Banking Regulation in Austria: Overview

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This Banking Regulation guide provides a high level overview of the governance and supervision of banks, including legislation, regulatory bodies and the role of international standards, licensing, the rules on liquidity, foreign investment requirements, liquidation regimes and recent trends in the regulation of banks.

Legislation and Regulatory Authorities

Legislation

1. What is the legal and regulatory framework for banking regulation?

The primary sources of banking regulatory law in Austria are the

- Banking Act (*Bankwesengesetz*) implementing the Capital Requirements Directive (2013/36/EU) (*CRD IV*) as amended by *CRD V* ((EU) 2019/878). The Banking Act governs (among other things) the:
  - licensing of credit institutions (Article 1) and of (mixed) financial holding companies (Article 7b);
  - freedom of establishment and to provide services within the EEA as well as cross-border demergers (Articles 9 and following);
  - ownership requirements (Articles 20 and following);
  - governance requirements (Articles 5, 28a, 29, 39, 39c, 39d, 42, 63a);
  - rules on cover funds for gilt-edged securities (*Deckungsstock*) (Articles 66 and following);
  - contractual terms such as for savings deposits (Article 31 and following), certain value date provisions and banking secrecy (Article 38);
  - protection of the designations "bank" and "credit institution" (Article 94);
  - special penalty provisions for banks qualifying as legal entities (Article 99d);
  - provisions facilitating whistleblowing by bank employees (Article 99g) and "naming and shaming" by the Financial Market Authority (FMA) (Article 99c).

- Capital Requirements Regulation ((EU) 575/2013) (*CRR*)), as amended by Regulations (EU) 2019/876, (EU) 2019/2160, (EU) 2020/873, Commission Delegated Regulation 2021/424/EU and Regulation (EU) 2021/557 together with Commission Delegated Regulations 2015/61/EU, 2015/62/EU and 2015/63/EU.

  The application of the CRR to Austrian credit institutions qualifying as CRR financial institutions is mandatory by virtue of a provision in the Austrian Banking Act. Any (mixed) financial holding company, investment holding company, payment institution, asset management company, financial leasing company and investment firm by virtue of a CRR definition qualifies as a CRR financial institution.

- SSM Regulation *((*EU) 1024/2013), Regulation (EU) 468/2014 (*SSM Framework Regulation*) and the Austrian Act on an Authority for Financial Market Supervision (*Finanzmarktaufsichtsbehördengesetz*).

- Act on the Recovery and Resolution of Banks (*Sanierungs- und Abwicklungsgesetz*) (BaSAG) implementing Directive 2014/59/EU, as amended by Directive (EU) 2019/879 (*BRRD II*) and the Single Resolution Mechanism Regulation ((EU) 806/2014), as amended by the *SRM II Regulation* ((EU) 2019/877).

- Deposit Guarantee Schemes and Investor Compensation Act 2015 (*Einlagensicherungs- und Anlegerentschädigungsgesetz) (ESAEG*) implementing *Deposit Guarantee Schemes Directive (2014/49/EU)* (DGSD). and *Investor Compensation Schemes Directive (97/9/EC)* (ICSD).

Other relevant federal laws include the:

- Investment Firms Act 2023 (*Wertpapierfirmengesetz*) which entered into force on 1 February 2023 and the Austrian Securities Supervision Act 2018 (*Wertpapieraufsichtsgesetz*) (SSA), which set out regulations on financial instruments' trading, compliance and organisation of FMA or ECB licensed credit institutions and of FMA licensed investment firms.

The SSA (together with the Insurance Supervision Act, Investment Fund Act and AIFM Act) will have to be amended in line with proposed amendments and new requirements under the EU Commission´s proposal for a Retail Investment Strategy package (COM [2023] 279 fin).

See Hot topics: *proposed Directive on retail investment protection*.

- Payment Services Act 2018 (*Zahlungsdienstegesetz*) implementing the Payment Services Directive ((EU) 2015/2366) (PSD2), which regulates the performance of payment services rendered, among others, by FMA or ECB licensed credit institutions and the Austrian Consumer Payment Account Act (*Verbraucherzahlungskontogesetz*).

  PSD 2 will be replaced by PSD 3 and PSR (currently proposals) streamlining the regulatory frameworks for payment institutions and e-money institutions. An EU Commission proposal for a Financial Data Access Framework (FIDA proposed 2023), accompanies the revisions to PSD 2 and the introduction of the digital euro.

  See Hot topics: *proposed Regulation on framework for financial data access (FIDA*).

  The European Central Bank (ECB) has begun the preparation phase for the digital euro, taking at least two years. In June 2023, the EU Commission had already proposed regulations for the digital euro and cash, emphasising the importance of maintaining both digital and cash payment options. The ECB assesses the digital euro as enhancing strategic sovereignty in European payment transactions.

- Financial Market Money Laundering Act (*Finanzmarkt-Geldwäschegesetz*), which stipulates statutory due diligence obligations relating to money laundering and terrorism financing. It implements, among others, Fourth Money Laundering Directive ((EU) 2015 /849) (MLD4), as amended by the Fifth Money Laundering Directive ((EU) 2018/843) (MLD5).

  See Hot topics: *EU AML and CTF legislative package*.

- Consumer Credit Act (*Verbraucherkreditgesetz*) and the Mortgage Credit Act (*Hypothekar- und Immobilienkreditgesetz*) implementing the Consumer Credit Directive (2008/48/EC) (*CCD*) and the Mortgage Credit Directive (2014/17/EU) (MCD), covering the online distribution of consumer credits and digital lending.

- Due to the adoption of the *Covered Bonds Directive* ((EU) 2019/2162) and the entry into force of the *Covered Bonds Regulation* ((EU) 2019/2160) on 8 July 2022, the Acts on mortgage bonds (*Pfandbriefe*), mortgage banks (*Hypothekenbanken*) and funded bank bonds (*fundierte Bankschuldverschreibungen*) were repealed and replaced by the new Covered Bonds Act (*Pfandbriefgesetz*) and accompanying amendments of other acts, that entered into force on 8 July 2022.

  This Act enables credit institutions without a special licence to issue covered bonds on compliance with statutory requirements. Consent declarations by consumers and non-consumers are widely used in Austria to enable bank issuers to enter eligible assets (mortgage loans, substitute assets and specified derivative contracts) into the cover register.

- The *Basel III framework* including the approved final texts of CRR III and CRD VI that must be adopted by the EU Parliament in April 2024 is likely to take effect starting from January 2025 (CRR III) and 18 months from the entry into force (CRD VI). See Hot topics: *CRR III and CRD VI*.

- Proposed amendments to strengthen EU bank crisis management and deposit insurance (CMDI) are also under way. The legislative timeline for the EU process is yet to be determined, with trilogue negotiations expected to start later in 2024.

  See Hot topics: *EU bank crisis management and deposit insurance (CMDI) reforms*.

- The Credit Servicers Directive (EU 2021/2167) has not yet been implemented in Austrian national law and in January 2024 the Commission initiated an infringement procedure against Austria and 21 other EU member states.
- Starting from 30 December 2024, the provisions of the EU Regulation on markets in crypto-assets (MiCA) will largely become effective.

  MiCA will regulate the issuing and provision of services relating to crypto-assets, governance and organisational questions of crypto-asset service providers supplementing the MiFID rules by relating and applying to non-financial-instruments which are crypto-assets. The MiCA rules will be supplemented by the Distributed Ledger Pilot regime and the Digital Operational Resilience Act which entered into force in 2023. These three EU legal acts form the three layers of the EU´s Digital Finance Package 2020.

  See also Hot topics: *EU Regulation on markets in cryptoassets (MiCA).*
- In 2024, the momentum for creating new rules and standards for ESG regulation will continue.. Prudential regulations integrate ESG aspects into all pillars of banking supervisory law, for example:
  - revisions to the Sustainable Finance Disclosure Regulation ((EU) 2019/2088) (SFDR) and Technical Screening Criteria for the Taxonomy Regulation ((EU) 2020/852) are envisaged for 2024. The Corporate Sustainability Reporting Directive (Directive (EU) 2022/2464) (CSRD), effective from July 2024, will expand sustainability reporting and be accompanied by the publication of multiple European Sustainability Reporting Standards;
  - the European Green Bonds Regulation will enter into force in November 2024;
  - political consent was reached between the Council and the European Parliament on a proposal for a Regulation on ESG Rating Activities.

