

TRANSLATION FROM GERMAN ORIGINAL

## **Mortgage Bank Act \*)**

(Austrian "*Hypothekbankgesetz - HypBG*")

German *Reich* Law Gazette of 1899, p. 375, as amended by

1	German <i>Reich</i> Law Gazette of 1923, p. 635	2	German <i>Reich</i> Law Gazette of 1926, p. 97	3	German <i>Reich</i> Law Gazette of 1927, p. 491
4	German <i>Reich</i> Law Gazette of 1930, p. 108	5	German <i>Reich</i> Law Gazette of 1938, I 1574 (= Law Gazette for the province ("Land") of Austria 1938/648)		
6	(Austrian) Federal Law Gazette No. 1974/509	7	(Austrian) Federal Law Gazette No. 1993/532	8	(Austrian) Federal Law Gazette Part I No. 1998/88
9	(Austrian) Federal Law Gazette Part I No. 2001/97	10	(Austrian) Federal Law Gazette Part I No. 2004/90		(Austrian) Federal Law Gazette Part I No. 2005/xxx

*\*) In this Act, the term "bank" has not been replaced by the term "credit institution" (cf. sec. 104 of the [Austrian] "BWG" [Banking Act], Federal Law Gazette No. 1993/532), because in the Mortgage Bank Act the term "bank" is used to denote the "Hypothekbank" (mortgage bank).*

**Sec. 1** "(1) Stock corporations whose corporate objects are the granting of mortgage loans on real property and the issuance of bonds or debentures on the basis of the mortgages acquired (mortgage banks) may carry out their business only with the approval of the Austrian Financial Market Authority (FMA)."

*([Austrian] Federal Law Gazette Part I No. 2001/97)*

*(2) (canceled, [Austrian] Federal Law Gazette Part I No. 2001/97)*

Any modification of, or amendment to, the Articles of Association of a mortgage bank shall require the approval

of the FMA. (*[Austrian] Federal Law Gazette Part I No. 2001/97*)

**Sec. 2** General partnerships, limited partnerships, limited liability companies, [registered] cooperatives, and individuals may not operate an enterprise of the type specified in sec. 1 para. 1.

**Sec. 3** (*canceled, [Austrian] Federal Law Gazette Part I No. 2001/97*)

**Sec. 4** The supervisory authority shall have the right to give any instructions necessary to ensure that the business of the bank complies with the laws, the Articles of Association and any other mandatory provisions.

In particular, the supervisory authority shall have the right,

1. at any time to inspect the books and records of the bank as well as to examine the cash on hand and the investments;

2. to demand information on all business matters from the administrative bodies of the bank;

3. to delegate a representative to the shareholders' meeting and to the meetings of the administrative bodies of the bank, to request the calling of shareholders' meetings and the scheduling of meetings of the administrative bodies as well as the specification of the items to be resolved; if such request is not complied with, the supervisory authority may directly call or schedule meetings or specify the items to be resolved, such measures to be taken at the expense of the bank;

4. to prohibit the execution of resolutions or instructions which would violate the law, the Articles of Association or any other mandatory provisions.

The supervisory authority may appoint a commissioner who shall perform the supervisory tasks under its direction. The supervisory authority may order the bank, in consideration for the work of such commissioner, to pay a remuneration to the treasury in an amount to be fixed by the supervisory authority.

**Sec. 5** (1) In addition to the granting of mortgage loans and the issuance of "*Hypothekendarlehenbriefe*" (mortgage bonds), mortgage banks may only engage in the following business:

1. acquire, alienate, and grant loans on, mortgages;

"2. grant loans not secured by a mortgage to Austrian corporations governed by public law or to any Contracting State to the Agreement on the European Economic Area other than Austria or to Switzerland as well as to their regional governments and local authorities, for which the competent authorities, in accordance with Article 43.1.b.5 of Directive 2000/12/EC of the European Parliament and of the Council relating to the taking up and pursuit of the business of credit institutions, have set a weighting of 20 percent, at the most, or against the full guarantee by one of the above-mentioned authorities, and issue debentures on the basis of the claims so acquired;"

(*[Austrian] Federal Law Gazette Part I No. 1998/88, [Austrian] Federal Law Gazette Part I No. 2004/90*)

3. grant loans to Austrian small-scale railway companies against pledging of the railway and issue debentures on the basis of the claims so acquired;

4. purchase and sell securities on a commission basis, to the exclusion of forward transactions;

"5. accept funds or other objects for depositing purposes, however provided that the total amount of the deposited funds will not exceed 50 percent of the paid-in capital stock;"

(*German Reich Law Gazette of 1930, p. 108*)

6. undertake the collection of bills of exchange, money orders and similar papers;

"7. banking transactions pursuant to sec. 1 para. 1 sub-para. 7 lit. b through f of the (Austrian) "BWG" (Banking Act)."

