Banking regulation in Austria: overview

by Dr Peter Knobl, Cerha Hempel Rechtsanwälte

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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.

To compare issues across multiple jurisdictions, visit the *Country Q&A tool*. This Q&A is part of the global guide to banking regulation. For a full list of jurisdictional Q&As visit *www.practicallaw.com/bankingregulation-guide*.

Legislation and regulatory authorities

Legislation

1. What is the legal framework for banking regulation?

The primary sources of banking regulatory law are

- The Banking Act (*Bankwesengesetz*) implementing Directive 2013/36/EU (CRD IV), as amended by Directive (EU) 2019/878 (CRD V).
- Regulation (EU) 575/2013 on prudential requirements for credit institutions and investment firms (Capital Requirements Regulation (CRR)), as amended by Regulation (EU) 2019/876 together with Commission Delegated Regulations 2015/61/EU, 2015/62/EU and 2015/63/EU.
- Regulation (EU) 1024/2013 on the prudential supervision of credit institutions (SSM Regulation), Regulation (EU) 468/2014 (SSM Framework Regulation) and the Austrian Act on an Authority for Financial Market Supervision (*Finanzmarktaufsichtsbehördengesetz*).
- The Austrian Recovery Bank and Resolution Act 2014 implementing Directive 2014/59/EU, as amended by Directive (EU) 2019/879 and Regulation (EU) 806/2014 (SRM Regulation), as amended by Regulation (EU) 2019/877.
- The Austrian Deposit Guarantee Schemes and Investor Compensation Act 2015 implementing Directive 2014/49/EU on deposit guarantee schemes and Directive 1997/9/EC on investor-compensation schemes.
- 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.

The Banking Act governs (among other things) the:

- Licensing of credit institutions and financial institutions (*Article 1*).
- Freedom of establishment and to provide services within the EEA (*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 (*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".
- Special penalty provisions for banks qualifying as legal entities.

Other relevant federal laws include the:

- Austrian Securities Supervision Act 2018 (*Wertpapieraufsichtsgesetz*) which sets out regulations on financial instruments' trading and compliance, inter alia, by banks.
- Austrian Payment Services Act 2018 (*Zahlungsdienstegesetz*) implementing Directive (EU) 2015/2366 on payment services in the internal market (PSD2) which regulates the performance of payment services, among others, by banks and the Austrian Consumer Payment Account Act (*Verbraucherzahlungskontogesetz*).
- Austrian Financial Market Money Laundering Act (*Finanzmarkt-Geldwäschegesetz*) which stipulates statutory due diligence obligations relating to money laundering and terrorism financing.
- Austrian Consumer Credit Act (*Verbraucherkreditgesetz*) and the Austrian Mortgage Credit Act (*Hypothekar- und Immobilienkreditgesetz*).

Due to an envisaged adoption of an EU Directive on Covered Bonds in 2019/2020, the Austrian Acts on *Pfandbriefe*, *Hypothekenbanken* and *fundierte Bankschuldverschreibungen* might then become consolidated in a uniform law on covered bonds.

Secondary and tertiary EU banking supervisory acts have been implemented into Austrian law or apply directly, leaving little room for specific Austrian banking regulation.

Regulatory authorities

2. What are the regulatory authorities for banking regulation in your jurisdiction? What is the role of the central bank in banking regulation?

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 institutions in Austria, in conjunction with the FMA and the OeNB.

From 1 January 2019, the following significant groups of institutions have been supervised by the ECB:

- 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).
- Sberbank Europe AG (Credit Institution).

The ECB applies the relevant provisions of EU and national law to significant institutions or groups of institutions (SIs). In addition to applying European Regulations and Directives, binding Regulatory Technical Standards (RTS) and Implementing Technical Standards (ITS) drawn up by the EBA and the European Commission, it applies 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 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, the CRR, the SSM Regulation, applicable EBA guidelines and recommendations, the ECB's guidance and with 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 less significant credit institutions. 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 resolution authority for SIs.

OeNB. As well as its role in economic policy (*see below, Central Bank*), the OeNB supervises payment and settlement systems and, at the moment (this may change in 2020, see below) conducts on-site inspections of SIs on behalf of the ECB and of LSIs on behalf of the FMA.

In addition, it provides:

- Reports about on-site inspections commissioned by the ECB or the FMA.
- Expert opinions on risk assessment models after a bank has submitted an application for approval.

These reports provide the basis for any official measures (administrative steps) to be taken by the ECB or the FMA. A credit institution has the right to express its opinion on the inspection report (*Article 71(6), Banking Act*).

The Austrian Government in November 2018 planned to reform the supervisory regime by:

- Eliminating the parallel supervision by the OeNB and the FMA and transfer tasks from the OeNB to the FMA, concentrating all banking supervisory tasks at the FMA. However, the competence to monitor financial stability (macroprudential analyses) was envisaged to remain with the OeNB.
- Allowing the OeNB to issue audit assignments to the FMA in the event of a crisis.

The reform project was, however, reclined due to the Austrian government's overthrow in 2019. It remains to be seen whether it will be pursued post-election in 2020.

