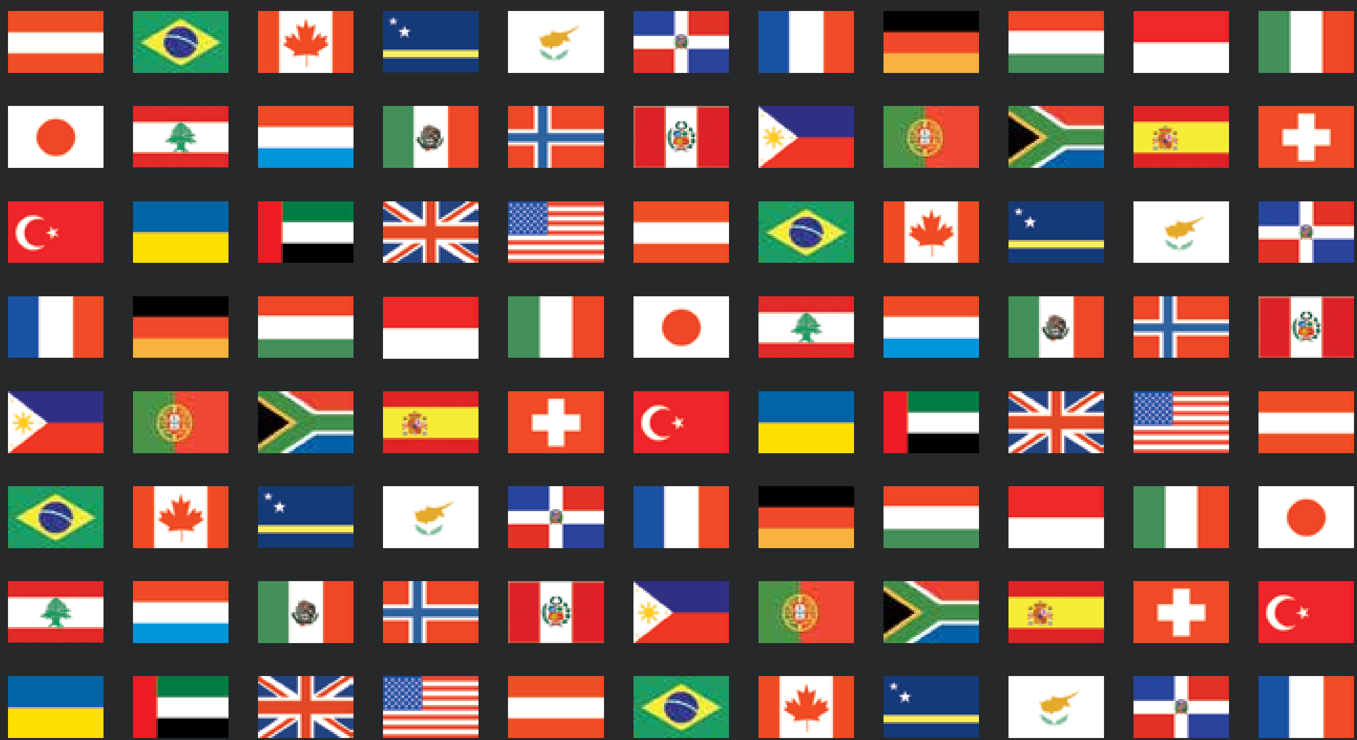
Banking Regulation

In 27 jurisdictions worldwide

Contributing editor
David E Shapiro



2015

GETTING THE DEAL THROUGH

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DEAL THROUGH

Banking Regulation 2015

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CONTENTS

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. Trust in the stability of the banking and financial system is indispensable for the smooth and efficient supply of funds to the corporate, private and public sectors, and this trust 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 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 2009/110/EC, PSD) and provide for the licensing and capital requirements for payment and e-money institutions; a proposal for a revised Payment Service Directive (PSD II), published by the European Commission in 2013, is currently discussed among policymakers;
- 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 BaSAG entered into force on 1 January 2015;
- the Securities Supervision Act 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, PD), provides in particular for the prospectus framework relevant to securities offerings and offerings of investments in Austria;
- the Investment Fund Act (InvFG 2011), 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 Act on the Financial Market Authority, including additional regulations, governs the organisation of the Austrian Financial Market Authority (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 new 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 of 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, Österreichische Volksbanken-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, 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 which, 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. In the aftermath of the recent financial crises, a new Directive on Deposit Guarantee Schemes (Directive 2014/49/EU) became effective as of June 2014, imposing an obligation to bring into force most of the provisions by July 2015.

