Austria

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Regulatory framework

1 What are the principal governmental and regulatory policies that govern the banking sector?

Austrian governmental and regulatory policies for the banking sector primarily aim at maintaining a stable and robust financial system. Transparency and trust in the stability of the banking and financial system are indispensable for the smooth and efficient supply of funds to the corporate, private and public sectors and must be consistently upheld. To this end, the entire financial market must observe a strict rule-based framework.

The main goals of the regulatory framework for the banking sector are:

- increasing transparency, the financial stability and the financial institutions' loss-bearing capacity;
- ensuring the efficient supply of credit to businesses and individuals;
- strengthening and harmonisation of the supervision of banks, securities, insurance and financial conglomerates; and
- requiring better institutions' internal control systems and more effective institutions' internal control by the management board.

2 Summarise the primary statutes and regulations that govern the banking industry.

As a member state of the European Union, the developments of Austria's banking regulations are extensively connected with European measures. The key Austrian legislation applicable to credit institutions includes:

- the Banking Act (BWG), including additional regulations (eg, relating to capital requirements, liquidity, ownership, notification duties, etc), provides for the fundamental framework applicable to credit institutions and financial institutions in Austria, including, inter alia, the licensing regime, supervision, capital and liquidity requirements, anti-money laundering, as well as receivership proceedings and penalties;
- the Payment Service Act (ZaDiG) and the E-Money Act 2010 (E-GeldG) implement the Payment Service Directive (Directive 2007/64/EC) (PSD I) and the Electronic Money Directive (Directive 2009/110/EC). PSD I and the E-Money Act 2010 provide for the licensing and capital requirements for payment and e-money institutions. The revised Payment Service Directive (Directive 2015/2366) (PSD II) entered into force on 12 January 2016 and has to be implemented in national laws by 13 January 2018. In addition, the Interchange Fee Regulation (Regulation 2015/751), which provides for requirements for card-based payment transactions, applies since 9 June 2015;
- the Bank Recovery and Resolution Act (BaSAG) implements the Bank Recovery and Resolution Directive (Directive 2014/59/EU) (BRRD) and provides for the obligation of credit institutions to draw up recovery and resolution plans. The implementation of the Single Resolution Mechanism (SRM) at European Union level required a revision of the BaSAG in 2015. The bulk of the amendments entered into force in January 2016 and strengthen the rights and duties of the Austrian Financial Markets Authority (FMA) as national resolution authority;
- the Securities Supervision Act 2007 (WAG 2007), including additional regulations, provides for licensing of investment service providers, customer protection provisions, disclosure and notification requirements, etc;
- the Capital Markets Act, which primarily implements the Prospectus Directive (Directive 2003/71/EC), provides in particular for the prospectus framework relevant to securities offerings and offerings of investments in Austria;
- the Investment Fund Act, together with selected provisions of the BWG, is the main legal source governing activities of investment fund management companies;
- the Real Estate Investment Fund Act regulates the issuance of open-end real estate funds and the activities of investment fund management companies for real estate;
- the Alternative Investment Fund Manager Act implements the AIFM Directive (Directive 2011/61/EU) and governs the activities of alternative investment fund managers;
- the Stock Exchange Act (BörseG) and the Takeover Act provide the legal framework relating to listing and trading of securities as well as public takeover offerings;
- the Securities Deposit Act regulates the depositing and acquisition of securities;
- the Act on Deposit Guarantee Schemes and Investor Compensation (ESAEG) implements the Directive on Deposit Guarantee Schemes (Directive 2014/49/EU) and regulates the protection of all deposits and credit balances including interest on accounts and savings;
- the Act on the Financial Market Authority, including additional regulations, governs the organisation of the FMA, the cooperation with other regulatory authorities and the applicable cost framework;
- the Mortgage Bond Act applies to the issuance of mortgage bonds by credit institutions;
- the Financial Conglomerate Act contains provisions regarding the additional supervision of financial conglomerates by regulatory authorities; and
- specific other laws, inter alia, apply to Sparkassen, Bausparkassen and Hypothekenbanken.

In addition to Austrian law, certain EU regulations are directly applicable to Austrian credit institutions, including in particular the Capital Requirements Regulation (Regulation No. 575/2013) (CRR), which is to a large extent based on the Basel III standards issued by the Basel Committee on Banking Supervision. The CRR includes most of the technical provisions governing the prudential supervision of Austrian credit institutions.

3 Which regulatory authorities are primarily responsible for overseeing banks?

The European Central Bank (ECB), as the prudential supervisor of banks in the eurozone, the FMA and the Austrian National Bank (OeNB; and together with the FMA, the Austrian Regulatory Authorities) are the regulatory authorities primarily responsible for overseeing Austrian banks. Since November 2014, banking supervision is shaped by the Single Supervisory Mechanism (SSM) based on the SSM Regulation (Regulation No. 1024/2013) and the SSM Framework Regulation (Regulation No. 17/2014). Since then, banking supervision is performed by the ECB having extensive micro- and macroprudential powers. All credit institutions of the eurozone are under the SSM's remit; however, the ECB does not directly supervise all of them. Supervisory tasks and responsibilities are divided between the ECB and the national competent authorities and are allocated on the basis of the significance of the supervised credit institutions. Credit institutions are classified as 'significant' or 'less significant', based on criteria set forth in the SSM Regulation and the SSM Framework

Regulation. The ECB directly supervises only the first category comprising approximately 120 credit institutions.

