Austria

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1. REGULATORY FRAMEWORK – OVERVIEW

The relevant sources of law regulating banking activities in Austria are predominantly enacted as Austrian federal laws or as directly applicable EU regulations. Certain matters are addressed in regulations promulgated by the Austrian Financial Market Authority (FMA) and by the EU Commission adopting Binding Technical Standards (BTS) issued by the European Banking Authority (EBA) and in EBA Guidelines/Recommendations. FMA also published a number of minimum standards, circulars and other forms of soft law interpreting the main federal law enactments.

- The Austrian Banking Act (*Bankwesengesetz*) and the EU Capital Requirements Regulation (CRR) are the main sources of bank regulatory law. The Banking Act covers various regulatory matters, eg, the licensing of credit institutions and financial institutions (Article 1); the freedom of establishment and the freedom to provide services within the EEA (Article 9 *et seq*); ownership requirements (Articles 20 *et seq*); or rules on cover funds (*Deckungsstock*; Articles 66 *et seq*). Furthermore, the Banking Act provides for compulsory or impermissible contractual terms such as for savings deposits (Articles 31 *et seq*); or value date provisions exceeding the scope of those included in the Austrian Payment Services Act (Article 37). Other matters covered concern, eg, banking secrecy (Article 38), money laundering and counter-terrorism (Articles 39 *et seq*), or deposit protection and investor compensation (Article 93). The CRR (including the relating BTS) covers minimum regulatory capital requirements and quality criteria for CET 1, AT 1 and T2 capital instruments, limits on large exposures, new liquidity rules and limits on qualifying holdings outside the financial sector. Furthermore, the CRR introduces a leverage ratio and imposes disclosure requirements on credit institutions and investment firms.
- The Austrian Housing Construction Savings and Loan Associations Act (*Bausparkassengesetz*) regulates the operation and supervision of building savings bank (*Bausparkassen*).
- The Austrian Investment Fund Act (*Investmentfondsgesetz*) regulates the operation and management of investment funds and the Austrian Real Estate Investment Fund Act (*Immobilieninvestmentfondsgesetz*) in relation to real estate investment funds.
- The Austrian Alternative Investment Fund Management Act contains licensing and supervision of certain managers of collective investment undertakings.

- The Austrian Securities Supervision Act (*Wertpapieraufsichtsgesetz*) sets forth regulations on financial instruments trading and compliance.
- The Austrian Capital Market Act (*Kapitalmarktgesetz*) provides for rules on public offerings of securities and other capital investments.
- The Austrian Payment Services Act (*Zahlungsdienstegesetz*) regulates the performance of payment services in Austria.
- In addition, there are a number of Austrian federal laws implementing EU Directives such as the Austrian Remote Financial Services Act (*Fernfinanzdienstleistungsgesetz*), the Austrian Financial Collateral Act (*Finanzsicherheitengesetz*), the Austrian E-Money Act (*E-Geld Gesetz*) and the Austrian Consumer Loan Act (*Verbraucherkreditgesetz*).

EU bank supervisory laws have been implemented into Austrian laws, or apply directly as EU regulations, leaving little room for specific Austrian banking regulations.

2. AUTHORITIES, REGULATORS

2.1 Supervisory architecture – nature, characteristics

At the moment, responsibilities in Austrian banking supervision are shared between the FMA and Austria's central bank (Oesterreichische Nationalbank – OeNB). From November 2014, licensing matters for all credit institutions and the prudential supervision for significant Austrian credit institutions (assessed on a consolidated group-wide basis) will be transferred to the European Central Bank (ECB).

Currently, the FMA's responsibilities include the granting and withdrawal of banking licences, administrative measures and issuance of binding standards.

The OeNB is currently responsible for the ongoing supervision of credit institutions through an ongoing analysis of economic data provided by credit institutions licensed in Austria. To enable OeNB to fulfil its supervisory obligations, Austrian credit institutions have to provide monthly reports about their capital and certain other economic information relating to their risk exposure. OeNB may also conduct on-site audits at credit institutions. On the basis of the information OeNB receives, it continuously reports its audit results to the FMA that may take administrative steps.

2.2 Lead bank regulators

As described above under section 2.1 the lead bank regulators in Austria are FMA and OeNB. Under the Single Supervisory Mechanism (SSM), that has been implemented in the EU through the SSM Regulation, ECB will, in addition to the FMA and the OeNB, assume new banking supervision responsibilities from November 2014. In Austria, ECB will be responsible for the supervision of six significant credit institutions located in Austria.

The FMA is the competent authority for the supervision of credit institutions, insurance companies, pension funds, investment firms, investment management companies and payment services providers in Austria. The FMA may take official measures and pass certain regulations specifying supervisory obligations. The FMA is responsible for enforcing

its own administrative decisions with the exception of orders imposing administrative penalties. Administrative and penal decisions of the FMA may be appealed against at the Austrian Administrative Court of first instance.

As supervisory authority for credit institutions in Austria, the FMA is required to act in line with the provisions of the Banking Act and the CRR and applicable EBA guidelines and recommendations and with due attention to financial stability, the smooth functioning of the banking system and creditor protection. With regard to supervision of credit institutions, the core competences and duties of the FMA include the licensing of credit institutions, the performance of supervisory procedures, the supervision of intra-bank models, the ordering of OeNB to carry out on-site inspections, monitoring of measures taken by credit institutions to remedy shortcomings, the interpretation of supervisory laws concerning credit institutions, collecting and analysing information relating to credit institutions, the sanctioning of credit institutions and participating in international bodies concerning banking supervision. The FMA is also the competent authority for Austrian credit institutions that want to provide cross-border banking services by way of freedom to provide services or freedom of establishment. Credit institutions which are authorised and established in a member state may carry out the financial activities listed in Annex I to Directive 2013/36/EU by the establishment of a branch or under the freedom to provide services, if the credit institution's authorisation covers such activities and a corresponding notification has been made.

