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Study on the feasibility of reducing obstacles to the transfer of assets within a cross border banking group during a financial crisis

National Report
Austria

By

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Part I - National regulation

Please provide a presentation of your national regulation (law, cases,...) and attach it as Annex A and B to this document :

- the relevant legal texts and cases in English (of summarized in English).

The primary statutes are the Austrian Banking Act (*Bankwesengesetz – BWG*) and the regulations handed down thereunder, in particular the Solvency Regulation (*Solvabilitätsverordnung – SolvaV*). Of less importance in the present context are the Securities Supervision Act (*Wertpapieraufsichtsgesetz 2007 – WAG 2007*) and Stock Exchange Act (*Börsegesetz – BörseG*), relevant in particular as to rules against insider trading and market manipulation (which are applicable to other market participants as well).

Austrian credit institution may be established in the form of the joint stock company (*Aktiengesellschaft – AG*), company with limited liability (*Gesellschaft mit beschränkter Haftung – GmbH*), savings bank (*Sparkasse*) or cooperative (*Genossenschaft*). The relevant statutes from a company law perspective are the Austrian Stock Corporation Act (*Aktiengesetz – AktG*), the Austrian Limited Liability Companies Act (*GmbH-Gesetz – GmbHG*), the Savings Banks Act (*Sparkassengesetz – SpG*) and the Austrian Cooperative Act (*Genossenschaftsgesetz – GenG*). The responses to the questions in this questionnaire typically apply to credit institutions established in the form of an AG or GmbH.

We enclose an English translation of the BWG, the Solvency Regulation, the AktG and the GmbHG as Annex A-B to this document. The other statutes may only be obtained in German language.

- If possible, examples of transfer of assets agreements.

For each question, please first consider:

- your national Civil Law, Company Law, and Insolvency Law
- and on a second time explain if there are specific regulations for Banking groups
- on a third time explain if there are specific regulations for cross-border transfer of assets.

1. Summary

- Generally speaking, is the transfer of assets allowed (could you please precise briefly under which conditions):

In crisis situation:

- from parent to subsidiary

Civil law: No specific rules apply (for general rules applicable see the respective section in relation to transactions in going concern situations below).

Company law: On 1 January 2004 an Austrian Act on Equity Replacements (*Eigenkapitalersatz-Gesetz – EKEG*) entered into force. The EKEG contains detailed provisions regarding equity replacing shareholder loans. It in particular stipulates

that a loan granted by a shareholder in a financial crises as defined in section 2 EKEG is deemed to be equity replacing. A financial crises is defined to be if (i) the company is insolvent (*zahlungsunfähig*) within the meaning of section 66 of the Austrian Bankruptcy Code (*Konkursordnung – KO*), or (ii) the company is over-indebted (*überschuldet*) within the meaning of section 67 KO, or (iii) the quota of own funds (*Eigenmittelquote*) according to section 23 of the Business Reorganization Act (*Unternehmensreorganisationsgesetz – URG*) of the Company is less than 8% and its fictitious duration of debt redemption (*fiktive Schuldentilgungsdauer*) according to section 24 URG is more than 15 years .

A "shareholder" within the meaning of the EKEG is defined to be (i) a shareholder with controlling participation, (ii) a shareholder with a participation of at least 25%, and (iii) any person not holding a participation in the company but having a controlling influence (*beherrschenden Einfluss*) with regard to the company (section 5(1) EKEG). Following this, a controlling influence of a person not being a shareholder exists if such person has factual material influence on important decisions of the management of the company and exercises such influence as if it were a shareholder having the majority of the votes. Information and control rights typically agreed in loan agreements do not create such "shareholder" position (this is explicitly provided in section 5 para 1 no 3 EKEG).

Furthermore, a person granting a loan/credit to a company is to be considered as shareholder if (i) it holds a participation or other rights in a person other than the company granted the loan/credit which has a dominant (*beherrschenden*) influence regarding the company granted the loan/credit (indirect controlling participation), or (ii) it indirectly holds a participation in the company granted the loan/credit of at

least 33%, or (iii) it holds a controlling direct or indirect participation in a company which holds a participation of at least 25% in the company granted the loan/credit (section 8 EKEG).

A company tax of 1 %, based on the credit amount, could be triggered, and any interest payments under the loan would be treated as dividends. In bankruptcy, the loan(s) would be treated as equity and thus be subordinated to other debt.

- from subsidiary to parent

Civil law: No specific rules apply (for general rules applicable see the respective section in relation to transactions in going concern situations below).

Company law: A strict system of capital maintenance rules applies to Austrian companies (joint stock companies or companies with limited liability). The concept is based on the idea that the entire set of assets of the company should be protected on behalf of the company's creditors. This goal is reached by a set of capital maintenance rules, regulating in detail the pay-in obligations of the founders, capital increases as well as capital decreases and restricting the possibility of any direct or indirect distribution to shareholders other than by profit distribution (or permissible arm's length transactions with related parties).

Pursuant to section 52 AktG and section 82 GmbHG the entire set of corporate assets, even those exceeding the stated capital, falls under the capital maintenance rules. There is no legal basis for distributions to the shareholders on behalf of the private company except for explicitly specified circumstances. The most important of these exceptions is the right of the shareholders to receive dividend payments which are restricted to the amount of net

profits as shown in the approved annual financial statements and not excluded from distribution by law or the articles of association.