Regulatory Authorities

2. What are the regulatory and supervisory authorities for banking regulation in your jurisdiction?

Lead Bank Regulators

These are the:

- European Central Bank (ECB).
- Financial Market Authority (FMA).

ECB. The ECB is responsible for banking supervision in the euro area under the Single Supervisory Mechanism (SSM) and supervises six significant entities and their groups in Austria (SIs), in conjunction with the FMA and the Austrian Central Bank (*Oesterreichische Nationalbank*) (OeNB).

From 1 January 2024, the following significant groups of institutions have been supervised by the ECB:

- Addiko Bank AG (Credit Institution)
- BAWAG Group AG (Financial Holding Company).
- Erste Group Bank AG (Credit Institution).
- Volksbank Wien AG (Credit Institution).
- Raiffeisen Bank International AG (Credit Institution).
- Raiffeisenbankengruppe Oberösterreich Verbund eGen (Financial Holding Company).

The ECB applies:

- The relevant provisions of EU and national law to significant institutions or groups of institutions (SIs).
- European Regulations and Directives, binding Regulatory Technical Standards (RTS) and Implementing Technical Standards (ITS) drawn up by the European Banking Authority (EBA) and the European Commission.
- National legislation, such as the Banking Act.

FMA. The FMA is the supervising authority for less significant banks, institutions and groups of credit institutions (microprudential supervision of less significant institutions (LSIs)), while the OeNB is responsible for their overall risk assessment (macroprudential analysis). Within the SSM framework, it is the national competent authority (NCA) as well as the national designated authority (NDA) in most cases.

The FMA is also the national supervising authority for insurance companies, pension funds, investment firms, investment management companies and payment services providers.

The FMA must act in accordance with:

- The Banking Act and the CRR.
- The SSM Regulation.
- The BaSAG and the SRM Regulation.
- The Deposit Guarantee Scheme and Investor Compensation Act.
- Directly applicable EU law including RTS/ITS converted into Commission (Implementing or Delegated) Regulations.
- Applicable EBA guidelines and recommendations.
- The ECB's guidance.
- Due attention to financial stability, the smooth functioning of the banking system and creditor protection.

The authority can take official measures and pass certain regulations specifying supervisory obligations of LSIs. The FMA is responsible for enforcing its own administrative decisions, except for orders imposing administrative penalties.

Administrative and penal decisions of the FMA can be appealed against at the Austrian Administrative Court of first instance.

The FMA is the resolution authority for Austrian LSIs. It is further responsible for implementing the resolution decisions of the Single Resolution Board (SRB), an EU agency qualifying as a legal entity and acting as the resolution authority for SIs.

OeNB. The OeNB has itself no authoritative power as to banking supervision (which was, in December 2021, confirmed by the Austrian Constitutional Court to be constitutional, (*judgment G 224/2021 et al*). It has, however, certain powers relating to the supervision of payment and settlement systems and of international financial sanctions. In its function as expert and fact-finding entity for the FMA and the ECB, the OeNB:

- Conducts on-site inspections on behalf of the FMA.
- Renders reports about on-site inspections on behalf of the ECB or the FMA.
- Provides expert opinions on risk assessment models after a bank has submitted an application for approval.

  These fact-finding reports provide the basis for authoritative measures (administrative steps) to be taken by the ECB or the FMA. Any credit institution has the right to express its opinion on the envisaged inspection report (Article 71(6), Banking Act).

Other Authorities

These include:

- **State commissioners.** These are representatives of and accountable to the FMA and have authoritative power on behalf of the FMA. They:
  - are appointed for a maximum term of five years;
  - must be invited by the credit institution to company meetings and audit committees;
  - must object to resolutions that violate administrative decisions of the Federal Minister of Finance or the FMA.
  - have inspection rights and must report facts to the FMA which indicate that the institution's fulfilment of its obligations to creditors or the security of its assets are no longer ensured.

  The Minister of Finance must appoint a state commissioner and a deputy state commissioner for credit institutions with total assets in excess of EUR1 billion.
- ***Oesterreichische Kontrollbank AG*** **(OeKB).** This is Austria's main provider of financial and information services to the export industry and the capital market without any authoritative powers. In particular, issuers of securities and fund companies can fulfil their reporting and disclosure obligations by using the OeKB's electronic reporting platforms and prospectus storage systems. Together with the operating company of the Vienna Stock Exchange, OeKB is half-owner of the Central Counterparty Austria (CCP.A) of the Austrian Securities and Electricity Exchanges.

  Its subsidiary, OeKB CSD GmbH, is the only Austrian licensed central securities depositary pursuant to the Central Securities Depositories Regulation (Regulation (EU) 909/2014) (CSDR), rendering securities account maintenance services at the top tier level (central maintenance service), initial recording of securities in bank-entry systems (notary service) and the operation of a securities settlement system (settlement service).

Central Bank

OeNB. The OeNB contributes to monetary and economic policy decision making in Austria and in the Euro area. It only has authoritative power in supervising the establishment of payment systems in Austria and in monitoring compliance of banks with international financial sanctions imposed by the UN or the EU.

The primary focus of the OeNB is safeguarding domestic financial stability and supplying high-quality, counterfeit-proof cash.

In addition, it:

- Manages reserve assets within the *Statute of the European System of Central Banks* and of the ECB, that is, gold and foreign exchange holdings.
- Prepares economic analyses.
- Compiles statistical data.
- Is active in international organisations.
- Has non-authoritative functions (fact-finding, expert role) in banking supervision (*see above, Lead bank regulators*).

Others

The role of external bank auditors was clarified in 2005 by the Austrian legislation. Neither contractually mandated bank auditors (which are the rule) or auditors acting as representatives of statutory auditing institutions (savings banks and co-operative banks) can become liable under Austrian national law for damages caused to the bank.

However, if such auditors act on the basis of a special separate mandate granted by the FMA, the Austrian State will become liable if damages are caused directly to the bank by their acts and omissions.

Bank Licences

3. What licence(s) are required to conduct banking services and what activities do they cover?

Types of Licence

The ECB licenses Austrian CRR credit institutions including systemic investment firms in Austria and other SSM member states and those Austrian (mixed) financial holding companies for which the ECB is the consolidating supervisor. The scope of the licence issued by the ECB also covers regulated activities under Austrian law other than taking deposits from the public and granting credits (see below, *Regulated Activities*).

The FMA licenses:

- All credit institutions headquartered in Austria that do not qualify as CRR credit institutions and all non-class 1 investment firms (both categories qualifying as CRR financial institutions) (*see below, Regulated Activities*).
- (Mixed) financial holding companies with their head office in Austria for which the FMA is the consolidating supervisor (non-significant supervised groups) provided that minimum one group member is a credit institution and more than 50% of the own funds, consolidated turnover, income or other indicators within the group can be attributed to CRR credit institutions or CRR financial institutions.

Licences can be granted subject to conditions and requirements and can cover one or more types of listed transactions. The terms of the licence can also exclude individual banking transactions.

Credit institutions licensed in Austria can further provide banking services in other member states by way of freedom to provide services or by using the freedom of establishment (Article 10, Banking Act).

From 28 June 2021, (mixed) financial holding companies registered in Austria have had to apply for a special licence as (mixed) financial holding company at the FMA on exceeding specified trigger thresholds relating to the equity, consolidated assets, revenues, personnel or other indicators of a subsidiary qualifying as credit institution or financial institution. The relevant licensing procedure is comparable to that of a banking licence procedure but somewhat less burdensome (see *Timing and Basis of Decision*).

Regulated Activities

A "CRR credit institution" is defined an undertaking which takes deposits or other repayable funds from the public and grants credit for its own account (Article 4(1), CRR). Investment firms with a balance sheet total or aggregate assets of EUR30 billion dealing on own account or underwriting or placing financial instruments on a firm commitment basis since 26 June 2021 have also been defined as CRR credit institutions ("systemic investment firms") and are therefore required to apply for a CRR banking licence once they cross the EUR30 billion threshold.

The CRR's concept of "institutions" has been changed since 26 June 2021 by eliminating investment firms (apart from systemic ones) from this legal term. As a result, CRR investment firms now come under the scope of "(CRR) financial institutions".