The OeNB is the central bank of the Republic of Austria and, as such, an integral part of both the European System of Central Banks (ESCB) and the Eurosystem. In the public interest, the OeNB contributes to monetary and economic policy decision making in Austria and in the Euro area. In line with the Austrian Act on the *Oesterreichische Nationalbank* (*Nationalbankgesetz* – NBG), the OeNB is established as a stock corporation. Given its status as a central bank, it is, however, governed by a number of special provisions.

The main tasks of the OeNB focus on contributing to a stability-oriented monetary policy within the Eurosystem, safeguarding financial stability in Austria and supplying the general public and the business community in Austria with high-quality, ie counterfeit-proof, cash. In addition, the OeNB manages reserve assets, ie gold and foreign exchange holdings, with a view to backing the euro in times of crisis, draws up economic analyses, compiles statistical data, is active in international organisations and is responsible for payment systems oversight.

The SSM Regulation which entered into force on 3 November 2013 confers on the ECB both micro-prudential supervisory tasks and macro-prudential supervisory tasks. The SSM is the system of financial supervision composed of the ECB and the national competent authorities (NCAs) of participating member states. Within the SSM, the ECB will be responsible for the direct supervision of significant credit institutions. A credit institution may be classified significant if the total value of its assets exceeds EUR 30 billion, if it is important for the economy of the relevant member state (ie in case of total assets of more than EUR 5 billion and the assets represent more than 20 per

cent of the GDP), if its cross-border activities on a group level are significant (ratio of its cross-border assets to its total assets is above 10 per cent), in case of a request for or the receipt of direct public financial assistance from the European Stability Mechanism (ESM) and in case the credit institution is one of the three most significant credit institutions in a participating Member State. In Austria BAWAG P.S.K. Bank für Arbeit und Wirtschaft und Österreichische Postsparkasse AG, Erste Group Bank AG, Raiffeisenlandesbank Oberösterreich AG, Raiffeisenlandesbank Niederösterreich-Wien AG, Raiffeisen Zentralbank Österreich AG and Österreichische Volksbanken-AG will be directly supervised by ECB. The ECB will also be responsible for the effective and consistent functioning of the SSM. In this context, ECB will assume competence for licensing of credit institutions and will also assess the acquisition of qualifying holdings in credit institutions. Furthermore, ECB will become competent regarding the cross-border provision of services and for the right of establishment of credit institutions envisaging to expand to non-participating EU member states. ECB will also be able to address general instructions to national competent authorities regarding the supervision of less significant supervised entities and will retain investigatory powers over all supervised entities.

The EBA is an independent EU authority which works to ensure effective and consistent prudential regulation and supervision across the European banking sector. The main task of the EBA is to contribute to the creation of the European Single Rulebook in banking which objective is to provide a single set of harmonised prudential rules for financial institutions throughout the EU.

2.3 Other authorities

For credit institutions with total assets in excess of EUR one billion, the Austrian Minister of Finance must appoint a state commissioner and a deputy state commissioner for a maximum term of five years. The commissioners have to be invited by the credit institution to general meetings, to meetings of the members of the supervisory board, to the audit committees and executive meetings of the supervisory board. The state commissioner and the deputy are obliged to object to resolutions that violate administrative decisions of the Federal Minister of Finance or the FMA, they have inspection rights and they must immediately report facts to the FMA which become known to them and on the basis of which the credit institution's fulfilment of its obligations to creditors - and especially the security of the assets entrusted to the credit institution - are no longer ensured.

The Austrian Control Bank (*Oesterreichische Kontrollbank AG* – OeKB) is Austria's main provider of financial and information services to the export industry and the capital market. In particular, issuers of securities and fund companies can fulfil their reporting and disclosure obligations by using the OeKB's electronic reporting platforms.

2.4 Role of Central Bank

Please see above section 2.2.

3. BANKING LICENCE

3.1 Characteristics, nature

The performance of banking transactions pursuant to Article 1 of the Banking Act requires a written licence by the FMA. Licences may be issued subject to conditions and requirements and including one or several of the types of banking transactions listed in Article 1 of the Banking Act. The scope of the licence may also exclude individual banking transactions. As mentioned in section 2.2, starting on 4 November 2014, ECB will become the competent supervisory authority for the licensing of credit institutions established in SSM member states. The authorisation process for a credit institution that shall be established in Austria will then be as follows: the FMA will continue to be the point of entry for an application; it carries out a first assessment of the application on the basis of the conditions laid down under the Banking Act. If it considers that the application complies with those conditions, it will prepare a draft decision and send it to ECB. ECB will perform an independent assessment of the application based on the FMA's draft decision. ECB may agree or object to the (positive) draft decision of FMA but its decision to grant the authorisation will be final. The ECB decision will be notified to the applicant by the FMA.

Credit institutions licensed in Austria may provide banking services in other member states by way of freedom to provide services or by using the freedom of establishment (Article 10 of the Banking Act). A credit institution wishing to establish a branch in the territory of another member state must notify the FMA accordingly and provide certain information. The FMA must within three months of receipt of the information convey the information to the competent authority of the host member state and inform the credit institution accordingly by means of an administrative decree within the same period. A credit institution envisaging carrying out its activities in another member state for the first time by way of freedom to provide services must notify the FMA of those activities. Within one month of receiving the notification, the FMA must convey that notification to the competent authority of the host member state. ECB will also act as home member state supervisory authority regarding SSM institutions that intend to provide services or establish a branch in member states outside the SSM area.