Other authorities or official institutions

These include:

- State commissioners.
- *Oesterreichische Kontrollbank AG* (OeKB).

The Austrian Minister of Finance must appoint a state commissioner and a deputy state commissioner for credit institutions with total assets in excess of EUR1 billion.

State commissioners. These are representatives of and accountable to the FMA. They are appointed for a maximum term of five years, have to be invited by the credit institution to company meetings and audit committees, and must object to resolutions that violate administrative decisions of the Federal Minister of Finance or the FMA. They 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.

OeKB (Austrian Control Bank) *(Oesterreichische Kontrollbank AG)*. This 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 and prospectus storage systems.

OeKB does not exercise any authoritative powers towards capital market participants.

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 (Austrian Central Bank) (*Oesterreichische Nationalbank*). The OeNB contributes to monetary and economic policy decision making in Austria and in the Euro area. It has authoritative power in supervising the establishment of payment systems in Austria as well as 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, that is, gold and foreign exchange holdings, draws up economic analyses, compiles statistical data, is active in international organisations and oversees payment systems and compliance with international sanctions lists (*see above, Lead bank regulators*).

Others

The role of bank auditors has been clarified by the Austrian legislation to the effect that contractually mandated bank auditors (which are the rule) as well as auditors acting as representatives of statutory auditing institutions (savings banks, cooperative banks) are legally not attributed to the Austrian state. The Republic of Austria does not therefore become liable for damages caused by these external auditors. If however, such auditors acted on the basis of a special separate mandate granted by the FMA, their acts and omissions would be attributed to the Austrian state, which would become liable, if damages were caused directly to the bank.

Bank licences

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

Types of licence

The ECB licenses CRR credit institutions in SSM member states. The scope of the licence issued by ECB, however, also covers regulated activities under Austrian law other than taking deposits from the public and granting credits (*see below, Question 3*).

The FMA licenses all credit institutions headquartered in Austria that do not qualify as CRR credit institutions but qualify as CRR financial institutions only.

Licences may 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*).

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, paragraph 1, CRR*).

Austrian law requires a banking licence for financial activities carried out for commercial purposes by credit institutions known as "non-CRR credit institutions" (in terms of EU law "CRR financial institutions") 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.
- Securities underwriting.
- Issue of notes for investing their proceeds in other banking transactions.
- 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 investment services and data reporting services (as referred to by the Securities Supervision Act 2018).

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 licencing process are the:

- Application for authorisation of a credit institution that must be structured in line with parts of the FMA's Regulation on Qualifying Holdings 2016 (EKV 2016), the Annex of the EBA's draft RTS and ITS on authorisation of credit institutions (EBA/RTS/2017/08) and the ECB's Guide to assessment of licence applications (2019).

- Programme of operations and business plan also reflecting the EBA's and the ECB's requirements referred to in the documents cited above.

There is a pre-application discussion phase before the application will be submitted to the FMA which will confirm the receipt. FMA cooperating with the ECB will then usually request more information until it will confirm completion of information. A 12-month assessment period starts to run 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 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 IV 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) 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 as well as 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), 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.
- FMA is not prevented from fulfilling its monitoring duties by the laws, regulations or administrative provisions of a third country.
- 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 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 supervisory board 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 FMA and by the ECB are:

- Programme of operations and business plan for the first three years.
- Governance (fitness and propriety of board members and of the whole board collectively, of key function holders and of suitable shareholders).
- Sufficient capital, liquidity and solvency.
- Compliant internal organisation (risk management, compliance, audit, and AML officer).

Foreign applicants

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

Non-CRR 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 for).

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. The application procedure lasts between six and 12 months (calculated from confirmation of completed information issued the FMA). The licence may be subject to conditions and requirements and limited in scope, usually based on a recommendation by the FMA. 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 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 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 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*).

Cost and duration, stability tax

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 to it 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 IV 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 the European Securities and Markets Authority (ESMA) concerning the cross-border provision of investment services to EU residents under MiFID II (*ESMA35-43-349, Chapter 13, found at https://www.esma.europa.eu/sites/default/files/library/esma35-43-349_mifid_ii_qas_on_investor_protection_topics.pdf*).

Forms of banks

> 6. What forms of bank operate in your jurisdiction, and how are they generally regulated? Does the regulatory regime distinguish between different forms of banks? Are there any specific requirements for banks or banking groups in your jurisdiction in relation to the scope of business or organisation?

A bank is defined a legal entity authorised to conduct banking activities as listed in the Banking Act which provides for two types of institutions:

- Credit institutions (*Kreditinstitute*) encompassing CRR credit institutions and non-CRR credit institutions (the latter usually qualifying as CRR financial institutions).
- Financial institutions (*Finanzinstitute*), apart from electronic money institutions and payment institutions not qualifying as CRR financial institutions.

