

**SCHEDULE 2**

**AUSTRIA**

**COUNTRY ANALYSIS**

**Draft - September 2000**

## **1. General**

### **1.1 Pledge – General Characteristics**

- Austrian law provides a general definition of the term pledge as an in rem right of a creditor to take possession of property as result of the inability of the debtor to pay outstanding debts. Any individually transferable property or claim, including securities, can be made the subject of a pledge.
- The pledgee is not entitled to make commercial use of the pledged assets.
- The pledgee must keep the assets in safe custody and must take reasonable care of the assets.
- A valid substitution of pledged securities requires agreement by the parties.
- The pledging of securities does not cause any tax obligation or similar duties.
- The investment portfolios of major Austrian banks consist primarily of OECD-Government Bonds and first-class bank securities. The bonds are in most cases held either through Österreichische Kontrollbank (ÖKB), which is a recognised account keeping institution, through Österreichische Nationalbank or through international clearing organisations (Euroclear, Cedel).

### **1.2 Transfer of Title – General Characteristics**

- There is no statutory provision with regard to the establishment of the transfer of title. The so-called “Sicherungsübereignung” is based on Austrian case law. While in a “Sicherungsübereignung” the transferee becomes the legal owner of the asset, a number of restrictive provisions apply to the relationship between the transferor and the transferee (many of which will also apply to a pledge of collateral).

These include:

- the transfer must be perfected by delivery of the asset to the transferee or his agent;
- the transferee may only exercise rights of ownership to the extent agreed between the parties or as necessary to support the priority of his claim;
- the transferee’s ownership is contingent on the validity of the claim;
- even if the parties have agreed that the transferred assets may be sold by the transferee without court proceedings, a sale may only be effected by the transferee at a market or quoted price or at the independently assessed value of the asset and any agreement between the parties to the contrary will be void;
- the transferee must redeliver a portion of the assets if their value has increased over and above that of the transferee’s claim;

- any agreement that the transferee be allowed to keep the assets regardless of any excess in value of the assets over that of the transferee's claim will be void;
- use of the assets may be enjoyed by the transferee only to the extent authorised by the transferor and in any case only in a manner not harmful to the interests of the transferor and the parties may only validly agree that the transferee has a right of usufruct if separate consideration is given for this; however, the transferee may pledge the assets to a third party with or without the transferor's consent.
- Further restrictions may be imposed by agreement between the transferor and the transferee. If the transferee disposes of the assets to a third party in violation of the above provisions or any additional contractual restrictions, the transferee will become liable to the transferor in damages, although the disposal will not be set aside so long as the third party was acting in good faith. Assets held by a transferee under the sicherungsübereignung will be available to the transferee's creditors only on enforcement of the transferee's claim against the transferor (subject to the already mentioned legal and agreed restrictions). To the extent the transferor discharges its obligations to the transferee, the assets will not be available to the transferee's creditors.
- Special mandatory provisions apply with regard to set-off in bankruptcy and debt composition proceedings. Notably, claims not due at the time of bankruptcy or a debt composition may be set-off. However, no claims may be set-off which arose only after the commencement of the bankruptcy or debt composition proceedings, or within the preceding six months (subject to certain exceptions).

Credit Institutions are not subject to debt composition proceedings. Instead a special receivership regime applies under the Austrian Banking Act. However, there are no rules in relation to set-off in the receivership of credit institution. There are no other rules under Austrian Law which would permit the courts to freeze or otherwise prevent or delay the enforcement of rights of set-off against the party subject to formal insolvency proceedings.

- Whether a transaction is characterised as an outright sale, a transfer of ownership or a Sicherungsübereignung depends on the transaction's purpose rather than whether a right to use the assets is agreed or not. A repo would be regarded as being similar to a Sicherungsübereignung, a transaction where a transferee has merely the option to return the asset would most likely be regarded as an outright sale combined with a put option which is granted in favour of the transferee.
- Under domestic law there is no risk that any transfer of title will be recharacterised as creating a security interest.
- The substitution of securities is subject to agreement by the parties. An exchange of securities during the six month period before the start of insolvency proceedings might give rise to an invalidation of such transaction under certain conditions further specified in the law. However, previous decisions of the Austrian courts suggest that, if at a time any mark-to-market collateral arrangement was agreed, no preference existed then subsequent "top-up" deliveries of collateral are not subject to avoidance either. However one should not fully exclude the risk of a "top-up" being vulnerable to avoidance.

- There are no tax implications of the transfer of title.

## **2 Private International Law and Domestic Law Aspects of Collateral**

### Validity of the Contract/Attachment:

Austrian private international law:

- The validity of the formation of a contract will be governed by the law of the country of incorporation of the counterparty which provides the characteristic consideration
- The creation of a pledge agreement between the parties would be governed by the law chosen by the parties to govern the pledge, subject to the conflicts of law rules of the Rome Convention.

Austrian Domestic Law:

- There exists a two tier system consisting of a pledge agreement between the parties (title) and an act of perfection (modus).

### Perfection:

Austrian private international law:

- *Lex rei sitae* will determine perfection requirements, so long as it is not contradictory to guiding principles of Austrian law.