3.2 Regulated activities, scope of licence

According to Article 4 para. 1 no. 1 CRR, a 'credit institution' is defined as an undertaking the business of which is to take deposits or other repayable funds from the public and to grant credits for its own account (also referred to as 'CRR credit institution' in the Austrian Banking Act). As opposed to this very narrow definition of the activities of a credit institution, Austrian law requires a banking licence for many types of financial activities if carried out for commercial purposes, including:

- the taking of funds from other parties for the purpose of administration or as deposits (deposit business);
- the provision of non-cash payment transactions and clearing services in

current account for other parties (current account business);
- the conclusion of money-lending agreements and the granting of monetary loans (lending business);
- the purchase of cheques and bills of exchange, and in particular the discounting of bills of exchange (discounting business);
- the safekeeping and administration of securities for other parties (custody business);
- the issuance and administration of payment instruments;
- the trading for one's own account or on behalf of others in foreign exchange, money market instruments; futures, options and swaps; transferable securities and other derivative instruments;
- the trading for one's own account or on behalf of others in commodity derivatives;
- the assumption of suretyships, guarantees and other forms of liability for third parties where the obligation assumed is monetary in nature (guarantee business);
- the securities underwriting business;
- the acceptance of building savings deposits and the extension of building loans in accordance with the Building Society Act (building savings and loan business);
- the investment fund business;
- the business of financing through the acquisition and resale of equity shares;
- the real estate investment fund business;
- the factoring business;
- the conduct of money brokering transactions on the interbank market;
- the brokerage of transactions relating to the banking deposit business, the lending business, the guarantee business and the foreign exchange business.

As referred to in section 3.1, Austrian credit institutions may apply for limited licences that only cover some of the above listed banking transactions. Credit institutions that have obtained a licence for the deposit business and the lending business as well as credit institutions that have obtained a licence for the current account business or the issuance and administration of payment instruments are by law authorised to issue electronic money according to the Austrian E-Money Act and to provide certain payment services according to the Austrian Payment Services Act.

3.3 Licensing procedure (parties involved, nature and form of application, duration, cost, licensing decision)

As referred to in section 3.1, credit institutions envisaging to conduct banking transactions in Austria must obtain a licence from the FMA (respectively the ECB beginning with 4 November 2014). The applicant must enclose the following information and documents with its application:
- place of establishment and legal form of business organisation;
- articles of association;
- business plan;

- initial capital;
- identity and amount contributed by shareholders possessing a qualifying participation in the credit institution;
- if none of the owners holds a qualifying participation, the 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;
- the identities of the designated executive directors and their qualifications for operating the undertaking;
- the identities and addresses of agents.

The licence is to be issued by the FMA (respectively the ECB), if:

- the undertaking is to be established as a credit institution in the legal form of a joint-stock company, a cooperative society or a savings bank;
- the articles of association do not contain any provisions which would not ensure the security of the assets with which the credit institution is entrusted and the proper execution of transactions pursuant to Article 1 para. 1 of the Banking Act;
- the persons that hold qualifying participations in the credit institution meet the requirements stipulated in the interest of sound and prudent management of the credit institution, and no facts are known which would raise doubts as to the personal reliability of those persons;
- the FMA is not prevented from fulfilling its supervisory duties because of the credit institution's close links to other natural or legal persons;
- the initial capital or initial endowment amounts to at least EUR 5 million and is freely available to the directors without restrictions or charges in Austria;
- the directors find themselves in an orderly economic situation and no facts are known which would raise doubts as to their personal reliability as required for the conclusion of banking transactions (no criminal charges or convictions, no bankruptcy proceedings against the directors) - there are similar requirements for the members of the supervisory board;
- the directors are sufficiently fit and proper for operating the credit institution; the members of the supervisory board also have to possess sufficient professional qualifications and experience necessary to exercise their function within the credit institution;
- the directors shall commit sufficient time to perform their functions in the institution (limitation of functions outside the institution);
- the centre of at least one director's interests lies in Austria;
- at least one director has command of the German language;
- the credit 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 the case of credit cooperatives, 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;

- the place of establishment and the head office of the credit institution is located in Austria.

Before issuing a licence to a credit institution, the FMA has to consult with OeNB and at the same time also notify the Federal Ministry of Finance. As mentioned in section 3.1, starting in November 2014 the ECB will ultimately decide about the granting of licences to credit institutions. If the licence application includes the authorisation to accept deposits subject to (deposit) guarantee obligations or to provide investment services subject to (investor) compensation obligations, the FMA must also consult the protection schemes before issuing the licence. Every credit institution licensed in Austria is obliged to belong to a trade association and be member of a protection scheme if it takes deposits or provides certain other investment or banking services.

4. FORMS OF BANKS

Under Austrian law, a bank may be regarded as a legal entity authorised to conduct banking activities as defined in the Banking Act. The Banking Act sets forth two types of institutions, the credit institution (*Kreditinstitut*) and financial institution (*Finanzinstitut*). The Banking Act does not distinguish between categories of banks such as universal, commercial, retail, investment, private or other banks.

The Banking Act provides for a of activities a bank may be licensed to conduct in Austria.

As of April 2014 there were 722 credit and financial institutions licensed in Austria, 469 banks headquartered in the European Economic Area (EEA) were registered with FMA as conducting business in Austria under the freedom to provide services and 31 EEA banks were registered as operating under the freedom of establishment in Austria. Only six of these 722 institutions were qualified to be significant in terms of the ECB's competence for prudential supervision by November 2014.

4.1 State-owned banks

The Austrian National Bank (*Oesterreichische Nationalbank*) is the most important Austrian state-owned bank. It used to be held by the Republic of Austria in conjunction with trade unions, other Austrian banks and insurance companies. Since May 2010, however, it is solely owned by the Republic of Austria. The bank's legal foundations are the National Bank Act (*Nationalbankgesetz*), the Foreign Exchange Act (*Devisengesetz*), the Banking Act and the Act on the Institution and Organisation of the Financial Market Authority (*Finanzmarktaufsichtsbehördengesetz*).

The Austrian National Bank shall ensure financial stability and money supply within Austria. Its agenda comprises, among other things, implementation of monetary policy, management of reserves, and also issuing of legal tender (notes and coins). Furthermore, the Austrian National Bank closely cooperates with the FMA as they share supervisory responsibilities.