The following Austrian banks (including their subsidiaries or affiliates) are directly supervised by the ECB: BAWAG PSK AG, Erste Group Bank AG, Raiffeisen-Holding Niederösterreich-Wien reg.GenmbH, Raiffeisenlandesbank Oberösterreich AG, Raiffeisen Zentralbank Österreich AG and – owing to significant cross-border assets – Sberbank Europe AG and VTB Bank (Austria) AG. UniCredit Bank Austria AG, as a subsidiary of UniCredit SpA, is also supervised by the ECB directly. The day-to-day supervision is conducted by joint supervisory teams (JSTs), which comprise staff from both the ECB and the Austrian Regulatory Authorities.

Less significant banks remain under the supervision of the Austrian Regulatory Authorities subject to the oversight of the ECB. The ECB may take on the direct supervision of less significant institutions if required to ensure the consistent application of the high supervisory standards. Austrian Regulatory Authorities have to report on a regular basis to the ECB about their supervisory activities. Banking supervision in Austria itself has been divided between the FMA and the OeNB since 1 January 2008.

The FMA is particularly responsible for licensing, authorisation, notification and supervisory procedures, supervising intra-bank models, commissioning the OeNB to carry out on-site inspections, monitoring actions taken by credit institutions to remedy shortcomings, collecting and analysing qualitative information, evaluating analysis results with respect to official measures and legislation related to banking supervision, sending departmental representatives to international bodies, supervising branches and representative offices of foreign credit institutions in Austria, as well as cross-border supervision. Furthermore, the FMA is the competent authority with respect to securities supervision.

The OeNB is responsible for the ongoing prudential supervision of credit institutions, including regular inspections as well as ad hoc inspections of credit institutions. Moreover, the OeNB obtains data on other financial intermediaries from the FMA to analyse financial conglomerates and also draws up off-site banking analyses. The OeNB notifies the FMA if the risk situation of a credit institution has changed significantly or if a violation of supervisory provisions by a credit institution is suspected. The OeNB provides the FMA with the findings of its inspections and analyses, which are the basis for official actions by the FMA.

Pursuant to the BWG, the Federal Minister of Finance has to appoint a state commissioner and a deputy state commissioner for each Austrian bank with total assets of more than €1 billion to assist in the supervision of such bank. State commissioners ensure that no decisions are taken by the credit institution's shareholder meetings and supervisory board meetings that, in their view, violate federal laws, regulations or orders by authorities. If the state commissioner objects to any resolution proposed at a credit institution's shareholder meeting or supervisory board meeting, he must notify the FMA immediately. The effectiveness of such resolution is suspended until the FMA has determined the validity of the shareholders' or supervisory board's resolution.

4 Describe the extent to which deposits are insured by the government. Describe the extent to which the government has taken an ownership interest in the banking sector and intends to maintain, increase or decrease that interest.

Deposit guarantee schemes are harmonised on a European level. In 1994, the Deposit Guarantee Schemes Directive (Directive 94/19/EC) introduced the obligation to implement deposit guarantee schemes. However, in their national implementations of the Directive the EU member states introduced significantly different schemes in view of the level of coverage, the scope of covered depositors and products and the payout delay.

Under current legislation, any credit institution accepting deposits or providing specific investment services must belong to an investor compensation scheme. Otherwise the FMA would render a decree declaring the credit institution's licence to be expired. The investor compensation schemes are established within the framework of the respective trade associations. By regulation of the Federal Minister for Economy governing the establishment of these trade associations and specialised groups, credit institutions accepting deposits or providing investment are assigned to one of the five trade associations:
- the Austrian Bankers' Association;
- the Regional Mortgage Banks Association;
- the Rural Credit Cooperatives Association;
- the Savings Banks Association; or
- the Credit Cooperatives' Association according to the Schulze-Delitzsch system.

Each trade association is obliged to maintain an investor compensation scheme that all member institutions accepting deposits or providing investment services may join.

Based on the BWG (section 93 BWG):
- deposits and building saving deposits;
- credit balances that result from funds left in an account or from temporary positions in the course of banking transactions, the provision of payment services or the issuance of e-money and which the credit institution must repay according to the applicable legal and contractual provisions; and
- any debt evidenced by a certificate issued by a credit institution, with the exception of mortgage bonds, municipal bonds and funded bank bonds of private persons and undertakings are guaranteed in full up to an amount of €100,000. Additionally, liabilities of a credit institution arising from custody business, trading for one's own account or on behalf of others in certain instruments, third-party securities underwriting or severance and retirement fund business are covered by the investor compensation scheme and guaranteed in full up to an amount of €100,000; regarding undertakings, such claims have to be deducted by a deductible of 10 per cent.

In addition to deposit guarantee schemes, several sectors (eg, Sparkassen, Raiffeisen, Volksbanken) established a liability network providing for reciprocal liability of all member of the network for the liabilities of a single member. This liability is in excess of the statutory guaranteed amount of €100,000 and therefore offers additional security.

