liechtenstein Financial Markets Authority (*Finanzmarktaufsicht* – "**FMA**"). Traditionally, Liechtenstein banks' core business activities are private banking and asset management for local and international private and institutional clients. At the end of 2019, Liechtenstein banks and their group companies managed client assets in the amount of 305 billion Swiss francs.

The three largest Liechtenstein banks are LGT AG, Liechtensteinische Landesbank AG, and VP Bank AG. The latter two are publicly listed and their shares traded on the SIX Swiss Exchange. LGT AG, on the other hand, remains privately owned by the Liechtenstein Princely family.

In recent years, Liechtenstein banks have faced high regulatory pressure and have had to operate in an environment characterised by challenging market conditions. Recent developments in the field of private banking and wealth management led to a consolidation amongst existing Liechtenstein banks, not least to spread the increasing regulatory burden; others have expanded their business outside of Liechtenstein.

At the same time, the Liechtenstein government has continued its efforts to improve the regulatory framework to attract fintech start-ups and innovative financial service providers.

Regulatory architecture: Overview of banking regulators and key regulations

Supervisory bodies

Liechtenstein banks are supervised by a single regulator: the FMA. The FMA is responsible for both prudential supervision and consumer protection.

Based on the Currency Treaty with Switzerland, the official currency in Liechtenstein is the Swiss franc, and the Swiss National Bank (*Schweizer Nationalbank* – "**SNB**") functions as the central bank for Liechtenstein. Swiss provisions on monetary, credit and currency policy therefore apply directly in Liechtenstein and the SNB has the power to enforce these provisions in relation to Liechtenstein banks. The Liechtenstein banks also have reporting obligations to the SNB.

Liechtenstein is a member of the European Economic Area ("**EEA**"), which comprises the members of the European Union ("**EU**") as well as Iceland, Norway and Liechtenstein. EU directives and regulations that have been incorporated into the EEA Agreement have to be implemented or applied directly, as the case may be, by Liechtenstein.

In particular, Regulation (EU) 1093/2010 establishing the European Banking Authority ("**EBA**") has been incorporated into the EEA Agreement and therefore has direct effect in Liechtenstein. The EBA is one of three EU supervisory authorities that have been created to strengthen oversight of cross-border groups and establish a European single rule book applicable to all financial institutions in the EU internal market. EU legislation can confer power upon the EBA to take measures with binding effect in an EU Member State or on banks having their seat in the EU. The particular institutional set-up of the EEA Agreement made it necessary to incorporate the Regulation with amendments in this respect. Measures taken by the EBA can have no direct effect in Iceland, Norway and Liechtenstein and are not binding on banks having their seat in these EEA Member States. Instead, the European Free Trade Association ("**EFTA**") Surveillance Authority will adopt decisions with binding effect on the basis of drafts prepared by the EBA, which drafts were requested by the EFTA Surveillance Authority or were initiated by the EBA itself. Guidelines or recommendations issued by the EBA have to be applied by Liechtenstein banks if the FMA notifies the EBA within two months of their publication that it intends to comply with them.

Furthermore, Liechtenstein is obliged to comply with Regulation (EU) 1092/2010 on the financial supervision of the EU at macro level and establishing a European Systemic Risk Board ("**ESRB**"). In particular, the Regulation provides for the creation of the ESRB. The ESRB is an unincorporated body with responsibility for macroprudential oversight of the EEA financial system with the aim of contributing to the prevention or mitigation of systemic risks to financial stability in the EEA stemming from developments within the financial system. In carrying out its tasks, the ESRB is empowered, in particular, to make recommendations on remedies to identified risks. The EEA Member States must comply with these recommendations.

On a national level, the FMA, the Liechtenstein government and the recently established Financial Stability Council are responsible for monitoring financial stability and implementing macroprudential policy.

Key legislation

EEA Member States have to implement EEA-relevant EU legislation that has been incorporated into the EEA Agreement by a corresponding decision of the EEA Joint Committee. One of these EEA-relevant legal areas is financial services. For this reason, Liechtenstein banking regulation is largely based on EU legislation.

The key laws applicable to banks are:

- The Banking Act (*Bankengesetz* – "**BankG**"; LGBl. 1992/108) and the Banking Ordinance (*Bankenverordnung* – "**BankV**"; LGBl. 1994/022), which set out the requirements for the pursuit of banking activities and provision of the investment and ancillary services listed in Annex I, §§ A and B of the Markets in Financial Instruments Directive (Directive 2014/65 – "**MiFID II**") in Liechtenstein. Main banking activities include deposit-taking, lending, custody of securities, payment transfer services, the assumption of guarantees, surety and similar liabilities as well as trading in foreign currencies.