The OeKB, though not state-owned, is mandated by law with functions

essential for the Austrian financial market. It acts as central financial and information service provider to the Republic of Austria, the export sector and the capital market.

The OeKB is largely concerned with export services. It is entitled to issue guarantees on the Republic's behalf and to promote exports in international trade.

The Austrian Control Bank is the officially appointed mechanism for the storage of regulated information ('OAM' under EU Directive 2013/50/EU), operating the 'Issuer Information Center.Austria' (a disclosure portal for issuer's capital market activities). Moreover, it is Austria's central securities depositary (CSD), thus enabling the central custody and transfer of securities. It furthermore acts as central clearinghouse. The bank is further Austria's central registry for international security identification numbers (ISIN). It is also registration office for prospectuses under the Capital Market Act and runs an auction system for government bonds.

Other state-owned banks are Hypo Alpe-Adria-Bank International AG and KA Finanz AG.

4.2 Universal banks, commercial and retail banks

There is no regulatory division of banks into universal, commercial or retail banks. A universal bank would be a bank that has obtained licences to conduct activities in all relevant aspects of Article 1 of the Banking Act. The same applies for commercial and retail banks. Requisite licences may be 'tailored' to fit a bank's demand.

In the context of commercial and retail banks, the regional mortgage banks (*Landes-Hypothekenbanken*) are specifically licensed.

4.3 Investment banks

Investment banks may be regarded as banks licensed to conduct investment and securities related activities under the Banking Act. Depending on the scope of investment activities, a licence may be required for the issuance and administration of payment instruments, foreign exchange and foreign currency business, trading in money market instruments, the futures and options business, trading in forward rate agreements and equity swaps, the securities business, trading in derivatives, trading in commodity derivatives, the securities underwriting business, the (real estate) investment funds business and the capital financing business.

4.4 Private banks

Private banks and family offices play a relatively minor role in the Austrian banking landscape. As with other types of banks, they may need to be licensed for a variety of banking or investment or AIFM activities, depending on the services offered by such bank (eg discretionary portfolio management, management of an AIF).

4.5 Other banks

A pension fund (*Pensionskasse*) is a private asset management company

for the purpose of investments for retirement. Savings banks (*Sparkassen*) ought to secure local credit needs and finance trade, commerce, and social infrastructure. They are subject to a specific corporate law regime.

Financial institutions, though not banks in a strict sense, are authorised to conduct one or more of the following activities, if conducted as their main activities: (i) leasing business; (ii) providing advice on capital structure, industrial strategy and related questions, advice and services related to mergers and acquisitions; (iii) credit reporting services; (iv) lockbox services; (v) payment services in accordance with the Payment Services Act; and (vi) issuing money in accordance with the E-Money Act. Financial institutions are, with minor exceptions, generally not subject to the Banking Act and no licence (under the Banking Act) must be obtained. Other licences such as under the Trade Code (*Gewerbeordnung*) or the Payment Services Act or the E-Money Act may be required.

4.6 Regulation of SIFIs (Systemically Important Financial Institutions)

Article 23c of the Banking Act provides for Systemically Important Financial Institutions (SIFI). An institution may be classified systemically important by FMA if this institution's failure may cause systemic risk. FMA has authority to promulgate regulations requiring SIFIs to implement a capital buffer of up to 2 per cent of CET 1 capital, in addition to the capital requirements pursuant to Article 92 CRR. Such buffer shall not lead to 'unreasonable adverse effects' on the financial market of the EU or the financial markets of other member states. In any event, FMA must re-evaluate such buffer requirements on an annual basis.

5. ORGANISATION OF BANKS

Credit institutions may conduct their business in the form of a corporation (*Kapitalgesellschaft*) such as a limited-liability corporation (GmbH), a stock corporation (AG), a European Public Company (SE), a cooperative society (*Genossenschaft*), a European Cooperative Society (SCE), or a savings bank (*Sparkasse*). Credit institutions cannot be established in the corporate form of joint partnerships (OG) or of limited partnerships (KG) or as 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.

5.1 Corporate bodies – corporate governance

Corporate bodies depend on the corporate form chosen. For example, the organisational structure of the Austrian stock corporation rests on three bodies: the general meeting, the supervisory board and the management. The annual general meeting elects a supervisory board for a maximum period of five years, but may prematurely terminate this appointment by a qualified majority (the articles of incorporation may reduce this requirement to a simple majority). Upon a petition of a minority of 10 per cent a court may prematurely remove from office for good cause members elected by the general meeting and members delegated by shareholders. The supervisory

board elects a chairperson for a maximum period of five years; it is possible for the supervisory board to call for the resignation of the chairperson prematurely for good cause (violation of duties, vote of no confidence by the general meeting). The management board is solely responsible for running the company and shall neither be subject to instructions from the annual general meeting nor from the supervisory board.

Credit institutions are subject to the Standard Compliance Code of the Austrian banking industry. The management board is directly responsible for establishing an independent compliance function.

Credit institutions are required to establish and maintain an independent compliance function which monitors and regularly assesses the adequacy and effectiveness of compliance and adherence to the law. Staff dealing with compliance issues is not allowed to take on any other activities. FMA assumes that credit institutions are called upon to establish autonomous and independent compliance functions which, in accordance with the understanding of compliance laid down in the MiFID proactively deal with the minimisation of the risk of violation.

Mandatory committees in the supervisory boards of Austrian credit institutions

The following requirements apply to credit institutions of any legal form, the balance sheet total of which exceeds one billion euros or which have issued transferable securities listed on a regulated market.

Before 1 January 2014, the supervisory boards of such credit institutions had to install an audit committee supervising the audit and issuance of financial statements, the internal control system, the internal audit function and the internal risk management system as well as preparing the appointment of the bank auditor. Also partly before 2014, specified credit institutions had to install a remuneration committee within their supervisory boards. Such committees must supervise the remuneration policy, the remuneration practices and the remuneration incentive structure in line with the management and limitation of risks and the institution's risk management policy and have to prepare decisions on remuneration by the supervisory board.

