INFORMATION ON BANK RESOLUTION UNDER THE AUSTRIAN ACT ON BANK RECOVERY AND RESOLUTION („BaSAG“)

In Austria, the EU Bank Recovery and Resolution Directive (BRRD) was transposed into national law by the Austrian Act on Bank Recovery and Resolution („BaSAG“).

BaSAG entered into force on 1 January 2015.

BaSAG entrusts the financial market authority with a set of tools to intervene sufficiently early and quickly when institutions or institution groups violate or are likely to violate regulatory rules, so as to obviate a further deterioration in their financial status. In addition, it governs procedures to resolve and recover banks. The focus of BaSAG is to ensure that the owners of the bank (e.g. shareholders) and creditors (e.g. bond holders) bear losses first, before a resolution fund endowed by the banks bears losses. Those objectives should help avoid using taxpayers‘ money to recover or resolve a bank.

BaSAG pursues three principles:

- recovery and resolution of credit institutions without a severe impact on value
- protection of taxpayers in the course of bank recovery and resolution
- equal treatment of all creditors in a bail-in

RECOVERY

Since the Bank Intervention and Restructuring Act (BIRG) took effect, banks have been obliged to draw up and update recovery plans and to take recovery actions in their own responsibility. All recovery actions are based on private law and do not interfere with owners‘ or creditors‘ rights.

RESOLUTION

If recovery fails, the Austrian Financial Market Authority (FMA), which fulfills the role of the national resolution authority, initiates a resolution procedure. FMA prepares resolution plans for individual institutions to provide for a prompt intervention of the regulator and to safeguard financial market stability.

Since 1 January 2016, the Single Resolution Board has taken over full responsibility for bank resolution under direct supervision by ECB.

An institution enters into resolution if it is deemed to be failing or likely to fail in one of the following circumstances:

— the institution infringes with capital adequacy requirements that are conditional for continuing authorisation in a way that would justify the withdrawal of the authorisation by ECB,

— the assets of the institution are or will, in the near future, be less than its liabilities,

— the institution is or will, in the near future, be unable to pay its debts or liabilities as they fall due,

— extraordinary public financial support is required except when, in order to remedy a serious disturbance in the economy and preserve financial stability, the extraordinary public financial support takes any of the following forms:

(i) a State guarantee to back liquidity facilities provided by central banks or for newly issued liabilities,

(ii) injections of own funds or purchase of capital instruments to address capital shortfalls established in national, Union or Single Supervisory Mechanism-wide stress tests, in asset quality reviews or equivalent exercises by the ECB, EBA or national authorities confirmed by ECB,

— having regard to timing and other relevant circumstances, there is no reasonable prospect that any alternative private sector measures, including measures by Institutional Protection Scheme („IPS“), or supervisory action (including early intervention measures or write down or conversion of relevant capital instruments) would prevent the failure of the institution,

— a resolution is necessary in the public interest; a resolution is treated as in the public interest if it is necessary for the achievement of and is proportionate to one or more of the resolution objectives and winding up of the institution under normal insolvency proceedings would not meet those resolution objectives to the same extent.

The resolution authority may exercise the power to write down and convert capital instruments (core capital, additional core capital, supplementary capital) immediately before of together with the application of the following resolution tools:

— transfer of shares or other instruments of ownership, assets, rights or liabilities of an institution under resolution to a purchaser that is not a bridge institution (“sale of business tool”)

— transfer of assets, rights or liabilities of an institution to a bridge institution that is owned by public authorities (“bridge institution tool“)

— transfer of assets, rights and liabilities to an independent legal entity (bad bank) owned by public authorities that has been created for the purpose of administering and disposing of nonperforming debts and assets, only together with another resolution tool („asset separation tool“), and/or

— conversion of liabilities (including capital instruments eligible as own funds) into equity or reduction of the principal amount of claims or debt instruments during resolution to recapitalise the institution to the extent sufficient to restore its ability to carry out the activities for which it is authorised, to provide capital for a bridge institution or under the sale of business tool or the asset separation tool (“bail-in tool“)

The use of resolution tools by the resolution authority may disrupt the rights of shareholders and creditors and may be exercised without their consent. The resolution authority shall ensure that the application of resolution tools does not incur higher losses than under normal insolvency proceedings.

The “bail-in“ tool covers various creditor groups. While some creditors are fully excluded from bail-in, others have to absorb losses in an exactly defined sequence (“loss absorption cascade“). Losses are absorbed on a tier basis, i.e. creditors of the next higher tier are only bailed in if the claims of the preceding tier of creditors are not sufficient to cover the losses.

Sequence of allocation of losses:

1st tier, Common Equity Tier 1 capital instruments (e.g. common shares, the shareholders or holders of other instruments of ownership bear the highest risk of loss)

2nd tier, Additional Tier 1 capital instruments (e.g silent capital contributions)

3rd tier, Tier 2 capital instruments (e.g. participation rights)

4th tier, unsecured and subordinated claims (e.g. subordinated debt instruments)

5th tier, unsecured and unsubordinated non-preferred claims (e.g. senior bonds, which are junior to ordinary senior debt but have a higher priority ranking in the normal insolvency proceedings than subordinated debt instruments)

6th tier, unsecured ordinary senior claims (e.g. ordinary senior bonds)

7th tier, not covered deposits (e.g. deposits not covered by deposit guarantee scheme)

Risks involved in bank resolution

Liquidity risk: Securities prices are sensitive to market fluctuations, especially securities issued by a bank for which a bail-in procedure was initiated. This means that investors are exposed to a risk that the securities issued by the bank cannot be sold or can only be sold at a lower price.

Counterparty/credit risk: The resolution authority may change the terms and conditions of the securities concerned, e.g. by changing the maturity date or deferring interest payments for a certain period. That means that creditors or investors of bank for which a bail-in procedure was initiated are exposed to a risk that they receive payments delayed and/or to a considerable lower extent than originally agreed upon (up to the risk of a total loss of the amount invested).

Concentration risk: The risk of losses increases the more securities of the bank under resolution are included in the investor’s portfolio (up to the risk of a total loss of the amount invested).

Claims of creditors excluded from bail-in

There is no bail-in risk in relation to deposits covered by the deposit guarantee scheme or liabilities in a cover pool. Public financial support through additional financial stabilisation tools such as the bank resolution fund shall be used as last resort after having exploited the other resolution tools to the maximum extent practicable.