There is no whitewash procedure available in Austria. According to the Austrian Supreme Court and part of Austrian legal writing the violation of Austrian capital maintenance rules may be justified if the transaction in question is in the interest of the company (within the scope of the arms' length principle). Except for that, shareholders may only receive funds / assets from the subsidiary in the following scenarios: (i) Decrease of share capital (formal procedure to be followed); (ii) consideration in arm's length transactions, (iii) distribution of liquidation surplus.

Transactions violating the rules on the protection of the company's assets, as described above, are at risk of being null and void. Following this, only downstream guarantees/assumptions of liabilities or permissible arm's length transactions would be available in most circumstances.

- from subsidiary to another subsidiary

Civil law: No specific rules apply (for general rules applicable see the respective section in relation to transactions in going concern situations below).

Company law: The capital maintenance rules do not only apply to transactions between a subsidiary and its parent but also to transactions between sister companies or related parties. Up-stream and cross-stream guarantees/assumption of liabilities are at risk of being void under Austrian capital maintenance rules.

In going concern situations:

- from parent to subsidiary

- **Civil Law: According to Austrian law an agreement is valid upon the mutual understanding between the contracting parties as regards the essential parts of the agreement. There is generally no obligation to use a particular form for the conclusion of an agreement. There are, however, a few exceptions to this general rule. Amongst others, suretyships (*Bürgschaften*) and guarantees (*Garantien*) must be made in writing in order to be enforceable. For clarification purposes kindly note that these rules do not apply to liabilities assumed by credit institutions in the course of their business activities (see section 1 subsection 6 BWG).**

- **Additional legal formalities (for example that the contract must be in writing, signed in any particular way, as a deed and/or notarized as well as the need to give notice or register at a public office) may be required under specific circumstances. Besides the general requirement that a contract must actually be possible (*möglich*) a contract must also be permissible (*erlaubt*) under Austrian law. Following this general principle of Austrian law a contract may be null and void if it violates a legal provision or public morals (*gute Sitten*). However, a contract will be null and void only to the extent that the nature of a particular legal provision requires that contracts of that type to be declared void. There are numerous legal restrictions, the violation of which has legal consequences other than the nullity of a contract. In general, public morals are violated in the case of serious interference with legally protected interests or by a substantial imbalance of interests.**

- **Company law: The rules on equity replacing loans only apply when a loan is granted by the parent to the subsidiary and the subsidiary is in a crises situation (see above).**

- from subsidiary to parent
- **Civil Law: No specific rules apply (for general rules applicable see the respective section in relation to transactions in going concern situations above).**
- **Company law: The Austrian capital maintenance rules are applicable both in going concern situations and in crises situations (see above).**

Are there specific regulations for cross-border transfer of assets?

No (within the EEA). To other transactions the Foreign Exchange Act (*Devisengesetz - DevG*) or the Foreign Trade Act (*Außenhandelsgesetz 2005 - AußHG 2005*) may apply.

- Are there any specific rules in Banking Law in relation to transfer of assets?

- from parent to subsidiary

Depending on the specific transfer certain information/consent requirements may apply (see below).

- from subsidiary to parent

Depending on the specific transfer certain information/consent requirements may apply (see below).

- from subsidiary to another subsidiary

Depending on the specific transfer certain information/consent requirements may apply (see below).

- Are there specific regulations for cross-border transfer of assets?

Depending on the specific transfer certain information/consent requirements may apply (see below). In transactions with third

parties (outside the EEA) the Foreign Exchange Act (*Devisengesetz* - *DevG*) or similar laws may apply.

2. Scope

- Does the notion of company groups exist?
 - Generally speaking in corporate Law? (If it exists, please give a definition, conditions and the main applications?)

Yes, the notion of a company group (*Konzern*) exists under Austrian corporate law (see especially section 15 Austrian Stock Corporation Act).

A group of companies is defined as a group of legally independent enterprises that are, for business reasons, integrated by common control. The control could either be established by participations or by other means providing direct or indirect influence over other enterprises.

The main applications of the corporate group concept relates to the financial statements, the take-over regime, corporate governance laws (in particular, regarding the supervisory board, squeeze outs, reporting of certain information, etc), or the representation vis-à-vis employees. Compared to Germany the Austrian rules regarding a group of companies are not as conclusive and are not provided for in one general frame work of provisions.

- Is there in your national law a definition of "group interest" that specifically allows or facilitates intra-group transfer of assets?

Generally, Austrian tax law does not have a definition of group interest allowing (or facilitating) intra-group transfers of assets.

- Are there specific tax issues that need to be addressed in intra-group transfers of assets?

An intra-group transfer of assets has to be executed in accordance with the arm's-length-principle in order to avoid negative corporate and tax law consequences, e.g., disguised repayment of capital or deemed profit distributions (or disguised contributions or deemed contributions).

In equity transaction capital duty of 1% may have to be taken into account. In the context of financing transactions Austrian stamp duty may apply in the amount of 0.8% of the loan amount (in case of revolving credit facilities or credit facilities with a maturity of more than 5 years a rate of 1.5% will apply).

- Are there specific regulations for banking groups?