As of 2014 Austrian credit institutions have to install a mandatory nomination committee preparing appointments of members of the management body. Further, the supervisory boards of Austrian credit institutions have to install a risk committee advising the management body on risk matters.

5.2 Organisation (requirements, corporate documents, audit function etc)

Banks are subject to a number of organisational requirements. FMA has published a detailed set of guidelines. The application and/or the scope of the organisational regulations depend on the type, scope and complexity of the business activities and investment services and other activities.

Pursuant to Articles 17 and 19 of the Securities Supervision Act, an institution

has to implement a comprehensive set of organisational requirements, eg, establishing an organisational structure and maintaining a decision-making process which allow the clear documentation of reporting obligations and allocated functions and responsibilities. The institution has to establish an internal reporting system, to maintain adequate and systematic records of its business activities and internal organisation and to ensure the proper, fair and professional performance of tasks even if relevant staff take on several functions. The institution has to establish mechanisms to safeguard security and confidentiality of information, must ensure continuity and regularity of investment services and activities and establish effective and transparent procedures for the prompt processing of complaints filed by retail customers.

5.3 Auditors and other experts

If certain size-related criteria are met, Article 42 of the Banking Act provides the mandatory establishment of a separate organisational unit for auditing tasks (otherwise, audit may be outsourced). This unit may also take over the auditing tasks included in the Securities Supervision Act. In case of smaller credit institutions that do not meet the size-related criteria of Article 42 of the Banking Act but focus on investment services, Article 20 of the Securities Supervision Act must additionally be observed.

One of the main tasks of an audit is to establish, implement and maintain an audit plan. The audit, therefore, plays a significant role.

5.4 Risk management

The Banking Act and Article 435 CRR require the establishment of risk management. Article 39 of the Banking Act stipulates the control, monitoring and limitation of all risks pertaining to banking business and banking operations. If, in a credit institution, an organisational unit that satisfies the independence requirements is entrusted with risk management, it is not necessary to establish another independent organisational unit that carries out the risk management tasks. The underlying risk management policy, however, shall in any case be evaluated with respect to the requirements under the Securities Supervision Act (risk arising from best execution, from sales models for securities, etc) and be adapted, if necessary. Pursuant to Article 435 CRR, a credit institution has to disclose at least once a year (eg in the annual report) details of its risk management objectives and policies including a concise risk statement describing the institution's overall risk profile associated with its business strategy and an adequacy declaration by the management body.

5.5 Supervision of management

Management supervision is firstly carried out by the supervisory board. The size of the supervisory board is defined in the articles of incorporation; it must consist of at least three members (excluding works' council representatives). Moreover, works' council representatives are entitled to delegate one representative for every two shareholder representatives to the supervisory board.

To ensure transparency in relation to the suitability and the independence

of supervisory board members, the following must be presented before the election: expert knowledge of the candidate; professional experience, and any circumstances that might constitute reasons for conflicts of interest.

The supervisory board has to convene on a regular basis (at least four times a year). The annual projections and quarterly reports as well as special reports in cases of imminent crises must be presented to the supervisory board. The supervisory board may at any time conduct exhaustive audits itself or may commission experts to conduct such audits. It approves the annual financial statements and has to arrange for the audit of the consolidated financial statements and approve them. The supervisory board may request experts to take part in its meetings. Exchange-listed stock companies must set up an audit committee of the supervisory board of which one member has to be a financial expert.

5.6 Compensation

FMA in collaboration with OeNB has issued guidelines on certain aspects of remuneration policies and practices. Generally, the principles set forth in the Banking Act (Articles 39, 39b) shall apply to variable remuneration components. As a matter of practice, FMA in executing its supervision has to apply the guidelines, recommendations and technical standards issued by EBA such as the Guidelines on Remuneration Policies and Practices dated 10 December 2010.

The supervisory board is in charge of examining and approving the remuneration policy. It has to monitor the policy on a regular basis and is responsible for its practical implementation. A special remuneration committee must be established in certain banks. The management board, however, remains responsible for the implementation of the remuneration policies.

Remuneration policies shall differentiate between principles applying to all employees and those which apply to specific groups of employees only. Specific principles apply to management board members, risk takers, staff engaged in control functions, staff that is in the same remuneration bracket as senior management and risk traders whose activities might have a material impact on the bank's risk profile. Any credit institution has to determine which of its staff falls within the group of risk traders. According to FMA's current practice, staff that is remunerated with a high variable remuneration component is generally regarded as 'risk traders'.

5.7 Special Rules for SIFIs

The generally applicable rules on SIFIs set forth under the Banking Act relate to measures limiting systemic risk, the introduction of a systemic risk buffer (see chapter 6.4), certain restrictions on dividend distribution and the establishment of a capital maintenance plan.

6. LIQUIDITY AND CAPITAL ADEQUACY

6.1 Role of International Standards (Basel III)

Basel III was implemented into European Union law by Directive 2013/36/EU (CRD IV) and the CRR. Austria has implemented CRD IV into national law by

amending the Banking Act in 2013. CRR as directly applicable Regulation and the amended Banking Act came into force on 1 January 2014 and have to be applied by all Austrian credit institutions.

The CRR mainly regulates new solvency requirements for credit institutions and investment firms as well as liquidity coverage ratios and a new leverage ratio (see in more detail in chapter 1). CRD IV requires credit institutions to maintain certain capital buffers consisting of core equity capital. In addition, the EBA is mandated to issue a number of Regulatory Technical Standards and Implementing Technical Standards further specifying the regulations of CRR and CRD IV. EBA Standards will become binding and have to be applied by credit institution and regulatory authorities of EU member states through the adoption of delegated EU Commission regulations (see, for example, Commission Regulation 241/2014).

