The Legal 500 Country Comparative Guides

Austria: Banking & Finance

This country-specific Q&A provides an overview to banking & finance laws and regulations that may occur in Austria.

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1. **What are the national authorities for banking regulation, supervision and resolution in your jurisdiction?**

   The Austrian Financial Market Authority ("FMA") is established as an integrated supervisory institution, supervising all financial service providers in Austria. The FMA shares responsibilities with the Österreichische Nationalbank ("OeNB") in connection with banking supervision. While the OeNB is in charge of fact-finding, including on-site and off-site analysis of banks, the FMA is responsible for the decision-making process and therefore is empowered to act as the competent authority in the area of banking supervision as well as in the area of banking recovery and resolution. The European Central Bank ("ECB") is responsible for banking supervision in the Euro area under the Single Supervisory Mechanism ("SSM") and supervises significant entities in Austria, together with the FMA as the National Competent Authority ("NCA") and the OeNB. Therefore, the FMA works in close cooperation with the ECB and the OeNB. However, the exclusive responsibility for granting and extending concessions of CRR credit institutions (i.e. those credit institutions that receive deposits or other repayable funds from the general public and grant loans on their own account pursuant to Article 4 para 1 no 1 CRR (Regulation (EU) No 575/2013 – "Capital Requirements Regulation") lies with the ECB. For Austrian non-CRR credit institutions as well as for branches of foreign credit institutions, the exclusive responsibility remains with the FMA.

2. **Which type of activities trigger the requirement of a banking licence?**

   The ECB licenses CRR-credit institutions in SSM-Member States. The scope of the license granted by the ECB also covers banking transactions under national law. Pursuant to the Austrian Banking Act ("BWG") an entity requires a license as a credit institution, which is issued by the competent supervisory authority, for activities listed in sec 1 para 1 BWG, in particular when carrying out one or more of the following activities for a commercial purpose: (i) deposit business ("*Einlagengeschäft*"), (ii) current account business ("*Girogeschäft*"), (iii) lending business ("*Kreditgeschäft*"), (iv) discount business ("*Diskontgeschäft*"), (v) custody business ("*Depotgeschäft*"), (vi) issuing and administration of payment instruments ("*Ausgabe und Verwaltung von Zahlungsmittel*"), (vii) trading for one's own account or on behalf of others on specific markets or with certain instruments set out in sec 1 para 1 no 7 lit a–f BWG including trading with futures and equity swaps or financial instruments pursuant to the Securities Supervision Act 2018 ("WAG 2018"), (viii) guarantee business ("*Garantiegeschäft*"), (ix) securities issuing business ("*Wertpapieremissionsgeschäft*"), (x) building savings and loan business ("*Bauspargeschäft*"), (xi) investment fund business ("*Investmentgeschäft*"), (xii) real estate investment fund business ("*Immobilienfondsgeschäft*"), (xiii) capital financing business ("*Kapitalfinanzierungsgeschäft*"), (xiv) factoring business ("*Factoringgeschäft*"), (xv) money brokerage transactions in the interbank market or brokerage of transactions in connection with specific banking transactions ("*Geldmaklergeschäft*"), (xvi) severance and retirement fund business ("*Betriebliches Vorsorgekassengeschäft*"), and (xvii) exchange bureau business ("*Wechselstubengeschäft*").

   Further, an entity requires a license as a financial institution, which is also issued by the

competent supervisory authority, for additional activities listed in sec 1 para 2 BWG, in particular when carrying out one or more of the following activities for a commercial purpose in addition to to their activities as a credit institution: (i) leasing business ("*Leasinggeschäft*"), (ii) consulting companies on capital structure and industrial strategy ("*Beratung über die Kapitalstruktur*"), (iii) provision of trade information ("*Erteilung von Handelsauskünften*"), (iv) provision of safety deposit box management services ("*Schließfachverwaltung*"), (v) provision of payment services under the Payment Services Act 2018 ("ZaDiG 2018") and (vi) the issuing of e-money under the Electronic Money Act 2010 ("E-GeldG 2010").

3. **Does your regulatory regime know different licenses for different banking services?**

   The license for conducting banking activities as a credit institution or additionally as a financial institution may be granted under conditions and obligations connected to it and may be restricted to individual banking activities mentioned above. In the company database of the FMA the scope of the license(s) granted to each entity is publicly available.

