Looking back

Volker Glas of Cerha Hempel Spiegelfeld Hlawati outlines the developments affecting bank lending in Austria over the past year

Since 2004 the volume of outstanding bank loans granted by Austrian financial institutions has increased by more than e25 billion to e278 billion in 2006. According to the latest bank lending survey conducted by the Austrian central bank in January 2007, demand for corporate loans slightly increased in 2006; for 2007, Austrian banks expect an accelerated growth in demand for corporate loans. With regard to private clients, Austrian banks anticipate a slight increase in demand for bank loans.

Most recent legislative developments in the area of bank lending affected laws on bank regulation such as the implementation of the Basel II Capital Accord and EC directives 2006/48/EC and 2006/49/EC into the Austrian Banking Act 1993 (Bankwesengesetz). Below we cover the main recent market and legal developments in Austrian bank lending.

Stamp tax on credit and loan agreements

Austrian civil law distinguishes between credit agreements (*Kreditvertraege*) and loan agreements (*Darlehensvertraege*). This difference is of a rather theoretical nature, that is, credit agreements are effective upon agreement of the parties to the contract and loan agreements become effective only upon transfer of the loan amount to the borrower. So the practical impact of this distinction is low.

Stamp duty is generally payable on both types of agreement, and it depends on the assessment which contract (loan agreement or credit agreement) has been concluded to be able to assess when the tax is triggered (and to analyse whether and how it can be avoided).

According to the Austrian Stamp Tax Act (Gebuehrengesetz 1957), stamp tax is levied on credit agreements in the amount of 0.8% of the credit amount if the credit is obtained once, or more often within five years after conclusion of the credit agreements, and in the amount of 1.5% in all other cases. With regard to loan agreements, stamp duty amounts to 0.8% of the loan amount.

The imposition of stamp duty on credit or loan agreements is generally triggered if either a written document (*Urkunde*) or other written evidence of the existing contract (*Ersatzbeurkundung*) is created.

Austrian companies have developed various strategies to avoid the imposition of stamp duty on credit or loan agreements, one of the more popular ones being the offer-acceptance scheme. The only written document created is an offer (usually signed by the debtor), the agreement then is completed by actual compliance with the offer (usually by the creditor through disbursement of the funds). While the offer-acceptance scheme initially cannot trigger stamp duty as no written contract (signed by both parties) exists, in recent years it has become more difficult for the parties to avoid giving "other written evidence" of the existing contractual relationship during the term of the credit agreement. In February 2007 the Austrian Federal Ministry of Finance has issued stamp duty directives (*Gebuehrenrichtlinien*), specifying the ministry's interpretation of "written evidence". According to the directive, even telefaxes or emails referring to the credit or loan agreement can be qualified as written evidence in certain circumstances and consequently trigger the imposition of stamp duty on the agreement. So far, no decisions by appellate courts ruling exist on the validity of the ministry's interpretation of the Stamp Tax Act.

The Austrian financial authorities have constantly expanded the scope of application of written evidence in recent years. So Austrian companies, in particular big enterprises, in recent years have founded separate financing vehicles outside Austria to implement larger financing activities offshore, thereby relying on other exemptions of the Stamp Tax Act.

Credit agreements up to LMA standards

As typical in a civil law environment, Austrian credit agreements have been rather short in comparison with international standards. However, in recent years Austrian banks have started to employ longer, more detailed credit contracts, as customary in international finance. The full scope of common law documentation as proposed in the model agreements by the Loan Market Association is used only for credit volumes where Austrian lenders are likely to seek syndicate partners in the London market, but Austrian banks often have implemented model agreement-like documentation, roughly in line with the LMA standard, governed by Austrian law, streamlined to some extent and taking into account peculiarities of Austrian law such as stamp tax optimization. This compromise has achieved results that better match the needs of the contractual partners than merely using the standard LMA document and subjecting it to Austrian law without further adaptations. As a result, the typical Austrian credit agreement is no longer the two-pager it used to be, however it is also not the 100-page document used by international banks in UK financings, but instead is something between these two extremes.

Credit agreements by unlicensed banks

The Austrian Supreme Court decided a case concerning a Swiss-based bank that, without concession to conduct banking business (*Bankgeschaefte*) in Austria, granted two loans of €3.8 million and €3.9 million to an Austrian citizen. According to the contract, the debtor had to pay periodically interest and repay the loan upon maturity. The parties agreed on the applicability of Swiss law. When the debtor defaulted on the interest payments, the bank declared the loan mature and demanded repayment of the nominal amount and interest up to this date.

