

THE AUSTRIAN LEGAL MEASURES IN COURSE OF THE FINANCIAL TURMOIL¹

ALEXANDER PUTZER

Head of Legal of Raiffeisenbank Kleinwalsertal AG

Lecturer of the University of Innsbruck (Austria)

Resumen: En muchos países se ha puesto de manifiesto que para poder superar de forma rápida y eficiente la crisis del mercado financiero era necesaria la intervención estatal. Con el objetivo de evitar daños a la economía austriaca, se ha adoptado un paquete de medidas que permitan mantener la estabilidad del sector financiero nacional. Para intervenciones directas Austria ha creado un fondo de rescate de cien mil millones de euros. Además, también se contemplan una serie de regulaciones complementarias que no requieren de fondos específicos. En este trabajo se exponen conjuntamente todas las medidas y reformas legislativas que se han llevado a cabo hasta la fecha en Austria para hacer frente a la crisis del mercado financiero.

Palabras clave: crisis del mercado financiero, liquidez, recapitalización.

Abstract: In the course of the turmoil of the financial market it became clear that for quickly and efficiently tackling it, governmental interventions were necessary in numerous countries. To save the Austrian economy from damage, a bundle of measures was brought up. Due to this the stability of the domestic financial sector could be preserved. Austria has intended a budget of EUR 100 billion for direct interventions. Additionally there are a couple of regulations which did

¹ This article is based on the transcript of the Author's lecture on "Austrian Measures against the Financial Market Crisis" at the Universidad de Alcalá, Alcalá de Henares (Madrid) on 26th May 2009. It partly is derived from the Author's work "Finanzmarktstabilisierung: Das österreichische Maßnahmenpaket", published in ZFR 2009, 50.

not afford an own budgeting. All these measures taken up to now are referred to here in common as the Austrian legal measures against the financial turmoil.

Keywords: financial turmoil, liquidity, re-capitalisation

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I. INITIAL POSITION

The words “crisis” and “turmoil” since 2007 experience high attention in the financial industry. The financial turmoil which appeared worldwide in different intensity was pushed by the subprime crisis released in the U.S.A. Since that time in many places it has questioned the stability of the financial sector as well as the trust of the investors.

What followed the crisis was her political analysis and that of the possible effects. The welcome result were internationally co-ordinated reactions which were not only necessary overall, but also effective and useful.

The first reaction on the financial turmoil in the form of politically formed and governmentally carried out measures was worked out in the USA. In Europe the countries under the aegis of the EU agreed on obeying the measure bundle developed by the committee of the G7. This bundle in particular includes the support of system-relevant financial institutions, the prevention and resolving of a credit crunch² and the strengthening of the deposit-guarantee systems.

On the basis of this abstract bundle the single states compiled and decided on own, measures and regulations, which gave respect to national crisis scenarios and corresponding challenges. Thus the Austrian parliament concerned with the protection of the financial market stability and the reputation of the Austrian banks³ to federal law gazette No. I 2008/136 published the central bundle of measures including the so called FinStaG (Act on the Financial Market Stability) and the IBSG (Act on Strengthening of the Interbank Market). However, there have been quite a number of additional regulative measures, which will also be shown here.

Bringing the current financial market situation in Austria to the point, it can be stated that there are various signs of a moderate recovery. Especially a credit crunch can not be observed in Austria. The data published by the OeNB (Austrian National Bank) shows that at no time since the breakout of the turmoil Austria's economy suffered from such a crunch.

Basically the same can be stated concerning the whole Euro Area. Although in some countries signs of credit crunches appeared and even became manifest in some cases, yet no serious credit crunches occurred.

As the last "Euro Area Bank Lending Survey" of the ECB – the European Central Bank – shows, the demand for loans to households⁴ as well as the demand for loans and credit lines to enterprises⁵ in general is actually rising again in Europe. Correspondingly the restrictions in

² See *Mitterlehner/Nowotny/Leitl/Sorger/Pinkl/Prehofer/Sevelda/Uher*, „Kreditklemme“ – real oder gefühlt?, ÖBA 2009, 1.

³ Governmental Draft 682 BlgNR 23. GP 2.

⁴ ECB, The Euro Area Bank Lending Survey – April 2009 (2009) 8.

⁵ ECB, The Euro Area Bank Lending Survey – April 2009 (2009) 20.

credit standards for the approval of loans/credit lines to households and to enterprises are being lowered again since the beginning of the first quarter of 2009.⁶

II. A EUROPEAN FRAMEWORK IN THE FIELDS OF COMPETITION LAW⁷

Not surprisingly the legal measures discussed in this context were and still are subject to assessment by the European Commission under the perspective of the competition law.

The EU competition law serves to prevent undesirable distortions of competition between Member States. This includes – according to Art 87 and the following of the EC Treaty – the control of state aid.

