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Austria: FinStaG - Recapitalization and Asset Guarantee (AT GFC)

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Abstract

Following the adoption of a joint framework by Euro area countries in response to the intensifying financial crisis in October 2008, Austria enacted a package of measures including the Financial Market Stability Act (Finanzmarktstabilitätsgesetz, "FinStaG"). In addition to permitting nationalization under certain circumstances, FinStaG allowed the Austrian government to use six specific measures to recapitalize credit institutions operating in Austria and Austrian insurance companies. According to FinStaG, €15 billion could be used for this purpose, though this amount would later be increased. Eight institutions received support through FinStaG, and the government granted capital and liquidity support totaling €21 billion. It appears that recapitalization measures can still be instituted under FinStaG, but the blanket approval by the European Commission expired on June 30, 2011, at which point any measures would have to be considered on a case by case basis.

Keywords: Austria, financial crisis, capital injections, recapitalizations

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Austria FinStaG – Recapitalization

At a Glance

Following the declaration of a joint action plan for EU Member States, in October 2008 Austria enacted a number of measures in response to the financial crisis. Included in this response was the Financial Market Stability Act (Finanzmarktstabilitätsgesetz, "FinStaG"), which provided the legal framework for recapitalization of individual credit institutions and insurance companies.

Summary of Key Terms	
Purpose: to strengthen and stabilize individual institutions	
Announcement Date:	October 26, 2008
Operational Date	October 27, 2008
Expiration Date	June 30, 2009, subsequently extended to June 30, 2011
Legal Authority	Finanzmarktstabilitätsgesetz (Financial Market Stability Act – FinStaG)
Authorized Amount	€15 billion, subsequently increased to €23.5 billion
Amount Used	€21 billion
Participants	Credit institutions operating in Austria and Austrian insurance companies

Under FinStaG, the Austrian government could utilize six recapitalization measures to assist distressed or failing institutions. According to FinStaG, the government was authorized to spend €15 billion on these recapitalization measures, but this amount was subsequently increased to €23.5 billion. Each institution receiving assistance through FinStaG entered into a master agreement with the Austrian government dictating specific terms and conditions. Recapitalization measures were carried out by a separate entity, Finanzmarketbeteiligung (FIMBAG), acting on behalf of the Austrian government. The FinStaG measures most frequently used during the crisis were the assumption of liabilities and the provision of capital, in particular participation capital.

The European Commission issued a blanket approval of measures under FinStaG in line with Article 87(3)(b) of the EC Treaty, which permits state aid that prevents serious disruptions to a member state's economy. This approval expired on June 30, 2011 after being extended multiple times. As a result, the Minister of Finance retains the powers granted under FinStaG, but any recapitalization measure would have to be individually approved by the EC. During the crisis, eight credit institutions received support through FinStaG. As of 2016, the Austrian government granted €21 billion in capital and liquidity support under FinStaG.

Summary Evaluation

What little scholarship and evaluation exists on FinStaG focuses largely on the design of the recapitalization framework and potential reforms that should take place in preparation for future crises, rather than on gauging the recapitalization measures' success during the financial crisis. For example, criticisms of the program argue that the use of participation capital gave the Austrian government insufficient control.

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I. Overview

Background

In response to the intensifying financial crisis, Euro area countries convened at a summit in October 2008. The meeting resulted in a joint action plan, released on October 12, that called in part for national governments to work with central banks and supervisors to "provid[e] financial institutions with additional capital resources so as to continue to ensure the proper financing of the economy" and to allow for "an efficient recapitalisation of distressed banks" (Declaration on a Concerted European Action Plan of the Euro Area Countries). In Austria, this resulted in the passage of the Financial Market Stability Act (FinStaG) on October 26, 2008 as part of a broader financial market stability package that also contained the Interbank Market Support Act (IBSG).[2] The package was approved by the European Commission (EC) under Article 87(3)(b) of the EC Treaty, which permits state aid that remedies a serious disturbance in a member state's economy (Article 87 of the EC Treaty).