6.2 Liquidity requirements

Credit institutions must ensure that they are able to meet their payment obligations at any time (Article 39 para. 3 of the Banking Act). The managing directors are responsible that the credit institution:

- establishes company-specific financial and liquidity planning based on banking experience;
- sufficiently ensures its ability to compensate for any future imbalances of incoming and outgoing payments by constantly maintaining sufficient liquid funds;
- has in place systems for monitoring and controlling the interest rate risk of all transactions;
- structures its interest rate in line with the maturity structure of its assets and liabilities in such a way that potential changes in market conditions are taken into account; and
- it has in place documentation on the basis of which the credit institution's financial situation can be calculated with reasonable accuracy at all times; these documents are to be presented to the FMA with appropriate comments on request.

Notwithstanding these obligations credit institutions must hold certain amounts of liquidity at all times (Article 25 of the Banking Act).

From 1 January 2015 the CRR requires credit institutions to hold liquid assets, the sum of the values of which covers the liquidity outflows less the liquidity inflows under stressed conditions so as to ensure that institutions maintain levels of liquidity buffers which are adequate to deal with any possible imbalance between liquidity inflows and outflows under gravely stressed conditions during a period of 30 days (Liquidity Coverage Ratio – LCR). The LCR as a short-term liquidity business ratio will be phased as follows: 2015 60 per cent, 2016 70 per cent, 2017 80 per cent, 2018 100 per cent. In addition, presumably starting in 2018, credit institutions will also have to ensure that their long term obligations will adequately be met with a diversity of stable funding instruments under both normal and stressed conditions (Net-Stable-Funding Ratio – NSFR as a long-term liquidity business ratio).

6.3 Capital adequacy framework

Article 92 of the CRR regulates the minimum capital requirements of credit institutions. Accordingly credit institutions must at all times satisfy the following own funds requirements:

(i) Common Equity Tier 1 capital ratio of 4.5 per cent (as of 1 January 2015) of the total risk exposure; (ii) Tier 1 capital ratio of 6 per cent of the total risk exposure; (iii) total capital ratio of 8 per cent of the total risk exposure.

The total risk exposure amount is calculated as a sum of the following items:

- The risk-weighted exposure amounts for credit risk and dilution risk, calculated according to the Standardised Approach or the Internal Ratings Based Approach (IRB) in respect of all the business activities of an institution, excluding risk-weighted exposure amounts from the trading book business of the institution.
- The own funds requirements for the trading-book business of an institution, for the:
- position risk and (ii) large exposures exceeding the limits specified in Articles 395 to 401 of the CRR to the extent an institution is permitted to exceed those limits.
- The own funds requirements for: (i) foreign-exchange risk; (ii) settlement risk; (iii) commodities risk.
- The own funds requirements for credit valuation adjustment risk of OTC derivative instruments other than credit derivatives recognised to reduce risk-weighted exposure amounts for credit risk.
- The own funds requirements for operational risk. And
- The risk-weighted exposure amounts for counterparty risk arising from the trading book business of the institution for the following types of transactions and agreements: (i) contracts listed in Annex II of the CRR and credit derivatives; (ii) repurchase transactions, securities or commodities lending or borrowing transactions based on securities or commodities; (iii) margin lending transactions based on securities or commodities; (iv) long settlement transactions.

Notwithstanding adherence to the above listed minimum capital requirements, the own funds of an institution may not fall below the amount of initial capital required at the time of its authorisation.

The eligible capital of a credit institution – which consists of the entire Tier 1 capital and Tier 2 capital up to the amount of one third of the Tier 1 capital – serves as basis for the restrictions concerning qualifying holdings outside the financial sector and large exposures.

In addition to the own funds requirements according to CRR, CRD IV introduced new capital buffer requirements that were implemented into Austrian law through Articles 23 through 23d of the Banking Act. All capital buffers have to consist of Common Equity Tier 1 capital. From 1 January 2016 all credit institutions have to maintain a capital conservation buffer of 2.5 per cent of the total risk exposure, that is phased in over a period of four years in steps of 0.6125 per cent. In addition, the FMA may require credit

institutions to maintain an anti-cyclical capital buffer of up to 2.5 per cent (in steps of 0.25 per cent) beginning with 2016 and a systemic risk buffer of at least 1 per cent of the total risk exposure with the latter becoming applicable on 1 January 2014. These buffers mainly serve for better absorption of losses by institutions in times of crisis, to reduce pro-cyclical effects due to the economy of a member state and to reduce systemic risks that may affect the entire economy of a member state.

6.4 Special requirements for SIFIs

Regarding Global Systemically Important Institutions (G-SRIs) and Other Systemically Important Institutions (O-SRI) FMA may prescribe additional Common Equity Tier 1 capital buffers. The G-SRI buffer may be set between 1 and 3.5 per cent and the O-SRI buffer between 0 and 2 per cent. In case an institution will be subject to a systemic risk buffer, a G-SRI buffer and an O-SRI buffer, it will only have to meet the highest of the three buffer requirements (no cumulation principle).

7. CONSOLIDATED SUPERVISION

7.1 Role of consolidated supervision

According to Article 11 of the CRR, parent institutions in a member state have to comply with the obligations laid down in the CRR on the basis of a consolidation. The parent undertakings and their subsidiaries subject to the CRR are obliged to set up a proper organisational structure and appropriate internal control mechanisms in order to ensure that the data required for consolidation is duly processed and forwarded. In particular, they have to ensure that subsidiaries not subject to the CRR requirements implement arrangements, processes and mechanisms to ensure a proper consolidation. Institutions controlled by a parent financial holding company or a mixed parent financial holding company in a member state have to comply with the CRR on the basis of a consolidation of that financial holding company or mixed financial holding company. This, *inter alia*, requires that as a minimum, one member entity of the group qualifies as a CRR credit institution or CRR investment firm and, in the case of mixed financial holding companies, additionally another group member qualifies as a licensed insurance undertaking.