"Austrian credit institutions" known as "non-CRR (other) credit institutions" (under EU law "CRR financial institutions") must obtain a banking licence for financial activities carried out for commercial purposes in Austria, including one or more of the following types of business:

- Deposits.
- Current accounts.
- Lending.
- Discounting.
- Custody.
- Issue and administration of payment instruments.

- Foreign exchange, money market instruments; futures, options and swaps; transferable securities and other derivative instruments.
- Commodity derivatives.
- Guarantees.
- Issue of covered bonds.
- Issue of other bonds (than covered bonds) for investing their proceeds in any other banking transactions.
- Securities and derivatives underwriting, placement and issuance support.
- Building savings and loans.
- Investment funds.
- Real estate investment funds.
- Capital financing.
- Factoring.
- Money brokering transactions on the interbank market.
- Brokerage transactions relating to banking deposits, lending, guarantees and foreign exchange.
- Severance and retirement funds.
- Purchase and sale of forex and of traveller's cheques.

Austrian credit institutions (*see above*) can apply for limited licences that only cover some of the above listed banking transactions. In general, any Austrian licensed credit institution is also authorised to render specified investment services and payment services, trade in gold bullion and to provide data reporting services (as referred to by the SSA).

Licensed Austrian credit institutions do not require an additional investment firm or payment institution licence to perform specified investment services and payment services, as this is included in the scope of their statutory licence.

Entities not licensed as credit institutions must apply for:

- A CRR credit institution licence (firms class 1) issued by the ECB, if trading on their own account or underwriting or placing financial instruments on a firm commitment basis and meeting or exceeding a EUR30 billion threshold of consolidated assets.
- An investment firm (class 1 minus) licence if providing any of the two above activities or services and the threshold of EUR15 billion respectively EUR5 billion consolidated assets is met or exceeded. This licence is issued by the FMA in line with the IFR/IFD, the Investment Firms Act 2023 and the SSA.
- Sufficiently small and non-interconnected investment firms (class 3) and investment firms not falling in any of the other categories (class 2) and providing any of the investment services or activities listed in section 3(2) of the SSA only require an investment firm licence issued by the FMA (see paragraph above). Activities permitted on the basis of a class 2 or 3 investment firm licence in Austria has been widened to cover all nine investment services and the ancillary services listed in Annex I of MiFID II by laws accompanying the Investment Firms Act 2023.

- Entities not licensed as credit institutions must apply for a payment institution licence if providing any of the payment services listed in the Payment Services Act 2018.
- The provision of account information services as a single payment service rendered by a non-credit institution only requires registration with the FMA.
- Registration with the FMA under the Financial Markets AML Act is further required for the provision of services by virtual currency providers without a credit institution licence.

4. What is the application process for bank licences?

Application

The licensing process for a CRR credit institution (both SIs and LSIs, see *Question 2*) is as follows:

The central documents to be examined by the FMA/ECB during the licensing process are the:

- Applications for authorisation of a credit institution that must be structured in line with:
  - Commission Delegated Regulation (*EU) 2022/2580* supplementing the CRD IV Directive (2013/36/EU); and
  - the ECB's revised guide to assessment of licence applications (2019) and its guide to assessment of Fintech credit institutions licence applications (2018).
- Programme of operations and business plan which must also reflect the EBA's and the ECB's requirements referred to in the above documents.

Receipt of the application is confirmed in a pre-application discussion phase before the application is formally submitted. The FMA co-operating with the ECB usually requests more information before confirming completion of the application. A 12-month assessment period runs from the confirmation date, at the end of which a formal authorisation decision issued by the ECB must be taken. ECB experts must be involved by the FMA at an early stage of this process.

The FMA assesses the application on the basis of the conditions in the Banking Act. If it considers that the application complies with CRD and Banking Act requirements, it prepares a draft decision and sends it to the ECB for a decision.

The ECB conducts its own assessment of the application based on the FMA's draft decision, and makes a final decision which is then notified to the applicant.

Licensing applications for Austrian non-CRR credit institutions (CRR financial institutions apart from financial holding companies and class 1 investment firms) or Austrian branches of non-EU-based and non-EEA-based (CRR and non-CRR) credit institutions are conducted entirely by the FMA.

A link to the contact form for legal enquiries about business models can be found at: *https://www.fma.gv.at/en/banks/licencing-notification/contact-form-for-legal-enquiries-about-business-models/*

Requirements

Austrian non-CRR credit institutions and branches of foreign non-EU-based credit institutions must obtain a licence from the FMA (Article 4(1)(a), SSM Regulation). The ECB also verifies that the requirements under Austrian law are fulfilled.

The credit institutions must enclose the following information and documents with their applications:

- Place of establishment and legal form of business organisation.
- Articles of association.
- Business plan for the first three years together with a budget calculation, and if the application includes an application to receive deposits, a forecast about the level of covered deposits.
- Initial capital.
- Identity and amount contributed by shareholders with a qualifying participation in the credit institution.
- Identity and the amount contributed of the 20 largest shareholders, as well as an indication of the group structure if those shareholders belong to a group of companies (if none of the owners holds a qualifying participation).
- Identities of the designated executive directors and their qualifications for operating the undertaking.
- Identities and addresses of agents.

The licence will be issued by the FMA (by the ECB for CRR credit institutions) if the:

- Undertaking is to be a joint-stock company (including *Societas Europea*) (SE), a co-operative society or a savings bank.
- Articles of association do not contain any provisions which fail to ensure the security of the assets and the proper execution of transactions under the Banking Act (Article 1(1)).
- Capital, liquidity and solvency of the institution will prospectively be sufficient.
- Internal organisation (risk management, compliance, audit) will be compliant.
- Persons that hold qualifying participations (more than 10% of the share capital or voting rights) meet prudent requirements and are "suitable shareholders" (if there are no qualifying participations, then the 20 largest stakeholders).
- FMA is not prevented from fulfilling its supervisory duties because of the institution's close links to other natural or legal persons (this includes the prevention of non-transparent group structures).
- FMA is not prevented from fulfilling its monitoring duties by the laws, regulations or administrative provisions of a third country, which interfere the meeting of FMA supervisory demands.
- Initial capital or initial endowment amounts to at least EUR5 million and is freely available to the directors without restrictions or charges in Austria.

- Directors (and key function holders) or members of the supervisory board (SB) are financially sound not facing, for example, criminal charges or convictions or bankruptcy proceedings).
- Directors and some key function holders like the head of risk management, the head of banking compliance, the AML responsible officer and the head of investment services compliance, are sufficiently fit and proper for operating the institution and the members of the SB have individually and collectively sufficient professional qualifications and experience to exercise their function.
- Directors commit sufficient time to perform their functions.
- Centre of at least one director's interests is in Austria.
- Institution has at least two directors and the articles of association rule out individual powers of representation, individual powers of commercial representation and individual commercial powers of attorney for the entire business operation or, in credit co-operatives, the management of the business is restricted to the directors.
- None of the directors have another main profession outside the banking industry or outside insurance undertakings or pension funds.
- Place of establishment and the head office of the credit institution is located in Austria.
- Other requirements are that at least one director speaks German and that there is an adequate programme of operations.

In practice, the most important criteria assessed by the FMA and by the ECB are:

- Programme of operations, business plan for the first three to five years and risk profile.
- Governance (fitness and propriety of board members and of the whole board collectively, of key function holders and of qualifying direct and indirect shareholders (see Annexes I and II to Commission Delegated Regulation (EU) 2022/2580).
- Amount, quality, origin and composition of the applicant's capital, expected capital at authorisation and reliably available future capital resources, adequacy of internal capital and liquidity.
- Compliant internal organisation (risk management, compliance, audit, and AML officer) and structure (IT organisation and outsourcing requirements).
- The joint EBA and European Securities and Markets Authority (ESMA) Guidelines on the assessment of the suitability of members of the management body and key function holders under Directive 2013/36/EU and Directive 2014/65/EU (EBA/GL/2021/06 dated 2 July 2021) and the ECB's revised Guide to fit and proper assessments dated June 2021 have been applied since 31 December 2021.
- The ECB has issued a template questionnaire on fitness and propriety of board members and key function holders of supervised entities for use by the NCAs.

Foreign Applicants

Special licensing requirements for foreign non-EU applicants under the Banking Act include the following obligations:

- There must be at least one director whose interests are based in Austria and one that is competent in German.