Before Austria passed FinStaG, on October 17, Constantia Privatbank had to be bailed out by a group of five Austrian banks with assistance from the government. Though the bank had a relatively small balance sheet, it was judged to be of systemic importance to the Austrian economy due to its €10 billion fund management business. The five banks provided €400 million in liquidity to the bank, which was backed by a government guarantee. Austria's central bank also provided €50 million in liquidity. The Constantia bailout predated FinStaG but demonstrated the need for a legal framework for recapitalizing distressed banks in the context of the financial crisis (Komarek and Groendahl 2008).

Program Description

FinStaG allowed the Austrian government to issue guarantees, assume liabilities, and recapitalize distressed or failing banks. The legislation authorized the federal Minister of Finance to use six specific recapitalization measures, outlined in Figure 1 below.

Recipients of these measures had to be credit institutions authorized under the Austrian Banking Act or domestic insurance companies. FinStaG also permitted nationalization if an institution was at risk of failing and causing serious damage to the Austrian economy (See FinStaG – Nationalization Case). €15 billion was initially authorized for these measures by FinStaG, but any leftover money from the €75 allocated for use under IBSG, which was passed alongside FinStaG, could also be used (136th Federal Act). The legal limit was

[2] Whereas FinStaG permitted assistance to specific institutions, IBSG instituted a broad guarantee scheme and clearingbank available to all credit institutions operating in Austria and Austrian insurance companies with the aim of stimulating the interbank market. For more information, see IBSG and OeCAG cases

increased multiple times; in 2016 it reached €23.5 billion (Austrian Stability Programme: Update for the period 2016 to 2021).

FinStaG did not specify an expiration date for the use of its recapitalization measures. However, the European Commission's approval of the law under Article 87(3)(b) of the EC Treaty was only granted until June 30, 2009 (Kalss 538). This approval was subsequently extended multiple times until expiring on June 30, 2011, at which point each individual measure taken under FinStaG would have to be approved separately by the EC (Measures for Strengthening and Stabilising Individual Institutions).

To carry out the recapitalization measures authorized by FinStaG, the Austrian government established Finanzmarktbeteiligung AG (FIMBAG). FIMBAG was a subsidiary of Österreichische Industrieholding AG (ÖIAG), an existing investment and privatization agency owned by the government (Institutions). FIMBAG was also responsible for monitoring beneficiary institutions for compliance with the conditions established by their individual agreements with the government and reporting back to the Federal Ministry of Finance (Kalss 539). Once the purpose of instituting any of these measures was achieved, in accordance with FinStaG, FIMBAG was required to privatize any shares or interests acquired by the government (136th Federal Act).

Figure 1: Recapitalization Measures Available Under FinStaG

Option	Instrument
1	assumption of liability (including, but not limited to, guarantees, suretyships, collateral promises) for obligations of the affected legal entity
2	assumption of liability (including, but not limited to, guarantees, suretyships, collateral promises) for obligations to the affected legal entity
3	granting of loans and supply of own funds to credit institutions pursuant to sections 23 and 24 of the Banking Act (BWG) and to insurance companies pursuant to sec. 73b of the Insurance Supervision Act (VAG)
4	acquisition of shares or partnership interests or convertible bonds in connection with capital increases
5	acquisition of existing shares or partnership interests by legal transaction
6	acquisition of partnership or company assets by way of a merger according to sec. 235 of the Stock Corporation Act (Aktiengesetz, "AktG")

Source: 136th Federal Act

Outcomes

According to the Austrian Ministry of Finance, eight credit institutions received some support under FinStaG.[3] These eight institutions included some of the largest banks operating in Austria, measured by total assets (List of Banks in Austria); three of the banks, Erste Group, BAWAG, and Raiffeisen Zentralbank AG, are among the five largest banks in the country (Banks in Austria). Of the six measures available, the most frequently used were provision of capital in the form of participation capital or shareholder contributions and assumption of liability by the government. Under FinStaG, the Austrian government acquired shares in three of the banks, Österreichische Volksbanken, Kommunalkredit Austria, and Hypo Alpe-Adria-Bank International AG. Two of those, Kommunalkredit and Hypo-Alpe-Adria, were nationalized following their failures in 2008 and 2009, respectively (Measures for Strengthening and Stabilising Individual Institutions) (See FinStaG – Nationalization Case).