Such aid is available if the state plans to support a private company and this support leads to a disturbance of the competition with competitors from other Member States or at least threatens to distort competition.⁸ Since it is the primary object of the Austrian legal measures against the financial turmoil, there is no question that the corresponding governmental actions support private companies. And the financial dimensions of the measures superfluous the question of the potential for a disturbance of the European competition. The Austrian legal measures were therefore subject to an examination by the European Commission.

Since this was already expected from the outset, the wording of the Austrian legal measures was already chosen with a conscious look at the wording of the relevant articles of the EC Treaty.⁹

For the examination of such measures the EU Commission has established a framework of official communications. Based on the current guidelines of 2004 for rescue and restructuring aid, the on 13th October 2008 it published new guidelines to serve for the design of measures which deal with the financial turmoil. These guidelines consist of the communications from the commission on “The application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis”¹⁰ and adjoined to this

⁶ ECB, The Euro Area Bank Lending Survey – April 2009 (2009) 8; 14.

⁷ With details *Arhold*, Globale Finanzkrise und europäisches Beihilfenrecht – Die (neuen) Spielregeln für Beihilfen an Finanzinstitute und ihre praktische Anwendung, *EuZW* 2008, 713.

⁸ See *Streinz*, *Europarecht*⁸ (2008) Rz 1020 ff; also *Peyerl*, EG-Beihilfenverbot und Steuerrecht, *JAP* 2008/2009, 26.

⁹ See Governmental Draft RV 682 BlgNR 23. GP 3 and Committee Report 683 BlgNR 23. GP 3.

¹⁰ Official Journal of the European Union C 270/8, 25.10.2008.

the Commission communications “Temporary framework for State aid measures to support access to finance in the current financial and economic crisis”¹¹ and “The re-capitalisation of financial institutions in the current financial crisis: limitation of aid to the minimum necessary and safeguards against undue distortions of competition”¹² and finally the communication “on the Treatment of Impaired Assets in the Community Banking sector”.¹³

This framework makes it clear that the current relevant measures and regulations of the Member States according to Article 87 subparagraph 3 litter b of the EC Treaty are to be regarded as compatible with the common market, if they are designed reasonably. According to the provision named, state aid is permitted, when it is necessary “to remedy a serious disturbance in the economy of a Member State”.

These new guidelines are therefore now the basis for the assessment of projects of the Member States. The Austrian measure bundle was approved by the EU Commission on 9th December 2008¹⁴ and entered into the State Aid Register under the number N 557/2008. One of the most prominent aspects of the public debate, the remuneration of re-capitalisation measures, is dealt with under paragraph 92 and the following of the decision of the Commission. It is noted that the state through the coupon and repayment terms will be awarded with a minimum yield of 9,1% to 9,3% expected, and also yields well over 10% are possible.¹⁵ It should be noted that this high rate is one of the main factors for the tentative adoption and implementation of the stability measures in Austria.

On the fringes it should be mentioned that the Commission under the competitive examination did not assess the whole bundle of legal measures, but has only reviewed the IBSG and the FinStaG. Other proposed measures, such as the increased deposit-guarantee to SMEs, are basically not capable of causing serious competition-distorting effects.

In the fight against the financial turmoil the EU Commission by now has approved nearly 50 support- and stabilisation efforts of

¹¹ Consolidated version: Official Journal of the European Union C 83/1, 7.4.2009.

¹² Official Journal of the European Union C 10/2, 15.1.2009.

¹³ Dated 25.2.2009, published actually under URL http://ec.europa.eu/competition/sectors/financial_services/financial_crisis_news_en.html.

¹⁴ „K(2008) 8408 endgültig“, 9. 12. 2008.

¹⁵ „K(2008) 8408 endgültig“, 9. 12. 2008, marginal 95.

national governments. And still a couple of relevant national actions are considered for an examination by the EU Commission.¹⁶

III. OVERVIEW OF THE LEGAL MEASURES AGAINST THE FINANCIAL TURMOIL

The central elements of the legal measures for Austrian financial market stability happen to be the Act on Strengthening of the Interbank Market (IBSG) and the Act on the Financial Market Stability (FinStaG) whose protective purpose is „the public interest in the preservation of the economical stability“.¹⁷

To efficiently provide for this purpose, the Austrian legislator follows the core strategies of¹⁸

strengthening interbank liquidity (primarily by the IBSG),
offering opportunities for re-capitalisation (by the FinStaG) and
recovering the trust of private and institutional investors in the financial markets (primarily via adaption of the deposit-guarantee-system).

As an additional precaution and even as a beginning of a realignment of the legal framework the supervision of financial institutions is already strengthened.

Beside the issuance of the IBSG and the FinStaG amongst others the Banking Act, the Insurance Supervisory Act, the Stock Exchange Act, and the Act governing the Financial Market Authority have been adapted in 2008.¹⁹

In addition to these legal acts up to now the following federal regulations have been remitted:

Short selling prohibition order (“LVV”, federal law gazette II 2008/375), 2. LVV (federal law gazette II 2008/412), first change of the 2. LVV (federal law gazette II 2009/27) and second change of the 2. LVV (federal law gazette II 2009/121);

federal regulation on the definition of closer regulations concerning the conditions and requirements for measures under the FinStaG and

¹⁶ See EU-MEMO/09/174, 22.4.2009.

