Debt capital markets in Austria: overview

Uwe Rautner
Rautner Huber Attorneys at Law

global.practicallaw.com/1-542-5286

MAIN DEBT CAPITAL MARKETS/EXCHANGES

1. What are the main debt securities markets/exchanges in your jurisdiction (including any exchange-regulated market or multi-lateral trading facility (MTF))?]

Main debt markets/exchanges
The main market for debt securities is the Vienna Stock Exchange (VSE) (see Equity capital markets in Austria: Regulatory overview, Question 1).

Debt securities can be admitted to trading on one of the two regulated markets (that is, the Official Market and the Second Regulated Market) and the Third Market, which is operated as a multilateral trading facility (MTF).

Approximate total issuance on each market
As measured by its volume, the Austrian bond market plays a bigger role than the Austrian equity market. The total market volume outstanding of debt securities amounts to EUR486,108 billion as of February 2013. At present, 3,952 debt securities are admitted to trading at the VSE.

2. What are the main regulators and legislation that applies to the debt securities markets/exchanges in your jurisdiction?

Regulatory bodies
The regulatory bodies are the same as for equity capital markets (see Equity capital markets in Austria: Regulatory overview, Question 2).

Legislative framework
The legislation is the same as for equity capital markets (see Equity capital markets in Austria: Regulatory overview, Question 2). Additionally, the following legislation applies (each as amended or supplemented from time to time):

- Mortgage Bank Act (Hypothekenbankengesetz (HypBG)).
- Mortgage Bond Act (Gesetz über Pfandbriefe und verwandten Schuldsverschreibungen öffentlich-rechtlicher Kreditanstalten vom 2.12.1927 DRGBI I 492 (PfandbriefG)).
- Covered Bonds Act (Gesetz vom 27. Dezember 1905 betreffend fundierte Bankschuldsverschreibungen (FBSchV)).
- Bond Trustee Act (Gesetz vom 24. April 1874 betreffend die gemeinsame Vertretung der Rechte der der Besitzer von auf Inhaber oder durch Indossament übertragbaren Teilschuldsverschreibungen und die bücherliche Behandlung der für solche Teilschuldsverschreibungen eingeräumten Rechte (KuratorienG)).

MARKET ACTIVITY AND DEALS

3. Outline the main market activity and deals in your jurisdiction in the past year.

The main market activity consisted of bonds issued by corporates and banks. On the corporate side, particularly bonds with small denomination that also attract private investors (retail issues) have been seen in the market. Convertible bonds and bonds with warrants traditionally play a less important role in Austria. However, hybrid bonds seem to be on the rise (see, for example, the EUR150 million hybrid bond issued by Constantia Flexibles Group in 2013).

In 2012/13, major deals included:

In 2012/13, the major financial sector deals included:

LISTING DEBT SECURITIES

4. What are the main listing requirements for bonds and notes issued under programmes?

Main requirements
The main requirements are similar to those for equity securities (see Equity capital markets in Austria: Regulatory overview, Question 3).

Minimum size requirements
The minimum size requirements are as follows:
Official Market (section 68, Stock Exchange Act (SEA)): the total nominal value of securities (other than shares) must be at least EUR725,000.

Second Regulated Market (section 68, SEA): the total nominal value of securities admitted to trading must be at least EUR725,000.

Third Market: there are no minimum size requirements.

Trading record and accounts
There are no minimum trading record requirements, accounts requirements or working capital requirements.

Minimum denomination
There are no minimum denomination requirements. However, the denomination of the issue must be suitable for trading purposes where the securities are listed on a regulated market (that is, the Official Market and Second Regulated Market). On the Third Market no such requirements apply.

5. Are there different/additional listing requirements for other types of securities?

The requirements for the admission to listing which apply to bonds and notes also apply to certificates and warrants.

STRUCTURING A DEBT SECURITIES ISSUE

6. Are different structures used for debt securities issues to the public (retail issues) and issues to professional investors (wholesale issues)?

Where debt securities are issued to professional investors only (as opposed to the public) no prospectus needs to be drawn up and approved by the FMA.

In some cases, bonds may be issued in the form of registered bonds (Namensschuldverschreibungen) where the bonds are subscribed by insurance companies that allocate the bonds to their reserve fund (Deckungsschutz), since a more favourable risk weighing applies to registered bonds under the current regulatory framework (as compared to bearer bonds).