A parent institution is defined as an institution in a member state that has an institution or a financial institution as a subsidiary or which holds a participation in such an institution or financial institution, and which is not itself a subsidiary of another institution authorised in the same member state, or of a financial holding company or mixed financial holding company set up in the same member state. A subsidiary is a company where a parent undertaking

- holds the majority of the voting rights;
- has the right to appoint or remove the majority of the members of the management or supervisory body;
- has the right to exercise a dominant influence pursuant to a contract or the articles of association;

- is a shareholder in or member of an undertaking, and a majority of the members of the management or supervisory bodies of that undertaking who have held office during the financial year, during the preceding financial year and up to the time when the consolidated accounts are drawn up, have been appointed solely as a result of the exercise of its voting rights;
- is a shareholder in or member of an undertaking, and controls alone, pursuant to an agreement with other shareholders in or members of that undertaking, a majority of shareholders' or members' voting rights in that undertaking.

Participation means rights in the capital of other undertakings which, by creating a durable link with those undertakings, are intended to contribute to the company's activities, or the ownership, direct or indirect, of 20 per cent or more of the voting rights or capital of an undertaking.

According to Article 18 of the CRR, institutions that are required to comply with the requirements of the CRR on the basis of their consolidation have to undertake a full consolidation of all credit institutions, investment firms, financial institutions, ancillary services undertakings and asset management companies that are its subsidiaries or, where relevant, the subsidiaries of the same parent financial holding company or parent mixed financial holding company. Subsidiary institutions, financial institutions and ancillary services undertakings do not have to be included in the consolidation where the total amount of assets and off-balance sheet items of the undertaking concerned is less than EUR 10 million or 1 per cent of the total amount of assets and off-balance sheet items of the parent undertaking.

7.2 Accounting requirements

The rules regarding consolidated financial statements of parent institutions are provided for in Article 59 of the Banking Act. The scope of consolidation for purposes of the consolidated financial statements under the Banking Act is not exactly the same as the scope of prudential consolidation according to CRR. Article 59 of the Banking Act regulates that a credit institution must prepare consolidated financial statements and a consolidated annual report for its group of credit institutions according to the rules of Article 30 Banking Act. Article 30 regulates what is to be understood as a group of credit institutions for purposes of financial consolidation. There is a special provision for parent institutions applying IFRS for the consolidated financial statements enabling them to use these IFRS statements under the Austrian Banking Act.

7.3 International coordination and cooperation among regulators

As referred to in chapter 2.2. above, starting in November 2014 ECB, will become the competent supervisory authority for significant credit institutions and significant groups of credit institutions. According to the draft SSM Framework Regulation of ECB, the actual supervision of significant institutions and groups will be conducted by 'Joint Supervisory Teams' (JSTs). JSTs will be operational units within the SSM and they will be the main tool

through which national competent authorities such as FMA assist the ECB in the supervision of significant entities. One JST will be established for each significant supervised institution or group. Each JST will include staff from the ECB and from national competent authorities, and will be coordinated by an ECB staff member (JST coordinator). The JST coordinator will be assisted by a sub-coordinator from each national competent authority that has appointed more than one staff member to the JST.

Pursuant to the draft SSM Framework Regulation, the FMA will also be involved in the preparation of ECB decisions and notifications to the ECB in relation to significant supervised entities located in Austria, such as, eg decisions concerning the granting or withdrawal of banking licences, notifications of the establishment of a branch in other member states or notifications concerning the acquisition of a qualifying holding of a credit institution. FMA will also have to assist ECB in cases of general investigations and on-site inspections upon request.

FMA is also a member of the Board of Supervisors of EBA which is the main decision-making body of EBA. The main role of the Board of Supervisors is to take all policy decisions of EBA, such as adopting draft technical standards, guidelines, opinions and reports. The Board of Supervisors also takes the final decision on EBA's budget. The Board of Supervisors is composed of the EBA's Chairperson, and of the 28 national supervisory authorities.

8. SHAREHOLDERS, ACQUISITIONS OF BANKS

8.1 Reporting of significant shareholdings

The Banking Act requires anyone having taken a decision to acquire or dispose of (directly or indirectly) a qualified participation of 10 per cent in an Austrian credit institution to inform FMA in advance. Every decision to increase or decrease qualified participation by reaching a 20, 30 or 50 per cent threshold of voting rights or capital must also be notified. This also covers investors acting in concert. In addition to the investor, the credit institution itself must notify FMA of such ownership change, but only post closing.

Besides these requirements, Articles 91 *et seq* of the Austrian Stock Exchange Act (*Börsegesetz*) may apply if the bank is listed on a regulated market in Austria. These provisions govern general notification obligations of purchasers and sellers of shares in a stock corporation having its registered seat in Austria. Furthermore, the Transparency Regulation (*Transparenz-Verordnung*) applies, providing details on investor's transparency obligations under the Stock Exchange Act. Article 11 *et seq* Securities Supervision Act (Wertpapieraufsichtsgesetz) governs certain reporting obligations in connection with the acquisition of shares in Austrian investment firms. The Regulation on the Control of Ownership (*Eigentümerkontrollverordnung*) provides pre-closing transparency obligations in terms of investments in Austrian credit institutions, investment firms, insurance undertakings, payment institutes and e-money-institutes. The Austrian Takeover Act (*Übernahmegesetz*) sets forth notification obligations in connection with takeover transactions.

As a practical matter, we would advise having legal counsel asses a transaction before reaching thresholds of 3, 4, 5, 10, 15, 20, 25, 30, 35, 40,

45, 50, 75 and 90 per cent of voting rights and/or capital. These thresholds should be read extensively to include any instruments that give or might give (eg by way of conversion) voting rights or participation in capital including derivative instruments, even if merely cash-settled. The violation of reporting obligations may entail administrative sanctions and usually results in a suspension of voting rights.