The most recent publicly available data, published in April 2017, calculates that under FinStaG the government granted capital and liquidity support totaling €21 billion. After taking repayments into account, the net total was calculated as €17 billion. As of the end of 2016, €7.4 billion was used for subscription of capital and other capital measures. Federal guarantees under FinStaG amounted to another €7.4 billion, with claims under those guarantees equaling €1.3 billion[4] (Austrian Stability Programme: Update for the period 2016 to 2021).

[3] The eight institutions were: Aviso Zeta AG (formerly Constantia Privatbank), BAWAG P.S.K Bank für Arbeit und Wirtschaft und Österreichische Postsparkasse AG, Erste Group Bank AG, Hypo Alpe-Adria Bank International AG, KA Finanz AG, Kommunalkredit Austria AG, Österreichische Volksbanken AG and Raiffeisen Zentralbank AG/Raiffeisen Bank International AG) (Measures for Strengthening and Stabilising Individual Institutions).

[4] Both option 1 and 2 allow government guarantees. It is not clear which of the two this figure refers to, but it likely that the majority of guarantees were for obligations to credit institutions (option 2).

II. Key Design Decisions

1. **The Financial Market Stability Act (FinStaG) was part of a package of measures including the Interbank Market Support Act (IBSG).**

The Financial Market Stability Act (FinStaG) was passed alongside the Interbank Market Support Act (IBSG) as part of the Austrian Financial Market Stability Package. This package of measures was introduced in response to the joint call from Euro area countries for national legislation aimed at restoring financial market stability (Austrian Financial Market Stability Package).

2. **FinStaG permitted the Federal Minister of Finance to recapitalize certain institutions and provided the basic legal framework for recapitalization.**

FinStaG allowed the Federal Minister of Finance to "secure the macroeconomic balance and protect the Austrian national economy" through recapitalization measures in order to "remedy a considerable economic disruption in Austria" (136th Federal Act). FinStaG provided the basic legal framework for the recapitalization scheme.

3. **The recapitalization scheme authorized by FinStaG was also governed by a requirements ordinance issued by the Minister of Finance.**

FinStaG stipulated that the Federal Minister of Finance, with the Federal Chancellor, "shall have the authority to enact an ordinance determining the details of the conditions and obligations imposed for measures taken pursuant to this Federal Act" (136th Federal Act). In line with this, the Federal Minister of Finance released an ordinance that stipulates the detailed provisions governing the scheme authorized by FinStaG (Kalss 539).

4. **The European Commission ruled that the recapitalization scheme constituted state aid, but was permitted under Article 87(3)(b) of the EC Treaty.**

On October 31 2008, a little less than a week after FinStaG was enacted, Austria notified the European Commission (EC) of its passage. In a letter dated December 9, the EC notified the Austrian government that though the recapitalization scheme under FinStaG (as well as the guarantees through IBSG) constituted state aid under Article 87(1) of the EC Treaty, it was permitted under Article 87(3)(b) of the Treaty (Austria: Measures and prolongations under the Law on the stability of the financial markets and on strengthening the interbank market for credit institutions and insurance companies). Article 87(3)(b) permits state aid "to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State" (Article 87 of the EC Treaty). This decision was consistent with an earlier communication published by the EC, which stated that Article 87(3)(b) could be used as a legal basis for aid measures like general schemes to address the financial crisis (Communication 2008/C 270/02).

5. FinStaG had no statutory time limit, but the general scheme was only approved by the European Commission for a certain amount of time.

FinStaG, unlike IBSG, did not specify an end date for the recapitalization scheme. However, when the EC issued its state aid decision, it only approved new measures under the scheme until June 30, 2009 (Kalss 538). Austria applied for and received four extensions of this deadline, until June 30, 2011 (Austria: Measures and prolongations under the Law on the stability of the financial markets and on strengthening the interbank market for credit institutions and insurance companies). After June 30, 2011, any new support measure adopted for an individual institution under FinStaG had to be separately examined and approved by the EC (Measures for Strengthening and Stabilising Individual Institutions).

6. The government could recapitalize credit institutions operating in Austria and Austrian insurance companies under FinStaG.