- The FMA/ECB must not be prevented from its supervisory functions by third-state legal provisions of a person/entity having close relations with the credit institution (which includes non-transparent group structures).
- There must be a duly licensed intermediate EU parent company/financial holding company if the applicant belongs to a third-state group where minimum another CRR credit institution is a member.

Special rules for direct or indirect non-EU, non-EEA and non-Swiss acquirers of shareholdings in Austrian licensed banks that qualify as "critical infrastructure" entered into force in Austria on 27 July 2020 (Austrian Foreign Investment Screening Act under the EU's FDI Screening mechanism (for more detail see *Question 12*).

A foreign (non-EU and non-EEA headquartered) credit institution (whether or not qualifying as CRR credit institution) that applies for a licence to operate a branch in Austria (as opposed to subsidiaries, for whom the licence procedure above applies) must enclose the following information and documents (in addition to the information listed above):

- Last three annual financial statements of the undertaking.
- Transactions conducted by the foreign undertaking, as well as the locations at which those transactions are conducted.
- Amount in euros of the initial capital dedicated to the Austrian branch and freely available to the directors without limitations or charges in Austria.
- Decision-making powers granted to the management of the branch, as well as those of the head office whose consent is required for certain internal decisions.
- Written declaration from the supervisory authority responsible for the undertaking's head office stating that it has no objections to the establishment of a branch of this undertaking in Austria.

Timing and Basis of Decision

CRR financial institutions qualifying as Austrian credit institutions. The granting of a licence for CRR financial institutions is declared by the FMA by a written administrative decision. The procedure lasts between six and 12 months and may in exceptional cases take longer (for example, if additional information is requested).

Licences can be subject to appropriate conditions and requirements and limited to one or more of the types of transactions listed in the Banking Act (Article 1(1))) and can exclude parts of individual types of transactions.

CRR credit institutions including systemic (class 1) investment firms. The application procedure lasts between six and 12 months (calculated from confirmation of completed information issued by the FMA/ECB). The licence issued by the ECB may be subject to conditions and requirements and limited in scope. If an application is (partly) rejected or conditions are imposed, it becomes subject to a hearing procedure.

Before issuing or notifying a licence to a credit institution, the FMA/ECB must consult the OeNB and notify the Federal Ministry of Finance. If the licence application includes the authorisation to accept deposits subject to guarantee obligations or to provide investment services subject to compensation obligations, the FMA/ECB must also consult the relevant protection schemes before issuing the licence (usually the Einlagensicherung Austria GmbH) (Austrian deposit insurance scheme).

Every credit institution licensed in Austria must belong to a trade association and be a member of a protection scheme if it takes deposits or provides certain investment or banking services.

The ECB and the FMA both have the power to withdraw a licence.

The FMA/ECB must inform the EBA of any grant or withdrawal of a licence and it must inform the European Commission, the EBA and the European Banking Committee (EBC) without delay of any approvals of branches which are granted to credit institutions established in a third country (see above, *Foreign Applicants*).

Financial holding companies. The granting of a licence to a financial holding company with its head office in Austria for which the FMA is the consolidating supervisor (and its withdrawal) is declared by the FMA by a written administrative decision. The procedure is similar to that of granting a banking licence (but less onerous) and lasts maximum six months on the complete filing of all application documents with the authority.

There are special rules governing the coordination procedure between the FMA and the consolidating supervisory authority, if the FMA is not the consolidating supervisory authority of the group.

Licences for financial holding companies in Austria for which the ECB is the consolidating supervisor (significant supervised group) are granted by the ECB.

Cost and Duration

The FMA fee for issuing a licence for the operation of bank transactions is EUR10,000, the administrative decision fee is EUR100 and the extension fee for a licence is EUR2,000. The costs of the licence proceedings also depend on whether the applicants engage a lawyer. There are also annual ongoing costs for the licence.

In addition, the ECB charges annual supervisory fees to all CRR credit institutions in Austria, and significant banks must pay a higher supervisory fee than less significant banks.

A special Austrian stability tax applies to Austrian licensed banks and Austrian branches of EU banks with a balance sheet total of more than EUR300 million that amounts to 0.024% (0.029% if the balance sheet total of the bank/branch exceeds EUR20 billion) of the taxable base.

5. Can banks headquartered in other jurisdictions operate in your jurisdiction on the basis of their home state banking licence?

CRR credit institutions authorised in an EU member state can conduct the activities listed in Annex I of CRD in Austria through a branch or by means of the freedom to provide services, provided that their authorisation permits them to do so (Article 1a(1), paragraph 1, Banking Act).

CRR credit institutions authorised in an EEA member state can also provide cross-border activities through a branch (freedom of establishment) or under the freedom to provide services. The intention to conduct cross-border banking activities on either basis must be notified to the respective supervisory authority.

There are supplementary rules in the SSM Framework Regulation for the passporting related division of powers between the ECB and the FMA, for CRR credit institutions located in or outside Eurozone member states but within the EU or the EEA.

Branches of non-EU and non-EEA based banks cannot rely on the single licence principle. The establishment of such branches on Austrian territory requires an application for a banking licence to be submitted to the FMA where the licensing criteria are comparable to the foundation of an Austrian subsidiary qualifying as credit institution.

There is an exemption from the banking licensing requirement for the provision of cross-border banking services supplied exclusively on request by an Austrian customer. This exemption has been narrowed by an extensive interpretation by ESMA concerning the cross-border provision of investment services to EU residents under MiFID II (*ESMA35-43-349, Chapter 13*).

Organisation of Banks

Legal Entities

6. What legal entities can operate as banks?

Credit institutions can conduct their business as a corporation (*Kapitalgesellschaft*) such as a:

- Limited liability company (GmbH).
- Flexible company (FlexKapG).
- Stock corporation (AG).
- European public company (SE).
- Co-operative society (*Genossenschaft*).
- European cooperative society (SCE).
- Savings bank.

Credit institutions cannot be established in the corporate form of joint partnerships (*OG*), limited partnerships (*KG*) or sole proprietorships.

Member state credit institutions are entitled to provide their services in Austria either by establishing a branch (freedom of establishment) or under the freedom to provide services.

The most usual legal form to operate even small Austrian banks is the stock corporation due to its ideal interplay between corporate governance exigencies (for example, mandatory SB committees), minimum regulatory and organisation requirements, internal and external capital financing opportunities, internal control and organisation system demands as well as potential integration needs into an existing corporate group structure.

Limited liability companies are suitable only for banks with special restricted licences such as asset management companies of UCITS and AIFs, which do not need to approach the share capital markets.

7. What requirements apply to the structure of banking groups?

The Austrian banking regulatory requirements conform to the EU framework including the CRR and CRD. The Austrian rules on removing impediments to the resolvability of resolution groups also conform to the EU framework including the BRRD and the SRM.

These rules**,** among others, require the FMA or the SRB to demand the establishment of an intermediate EU parent financial holding company or intermediate EU parent credit institution, where there are supervisory concerns on a group structure with an ultimate parent company outside the EU.

The resolution authority can also require an entity or a parent undertaking to set up a parent financial holding company in the EU or an EU parent financial holding company to remove potential impediments to the resolvability of resolution groups.

Other regulatory tools include the:

- Suspension of voting rights held by financial holding companies or by credit institutions.
- Administrative instruction to transfer participations in CRR credit institutions or CRR financial institutions to owners of these entities.
- Orders to:
    - transfer or reduce participations in credit institutions; and
    - immediately comply with group-related supervisory requirements.

Apart from these requirements, the restrictions on foreign shareholdings in banks (see *Question 13*) and the group related licensing requirements apply (see *Question 4*, *Requirements*on preventing non-transparent group structures and the application of supervisory laws of third states interfering the meeting of supervisory demands by the FMA).

Any licensed credit institution must have its place of establishment and the head office in Austria, similarly, any licensed financial holding company must have its seat and registration within Austria.

Austria further applies the EU and UN sanctions regimes by using its special implementing laws and has further transposed MLD 5 into its national laws.

Austrian entities are also affected as "non-US-persons" by US sanctions imposed under the Countering America’s Adversaries Through Sanctions Act (Public Law 115-44) (CAATSA) and under the Chemical and Biological Weapons Control and Warfare Elimination Act of 1991 (CBW Act) including their Specially Designated Nationals lists.

Governance

8. What are the governance and organisational requirements for banks?

Governance rules of corporate bodies depend on the corporate form chosen.