7. Are trust structures used for issues of debt securities in your jurisdiction? If not, what are the main ways of structuring issues of debt securities in the debt capital markets/exchanges?

Trust structures similar to those in the United States or United Kingdom, where a trustee acts as an intermediary between the issuer and the bondholders throughout the life of the bond, are not common in Austria. Usually, the bond will be underwritten by the underwriting banks and subsequently allocated to the investors based on their orders.

However, there are some cases where trust structures are used in Austria but those structures do not have much in common with the Anglo-American concept. For instance, the issuer usually enters into a trust agreement with a trustee under the Austrian Bond Trustee Act where the bonds are secured by a mortgage. The trustee then acts as security trustee who administers and, if necessary, enforces the security on behalf of the bondholders.

Additionally, under the Austrian Bond Trustee Act, a trustee can be appointed by an Austrian court upon the request of any interested party (for example, a bondholder) or upon the initiative of the competent court, for the purposes of representing the common interests of the bondholders in matters concerning their collective rights. This may, in particular, be the case where insolvency proceedings are opened with respect to the issuer or other circumstances generally affecting bondholders' rights occur. If a trustee is appointed, it will exercise the collective rights and represent the interests of the bondholders and will be entitled to make statements on their behalf that are binding on all bondholders.

ADVISERS AND DOCUMENTS: DEBT SECURITIES ISSUE

8. Outline the role of advisers used and main documents produced when issuing and listing debt securities.

Lead manager(s)
One or more investment banks are appointed as lead manager(s). The lead manager's main duties include:

- Arranging the bond issue.
- Advising the issuer on the structure and timing of the issue.
- Controlling and managing the transaction process.
- Coordinating the syndicate of underwriters.

Agents
The paying agent is usually an investment bank that is responsible for arranging payments of interest and principal to the bondholders. Where more than one jurisdiction is involved, there may be a principal paying agent that distributes any such amounts received from the issuer to the other paying agents (located in the other jurisdictions relevant for the bond issue), which pass any such amounts on to the respective bondholders abroad. It is to be noted that the paying agents not only arrange for payment of interest and principal but also provide information to the bondholders.

Lawyers
The issuer and the lead manager usually engage their own lawyers. Whereas the issuer’s lawyer advises the issuer, among other things, on the preparation of the prospectus (if necessary), including any regulatory questions in connection with the bond issue, and carries out a legal due diligence, the lead manager’s lawyers are primarily engaged with drafting the underwriting agreement and related documents.

Auditors and tax advisers
The auditors prepare the issuer’s accounts and financial data for the prospectus, verify the financial data to be included in the prospectus and issue a comfort letter. Specific tax issues are often handled by an external tax adviser.

Main documents
The main documents include:

- Prospectus (if required).
- Underwriting agreement.
- Agreement among managers.
- Paying agency agreement.
- Legal opinions issued by the legal and tax advisors.
- Comfort letters issued by the accountants.
- Corporate resolutions and other necessary corporate documents.
- Application for listing with the VSE (if a listing of the debt securities is intended).
DEBT PROSPECTUS/MAIN OFFERING DOCUMENT

9. When is a prospectus (or other main offering document) required? What are the main publication/delivery requirements?

A prospectus is required (unless an exemption applies) where either:

- The debt securities are offered to the public in Austria.
- The debt securities are to be admitted to trading on a regulated market in Austria (that is, the Official Market or Second Regulated Market).

Conversely, a prospectus is not required for a listing of the shares on the Third Market of the VSE, unless the offer is made to the public and no exemption from the prospectus requirements under the Capital Market Act (CMA) applies (see Question 12). The prospectus must be approved by the FMA or, where the issuer is established in another EEA country, the prospectus can be passported into Austria. Issuers that are incorporated outside the EEA must file the prospectus with the competent authority of the EU/EEA member state in which the shares are offered to the public for the first time, or where the first application for admission to trading on a regulated market is filed. The prospectus must be published without delay, but at least one banking day prior to the public offer or the admission to trading of the debt securities on the regulated market.

After having been approved by the FMA, the prospectus can be published:

- In the Amtsblatt zur Wiener Zeitung or otherwise in at least one newspaper with nation-wide circulation.
- In printed form, free of charge, to the public at the offices of the market on which the securities are being admitted to trading, or at the registered office of the issuer and at the offices of the financial intermediaries placing or selling the securities, including paying agents.
- In electronic form on the issuer’s website and, if applicable, on the website of the financial intermediaries placing or selling the securities, including paying agents.

