Topics in our issue:

New deposit guarantee scheme 1
Investing in insolvent enterprises 3
Coming up: new EU data protection law 4

New deposit guarantee scheme

For many years depositor protection was not an issue at all; only especially nervous customers showed an interest in what happens if their bank should become bankrupt. With the global financial crash and several banks "exiting" from the market this attitude has undergone an abrupt change.

Nowadays, depositors inquire more often safety of their deposits rather than interest rates. Policymakers have responded: after introducing a harmonized system for the supervision and resolution of banks, their next step is to harmonize depositor protection across the European Union. The object of the exercise is to ensure that depositors will get back their secured (= covered) deposits and are more thoroughly informed about guarantee schemes, so that bank runs should be largely prevented in the future. In late March 2015, the Federal Ministry of Finance sent out for comments a draft law covering deposit guarantees and reimbursement of depositors at banks (Einlagensicherungs- und Anlegerentschädigungsgesetz = ESAEG). The Act is to implement into national law Directive 2014/49/EU on deposit guarantee schemes of 16 April 2014, and it will lead to a fundamental change of the current regime of depositor protection in Austria.

At present, each of the five banking associations – i.e. Raiffeisen banks (rural credit cooperatives), savings banks, banks and bankers, Volksbanken (industrial credit cooperatives) and mortgage banks – operates its own scheme to comply with the statutory requirement of guaranteeing deposits. For the future, a single scheme is envisaged which all banks need to join under penalty of having their banking licence cancelled. Still, the ESAEG makes provision for institutional protection schemes (IPS) to be recognized by the Financial Market Authority (FMA) as deposit guarantee schemes subject to their compliance with special requirements. Banks that are members of an IPS which has been recognized as a deposit guarantee scheme need not join the harmonized deposit guarantee scheme. There is, thus, some likelihood that Austria will continue to have more than one deposit protection scheme.

JUNE
2015

PRESLMAYR
RECHTSANWÄLTE

Generally, the coverage level of € 100,000.00 per person and per bank will continue to apply (joint accounts will be split up equally), but it will be possible under the ESAEG to extend the coverage level up to € 500,000.00 (e.g. when the deposit derives from a private real estate transaction or insurance payment or payment of damages and the deposit becomes unavailable within three months after it has been made). Such a temporary high balance will also apply to deposits which are made for social purposes as defined by the law or which are linked to specified life situations (severance pay or similar). Moreover, some exemptions will no longer apply (deposits made by major corporations and deposits in a foreign currency will be covered as well), so that the scope of the guarantee will increase.

Covered deposits will be paid out more quickly than is the case now. Presently set at 20 work days, the period will be reduced incrementally to, ultimately, seven work days after the deposits become unavailable (on and after 1 January 2024). In order to accelerate payment, the banks are forced to adapt their systems so that they can identify the level of their customers' covered deposits at any time. When a claim arises, they need to furnish this information immediately to the organization that runs the guarantee scheme (SE) so that it can take the requisite steps for payment.

The new regime challenges the banks not just in technical respects – the financial burden imposed after the changeover to the new regime is enormous. Previously, the money for payment to affected customers was requested by the SE only when a claim actually arose, but in the future the banks need to set up a fund which must comprise at least 0.8% of its members' covered deposits by 2024. At present, covered deposits in Austria make up approx. € 205 billion. Therefore, the banks need to get together some € 1.6 billion over the coming years just to fill up the fund. The first payments are to be made already in 2015. The money of the fund must be invested safely and with adequate liquidity. If the fund is unable to cover all the claims, the banks need to make special annual contributions of up to 0.5% of the covered deposits. Moreover, the other (possible) SEs must provide their own funds and may need to levy special contributions if more money should be needed. Ultimately, the affected SE will have to take out a loan if it fails to cover all claims. The obligation of the Federal Ministry of Finance to furnish such amounts to the SE as exceed € 50,000.00 in covered deposits per customer will no longer apply, and neither will the federal guarantee for loans or bonds issued by the SE be assumed by the Federal Ministry of Finance. With this, the state no longer takes an active part in depositor protection.

The banks' contributions must be computed based on the risk and the covered deposits; in this way, banks that opt to pursue high-risk business will have to pay higher contributions to the fund. The method of computation will be defined by the SE and requires the FMA's approval. The European Banking Authority will be requested to notify risk categories and indicators and their respective weights.

If a bank becomes insolvent, the SE can file payments to customers as claims against the bank's estate, and, contrary to previous practice, such claims will be given preferential treatment. This treatment is not regulated in the ESAEG or in the Insolvency Code, but in Section 131 of the Federal Act Governing the Recovery and Resolution of Banks (BaSAG) which became effective already on 1 January 2015. Under this Act, however, the responsible SE will be liable in a bank's insolvency under certain preconditions (e.g. customers have continued access to their deposits), i.e. it must make a contribution of, at most, 50% of its target funding level (= 0.8% of the covered deposits).

There will be no change in the compensation for investors (the requisite provisions in the Banking Act will be transferred to the ESAEG).

The ESAEG is to enter into force in early July 2015. It has complex transitory provisions for harmonizing the existing sectoral structure which extend to 1 January 2019. It will certainly improve the depositors' position because the scope will be increased and the payment period reduced and because a fund needs to be established. Such improvements for customers, however, entail a substantial burden for the banks.