4. **Does a banking license automatically permit certain other activities, e.g., broker dealer activities, payment services, issuance of e-money?**

   An entity which has been granted a license for a deposit business may also conduct an exchange bureau business and/or leasing operations pursuant to sec 1 para 3 BWG ("legal license"). Further, all licensed entities may conduct ancillary activities pursuant to the legal license, which are directly connected with banking activities in accordance with the scope of the license granted. Credit institutions are also allowed to carry out certain activities pursuant to the WAG 2018, some payment services set out in the ZaDiG 2018 and under specific conditions the entities may issue electronic money in accordance with the E-GeldG 2010.

5. **Is there a "sandbox" or "license light" for specific activities?**

   There is no predetermined license light scheme or a sandbox allowing for banking transactions set forth in the BWG. However, it is currently under discussion that the FMA establish an accompanying licensing procedure in the sense of a regulatory sandbox. In the proposed sandbox, FinTechs seeking a licence, but also existing licensed entities wanting to test financial innovations, are to be prepared for supervision in an intensive dialogue with the FMA so that they can test their business models. In this context there is also a close exchange with the British Financial Conduct Authority ("FCA"), which already has collected experience in operating a sandbox for several years.

6. **Are there specific restrictions with respect to the issuance or custody of crypto currencies, such as a regulatory or voluntary moratorium?**

   There are no specific restrictions under Austrian law with respect to the issuance or custody of crypto currencies. However, depending on the business model of the entity, such activity

may require *inter alia* a banking license. Therefore, the FMA offers a contact form for enquiries ("*Kontaktformular FinTech-Modelle*") as to whether the specific business model requires a banking license. The enquiry needs to explain the specific business model in detail.

7. **What is the general application process for bank licenses and what is the average timing?**

   In general, the ECB is competent for granting and extending licenses to CRR-credit institutions. For Austrian non-CRR credit institutions, as well as, for branches of foreign credit institutions in Austria, competence remains with the FMA.

   All applications are to be submitted to the FMA, regardless of whether the decision has to be taken by the FMA or the ECB. The FMA assesses the application based on the conditions set out in the BWG. In case the applicant fulfils the conditions in accordance with the CRR, the FMA forwards the application with a draft decision and the relevant documentation to the ECB for the decision-making process. The applicant must enclose particular information on the business plan from which the type of the planned transactions, the organizational structure of the credit institution, the planned strategies and processes for the monitoring, controlling and limitation of risks arising from banking transactions and banking operations, as well as, the identity and the amount contributed by owners, who possess a qualifying holding in the credit institution and information required for the purpose of assessing the reliability of these owners, is apparent. The average timing essentially depends on whether the application is for a "full" license and therefore for major banking activities and the concept presented to the FMA. However, the process should be completed within a period of twelve months.

8. **Is mere cross-border activity permissible? If yes, what are the requirements?**

   The rules for banking activities on a cross-border basis are set down in the EU Directive 2013/36/EU ("Capital Requirement Directive" – "CRD IV") amended by the EU Directive 2019/878/EU ("Capital Requirements Directive" – "CRD V") and sec 9 to 19 BWG. Therefore, credit institutions being granted a license in a European Economic Area ("EEA") Member State are authorized within the scope of the authorization/license of their home state to also provide banking operations in Austria (single license principle) by way of a branch ("freedom of establishment") or under the freedom to provide services.

   Credit institutions incorporated (and licensed) within the EEA must notify the home NCA of their intention to conduct activities in Austria. This authority must in turn inform the FMA as host NCA of the institution's intention.

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

   A banking license may be granted to (i) a limited-liability corporation ("*Gesellschaft mit*

beschränkter Haftung"), (ii) a stock corporation ("*Aktiengesellschaft*"), (iii) an European public company ("*Societas Europaea*"), (iv) a cooperative society ("*Genossenschaft*"), (v) an European cooperative society ("*Europäische Genossenschaft*") or a savings bank ("*Sparkasse*"). The initial capital has to be in each case at least EUR 5 million and has to be available to the directors without restriction or encumbrance in Austria. However, most Austrian banks choose the legal form of a stock corporation for operating their business.

10. **What are the organizational requirements for banks, including with respect to corporate governance?**

The FMA has published a detailed set of guidelines and circular letters ("*FMA Rundschreiben"*) on the application and the scope of the organizational regulations, which depend on the type of business activities envisaged by the entity. An institution has to implement and continuously monitor a comprehensive set of organizational requirements such as organizational structure, clear decision-making processes, documentation and reporting obligations, as well as, responsibilities. Furthermore, the management shall define and oversee the internal principles of proper business management ("fit & proper"), guaranteeing the requisite level of care when managing the institution, and in particular, focus on the segregation of duties in the organization and the prevention of conflicts of interest and therefore, establish mechanisms to safeguard security and confidentiality of information in particular pursuant to sec 38 BWG.

