

AUSTRIA – Full Answers

1. Provision of banking services by a foreign bank, without a local licence, on cross border basis

1.1 To what extent can a foreign bank (which is not locally authorised) provide the services listed in 1.3 (on a cross border basis) to local retail customers, commercial clients and wholesale counterparties?

Conducting banking activities as mentioned in the Austrian Banking Act in Austria is only permitted after obtaining a banking licence under Austrian law or passporting a banking license of a credit institution duly authorised and registered in another EEA Member State. According to Sec 1 of the Austrian Banking Act all of the services mentioned above qualify as banking activities. If these activities of a foreign bank are deemed to be carried out in Austria on a commercial basis, a national license will have to be obtained. For instance, if transactions are executed by way of correspondence (such as by facsimile or postal exchange of confirmations/signature pages), it might be sufficient to qualify as conducting business in Austria if the location of dispatching/posting the offer in order to enter into a transaction or the acceptance thereof takes place in Austria (this should apply to correspondences by means of electronic communications as well). Promotion of services or marketing activities without offering services to customers in Austria is however not restricted.

1.2 Where local authorisation or licensing is required, are there any useful exemptions?

[No answer]

1.3 To what extent can a foreign bank (which is not locally authorised) promote the services below locally? Where there are restrictions on promotion, are there any useful exemptions?

- **Deposit taking and payment services/provision of bank accounts;**
- **Lending (either secured, e.g. on land/real estate, or unsecured) and other forms of finance such as trade finance;**
- **Originating/purchasing/selling debt participations (secured or unsecured), such as syndicated loans or securitised debt obligations.**

Promotion of services or marketing activities without offering services to customers in Austria is however not restricted.

1.4 Can a foreign bank establish a local representative office to promote such services where these are to be conducted by the bank on a cross border basis (and not by the local office)?

Conducting banking activities in Austria is subject to licensing requirements under the regime of the Austrian Banking Act. Those licensing requirements apply if the relevant services are rendered in Austria (through local presence or cross-border). Even if there has been no physical contacts in Austria between the foreign bank and potential customers (and subsequently no offers submitted or accepted in Austria), it may still be argued that transactions fall within the ambit of conducting business in Austria. Advertising activities may be rendered without having a banking license via a local representative office, whereas offering cross-border banking services to customers in Austria would require a banking license.

According to Sec 73 of the Austrian Banking Act, before establishing a representative office, foreign banks have to provide the Austrian Financial Market Authority (Finanzmarktaufsichtsbehörde FMA) with a notice issued by the financial markets authority of their respective state of domicile containing, amongst other information, a statement that there are no objections in relation to the establishment of a representative office of the foreign bank in Austria. Typical functions of a representative office include marketing activities and market research. Representative offices must report the following to the FMA: (i) the planned time of opening; (ii) the actual opening; (iii) the head of the representative office; (iv) the location; (v) any changes in the information and (vi) the closure of the representative office.

In addition foreign banks have to file a notice with the FMA containing information concerning the opening, registered office, current activities of the foreign bank, planned activities in Austria, qualifying holdings in the credit institution and the manager of the representative office. Currently ten foreign banks have registered representative offices in Austria.

2. Provision of investment services from home country without a local license

2.1 To what extent can a foreign bank or investment firm (which is not locally authorised) provide the services below to local retail customers, commercial clients and wholesale counterparties? Are there any useful exemptions?

If the investment services are deemed to be carried out in Austria on a commercial basis a national banking or investment license will have to be obtained (depending on whether such an activity qualifies as being carried out in Austria or is only cross-border from outside Austria). As regards online transactions the criteria relating to legal acts would prevail (i.e. the place of submitting an offer and/or the place of acceptance of an offer would be of major importance). As a licensing requirement, the management and seat of the investment companies conducting businesses in Austria have to be located in Austria.

2.2 To what extent can a foreign bank or investment firm (which is not locally authorised) promote the services below locally? Are there any useful exemptions?