For banks the general maintenance of regulatory capital has to be achieved within the corporate group. Group for those purposes is defined in section 30 BWG. Pursuant to section 30 BWG a group of credit institutions is deemed to exist in cases where a superordinate institution (credit institution or financial holding company) incorporated in Austria, in relation to one or more credit institutions, financial institutions, investment firms or ancillary services undertaking (subordinate institutions) incorporated in Austria or abroad,

(i) holds a majority share directly or indirectly;

(ii) holds a majority of the voting rights in the company;

(iii) has the right to appoint or dismiss a majority of the members of the administrative, management or supervisory body;

(iv) has the right to exercise a controlling influence;

(v) actually exercises a controlling influence;

(vi) on the basis of a contract with one or more members, has the right to make decisions as to how members' voting rights are to be exercised in the appointment or dismissal of the majority of members of the management or supervisory body where necessary in order to attain a majority of all votes; or

(vii) directly or indirectly holds at least 20% of the voting rights or capital in the subordinate institution and this participation is managed by a group undertaking jointly with one or more undertakings which do not belong to the group of credit institutions.

If more than 10 % are held but the respective company is part of the group according to section 30 BWG an election is possible to consolidate proportionately.

Please specify any relevant information relating to intra-group transfer of assets that has not been dealt with in the previous questions and that would be useful for the study.

3. Conditions and sanctions

a) Authorization

- Do decisions to transfer assets have to follow specific approval procedures such as the approval of the board of directors or the transferor or transferee or the approval of shareholders obtained through a special meeting of shareholders?

Whether or not a special approval procedure has to be followed in respect of the transfer of assets depends on the specific transfer and the articles of association of the relevant company. Depending on the size of the transfer (or the transfers) and whether or not the transfer is considered an extraordinary transaction, the involvement of the supervisory board or even of the shareholders might be required.

- Do transfers of assets need to be approved by other third parties or supervisory authorities?

Depending on the assets a notification of supervisory authorities might be required, e.g., if participations are transferred leading to a change of substantial holding interests. In addition, capital markets rules might require a notification procedure, e.g., ad-hoc filings, if insider information is at stake and certain requirements are fulfilled.

- Do transfers of assets have to be notified to other third parties or supervisory bodies or published?

Under capital markets rules or competition law certain information might have to be published upon the transfer of assets.

- Would a specific agreement incorporating the terms and conditions of the transfer between transferor and transferee and executed by their authorized representative be required?

In light of the arm's-length-principle such specific agreement should be entered into in order to be able to prove the principle has been fulfilled.

- Are there differences between transfers in going concern situations / transfers in crisis situations?

Generally, there might be differences, e.g., in a crisis certain transfers the consideration due to the transferor might not be received in total due to insolvency provisions, or a transfer might be considered partially a loan that is not repayable if extended to a related person in a crisis.

b) Counterpart for the asset transfer

- Is the transfer of assets treated differently by your national Law :
 - if it respects the arm's length principle/normal market conditions dealing (please explain what is considered as arm's length)

A transfer of asset generally has to comply with the arm's length principle. If it does not negative corporate and tax law consequences would follow. Dealing at market conditions would, in normal circumstances, be considered in accordance with the arm's length principle; note: exceptions might be that in case a large shareholding is transferred, the market price does not reflect a control (or substantial stake) premium.

- if it is agreed under preferential conditions or disadvantageous to the transferee but advantageous to transferor and the group as a whole

A transfer that is preferential or disadvantageous to one of the parties involved triggers the respective corporate and tax law consequences described above. It would not be accepted in light of the benefit to other group members.

- if there is no counterpart/compensation for the transfer

The consequence would be a deemed distribution or a disguised contribution.

- if the transfer is included in a loan or credit agreement between transferor and transferee.

In that case the loan agreement would have to be tested in line with the arm's length principle, i.e. whether interest rates are adequate, the securities provided for, etc.

- Are there differences between transfers in going concern situations / transfers in crisis situations?

Yes, there could be differences (see above).

a) Compulsory counterparts and guarantees

- Is there any compulsory counterpart or guarantee that transferee should provide to transferor?

No

Please specify any other relevant information relating to the conditions to be met for a transfer of asset to be authorized that has not been dealt with in the previous question and that would be useful for the study.

b) Financial capacities of the transferor and the transferee

- Does the decision to transfer have to comply with conditions relating to the financial capacities/health of the transferor/transferee?

We assume that any transfer of assets will not reach amounts jeopardizing (threatening) the existence of the transferor. Austrian law does not consider the granting of a loan to a company in a crisis to be contrary to public policy or similar legal concepts if it can be seen as a restructuring loan granted after a careful and competent assessment of the circumstances at hand. Only under specific circumstances can lenders/shareholders be held liable for

third party damages incurred as a result of a delay in filing for insolvency.

A bridging loan to a company in crisis will generally not be considered contrary to Austrian law. Such a loan will not result in the lender/shareholder being held liable if it is made in order to prevent illiquidity during the period required for the preparation and examination of restructuring. However, the purpose of such a loan must only be to provide bridging finance during the time required to assess the feasibility of a restructuring of the company.

The rules on equity replacing shareholder loans may apply in circumstances where such loan is granted by a shareholder in a financial crises (see above).

- What are the consequences when the transfer has occurred but those conditions have not been respected?

A loan granted only to postpone insolvency and to enable the lender/shareholder to improve its own position in comparison with other creditors could result in liability for the lender/shareholder.

- Are there any conditions relating to the consequences of the transfer on the financial situation of the group?

Please specify.

- What is the rank of claim of the transferor in case of insolvency proceedings of the transferee? Please specify any other relevant information relating to Financial capacities of the transferor and the transferee that has not been dealt with in the previous question and that would be useful for the study

In a financial crisis, equity replacing shareholder loans may not be repaid (the same applies to interest to be paid for the granting of such loans). Security granted in connection with such loans may

not be enforced. In an insolvency situation the respective claims of the lender would be subordinated and treated like equity.