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 which 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.

During the financial crisis 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; in Österreichische Volksbanken-AG, the government acquired a 43.3 per cent stake. 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 is intended to be privatised. The Volksbanken sector recently decided on substantial reorganisation plans that include a split of Österreichische Volksbanken-AG and liquidation of the remaining non-core business.

Other banks, including the listed Erste Group Bank AG and listed Raiffeisen Bank International AG, have been supported with participation capital issuances purchased by the Republic of Austria, which have already been paid back (including interest).

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 para 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 para 2 of the ZaDiG; and
- issuance of e-money pursuant to section 1 para 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 as a remarkable challenge for the Austria 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 inhere 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. Such enhanced rules strengthen the overall confidence in the financial markets but are also likely to hinder effective governance, especially in smaller banks which cannot find appropriate board members easily. Further, the high number of credit institutions on the small Austrian market, their exposure in the CEE/SEE region, aggregate total assets of €265 billion (as of end 2013), 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 institutions. 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 multi-track 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.

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 on a European level will continue and, thus, will significantly influence the Austrian banking industry in the upcoming years.

In its Work Programme 2015 published on 16 December 2014, the EU Commission announced to set out an action plan to build a Capital Markets Union. The EU Commission intends, inter alia, to reduce fragmentation in financial markets, to improve access to finance for SMEs and to strengthen cross-border capital flows in the single market. The EU Commission revealed that it will propose a framework for high-quality securitisation and review the Prospectus Directive to reduce administrative burdens on SMEs.

These and other regulatory changes will to a large extent concern entities and activities that do not directly belong to the banking industry. If alternative forms of financing may continue to become of major importance, a concurrent slowdown in the banking industry cannot be excluded. However, entities and activities that do not directly belong to the banking industry may also face stricter regulations, as they can carry systemic risks as well.

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?

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.

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.

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 kind of information or documents pursuant to section 70 para 1 BWG;
- implementing certain measures pursuant to section 70 paras 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.

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 2013, the FMA conducted 62 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 40 bank audit and early recognition meetings with bank auditors of the auditing associations of the decentralised sectors, issued 47 audit engagements to the OeNB and 12 on-site activities related to model approval took place. The FMA ordered 7 credit institutions, under threat of a coercive penalty, to establish compliance with statutory provisions within an appropriate period of time. Furthermore, the FMA once imposed a minimum capital requirement that is higher than the statutory minimum and charged interest pursuant to section 97 BWG in 16 occasions.

12 How has bank supervision changed in response to the 2008 financial crisis?

The Austrian Regulatory Authorities have revised their structure in order to react to the difficulties raised by the 2008 financial crisis and the following legislative changes in the supervision framework. The measures have resulted in an enhanced efficiency and effectiveness in fulfilling the tasks prescribed by the statutes of law.

In addition, the FMA has intensified its pre-emptive approach to investigate banking, investment and insurance service businesses of unlicensed entities to validate the compliance with regulatory laws and implement prosecution measures, if necessary. This, in particular, related to certain crowd funding and public participation schemes which have been held to breach the banking license requirements set forth in the BWG.

Resolution

13 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). Regarding new legislation please see the Update and trends section.

14 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.

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.

15 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 14).

16 How has bank resolution changed in response to the recent crisis?

Please see the Update and trends section.

Capital requirements

17 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 provides 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 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 provides 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.

18 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 (please see questions 10, 19 and 20). 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.