After determining that the Swiss bank would have required a banking licence (*Konzessionen*) to conduct banking business in Austria, the Supreme Court ruled on the legal consequences of its violation of regulatory requirements on the contract.

According to Section 100 of the Austrian Banking Act 1993 (Bankwesengesetz,) anyone who does not have the required licence to conduct banking business in Austria may not claim any financial remuneration (that is, interest or commissions) with regard to

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Author biography

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Volker Glas works in the banking and corporate finance department and has been a partner at CHSH since 1999. Glas graduated from the University of Vienna (Dr iur) in 1993 and New York University (LLM) in 1994, and joined CHSH as an associate in 1994. He was admitted both to the Austrian Bar and to the New York Bar in 1998.

Volker Glas specializes in banking, finance and capital markets. He regularly represents Austrian corporate borrowers in syndicated (LMA) loans and advises lenders or borrowers in senior and mezzanine financings, most recently Deutsche Bank AG, Amsterdam branch, in a €100 million financing of an Austrian copper refiner with the borrowing base secured by its copper warehouse, Telekom Austria in a €750 million syndicated facility involving 15 syndicate banks, JPMorgan in a multicurrency revolving LMA warrant and securities repo facility for the Bear Stearns group with respect to assets in Austria, Barclays Bank in an asset financing involving an Austrian direct marketing services provider, and in 2006 a series of other successful financings involving Check Online, Oesterreichische Kontrollbank and Bayerische Landesbank. In 2006, he advised the EIB/EIF in connection with their role as credit enhancer in a securitization involving RZB group and Polish leasing receivables. He also advises Austrian bond issuers in structuring and offering straight bonds, exchangeable bonds or EMTN or similar programmes.

Recent equity offerings included the Austrian Airlines rights offering in 2006 and the Immofinanz and A-Tec Industries convertible bond offer in January and May 2007, and on the debt side Telekom Austria's most recent €1 billion bond issue under its €5 billion EMTN programme.

Founded in 1921, CHSH Cerha Hempel Spiegelfeld Hlawati is a leading Austrian law firm, with offices in Bratislava, Brussels, Budapest, Bucharest, Gdansk, Katowice, Poznan, Warszawa and Wroclaw. The firm represents Austrian and international companies in the fields of telecommunications, energy, transport, new media and financial services. Cerha Hempel Spiegelfeld Hlawati is regarded as one of Austria's leading law firms in mergers and acquisitions, banking and capital markets, real estate, litigation and arbitration. The firm is a member of Lex Mundi.

The firm was awarded Austrian law firm of the year in 2004 as well as 2005 by the *International Financial Law Review*.

contracts concluded without a licence from the debtor. Section 100 of the Austrian Banking Act 1993 is a mandatory provision.

In Austrian literature it had been argued whether this section constituted a sanction (*Strafbestimmung*) for the creditor or was to be read as a protection clause for the debtor.

The Supreme Court now ruled that it was a sanction for the creditor conducting banking business without a licence and consequently the creditor cannot claim any kind of financial remuneration. Supporters of the interpretation of Section 100 Austrian Banking Act as a protective clause for the debtor had argued that, instead of the void remuneration agreement in the contract, the creditor should at least be entitled to statutory interest rates.

As a result of the interpretation of Section 100 of the Banking Act the Supreme Court further ruled that the Swiss bank in the specific circumstances did not have a right to declare the credit amount mature, as the debtor did not have any obligations towards the bank. The debtor neither had to pay any kind of remuneration nor was the credit amount due. Consequently, the debtor could not be in delay with any payments and the creditor had no right to demand the credit amount before maturity.

This ruling of the Supreme Court has a big impact on the consequences of conducting banking business in Austria without a licence. The negative consequences for banks operating without a licence are substantial, in particular in case of long maturity loan agreements.

Free movement of capital for third-country banks

The Administrative Court Frankfurt am Main (Germany) has asked the Court of Justice of the European Communities for a preliminary ruling in the matter of a Swiss bank seeking authorization to conduct commercial credit business in Germany, which was denied because of the German law requirement of a central administration or a branch in Germany. The ruling of the Court of Justice of the European Communities also affects Austrian banking business as the Austrian Banking Act contains a similar provision: The Court of Justice of the European Communities ruled that the right of free movement of capital is not available to companies established in a non-member state.

Terms and conditions in consumer credit agreements

Upon a complaint by the official representation of employees (*Arbeiterkammer*), the Austrian Supreme Court of Justice examined 41 provisions applied by Austrian banks in general terms and conditions to consumer credit agreements. Primarily this ruling is legally binding only on the one bank that used the provisions but in fact this ruling affects all banks conducting credit business in Austria. This ruling, published on March 20 2007 is regarded to be the most significant ruling in the Austrian banking sector in recent years. The most important decisions in this ruling concern the following provisions incorporated in general terms and conditions:

The bank has the right to demand the presentation of the object acquired with the credit amount, provided the object is moveable, at a place to be determined by the bank.