11. **Do any restrictions on remuneration policies apply?**

Requirements for remuneration policies and practice of credit institutions licensed in Austria are set out in sec 39/2, 39b and in the Annex to sec 39b BWG. These provisions implement the EU Directive governing remuneration policies and practices (CRD IV (CRD V still to be implemented)) into Austrian Law. The FMA has to take these regulations into account according to the European convergence in respect of supervisory tools and supervisory procedures. As a consequence, the guidelines and recommendations (and other measures) that are issued by the European Banking Authority ("EBA") must be applied. Therefore, the Annex to sec 39b BWG, the circular letter (re-)issued by the FMA in January 2018 ("*Grundsätze der Vergütungspolitik und –praktiken; Rundschreiben der FMA zu §§ 39 Abs. 2, 39b und 39c BWG"),* and the guidelines from the EBA considering remuneration policies e.g., guidelines on sound remuneration policies under CRD IV and disclosures under the CRR contain the main rules for restrictions on remuneration.

Therefore, the remuneration provisions of the BWG shall ensure that credit institutions adopt remuneration policies and practices that encourage their employees to act in a sustainable and long-term manner and align their personal objectives with the long-term interests of the credit institution.

Pursuant to sec 39 para 2 BWG, credit institutions and groups of credit institutions need to have administrative, accounting and control procedures for the identification, assessment,

management and monitoring of banking business and banking operational risks, as well as risks arising from remuneration policies and practices that are appropriate to the nature, scale and complexity of the banking business conducted.

12. **Has your jurisdiction implemented the Basel III framework with respect to regulatory capital? Are there any major deviations, e.g., with respect to certain categories of banks?**

    The EU implemented the Basel III framework via CRR and CRD IV, which contain a number of discretions for Member States. The CRR is directly applicable in Austria, and CRD IV was implemented in Austria through an amendment to the BWG in 2013. With the EU banking package, further key elements of the Basel III framework were introduced at the European level by amendments to, *inter alia*, the CRR ("CRR II") and CRD IV ("CRD V"). The EU banking package was published in the Official Journal of the European Union on 7 June 2019. While the CRD V must be implemented in national law by the end of December 2020, the CRR will apply beginning in June 2020. For example, additional capital buffers with regard to Global Systemically Important Institutions (G-SII) and Other Systemically Important Institutions (O-SII) may be prescribed.

13. **Are there any requirements with respect to the leverage ratio?**

    Since 2015 all institutions are required to disclose their leverage ratio and its components. In order to avoid excessive indebtedness of the institutions on the one hand (as a consequence of the financial crisis 2007), and in order to compensate for potential deficiencies in the internal risk models on the other, banks are required to report the leverage ratio to the supervisory authorities as part of their reporting obligations. Supervisors will track the new ratio in order to analyse its impact more closely and to complete possible adjustments. Recently CRR II implementing a binding leverage ratio requirement of 3% of Tier 1 capital has been published in the Official Journal of the European Union ("OJ") and will come into effect as of June 2020.

14. **What liquidity requirements apply? Has your jurisdiction implemented the Basel III liquidity requirements, including regarding LCR and NSFR?**

    The CRR (CRR II) requires entities to hold 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") and to ensure their ongoing ability to meet short term obligations. The LCR as a short-term liquidity business ratio was fully introduced in 2018; amendments made by the CRR II are applicable as of June 2020. The new rules impose a binding leverage ratio requiring institutions to maintain Tier 1 capital of at least 3% of their non-risk-weighted assets. An additional leverage ratio buffer will apply to G-SIIs. In addition the European Commission proposed that credit institutions shall also have to ensure that their long term obligations will adequately be met with a diversity of stable funding instruments under both normal and stressed conditions (Net-Stable-Funding Ratio —

"NSFR" as a long-term liquidity business ratio).

Furthermore, entities are required by the BWG to ensure that they are able to meet their payment obligations at any time e.g., by establishing company-specific financial and liquidity planning based on banking experience pursuant to sec 39 para 3 BWG.