The Banking Act does not distinguish between categories of banks such as universal, commercial, retail, investment, private or other banks. However, both Austrian and EU law define the following types of institutions in specific regulatory contexts:

- Credit institutions of significant relevance (*Article 5(4), Banking Act*) whose total assets must as a rule reach or exceed EUR5 billion (*Articles 29, 39(5), 39c and 39d Banking Act*). This Austrian legal distinction between banks with a balance sheet total of less than EUR5 billion and other banks will be reflected in the CRR II's categorisation of "small and non-complex institutions", "large institutions" and "other institutions" as from 2021 resulting in future facilitated reporting, disclosure, remuneration, NSFR and resolution plan requirements for small and non-complex institutions.
- Credit institutions whose total assets exceed EUR1 billion or which have issued transferable securities that are admitted to listing on a regulated market (*Articles 63a(4), Banking Act*).
- SIs and LSIs (*Article 2, paragraphs 16 and 23, SSM Framework Regulation*).
- Globally (G-SIIs) or nationally (O-SIIs) systemically important institutions (*Articles 23b and 23c, Banking Act*).
- Top-tier banks having a balance sheet total larger than EUR100 billion and belonging to a resolution group (BRRD II to be implemented from 28 December 2020).

In January 2019, there were:

- 596 credit and financial institutions licensed in Austria, six of which were classed as significant in terms of the ECB's competence for prudential supervision; seven were classed as nationally systematically important institutions (SIFIs or O-SIIs) and none were classed as G-SIIs.
- 564 banks headquartered in the EEA conducting business in Austria.
- 26 EEA banks established in Austria.

State-owned banks

There are the following state-owned banks:

- The OeNB (*see Question 2*) is the most important state-owned bank and is established as a stock corporation under the Act on the Oesterreichische Nationalbank (*Nationalbankgesetz* (NBG)). Its shares are solely owned by the state. The bank's legal foundations are the:
    - Statute of the European System of Central Banks and of the ECB;
    - Act on the Austrian National Bank;
    - Foreign Exchange Act;
    - Banking Act;
    - Act on the Institution and Organisation of the Financial Market Authority

The OeNB has a duty to ensure financial stability and money supply in Austria.

- KA Finanz AG (a wind-down unit governed by Article 162 BaSAG without a banking licence responsible for the structured wind-down of the former Kommunalkredit AG's non-strategic loan, securities and CDS portfolio).
- Heta Asset Resolution AG (HETA) as the wind-down unit converted out of the Hypo Alpe-Adria Bank International AG by special law. HETA no longer has a banking licence, but can perform limited banking activities for wind-down purposes only, except for accepting deposits from the public and providing investment services and activities. It is expected to terminate its wind-down activities by year-end 2020.
- Immigon Portfolioabbau AG was a wind-down unit governed by Article 162 BaSAG without a banking licence ("bad bank"). Its assets stem from the former Oesterreichische Volksbanken AG (ÖVAG), but the unit itself entered into its liquidation stage on 30 June 2019.

The OeKB, though not state-owned, acts as a central financial and information service provider to the export sector and the capital market. It is entitled to issue guarantees on the state's behalf, and to promote exports in international trade (*see also Question 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 can be "tailored" to fit a bank's needs.

In the context of commercial and retail banks, regional mortgage banks (*Landes-Hypothekenbanken*) and building societies (*Bausparkassen*) are specifically licensed in line with the Banking Act, the Building Society Act and predecessor laws.

Investment banks

Investment banks are banks licensed to conduct investment and securities related activities under the Banking Act. Depending on the scope of investment activities, a licence is required for:

- Issue and administration of payment instruments.
- Foreign exchange and foreign currency business.
- Trading in:
    - money market instruments;
    - futures and options;
    - forward rate agreements and equity swaps trading;
    - securities.
- Securities underwriting .
- Managing (real estate) investment funds.

Private banks

Private banks and family offices play a relatively minor role in the 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 the bank (such as discretionary portfolio management or management of an AIF). The largest Austrian private banks are owned by the largest Austrian or non-Austrian commercial and retail banks.

Other banks

A pension fund (*Pensionskasse*) is a private asset management company for the purpose of investments for retirement. Savings banks (*Sparkassen*) are supposed 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:

- Lease business.
- Providing advice on capital structure, industrial strategy and related questions, advice and services related to mergers and acquisitions.
- Credit reporting services.
- Safe deposit services.
- Payment services under the Payment Services Act.
- Issuing e-money under the E-Money Act.

Financial institutions are, with minor exceptions, generally not subject to the Banking Act and no banking licence needs to be obtained. Other licences such as under the Austrian Trade Code (*Gewerbeordnung*), the Payment Services Act, the Securities Supervision Act or the E-Money Act may be required. (Mixed) Financial holding companies as defined by the CRR will in the future become subject to a new licensing requirement under CRD V applicable from 28 June 2021.

Regulation of nationally systemically important financial institutions (SIFIs, O-SIIs)

The Banking Act (*Article 23c*) includes a special capital buffer regime for national SIFIs (O-SIIs). An institution is classified a national SIFI by the FMA if its failure could cause a national systemic risk. The FMA can require SIFIs to implement a capital buffer of up to 2% of Common Equity Tier 1 (CET 1) capital in addition to the capital requirements set out in the CRR (*Article 92*). The buffer must not lead to "unreasonable adverse effects" on the financial market of the EU or the financial markets of other member states, and must be re-evaluated on an annual basis.