The revised Directive on Deposit Guarantee Schemes (Directive 2014/49/EU) amends the legal framework for the protection of deposits and harmonises the legal situation in Europe. The ESAEG transposed the Directive into national law in August 2015. The ESAEG provides a single protection scheme instead of currently five schemes of different trade associations. On 1 January 2019, a single fund will be established at the Austrian Economic Chambers for deposit protection purposes. Credit institutions will be obliged to pay into the funds in advance, rather than retrospectively as under current legislation. Payment in advance should guarantee the fund's ability to protect depositors against the consequences of the insolvency of a credit institution. During the financial crisis of 2008 and its aftermath, various Austrian banks had to be rescued or at least supported by the Republic of Austria. Kommunalkredit Austria AG, which later demerged into Kommunalkredit Austria AG and KA Finanz AG, and Hypo Alpe Adria International AG were fully taken over by the government. KA Finanz AG and Hypo Alpe Adria International AG (whose wind-down unit is now operating under the name Heta Asset Resolution AG) are bad banks and will be fully liquidated. Kommunalkredit Austria AG was recently privatised. Österreichische Volksbanken AG was restructured in 2015 and split into the bank Volksbank Wien AG and immigon portfolioabbau ag (Immigon). The Republic of Austria holds a 43.3 per cent stake in Immigon, which is a wind-down unit pursuant to section 162 of the BaSAG.

5 Which legal and regulatory limitations apply to transactions between a bank and its affiliates? What constitutes an 'affiliate' for this purpose? Briefly describe the range of permissible and prohibited activities for financial institutions and whether there have been any changes to how those activities are classified.

Pursuant to section 70a paragraph 5 BWG, the FMA is entitled to supervise the transactions between the credit institutions, superordinate holding companies and its subsidiary undertakings when the parent undertaking of a credit institution is a mixed financial holding company, parent mixed financial holding company or a mixed activity holding company. For this purpose a mixed financial holding company is a parent undertaking, other than a regulated entity, which together with its subsidiaries, at least one of which is a regulated entity which has its head office in the EU, and other entities, constitutes a financial conglomerate. Such term is defined in article 4 (21) CRR in conjunction with article 2(15) of Directive 2002/87/EC.

Credit institutions must have in place adequate risk management processes and internal control mechanisms, including sound reporting and accounting procedures, so that the credit institution's transactions with the parent undertaking and its subsidiaries can be identified, measured, monitored and controlled appropriately. Intra-group transactions trigger particular reporting obligations towards the FMA. Credit institutions must report all material intra-group transactions, especially loans, guarantees, off-balance sheet transactions, cost-sharing agreements, reinsurance transactions, capital investment transactions and transactions concerning own funds, on at least a quarterly basis. These reporting obligations go beyond the mandatory reports to the Central Credit Register pursuant to section 75 BWG. Where intra-group transactions impose a threat to a credit institution's financial position, the FMA can take appropriate measures.

The affiliation of credit institutions requires the conclusion of a contract between the central body and the affiliated credit institutions, the approval of the shareholders' or general meeting of each participating credit institution and amendments of the articles of association. The formation of an affiliation of credit institutions is subject to an application to and an approval by the FMA. The application must be accompanied by documents reflecting in particular the control, monitoring and risk management processes, the ability of the affiliation to comply permanently with the prudential requirements, and other significant information. An affiliation of credit institutions is not a group of credit institutions, which is formed by a superordinate institution and its subsidiaries.

Various provisions of the BWG, for example, relating to licences, freedoms of establishment and to provide services, capital requirements and liquidity, or supervision, are not applicable to affiliated credit institutions. The affiliated credit institutions are subsequently exempt from those notification and reporting duties that are intended exclusively for the monitoring of these provisions.

Under the BWG, financial institutions are authorised to conduct one or more of the following activities for commercial purposes if they are conducted as the institution's main activities:

- conclusion of lease agreements (leasing business);
- provision of advice to undertakings on capital structure, industrial strategy and related questions, as well as advice and services related to mergers and the purchase of undertakings;
- provision of credit reporting services;
- provision of safe deposit services;
- provision of payment services pursuant to section 1 paragraph 2 of the ZaDiG; and
- issuance of e-money pursuant to section 1 paragraph 1 of the E-GeldG.

6 What are the principal regulatory challenges facing the banking industry?

Contributions to the resolution financing arrangements (eg, national resolution funds and the Single Resolution Fund) will prove a remarkable challenge for the Austrian banking industry. All Austrian credit institutions already have to pay the above-average amount of the bank levy. It is uncertain whether or to what extent the Austrian legislator will approach this double burden and thus avoid competitive disadvantages for Austrian banks.

Other burdens lie in the rapid development of banking regulations and the resulting necessity for banks to react quickly. Provisions regarding the professional qualifications and experience necessary for operating the credit institution for both the executive and supervisory board of credit institutions have been tightened in recent years (eg, fit and proper test). Such enhanced rules strengthen the overall confidence in the financial markets but are also likely to hinder effective governance, especially in smaller banks that cannot find appropriate board members easily. Further, the high number of credit institutions on the small Austrian market and the low margins in Austria may lead to a restructuring of the credit institutions' business strategy, particularly driven by acts of risk minimisation.

In general, credit institutions will face challenges in banking supervision to different extents, based on whether they are designated a significant or a less significant credit institution. Nevertheless, all banks of the eurozone must comply with ECB-issued guidelines and use standardised templates for data collection and information requests, and this may temporarily cause multitrack processes in credit institutions and require organisational changes in a medium to long-term perspective.

7 Are banks subject to consumer protection rules?

Banking activities rendered towards consumers are subject to consumer protection rules, most of which are provided for in the Consumer Protection Act (KSchG) and the Consumer Credit Act. The BWG also provides for consumer protection rules (eg, section 34 BWG relating to consumer current account agreements and stipulating that such account agreements must at least contain the annual interest rate applicable to credit balances, apart from the information required under the ZaDiG, and section 37 BWG, which provides for specific value dates for money transactions with consumers in connection with savings deposits, credit accounts or current accounts). In relation to credit agreements and credit transactions and when dealing with consumers as defined in the KSchG, banks must comply with the Consumer Credit Act. In addition, the WAG 2007 obliges banks to apply the necessary expertise and diligence for the best interests of their clients when providing investment services (section 38 WAG 2007).