Creditors who do not fall within the above category are, generally speaking, unsecured creditors, unless such creditor is a secured creditor or has a right to segregation (*Aussonderungsrecht*). The assets of the estate which remain after the claims of the creditors of the estate have been completely satisfied are distributed pro rata among all insolvency creditors.

- Are there differences between transfers in going concern situations / transfers in crisis situations?

Yes, there could be differences (see above). For instance, the provisions in relation to equity replacing loans only apply to a loan (or credit) granted to an Austrian company in a financial crisis of such company.

c) Information and transparency

- Does specific information have to be communicated on the transfer to :
 - supervisors

There might be information/consent requirements depending on the assets to be transferred or structure of the transaction. Amongst others, a notification of the FMA is required in case that a person or group of persons which is not an Austrian credit institution intends to acquire or dispose of its (direct or indirect) shareholding in an Austrian credit institution and the limits of 10% (qualifying participation), 20%, 33% or 50% of the voting rights or capital of the credit institution are reached, exceeded or fallen below. A formal regulatory approval will be required if the (direct or indirect) shareholder is an Austrian credit institution.

Certain restructurings (e.g. a merger, de-merger or amalgamation of credit institutions) also require a formal regulatory approval.

Credit institutions must also immediately notify (in writing) the FMA, inter alia, (i) in circumstances which make it clear to a prudent director that the ability to fulfill obligations is endangered as well as the occurrence of insolvency or overindebtedness, (ii) any failure to comply with the solvency standards prescribed by the BWG, any regulations or administrative rulings for a duration of more than one month, (iii) the reduction of eligible capital due to principal and interest payments on short-term subordinated capital to less than 120% of the minimum capital requirement (pursuant to section 22(1) BWG).

- Shareholders

Depending on the assets transferred certain information requirements might be have to be observed (see above).

- employees

The Austrian Labour Constitution Act (*Arbeitsverfassungsgesetz - ArbVG*) contains general information requirements in relation to the financial and economic situation of the company.

- third parties (specify who can have an access to this information and how)

Under capital markets rules or competition law certain information might have to be provided to the respective supervisory authorities.

- If yes should this information be communicated before the transfer or after it :

- supervisors

Mainly depends on the information/consent requirements triggered.

- shareholders

Corporate approvals should be obtained before transfer of assets.

- employees

N/a.

- third parties (specify who can have an access to this information and how)

N/a.

- Please specify any other relevant information relating to Information and transparency that has not been dealt with in the previous question and that would be useful for the study.

d) Sanctions

- When a transfer of assets has occurred what are the sanctions (civil liability of the manager or the supervisory authorities, nullity, criminal penalty, ...) that may be incurred :

- under Insolvency Law

Transactions entered into prior to the filing of insolvency proceedings may be subject to insolvency avoidance rules within certain hardening periods. Within these hardening periods, a transaction may be declared void and

unenforceable if it could be considered detrimental to other insolvency creditors. Any of the debtor's assets of which the estate has been deprived by means of a voidable transaction are to be returned to the estate.

- under Civil Law

Directors who enter into new agreements on behalf of the company which the company is unlikely to be able to fulfil, without informing the other party of the company's financial situation, risk being held personally liable for any damages arising. Entering into any such agreement may also constitute a criminal offence (see below). Generally speaking, the managing directors are obliged to take certain measures when becoming aware that the company is unable to pay its debt when due (*zahlungsunfähig*) or overindebted (*überschuldet*). Failure to do so can result in personal liability for any damages or outstanding payments of the company.

Further, liability of the directors towards creditors may result from negligently causing the company's insolvency through making excessive expenditures, granting or taking of excessive credit or carelessly using such credit, or by concluding high risk transactions which do not form part of the ordinary course of the company's business or are in sharp contrast with the means available (see below).

The managing directors are obliged to file for a reorganisation procedure pursuant to the Austrian Reorganisation Act (*Unternehmensreorganisationsgesetz – URG*) if they, inter alia, received an auditor's report pursuant to which the quota of own funds (*Eigenmittelquote*) according to section 23 URG of the Company is less than 8% and its fictitious duration of debt redemption (*fiktive Schuldentilgungsdauer*) according to section 24 URG is more

than 15 years. Failure to do so may result in a personal liability of the managing directors (and/or the shareholders, if they instructed the managing directors not to file for a reorganisation procedure).

- under Company Law

Generally speaking, managing directors are obligated towards the company to exercise the care and diligence of a prudent businessman in performing their tasks. If they violate this obligation, they are jointly and severally liable towards the company for any damage resulting therefrom. In particular, they are obliged to ascertain whether the company has already lost half of its share capital or whether grounds exist for opening insolvency proceedings. Failure to do this may lead to personal civil liability for the directors and constitutes a criminal offence (see also below).

In relation to up-stream and cross-stream transactions the directors may be liable for payments made to shareholders in contravention of capital maintenance rules under company law. To avoid liability risks for its directors, a limited company (GmbH) will normally require documentation to be drafted so as to limit its obligations in accordance with Austrian capital maintenance rules.