Additionally, printed versions of the prospectus must be made available free of charge where the prospectus is published electronically. One original copy is to be submitted to the Oesterreichische Kontrollbank AG (OeKB). Furthermore, a filing must be made with the issue calendar prior to the public offering and the International Securities Identification Number (ISIN) is to be obtained from the OeKB.

10. Are there any exemptions from the requirements for publication/delivery of a prospectus (or other main offering document)?

The exemptions set out in Equity capital markets in Austria: Regulatory overview, Question 11 also apply to debt securities, unless such exemptions expressly refer to the public offer or listing of shares or securities (other than debt securities). Additionally, the requirement to publish a prospectus does in particular not apply to debt securities issued by:

- The federal government, Austria’s provincial states (Länder) or the Austrian National Bank as well as irrevocably and unconditionally guaranteed securities issued by the federal government or Austrian provincial states.
- An EEA member state or by one of an EEA member state’s regional or local authorities or central banks as well as irrevocably and unconditionally guaranteed securities issued by a member state or by one of a member state’s regional or local authorities (subject to the fulfilment of certain conditions).
- Credit institutions in a continuous or repeated manner (subject to the fulfilment of certain conditions).

11. What are the main content/disclosure requirements for a prospectus (or other main offering document)? What main categories of information are included?

The content and disclosure requirements for a prospectus are detailed in the Prospectus Regulation (see also Equity capital markets in Austria: Regulatory overview, Question 12). Additionally, international and national market standards should be observed.

On an international level, the recommendations and guidance notes contained in the IPMA Handbook issued by the International Capital Market Association (ICMA), the trade association for investment banks and securities firms in the international capital markets, should be followed when carrying out a bond issue. However, the existing IPMA Handbook is currently under review due to the various changes to the EU Prospectus Directive by the Commission Delegated Regulation (EU) 486/2012 which entered into force on 1 July 2012. It may therefore take some time before ICMA publishes a revised version of this Handbook.

12. Who is responsible for the prospectus (or other main offering document) and/or who is liable for its contents?

Similar rules to those for equity securities apply (see Equity capital markets in Austria: Regulatory overview, Question 13).

TIMETABLE: DEBT SECURITIES ISSUE

13. What is a typical timetable for issuing and listing debt securities?

The timetable of a bond issue can vary from a few days to several months depending on whether a prospectus approved by the FMA needs to be prepared and published and a listing of the bond at a foreign or Austrian regulated market is intended. The timetable for a typical bond issue can be divided into four key steps:

- Pre-launch. The pre-launch period may typically take two to four weeks (or even longer for complex transactions) during which the lead managers and other external advisors are appointed and the structure of the intended issue is to be determined (for example, wholesale or retail issue, and so on).
- Launch. The launch period normally lasts one to four weeks during which the main legal documents are produced and negotiated (including the prospectus and the underwriting agreement) and the prospectus is submitted to the FMA for approval.
- Issue. At the end of the launch period, the underwriting agreement is signed and the approval of the prospectus by the FMA must be obtained. The prospectus is then published. A few days after signing, closing takes place where the remaining documents are signed and the bonds are delivered to the bondholders in return for payment.
- Post-issue. During the life of the bond, the issuer must make payments on interest to the bondholders via the paying agent until the bond matures. Additionally, the paying agent is responsible for passing on information to the bondholders in accordance with the terms and conditions of the bond.
14. What are the main tax issues when issuing and listing debt securities?

Interest earnings from debt securities derived by a person resident in Austria are subject to a 25% withholding tax.

Additionally, a withholding tax of 25% will apply to the profits received from a sale of the bond if the bond was acquired on or after 1 October 2011 and sold after 31 March 2012. The tax is withheld where an Austrian paying agent or custodian is involved. For Austrian corporations that sell debt securities, the realised capital gains are classified as current returns, and subject to corporate income tax at the standard rate of 25%.

A reduced treaty rate may be available under an applicable double taxation treaty. Certain corporate investors can also claim a refund under Austrian domestic tax law.

15. How are debt securities cleared and settled and what currency are debt securities typically issued in? Are there special considerations for holding, clearing and settling debt securities issued in foreign currencies?