Apart from regulatory authorities, other organisations (eg, Organisation for Consumer Protection, Chamber of Labour) monitor the conduct of banks towards consumers and make infringements of consumer protections rules public or bring them to court. Recent practices that have drawn intense scrutiny particularly relate to wrong or misleading investment advisory services (eg, shipping funds).

8 In what ways do you anticipate the legal and regulatory policy changing over the next few years?

We expect that comprehensive legislative changes at a European level will continue and, thus, will significantly influence the Austrian banking industry in the upcoming years.

On 30 September 2015, the European Commission published its Capital Markets Union Action Plan, which provides for the establishment of a true single market for capital across the member states. The European Commission intends to support access to finance, to remove barriers to cross-border investments and to lower the costs of funding. The upcoming implementation of various EU Directives will tie up considerable resources in the banking sector. On 30 November 2015, the European Commission (COM (2015) 583 final) proposed to revise prospectus rules to improve access to finance for companies and to simplify information for investors (eg, a prospectus for smaller companies (SMEs), simplifying secondary issuing for listed companies). On 3 July 2016, the Market Abuse Regulation (which contains provisions about, eg, market sounding, director's dealings and insider law) becomes applicable.

The revised Markets in Financial Instruments Directive (Directive 2014/65/EU) (MiFID II) with its accompanying Markets in Financial Instruments Regulation (Regulation 600/2014) (MiFIR) provides a new legal framework for securities trading, investor protection (including rules on advice and the sale of investment products) and reporting requirements, and strengthens supervisory powers for regulators. The member states are obliged to implement MiFID II by 3 January 2017. The bulk of provisions of MiFIR will apply on 3 January 2017 as well.

PSD II (the Payment Services Directive (Directive 2015/2366)) will replace PSD I (Directive 2007/64/EC) and has to be transposed into national law by the member states by 13 January 2018. PSD II extends the scope of application for providers of payment services (eg, new business models known as 'third party payment service providers') and introduces new rules for liability allocation and transparency requirements.

Since 1 January 2016, the application of the SRM has provided for the establishment of an SRF. The SRM aims to ensure the orderly resolution of failing banks without recourse to taxpayers' money. The SRF will be built up over a period of eight years with ex ante contributions from the banking industry and a target level of at least 1 per cent of the covered deposits of all the credit institutions authorised in the member states (Austria's credit institutions contributed €198.20 million in 2015; the amount of deposits covered by the SRF should be about €50 billion by the end of 2024).

The revised Anti-Money-Laundering Directive (Directive 2015/849) has to be implemented into national law by 26 June 2017. The Anti-Money-Laundering Directive regulates new due diligence requirements regarding the customer, new duties to report suspicious transactions and new obligations to maintain payments records.

In addition, we expect that Europe-wide cooperation with regard to the supervision of banks will still intensify, particularly between the ECB and the national competent authorities but also closer cooperation among other European institutions and bodies such as the European Systemic Risk Board and the European Banking Authority.

Supervision

9 How are banks supervised by their regulatory authorities? How often do these examinations occur and how extensive are they?

Four institutions supervise the financial markets in Austria:
- the ECB supervises banks under the SSM;
- the Oesterreichische Nationalbank (OeNB) monitors the stability of the financial market at a macro level. The OeNB, is responsible for the supervision of payment systems and is involved in the supervision of banks;
- the FMA monitors and checks the individual financial institutions and participants in the markets (micro level); and
- the Federal Ministry of Finance develops the legislative framework, which is then adopted by the Austrian parliament (legislative process).

The ECB is responsible for banking supervision in the eurozone under the SSM. The ECB cooperates with the FMA and OeNB in performing supervisory tasks. The division of supervisory tasks depends on whether the supervised bank is deemed 'significant' or 'less significant'. This differentiation is based on the size, economic relevance and scope of cross-border activities of the supervised bank.

The ECB directly supervises significant banks. JSTs, whose size and organisation depends on the nature, complexity, scale, business model and risk profile of the supervised credit institution, carry out the ongoing supervision of these banks. Moreover, JSTs carry out on-site inspections (eg, in-depth investigations of risks, risk controls and governance with a predefined scope and time frame at the premises of a credit institution). These inspections are risk-based and proportionate. The need for an on-site inspection is determined by the JST in the context of the supervisory examination programmes (SEPs). The scope and frequency of on-site inspections are proposed by a JST, taking into account the overall supervisory strategy, the SEP and the characteristics of the credit institution (eg, size, nature of activities, risk culture). In addition to these planned inspections, ad hoc inspections may be conducted in response to an event or incident that has emerged at a credit institution and that warrants immediate supervisory action.

The FMA and OeNB directly supervise less significant banks. The FMA remains the authority in charge of taking supervisory decisions concerning less significant banks. The OeNB continues to be responsible for the overall risk assessment.

The Austrian Regulatory Authorities supervise credit institutions by means of:
- on-site inspections (yearly and ad hoc);
- mandatory information to be submitted on a regular basis (annual reports, regular notification requirements, etc); and
- requests for other information and documents that seem necessary at any time.