THE AUTHOR:

***Mag. Erland Pirker** is attorney-at-law and partner at Preslmayr Rechtsanwälte. He focuses on banking law, real estate and landlord-and-tenant law, and litigation.*

E pirker@preslmayr.at

(June 2015)

Investing in insolvent enterprises

The most recent reform of the Bankruptcy Code (in 2010) has made it easier to reorganize a bankrupt company, a procedure which, however, typically needs an investor in order to be successful.

Asset deal or share deal

There are two modes of taking over an insolvent enterprise:

An asset deal involves the acquisition of a company's key assets. The original corporate entity ceases to operate and the buyer starts a new enterprise, transferring the assets to this new entity. The purchase price paid by the buyer is added to the estate and distributed among the creditors. The procedure is known as "übertragende Sanierung" (business asset sale) when the proceeds are used to satisfy the creditors of the insolvent company.

A share deal involves continuing the insolvent company during insolvency proceedings and disencumber it in line with a reorganization plan, after which the investor acquires those shares of the company which were not involved in the insolvency as a reward for financing the reorganization plan. The takeover takes place at the shareholders level.

Regardless of the mode chosen, it is important for the investor that the business is still operating ("alive") at the time insolvency proceedings are instituted.

Investor's approach – due diligence

For the investor it is essential to obtain information on the economic situation of the target. He or she should contact the administrator and become involved in the sales process. To this end the investor needs to furnish a non-binding letter of interest. After the investor has signed a confidentiality agreement, the administrator will provide the requisite information and data which will then be submitted to a due diligence investigation. The due diligence comprises more or less thorough checks depending on the size of the target, until a binding offer can be submitted.

Finalizing the deal

Once offers have been submitted, the administrator enters into final negotiations with the highest bidders which involve not just the price but also how it will be financed and, occasionally, guarantees. The administrator will then close the deal subject to the court and committee of creditors consenting to the terms of the deal. Once their consent has been obtained, the transaction is implemented.

The purchase price, usually paid in as a trust deposit at this point in time, is incorporated in the estate, and the assets are transferred or the shares assigned to the buyer.

On a case to case basis it needs to be examined whether the acquisition would create a market-dominating position for the buyer. It is recommended to have a law office investigate the situation in terms of cartel law, abuse of a dominant position on the market and merger control aspects. The same applies to the integration of staff from the enterprise to be taken over. The specificities of the Act Governing Adjustments to Employment AVRAG may remove some obstacles after a buyer takes over an insolvent enterprise.

Legal consultation

Depending on the scope of the acquisition, the effort invested in the various stages from initial interest to obtaining information to due diligence to the final negotiations and the closing may vary considerably. When a large-scale purchase is involved it is recommended to consult a lawyer from the very start who will provide support not just in the due diligence phase but also in wording a binding offer, in the final negotiations, in the design of the contract and in implementing the transaction.

THE AUTHOR:

Dr. Matthias Schmidt *is attorney-at-law and partner at Preslmayr Rechtsanwälte. He is specialized in insolvency law, the reorganization of businesses, the law of contracts and the law of civil procedure.*

E schmidt@preslmayr.at

Coming up: new EU data protection law

The attempt to harmonise data protection law throughout Europe by way of the Data Protection Directive of 1995 was only partially successful. A divergence in the implementation, handling and interpretation of the Directive between member states continues to impede the free flow of data within the EU. Massive criticism from enterprises and consumer protection groups in the various EU member states caused then Commissioner Reding to unveil, on 25 January 2012, a draft for an entirely new EU data protection regime: the so-called General Data Protection Regulation, which is to have direct effect on all EU member states and replace national data protection laws.

Status of negotiations

Commissioner Reding's proposal of January 2012 was exhaustively discussed by the European Parliament. Lobbyists of European and global organisations staged a lobbying effort that was unique in the history of the European Parliament and that produced almost 4000 applications for amendments from MEPs. The outcome was a new text with proposals for amendments, which was finally adopted by a clear majority of the plenary of 12 March 2014. For an official comparison of the Commission's proposal and the amended text see http://www.europarl.europa.eu.

Once the European Parliament adopted the resolution all eyes turned to the European Council which must produce its own text, to which end the representatives of the member states need to arrive at a political agreement.

Jean-Claude Juncker, new President of the European Commission, wants to finish the negotiations in 2015, a goal considered highly ambitious by many observers. Insiders tend to expect a result in the first half of 2016. Current drafts provide for the reform to become effective two years after its publication in the Official Journal. Given the current state of affairs this translates as 2017/2018.

Future fines

The current Directive of 2000 provides for maximum fines of € 25,000.00, while the Commission's draft foresees fines between € 250,000.00 and € 1 million or, alternatively, 0.5% to 2% of the annual worldwide turnover in case of an enterprise, whichever is greater. The European Parliament apparently considers such fines to be still too low as its draft of March 2014 stipulates € 100 million (!) or 5% of an enterprise's global turnover. Considering the scope of such fines it is expedient to give thought to the data protection law. The Preslmayr data protection team will be pleased to help you!

THE AUTHOR:

Dr. Rainer Knyrim *is attorney-at-law and partner at Preslmayr Rechtsanwälte. His priority is on data protection law, and he is the editor-in-chief of „Datenschutz konkret", a magazine focusing on data privacy published by Manz.*

E knyrim@preslmayr.at

Preslmayr Rechtsanwälte OG
Universitätsring 12, 1010 Vienna, Austria
Tel: (+431) 533 16 95
office@preslmayr.at www.preslmayr.at
FN 9795f, HG Wien
DVR: 07077411 UID: ATU10504104