In general a shareholder of a limited liability company will not be liable for the obligations of the company. However, in very exceptional circumstances a piercing of the corporate veil (*Durchgriffshaftung*) has been recognized under Austrian law. Briefly, shareholder liability may be asserted when the assets of the company and a shareholder are commingled (*Vermögensvermischung*). A piercing of the corporate veil has also been discussed in connection with situations of gross under-capitalization (*Unterkapitalisierung*), i.e. when the company's registered capital was evidently insufficient to

meet its financial obligations. Other cases which may lead to a piercing of the corporate veil include cases in which the controlling shareholder had exercised undue influence on the management of the company (*Missbrauch der Organisationsgewalt*) or had, from a factual side, taken over the management of the company (*faktische Geschäftsführung*).

- under Banking Law

A breach of the provisions of the BWG may be subject to an administrative fine of up to EUR 50,000. The FMA may also impose certain administrative measures in case of non-compliance with the provisions of the BWG.

- under Criminal Law

Under exceptional circumstances the transfer of assets may lead to a criminal liability of the directors of the company. Several provisions may be applicable in this regard. We have focused on those provisions which have a particular relevance in the insolvency situation of a company.

According to Section 156(1) of the Austrian Criminal Code (*Strafgesetzbuch – StGB*) intentional fraudulent bankruptcy (*betrügerische Krida*) is sanctioned with six months to ten years imprisonment. Intentional fraudulent bankruptcy arises if someone intentionally (i) conceals, evades, sells or damages part of the assets of the debtor, or (ii) fosters the pretence of or acknowledges a (non-existent) debt, or (iii) in some other way reduces or pretends to reduce one's assets, and as a consequence at least one creditor suffers a disadvantage.

According to Section 158 StGB, intentional preference of a creditor (*Begünstigung eines Gläubigers*) is sanctioned with

a maximum of two years imprisonment. There is an intentional preference of a creditor if the debtor gives preferential treatment to one of its creditors after bankruptcy has occurred and, if the debtor knows of this fact and at least one creditor suffers a disadvantage.

According to Section 159 StGB, gross negligence leading to the insolvency and the gross negligent disregard of creditors' interests are sanctioned by imprisonment of up to two years. Such actions include (i) destroying, damaging, making unusable, squandering or giving away an important part of the assets, (ii) spending excessive amounts of money in speculative ventures or in high risk business ventures which are not related to the regular scope of business, (iii) incurring excessive costs despite financial circumstances or business capacity, (iv) failing to keep the books or business documents in such way that gaining an overview of the actual financial and profit situation is very difficult, or failing to take other agreed and necessary controlling mechanisms which make it possible to obtain such overview, (v) failing to prepare mandatory annual reports or preparing such reports late or in such way that an overview of the actual financial and profit situation is very difficult.

Criminal liability is not limited to the members of a company's management but also extends to other persons if such persons are involved in such actions. Members of the supervisory board or shareholders may be held liable if they have exercised controlling influence over the company and were aware of actions taken by the management, or if they had approved such actions, or if are aware o such actions and failed to prevent them.

- Other

For instance, theft (*Diebstahl*), fraud (*Betrug*), breach of trust (*Untreue*).

e) Third parties

▪ **Supervisory authorities**

- What is the role of the supervisory authorities in case of a transfer of assets (right to be informed, have to give an authorization)? Please distinguish the home/host supervisory authorities.

Within the same group of credit institutions the large lending limits pursuant to section 27 BWG may not apply due to zero risk weighting (and if fully consolidated and based in Austria lendings within the same group of credit institution may also attract zero risk weighting for solvency purposes).

For further possible notification/information requirements see also above at C. (Information and transparency).

- Are there any conditions or consequences relating to solvency ratios (implementation of Basel II notably)?

Banks need to have sufficient own funds at any time. The capital adequacy requirements apply both on a solo and on a consolidated level (if a bank is also the holding of a group of credit institutions). Generally speaking, total regulatory equity needs to be at least 8 per cent of the total of risk weighted assets and off balance sheet items. Austrian law follows applicable EU law in this respect.

- Are there differences between transfers in going concern situations / transfers in crisis situations?

Yes, there could be differences (see above).

- Please specify any relevant information relating to the supervisory authorities that has not been dealt with in the previous questions and that would be useful for the study

- **Minority shareholders**
 - Does a minority shareholder of the transferor have any right concerning the transfer:

- before the transfer or the decision to transfer (e.g. right of opposition, right of approval, right to be informed...),

Whether or not a special information (or right of opposition) procedure has to be followed in respect of the transfer of assets depends on the specific transfer and the articles of association of the relevant company (see above).

- after the transfer (e.g. Right to have the transfer annulled when transfer disadvantageous to transferor, request for an audit...).

Whether or not a special information (or right of opposition) procedure has to be followed in respect of the transfer of assets depends on the specific transfer and the articles of association of the relevant company (see above).

- **Creditors**
 - Do Creditors of the transferor have any rights concerning the transfer :

- before the transfer or the decision to transfer (e.g. Right of opposition, acceleration rights, or right of approval, right to be informed...),

No specific rules apply to a decision to transfer assets.

- after the transfer (right to have the transfer annulled for fraud when transfer disadvantageous to transferor and aimed at fleecing creditors...)

Yes, there could be certain rights (see above).

- **Employees**

- Do Employees of the transferor have any right concerning the transfer :

- before the transfer or the decision to transfer (eg. Right of opposition, acceleration rights, or right of approval, right to be informed...).

No.

- after the transfer (right to have the transfer annulled when transfer disadvantageous to transferor and likely to result in redundancies...).

Depending on the assets transferred (such rights do, generally speaking, not apply to financial funds as described herein).