The FMA monitors the adequacy of the capital and liquidity available for the quantitative and qualitative coverage of all significant risks arising from banking transactions and banking operations, the systemic risk emanating from a credit institution for the stability of the financial system and the risks as determined on the basis of stress tests. Moreover, the FMA supervises the exposure of credit institutions to the interest rate risk arising from non-trading activities and takes measures when the economic value of a credit institution declines by more than 20 per cent of its own funds as a result of a sudden and unexpected change in interest rates.

The FMA and OeNB jointly define an inspection plan for each upcoming calendar year, taking into account inspections of systemically important credit institutions, an appropriate frequency of inspections of institutions that are not systemically important, resources for ad hoc inspections, thematic focuses of inspections and review of measures taken to remedy the defects identified. The Austrian Regulatory Authorities regularly publish and update directives and guidelines regarding supervision and how they will approach certain issues. See also question 3.

10 How do the regulatory authorities enforce banking laws and regulations?

The FMA is authorised to exclusively enforce banking laws and regulations, including:
- requesting certain kinds of information or documents pursuant to section 70 paragraph 1 BWG;
- implementing certain measures pursuant to section 70 paragraphs 2, 4 and 4a BWG (eg, prohibition of profit distributions, complete or partial prohibition of the continuation of business operations, imposing additional capital requirements or fines, withdrawal of the banking licence);
- requesting reorganisation measures (receivership or insolvency proceedings) pursuant to section 81 et seq BWG;
- collecting penalty interest for violation of capital requirements pursuant to section 97 BWG; and
- imposing fines due to administrative offences stipulated in section 98 and 99 BWG.

The ECB may impose sanctions on significant banks if regulatory requirements have been breached. The ECB may impose administrative pecuniary penalties on these banks of up to twice the amount of the profits gained or losses avoided because of the breach where those can be determined, or up to 10 per cent of the total annual turnover in the preceding business year (article 18 SSM Regulation).

11 What are the most common enforcement issues and how have they been addressed by the regulators and the banks?

According to the FMA's annual report for 2014, the FMA conducted 54 management talks (the purposes of the meetings is to maintain contact with the management of credit institutions and to examine in greater detail their risk assessment and strategy), and 46 bank audit and early recognition meetings with bank auditors of the auditing associations of the decentralised sectors, issued 43 audit engagements to the OeNB and nine on-site activities related to model approval took place. If there is a risk of a credit institution being unable to fulfil its obligations to creditors and customers, pursuant to section 70 paragraph 2 BWG, the FMA may prohibit distributions of capital or profits, appoint a government commissioner, relieve directors of their duties or prohibit the further pursuit of business activities. The FMA ordered such measures on two occasions in 2014. The FMA also ordered 16 credit institutions, under threat of a coercive penalty, to establish compliance with statutory provisions within an appropriate period of time. Furthermore, the FMA twice imposed a minimum capital requirement that is higher than the statutory minimum and charged interest pursuant to section 97 BWG on 15 occasions.

Resolution

12 In what circumstances may banks be taken over by the government or regulatory authorities? How frequent is this in practice? How are the interests of the various stakeholders treated?

The Financial Market Stability Act entitles the Federal Minister of Finance to take measures for the recapitalisation of credit institutions and insurance undertakings (relevant entities) in order to remedy a considerable disruption within Austria's economy, in order to ensure the macroeconomic balance, and for the protection of Austria's national economy. Apart from monetary measures (eg assumption of liabilities or provision of facilities and own funds), the Minister of Finance is entitled to acquire shares in a relevant entity and, if performance of a relevant entity's obligations as regards its creditors is jeopardised, may – as a final remedy – take over such relevant entity for reasonable consideration. The shares acquired in accordance with the provisions of the Financial Market Stability Act have to be privatised upon the achievement of the intended purpose, taking into consideration the prevailing market conditions. The Federal Minister of Finance is entitled to set forth further conditions and requirements for the measures specified in the Financial Market Stability Act. In this context, additional conditions and requirements were imposed, in particular, with regard to the following aspects: the business focus (the pursuance of sustainable business policies), the application of the funds received, the remuneration of managers, the Tier 1 requirements, the dividend policy (payment of dividends only to the extent reasonable in consideration of the profit situation), measures for safeguarding jobs, measures for the prevention of distortion of competition, as well as the legal consequences of non-compliance with the aforementioned conditions and requirements. The Austrian government has taken over or has supported several banks pursuant to the Financial Market Stability Act (see question 4).

Since 1 January 2015, the BaSAG provides the regulatory authorities with a wide range of powers: for example, the FMA may appoint a temporary administrator in the event the replacement of managing directors, members of the supervisory board or members of the senior management (see question 13) is not sufficient to remedy the need for early intervention. Such temporary administrator either replaces or acts jointly with the managing directors. Further, the FMA, as resolution authority, is entitled to take over a credit institution when applying the resolution tools or when arranging their application.

13 What is the role of the bank's management and directors in the case of a bank failure? Must banks have a resolution plan or similar document?

Managing directors of a credit institution are responsible for defining and supervising the internal principles of a proper management to ensure due diligence in managing the credit institution, and for providing for an organisational segregation of duties and the prevention of conflicts of interest. The effectiveness of these principles has to be regularly verified and appropriate steps to correct any deficiencies have to be taken. Managing directors and members of the supervisory board have to observe statutory, regulatory, organisational and capital requirements as well as specific rules of conduct.

If a credit institution's management and directors consider that their credit institution is failing or likely to fail, they are obliged to notify the FMA pursuant to section 114 BaSAG. A credit institution is deemed to be failing or likely to fail in one or more of the following circumstances:

- the credit institution infringes or will infringe the law or the requirements for continuing authorisation in a way that would justify the withdrawal of the banking licence;
- the assets are or will be less than the liabilities;
- the credit institution is or will be unable to pay its debts or other liabilities as they fall due; or
- extraordinary public financial support is required.