For example, the organisational structure of an Austrian stock corporation has three corporate layers:

- Shareholders' meeting.
- Supervisory board (SB) (two-tier system).
- Management board (MB).

The annual shareholders' meeting elects the SB for a maximum five-year term, but can terminate this appointment by a qualified majority (or simple majority if enabled by the articles of incorporation). A minority of 10% can petition a court to remove members from office for good cause. The SB elects a chairperson for a maximum five-year term, although it can call for their early resignation for good cause (such as violation of duties or vote of no confidence).

The MB is solely responsible for running the company and not subject to instructions by the annual general meeting nor by the SB (duty to act independently for MB members). It is also responsible for compliance, risk management, independent audit and AML/TF monitoring. Group interests are usually enforced towards MB members of stock corporations by the SB's right of nomination and revocation of MB members and by majority resolutions taken by the shareholders' meeting.

Under the Banking Act, MBs of credit institutions whose total assets exceed EUR1 billion or which have transferable securities listed on a regulated market must establish an **audit committee**. This committee supervises the audit and issuance of financial statements, the internal control system, audit function and risk management system.

Further, the MBs of credit institutions whose total assets exceed EUR5 billion must establish at least the following committees within their SB:

- **Nomination committee**. This committee prepares the appointments of the members of the management body before the external (FMA/ECB) "fitness and propriety" procedure will be applied.
- **Remuneration committee.** The remuneration committee supervises the remuneration policy, practices and incentive structure in each case in the context of controlling, monitoring and limiting risks and has to prepare decisions on remuneration by the SB.
- **Risk committee.** The risk committee must advise the management body on the risk strategy and other risk matters.

The Banking Act requires a minimum number of "formally independent" (see Article 28a (5b), Banking Act) SB and committee members in Austrian licensed banks. Credit institutions of significant relevance (total assets reaching or exceeding EUR5 billion) must comply with the following requirements:

- At least two "formally independent" SB members must be appointed [Article 28a (5a), Banking Act].

- At least the chairperson and the remuneration expert within the remuneration committee must be "formally independent". There are stricter independence requirements for remuneration committees in SIFIs (O-SIIs) under the EBA guidelines on sound remuneration policies.
- At least the chairperson and the accounting/audit expert as well as the majority of members of the audit committee must be (not formally) independent by, among others, complying with a three-year blocking period after previous occupations.
- One "formally independent" chairperson and a second (not formally) independent member must be appointed for the risk committee. There are stricter independence requirements for committee members of the risk committee of SIFIs (O-SIIs), where the majority of the members and the chairperson must meet the formal independence criteria [Article 28a (5b), Banking Act)].

No independent member requirement exists for the nomination committee.

9. What is the supervisory regime for key individuals within banks?

Key function holders are defined as employees of a credit institution that exercise a significant influence on the business activities of a credit institution due to their position without being formally members of the MB or SB (FMA Circular on Fitness and Propriety of Management Board Members, Supervisor Board Members and Key Function Holders (FMA Circular 03/2023 dated 18 March 2023)).

The following qualify as key function holders:

- The heads of internal control functions, that is, of:
    - risk management;
    - Banking Act compliance;
    - MiFID compliance;
    - internal audit;
    - AML compliance.
- Any head of an important business activity.
- Any head of a significant branch.
- The managers responsible for subsidiaries belonging to the group.

(Article 4/1/17 CRR.)

Such key function holders must be identified by the credit institutions and be assessed relating to their fitness and propriety in performing key functions within the credit institution. Key function holders can, at the FMA's discretion, be invited to pass a fit and proper test at the FMA.

Within Austrian licensed credit institutions of significant relevance, the following key function holders must be notified (appointment and changes) to the FMA before they start their activities:

- Head of risk management.
- Head of Banking Act compliance.
- Head of MiFID-compliance.
- Head of AML-compliance.

The appointment and change of the head of internal audit function must be notified to the FMA in advance relating to any Austrian credit institution even one without significant relevance.

The assessment of the fitness and propriety of the heads of internal control functions is carried out by the credit institutions based on criminal records, the CVS of the candidates and a check on their conflicting interests. The appointment and/or change in person can be prohibited or rejected by the FMA. The FMA can at its discretion invite candidates to pass a fit and proper test.

10. Do any specific remuneration requirements apply to bank employees?

Credit institutions must generally have a remuneration policy and practices.

Requirements for the remuneration policies and practice of any credit institution licensed in Austria and of any Austrian branch of foreign credit institutions are set out in the Banking Act (Articles 39, 39b and Annex to Article 39b).

Requirements for remuneration policies and practice of investment firms licensed in Austria are set out in the Investment Firms Act 2023 (Articles 21ff and Annex to Article 21).

The remuneration rules for licensed investment firms under the Investment Firms Act 2023 differ from those for licensed credit institutions.

Under Regulation (EU) 2019/2088 on sustainability-related disclosures in the financial services sector (SFDR), sustainability risks and ESG criteria must also be considered in the remuneration policy which must be established on a gender-neutral basis.

The main restrictions apply to:

- Variable remuneration portions. The requirement to pay out parts of variable remunerations in shares or other capital instruments can be neutralised by Austrian banks not qualifying as CRR "large institutions". A variable remuneration exceeding EUR50,000 or one-third of the fixed remuneration portion (gross income) must be qualified to be a substantial part of the overall remuneration rendering the variable remuneration restrictions applicable.

- Retention periods for variable remuneration portions.
- The application of neutralisation and proportionality criteria to remuneration of identified staff.

Other rules and guidelines governing remuneration policies and practices are found in:

- FMA's Circular on Principles of Remuneration Policy and Practices 05/22, dated 15 June 2022.
- Annex REMBM to FMA's VERA Regulation reflecting remuneration reporting obligations of banks to the OeNB.
- EBA guidelines, recommendations and technical standards such as the:
    - Guidelines on Sound Remuneration Policies dated 2 July 2021;
    - Guidelines on Remuneration Policies and Practices related to the sale and provision of retail banking products and services dated 28 September 2016.
- Sectoral ESMA remuneration guidelines applying to mutual funds management companies (UCITS) and Alternative Investment Funds management companies (AIFMs) that are subsidiaries of Austrian licensed credit institutions.

The credit institution's SB (or its remuneration committee) is in charge of examining and approving the remuneration policy. It must monitor and implement the policy in practical terms. For Austrian credit institutions of significant relevance (balance sheet total of EUR5 billion or above) a special remuneration committee must be installed (*see Question 8*). The MB, however, remains responsible for implementing remuneration policies.

Remuneration policies must differentiate between principles applying to all employees and those which apply to specific groups of employees only, such as MB members, risk takers and staff engaged in control functions ("identified staff").

Material risk takers (having a material impact on the institution's risk profile) in any credit institution must be identified (Delegated Regulation (EU) 2021/923 supplementing CRD IV.

Material risk takers include:

- **MB and SB** members and employees with higher management tasks.
- Employees with management tasks in internal control functions and substantial business areas.
- Any employee whose remuneration is at least EUR500,000 and equals the average remuneration of the MB and SB members.
- Employees with a higher management whose activities have a material impact on the risk profile of the business area in which they perform.

(Article 39b(2), Banking Act.)

SIFIs (O-SIIs) are excluded from a categorisation as a small, non-large or non-complex institution under the CRD.

Prudential Requirements

11. What are the prudential requirements for banks?

The Austrian prudential requirements for banks in Austria do not substantially diverge from the Basel framework, reflecting the EU framework for banking regulation underpinned by the CRR, CRD, BRRD including TLAC and the SRM-Regulation.

Changes to the BRRD and the SRM-Regulation are expected through a proposal for a CMDI package, while Basel 3.1 is due to take effect in the EU on 1 Jan 2025 (*see Question 1*).

Capital Requirements

Minimum capital requirements of credit institutions are regulated by Article 92 of the CRR.

Under this, credit institutions must at all times satisfy the following own funds requirements:

- Common Equity Tier 1 capital ratio of 4.5% of the risk-weighted assets (RWA) and other positions.
- Tier 1 capital (Common Equity Tier 1 and Additional Tier 1 capital) of 6% of RWA.
- Total capital ratio of 8% of RWA (attributable Tier 2 capital is currently limited to 30% of Tier 1 capital for purposes of qualifying holdings outside the financial sector; attributable Tier 2 capital is limited to 0% of Tier 1 capital for large exposure purposes from 28 June 2021).
- CRR II added the mandatory leverage ratio of 3% of the total risk exposure amount (TREA) in Tier 1-capital as additional capital requirement from 28 June 2021 for any CRR credit institution. G-SIIs must in addition apply an additional leverage ratio buffer of half of the G-SII buffer from 1 January 2023 (*see below*).