The Supreme Court ruled that this provision was discriminating (*gröblich benachteiligend*) against consumers according to Section 879(3) of the Austrian Civil Code (Allgemeines Bürgerliches Gesetzbuch, ABGB) and consequently void, as the bank could demand presentation of the object in its sole discretion at any place; this right for the bank severely restricts the consumer's right to use the object.

The debtor is obliged to compensate the bank for all costs and disbursements, expended by the bank to ensure the bank's ownership rights.

The Supreme Court declared this provision void because of violation of Section 879(3) ABGB, as the consumer has no possibility to estimate the actual costs and compensation is not restricted to those costs and disbursements expended for the bank's adequate prosecution of its ownership rights.

The bank is entitled to demand amounts due and payable without overdue notice or setting a grace period and to acquire or sell any liens at the bank's option.

With regard to this clause, the Supreme Court ruled that it was not transparent, as a consumer could get the impression that the bank is not further limited in respect of the realization of pledges and liens; nevertheless, obligatory legal protective provisions, especially with regard to the modus of the realization of pledges and liens still apply. According to Section 6(3) of the Consumer Protection Act (Konsumentenschutzgesetz) non-transparent provisions are void.

The competent court of judgement is at the registered office of the bank in Vienna.

According to Section 14 of the Consumer Protection Act, the choice of the competent court of judgement is restricted if it has an adverse effect for the consumer. As the relevant provision has only a restricted validity, the Austrian Supreme Court of

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Justice ruled that this provision violated the transparency requirements according to the Consumer Protection Act and consequently was void.

Instalments include interest of x% per annum, management fees of 0.25% pa and credit commissions of 1/8% pa.

As the consumer is neither informed about the purposes the additional interest amounts are charged for and is not able to estimate the effective annual interest rate, which according to section 33(2) Austrian Banking Act has to be displayed at a prominent position in the contract, the relevant provision was considered non-transparent according to the Consumer Protection Act and consequently void.

Early termination of mortgage-backed credit agreements

According to mandatory Austrian banking law (Section 33(8) of the Austrian Banking Act), consumers have a statutory early repayment right. The bank may not charge additional fees for early repayment and the consumer may not be forced to pay interest for the period between early repayment and the consented maturity. As an exception to this general rule, according to Section 33(8) of the Austrian Banking Act the credit bank may charge fees for early repayment in several cases. Early repayment can be excluded in: (a) credit agreements for construction or improvement of buildings with a maturity of 10 years or more; or (b) mortgage-backed credit agreements. For both types of credit agreement early termination may only be excluded; (i) for a maximum duration of six months; or (ii) for as long as a fixed interest rate has been agreed.

The Supreme Court indicated that this provision could be interpreted in two different ways. "In cases of (i) and (ii)" could either mean: (1) in case early repayment was excluded by the parties for a duration as determined in (i) and (ii); or (2) in any case where early redemption could have been excluded.

Based on the hypothetical intention of the legislator and teleological construction the Supreme Court found that (1) was the correct reading of the law and consequently credit banks may not charge fees unless early repayment had been excluded contractually for the time of the exclusion being admissible according to (i) and (ii). Such additional fees for early redemption are regarded as the price for the consumer's right to repay the credit at any time although repayment had been excluded contractually.

Practically this ruling strengthens the consumer's position and prevents credit banks from counteracting the consumer's right to early repayment by charging the consumer additional fees for early repayment.

EU directive on credit agreements for consumers

In recent years most legal amendments with regard to bank lending in Austria were related to EU perceptions and it is likely that further amendments will have to be implemented in Austrian law soon, as a new EU Consumer Credit Directive is in the pipeline. After years of preparation, the German presidency provided a new modified proposal for a consumer credit directive in March 2007. Although this consumer credit directive is not expected in the near future and the German proposal is still subject to discussion, the general intention of the planned directive appears to be clear. Consumer protection is to be ensured by the creditor's obligation to inform the consumer, in particular about all kind of costs evolving from the envisaged credit agreement. Further the directive seeks to ensure transparency of credit agreements and credit costs to enable the consumer to compare credit offers within the EU.

The banking sector opposes the projected directive, arguing that the directive would cause additional expenses and partially not serve the consumers' interest.

The details of the directive are still in discussion and a timeframe for adoption of the directive cannot yet be estimated.