15. **Do banks have to publish their financial statements? Is there interim reporting and, if so, in which intervals?**

Pursuant to the BWG banks are required to publish their annual financial statements, as well as, their consolidated financial statements. The BWG contains some specific rules on the illustration of financial statements of credit institutions. Banks have to report on a regular basis to the FMA as supervisory authority. These reports are not necessarily publicly available unless it is required by other provisions. In addition, banks must meet several disclosure requirements under the CRR (CRR II), for example a description of the main characteristics of the equity instruments issued and the required disclosure of remuneration policies and practices.

16. **Does consolidated supervision of a bank exist in your jurisdiction? If so, what are the consequences?**

Under the CRR (CRR II), consolidated supervision of EU parent and subsidiary institutions may be possible under certain conditions. Therefore, parent institutions in an EU member state have to comply with the consolidation obligations laid down in the CRR (CRR II). The parent undertakings and their subsidiaries must implement proper organizational structures and appropriate internal control mechanisms to ensure that the data required for consolidation is duly processed and forwarded. Sec 77b BWG requires that the competent supervisory authority in regard to the supervision of the EU, parent credit institution assumes a central role (the cross-border coordination of supervisory activities). In doing so, the FMA must ensure appropriate coordination and cooperation with the respective competent authorities of third countries if necessary.

17. **What reporting and/or approval requirements apply to the acquisition of shareholdings in, or control of, banks?**

Pursuant to sec 20 para 1 BWG any party who has taken a decision to acquire or dispose of (directly or indirectly) a participation of 10%, or to increase or decrease qualified shareholding by reaching a 20%, 30% or 50% threshold of voting rights or capital in an Austrian credit institution (or in such a way that the credit institution becomes a subsidiary undertaking of that party), must inform the FMA in advance in writing. Further, the credit institutions shall immediately notify the FMA in writing of any acquisition or relinquishment of qualified shareholdings as well as of any reaching, exceeding or falling below the shareholding thresholds as soon as they become aware thereof. In addition, credit institutions must notify the FMA in writing at least once a year of the names and addresses of

shareholders holding qualified interests. The FMA shall have a maximum of 60 working days from the receipt of the notification and all the documents required pursuant to sec 20b para 3 BWG to prohibit the proposed acquisition in writing following an assessment according to the assessment criteria set forth in sec 20b BWG, provided there are reasonable grounds therefore, or the information submitted by the proposed acquirer is incomplete. Thus, the FMA shall examine the suitability of the interested buyer and the financial stability of the intended acquisition.

18. **Does your regulatory regime impose conditions for eligible owners of banks (e.g., with respect to major participations)?**

For assessing the notification pursuant to sec 20 para 1 BWG, in order to ensure the sound and prudent management of the credit institution to be acquired and in relation to the likely influence of the proposed acquirer on the credit institution to be acquired, the suitability of the proposed acquirer and the financial stability of the proposed acquisition shall also take into account the reliability of the proposed acquirer, the good reputation, professional qualifications and experience of any person who will direct the business of the credit institution.

19. **Are there specific restrictions on foreign shareholdings in banks?**

The notification requirements pursuant to sec 20 para 1 BWG apply to any investor in credit institutions licensed in Austria. Therefore, there are no specific restrictions on foreign shareholdings in banks.

20. **Is there a special regime for domestic and/or globally systemically important banks?**

The FMA must classify a bank as G-SII if it can be assumed that a malfunction, a threat to the existence or failure of this institution leads to a systemic risk with global implications. As a consequence, the BWG provides for a special capital buffer regime for G-SIIs (sec 23b BWG) and O-SIIs (sec 23c BWG). The FMA can require G-SIIs to implement a capital buffer proportional to the Common Equity Tier 1 (“CET 1”) in addition to the capital requirements set out in the CRR (CRR II). The FMA shall submit a list of credit institutions and groups of credit institutions that are classified by the FMA as G-SIIs or as O-SIIs to the European Commission, the EBA, the European Systemic Risk Board and the Financial Market Stability Board. The FMA must update this list annually.

21. **What are the sanctions the regulator(s) can order in the case of a violation of banking regulations?**

The FMA can impose sanctions in case of violations of banking regulations. The BWG provides, *inter alia,* for “penalty interests” as compensation for the benefits arising from the violation pursuant to sec 97 BWG, fines of up to 5 million for certain violations that do not fall within the jurisdiction of the courts pursuant to sec 98 BWG, suspension of voting rights for the shareholdings (“naming and shaming”), provided that such disclosure does not seriously

jeopardize the stability of the financial markets or cause a disproportionately high level of damage to the parties concerned.