¹⁷ Committee Report 683 BlgNR 23. GP 2.

¹⁸ https://www.bmf.gv.at/Finanzmarkt/ManahmenpaketzurSic_9175/_start.htm.

¹⁹ See *Dallmann/Reich-Rohrwig*, Staatshilfe für Banken, *ecolex* 2008, 1076; further ZFR 2008/137, 239.

the IBSG (federal law gazette II 2008/382; in the following referred to as Regulation on Conditions).

IV. LIQUIDITY CARE (IBSG)

The Austrian legislator with the IBSG wants to ease the threat of a credit crunch. By this tribute is paid to the awareness that liquidity care and liquidity passing on have to be made substantially easier to preserve the Austrian economy from the stranglehold of a credit crunch.

1. Measures of liquidity care

The IBSG enables credit institutions, insurance companies and their legal special interest groups to found – as an owner – a company which provides for the organisation of liquidity exchange in the financial sector. A co-ownership of the state is not intended by law.

But the state may provide for general guarantees and concrete liabilities for this company.

The budget for the voluntary²⁰ measures under the IBSG amounts to a total of EUR 75 billion. This budget was not split on the single intended measures, it is available as a global budget. Interest and expenses will not be credited on the budget exploitation.²¹

2. Austrian Clearingbank AG

As such a “liquidity clearing institution” the Austrian Clearingbank AG (OeCAG) was established.²² Concerning liabilities of this special bank the Federal Minister for Finances has pronounced duty for a general liability buy-out of the state. This duty is actually limited by EUR 4 billion.²³ It is valid for a fixed period for all transactions which are entered into by the Clearingbank within the scope of its duties until 31st December 2009. Correspondingly the Clearingbank must fulfil special reporting duties according to the IBSG.

²⁰ § 1 Par 5 IBSG.

²¹ § 3 IBSG.

²² Details in *Dallmann/Reich-Rohrwig*, Staatshilfe für Banken, *ecolex* 2008, 1076; see also <http://www.clearingbank.at/>.

²³ See <http://www.clearingbank.at/de/haftungstraeger/seiten/default.aspx>.

For actions of the Clearingbank the following basic conditions are fixed by paragraph 1 subparagraph 2 and 3 of the IBSG:

Services have to be available to all beneficiaries under the same conditions; such beneficiaries are credit institutes according to the Banking Act and insurance companies according to the Insurance Supervisory Act;

the Clearingbank is allowed to assign another bank with conducting the services of the Clearingbank and

a market-compliant remuneration has to be settled for services of the Clearingbank.

3. Guarantees for debentures

In addition it is also provided for, that the Federal Minister for Finances can assume a state liability for so-called “other bond issues” of financial institutions according to the Banking Act.

These liabilities have to be assumed in accordance with the strict liability assumption rules of the FinStaG – which I will refer to in detail later. And the term of the relevant emissions may not exceed five years.

This option for refinancing banks and strengthening their liquidity care has already been used a couple of times successfully by the largest banks in Vienna.

This frame can expressly be used to provide issues of commercial papers, the single issue of loans and issues of loans within special programmes (e.g. MTN-programmes) with an irrevocable guarantee of the state.²⁴ The Clearingbank itself is currently planning the issuance of commercial papers with such a guarantee of the state.

4. Stipulation of a time limit of the IBSG

The IBSG by law expires on the 31. December 2009. This temporal limitation clearly expresses the character of this Act as a temporal crisis intervention. Measures taken up to this time, especially the assumption of liabilities as well as the founding up of the Clearingbank will prevail beyond this.

²⁴ See https://www.bmf.gv.at/Finanzmarkt/ManahmenpaketzurSic_9175/aBelebungdesInterba_9176/BundeshaftungfrWert_9183/_start.htm.

V. RE-CAPITALISATION (FINSTAG)

For the economic continuance as well as especially for the ability to be able to repulse an acquisition-attempt, the core capital rate of a financial institution is a central factor.²⁵

The financial turmoil internationally originated action demand in this area. And the not simultaneous support of financial institutions in Europe and in the USA by the local governments by measures which affected their core capital rate caused additional pressure in the international sphere.²⁶

Hence, it is the aim of the FinStaG to protect and strengthen the core capital rate of domestic banks as an essential indicator for their economic stability. The corresponding measures, which will be shown here in detail, can moreover serve as the central instruments for the realisation of the political promise to protect system relevant banks from failure if necessary.²⁷

1. Measures of re-capitalisation

In compliance with the relevant specifications of European law measures according to the FinStaG can be granted to credit institutes and insurance companies when this is necessary to prevent a substantial disturbance of the economic life, the national economic balance or a special protective demand of the Austrian national economy from occurring. The measures, which can even lead to nationalisation of financial institutions, will be shown in the following.