  Undertakings require a licence issued by the FMA in order to take up an activity or service covered by the BankG on a professional basis in Liechtenstein. Banks or investment firms having their seat in another Member State of the EEA may pursue activities covered by the fourth Capital Requirements Directive (2013/36/EU – "**CRD IV**") or MiFID II in Liechtenstein either on a cross-border basis or through a Liechtenstein branch if they have been licensed for such activities in their home Member State. The BankG and BankV contain detailed provisions regarding formal

and material requirements for obtaining and retaining a banking licence, licensing procedures, ongoing supervision by the FMA and sanctions.

The BankG and BankV implement several EU directives into Liechtenstein law, including the CRD IV, the Capital Requirement Regulation (575/2013 – "**CRR**") and MiFID II.

Furthermore, several acts related to the provision of financial services are of particular relevance to Liechtenstein banks:

- The Due Diligence Act (*Sorgfaltspflichtsgesetz*; LGBl. 2009/047) and the Due Diligence Ordinance (*Sorgfaltspflichtsverordnung*; LGBl. 2009/098), which implement the recommendations of the Financial Action Task Force to combat money laundering and terrorist financing as well as EU anti-money laundering directives in force in the EEA.
- The Bank Recovery and Resolution Act (*Sanierungs- und Abwicklungsgesetz* – "**SAG**"; LGBl. 2016/493) and the Bank Recovery and Resolution Ordinance (*Sanierungs- und Abwickungsverordnung*; LGBl. 2016/509), which implement the EU Bank Recovery and Resolution Directive (2014/59/EU – "**BRRD**"). The SAG applies to Liechtenstein banks and other financial institutions and establishes a framework for the recovery or orderly resolution of failing banks. It grants wide powers to the FMA in its capacity as the national resolution authority.
- The EU Market Abuse Regulation (596/2014 – "**MAR**"). The Liechtenstein implementing provisions have been adopted in the EEA-Market Abuse Regulation Implementation Act (*EWR-Marktmissbrauchsverordnung-Durchführungsgesetz* – "**EWR-MDG**"; LGBl. 2020/155).
- The Payment Services Act (*Zahlungsdienstegesetz*; LGBl. 2019/213) and the Payment Services Ordinance (*Zahlungsdiensteverordnung*; LGBl. 2019/233), which implement the Second EU Payment Services Directive (2015/2366). They contain provisions regarding the formal and material requirements for the provision of payment services in Liechtenstein and the rights and obligations of payment service providers and their customers.
- The E-Money Act (*E-Geldgesetz*; LGBl. 2011/151) and the E-Money Ordinance (*E-Geldverordnung*; LGBl. 2011/158), which implement the EU E-Money Directive (2009/110/EC). They contain provisions regarding the formal and substantial requirements for issuing e-money on a professional basis as well as the rights and obligations of e-money institutions and their customers.
- The Foreign Account Tax Compliance Act (*Gesetz vom 4. Dezember 2014 über die Umsetzung des FATCA-Abkommens zwischen dem Fürstentum Liechtenstein und den Vereinigten Staaten von Amerika* – "**FATCA**"; LGBl. 2015/007), which transposes the Intergovernmental Agreement between Liechtenstein and the United States of America to Improve International Tax Compliance and to Implement FATCA into Liechtenstein law. It requires Liechtenstein banks and other financial institutions to report to the Internal Revenue Service information about financial accounts held by US persons. The Agreement signed by Liechtenstein follows Model 1 according to which taxpayer information is exchanged between national tax authorities.
- The Act on International Automatic Information Exchange in Tax Matters (*Gesetz über den automatischen Informationsaustausch in Steuersachen*; LGBl. 2015/355) and the Ordinance on International Automatic Information Exchange in Tax Matters (*Verordnung über den automatischen Informationsaustausch in Steuersachen*; LGBl. 2015/358), which implement the automatic exchange of financial account information in tax matters developed by the OECD.