22. **What is the resolution regime for banks?**

Austria has implemented the Directive 2014/59/EU ("BRRD") by adopting the Federal Act on the Recovery and Resolution of Banks ("BaSAG"), thereby creating a national legal framework for dealing with banks that are failing or likely to fail. The BaSAG contains provisions (i) prescribing the preparation of recovery plans by banks and by the resolution authorities, including powers to remove obstacles to a resolution ("prevention"), (ii) enabling supervisory authorities to intervene at an early stage, including related additional powers to intervene ("early intervention") and (iii) forming the basis for the establishment of a national resolution authority and for entrusting the authority with the necessary powers and tools ("resolution"). The following resolution tools are at the FMA's disposal: (i) the sale of business tool, (ii) the tool to establish a bridge institution ("bridge bank"), (iii) the asset separation tool and (iv) the tool for bailing-in of creditors ("bail-in"). The bail-in is one of the core elements of the BRRD. It provides the resolution authority with the possibility to write down the eligible liabilities in a cascading contribution to absorb losses of an institution, or to convert them into equity capital.

23. **How are client's assets and cash deposits protected?**

The Act on Deposit Guarantee Schemes and Investor Compensation ("ESAEG") implements the Directive on Deposit Guarantee Schemes (Directive 2014/49/EU) and regulates the protection of deposits and credit balances including interest on accounts and savings. The objective of ESAEG is to ensure the rapid and comprehensive compensation of depositors' claims in the event of a guarantee. The aim is to ensure that claims arising from security incidents are satisfied by the member institutions of the security schemes within a short period of time so that financial obligations for the federal government can be avoided. In a guarantee case, deposits of up to EUR 100,000 per customer and bank are covered. Every credit institution domiciled in Austria that wishes to accept customer deposits or provide investment services requiring guarantees must belong to a protection scheme.

24. **Does your jurisdiction know a bail-in tool in bank resolution and which liabilities are covered?**

One of the resolution tools at the FMA's disposal is the bail-in as core element of the BRRD. It permits the FMA to write down the eligible liabilities in a cascading contribution to absorb losses of an institution, or to convert them into equity. The most important examples for exceptions to the scope of application of the bail-in are protected deposits, secured liabilities and liabilities against employees.

25. **Is there a requirement for banks to hold gone concern capital ("TLAC")?**

New standards on the Total Loss-Absorbing Capacity (TLAC) of G-SIIs and a mandatory Pillar

1 subordinated Minimum Requirement for Own Funds and Eligible Liabilities (MREL) requirement for GSIIs were agreed upon. On 22 November 2019, the EBA published a consultation draft for implementing technical standards (ITS) on the disclosure and reporting requirements for MREL and TLAC. This is the first time that EBA intends to introduce harmonised reporting and disclosure requirements for MREL and TLAC. By integrating disclosure and reporting, EBA aims to increase efficiency and facilitate the use of information by authorities and market participants. The consultation will end on 22 February 2020 and the revised standards are scheduled to be submitted to the European Commission by June 2020. Further, the FMA regulation on the minimum content of the Central Securities Depositories Recovery, Settlement and Contingency Recovery Plan ("ZvSAN-V") also contains also provisions regarding TLAC.

26. **In your view, what are the recent trends in bank regulation in your jurisdiction?**

The amendments made by CRR II and CRD V regarding capital requirements of credit institutions and investment firms shall strengthen the resilience of the banking sector by introducing more risk-sensitive capital requirements. Challenges arise in particular from the fact that these concepts designed for large institutions ("big players" and G-SII e.g., TLAC and MREL) may not be applied to small institutes without making adaptations, as Austria has a particularly large number of small and medium-sized banks.

27. **What do you believe to be the biggest threat to the success of the financial sector in your jurisdiction?**

The financial sector has to face and meet recent challenges created by new ways of digitalization and data processing technology within the field of banking operations and investment service providers (FinTech). Especially traditional financial institutions have to be aware of their new digital competitors. Other important issues are rising standards of regulation, complexity and increasing costs for the institutes. With regard to the current interest rates, the "Compliance tool" proposed by the European Commission aiming at facilitating institutions' compliance with their Regulations and Directives may enable each institution to rapidly identify the relevant provisions with which they have to comply and improve the Cost-Income-Ratio. Further, due to the current good economic environment, a strong demand for credit and low risk provisions the general outlook for Austrian banks is positive.