The introduction of capital buffers by the CRD has been transposed into Austrian law (Articles 23 to 23f, Banking Act).

The capital conservation buffer of 2.5% of RWA applies by virtue of Austrian law to any credit institution licensed in Austria.

The following additional capital buffers can individually be prescribed by the FMA:

- Countercyclical capital buffer of up to 2.5% of RWA generated in the respective EU member state (currently 0% for RWA generated in Austria.
- Systemic risk buffer on a consolidated basis for twelve Austrian institutions' groups and ten Austrian credit institutions having to comply on a non-consolidated basis in addition (between 0.5% and 1% of RWA in 2024).
- Buffer for global systemically important institutions (G-SII buffer, not relevant in Austria).
- Buffer for other SIIs (O-SII buffer of 0,9% to 1,5% of RWA on a consolidated basis for seven Austrian institutions, and of 0.25% to 1.75% on a solo basis for eight Austrian institutions).

The systemic risk buffer and the O-SII buffer must be applied cumulatively, but if a cumulated buffer ratio of 5% of RWA is exceeded, this will trigger a consent requirement by the EU Commission.

These buffers mainly:

- Act as a better absorption of losses by institutions in times of crisis.
- Purport to reduce pro-cyclical effects due to the economy of a member state.
- Envisage reducing systemic risks that could affect the entire economy of a member state.

The FMA/ECB in practice additionally impose bank-specific Supervisory Review and Evaluation Process (SREP) Guidance (P2G), reflecting their additional individual capital expectations for SREP compliance reasons.

The CRD, CRR and BRRD/SRMR aim to clarify that non-compliance with additional individual capital expectations issued by the FMA/ECB (P2G) will not trigger restrictions on the distribution of profits or any other supervisory measures, as opposed to the violation of buffer or Pillar 2 requirement (P2R) ratio or MREL requirements.

Further, bank specific SREP buffers (P2R) can individually be imposed by the FMA/ECB to cover additional risks identified in Pillar 2 as SREP capital add-on. The "SREP capital add-on" must be composed of up to:

- 25% Tier 2 capital.
- 18.75% Additional Tier capital.
- 56.25% Common Equity Tier 1 capital.

Violations of P2R can trigger supervisory sanctions similar to the violation of capital requirements in Pillar 1.

See *Question 15* for MREL quotas and minimum subordination requirements.

Liquidity Requirements

The mandatory liquidity coverage ratio (LCR) required to counterbalance short-term liquidity needs in stress scenarios in Austria is calculated by dividing the sum of liquid assets by the net fund outflow under gravely stressed conditions over 30 days.

The net stable funding ratio (NSFR) is calculated by dividing the sum of stable funding instruments by the requirement for net stable funding instruments for long-term debt of one year under both normal and stressed conditions.

For small and non-complex credit institutions and investment firms (having, among others, total assets of up to EUR5 billion), a simplified NSFR applies.

The liquidity related reporting requirements continue to apply. There are no special requirements for G-SIIs.

Leverage Requirements

The Basel III leverage ratio was introduced into EU legislation by the CRR.

On 28 June 2021, a mandatory leverage ratio of 3% calculated as the banks' Tier 1 capital measure divided by its total exposure started to apply.

On 1 January 2023, for G-SIIs an additional leverage ratio buffer requirement of half of the G-SII-buffer calculated on their total exposure started to apply. Before June 2021, this Basel III leverage ratio had been introduced by the CRR as a reporting and disclosure requirement only, but not as a minimum balance sheet structure requirement.

Shareholdings/Acquisition of Control

12. What requirements or restrictions apply to the acquisition of shareholdings and of control of banks?

Shareholdings. Anyone wishing to acquire or dispose of (directly or indirectly) a participation of 10%, or to increase or decrease a qualified participation by reaching a 20%, 30% or 50% threshold of voting rights or capital in an Austrian licensed credit institution (including CRR financial institutions not qualifying as CRR credit institutions), must inform the FMA in advance (Banking Act).

They must file with the FMA an ownership control notification including around 50 attachments, but for the non-objection by the ECB.

After receipt of a complete set of documents together with the notification form and after having confirmed the completeness of the filing documents, the FMA/ECB has 60 days to decide whether to allow or prohibit the action or to abstain from issuing any statement. Once the 60-day period has elapsed, the acquisition can be closed.

The FMA/ECB assesses the suitability of the proposed acquirer and the financial soundness of the proposed acquisition in terms of reputation, financial soundness, effective supervision and money laundering risk, among others. The 10, 20, 30 and 50% thresholds include investors acting together.

The credit institution itself must also notify the FMA of the ownership change, but only after closing.

On 27 July 2020, the Austrian Foreign Investment Screening Act (*Investitionskontrollgesetz) (InvKG*) entered into force requiring an additional approval by the Minister for Digital and Economic Affairs in particular for the acquisition of direct or indirect holdings of 25% and 50% in the voting rights of Austrian undertakings of critical infrastructure (including banks, see *Question 13*).

Other reporting requirements include the following:

Articles 130 and following of the Stock Exchange Act (*Börsegesetz* 2018 (*BörseG*)) governing notification obligations of purchasers and sellers of shares in a stock corporation having its registered seat and listed on a regulated market in Austria.

Transparency Regulation (*Transparenz-Verordnung 2018*) which details investor's transparency obligations under the BörseG.

SSA (Article 14 and following) which governs certain reporting obligations in connection with the acquisition of shares in investment firms.

Regulation on the Control of Ownership (*Eigentümerkontrollverordnung 2016*) which provides pre-closing transparency obligations in terms of investments in Austrian licensed credit institutions, investment firms, insurance undertakings, payment institutes and e-money-institutes.

Takeover Act (*Übernahmegesetz* 1998 *(*ÜbG*)*) setting out notification obligations in connection with takeover transactions in targeted Austrian stock corporations listed on an Austrian or EU regulated market.

Non-compliance with reporting obligations can result in administrative sanctions and usually results in a suspension of voting rights.

Takeovers/mergers. Additional legal restrictions are required for bank takeovers and mergers. Generally, a cross-border merger or merger of entirely national credit institutions requires special approval by the FMA to be valid (Article 21, Banking Act).

Special FMA approval is required for:

- Mergers of (CRR) credit institutions where an Austrian licensed credit institution is involved.
- Reaching, exceeding or falling below the thresholds of 10%, 20%, 33% and 50% of the voting rights or capital of a credit institution or CRR credit institution domiciled in a third country.
- Any change in the corporate form of a credit institution.
- Demerger of (CRR) credit institutions where an Austrian licensed credit institution is involved.
- Merger of Austrian licensed credit institutions with non-banks.

If such transactions are attempted without special approval, administrative sanctions can be imposed by the FMA and the transaction becomes legally ineffective.

Banks can make minority or controlling investments in other banks, however subject to compliance with consolidated supervision, minimum own funds, liquidity, large exposure and other CRR requirements. Minority or controlling investments in qualifying holdings in companies outside the financial sector are for banks subject to the additional restrictions in Article 89 and following of the CRR. Qualifying holdings in banks by companies not belonging to the financial sector are subject to the ownership notification procedure permitted.

Since 28 June 2021, financial holding companies have become subject to a new licensing procedure (*see Question 4*). This also applies to non-class 1 investment firms crossing the EUR30 billion assets threshold after 26 June 2021, which must apply for a CRR credit institution licence.

13. Are there specific restrictions on foreign shareholdings in banks?

On 27 July 2020, the Foreign Investment Screening Act (*Investitionskontrollgesetz*) (InvKG) entered into force with the aim of installing a Foreign Direct Investment (FDI) screening mechanism in line with the FDI Screening Regulation (EU) 2019/452.

It prescribes the requirement to apply for a special approval by the Minister for Digital and Economic Affairs for any non-EU, non-EEA and non-Swiss buyer of:

- Direct or indirect holdings of 25% and 50% in voting rights.
- Attainments of controlling influence.
- Acquisitions of substantial assets linked with a controlling influence, all in Austrian undertakings of critical infrastructure including banks.