The adaptable budget frame for these measures amounts to EUR 15 billion. This sum may be increased by any amount of the IBSG-budget that has not been called for. By this a maximum budget for the FinStaG-measures of EUR 90 billion is possible.²⁸

²⁵ Critically *Wolfgang*, Was ist Eigenkapital der Banken in der Krise eigentlich wert?, ÖBA 2008, 847.

²⁶ See *Herbst*, Auf Einkaufstour in der Finanzmarktkrise, Die Presse 4. 11. 2008.

²⁷ See *BMF*, Ergebnisse des ECOFIN-Rates am 8. 10. 2008 in Luxemburg (2008).

²⁸ § 2 Par 4 FinStaG.

2. Instruments of the FinStaG

The instruments – on whose application the Federal Minister for Finance decides – are

debtor-sided and creditor-sided liability acquisitions (especially by guarantees and debt accession),

advances and supplies of capital resources,

the investor-sided participation in capital increases,

the acquisition of shares and

the acquisition of assets of a company by fusion.

Should the above named measures not be sufficient in a case and should it therefore be necessary for averting a heavy economical damage, the acquisition of a company through the state can be arranged by a federal regulation of the Federal Minister for Finance, ordering the expropriation.

Within the scope of the investor-sided participation in capital increases the federal state actually has already acquired so-called participation capital of the largest banks in Austria. This acquisition was regarded necessary to rise the core capital ratio of these banks to a level of round about 9 % (before this the ratio was between 7 and 8 %).

The prices for this form of the support besides a market-compliant remuneration are additional conditions concerning the dividend politics towards present owners to ensure an adequate use of the capital. On the other hand the participation capital does not go along with voting rights concerning the companies – so the state has become only what is called a silent partner.

The possibility of company acquisition and expropriation goes hand in hand with the duty of the government to ensure the immediate re-privatisation of the relevant companies. The corresponding legal provision is laid out merely to initiate the re-privatisation if the necessity in terms of FinStaG has become obsolete. Due to this the state could be forced to initiate the re-privatisation mistimed. The economic interests of the state here by law remained on the distance.

However, the legal materials refer to this topic and they state, that the re-privatisation also has to regard the economic interests of the Austrian state.²⁹ So in case the re-privatisation could perhaps be as profitable to

²⁹ Governmental Draft 682 BlgNR 23. GP 3.

the state as the one that followed the banking crisis in Sweden in the early 1990s.

3. Conditions and requirements for the re-capitalisation and also for emission liability according to the IBSG

Legal entities, which take up measures of re-capitalisation, have to fulfil corresponding conditions and requirements laid down in the FinStaG. The 10-points frame given in the law is concretised by the Regulation on Conditions issued by the Federal Minister for Finance. By virtue of reference this default is valid also for the liability acquisition for special issues according to the IBSG.

The legal frame expands from default for the business-political adjustments (e.g. granting of credit to SME, avoidance of distortions of competition) and the usage of the supplied capital over aspects pertaining to labour law (like the compensation of organs and the workplace protection) up to regulations concerning core capital equipment and dividend distribution.

With regard to the threat of a credit crunch high public attention is paid to the grant of credit to SME. Their situation is regarded as an especially significant indicator for the whole economic situation and the danger of a recession. Here in contrast to the reorganisation of the deposit-guarantee (which I will refer to later) the legislator abstained from a legal definition of the concept of the “SME” in favour to preserve flexibility. However, this also opens a certain legal uncertainty which up to now has not been reduced.

Concerning the conditions and requirements discussed intensively worldwide, which are established for the granting of support to banks and insurance companies in the current context, the Austrian Federal Minister for Finance issued the Regulation on Conditions. In case a legal entity receives support from the state, the Federal Minister for Finance has to safeguard that the adequate of these possible conditions and requirements will be imposed.

The requirements – which are even further concretised within the scope of actual capital granting³⁰ – are

³⁰ § 1 Par 2 of the Regulation on Conditions.

the adjustment of the business policy with regard to lastingness and possible reductions of risk-loaded positions;

specifications concerning the use of the capital granted; this with special focus on the grant of credit to SME and the mortgage loan allocation to households; however, restrictions given by the business object of the legal entity will be regarded;

the review of the compensation systems on incentive effects which tempt into immoderate risks; if necessary these systems have to be adjusted as far as it is allowed under civil law;

the adjustment of the compensation systems in general to an adequate level, especially concerning the sales of organs, company representatives and the top executives; in this context high attention is paid to aim arrangements;³¹

the review and adaptation of the company's core capital equipment;
the restriction of dividend-payment and other distributions to an adequate level;

the adequate consideration on a workplace protection;

the avoidance of distortions of competition;

and detailed default concerning the remunerations which have to be paid to the state for his performances.