- **Deposit holders**

- Regarding the directive 94/19: Who provides the deposit guarantee (the government, national bank, insurers...)? For which amount?

The Austrian deposit guarantee scheme (DGS) does not provide for funding arrangements such as capital held directly in DGS accounts (ex ante funds). By contrast, the Austrian scheme provides for financing based on ex post contributions from member banks forming part of the protection scheme of the respective trade organization. Hence, protection schemes must require their member institutions to pay proportionate contributions immediately in cases where guaranteed deposits or compensation for

guaranteed investment services is paid out. The Austrian deposit guarantee scheme does not provide for a fund structure. The protection schemes must be operated as legal entity in the form of liability companies (*Haftungsgesellschaften*). The protection schemes must generally ensure that the deposits are paid out within three months up to a maximum amount of EUR 20,000 or the equivalent value in foreign currency at the depositor's request.

- Is there a specific regulation concerning the deposit guarantee in case of a transfer of assets in another Member State?

N/a.

- If a transfer of assets including deposited funds occurs, does the deposit insurer or guarantor have to be notified?

N/a.

- Do Deposit holders of the transferor have any right concerning the transfer :

- before the transfer or the decision to transfer (e.g. Right of opposition or right of prior approval)

N/a.

- after the transfer (e.g. right to have the transfer annulled as deposited funds not part of transferor's assets but belong to deposit holders...)

N/a.

- **Member State**

- In case of transfer of assets to/from a transferee/transferor located in another Member State, has the host/home Member State any right or obligation?

- **Others**

- Please specify any other relevant information relating to third parties that has not been dealt with in the previous question and that would be useful for the study

f) Private international law

- What is the applicable law in case of transfer of assets:
 - If the transferor located in your member state and the transferee in another member state?

The Rome Convention lays down the rules of determining what law is to be applied to determine contractual obligations. The Convention applies both to contracts containing a choice of law clause and to those which do not. Article 1 (2) of the Convention lists the contractual obligations to which the Convention does not apply. These include questions involving the status or legal capacity of natural persons, obligations arising from negotiable instruments, questions of company law (e.g. rules on financial assistance) or questions whether an agent is able to bind a principal.

In principle, a contract is governed by the law chosen by the parties (subject to applicable mandatory provisions of the forum). In the absence of such choice of law the contract is governed by the law of the country with which it is most closely connected. The primary presumption is that the contract is most closely connected with the principal place of business of the party who is to effect the performance which is the characteristic of the contract or, where the performance is to be effected through

another place of business, the country in which that other place of business is situated.

- If the transferor located in another member state and the transferee in your member state?

Please see above.

- Please specify any other relevant information relating to Private international law that has not been dealt with in the previous question and that would be useful for the study

Part II -Evaluation of potential solutions

The purpose of this second part is to analyze potential solutions to remove obstacles to asset transferability. Different categories of solutions will be proposed.

We first would like to know which parts of your legislation would need to be amended in order to implement the solution.

Second, we would like to have your personal opinion about the feasibility of the solutions regarding the legislation in your Member State.

After that, we would like know if you consider that this solution is satisfactory and we would like you to explain why.

Lastly, we would like to know what legal obstacles still remain in your Member State.

Regarding those proposals, please consider that a transfer of assets from the subsidiary to the parent company in a crisis situation should not be considered as a transfer at arm's length.

1. Transfers from the parent company to the subsidiary or from the subsidiary to the parent at arm's length:

- **Proposal n°1**

Community legislation allows:

- any kind of transfer from the parent company to the subsidiary and
- transfers from the subsidiary to the parent at arm's length.

Possible consequences or conditions:

- Any restriction to those transfers have to be removed by Members States
- After the transfer, specific information about the transfer have to be communicated to supervisors and shareholders

Questions

i) Please provide a summary of the national measures that should be revised in order to reach this result.

- Both a transfer from the parent company to the subsidiary and a transfer from the subsidiary to the parent at arm's length would, in principle, be possible under Austrian law (bearing in mind that certain transactions may be subject to Austrian capital duty or Austrian stamp duty).

ii) In order to determine the feasibility of this solution, please explain precisely whether those modifications would entail

- frictions or even a disruption of your legal system or

N/a.

- entail substantial modifications but no major frictions with established legal principles or

N/a.

- merely minor changes.

N/a.

iii) Please precise if this solution does satisfactorily take into account interests of parent companies, subsidiaries, minority shareholders, creditors, deposit holders, employees, supervisory authorities or Member States as a whole

N/a.

iv) Please precise whether legal obstacles remain and how they could be removed in banking, insolvency and company law).

N/a.

2. Transfers from the subsidiary to the parent company (in preferential conditions)

a) Prior and overall agreements

- **Proposal n°2:**

Similar EU instrument:

Art. 234 - Solvency II: Amended Proposal for a Directive on the taking-up and pursuit of the business of Insurance and Reinsurance

Proposal:

For this proposal, please consider that an EU instrument has been adopted, which provides that a group agreement under which the parent company and some of the entities of the group can mutually commit themselves to transfer assets in a crisis situation has to be allowed by the Member States. This agreement is endorsed by each legal entity being a party to the agreement. This agreement guarantees financial support from the parent to the subsidiary and from the subsidiary to the parent. This agreement could only be voluntary because of the freedom of contracts, the limited liabilities of companies and minority shareholder rights.

This agreement is submitted to the supervisory authorities. A group-wide view of solvency and liquidity would be a useful part of the supervisory

assessment of an intra-group transfer. This group-wide approach will be required as part of the review of the CRD on 'colleges'.