- **Dealing in/buying/selling investments (as principal or as agent)**
- **Investment advice**
- **Discretionary management**

Promoting the services mentioned above would not require an investment license. When addressing (potential) Austrian counterparties, foreign banks or investment firms must bear in mind that marketing, advertising materials or activities which are accompanied by recommendations on the suitability of a particular investment for a particular Austrian counterparty may constitute investment advice. Investment advice related to financial instruments as defined in the Austrian Securities Supervision Act 2007 constitutes a licensed activity under the Austrian Securities Supervision Act 2007. Dealing in investments and discretionary management are principally licensed activities under Austrian law and can only be

provided to Austrian customers by non-locally authorised companies if the place of conducting business is outside of Austria.

Recognised third-country investment firms pursuant Article 4 Sec 1 No 25 of Regulation (EU) No 575/2013 are permitted without obtaining a licence to trade for one's own account or on behalf of others: a) Money-market instruments, b) Financial futures contracts, c) Interest-rate futures contracts, forward rate agreements, interest-rate and currency swaps, d) Transferable securities, e) Derivative instruments; unless these instruments are traded for private assets, as long as they limit their activities in Austria exclusively to the commercial execution of transactions covered by their licences as members of an exchange.

3. Local rules

3.1 When a foreign bank/investment firm enters into an agreement with a local customer, are there any restrictions on the contract being governed by foreign law and the courts of the foreign country having exclusive jurisdiction (i.e. is the contract required to be governed by local law and/or must the local courts have jurisdiction)?

The choice of a law, other than Austrian law would be recognised by Austrian courts as the law governing a contract/agreement. Under Austrian law, notwithstanding the recognition of foreign law as the governing law of the documents:

- (i) effect may be given to the law of another jurisdiction, with which the matter has a close connection insofar as, under the law of that jurisdiction, that law is mandatory irrespective of the governing law of the contract;
- (ii) Austrian courts will apply Austrian law insofar as it is mandatory irrespective of the law governing the contract;
- (iii) the application of foreign law may be refused if it is incompatible with public policy (*ordre public*) in Austria; and
- (iv) regard will be given to the law of the jurisdiction where the performance takes place in relation to the manner of performance and the steps to be taken in the event of a defective performance.

As a general rule parties may agree on a choice of law clause except in those cases where jurisdiction over consumer contracts are necessarily falls under Austrian law or there is another reason for a compulsory place of jurisdiction. Foreign court decisions will be recognised and enforced by the Austrian courts provided that reciprocity as to the recognition and enforceability of judicial decisions exists. If a judicial decision is rendered by a court of a Member State of the European Union and is enforceable in that country, Austrian courts generally have to enforce such decisions.

4. Regulatory appetite for foreign banks

4.1 What is the attitude of your national regulatory authority to cross border business and the presence of foreign banks?

Conducting business activities in Austria on a local or cross-border basis is only permitted after obtaining a banking/investment license. The FMA tends to favour a broad application of the Austrian rules of conduct in cases where the client is located in Austria.

4.2 Is it generally more common for foreign banks to operate locally through a branch or a subsidiary, or both (and does this depend on the activities the bank carries out)?

See answer to question 4.4.

4.3 Is it mandatory, in any situation, to operate through a branch or subsidiary?

See answer to question 4.4.

4.4 What are the benefits/disadvantages of operating through a branch or subsidiary?

The Austrian subsidiary of a foreign bank is a separate legal entity and generally only obliged to follow the laws of the host country (Austria), whereas unfavourable regulations of the foreign bank's home country will not affect the Austrian subsidiary. An Austrian subsidiary is able to passport its license to other EEA countries whereas foreign bank branches in Austria cannot passport their license and have no permission to offer services in other EEA countries pursuant to the freedom to provide services principle. This may also be the reason for why hardly any foreign banks operate through Austrian branches but prefer to establish subsidiaries in Austria.

If a foreign bank starts the application process for obtaining a banking licence in order to act via a local branch it has to provide additional documents and information such as (i) the foreign bank's balance sheets of the last 3 years or (ii) an internal authorisation of local managers/directors allowing them to make decisions in Austria. In addition at the end of every year the Austrian branch/foreign bank has to provide the FMA with balance sheets of the foreign bank.

The branch has to disclose additional information about the foreign bank, as the entity which is responsible for complying with the licensing requirements, whereas the subsidiary operates independently and the subsidiary itself is responsible for complying with the licensing requirements.

5. Establishing a branch

5.1 Does a branch have rights/recognition to trade in other countries

The banking license of a foreign bank's Austrian branch whose home member state is Austria cannot be passported to other countries. Even if a foreign bank's branch has been duly licensed under the laws of Austria it cannot operate in other EEA Member States on the basis of the freedom to provide services principle.