Further, pursuant to the BaSAG, the FMA (either as regulatory authority or as resolution authority):

- is entitled to demand that a specific or all managing directors, members of the supervisory board or members of the senior management resign or are being replaced in the stage of early intervention; and
- is obliged to do so when applying the resolution tools and exercising the resolution powers.

Pursuant to the BaSAG, every credit institution (in case of a group only the superordinate institution, central organisation or central institution) is obliged to draw up a recovery plan and a resolution plan. The FMA reviews the recovery plan and the resolution plan as to mandatory content and compliance with all requirements set by law. In this regard, the FMA also requests an expert opinion from the OeNB. In case the FMA detects any deficiencies, the credit institution is required to change the recovery plan or the resolution plan accordingly. The recovery plan and the resolution plan must be updated at least annually; in any event immediately, if a material change to the credit institution's legal or organisational structure, its business activity or its financial position could have an impact on the recovery plan or the resolution plan.

14 Are managers or directors personally liable in the case of a bank failure?

Managing directors and members of the supervisory board are subject to the liability scheme of general civil and corporate law. Subsequently, a managing director or a member of the supervisory board can be held liable for the failure of a credit institution, when acting deliberately or without the required diligence (see question 13). In the event managing directors do not comply with their notification obligation pursuant to section 114 BaSAG (see question 13), they can be punished with an administrative fine of up to €5 million or up to twice the amount of the benefit derived from the infringement where that benefit can be determined. The BaSAG also threatens this administrative penalty for other violations of the BaSAG (eg, information obligations). The company itself can also be held liable for violations of the BaSAG by their managing directors, with an administrative fine of up to 10 per cent of the total annual net turnover in the preceding business year.

Capital requirements

15 Describe the legal and regulatory capital adequacy requirements for banks. Must banks make contingent capital arrangements?

The CRR and Directive 2013/36/EU (CRD IV) implement the Basel III guidelines and harmonise EU banking supervision.

As to capital requirements, the CRD IV and CRR provide for a change in the structure and quality of own funds. Tier I capital was divided into common equity Tier I capital (CET I capital) and additional Tier I capital. While Tier II capital is still eligible, Tier III capital has been eliminated. Banks must satisfy the requirement of 8 per cent of own funds in relation to the total risk exposure amount, consisting of at least 4.5 per cent CET I capital and 6 per cent Tier I capital. Further, the CRD IV and CRR implemented various capital buffers, such as: a capital conservation buffer of 2.5 per cent of CET I capital, a countercyclical capital buffer, which is calculated for each bank individually and amounts to up to 2.5 per cent of CET I capital, or a systemic risk buffer of up to 2.5 per cent CET I capital. Also, higher capital requirements for counterparty credit risk exposures arising from derivatives, repos and specific securities financing activities were implemented.

On liquidity requirements, the CRD IV and CRR provide for a harmonised system with regard to quantitative liquidity standards. Regarding liquidity measures, the liquidity coverage ratio (LCR) and the net stable funding ratio (NSFR) are applicable. The LCR is a short-term liquidity measure equal to the ratio of high-quality liquid assets to net cash outflows during a 30-day stress period. The NSFR is based on a long-term horizon, during which available stable funding must exceed required stable funding. Finally, a leverage ratio, calculated as the ratio between Tier I capital and the sum of the exposure values of all assets and off-balance sheet items, was also implemented to improve the system stability.

16 How are the capital adequacy guidelines enforced?

The capital adequacy guidelines are enforced through the ongoing supervision by the Austrian Regulatory Authorities, in particular through FMA's authority to enforce banking laws and regulations (see questions 10, 17 and 18). Additionally, credit institutions are obliged to submit certain monthly, quarterly, half-yearly and yearly reports to the Austrian Regulatory Authorities, especially stating qualitative and quantitative information on their own funds, capital adequacy and the risks they have incurred and their risk-management procedures. Such reports are analysed by the OeNB and the results are provided to the FMA.

17 What happens in the event that a bank becomes undercapitalised?

Credit institutions should have robust strategies, policies, processes and systems for the identification, measurement, management and monitoring of liquidity risk over an appropriate set of time horizons to ensure that credit institutions maintain adequate levels of liquidity buffers. If a credit institution does not comply with the capital and liquidity requirements or appears likely to violate these requirements, the FMA shall intervene.

The specific measures for early intervention by the FMA include:

- the implementation of one or more recovery measures contained in the recovery plan;
- specific improvements of the risk management;
- the convening of a general meeting, particularly to introduce capital measures, or inclusion of certain items on the general meeting's agenda or the proposal to adopt certain decisions; the FMA may also call the general meeting itself, if necessary;
- the preparation of a negotiation plan that provides for a voluntary restructuring of the credit institution's obligations towards its creditors; and
- an on-site inspection by the OeNB to asses the assets and liabilities of the institution.