- Regulation (EU) 1286/2014 on basic information sheets for packaged investment products for retail investors and insurance investment products ("**PRIIPS Regulation**"), which is directly applicable in Liechtenstein due to a national provision. The implementing provisions were adopted in the PRIIP Implementing Act (*PRIIP-Durchführungsgesetz*; LGBl. 2016/513) and the PRIIP Implementation Ordinance (*PRIIP-Durchführungsverordnung*; LGBl. 2017/232). The PRIIPS Regulation has yet to be incorporated into the EEA Agreement but has been applicable in Liechtenstein on a unilateral basis since 1 January 2018.
- The Beneficial Owner Register Act (*Gesetz über das Verzeichnis wirtschaftlicher*; LGBl. 2019/008), which has provided for a register of beneficial owners of Liechtenstein entities and trusts into which all beneficial owners or controlling persons of Liechtenstein entities and trusts shall be entered.
- In addition, banks and e-money institutions have to observe guidelines (*Wegleitungen*), directives (*Richtlinien*) and communications (*Mitteilungen*) issued by the FMA, as well as the guidelines and recommendations issued by the EBA that the FMA complies with.

Recent regulatory themes and key regulatory developments in Liechtenstein

The key theme of 2020 for Liechtenstein regulators was the COVID-19 pandemic and its impact on Liechtenstein banks and the financial sector as a whole. The Liechtenstein policy response for the financial sector included the implementation of ESRB Recommendation 2020/6 regarding the mitigation of liquidity risks due to margin calls and Recommendation 2020/7 regarding the limitation of dividend payments, share repurchase programmes and variable remuneration programmes of financial institutions. The COVID-19 pandemic also caused a delay in the implementation of various legislative projects relevant to the financial sector.

Noteworthy legal and regulatory developments in 2020 include:

MAR

MAR and various EU Delegated Regulations implementing MAR finally entered into force in the EEA and Liechtenstein on 1 January 2021, more than one year after the respective decision was taken by the EEA Joint Committee. Liechtenstein adopted the relevant implementing provisions in EWR-MDG.

Brexit – Temporary permissions regime

In order to mitigate the negative effects of Brexit on local financial institutions, the Liechtenstein government approved an amendment to the BankV that permits investment firms and banks licensed in the United Kingdom to continue providing investment services and ancillary services pursuant to Annex 1, §§ A and B MiFID II to professional investors domiciled in Liechtenstein after Brexit takes effect (the so-called temporary permissions regime, or "**TPR**"). The amendment entered into force on 1 December 2020 and applies until 31 December 2022 or until the date of entry into force of an equivalent measure at EEA level.

UK banks and investment firms intending to take advantage of the TPR have to notify the FMA prior to taking up activities in Liechtenstein.

The Fifth Anti-Money Laundering Directive – Central bank account register

Liechtenstein also adopted a law implementing provisions of the Fifth Anti-Money Laundering Directive (2018/843), although these have not yet been implemented. A noteworthy change to the current law is the first-time creation of a central bank account register. The register is intended to provide the Liechtenstein Financial Intelligence Unit

and other competent national authorities timely access to information on the identity of account holders and holders of bank safe deposit boxes as well as the identity of authorised signatories and beneficial owners thereof. The provisions concerning the central bank account register will enter into force on 1 October 2021.

Upcoming changes

Several European legal acts relevant to the banking sector are pending entry into force in Liechtenstein:

- The Mortgage Credit Directive (2014/17/EU – "**MCD**"). The government published a bill transposing the MCD into national law in September 2020. The bill is pending adoption by the Liechtenstein parliament.
- The Securities Financing Transactions Regulation (2015/2365). The provisions requiring national implementation have been enacted in the EEA Securities Financing Transactions Implementation Act (*EWR-Wertpapierfinanzierungsgeschäfte-Durchführungsgesetz*; LGBl. 2019/362). The Act will enter into force in Liechtenstein together with the Regulation.
- The Securitisation Regulation (2017/2402). The provisions requiring national implementation have been enacted in the EEA Securitisation Implementation Act (*EWR-Verbriefungs-Durchführungsgesetz*; LGBl. 2020/504). The Act will enter into force together with the Regulation.
- The parts of the Banking Reform Package relevant for the EEA: Regulation 2019/876 amending the CRR; Directive 2019/878 amending the CRD IV; and Regulation 2019/879 amending the BRRD.

Bank governance and internal controls

General

The key requirements for the governance of banks are set out in the BankG and BankV and the directly applicable EU law such as the CRR. In addition, the FMA complies with relevant guidelines and recommendations of the EBA.

A Liechtenstein Bank shall have: (a) a board of directors for ultimate direction, supervision and control; (b) a management board responsible for the operational management consisting of at least two members, who shall exercise joint responsibility for their activities and may not simultaneously be members of the board of directors; (c) an internal audit, which shall report directly to the board of directors; (d) a risk management system independent of the operational business; and (e) adequate procedures for employees to report violations of the BankG and the CRR, as the case may be.