8.2 Approval requirements

Except for the requirement of 'special approvals' by FMA as discussed in section 8.4, there is generally no approval requirement. FMA may, however, prohibit a transaction within 60 days of notification. To this end, FMA assesses the suitability of the proposed acquirer and the financial soundness of the proposed acquisition in terms of, eg, reputation, financial soundness, effective supervision, risk of money laundering, or terrorist financing. If a party fails to fulfil its obligations under Article 20 of the Banking Act, the FMA may request further information if suitable and necessary.

8.3 Foreign investments

The notification requirements apply to any, including foreign, investors in Austrian licensed credit institutions. Pursuant to Article 64 of the Securities Supervision Act, foreign investment firms which are members of an Austrian stock exchange, as well as Austrian branches of foreign investment firms and financial institutions are subject to extensive transaction reporting duties towards FMA.

8.4 Acquisition of banks

In the case of bank takeovers and mergers, additional legal restrictions must be adhered to. Generally, a cross-border merger or merger of entirely national credit institutions requires special approval by FMA in accordance with Article 21 of the Banking Act. Without obtaining such special approval, a registration of the merger with the Austrian Commercial Register is not permissible. The transaction would further be invalid before obtaining such approval.

As regards merger and/or consolidation related issues, special approval of the FMA is required for: (i) actual mergers of credit institutions; (ii) every reaching, exceeding or falling below the limits of 10, 20, 33 and 50 per cent of the voting rights or capital of a credit institution or CRR-credit institution domiciled in a third country; (iii) any change in the corporate form of a credit institution (such as the change from a limited-liability company into a stock corporation and vice versa); (iv) spin-offs of credit institutions; and (v) the merger of credit institutions with non-banks. If such transactions are attempted without special approval, administrative sanctions may be imposed by the FMA.

Another FMA approval requirement is triggered if a licensed Austrian credit institution intends to engage in the brokerage of insurance contracts.

9. RESOLUTION

9.1 Liquidation – legal framework

The rules on insolvency proceedings – which apply to the liquidation of a

financial institution as well – are in the Insolvency Act (*Insolvenzordnung*). Furthermore, the Banking Act contains certain provisions applying to credit institutions only.

Credit institutions are required to immediately notify FMA in case of illiquidity or overindebtedness without the usual 60 days-grace period applying to non-banks. While generally a debtor itself and its creditors may file for bankruptcy, only FMA as the competent authority may do so on the credit institution's behalf outside receivership proceedings.

Also, while other debtors may file for reorganisation proceedings under the Insolvency Act, this route is not available for credit institutions. Instead, credit institutions may be subject to receivership (*Geschäftsaufsicht*) as provided for in Article 81 *et seq* of the Banking Act. Receivership proceedings are a special type of insolvency proceedings reserved for banks and may be instituted by the credit institution itself (in addition to the FMA). Under receivership, a court appointed receiver responsible for the business reorganisation of the credit institution assumes control and manages the business; the bank's liabilities are deferred by law. Unless the court overseeing the proceedings orders otherwise, the credit institution may continue its business while receivership is in effect. If the proceedings are successful, the credit institution may avoid liquidation.

9.2 Resolution regime

The Austrian Bank Intervention and Restructuring Act (*Bankeninterventions- und restrukturierungsgesetz*) has already anticipated parts of the EU Bank Recovery and Resolution Directive. It obliges credit institutions to take precautions for crisis scenarios by preparing recovery and resolution plans and by providing a legal basis for early intervention measures by the FMA.

The Act provides the FMA with early-intervention powers if a credit institution does not comply with certain capital or liquidity requirements or is about to violate those requirements. In such case, the FMA may order that: (i) a recovery plan be developed, if not yet available; (ii) measures of the recovery plan be implemented; (iii) certain improvements in risk management be made.

The FMA may further demand the convening of or convene itself a general meeting to undertake capital measures, include individual agenda items at a general meeting and propose the adoption of certain decisions and order the establishment of a negotiation plan that provides for voluntary debt restructuring with the creditors of the credit institution.

9.3 Bail-in/bail-out

Austria will have to implement the Bank Recovery and Resolution Directive (BRRD) –which sets out a minimum set of resolution tools such as the bail-in instrument – by 31 December 2014, and (apart from the bail-in tool which will apply as of 1 January 2016 at the earliest) generally apply it as of 1 January 2015. Yet, the Austrian legislator has not proposed a law on the implementation of the BRRD.

The Austrian laws currently in force do not provide for a 'classic' bail-

in regime as envisaged under the BRRD. Under the Financial Market Stability Act (*Finanzmarktstabilitätsgesetz*), the Austrian Minister of Finance is empowered to take over liabilities of financial institutions. Furthermore, credit institutions may be nationalised if heavily affected by a financial crisis (see above section 4.1).

10. REGULATORY DEVELOPMENTS AND TOPICAL TRENDS

In an effort to create a pan-European single banking rule book, most of the regulatory reforms in recent times have their origin in EU Directives. The EU legislators, and hence also the Austrian legislator, have adopted or still draft or negotiate a number of legal acts to increase regulatory requirements for European banks. Most importantly, the SSM, once fully operational in November 2014, will have the ECB directly supervise banks in the euro area and in other member states deciding to join the European Banking Union.

Besides the single supervisory mechanism (pillar 1), the European Banking Union will consist of a mutualised single resolution mechanism including a single resolution fund and a single resolution board as of 1 January 2015 (pillar 2). The single resolution fund targets achieving a volume of around EUR 55 billion by 2023. The single resolution board will consist of five members and will have the final decision on a compulsory resolution of a European bank. Whereas pillars 1 and 2 of the European Banking Union will only apply to the 18 participating member states of the European monetary union, the third pillar (revised deposit guarantee directive) of the European Banking Union will apply to all 28 EU member states without a guarantee fund being established.

At the moment, six significant Austrian credit institutions are subject to the ECB's asset quality review and to the ECB's stress test executed by ECB together with the EBA. This comprehensive assessment comprises a risk assessment, a balance sheet assessment and a forward-looking stress test.

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