The individual buffer requirements for the 7 Austrian national SIFIs (O-SIIs) are 1% or 2% of the risk-weighted asset in CET 1 capital (*FMA Regulation on Capital Buffers (Federal Law Gazette No. 435/2015, as amended)*).

Organisation of banks

Legal entities

7. What legal entities can operate as banks? What legal forms are generally used to operate as banks?

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

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

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 perfect interplay between corporate governance exigencies (for example, mandatory supervisory board 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 corporations would be suitable only for banks with special restricted licences such as management companies of UCITS and AIFs.

Corporate governance

8. What are the legislative and non-legislative corporate governance rules 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 (two-tier system).
- Management board.

The annual shareholders' meeting elects the supervisory board 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% may petition a court to remove members from office for good cause. The supervisory board elects a chairperson for a maximum five year term, although it may call for their early resignation for good cause (such as violation of duties or vote of no confidence).

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

Under the Banking Act, management boards 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 management boards of credit institutions whose total assets exceed EUR5 billion must establish minimum the following committees within their supervisory board:

- **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 supervisory board.
- **Risk committee.** The risk committee must advise the management body on the risk strategy and other risk matters.

The Austrian Banking Act has recently introduced the requirement of a minimum number of formally independent supervisory board and committee members in Austrian licensed banks. Credit institutions of significant relevance (total assets reaching or exceeding EUR5 billion) must usually appoint:

- At least **two** formally independent supervisory board members.
- At least the **chairperson and the majority of members** of the remuneration committee must be (not formally) independent from the subsidiary, its group and the controlling shareholder.
- At least the a **chairperson and the majority of members** of the audit committee must be (not formally) independent by complying with a three-year blocking period after previous occupations.
- No independent member for the nomination committee and.
- **One** (not formally) **independent chairperson** for the risk committee. There are stricter independence requirements for committee members of the risk committee of SIFIs (O-SIIs).

9. What are the organisational requirements for banks?

To form an Austrian AG or GmbH, the articles of association must be set out in the form of an notarial deed and registered in the commercial register. To engage in banking, prior approval by the supervisory authority is required.

This, among other things, in practice results in the requirement to have the initial own funds paid in on a bank account and blocked as well as to have evidenced access to additional own funds and debt towards the supervisory authority, before the licence will be issued by the ECB/FMA.

The application and/or the scope of the minimum organisational regulations of Austrian banks depend on the type, scope and complexity of the business activities, investment services, payment services and other activities.

Minimum organisational requirements include:

- The installation of an independent risk management function.
- An independent compliance function, internal audit department and an AML responsible office, the heads of which qualify as key function holders that must before appointment or change be subject to an internal fitness and propriety assessment.
- In addition to the above, (changes in) the heads of such functions in credit institutions of significant relevance must be notified to FMA**.**

Other minimum organisational requirements include the installation of:

- Mandatory committees within the supervisory board (see *Question 8*), of a special approval procedure for large exposures and self-contracting and the establishment of whistle-blowing systems.
- Reporting systems to comply with the common reporting and financial reporting frameworks, further including the:
    - suspicion reporting (AML, market manipulation, personal transactions in financial instruments);
    - remunerations reporting;
    - financial sanctions reporting;
    - and forex reporting.

The FMA, the ECB and the EBA have published a detailed set of guidelines and of guides on the above requirements.

Banks must maintain a decision-making process to allow the clear documentation of reporting obligations and allocated functions and responsibilities.

10. What are the rules concerning appointment of auditors and other experts?

Austrian licensed banks (as a rule qualifying as public interest entities by law) must comply with a mandatory structured tendering and selection process before appointing a bank auditor. This tendering and selection process must be effected by the audit committee of the bank's supervisory board and comply with mandatory restrictions included in Article 16 of the Audit Regulation (Regulation (EU) 537/2014).

The bank auditors will be selected by a shareholders' resolution on a proposal by the audit committee.

Credit institutions, whose annual net turnover does not exceed EUR50 million are exempt from this formal procedure.

The appointment of the bank auditor must be notified to FMA by the credit institution, while the appointed auditor must show there are no reasons for his/her/its exclusion to the FMA without request and within two weeks of appointment.

The FMA can refuse the appointment of the bank auditor within one month if there is a founded suspicion of a reason for exclusion or other conflict of interest. There are no special rules for SIFIs (O-SIIs).

11. What is the supervisory regime for management of banks?

Under Austrian banking and corporate law, management boards are responsible for installing adequate control functions within the bank, to facilitate control by external institutions and to efficiently supervise the activity of the second management level, in particular, as follows:

- Dividing business areas clearly and to minimise risk (first line of defence).
- Installing independent risk management and compliance functions, an AML responsible office and an efficient internal control system (second line of defence).
- Installing an independent internal audit function (third line of defence).
- Installing a supervisory board (including its mandatory committees) and initiate shareholders' meetings (corporate governance functions).
- Contractually by shareholders' resolution appointing an external bank auditor (corporate governance function, however, with additional public interest related tasks).
- Inviting external state commissioners acting on behalf of FMA to shareholders', supervisory boards' and certain committees' meetings (*see Question 2*).
- Accepting supervision by and monitoring compliance with rules and instructions of external lead bank regulators (*see Question 2*) (FMA/ECB).