The agreement may already be submitted when the subsidiary asks for authorization to take up and pursue the business of credit institutions. This agreement may also be submitted when the subsidiary asks for authorization and will be considered as a modification to the conditions of the authorization to take up and pursue the business of credit institutions.

Possible consequences or conditions:

- The capital adequacy rules is still respected after the transfer

- The transfer does not endanger the transferor's solvency

- The amount of the transfer is to be reimbursed by the transferee to the transferor. In case of insolvency, the creditors of the transferor will be reimbursed *before* the creditors of the transferor up to the amount of transfers that occurred

- After each transfer, the transferor informs supervisors and the shareholders during the ordinary General Assembly meeting following the transfer

- If the good faith, competence and prudence of the transferor's management is not in question and if the transfer fulfils all the conditions specified above, then the transfer cannot be challenged under Insolvency Law.

Questions

- i) Please provide a summary of the national measures that should be revised in order to reach this result.

It has to be distinguished between Austrian banking supervision law and Austrian corporate and tax law. It would, generally speaking, be feasible under Austrian banking supervision law to implement a similar legal framework as proposed under the Amended Proposal for a Directive on the taking-up and pursuit of the business of Insurance and Reinsurance ("Solvency II Directive"). However, depending on the specific structure of the proposal substantial modifications to existing Austrian corporate and tax law may be required. In particular, Austrian capital maintenance rules are very strict and do not allow an up-stream or side-stream transfer of assets within the group (other than transactions at arm's length).

Also, transactions entered into within the group which are not at arm's length may not be recognized for tax purposes. As a consequence, such transactions would be considered as hidden distribution of dividends.

- ii) In order to determine the feasibility of this solution, please explain precisely whether those modifications would entail
- frictions or even a disruption of your legal system or
Substantial modifications to the existing law would be necessary.
 - entail substantial modifications but no major frictions with established legal principles or
 - merely minor changes.
- iii) Please precise if this solution does satisfactorily take into account interests of parent companies, subsidiaries, minority shareholders, creditors, deposit holders, employees, supervisory authorities or Member States as a whole

iv) Please precise whether legal obstacles remain and how they could be removed in banking, insolvency and company law).

b) Strong guarantees covering the risk of outstanding payment

▪ **Proposal n°3**

Similar EU instrument:

Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements ()

Proposal:

For this proposal, please consider that an EU instrument has been adopted, which provides that a group agreement under which the parent company and some of the entities of the group can mutually commit themselves to transfer assets in a crisis situation has to be allowed by the Member States. This agreement is endorsed by each legal entity being a party to the agreement. This agreement guarantees financial support from the parent to the subsidiary and from the subsidiary to the parent. This agreement could only be voluntary because of the freedom of contracts, the limited liabilities of companies and minority shareholder rights.

This agreement is submitted to the supervisory authorities. A group-wide view of solvency and liquidity would be a useful part of the supervisory assessment of an intra-group transfer. This group-wide approach will be required as part of the review of the CRD on 'colleges'.

The agreement may already be submitted when the subsidiary asks for authorization to take up and pursuit the business of credit institutions. This agreement may also be submitted when the subsidiary asks for

authorization and will be considered as a modification to the conditions of the authorization to take up and pursuit the business of credit institutions.

Possible consequences or conditions:

-The capital adequacy rules is still respected after the transfer

-The transfer does not endanger the transferor's solvency

-The amount of the transfer is to be reimbursed by the transferee to the transferor. In case of insolvency, the creditors of the transferor will be reimbursed before the creditors of the transferor up to the amount of transfers that occurred

-After each transfer, the transferor informs supervisors and the shareholders during the ordinary General Assembly meeting following the transfer

- If the good faith, competence and prudence of the transferor's management is not in question and if the transfer fulfils all the conditions specified above, then the transfer cannot be challenged under Insolvency Law.

Questions

- i) Please provide a summary of the national measures that should be revised in order to reach this result.

In principle, the same restrictions apply as above under 2. b). The main legal obstacles under Austrian law are that a transfer of assets from the subsidiary to the parent company (or between sister companies) may violate Austrian capital maintenance rules.

Such transactions are at risk of being null and void. In addition, such transactions may not be recognised under Austrian tax law.

ii) In order to determine the feasibility of this solution, please explain precisely whether those modifications would entail

- frictions or even a disruption of your legal system or

Substantial modifications to the existing law would be necessary in order to enable an up-stream or side-stream transfer of assets.

- entail substantial modifications but no major frictions with established legal principles or

- merely minor changes.

iii) Please precise if this solution does satisfactorily take into account interests of parent companies, subsidiaries, minority shareholders, creditors, deposit holders, employees, supervisory authorities or Member States as a whole

iv) Please precise whether legal obstacles remain and how they could be removed in banking, insolvency and company law)

c) Liability of the parent company for the subsidiary's debts

Prior question

Firstly, please indicate if in your Member State, the parent company can be held jointly and severally liable for the subsidiary's debts and why:

-due to the specific legal form of the subsidiary where the shareholders are systematically liable for all decisions

As Austrian credit institutions may only be established in the form of a joint stock corporation or company with limited liability the

shareholders cannot, in principle, be held liable for the liabilities of their subsidiaries. As a general rule, only the company's assets are accountable for the liabilities of the company towards its creditors. Only in very exceptional circumstance a piercing of the corporate veil has been recognised (see above at 3(d) *Sanctions*). Different rules apply to savings banks and co-operatives.