18 What are the legal and regulatory processes in the event that a bank becomes insolvent?

Austria implemented the BRRD (Directive 2014/59/EU) by adopting the BaSAG. The BaSAG aims to ensure an orderly market exit of banks without causing substantial negative repercussions for financial stability while protecting depositors and other customers. If prevention measures and

Update and trends

EMIR – clearing obligation for interest rate swaps set:
The European Markets Infrastructure Regulation (Regulation No. 648/2012) (EMIR) introduced a mechanism for a legal obligation to clear certain classes of over-the-counter derivatives through clearing houses, also referred to as central counterparties (CCPs). The ESMA has determined that certain interest rate swaps classes fulfil the criteria of standardisation, having sufficient volume, liquidity and pricing information, and so should be subject to mandatory clearing. The obligation for central clearing of over-the-counter derivatives under EMIR will apply from June 2016. The clearing obligation covers the following class of over-the-counter interest rate derivatives denominated in the following currencies:
- fixed-to-float interest rate swaps (also known as plain vanilla) for Euros, pounds sterling, Japanese Yen, United States dollars;
- float-to-float swaps (also known as basis swaps) for Euros, pounds sterling, Japanese Yen, United States dollars;
- forward rate agreements for Euros, pounds sterling, Japanese Yen, United States dollars;
- overnight index swaps for Euros, pounds sterling, United States dollars.

The central clearing of interest rate swaps will become obligatory for firms in Category 1 on 21 June 2016. The firms deemed as falling in Category 2 will follow on 21 December 2016, while those falling in Category 3 have to follow the rules from 21 June 2017. Finally, Category 4 firms, which are non-financial counterparties whose over-the-counter derivatives portfolios exceed an asset-specific threshold, will have to clear their trades from 21 December 2018.

EBA Guidelines on sound remuneration policies and its opinion on the application of proportionality:
The European Banking Authority (EBA) published, on 21 December 2015, its final guidelines on sound remuneration policies together with its opinion on proportionality, recommending exemptions from the remuneration principles in the CRD IV. The guidelines ensure that institutions calculate correctly and consistently the so called 'bonus cap' by setting out specific criteria for mapping all remuneration components into either fixed or variable pay and detailing how specific remuneration elements, such as allowances, sign-on bonuses, retention bonuses and severance pay, are to be recognised over time.

The EBA Guidelines will apply as of 1 January 2017 to competent authorities across the EU, as well as to institutions including all subsidiaries that are not subject to the CRD IV framework. The Guidelines are based on the 'comply or explain' principle, which means that competent authorities will have two months to express their intention to comply with them, and in the event of non-compliance, they will need to explain their intention not to comply.

early intervention prove ineffective, institutions can be resolved instead of undergoing normal insolvency proceedings.

Pursuant to section 49 BaSAG a resolution is only possible under the following circumstances:
- the credit institution is failing or likely to fail;
- no private sector solution is planned; and
- the resolution is in the public interest.

If these conditions are not met, the credit institution must be wound up under normal insolvency proceedings:

Either the credit institution that is over-indebted or insolvent itself, or the FMA may request receivership from the competent court if it appears likely that the credit institution's over-indebtedness or insolvency can be remedied. Receivership can only be granted for one year and has various specific consequences determined in section 83 et seq BWG. During the receivership, with regard to liabilities established prior to the arrangement of receivership and being subject to statutory deferment of payment, neither insolvency proceedings over the assets of the credit institution can be initiated nor can a court-ordered lien or right to satisfaction be obtained. The receivership ends by order of the court or opening of insolvency proceedings.

In general, only the FMA may file for the opening of insolvency proceedings; during receivership, only the receiver may file such a request. The substantive insolvency requirements are determined according to section 66 et seq Insolvency Act (IO). The court must consult the FMA before appointing or dismissing a receiver or a liquidator. The insolvency proceedings follow the IO, with the exception that recapitalisation proceedings cannot be initiated.

19 Have capital adequacy guidelines changed, or are they expected to change in the near future?

The most recent changes of capital adequacy guidelines relate to CRR and CRD IV and its implementation in the BWG. CRD IV and CRR provide for the adoption of a large number of delegated and implementing acts in order to give full effect to the single banking rule book. These acts will specify the detail of how competent authorities and institutions should comply with the obligations laid down in CRD IV and CRR.

Ownership restrictions and implications

20 Describe the legal and regulatory limitations regarding the types of entities and individuals that may own a controlling interest in a bank. What constitutes 'control' for this purpose?

There is no limit to the type of entities and individuals that may own a controlling interest in a credit institution or a financial institution. The FMA, however, may prohibit an acquisition of a qualifying holding in case specific criteria are not met (see question 25).

The BWG, in connection with the CRR, distinguishes between:
- participation means the ownership, direct or indirect, of 20 per cent or more of the voting rights or capital;
- qualifying holding means a direct or indirect holding which represents 10 per cent or more of the capital or voting rights or entitling to exercise a significant influence;
- control means the relationship between a parent undertaking and a subsidiary or a similar relationship between any natural or legal person and undertaking; and
- close links means a situation in which two or more natural or legal persons are linked (eg, by participation of ownership or via a third party).

A qualifying holding is already sufficient to trigger notification requirements (see question 25).

21 Are there any restrictions on foreign ownership of banks?

Foreign ownership of an Austrian bank is neither prohibited nor restricted under Austrian law. Nevertheless, the FMA may prohibit the acquisition or increase of a qualifying holding after examination of the necessary criteria (see answers to questions 25, 26 and 28).

22 What are the legal and regulatory implications for entities that control banks?

In case the influence exercised by the entity having a qualifying holding imposes a risk for the sound and prudent management of the credit institution, the FMA must take required measures, including:
- prohibition of profit distributions, appointment of a government commissioner, completely or partly prohibition of the continuation of business operations, etc;
- sanctions completely or partly prohibiting the directors to manage the credit institution; or
- submission of a motion with the competent court to suspend the voting rights controlled by entity in question during the risk prevails or until the shares are purchased by a third party (see question 25).