The division of responsibilities between the board of directors and the management board must ensure proper supervision of the business conduct. The members of the board of directors and the management board must have the necessary knowledge, skills, and experience ("fit and proper") to collectively understand the activities of the bank, including the related risks. All members of the board of directors and the management board shall commit sufficient time to perform their functions.

Board of directors

The board of directors of a Liechtenstein bank is responsible for the overall direction, supervision and control of the bank. The board of directors has non-transferable responsibilities such as: (i) stipulating the internal organisation and issuing internal regulations for corporate governance, business conduct and risk strategy, in particular by

ensuring a division of responsibilities and implementation of measures to prevent conflicts of interest, as well as their regular review and amendment; (ii) stipulating the accounting system, financial control and financial planning; (iii) appointment and removal of the management board; (iv) supervising the management board in respect of the development of the business as well as their compliance with laws and regulations; (v) compiling business reports and approving interim financial statements, preparing the general meeting of shareholders and executing its resolutions; (vi) monitoring disclosure and communication; and (vii) regular monitoring and review of the suitability and implementation of the bank's strategic objectives in the provision of investment services, ancillary services and investment activities, the effectiveness of the bank's business regulations and the appropriateness of the bank's policy regarding the provision of services to clients, and taking the necessary steps to remedy any shortcomings.

The board of directors has to consist of at least three members. If the board of directors consists of five or more members, it may delegate responsibilities not expressly reserved by law to a committee composed of at least three board members. Banks of material significance for the national economy have to set up – in addition to the standard committees – a risk committee, remuneration committee, nomination committee and an audit committee.

Management board

The management board of a bank is responsible for the business operation and has to consist of at least two members with adequate experience and qualifications ("fit and proper"). Members of the management board may not at the same time be members of the board of directors of the same bank.

Remuneration

Liechtenstein banks are required to stipulate and implement sound remuneration policies pursuant to the requirements set out in the CRR and Annex 4.4 BankV as well as relevant Level II and Level III acts issued by the European Commission or the EBA, such as the EBA guidelines on sound remuneration policies (EBA/GL/2015/22) and remuneration policies and practices related to the sale and provision of retail banking products and services (EBA/GL/2016/06). Banks of material significance have to set up a remuneration committee consisting of members of the board of directors.

Further bodies

Banks also need to have an internal audit department that reports directly to the board of directors of the bank. For the sake of clarity, the business operations of a Liechtenstein bank shall be examined and audited every year by an external, independent audit company, which shall be acknowledged by the FMA.

Furthermore, banks shall have a risk management system independent of the operational business, a dedicated compliance department, and appropriate procedures by which employees can report violations of the BankG and the CRR. Personnel charged with key functions need to have a good repute as well as adequate experience and professional qualifications.

Place of management

The effective place of management of a bank has to be in Liechtenstein. For this reason, the FMA requires the members of the management board to effectively work in and from Liechtenstein. In addition, a bank has to demonstrate in the licensing process that it will have sufficient substance in the form of office space and key personnel employed in Liechtenstein to be able to effectively operate its business in and from Liechtenstein.

Outsourcing

Banks may outsource certain key functions, such as the internal audit function, with the prior approval of the FMA. Other functions may be outsourced without the prior approval of the FMA if the outsourcing guidelines pursuant to Annex 6 BankV are observed.

The overall direction, supervision and control of the bank by the board of directors and the core management duties may not be outsourced. The outsourcing providers may be located in and outside of Liechtenstein. The bank is required to act with due diligence when selecting and instructing an outsourcing provider, and has to have appropriate resources to adequately monitor the outsourcing provider on a continuing basis.

Bank capital requirements

A bank must have a fully paid-up capital of at least 10 million Swiss francs or the equivalent in euros or US dollars at the time of its authorisation.

In the case of investment firms, the minimum capital must amount to at least 730,000 Swiss francs or the equivalent in euros or US dollars. The FMA has the power to reduce the amount of the initial capital in certain cases, taking into account the nature and scope of the intended business of a bank or investment firm. It must be apparent from the business plan at the time of authorisation that the bank's or investment firm's own funds will not fall below the initial capital after taking up business.

Rules governing banks' relationships with their customers and other third parties

General

In Liechtenstein, there is no law that exclusively governs the relationship between banks on the one hand and customers and other third parties on the other hand. In fact, the general rules and provisions on contracts and legal transactions, which are laid down in the Liechtenstein Civil Code (*Allgemeines Bürgerliches Gesetzbuch* – "**ABGB**"; LGBl. 1003/001), shall be applicable for the relationship between banks, customers and other third parties, too.