-due to preferred shares under which the shareholder is systematically liable for some or all decisions of the company

Generally speaking, preferred shares in, for instance, a joint stock company do not establish a direct liability of the shareholder for the liabilities of the company.

- **Proposal 4**

Then, for this proposal, please consider that a EU instrument has been adopted and creates an automatic liability:

- by means of a specific type of company where the shareholders are systematically liable for all decisions that are disadvantageous for the company
- or by means of a preferred shares under which the shareholder is systematically liable for some or all decisions of the company

Questions

- i) Please provide a summary of the national measures that should be revised in order to reach this result.

Certain modifications of the present law may be necessary from a legal point of view. In particular, Austrian company law, insolvency law and to a certain extent the Austrian Banking Act may have to be amended. However, it should be noted that this proposal may not sufficiently take into account the corporate structure of the credit institution. For instance, the management board of a joint stock company is, generally speaking, solely responsible for the management of the company (no binding instructions by other corporate bodies are foreseen by the law) and represents the company in all legal matters. A responsibility of the shareholders, even though they had not exercised any (undue) influence on the management of the company, may be held unreasonable. Interests of shareholders may not be sufficiently taken into account.

- ii) In order to determine the feasibility of this solution, please explain precisely whether those modifications would entail
- frictions or even a disruption of your legal system or

Substantial modifications to the existing law would be necessary.
 - entail substantial modifications but no major frictions with established legal principles or
 - merely minor changes.
- iii) Please precise if this solution does satisfactorily take into account interests of parent companies, subsidiaries, minority shareholders, creditors, deposit holders, employees, supervisory authorities or Member States as a whole
- iv) Please precise whether legal obstacles remain and how they could be removed in banking, insolvency and company law).

d) Improving transferability transfer through the introduction of a new concept of "banking group"

- **Proposal n° 5**

Similar EU instrument:

Draft of the Ninth Company Law Directive for the conduct of groups containing a public limited company as a subsidiary

"Company Law Action Plan" dated May 2003: "framework agreement" for group companies

Under the "Company Law Action Plan" dated May 2003, the European Commission recommended specific rules on the enforcement of the group policy, for which Member States are required to draft a "frame agreement" for group companies that allows them to adopt a coordinated group company policy, as long as the interests of the companies' creditors are protected. This initiative has not been pursued. There might be merit in further investigating whether the definition of banking groups might remove obstacles in terms of banking law.

In that respect, a draft Ninth Company Law Directive on the conduct of groups containing a public limited company as a subsidiary was presented in December 1984 for consultation. The Commission did not pursue this work. The Directive was intended to provide a framework in which groups are managed on a sound basis whilst ensuring that interests affected by group operations are adequately protected. Particular reference was made to the possibility to transfer assets while protecting the interests of different parties. Under the 9th Directive project, the legal recognition of the 'group' went hand in hand with specific steps to protect minority

shareholders and creditors. It must be noted that a banking group would be a contract freely entered into. As contemplated in 1984 under the 9th Directive on company law, if a banking group does not wish to submit to a group regime, it will have to respect the economic interests of the subsidiary.

Proposal:

For this proposal, please consider that the idea of "group company" has been adopted by an EU instrument.

The managers of the subsidiaries will be obliged to follow instructions even if the subsidiaries will thereby incur financial losses. These managers must therefore not be held liable vis-à-vis their own companies. This power of management is accompanied by the right to use the financial resources of the subsidiary, since the economic advantage of the group can be maximized only where there is a complete integration of the two entities.

Once the agreement is concluded, transfers of assets are allowed between the members of the group.

Possible consequences or conditions:

- The constitution of the group is submitted to the supervisory authorities.
- In case of insolvency, there is a possibility for creditors to file their claims with any of the companies of the group
- In case of Insolvency, the creditors of the transferor will be reimbursed before creditors of the transferee up to the amount of transfers that occurred and the possibility for creditors to file their claims to any of the companies concerned by the transfer

Questions

- i) Please provide a summary of the national measures that should be revised in order to reach this result.

In particular, Austrian company law, insolvency law and to a certain extent the Austrian Banking Act may have to be amended.

- ii) In order to determine the feasibility of this solution, please explain precisely whether those modifications would entail

- frictions or even a disruption of your legal system or

Substantial modifications to the existing law would be necessary.

- entail substantial modifications but no major frictions with established legal principles or
- merely minor changes.

- iii) Please precise if this solution does satisfactorily take into account interests of parent companies, subsidiaries, minority shareholders, creditors, deposit holders, employees, supervisory authorities or Member States as a whole

- iv) Please precise whether legal obstacles remain and how they could be removed in banking, insolvency and company law)

e) Other solutions

▪ **Proposal n° 6**

Supervisors of the transferor and the transferee can jointly authorize transfers of assets without any counterpart if:

- The transferee is facing difficulties but no insolvency proceeding has been opened;
- The transfer does not jeopardize the solvency of the transferor.

Possible consequences or conditions:

- Transfer cannot be challenged by the national company Law, criminal Law or insolvency law because of the special resolution regime for banks/early interventions;
- The legislation ensures the entity providing a transfer a priority right in case of insolvency proceeding of the transferee.

Please feel free to suggest other solutions here.

ANNEX A National regulations relevant in assets transfers
between banks part of a same banking group

ANNEX B Examples of transfer of assets agreements