This application must (at the latest) be filed without delay after the signing date. Before this date, the applicant can apply for a clearance certificate that a specific FDI does not trigger the regulatory approval requirement.

The new approval requirement comes with a reporting requirement for the Austrian target undertaking if that entity is not mentioned on the pending application.

Non-compliance with the approval procedure results in the invalidity of the envisaged FDI transaction and triggers administrative fines.

In addition, the ownership notification procedure applies (*see Question 12*). Insufficiently reliable owners of Austrian licensed banks, non-transparent group structures or owners presumed to be preventing efficient supervision by FMA/ECB, are sufficient reasons for the FMA/ECB to disapprove major shareholders (owners) or to withdraw the banking licence.

Liquidation and Resolution

14. What is the legal framework for the liquidation of banks?

The rules on insolvency proceedings, which also apply to the liquidation of banks (credit institution), are found in the Insolvency Act (*Insolvenzordnung*).

The Banking Act, however, contains specific insolvency provisions applying only to credit institutions.

In practice the resolution rules (*see Question 15*) will be applied by the FMA/SRB before the opening of insolvency proceedings over a credit institution's assets is filed for at the competent court.

Credit institutions (MBs) are required to immediately notify the FMA in case of illiquidity or of over-indebtedness, without the usual 60-day grace period applying to non-banks.

While generally a debtor itself and its creditors can file for bankruptcy, only the FMA can do so on the credit institution's behalf outside receivership proceedings.

In addition, while other debtors can file for reorganisation proceedings under the Insolvency Act, this route is not available for credit institutions, which can be subject to receivership (*Geschäftsaufsicht*) instead (Article 81 and following, Banking Act).

Receivership proceedings are reserved for banks and can be brought by the credit institution itself (in addition to the FMA). Under receivership, a court appointed receiver responsible for the business reorganisation of the institution assumes control and manages the business. The bank's liabilities are deferred by law. Unless the court orders otherwise, the credit institution can continue its business while receivership is in effect. If the proceedings are successful, the credit institution can avoid liquidation.

Liquidation proceedings without insolvency of the bank follow general corporate law rules, as described below:

- A dissolution resolution is taken in the shareholders' general meeting.
- The bank enters into the corporate liquidation stage.
- The bank must change its firm and corporate purpose and liquidate its assets.
- The banking licence, can voluntarily only be waived of once all banking activities have been settled.

There are additional procedural rules to be observed if a CRR credit institution having customers in another EU member state becomes subject to insolvency proceedings or receivership proceedings based on Directive 2001/24/EC.

15. What is the recovery and resolution regime for banks?

Obligations to Prepare Recovery Plans

In general, any bank recovery measure must be initiated and executed by the bank itself in line with its recovery plan on the basis of an indicator excess ("red light"). Recovery plans must be drawn in advance up by any Austrian CRR credit institution and financial holding company and be transmitted for approval to the FMA/SRB. The FMA/SRB can, at a later stage, impose early intervention measures based on the occurrence of early intervention triggers.

The FMA/SRB can only impose resolution measures if:

- The early intervention does not succeed.
- There is a public interest in the resolution.
- The bank fails or is likely to fail.
- There is no other alternative way (in particular a private sector investment) to prevent the bank's failure.

Powers of the Regulator

The powers of the FMA/SRB include measures such as:

- Paying off insured depositors.

- Creating a bridge bank to operate, settle claims, enter into temporary public ownership, convert debt into equity or write off liabilities (*see also below, Resolution Tools Including Bail-in and MREL Quotas*).

The Financial Stability Board's standards on TLAC instruments have been implemented into Austrian law for G-SIIs, top-tier banks and other Pillar 1 banks only.

All other Austrian banks are only subject to the bank-specific minimum requirement for own funds and eligible liabilities (MREL) quota requirements prescribed by the FMA/SRB (see *Question 11*) to resolution entities including their resolution groups and to non-resolution entities.

Additional subordination minimum requirements may be applied by the FMA/SRB to non-Pillar 1 banks individually to safeguard compliance with the NCWO-principle.

Transfer of Business

This is an eligible resolution tool imposed by the FMA/SRB which can be executed without a third party's consent to affected agreements within the business. However, there are other protective provisions for third parties included the BaSAG (*see below, Resolution Tools Including Bail-in and MREL Quotas*).

Resolution Tools Including Bail-in

The BaSAG, implementing the Bank Recovery and Resolution Directive (2014/59/EU) (BRRD), as amended, covers CRR credit institutions including CRR financial institutions, financial holding companies and branches of third country institutions to the extent they are part of a group of credit institutions.

The FMA is established under the BaSAG as the competent resolution authority for LSIs in close co-operation with the OeNB. The SRM Regulation installs the SRB as the competent resolution authority for SIs.

The FMA/SRB must prescribe to resolution entities on a consolidated basis for their resolution groups two MREL quotas (risk-based MREL and leverage-based MREL), "external" MREL. The MREL for non-resolution entities is set at a solo level or sub-consolidated level, where applicable (internal MREL).

The additional subordination minimum requirements for eligible liabilities under MREL have triggered the introduction of a new asset class under Austrian banking law known as "senior non-preferred" capital from 30 June 2018 (section 131, BaSAG).

Resolution tools. Resolution tools available to the competent resolution authority are:

- Transfer of shares or other instruments of ownership, other assets, rights or liabilities to a purchaser that is not a bridge institution.
- Transfer of assets, rights or liabilities of an institution to a bridge institution in public ownership.
- Transfer of powers, assets, rights and liabilities to an independent legal entity ("bad bank") that is publicly owned for the purpose of the management and sale of non-performing claims and assets (only to be applied in conjunction with another resolution tool).
- Conversion of liabilities (including capital instruments eligible as own funds) into (higher ranking) equity or the writing down of the principal or outstanding amount of the liabilities, for the purpose of the recapitalisation of an institution,

for the capitalisation of a bridge institution, or during the sale of the business or during the separation of assets (creditor participation tool or bail-in).

These resolution tools can be combined by the resolution authority with other instruments such as prescribing a temporary suspension of termination rights, reservation on enforcing security rights or write-off of liabilities.

MREL Quotas

Minimum Requirements for Own Funds and Eligible liabilities (MREL) quotas are intended to:

- Safeguard resolvability and continuance of critical functions.
- Protect government funds and deposits covered by deposit guarantee schemes.
- Ensure financial market stability.

They are in principle individually determined for single credit institutions and must at all times be fulfilled by each bank.

This also applies to minimum subordination requirements, if applicable.

Additional mandatory MREL quotas and eligible subordination requirements have applied from 1 January 2022 to:

- Resolution entities at the level of the resolution group (external MREL).
- Subsidiary non-resolution entities at a solo level enabling a transfer of losses by write-down or conversion of bail in-able liabilities issued to and subscribed by parent resolution entities (internal MREL).

The changes to these rules introduced by the registered reporting mechanism (RRM) package applied from 1 Jan 2024.

Simplified Resolution Plan

Banks which are not G-SIIs, top tier banks or "fished banks" (entities qualified as top-tier banks due to their systemic risk by the SRB or by the FMA, despite not exceeding the EUR100 billion total asset threshold) are "other banks subject to resolution". From 1 January 2024, all MREL and relating minimum subordination requirements must be complied with by CRR credit institutions and other entities belonging to the same credit institution group.

LSIs that are subject to a simplified resolution plan (in Austria around 320 LSIs) that will be resolved in regular insolvency proceedings are prescribed an MREL quota equalling their regulatory minimum capital requirement by the FMA as resolution authority.

Individualised Resolution Plan

LSIs which are to subject to resolution proceedings (about 18 in Austria) are prescribed an MREL quota and must have full resolution plans.

Their MREL quotas will individually be prescribed within Pillar 2 by the FMA/SRB and correspond to:

- The sum of:

- a loss absorption amount equalling the Total SREP Capital Requirement Ratio (Pillar 1 and Pillar 2);
- a recapitalisation amount (equalling the Pillar 1 and Pillar 2 capital requirements including the Market Confidence Buffer);

- Market Confidence Buffer amounting to the Combined Buffer Requirement (CBR) minus the countercyclical capital buffer. Non-Pillar 1 banks subject to resolution proceedings may be subject to additional subordination MREL requirements if the resolution authority deems this necessary to eliminate potential "no creditor worse off" (NCWO) risks, however, in general they do not have any subordination MREL requirement.