Besides all this the Regulation on Conditions also orders for duties of information towards the Federal Minister for Finances. And there is also a regulation offering the possibility of formal obligations instead of contractual regulations about the conditions and requirements.

However, what is striking is the indefiniteness of the Regulation on Conditions. This becomes obvious by the frequent relation to the term of the "appropriateness of measures", while the legislator refuses to lend a face to the appropriateness.

Due to this these regulations in particular cases can be laid out as far or as closely as it is intended by the executive organ. This on the one hand opens constitutional-juridical questions. And on the other hand it creates the need for intensive discussions on the interpretation of the concept of the regulations in every single case, which definitely slows down the implementation of the legal measures against the financial turmoil. Up to now, this state of indefiniteness has not been given a change.

³¹ § 4 Par 3 of the Regulation on Conditions.

VI. COMMON ASPECTS OF THE IBSG AND THE FINSTAG

In the same manner in the IBSG as well as in the FinStaG it is envisaged, that the Federal Minister for Finance has to hand in a quarterly report on the execution and the effects of these Acts to the National Council.

Further it is common to both laws that the liabilities, which the state enters into towards a legal entity, without his approval may be transferred neither contractual, nor may be impounded. By this it is provided for that the state may remain in control over the fact towards whom he becomes a debtor.

VII. DEPOSIT-GUARANTEE

1. Recent changes

While in quiet periods of financial market it leads a shadowy existence, the deposit-guarantee in turbulent phases as the current experiences exceptional attention.

Particular importance will be given to it as a psychological moment. The absence of just such a deposit-guarantee in 1929 and the following period of economic depression drove the chain of bank failures in the U.S. As a consequence of a strong investor panic³² at that time approximately 5.000 Banks only in the United States collapsed. By today since the breakout of the crisis only slightly more than 60 U.S.-banks have failed.³³

In 2006 in the scope of a review of the Deposit-Guarantee-Directive³⁴ the EU Commission has stated that the security limit of EUR 20.000,00 was reasonable and sufficient.³⁵ But due to the effects and threats of the financial turmoil some European countries adapted their systems of deposit-guarantee to strengthen the trust of the consumers towards the banks. Also in Austria such a “confidence building measure”³⁶ was implemented.

³² See *Johler/Schroth* in *Dellinger*, BWG § 93 Rz 1 f; *Schroth*, Einlagensicherung (2003) 16.

³³ According to the data of the FDIC (Federal Deposit Insurance Corporation) published under <http://www.fdic.gov/bank/individual/failed/banklist.html> (28th May 2009).

³⁴ Directive 94/19/EG.

³⁵ Communication of the Commission KOM(2006) 729 vom 27. 11. 2006; additionally ZFR 2006/15, 54.

³⁶ Committee Report 683 BlgNR 23. GP 2.

The deposit-guarantee for individuals since 1st October 2008 provides for unlimited insurance. The deposit-guarantee for legal entities is still up to EUR 20,000 or 90% of deposits per depositor. However, an exception is made, for small and medium-sized enterprises (provided for that they meet the criteria for SME according to the Austrian Enterprise Code). For the deposits of the SME the safety limit is EUR 50.000,00.

Accordingly, the contributions to the deposit-guarantee institutions in the course of these amendments were adapted. Thus the maximum contribution was increased significantly from 0,93 % of the assessment base to 1,5 %. The applicable assessment base is the one of the measurement of a bank's credit risk.

In the case of the occurrence of a security case, the deposit-guarantee institution has to demand immediate proportional contributions by its members. This contribution, however, is limited to a maximum of EUR 50.000,00 per customer.³⁷

If the fund from contributions is not sufficient for the payment of this EUR 50.000,00-minimum, as a backup the institution has to provide for an additional debt financing.³⁸ Furthermore the Federal Minister for Finance has to be informed about the accumulated amount of the guaranteed deposits which exceed the limit of EUR 50.000. These deposits are directly guaranteed by the state and thus the Federal Minister for Finance has to provide for the appropriate funds.

For these measures EUR 10 billion have been budgeted.

2. Future of deposit-guarantee

In anticipation of the renewed European harmonization the unlimited deposit-guarantee for individuals in Austria is limited until the end of 2009.³⁹ From 1st January 2010 the limit of guaranteed deposits is EUR 100.000,00 per individual. The state will be liable for the difference between EUR 50.000,00 and EUR 100.000,00. The deposit-guarantee for legal entities will remain at the current level.

³⁷ § 93a Par 1 BWG.

³⁸ § 93a Par 3 BWG.

³⁹ § 103h BWG; see Committee Report 683 BlgNR 23. GP 4.

VIII. OTHER ACCOMPANYING MEASURES

Apart from the central components of the new legal framework, the Austrian legislator provides for the following accompanying measures.

1. Authorization of the Financial Market Authority to the order of a capital add-on

It has already been stated that the core capital equipment of a financial institution is central to its economic existence and the assessment of its creditworthiness.