The following appointments or changes in persons must be notified in advance to the FMA (which will in case of management board and supervisory board members of SIs immediately inform the ECB):

- Supervisory board members.
- Management board members.
- Head of internal audit department.
- Agents used for money remittance services outside the seat of the credit institution.
- Head of risk management department (if investment services are provided, additionally the head of the MiFID II risk management function) at credit institutions of significant relevance.
- Head of (banking) compliance function credit institutions of significant relevance.
- Responsible officer for AML compliance.
- Responsible officer for MiFID II compliance.
- Changes of other key function holders and of heads of internal control functions do not have to be pre-notified to FMA, but are subject to a prior internal fit and proper assessment requirement by the bank.
- Relating to material risk takers (that must be classified according to Delegated Commission Regulation 2014/640) additional restrictions on variable remuneration components and pertaining reporting requirements towards regulators apply (like for any other identified staff member).

Management supervision is mainly carried out by the supervisory board (*see Question 8*). The supervisory board must consist of at least three members, excluding representatives of works' councils who are entitled to delegate one representative for every two shareholder representatives to the board.

12. Do any remuneration requirements apply?

Credit institutions must generally have a remuneration policy and practices.

Requirements for 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*).

The main restrictions apply to variable remuneration portions, retention periods for variable remuneration portions and the application of neutralisation and proportionality criteria to remunerations of identified staff. The requirement to pay out parts of variable remunerations in shares or other capital instruments could under Austrian law be neutralised by Austrian banks. A variable remuneration exceeding EUR30 000 or 25 % of the fixed remuneration portion(gross income) must according to published current FMA practice be qualified to be a substantial part of the overall remuneration rendering the variable remuneration restrictions applicable.

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

- FMA and central bank (OeNB) guidelines.
- European Banking Authority (EBA) guidelines, recommendations and technical standards such as the:
  - Guidelines on Sound Remuneration Policies dated 21 December 2015;
  - Guidelines on Remuneration Policies and Practices related to the sale and provision of retail banking products and services dated 28 September 2016 (*applicable 13 January 2018*).
- 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 supervisory board (or its remuneration committee) is in charge of examining and approving the remuneration policy. It has to monitor and implement the policy in practical terms. For Austrian credit institutions of significant relevance (balance sheet total reaching or exceeding EUR5 billion) a special remuneration committee must be installed (*see Question 8*). The management board, however, remains responsible for the implementation of the remuneration policies.

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

Material risk takers (having a material impact on the institution's risk profile) must completely be identified in any credit institution (*Delegated Regulation (EU) 2014/604 supplementing Directive 2013/36/EU on capital requirements (Capital Requirements Directive IV)*).

Under CRD V, substantial remuneration facilitations will be introduced for identified staff of small institutions (with a balance sheet total of less than EUR5 million) and for identified staff of any other institution with an annual variable remuneration of maximum EUR50 000 if the annual variable part does not exceed one third of the employee's annual total remuneration, from 29 December 2020

SIFIs (including O-SIIs) will be excluded from a categorisation as a small, non-large or non-complex institution under CRD V.

13. What are the risk management rules for banks?

An independent risk management function must be established in any bank of significant relevance (balance sheet total of minimum EUR5 billion) by law (*Banking Act* and *Article 435, CRR*) for the purpose of control, monitoring and limitation of all risks pertaining to banking business and banking operations (*Article 39(5), Banking Act*). This department must be headed by a fit and proper, sufficiently reliable person to be pre-notified before appointment or change to the FMA which cannot be displaced by the management board without informing the supervisory board.

The risk management function must be independent from the operational business function and comply with the requirements of EBA's Guidelines on internal governance (*EBA/GL/2017/, Chapter 20*).

The risk management policies must be in accordance with the Banking Act and Regulation (EU) 565/2017. A credit institution has to disclose at least once a year details of its risk management objectives and policies (*Article 435, CRR*).

The risk management strategy **must** be prepared by the head of the risk management department, together with the management board. The risk management function **must** be consulted in any substantial change or extraordinary transaction, supervise violation of risk limits and the general risk appetite of the bank and report to and participate in risk committee's meetup.

Generally, the risk committee of the bank's supervisory board monitors the implementation of the bank's risk strategy. For the independence requirements for chairpersons of risk committees see *Question 8*.

The generally applicable rules on SIFIs (O-SIIs) under the Banking Act relate to the introduction of a systemic risk buffer (*see Question 17*). The consequence of non-compliance with these is that certain restrictions on dividend distribution and the establishment of a capital maintenance plan must be applied by the credit institution.