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

If a credit institution does not comply with the capital and liquidity requirements or appears likely to violate these requirements, the FMA shall intervene. Violation shall be assumed likely if:
- the credit institution's total capital ratio pursuant to article 92 (2) (c) CRR falls below the threshold of 8.625 per cent;
- the Common Equity Tier 1 capital ratio pursuant to article 92 (2) (a) CRR falls below the level of 5 per cent; or
- the credit institution does not initiate recovery measures according to its recovery plan although a triggering event has occurred.

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 which 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.

Additionally, the FMA shall impose a penalty interest on credit institutions for the following amounts:
- 2 per cent on the amount by which the credit institution falls below the capital requirement pursuant to article 99 (1) CRR in conjunction with section 70 para 4a no 1 BWG, calculated on an annual basis, for 30 days, except in the case of supervisory measures pursuant to section 70 para 2 BWG or in cases where the credit institution is over-indebted;
- 5 per cent over the applicable bank rate on the amount by which the credit institutions falls below Liquidity 1 funds pursuant to section 25 para 5 BWG, calculated on an annual basis, for 30 days; the amounts by which the credit institution falls short of its minimum reserve requirement (article 5 para. 1 and 2 of Regulation (EC) No 1358/2011) are to be deducted from the Liquidity 1 shortfall;
- 2 per cent on the amount by which the credit institutions falls below Liquidity 2 funds pursuant to section 25 para 10 BWG, calculated on an annual basis, for 30 days; and
- 2 per cent on the amount by which the credit institution exceeds large exposure limits pursuant to article 395 para 1 CRR, calculated on an annual basis, for 30 days, except in the case of supervisory measures pursuant to section 70 para 2 BWG or in cases where the credit institution is over-indebted.

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

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. The implications of the BaSAG (see Update and trends) to these procedures are yet to be determined.

21 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. Further changes are still subject to discussion on European and international level and seem likely to occur.

Ownership restrictions and implications

22 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 27).

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 27).

23 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 27, 28 and 30).

24 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 27).

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.

25 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 27);
- 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

Update and trends

Federal Law on Remedial Measures for Hypo Alpe-Adria-Bank International AG

In 2009, Austria nationalised Hypo Alpe-Adria-Bank International AG (HAA). After examining different options, the government enacted four acts on the reorganisation of HAA which came into force on 1 August 2014 and are intended to ensure that the bank's assets are sold on the best possible terms and that previous shareholders and subordinated bond holders bear a share of the restructuring costs. The FMA, as competent authority, issued a regulation setting forth the subordinated obligations and the liabilities towards (former) shareholders (the Restructuring Obligations) that cease to exist. Additionally, any guarantees and sureties given for the benefit of Restructuring Obligations cease to exist. Measures in favour of creditors of Restructuring Obligations are also enacted in this regard: a dividend distribution ban, effective until 2019, was imposed and any liquidation proceeds after completion of the liquidation of HAA's assets shall be distributed proportionally to the creditors of Restructuring Obligations. The legislation also affects the rights of creditors not directly affected by the bail-in: any statutory or contractual rights on termination, consent or any other right to alter a legal relationship (eg, adverse change or cross-default clauses) or to request security for its claims triggered by the measures of the legislation cannot be exercised.

Banking Union – Single Supervisory Mechanism (SSM), Single Resolution Mechanism (SRM) and Common Deposit Guarantee Scheme (CDGS), Bank Recovery and Resolution Directive (BRRD)

In addition to the CRD and CRR, further common rules for credit institutions in the EU member states were implemented and, together as a single rulebook, form the foundation of the European banking union. These rules aim at preventing a crisis (CRD and CRR) and, if a bank is in a crisis, offer a framework to manage the process, including structured winding downs (BRRD). Additionally, deposits up to €100,000 (per depositor or per bank) are protected at all times and everywhere in the EU (CDGS). The establishment of the SSM was the first step towards a banking union, ensuring the common implementation of such rules in the eurozone. The SSM applies to all the eurozone member states and is open to the participation of other member states. Non-eurozone member states may decide to join the SSM by establishing a close cooperation between their competent authorities and the ECB. The regulation confers key supervisory tasks and powers to the ECB and, since 4 November 2014, the ECB is exclusively responsible for key tasks concerning the prudential supervision of credit institutions; in particular it will:

- authorise and withdraw the authorisation of all credit institutions in the eurozone;
- assess acquisition and disposal of holdings in banks;
- ensure compliance with all prudential requirements laid down in EU banking rules and set;
- carry out supervisory stress tests to support the supervisory review, and carry out supervision on a consolidated basis;
- closely cooperate with national competent authorities in the exercise of macro-prudential powers and impose higher capital buffers than national competent authorities subject to specific conditions;
- carry out supplementary supervision over credit institutions in a financial conglomerate;
- apply requirements for credit institutions to have in place robust governance arrangements, processes and mechanisms and effective internal capital adequacy assessment processes; and
- carry out supervisory tasks in relation to early intervention when risks to the viability of a bank exist, in coordination with the relevant resolution authorities.

National authorities will assist the ECB and will prepare and implement the ECB acts under the oversight of the ECB, including day-to-day supervision activities. The ECB's supervisory powers will be the same as the powers granted to the competent national authorities under applicable EU law.

The SRM will implement the new rule set for all 28 member states in the Eurozone by means of the BRRD. The provisions relating to the cooperation between the Single Resolution Board and the national resolution authorities apply since 1 January 2015 and the SRM should be fully operational from 1 January 2016.

Act on Recovery and Resolution of Banks

The BaSAG implements the BRRD and became effective on 1 January 2015. The BaSAG introduces the following four main areas:

- *preparation and prevention*: credit institutions will be obliged to draw up a recovery plan and a resolution plan and submit it to the FMA.
- *early intervention*: Austrian regulatory authorities are empowered to intervene in credit institutions facing financial distress, even before being in a crisis. The BWG already provides the FMA with several powers (see questions 10 and 19).
- *resolution tools*: should the distressed bank continue to fail, resolution authorities will be provided with a credible set of resolution tools. These tools will ensure that any critical functions are preserved without the need to bail out the bank. Further, they shall ensure that shareholders and creditors of the bank under resolution bear an appropriate part of the losses and that the extent to which the cost of a bank failure is borne by the state and its taxpayers is minimised. The resolution authorities will be entitled to:
  - effect private sector acquisitions (parts of the bank can be sold to one or more purchasers without the consent of shareholders);
  - transfer business to a temporary structure (bridge bank) to preserve essential banking functions or facilitate continuous access to deposits;
  - separate clean and toxic assets between 'good' and 'bad' banks through a partial transfer of assets and liabilities; and/or
  - bail in creditors (mechanism to cancel or reduce the liabilities of a failing bank or to convert debt to equity, as a means of restoring the institution's capital position).
- *cooperation and coordination*: if a cross-border banking group fails national authorities will be able to coordinate resolution measures to protect financial stability in all affected member states and to achieve the best outcome for the group as a whole.

Moratorium on debt repayments by Heta Asset Resolution AG

On 1 March 2015, the FMA, as the Austrian resolution authority, imposed a moratorium on debt repayments by Heta Asset Resolution AG until 31 May 2016. The administrative decision by the FMA is based on the BaSAG and is a reaction to an audit of Heta Asset Resolution AG's balance sheet that exposed a shortfall of assets of between €4 billion and €7.6 billion which the Austrian government, as Heta's sole shareholder, refuses to fill. The moratorium should give the FMA time to draw up a resolution plan, ensuring equal treatment of all creditors. In principle, such resolution plan could provide for a creditors' contribution to the costs of winding down Heta (bail-in).

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.

26 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.

With regard to new legislation on including shareholders and certain creditors in the event of a crisis, see the Update and trends section.

Changes in control

27 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 30). 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.

If the FMA does not prohibit the intended acquisition within 60 days (in some cases 80 or 90 days) after confirming receipt of the notification, the acquisition shall be deemed approved.

28 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 27, 30 and 31).

29 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 27 and 30).

30 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 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).

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.

31 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 receipt of the notification to acquire a qualifying holding. From that day, the FMA has 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 FMA does not prohibit the acquisition within 60 days (or 80 or 90 days), the acquisition shall be deemed approved. In this case, the acquirer could still request the FMA to issue a decision approving the acquisition.

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