To ensure the adequacy of core capital ratios in the domestic banks the legislator has redesigned the so-called capital add-on as a means of proactive regulatory intervention.⁴⁰

The Financial Market Authority is now entitled to order a specific increase in the core capital ratio of a bank if no reasonable limit is set to the banking- and credit risks of the banking institution and a short-term adjustment towards an adequate limitation of these risks is unlikely.

Such an order can be issued by the Financial Market Authority without the prior fixation of other authoritative measures.⁴¹

2. Empowerment of the Financial Market Authority on the regulation of short sales

The financial turmoil has once again uncovered that just in such market phases massive short selling may cause relevant interferences. In the spirit of functioning markets the Financial Market Authority through an adjustment of the Stock Exchange Act got a new regulation authorisation.

It may regulate short selling to avert adverse consequences. Each regulation is limited with a maximum of three months, but can be renewed. It must list the financial instruments covered by the measure. Corresponding derivatives are then covered by law. The FMA may by this provide that

naked short selling for these securities is prohibited, or alternatively that

⁴⁰ Governmental Draft 682 BlgNR 23. GP 5.

⁴¹ Governmental Draft 682 BlgNR 23. GP 5.

the short seller of listed securities has to make an announcement to the Financial Market Authority, or

the relevant positions have to be subject to a publication or that

the seller at the time of conclusion of the contract must demonstrably dispose of a certain percentage of the sold financial instruments.

Also this new regulation authorisation was already exercised in the shape of the LVV - extended by meantime a couple of times. Since 28th October 2008 naked short selling of the following instruments and their derivatives on the spot market is prohibited in Austria:

Erste Group Bank AG,

Raiffeisen International Bank-Holding AG,

UNIQA Versicherungen AG and

Wiener Städtische Versicherung AG Vienna Insurance Group.

The only exceptions are made for short term naked short selling positions of market makers or specialists.

The previously issued Regulation on Transmission of Suspicions concerning Short Selling (SSV)⁴² of the Austrian Financial Market Authority by this has been replaced as far as a symbolic effect was sought by this federal regulation. The SSV orders to hand in a transmission stating a suspected market manipulation, when short selling orders exceed a limit defined as a certain quota of shares issued by an emitter.

A violation of the short selling regulations will be sanctioned as an administrative offence with a fine of up to EUR 75.000,00. In addition, to prevent a circumvention of this prohibition, the late delivery of the securities into the settlement system is now sanctioned much stricter.⁴³

3. Reporting obligations of the Financial Market Authority regarding the FinStaG

If the Financial Market Authority is the suspicion that in relation to a financial institution the prerequisites for an application of the FinStaG are met, it must report this suspicion to the Federal Minister for Finance.

He then should provide for early action. The first objective will be a consultation of the affected institution. Unilateral measures, which

⁴² Federal law gazette II 2008/329.

⁴³ § 48t Par 1 Z 2 Stock Exchange Act.

basically could be taken in application of the FinStaG, would both from a political as well as from an economic point of view not be preferable.

4. Amendment of valuation rules in the Insurance Supervisory Act

Along with the adoption of the first legal measures against the financial turmoil the National Council issued the Resolution 115/E (23rd GP) on the equivalent valuation of bonds in the portfolio and in direct funds. Further the Accounting Regulatory Committee of the EU Commission decided to adapt the accounting standards IAS 39 and IFRS 7.⁴⁴ According to these the federal law gazette I 2008/138 amended the Insurance Supervisory Act.⁴⁵

Specifically, it is now possible to evaluate stakes and shares in affiliated companies by the moderate lower of cost or market principle.⁴⁶ This also applies to stakes and shares held in a special UCITS-fund, which is controlled by the insurance company.

5. Future-oriented investor-compensation⁴⁷

By Resolution 116/E (23rd GP) of the National Council the Federal Minister for Finance was invited to submit a concept for a future-oriented investor-compensation. This resolution was answered with the draft 10 / ME (24 GP) to amend the Securities Market Supervision Act and the Banking Act.

The aim of this latest element of the Austrian legal measures against the effects of the financial turmoil is to restructure the investor-compensation in a way to develop a four-pillar model. These four pillars consist of

an ex-ante financing of the system by annual contributions of the investment service providers,

temporary partial investing of these annual contributions into an insurance policy during in the introductory phase of the new system to reach an adequate coverage already from the beginning,

⁴⁴ Governmental Draft 682 BlgNR 23. GP 1.

⁴⁵ ZFR 2008/139, 242; see also *Korinek/Harreither*, Bewertungserleichterungen für Versicherungsunternehmen, *ecolex* 2008/1089.

⁴⁶ § 81 Par 2 Insurance Supervisory Act.

⁴⁷ See with details *Raschauer*, Anlegerentschädigung neu, *ZFR* 2009/2, 2.

special contributions in case of the occurrence of a compensation case and

the possibility of funding of the investor-compensation institution through state-guaranteed bonds.

