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Austria: New draft bill confirms bail-in protection for repos and securities lending transactions



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Legal Status

- Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms ("BRRD") was implemented in Austria effective **1 January 2015**, including write-down / conversion measures and the **bail-in tool**.
- The bail-in tool allows the resolution authority to apply **write-down or conversion measures** not only to liabilities under a capital instrument, but also to **all other eligible liabilities**. These also include liabilities under derivative transactions, as well as **repurchase (repos) and securities lending transactions**.
- Art 49 of BRRD contains a **safeguard for derivatives** that aims to **prevent** resolution authorities – when deciding on a potential bail-in – from "**cherry picking**" only those derivatives which are "out of the money" from the failing institution's perspective. Art 49 BRRD requires that resolution authorities shall exercise the write-down and conversion powers in relation to a liability arising from a derivative only upon or **after closing-out** the derivatives. By doing so, the **bail-in** powers shall **only** be applied on the **net sum** resulting from closed-out derivatives. This way, the integrity of contractually agreed netting provisions shall be protected.
- This safeguard was implemented in Austria in § 91 of the Recovery and Resolution Act (*Sanierungs- und Abwicklungsgesetz – BaSAG*).
- From the black letter of the law, both Art 49 BRRD and § 91 BaSAG apply only to "derivatives" but do **not specifically** make **reference** to **other** types of **financial contracts**, such as repos or securities lending transactions.
- Both in the Austrian market, as well as in other Member States such as Germany, the Netherland and France, it has been a matter of **dispute** whether the **bail-in protection** in Art 49 BRRD / national implementation thereof (such as § 91 BaSAG) would **apply to repos and securities lending transactions**.



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Confirmation of bail-in protection for repos and securities lending transactions

- The Austrian legislator has on 26 November 2015 published a **new draft bill** which contains a specific **confirmation** that the **bail-in protection** in § 91 BaSAG does indeed also **apply to repos and securities lending transactions**.
- The draft bill proposes that § 91 BaSAG be supplemented with a new paragraph stating that § 91 BaSAG also applies to "**other financial contracts that are entered into under a framework contract containing a netting agreement**. This applies in particular to transactions listed in **§ 20 (4) item 1 to 4 of the Austrian Insolvency Code (Insolvenzordnung – IO)**".



- § 20 (4) IO provides for Austria's **netting safe haven** for derivatives and certain other financial contracts in case of **insolvency** proceedings. This protection of netting arrangements in insolvency **also covers repos and securities lending** transactions.
- The Austrian legislator has by way of the draft bill clarified what could by interpretation **already be derived** from Art 63(1)(k) BRRD and its Austrian law implementation in § 58 (1) item 11 BaSAG:

According to these "**general powers**", a resolution authority was already entitled to "**close-out and terminate financial contracts or derivatives contracts for purposes of applying**" the bail-in powers.

- Fortunately, the Austrian legislator has nonetheless specifically confirmed that repos and securities lending transactions **enjoy the same safeguard as derivatives** under § 91 BaSAG.
- The bill needs yet to be passed in the Austrian Parliament. We will follow-up once the amendment to BaSAG has entered into force.

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