Liquidity and capital adequacy

Role of international standards

14. What international standards apply? How have they been incorporated into domestic law/ regulation?

The BCBS standards for minimum liquidity requirements have been implemented by Articles 411ff of theCRR within the EU. Additional national Austrian liquidity standards apply for Austrian cooperative banks and saving banks annexed to a central credit institution, to the effect that annexed institutions are required to hold their liquid funds with the central credit institution or another credit institution within the EU elected contractually or by the articles of incorporation.

Austrian credit institutions are therefore required to ensure that:

- Long term obligations will adequately be met, with a diversity of stable funding instruments under both normal and stressed conditions.
- The credit institution holds enough liquid assets 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)).
- A compulsory net stable funding ratio (NSFR) applying to long term debt of a bank is complied with on a solo and a consolidated basis (from 28 June 2021).

Main liquidity/capital adequacy requirements

15. What liquidity requirements apply?

The mandatory liquidity coverage ratio (LCR) required to counterbalance short term liquidity needs in stress scenarios applies fully from 1 January 2018 and 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 credit institutions with total assets of maximum EUR5 billion, a simplified NSFR will apply.

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

16. Is a leverage ratio applicable?

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

Currently, banks must by June 2021 only disclose their leverage ratios to the supervisor under the existing reporting regime, but not comply with predefined requirements. Banks must also publish the leverage ratio in their disclosure reports at least once a year.

On 28 June 2021, a mandatory leverage ratio of 3% calculated as the banks' Tier 1 capital measure divided by its total exposure will start to apply and must be complied with.

On 1 January 2022, for G-SIIs an additional leverage ratio buffer requirement of half of the G-SII-buffer calculated on their total exposure will start to apply. Before June 2021 this Basel III leverage ratio was introduced by the CRR as a reporting and disclosure requirement only, but not as a minimum balance sheet structure requirement.

17. What is the capital adequacy framework that applies to banks?

Minimum capital requirements of credit institutions are regulated by the Article 92 of the CRR). Accordingly 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 and other positions (RWA).
- Tier 1 capital (Common Equity Tier 1 and Additional Tier 1 capital) of 6%.
- Total capital ratio of 8% (attributable Tier 2 capital is currently limited to 30 % of Tier 1 capital for purposes of large exposure limits and of qualifying holdings outside the financial sector; attributable Tier 2 capital will be limited to 0 % of Tier 1 capital for large exposure purposes from 28 June 2021).

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

Therefore, the capital conservation buffer of 2,5 % 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.

- Systemic risk buffer of at least 1%.
- Buffer for global systemically important institutions (G-SII buffer, not relevant in Austria; as to alterations from 1 January 2022 for G-SIIs due to the leverage ratio buffer requirement see above *Question 16*).
- Buffer for other SIIs (O-SII buffer, for seven Austrian institutions, between 1 and 2%).

These buffers mainly serve 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, and envisage reducing systemic risks that may affect the entire economy of a member state.

Further, bank-specific SREP buffers (P2R) may individually be imposed by the FMA/ECB to cover additional risks identified in Pillar 2. Violations of P2R may trigger supervisory sanctions similar to the violation of capital requirements in Pillar 1.

CRD V and CRR II aim to clarify that additional individual capital expectations for Supervisory Review and Evaluation Process (SREP) compliance reasons issued by the FMA/ECB (P2G) will on non-compliance not trigger restrictions on distribution of profits or any other supervisory measures, as opposed to the violation of buffer or P2R ratio requirements.

Under CRD V, CRR II, BRRD II and SRMR II but largely with legal effect from 27 June 2019, an additional mandatory minimum requirement for own funds and eligible liabilities **(MREL) quota** prescribed individually by the FMA/SRB will have to be complied with by Austrian CRR credit institutions providing for a minimum ratio of own funds and eligible debts divided through own funds and overall debts of a credit institution to cover potential loss absorption and recapitalisation amounts in cases of a bank's failure. This targets at implementing the Total Loss Absorbing Capacity (TLAC) standard of the Financial Stability Board (G 20) within the EU legal framework.

For G-SIIs and top-tier banks (belonging to a resolution group) CRR II will moreover convert the MREL ratio into generally applicable compulsory additional Pillar 1 requirements.

Consolidated supervision

Role and requirements

18. What is the role of consolidated supervision of a bank in your jurisdiction and what are the requirements?

Role

Parent institutions in a member state have to comply with the consolidation obligations laid down in the CRR (*Article 11*).

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 with the controlled institutions. This requires (among other things) that at least 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, at least one other group member qualifies as a licensed insurance undertaking. This consolidation requirement refers to minimum capital requirements, large exposures limits and leverage ratio requirements. For liquidity coverage ratio and disclosure requirements there are slightly different rules of consolidation.

A parent institution is one which at least holds a participation in an institution or financial institution and 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.

Participation means rights in the capital of other undertakings which are intended to contribute to the company's activities, or the ownership, direct or indirect, of 20% or more of the voting rights or capital of an undertaking.

Institutions that must comply with the CRR on the basis of their consolidation must usually 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 (*Articles 18 and 19, CRR*).