Depending on its legal form, an entity having a qualified holding in a credit institution may become subject to consolidated group supervision, including group financial statement requirements.

23 What are the legal and regulatory duties and responsibilities of an entity or individual that controls a bank?

Any person controlling a credit institution shall, in particular:
- notify the FMA of any intention to increase, sell or reduce the holding in a way that it exceeds, reaches or falls below certain thresholds (see question 25);

- make available information and documents that the FMA needs to fulfil its duties; and
- not prevent effective and efficient supervision by the Austrian regulatory authorities.

Transactions between a credit institution and its shareholder or other entities controlled by the shareholder have to be at arm's length in order to avoid breaches of Austrian capital maintenance rules. Transactions between the credit institution and certain individuals or entities (eg, managing directors, members of the supervisory board, and board members of controlling or controlled entities) require unanimous resolution by all managing directors and are subject to the consent of the supervisory board or any other supervisory body competent according to applicable law or the articles of association.

24 What are the implications for a controlling entity or individual in the event that a bank becomes insolvent?

Under Austrian law, a credit institution may only be established in the legal form of a corporation, a cooperative society or a savings bank. In general, only cooperation members of a credit institution organised as cooperative society may be held liable for the liabilities of the institution in case of insolvency.

Changes in control

25 Describe the regulatory approvals needed to acquire control of a bank. How is 'control' defined for this purpose?

Already the intention to directly or indirectly hold a qualifying holding (ie, 10 per cent of the voting rights or capital) in a credit institution, or to increase such a qualifying holding in order to reach or exceed the thresholds of 20 per cent, 30 per cent or 50 per cent of the voting rights or capital, or in such a way that the credit institution becomes a subsidiary of that party, must be pre-notified to the FMA (see question 28). To ensure the sound and prudent management of the credit institution in which an acquisition is proposed, and having regard to the likely influence of the potential acquirer on the credit institution, the FMA shall appraise the suitability of the proposed acquirer and the financial soundness of the proposed acquisition based on the following criteria:
- the reliability of the potential acquirer;
- the reliability, professional qualification and experience of any person who will direct the business of the credit institution as a result of the proposed acquisition;
- the financial soundness of the potential acquirer, in particular in relation to the type of business pursued and envisaged by the credit institution;
- whether the credit institution will be able to comply and continue to comply with regulatory requirements, in particular, whether the group it will become a part of has a structure that may jeopardise effective supervision; and
- whether there are reasonable grounds to suspect that, in connection with the proposed acquisition, money laundering or terrorist financing within the meaning of article 1 of Directive 2005/60/EC is being or has been committed or attempted, or that the potential acquisition could increase such risk.

Based on this appraisement, the FMA shall prepare a draft decision for the ECB to oppose or not to oppose the acquisition. The ECB shall decide on the basis of the appraisement and the FMA's draft decision. If the ECB does not prohibit the intended acquisition within 60 days after the FMA received the notification, the acquisition shall be deemed approved. If an application is to be rejected or additional conditions need to be imposed, it will become subject to a hearing procedure.

26 Are the regulatory authorities receptive to foreign acquirers? How is the regulatory process different for a foreign acquirer?

In principle, there is no difference in the regulatory process for a foreign acquirer. If the FMA requests additional documents from a non-EEA proposed acquirer or a proposed acquirer not subject to supervision under Directives 2013/36/EU, 2009/65/EC, 2009/138/EC or 2004/39/EC, the 60-day period can be suspended for up to 30 days (see questions 25, 28 and 29).

27 What factors are considered by the relevant regulatory authorities in an acquisition of control of a bank?

The FMA will review and assess all information provided by the proposed acquirer in connection with the notification, focusing on the criteria set by law (see answers to questions 25 and 28).

28 Describe the required filings for an acquisition of control of a bank.

Specific information to be filed is provided for in the Ownership Control Regulation, including information about:
- the identity of the proposed acquirer, bylaws, management board, economic beneficiaries, etc;
- the reliability of the acquirer with regard to criminal or administrative offences, insolvency proceedings, etc;
- the participations with a group of companies as well as other possible ways to exercise influence;
- the relevant business relationships, family ties or other relevant relationships as well as acquisition interests;
- the financial situation and credit standing of the acquirer;
- the funding of the intended acquisition, including disclosure of all relevant agreements; and
- the business plan, including a description of strategic objectives and plans, if the acquirer gains control.

In the case the bank is an Austrian stock exchange listed entity, an acquirer must also comply with the provisions of the BörseG and the Takeover Act (eg, filing and notification obligations, mandatory takeover bid, etc).

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Similar requirements must be fulfilled if the proposed acquirer intends to acquire a qualified holding in an insurance company pursuant, an investment firm, an investment service provider or a payment institution.

29 What is the typical time frame for regulatory approval for both a domestic and a foreign acquirer?

Within two working days, the FMA has to confirm the receipt of the notification to acquire a qualifying holding. Within five working days of the acknowledgement of the receipt, the FMA has to notify the ECB of the intention of the acquisition. The FMA verifies the completeness of the application and prepares its draft decision for the ECB at least 15 working days before the expiry of the assessment period of 60 days (see question 25). The authorities have 60 days to examine the intended acquisition and to prohibit it. In the case of the FMA requesting additional documents, the 60-day period is extended for up to 20 days (in some cases up to 30 days). If the ECB does not prohibit the acquisition within 60 days (or 80 or 90 days), the acquisition shall be deemed approved.