Pillar 1 Resolution Entities

Top tier banks and fished banks must fully be compliant with MREL quotas prescribed by the FMA/SRB and certain minimum subordination requirements from 1 January 2022.

However, GSIIs, top tier banks and fished banks qualifying as resolution entities must comply with additional MREL minimum quotas.

Related disclosure (publication) requirements also apply.

16. Are there any protections available to customers of a bank that has failed?

Austrian Deposit Guarantee Schemes

There are currently three Austrian deposit guarantee schemes in Austria:

- Einlagensicherung Austria GmbH.
- Österreichische Raiffeisen-Sicherungseinrichtung eGen (ÖRS).
- Sparkassen-Haftungs GmbH.

Deposit guarantee schemes protect savers and accountholders if a payout event occurs. A payout event occurs if:

- A bank is not in the position to repay deposits that are due.
- Insolvency proceedings are initiated towards a bank.
- Where a supervised management procedure is imposed.
- Where an official payment stop is imposed.

The schemes cover credit balances held in current, salary, student and pensions accounts, savings books and savings accounts including term deposit accounts, securities clearing accounts and saving and loan contracts.

Deposits including interest of up to EUR100,000 per eligible depositor and bank are covered.

A depositor is the holder of a credit balance on a bank´s accounts. Deposits held in foreign currencies are also covered, but will be paid out in EUR.

Credit balances held by natural persons irrespective of the nationality as well as by legal entities are covered.

Deposits made by public institutions or institutional investors such as credit institutions or insurance companies are not covered.

For joint accounts, all holders are entitled to claims in equal shares. The payout must take no more than seven working days from the payout event.

For a payout to be made, the depositor does not need to file an application but must inform the deposit guarantee facility that they hold an account.

Austrian Investor Compensation Schemes

There are three investor compensation schemes in Austria:

- Einlagensicherung Austria GmbH.
- Österreichische Raiffeisen-Sicherungseinrichtung eGen (ÖRS).
- Sparkassen-Haftungs GmbH.

Investor compensation is provided if a bank is unable to transfer or deliver securities to another custody account as instructed.

A payout event occurs if a bank becomes subject to either:

- Bankruptcy or receivership proceedings or to a moratorium declared by an administrative authority.
- The determination of an agreement measure taken in another member state of a bank voluntarily having become a member of the Austrian compensation scheme.

Earnings that accrue between the occurrence of the compensation case and the payment of the secured amount are taken into account by the investor compensation scheme of up to:

- EUR20,000 for natural persons.
- 90% of the secured amount in the case of legal entities.

Amounts resulting from the recovery of the customer's securities (dividend income, current payments, redemption or sales procedures) are protected by the deposit guarantee scheme up to EUR 100,000 per customer.

Contrary to the procedural rules under the deposit guarantee scheme, a claim under the investor compensation scheme requires a written application to the scheme that must be submitted within 12 months of date the payout case arose. The ESA will compensate payout cases within three months from assessment of the amount due and a finding that the claim is justified.

Conduct of Business

17. What conduct of business standards apply to banks' deposit-taking and lending activities?

The conduct standards for lending activities are based on:

- Minimum standards for the loan business and other transactions entailing counterparty risks (28 April 2022) issued by the FMA.
- EBA guidelines on loan origination and monitoring (EBA GL 2020/06 dated 29 May 2020).
- Minimum standards on risk management, the granting of foreign currency loans and loans with repayment vehicles (FMA-FXTT-MS 2023) issued by the FMA.
- The Consumer Credit Act and the Mortgage and Real Estate Credit Act as well as implementing regulations issued by the FMA under these Austrian laws. There is extensive case law issued by Austrian courts relating to this legislation.
- The EU Commission's implementing regulations on the replacement of the CHF-LIBOR by SARON and on the replacement of EONIA by €STR which apply to existing loans granted by Austrian credit institutions.
- The FMA Regulation on Measures to Limit Systemic Risks relating to Real Estate Financing by Credit Institutions (in force 1 August 2022) which prescribes borrower-based maximum credit volumes to domestic CRR credit institutions and domestic branches of other CRR credit institutions when granting real estate financings to private customers.

Deposit business conduct standards are as found in:

- Articles 31 and 32 Banking Act on savings books and saving accounts, and interpretative guidance issued by the FMA on the scope of the term "deposit business" triggering a licence requirement.
- FMA circulars on designing savings books, the disposal of balances on savings accounts and on KYC rules for savings books to prevent AML risks.
- Extensive case law by Austrian courts on the interpretation of the above statutory provisions.

The EBA's guidelines on internal governance, operational risks and ICT and security risks, remain unaffected by the cited conduct-of-business rules.

However, Regulation (EU) 2022/2554 on digital operational resilience for the financial sector (**DORA**) will have to be applied by banks from 17 Jan 2025. Banks and other finance entities will be obliged to introduce an extensive framework on governance and monitoring of ICT-risks going beyond what has been ruled out in the EBA's guidelines and prevailing the NIS 2 rules.

Contributor Profile

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Areas of practice. Banking and finance, capital markets, tax law, financial services regulation, insurance supervision law, derivatives and investment funds (UCITS and AIFs).

Recent transactions:

- EBRD on reselling its stake in Erste Bank Hungary Zrt to Erste Group Bank (year-end 2023).
- Hypo-Alpe-Adria Bank International, in project LUX on modelling a "bad bank" for HBInt.
- Republic of Austria, in the restructuring of Hypo Alpe Adria Bank International AG.
- OeNB on financial services regulatory issues.
- Zürcher Kantonalbank, on the purchase of Privatinvest Bank AG.
- Banking regulatory advice: BAWAG P.S.K. Bank für Arbeit und Wirtschaft und Österreichische Postsparkasse AG (repayment of participation capital), Svenska Handelsbanken AB (Austrian branch).
- Commerzbank AG (Austrian branch) on multiple legal questions of wholesale banking.
- Wiener Börse AG on regulatory, governance and securities laws questions.
- European Bank for Reconstruction and Development (EBRD) on converting its indirect stake in a listed Austrian bank into a direct participation and on exercising its pertaining voting rights.
- CCP Austria Abwicklungsstelle für Börsengeschäfte GmbH on the expansion of its central counterparty business to exchange-traded spot power contracts.
- EXAA on the adaptation of its stock exchange trading and settlement rules to a new central counterparty.

Languages. German, English.

Professional associations/memberships. European Community Studies Organisation (ECSA) Austria.

Most recent publications:

- *The Austrian Banking Limited Liability Company (Bank-GmbH) in Foglar-Deinhardstein/Aburumieh/Hoffenscher-Summmer (Eds.), GmbH Gesetz über Gesellschaften mit beschränkter Haftung (2024).*
- *Commentary on Articles 111 to 117 MiCAR, in Ficulovic/Knobl/Kreisl/Maitz/Pfurtscheller/Pracht/Raschauer/Silbernagl/Stern/Wessely/Wolfbauer, Kommentar zur MiCAR-Markets in Crypto-Assets Regulation (to be published in 2024).*
- *Commentary on Section 86a BaSAG, in Kammel/Schütz (Ed.) BaSAG-Bankensanierungs- und –abwicklungsgesetz (to be published in 2024).*
- *Commentary on Sections 60 to 63b Austrian Banking Act (bank audit), in: Laurer/Schuetz/Kammel/Ratka, Bankwesengesetz-Kommentar (year-end 2021).*
- *Commentary on Arts 12, 13 and 15 Market Abuse Regulation, in: Gruber (Ed.), Kommentar zum BörseG 2018 und zur MAR (2020).*
- *Banking and Financial Market Regulatory Compliance, in: Kofler-Senoner (Ed.), Compliance Management in Unternehmen (2016), pp 290-353.*
- *Significance and Union Legal Background to the Rules of Conduct pursuant to the Austrian Securities Supervision Act 2018, OeBA 2018, pp 410-416.*
- *The Rules of Conduct pursuant to the Austrian Securities Supervision Act 2018 – Systematic Overview based on the Requirements of MiFID II, OeBA 2018, pp 460-478.*

END OF DOCUMENT

RESOURCE HISTORY

Law stated date updated following periodic maintenance.

This document has been reviewed by the author as part of its periodic maintenance to ensure it reflects the current law and market practice on 01 April 2024.

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