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 EUR10 million, or 1% of the total amount of assets and off balance sheet items of the parent undertaking.

Third-country headed groups with significant assets within the EU of at least EUR40 billion will have to apply for a licence for mandatory intermediate parent undertakings (IPUs) in EU ((mixed) financial holding companies, credit institutions, investment firms) by 28 June 2021.

(Mixed) financial holding companies will themselves become subject to the CRR and CRD requirements and will have to apply for separate licences as (mixed) financial holding companies starting with 28 June 2021.

Requirements

A credit institution must, further to its CRR compliance requirements (*see above, Role*) prepare consolidated financial statements and a consolidated annual report for its group of credit institutions according to the rules of Article 30 of the Banking Act (*Article 59, Banking Act*). This rule regulates what is defined as a group of credit institutions for accounting purposes deviating from the CRR. There is a special provision for parent institutions applying International Financial Reporting Standards (IFRS) for the financial statements enabling them to use these statements also for accounting purposes under the Banking Act.

International co-ordination and co-operation

19. To what extent is there co-operation with other jurisdictions?

The ECB is the competent supervisory authority for significant credit institutions and significant groups of credit institutions.

Under the SSM Regulation, the FMA is also involved in ECB decisions relating to the grant or withdrawal of banking licences, in notifications relating to the establishment of a branch in other member states and the acquisition of a qualifying holding, in each case of a CRR credit institution, whether SI or LSI. FMA assists ECB in cases of general investigations and on-site inspections on request (*see Question 2*).

The FMA is also a member of the Board of Supervisors of the EBA which is the main decision-making body of this agency and takes agency related policy decisions, such as on adopting draft technical standards, guidelines, opinions and reports.

Shareholdings/acquisition of control

20. What reporting requirements apply to the acquisition of shareholdings in banks?

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 (that is, including CRR financial institutions not qualifying as CRR credit institutions), must inform the FMA in advance (*Banking Act*). This includes investors acting together. The credit institution itself must also notify the FMA of the ownership change, but only after closing.

Other reporting requirements include the following:

- Articles 130 and following of the Austrian Stock Exchange Act (*Börsegesetz* 2018 (*BörseG*)) governing notification obligations of purchasers and sellers of shares in a stock corporation having its registered seat and being listed on a regulated market in Austria.
- Transparency Regulation (*Transparenz-Verordnung 2018*) details investor's transparency obligations under the BörseG.
- Securities Supervision Act (*Wertpapieraufsichtsgesetz 2018, Article 14 and following*) governs certain reporting obligations in connection with the acquisition of shares in investment firms.

- Regulation on the Control of Ownership (*Eigentümerkontrollverordnung 2016*) provides pre-closing transparency obligations in terms of investments in Austrian licensed credit institutions, investment firms, insurance undertakings, payment institutes and e-money-institutes.
- Austrian Takeover Act (*Übernahmegesetz* 1998 *(ÜbG)*) sets 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 entail administrative sanctions and usually results in a suspension of voting rights.

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 credit institutions.
- 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.
- Spin-offs of credit institutions.
- Merger of 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.

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

Apart from the requirements discussed in Question 20, which apply to selling and purchasing shareholders of Austrian licenced banks individually, there is generally no approval requirement by FMA/ECB for non-Austrian banks acquiring stakes in Austrian banks.

As an exception, if an Austrian credit institution intends to acquire or sell a qualifying holding in a non-EEA-state based credit institution, this requires a prior FMA approval. The FMA/ECB can, however, within the ownership control procedure prohibit a transaction relating to stakes in an Austrian licensed bank within 60 days of being notified. For this purpose, 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, risk of money-laundering or terrorist financing, among others.

If a party fails to fulfil its obligations under the Banking Act (*Article 20*), the FMA/ECB can request further information if necessary.

If a party fails to notify FMA in advance of a decision to transfer shares in an Austrian bank, it will become legally suspended from exercising its voting rights. Insufficiently reliable owners, non-transparent group structures or owners preventing allegedly an efficient supervision by FMA/ECB are sufficient reasons for a withdrawal of the licence by FMA/ECB or for declining a purchase of a qualifying participation in an Austrian credit institution.

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. By 28 June 2021, financial holding companies will be subject to a new licensing procedure.

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

Specific restrictions which are contained in the Austrian Act on Foreign Trade do not apply to banks. However, the ownership notification procedure (*see Question 20*) applies. Insufficiently reliable owners of Austrian licensed banks, non-transparent group structures or owners presumed to be preventing an efficient supervision by FMA/ECB are sufficient reasons for FMA/ECB to reject to grant or to withdraw the banking licence.

Liquidation, resolution and transfer

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

The rules on insolvency proceedings, which also apply to the liquidation of a financial institution, are found in the Insolvency Act (*Insolvenzordnung*). The Banking Act contains specific insolvency provisions applying only to credit institutions. In practice, however, the resolution rules (*see below Question 24*) will be applied by the FMA/SRB before the opening of insolvency proceedings over a credit institution's assets.

Credit institutions (management boards) are required to immediately notify the FMA in case of illiquidity or of overindebtedness, 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.