In addition it is envisaged that a preventive system for early warning will be established. It will follow the example of the regulations for the deposit-guarantee, which has been formed according to the relevant guidelines of the EU.

IX. THE SPANISH REGULATIONS IN COMPARISON

1. Overview

Of all the countries in Middle-Europe, Spain is said to have been hit the most gravely by the financial turmoil.⁴⁸ According to my information especially the real estate sector and together with it the mortgage lenders were really hit seriously. The mortgage crisis doubtlessly affects the banking sector. Nevertheless from a global and even from a European point of view the situation of the financial sector in Spain doesn't seem to suffer from an existential crisis.

Similarly to all other European countries Spain has launched two major measures against the effects of the financial turmoil on the financial institutions:

the founding of a “Fund for Acquisition of Financial Assets from Financial Institutions” and
a guarantee scheme for credit institutions.

2. Fund for Acquisition of Financial Assets from Financial Institutions

Let me refer to the first of these two branches, the “Fund for Acquisition of Financial Assets from Financial Institutions”. When I first read this appellation, I instantly thought of Spain as the first European country installing a governmentally controlled “bad bank”.

But the Spanish acquisition fund is not working in this way. Whereas a bad bank would acquire the illiquid and risk carrying assets to relive a

⁴⁸ E.g. *iStockAnalyst*, The Financial Crisis in Spain (2009) <http://www.istockanalyst.com/article/viewarticlepaged/articleid/3210130/>.

bank's balance sheet, the acquisition fund is restricted to purchase only highly rated and secure assets. The aim of this measure is to support the banking system with fresh money in order to burst or at least ease the credit crunch, which in Spain is stronger pronounced than in many other European countries.

For this purpose the fund has a budget of EUR 30 billion, which can be expanded to EUR 50 billion if necessary.⁴⁹

The fund has two possibilities of acquisition of assets. The first one is to outright purchase the assets from financial institutions. To limit the fund's investment risks the assets acquired this way must have an AAA-rating. According to the Commission of the EU it is expected that the return for the state from this fund will be substantial.⁵⁰

The second possibility of acquisition is to enter into re-purchase agreements (REPOs) with the financial institutions. The banks then have to re-purchase the relevant assets at a pre-fixed price after a certain time. Assets purchased this way at least must have an AA-rating.

This fund's activities in addition will be subject to public audit and parliamentary control. The acquisition activities are currently notified to the Commission of the EU for a duration of six months (which means until the middle of 2009). After this period this measure can be re-notified.

In addition it is provided for that the fund's assets are properly diversified by legal regulations. E.g. the fund may not invest more than 10 % of its assets in securities of the same issuer.

3. Guarantee Scheme for Credit Institutions

The second regulatory measure is the guarantee scheme for credit institutions.⁵¹ Spain has set out a budget of EUR 100 billion, which under special circumstances may be exceeded up to EUR 200 billion, to cover the issuance of notes, bonds and obligations admitted to the official market in Spain. This measure is only accessible to currently solvent

⁴⁹ *de Valle/Comin*, Spain, in *Eder/Hörl/Winkler* (Ed.), *Finanzmarktstabilisierung in Europa/Stabilising the Financial Markets in Europe* (2008) 479 ff.

⁵⁰ IP/08/1630, 4. November 2008; State aid decision NN54/A/2008 – Spain, public version is not yet available.

⁵¹ IP/08/2049, 23. December 2008; State aid decision NN54/B/2008 – Spain [C(2008) 8960 final corr.; C(2009) 3069 final; C(2009)2746 final].

banks which have at least a share of 1/1000 of the Spanish credit market (according to the information provided for by the Bank of Spain).

The guarantees provided for under this measure follow these requirements:⁵²

- the guarantees will be granted irrevocably and unconditionally;
- a waiver of the beneficium excussionis is expressed (payment even if the principal is still solvent);
- the guarantee will cover the principal of the credit and the interest;
- a market oriented premium will be charged for each guarantee;
- on the date of the guarantee the guarantor can be called for both the principal and the interest; and
- the guarantee will have no legal force, if the characteristics of the underlying financial instruments are modified, unless the guarantor gives a previous written consent.

Furthermore the maximum term of the securities guaranteed may be five years.

The framework of this guarantee scheme is currently limited to 31. December 2009. Also here the character of a short termed crisis intervention of the legal measures is shown.

4. Deposit-Guarantee and Investor-Compensation Scheme

Another EUR 5 billion are budgeted to enhance the deposit-guarantee and the investor-compensation. The former amount guaranteed for was EUR 20.000,00 – since the end of 2008 the new amount guaranteed for is set to EUR 100.000,00, the same amount which will be applicable in Austria from 1st January 2010.

5. Conclusion

Concluding it can be remarked, that Spain as well as most of the other European countries, in the course of the financial turmoil has established legal measures to provide an improvement of the liquidity of financial institutions to prevent or ease a credit crunch. The measures are rather similar to the Austrian ones, as well as the intentions are.