5.2 How is a branch regulated?

The Austrian banking license may be withdrawn in case the foreign bank's banking license in the home country expires. Branches are treated like independent or standalone entities and have to fulfil their duties under Austrian banking law.

6. Establishing a subsidiary

The application and criteria for an independent subsidiary of a foreign bank obtaining a banking license would be the same as those for an Austrian bank seeking to obtain a banking licence. A subsidiary is an independent entity and has to fulfil its duties under Austrian banking law irrespective of the foreign bank.

The banking license of a foreign bank's subsidiary, whose home member state is Austria can be passported. If a foreign investment firm's subsidiary/foreign bank's subsidiary has been duly licensed under the laws of its EEA Home Member State, e.g. Austria, such a subsidiary may also offer its services in other

EEA Member States, provided that it notifies the relevant Member State regulator about its intention to offer services.

Furthermore, investment licenses may be passported to other EEA Member States if an investment firm is duly authorised and registered in Austria.

7. Supervision

7.1 Which national regulatory authority authorises, regulates and supervises foreign banks/investment firms/subsidiaries in your jurisdiction?

National as well as foreign bank branches or subsidiaries /investment firms are supervised by the FMA and the Austrian National Bank (OeNB).

7.2 Is there any split in supervision between the local regulator and the foreign/home regulator – e.g. in the case of locally authorised branch?

The Austrian authorities will supervise (i) Austrian subsidiaries of foreign banks/ investment firms and (ii) Austrian branches of foreign banks, which are treated like independent or standalone entities. Such an Austrian branch must fulfil its duties under Austrian banking law on its own although it may in fact depend on the foreign bank's instructions.

8. Individuals

8.1 Where a local branch or subsidiary is established and (if applicable) authorised, are individuals personally regulated and/or liable to fines?

Pursuant to Sec 9 of the Administrative Penal Act 1991 responsibility under administrative penal law for the compliance with the provisions of the administrative law by legal persons under commercial law shall rest, unless provided otherwise by provisions of administrative law or unless "special responsible representatives" are appointed, with the persons appointed as regular representatives. The managers appointed as regular representatives in Austria have the right and to the extent it is necessary to ensure responsibility under the penal law also the obligation, to appoint, upon request by the authority, one or several persons to be special responsible representatives to ensure compliance with the provisions of the administrative law for the whole company or for certain premises or departments of the company. The persons appointed as regular representatives for the foreign banks branch remain responsible under Austrian penal law, in spite of having been appointed as a special responsible representative, if they deliberately did not prevent the offence. Legal persons under commercial law are solely and severally liable for the payment of any fines imposed on persons appointed as regular representatives of the company or on a special responsible representative as well as for any other damages expressed in money and for the cost of legal proceedings.

As a licensing requirement of a bank/ foreign banks branch other than that of an investment firm, at least one of the two mandatory managers of a bank needs to have his centre of main/vital interests in Austria in order to ensure enforceability of local banking provisions and fines.

8.2 Does this extend to individuals overseas/in the home country?

The managers of foreign banks could be held personally liable for a branch in case the management of this branch cannot be held responsible.

In cases, e.g. when establishing a representative office without giving notice to the FMA or operating without a banking license, the manager of the foreign bank will be responsible and could therefore be held liable if no special responsible representative was appointed effectively in a foreign banks branch. In case of direct liability of foreign managers, the question of whether administrative fines issued by Austrian

authorities are enforceable, has to be assessed separately for every home country and is generally contingent on bilateral agreements.

8.3 Which officers and employees are subject to local vetting, and are the owners/controllers subject to local vetting?

Managers of foreign banks subsidiaries and branches have to fulfil certain qualifications as a licensing requirement and will be subject to a fit and proper test. Internal auditors and certain members of the supervisory board may also be subject to fit and proper tests.

Owners/controllers of Austrian subsidiaries are subject to constant local vetting insofar as Austrian banks have to disclose information concerning the identity of their shareholders with qualifying holdings. Foreign banks have to disclose information concerning the identity of their shareholders with qualifying holdings at the time of the licence application. Owners/controllers do not have to fulfil fit and proper requirements but a reliability of the shareholders must be given.

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