Also, 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.

24. What is the recovery and resolution regime for banks? Does your jurisdiction have any specific mechanisms for the transfer of banking business in a resolution scenario, for example to a bridge bank or a regulatory agency?

Obligations to prepare recovery plans

In general, any bank recovery measure must on the basis of an indicator excess ("red light") be initiated and executed by the bank itself in line with its recovery plan. Recovery plans must in advance be drawn up by any Austrian CRR credit institution and financial holding company and be transmitted for approval to the FMA/SRB. 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*).

The Financial Stability Board's standards on TLAC instruments will be implemented into Austrian law from 2022 for G-SIIs and top-tier banks only. All other Austrian banks will only become subject to individual MREL quota requirements prescribed by the FMA/SRB.

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*).

Resolution tools including bail-in and MREL

The Act on the Recovery and Resolution of Banks (*Sanierungs- und Abwicklungsgesetz* (BaSAG), implementing *Directive 2014/59/EU (the Bank Recovery and Resolution Directive) (BRRD)*) covers CRR credit institutions and CRR investment firms, including certain 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.

FMA/SRB must prescribe to all CRR credit institutions and specific CRR investment firms a minimum requirement for own funds and eligible liabilities (MREL) on a solo and a consolidated basis which is a minimum amount independent from the sum of risk–weighted assets of an institution/group and individually determined for any institution/group. This has recently 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*).

As to individually prescribed MREL quotas for CRR credit institutions and generally applicable MREL requirements for G-SIIs and top tier banks (enabled as from 27 June 2019), see the end of *Question 17*.

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.

Deposit Guarantee Schemes

Directive 2014/49/EU on DGS (Deposit Guarantee Scheme Directive) (*DGSD*) includes a harmonised level of covered deposits of up to EUR100,000 per customer and bank and has been implemented into Austrian law.

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

From 1 January 2019, the single deposit guarantee and investor compensation scheme (*Einlagensicherung Austria GesmbH)* run by the Austrian Chamber of Commerce (*Wirtschaftskammer Österreich*) has assumed the responsibility for the compensation of all depositors and investors in Austrian credit institutions. To date, only one institutional protection scheme has been recognised as an alternative deposit guarantee and investor compensation scheme in Austria (*Sparkassen-Haftungs-GmbH*) by the FMA.

Regulatory developments and recent trends

25. What are the regulatory developments and recent trends in bank regulation?

At the moment, compliance with the future MREL quota, LR and NFSR requirements, the amended EBA outsourcing guidelines and the backstop rules for new non-performing loans are in the focus of managers of Austrian banks.

MREL quotas are in most cases institute-specifically prescribed by the FMA/SRB within Pillar 2. The placement of preferred subordinated debt instruments to retail customers is substantially impeded by imposing minimum denomination requirements of EUR10,000 and more.

Further efforts will centre on implementing CRR II, CRD V (completing the Basel III-framework transposition in the EU) and AMLD V in time.

The EU commission's draft of a CRR III/CRD VI-package is expected to be published in early 2020, aiming to transpose the Basel IV-framework within the EU by 2022. Basel IV will focus on increasing the requirements for the risk-weighting of risk positions (RWAs) held by a bank including the operational risk, but also treat issues like the leverage ratio and the output floor for IRB (internal ratings based) banks.

It is currently expected that the Pillar 1 capital requirements will become more onerous for Austrian and German banks, so that corporate lending costs will rise due to the Basel IV transposition.

Contributor profile

Dr Peter Knobl, Partner

Cerha Hempel Rechtsanwälte

T +43 1 514 35 241
F +43 1 514 35 39
E *peter.knobl@cerhahempel.com* (from 16/9/2019, formerly *peter.knobl@chsh.com*)
W *www.cerhahempel.com* (from 16/9/2019, formerly *www.chsh.com*)

Professional qualifications. Lawyer

Areas of practice. Banking and finance, capital markets, tax law, banking and insurance supervision law, derivate financial instruments and investment funds (UCITS), alternative investment funds (AIFs)

Recent transactions:

- 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.
- EPG Group, in relation to an envisaged acquisition of the Austrian business of the Hypo-Alpe-Adria International Group, Hypo-Alpe-Adria-Bank AG.
- Sberbank of Russia, on the purchase of DenizBank AG (Austria).
- Zürcher Kantonalbank, on the purchase of Privatinvest Bank AG.
- Banking regulatory advice: Sberbank Europe AG, 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.

Languages. German, English

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

Most recent publications:

- *Banking and Financial Market Regulatory Compliance, in: Kofler-Senoner (Ed.), Compliance Management in Unternehmen (2016), pp 290-353.*
- *Commentary on Sections 60 to 63b Austrian Banking Act, in: Laurer/Schuetz/Kammel/Ratka, Bankwesengesetz-Kommentar (2017).*
- *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.*
- *Commentary on Arts 12, 13 and 15 Market Abuse Regulation, in: Gruber (Ed.), Kommentar zum BörseG 2018 und zur MAR (to be published).*

END OF DOCUMENT