Debt securities listed on the VSE are usually denominated in Euro.

CCP Austria Abwicklungstelle für Börsengeschäfte GmbH (CCP Austria) acts as the clearing agency for the clearing of all market segments at the VSE. As CCP Austria has no banking licence, OeKB has been instructed with the settlement of CCP-eligible transactions and the safekeeping of collaterals on behalf of CCP Austria.

16. What are the main areas of continuing obligations applicable to companies with listed debt securities and the legislation that applies?

Periodic financial reporting

Periodic financial reporting obligations are the same as for equity securities (see Equity capital markets in Austria: Regulatory overview, Question 23).

Other disclosure obligations

Issuers are obliged, amongst other things, to provide information on the place, time and agenda of the creditor meeting of debt securities holders, the payment of interest or the exercise of conversion rights, exchange, subscription or annulment and repayment as well as the right to participation of these bearers of debt securities.

17. Do the continuing obligations apply to foreign companies with listed debt securities?

While the reporting requirements under Austrian law, generally speaking, do not apply to foreign companies, the rules on ad hoc publicity apply to domestic and foreign issuers alike.

18. What are the penalties for breaching the continuing obligations?

The penalties for a breach of the continuing obligations are the same as for the equity markets to the extent they relate to debt securities (see Equity capital markets in Austria: Regulatory overview, Question 23).

19. Are there any proposals for reform of debt capital markets/exchanges? Are these proposals likely to come into force and, if so, when?

The most recent reforms include the implementation of Directive 2011/61/EU on alternative investment fund managers (AIFM Directive) and Regulation 352/2011/EU on undertakings for collective investment in transferable securities (UCITS Regulation) through the Alternative Investment Fund Managers Act (Alternative Investmentfonds Manager Gesetz (AIFMG)) which entered into force on 22 July 2013. However, more importantly, the CMA has been amended and now provides for a broadened exemption from the prospectus requirement. Following the amendment, securities can be offered to the public without publishing a prospectus if the aggregate volume of the issue amounts to less than EUR250,000 over a period of 12 months (prior to the amendment, the threshold amounted to EUR100,000). The recent change in the law is intended to facilitate crowdfunding under the existing market conditions. No further changes of the current legal framework for debt capital markets are currently underway in Austria.
ONLINE RESOURCES

Financial Market Authority (FMA)
Description. Website of the Austrian financial supervisory authority.

Oesterreichische Kontrollbank AG (OeKB)
W http://www.oekb.at/en/Pages/default.aspx
Description. Contains information assisting companies with the issuance of securities.

Vienna Stock Exchange (VSE)
W http://en.wienerborse.at/
Description. Convenient translations in the English language of certain Acts of Austrian federal law relating to securities trading as well as useful summaries of the rules of the VSE are available on this website.
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Uwe Rautner, Partner
Rautner Huber Attorneys at Law
T + 43 1 361361 11
F + 43 1 361361 99
E rautner@rautnerhuber.com
W www.rautnerhuber.com

Professional qualifications. Rechtsanwalt (Austria); Solicitor of the Senior Courts of England and Wales (non-practising)

Non-professional qualifications. LL.M (LSE)

Areas of practice. Uwe Rautner worked in the legal department of an Austrian bank and for over eight years with two prestigious international law firms in Vienna and New York City. Uwe Rautner has extensive experience in negotiating and structuring domestic and international finance and capital markets transactions with a particular focus on structured finance, hybrid capital transactions and restructurings.

Areas of practice. Banking & finance; capital markets; insolvency & restructuring.

Recent transactions

- Advising the lead manager in connection with the structuring of subordinated hybrid securities recognised as regulatory capital under Basel III/CRD IV.
- Advising the lead manager in connection with the issue of deeply subordinated notes by an Austrian corporate.
- Advising the lead manager as transaction counsel in connection with a bond issue listed on the Vienna Stock Exchange by one of Austria’s provincial states in the form of a private placement to institutional investors.
- Advising the lead manager in connection with the placement of a EUR100 million registered bond to institutional investors.
- Advising the arranger in connection with the syndication/placement of a Schuldverschreibung loan entered into with an Austrian borrower to institutional investors, predominantly insurance companies.

Languages. German, English

Professional associations/memberships. Member of the Austrian Association of Investment Companies.

Publications. Authored numerous publications in the fields of banking and capital markets law.

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