FinStaG stipulated that the government could recapitalize credit institutions operating in Austria as defined by the Banking Act, which included branches of foreign banks, and domestic insurance companies as defined by the Insurance Supervision Act (136th Federal Act).

7. FinStaG authorized €15 billion to be used for recapitalization measures; this was subsequently increased to €23.5 billion.

Under FinStaG, the federal government could not use more than €15 billion for recapitalization measures. This budget could be augmented if there were leftover funds from what was allocated for IBSG (136th Federal Act). This cap was later increased multiple times; in 2016, a €1.5 billion increase brought the legal limit to €23.5 billion (Austrian Stability Programme: Update for the period 2016 to 2021).

8. Conditions for recapitalization were established by a master agreement between each beneficiary institution and the Austrian government.

Though FinStaG provided the legal framework for recapitalization, once it was deemed necessary to use measures for a specific institution, the Austrian government and the relevant institution signed a master agreement dictating specific terms and conditions (Kalss 539). FinStaG gave the Minister of Finance the power to set conditions for the use of recapitalization measures. These conditions could regulate the orientation of the institution's business policy (for example, providing loans to SMEs), payment of executives and employees, the use of the funds, and distribution of dividends, and more (136th Federal Act). Guidelines for these master agreements were established by the Minister of Finance's ordinance (see Key Design Decision #3), but these guidelines were flexible enough to be tailored to each recapitalization intervention (Kalss 538-9).

9. There were six available measures for recapitalization.

FinStaG authorized the Federal Minister of Finance to use the following six specific recapitalization:

Figure 1: Recapitalization Measures Available Under FinStaG	
Option	Instrument
1	assumption of liability (including, but not limited to, guarantees, suretyships, collateral promises) for obligations of the affected legal entity
2	assumption of liability (including, but not limited to, guarantees, suretyships, collateral promises) for obligations to the affected legal entity
3	granting of loans and supply of own funds to credit institutions pursuant to sections 23 and 24 of the Banking Act (BWG) and to insurance companies pursuant to sec. 73b of the Insurance Supervision Act (VAG)
4	acquisition of shares or partnership interests or convertible bonds in connection with capital increases
5	acquisition of existing shares or partnership interests by legal transaction
6	acquisition of partnership or company assets by way of a merger according to sec. 235 of the Stock Corporation Act (Aktiengesetz, "AktG")
Source: 136th Federal Act	

10. Of the six available options, the assumption of liability (options 1 and 2) and the provision of capital (option 4) were used most frequently.

According to the Austrian Ministry of Finance, the assumption of liability[5] and the provision of capital through participation capital or shareholder contributions were the options most frequently used by the government to recapitalize institutions under FinStaG (Measures for Strengthening and Stabilising Individual Institutions).

11. Assumption of liability allowed the government to indirectly make more capital available to institutions.

According to the Ministry of Finance, by assuming liability the government "allowed the distressed institutions to reduce their risk provisioning, thereby freeing capital" (Measures for Strengthening and Stabilising Individual Institutions). Guarantees under FinStaG were also used during the nationalization of some banks during the crisis (Austrian Stability Programme: Update for the period 2016 to 2021) (See FinStaG – Nationalization Case).

[5] See footnote 4

12. Participation capital allowed the government to increase institutions' equity without receiving voting rights.

Participation capital, which was introduced in Austria 30 years before the crisis, was used to provide equity to credit institutions and insurance companies. In the context of the financial crisis, participation capital was seen as "a surrogate for the equity which was destroyed by the financial crisis and cannot be recovered through a relevant issuance of share capital," (Kalss 541). Participation capital did not grant the Republic of Austria any position or membership rights under stock corporation law, giving the government no direct influence over the beneficiary institution (Kalss 540). According to Kalss, the preference for participation capital stemmed from the banks' influence on the writing of FinStaG and their input during individual negotiations for institutional recapitalization (540).

13. Specific conditions were established for participation capital based on a determination of whether the beneficiary institution was sound or distressed.