Austrian domestic law:

- Perfection is achieved by what is referred to as “publication” (Publizität) which is achieved by physical transfer of the assets subject to the pledge to the secured party, or if a claim is pledged by informing the claim’s third party debtor of the pledge or marking the pledge in the pledger’s books (§§ 449, 451, 1368 ABGB). If transfer is not carried out the pledge is invalid due to the lack of perfection.
- There is no need under Austrian law to have the pledged securities registered. Usually the securities account will be blocked in favour of the secured party.
- For reasons of proof, a written document is preferable.

### Priorities:

Austrian private international law:

- *Lex rei sitae* will determine priorities, as long as it is not contradictory to guiding principles of Austrian law.

Austrian domestic law:

- In case of Insolvency of the pledgor the pledgee is granted a preferential position with regard to the fulfilment of his claims (§ 48, 120 Konkursordnung).
- In the case of insolvency of the custodian the depositor has a priority right with regard to the deposited securities. If the depositor has fulfilled his own obligation towards the custodian at the time of the beginning of the insolvency proceedings he has a right to be satisfied ahead of all other debtors.
- The time of creation of the pledge is the relevant factor for deciding priority (for a classic mortgage involving real estate it is the time of registration).

Enforcement:

Austrian private international law:

- The applicable law governing the establishment and the realisation of pledge is determined according to the conflicts of laws rules of the Rome Convention.

Austrian domestic law:

- The Handelsgesetzbuch (HGB), i.e., the Austrian Commercial Code contains special provisions regarding enforcement of a pledge. In the absence of a special agreement by the parties regarding the enforcement of the pledge, commercial parties may under certain circumstances sell pledged assets without court approval after giving one week's notice to the pledgor (§ 368 and Article 8 subpara 14 and 15 of the Introductory Decree to the Commercial Code). Under these provisions, securities which have a market or exchange value, and bank savings certificates shall not be sold by auction but by a commercial agent or a similar person. The securities held by an agent on his clients' behalf are pledged by law as a security for the agent's expenses and commission (§ 397 HGB)
- In all other cases the enforcement of a pledge may only be effected through the court.
- Pledges which have been created in the course of trades on a stock exchange are to be enforced according to the rules of commercial pledges even if the parties to the pledge do not qualify as commercial parties (§ 27 para 5 Börsegesetz).
- If the collateral provider is subject to formal insolvency proceedings, there is a 90 day freeze on the sale of the collateral if an immediate sale would otherwise put at risk a possible restructuring of the insolvent's business.

Further details of the realisation of the pledge in case of insolvency proceedings are regulated in §120 para 2, 3 and 4 Konkursordnung.

- The status of the secured party in insolvency proceedings depends upon the actual notification to the custodian about the creation of the pledge over the securities. If the secured party is not the custodian a separate agreement needs to be established between the secured party and the custodian stating that the custodian holds the collateral on behalf of the secured party.

Insolvency:

Austrian private international law:

- Austrian law in general follows the “territorial” approach. It is clear that assets located in Austrian territory are covered by the proceedings (absent specific provisions in the bilateral and multilateral insolvency treaties Austria is a party to) but there is no clear guidance as to whether assets located abroad are covered or not.

Austrian domestic law:

- According to the Austrian Insolvency Laws the insolvency or the debt composition comes into effect the beginning of the day which follows the day of the public announcement of the start of the court proceedings.
- In general the Austrian insolvency regime grants the liquidator a right to challenge certain transactions entered into within a specified period before the start of the court proceedings if the insolvent party’s intention was to favour a creditor.
- The insolvent debtor can by no means force the secured creditor to realise the collateral in order to have an advantage in the insolvency proceedings, although the parties can come to an agreement on a mutual basis.

After having given notice to the collateral provider that the collateral will be realised within the timeframe determined by law, the consent of the insolvent party is no longer necessary.

### **3. Miscellaneous**

#### **3.1 Cross-border transactions in multi-tiered holding systems**

The Austrian Deposit Law (“Depotgesetz”) defines the following types of deposits:

“Sonderverwahrung”: the custodian keeps the securities, upon special request by the depositor, separated from its own and third parties’ securities.

“Sammelverwahrung”: irregular deposit; the financial intermediary is allowed to co-mingle fungible securities with its own and third parties’ assets, the depositor has a claim against the custodian.

The Austrian Deposit Law states that the depository of securities is restricted in its right to pledge deposited securities; the depository is only entitled to pledge securities if he receives written permission by the depositor. Securities may only be pledged to credit institutions and only up to an amount equal to the sum of a credit or loan granted to the depositor by the depository. There are also further restrictions with regard to sub-depositaries.

#### **3.2. Implementation of the Settlement Finality Directive**

In Austria a working group from the Finance Ministry was formed to consider appropriate implementation. Initially Austria adopted a very narrow interpretation of Art. 9 (2), restricting its application to bankruptcy only (on the grounds that the Art. falls within the section concerning insolvency). Early in 1999 Austria dropped the bankruptcy-only restriction and has now adopted the narrow view in specific legislation implementing the Directive. The Legislation was passed by Parliament during the summer of 1999 and published in the Federal Law Gazette in July 1999 and came into force on December 1999.