From the various types of contracts laid down in the ABGB, the contract of mandate is probably deployed most often in the banking business. Pursuant to § 1009 ABGB, the agent is obliged to procure the transaction diligently and honestly in accordance with his promise and the granted power of attorney and – with the exception of § 1009a ABGB – to transfer all benefits arising out of the transaction to the principal. He is, even though he has been granted a limited power of attorney, entitled to use all means that are necessarily connected with the nature of the transaction or conform to the declared intention of the principal. If he exceeds the limitations of the power of attorney, he is liable for the consequences.

If, however, the agent is a bank, an investment firm or an asset management company, it may, except in the case of independent investment advice and portfolio management, assume that the principal has waived his right to be transferred any fees, commissions or grants received or still to be received by the agent from third parties, provided that: (a) the agent has complied with all of its disclosure obligations prior to the conduct of business; and (b) the principal has instructed the agent to carry out the transaction after such disclosure. Furthermore, the agent is obliged to point out the mentioned legal consequences in its General Terms and Conditions or other pre-formulated terms and conditions of business, as the case may be (*cf.* § 1009a ABGB).

Having said that, Liechtenstein banks usually have their own General Terms and Conditions on which they would base any relationship to their customers. In order to be valid and applicable, General Terms and Conditions need to meet certain criteria. Firstly, unusual provisions used by the bank in General Terms and Conditions (or standard contract forms) do not become part of the contract if they are detrimental for the customer and the customer would not have to expect these provisions due to the circumstances, in particular due to the formal appearance of the contract, unless the bank expressly made the customer aware thereof (*cf.* § 864a ABGB). Furthermore, a contractual provision contained in General Terms and Conditions, which does not determine either of the mutual main obligations, is void in any event if it causes a substantial imbalance of the contractual rights and obligations to the detriment of the customer when considering all circumstances of the case (*cf.* § 879 para 3 ABGB).

Furthermore, certain provisions laid down in the Consumer Protection Act (*Konsumentenschutzgesetz* – "**KSchG**"; LGBl. 2002/164) shall be considered as well. The KSchG, which per definition contains more favourable provisions for customers, supersedes provisions of the ABGB that were otherwise applicable amongst individuals.

Cross-border banking activities

As a principle, a bank shall be entitled to take up its business in Liechtenstein only on the basis of a licence issued by the FMA.

Yet, under the freedom to provide services, a bank having its seat in one of the countries of the EEA may also take up its banking activity in Liechtenstein provided the competent authority of its home Member State has notified the FMA prior to its first-time activity in Liechtenstein (passport).

A bank outside the EEA may provide banking services in Liechtenstein only through a branch in Liechtenstein. The establishment of such branch shall be subject to a licence that shall be issued by the FMA.

Other than that, banks from third countries may not provide any banking services in Liechtenstein unless on a "reverse solicitation" basis, whereas the criteria for such "reverse solicitation" are not entirely clear.

Conciliation board

By virtue of the ordinance of 27 October 2009 on the extrajudicial conciliation board in the financial services sector (*Verordnung vom 27. Oktober 2009 über die aussergerichtliche Schlichtungsstelle im Finanzdienstleistungsbereich*; LGBl. 2009/279), the Liechtenstein legislator has introduced an extrajudicial conciliation board that supersedes the previously existing bank ombudsman.

The conciliation board may be called upon – amongst others – to settle disputes between customers and banks about the services provided by the bank. The conciliation board acts as a mediator to resolve complaints submitted by customers. The conciliation board is not a court of law. Also, it does not have authority to make judicial rulings. In fact, it shall encourage discussions between the disputing parties and lead them to a mutually acceptable solution; however, neither the bank nor the customers are bound to accept any generated solution. In fact, they are free to take further legal measures, as the case may be.

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Daniel Damjanovic has been counselling clients in the banking industry for more than 15 years now. Amongst many others, in 2015, he advised on an in-bound sale and merger transaction between the third- and fourth-largest Liechtenstein banks. In 2017, he was lead counsel of the seller on the Liechtenstein side in one of the largest Liechtenstein cross-border sale transactions between an Austrian bank and a Liechtenstein bank. In 2019, he advised the seller in a share deal regarding another Liechtenstein bank and, in 2020, he was counsellor to a key shareholder of a Liechtenstein bank in a multinational cross-border transaction.

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