⁵² AQUI FALTA TEXTO

Still it is striking that Spain has not provided for regulations countering the possibility of a failure of system-relevant financial institutions. Especially there is no preparative regulation for the case the crisis should become worse, like e.g. the possibility of expropriation of financial institutions. So Spain is – besides the strengthening of the deposit-guarantee – actually focussing only on measures providing for liquidity. This suggests that the spanish legislator does not expect any scenarios threatening the economic exisatance of system-relevant financial institutions in Spain.

This – I assume – pays tribute to the fact that due to the hitherto strictness of the supervising authorities the Spanish banks are still impressively solvent and stable.

X. INTERNATIONAL REGULATORY OUTLOOK AFTER THE FINANCIAL TURMOIL

At international level several efforts are projected in relation to the financial turmoil, to strengthen the regulation and supervision of the financial market and its institutions.⁵³

The basic tendencies point towards the regulation of financial markets in way to reduce speculative investing and transactions and to lift the supervision of market participants to an international level. These plans currently are merely diffuse political demands. Especially the intention to form a strong international supervision of market participants is yet an interesting suggestion but not surprisingly due to uncounted negotiations that are still to come the realisation of this project is a long time coming.

The most concrete actions that can be spotted currently are those concerning rating agencies, deposit-guarantee and tax havens.

1. Rating Agencies

Rating agencies are being suspected as one major culprit of the financial turmoil. On the one hand the offer ratings of enterprises and financial instruments which are the basis for an uncounted number

⁵³ Concerning this see *Nowotny*, Aktuelle Perspektiven des internationalen Bankensystems, ÖBA 2008, 687 (690 f.); *Follak*, Regulatory Aspects of the Recent Turmoil in the Financial Markets, ÖBA 2008, 533.

of economic decisions, including loan granting decisions and even governmental investment decisions.

On the other hand they offer the service of advice to all enterprises – including advice on how ratings can be influenced positively. To prevent rating agencies from conflicts of interest, in the future the agencies will have to decide whether they want to offer public ratings or they want to offer the service of advice. Additionally a stricter supervision of the business of the rating agencies by all relevant national financial market authorities is planned.

These provisions and further details are supposed to become subject to a European regulation soon.

2. Deposit-Guarantee

In line with the existing European harmony in this area at the European level an adaptation of the rules for deposit-guarantee is actually being worked out. A first draft for these adjustments and harmonization can be seen in the suggestion of “COM (2008) 661 final of 15 10. 2008”. The main focus will be on raising the minimum deposit-guarantee level from EUR 20.000 to EUR 100.000 per customer – in case of natural [physical] persons – and on a new definition of the deposit-guarantee in favour of legal entities.

3. Tax Havens

Another measure for handling the financial turmoil and for re-regulating the international financial markets is dealing more intensively with so called tax havens. In Europe for example Andorra, the principality of Liechtenstein and Switzerland are regarded as such tax havens. The aim of the international efforts is to open these tax havens in the expectation of relevant capital- and tax repatriations.

Therefore the political pressure on various countries, including Austria, was enhanced to lower their standards of banking secrecy and to intensify the tax information exchange. These actions actually are successful, which lead to a new progress report of the OECD, in which it states that there are no tax havens anymore worldwide – which means that the black list of tax havens is empty now. The remaining grey list only names those countries, which will soon implement the OECD-

standards concerning tax information exchange towards at least 12 other countries.

XI. CONCLUDING REMARK

The Austrian and the Spanish legal measures against the effects of the financial turmoil – as well as many other similar decisions in the EU – basically prove to be suitable to hold back rampant effects of the financial turmoil.

Especially in light of the persisting stability and solvency of Austrian banks, it is understandable that the offered measures based on the new rules so far have been drawn on only in a few cases.

Conscious of this stability and solvency, the legislator has created the legal framework shown here not as a measure to escape from a crisis but rather as a framework to maintain and preserve the existing stability of the domestic banking and insurance sector also against increasing pressure.

Finally the comparison of Austrian and Spanish measures shows, that the challenges and the governmental reactions in both our countries are very similar. What is striking is the fact that Asturias budget for the relevant measures is EUR 100 billion, whereas Spain is budgeting a maximum of EUR 255 billion – just about two and a half times the Austrian budget. In respect of the size of the Spanish economy it might be necessary to further exceed the relevant budget in Spain. But this only affects the budgetary part; the measures themselves can be regarded as the accurate ones. Although the details of the regulation differ, the basic intentions are re-capitalisation of market participants and strengthening the interbank market to prevent or ease a credit crunch in Austria as well as in Spain. Behind these intentions there's in both our countries the urgent need for the general trust in the financial sector to be restored.

This trust has been risked by the financial institutions themselves. And now our governments have to join in to restore this trust. But the recent governmental and industrial actions and the corresponding reactions of the markets give hope that the turnaround after the financial turmoil is actually happening right now.

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