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Recent developments in Austrian banking and financing law



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Austrian bank stability measures

In October 2008, following the joint declaration on the European action plan for euro area countries, financial stability measures were enacted in Austria. These legislative measures consist, mainly, of the implementation of the Inter Bank Market Enhancement Act (*Interbankmarktstärkungsgesetz – IBSG*) and the Financial Market Stabilization Act (*Finanzmarktstabilitätsgesetz – FinStaG*). The objective of this new legislation has been to protect banks and insurance companies from the serious effects of the international financial crisis. In total, Austria has made available up to €100 billion to support the banking system.

Up to €75 billion has been designated for liability by means of guarantees or sureties. The IBSG provides for a separate entity to be set-up as a clearing house, which facilitates the refinancing of banks on the Austrian inter-bank market. The newly established entity borrows funds from banks or insurance companies on the

inter-bank market and then lends funds to banks and insurance companies on arm's length terms.

Up to €15 billion (plus any additional amount not utilised under the guarantee fund) has been designated for the recapitalisation of Austrian credit institutions and Austrian insurance companies. Under this scheme, essentially all major Austrian banks (such as Erste Bank, Raiffeisen, UniCredit Bank Austria, BAWAG and Hypo-Alpe-Adria) have or are in the process of entering into arrangements with the Republic of Austria for the subscription of participation capital as set out in the Austrian Banking Act by the Republic of Austria. The holder of participation capital does not become a shareholder but has a claim to an agreed interest from profits *pari passu* with the shareholders (therefore, dilution of existing shareholders only in respect of profit participation). Participation capital is subordinated also

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to subordinated debt and thus qualifies as tier 1 capital for regulatory purposes. In line with the position of the EU Commission, such participation capital bears interest at 9.3 % pa provided this amount is covered in the profits of the financial year. If 30 % or more of the participation capital is placed with third parties (thereof maximum 10 % with existing shareholders) the interest is reduced to 8 % pa. Conversion rights (into ordinary shares) are subject to individual terms.

Implementation of Directive 2006/48/EC into Austrian law

In May 2009, the Austrian government published a draft bill in order to implement Directive 2006/48/EC into Austrian law. A consistent legal framework shall be established for all payment services, whether effected within Austria or across borders (within the EU). In order not to create any adverse competitive position of Austria as a business location, the intention is to achieve the highest-possible harmonisation by providing for an implementation as close to the Directive's content and wording as possible.

Depositor protection

Furthermore, the draft bill provides for an amendment of the current Austrian depositor's protection scheme in accordance with Directive 2009/14/EC. In particular, the minimum coverage level shall be increased to €50,000. By December 31 2010, coverage for the aggregate deposits of each depositor will be set at €100,000. The same coverage level should apply to all depositors regardless of whether a Member State's currency is the euro or not.

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Implementation of Directive 2007/44/EC into Austrian law

Another bill introduced by the Austrian government concerns the implementation of Directive 2007/44/EC amending several Community acts concerning procedural rules and evaluation criteria for the prudential assessment of acquisitions and increase of holdings in the financial

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sector. The new provisions restrict the competent supervisory authorities in their administrative discretion when approving the acquisition or increase of a qualifying holding in a credit institution, assurance, insurance

or re-insurance undertaking or an investment firm. They provide specified criteria for the assessment of shareholders and management in relation to a proposed acquisition and a clear procedure for their application.

Austrian Constitutional Court repeals provision of Austrian Stamp Duty Act

The Austrian Stamp Duty Act (*Gebührengesetz – GebG*) enumerates certain legal transactions which are subject to an *ad-valorem* stamp duty. Such legal transactions include, among other things, loan and credit agreements, guarantee agreements, assignment agreements and mortgage deeds. An essential precondition for Austrian stamp duty to be applicable is that legal transaction is evidenced by a written document produced in Austria or brought into Austria. According to Section 25 GebG, several written documents evidencing any of the named legal transactions are executed, each document (potentially) triggered stamp duty on its own, if not notified within the required timeframes.

By February 26 2009, the Austrian Constitutional Court qualified Section 25 GebG to contradict Austrian constitutional law and repealed the entire provision. As a result, written documentation of the legal transactions mentioned in the GebG will henceforth not be exposed to the risk of multiple stamp duty on the same transaction irrespective of how many written documents are executed.