In determining the terms and conditions for participation capital, the beneficiary institution had to be judged either sound or distressed. This judgment was made in line with the EC's Recapitalisation Communication, and depended upon a variety of factors, including the volume of recapitalization, equity base, and risk profile of the institution (Kalss 544). Sound banks were charged an interest rate in line with market conditions but not less than 9.3% annually. For distressed institutions, the minimum interest rate was 10% (Petrovic and Tutsch).

If a sound bank was able to raise 30% of the capital privately, the minimum interest rate would no longer apply. Of this 30%, a maximum of one third could be raised from existing shareholders (Kalss 544).

14. A separate entity, Finanzmarktbeteiligung AG (FIMBAG), was set up to carry out recapitalization measures.

In accordance with FinStaG, the Austrian government established a new separate company, FIMBAG, as subsidiary of Österreichische Industrieholding AG (ÖIAG), the Austrian investment and privatization agency owned by the state. FIMBAG was authorized to carry out measures under FinStaG, and was required to monitor compliance with the master agreement (Institutions).

The relationship between the Austrian government and FIMBAG was contractualized by an Assumption Agreement. Under the agreement, FIMBAG agreed to monitor compliance, as mentioned above, and fulfill certain reporting requirements to the federal government (Kalss 539).

15. Once the purpose of recapitalization was achieved, the government had to privatize any shares and interests.

According to FinStaG, the government was required to privatize any shares or interests in a credit institution or insurance company it acquired once the economic disruption triggering the recapitalization measures had been remedied. The law also stated that in privatizing shares or partnership interests, “the situation on the capital market shall be taken into account” (136th Federal Act).

III. Evaluation

FinStaG has received little attention from scholars, and most scholarship focuses on the design of the framework rather than on its specific outcomes. In her detailed explanation of the Austrian response to the financial crisis, Kalss notes that the use of state participation capital under FinStaG “permits flexibility but also limits the possibility to exercise influence. Experience has shown that influence and control are generally exercised, and work better, on a more informal level” (Kalss 548). In its assessment of Austria’s financial stability, the IMF also noted that the recapitalization framework established by FinStaG could be strengthened, for example by increasing the budget for recapitalization and by giving FIMBAG a more prominent role in negotiations with distressed institutions to give the government more oversight over restructuring plans (Austria: Financial Sector Stability Assessment).

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V. Key Program Documents

Summary of Program

- Measures for Strengthening and Stabilising Individual Institutions – *Austrian Federal Ministry of Finance description of the Financial Market Stability Act (FinStaG)* https://english.bmf.gv.at/financial-sector/measures-stabilising-individual-institutions.html
- Austrian Financial Market Stability Package – *Austrian Federal Ministry of Finance overview of crisis response package including FinStaG* https://english.bmf.gv.at/financial-sector/austrian-financial-market-stability-package.html

- Austrian Stability Programme: Update for the period 2016 to 2021– *Austrian financial stability report submitted to European Commission* https://ec.europa.eu/info/sites/info/files/2017-european-semester-stability-programme-austria-en.pdf

- National Rescue Measures in Response to the Current Financial Crisis – *ECB Legal Working Paper summarizing crisis response measures taken by EU Member States, including Austria's guarantee program* https://www.ecb.europa.eu/pub/pdf/scplps/ecblwp8.pdf?23b81a456ecb550cfcd1b693d4f10685

Legal/Regulatory Guidance

- 136th Federal Act – *Group of Austrian acts, including the Financial Market Stability Act (FinStaG)* https://www.volksbankwien.at/m101/volksbank/m101_oevag/downloads/bonds_struk_anleihen/english_version_of_interbank_market_act.pdf

- Communication from the Commission (2008/C 270/02) – *Communication from the European Commission addressing state aid during financial crisis* http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008XC1025(01)&from=EN

Key Academic Papers

- Measures by the Austrian Regulatory Authorities in Response to the Financial Market Crisis (Kalss 2010) – *paper analyzing the Austrian government's response to the financial crisis.* https://doi.org/10.1017/S1566752910400026

Reports/Assessments

- EU Bank Packages: Objectives and Potential Conflicts of Objectives – *study by Austria's central bank comparing responses to the financial crisis across the EU.* https://ssrn.com/abstract=1734904