(2) Mortgage banks may employ available funds profitably to deposit such funds with appropriate banks, to purchase their "*Hypothekendarlehenbriefe*" (mortgage bonds) and the debentures issued by them pursuant to paragraph 1 subparagraphs 2, 3, to purchase such bills of exchange and securities [which may be purchased by the "*Reichsbank*" in accordance with the provisions of the "*Bankgesetz*" (Banking Act) of March 14, 1875] as well as to lend on securities in accordance with instructions to be drawn up by the mortgage bank. The instructions shall specify the securities on which the loan may be raised and the authorized volume of the loan.

(3) Mortgage banks may acquire real property only to prevent losses from mortgages or to procure business premises. [As regards such acquisition, in each federal state, mortgage banks domiciled in the territory of any other federal state shall be considered equal to the domestic mortgage banks\*)].

\* ) *obsolete.*

"**Sec. 5a** (1) Without prejudice to the rights of the "*Kreditanstalten*" (credit institutions subject to the Mortgage Bond Act) under the "*Pfandbriefgesetz*" (Mortgage Bond Act), only debentures complying with the provisions of this Federal Act may be put on the market under the name of "*Pfandbrief*" (mortgage bond), "*Kommunalbrief*" (public sector certificate), "*Kommunalschuldverschreibung*" (public sector bond) or "*öffentlicher Pfandbrief*" (public sector mortgage bond) or any other name containing one of these terms.

"(2) Mortgage banks governed by private law which are domiciled outside of Austria may put debentures on the market under the names permitted in their countries. If German translations of such names are used in this connection, the original-language name shall also be given. Furthermore, if any of the names indicated in para. 1 is used alone or in connection with another name in the distribution of debentures of mortgage banks governed by private law which are domiciled outside of Austria, such debentures may be put on the market only if they materially meet the requirements of Art. 22 para. 4 of the Council Directive on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (85/611/EEC, as amended by 2001/108/EC). (*[Austrian] Federal Law Gazette Part I No. 2004/90*)

"(3) Any person who, without being authorized thereto, issues debentures under the name of "*Pfandbrief*" (mortgage bond), "*Kommunalbrief*" (public sector certificate), "*Kommunalschuldverschreibung*" (public sector bond) or "*öffentlicher Pfandbrief*" (public sector mortgage bond), contrary to paragraphs 1 and 2, commits an administrative

offense and shall be liable to pay a fine of up to EUR 20,000.00 imposed by the FMA, unless such act constitutes a criminal offense subject to the jurisdiction of courts of law."

([Austrian] Federal Law Gazette Part I No. 1998/88, [Austrian] Federal Law Gazette Part I No. 2001/97))

**Sec. 6** (1) The total volume of "*Hypothekendarlehenbriefe*" (mortgage bonds) in circulation must at all times be covered at their nominal value by mortgages of at least the same amount and with at least the same interest yield. "If "*Hypothekendarlehenbriefe*" (mortgage bonds) are issued as zero-coupon bonds or with a redemption value greater than the nominal value, the imputed redemption value of the mortgage bonds shall be used instead of the nominal value for the calculation of the cover amount. In addition, securing excess cover at a rate of two percent of the nominal value of the "*Hypothekendarlehenbriefe*" (mortgage bonds) in circulation has to be maintained at all times in the form of assets eligible as substitute cover. The Articles of Association of the mortgage bank may provide that in addition to cover at the nominal value of the "*Hypothekendarlehenbriefe*" (mortgage bonds), cover at the discounted present value ("*Barwert*") must exist at all times."

"(1a) Mortgages or parts of mortgages of any other credit institution according to sec. 2 sub-para. 20 of the (Austrian) Banking Act shall be considered equivalent to those mortgages where the mortgage bank is the creditor, if it has been agreed in writing that they are held in trust by such other credit institution for the mortgage bank and it is certain that they correspond to the provisions of this Federal Act. The credit institution holding the mortgages or parts of mortgages in trust for the mortgage bank, must apply sec. 48 of the (Austrian) Banking Act

subject to the proviso that the sum of the mortgages or parts of mortgages thus held shall be shown separately."

(2) Insofar as mortgages on agricultural property are used for this purpose, at least half the cover must consist in redemption mortgages for which the annual repayment by the debtor amounts to no less than one fourth percent of the mortgage capital. However, in the event of such mortgages being repaid before their due date, the bank may use mortgages of another kind as substitute cover until the expiration of the scheduled redemption time.

(3) If the bank has acquired real property " " to prevent a loss from a mortgage established on such property in favor of the bank, it may use such property as cover for "*Hypothekenpfandbriefe*" (mortgage bonds) instead of the mortgage, however, at a maximum of half the amount at which the mortgage was used as cover before the purchase of the property by the bank. (*[Austrian] Federal Law Gazette Part I No. 1998/88*)

"(4) If, due to the repayment of mortgages or for any other reason, the prescribed total cover does not exist, the mortgage bank shall replace the lacking mortgage cover

1. by debentures issued by any of the Austrian corporations governed by public law, states, regional governments and local authorities mentioned in sec. 41 para. 1,
2. by deposits in bank accounts with a Zone A central bank (sec. 2 sub-para. 18 of the *[Austrian] Banking Act*) or with credit institutions pursuant to sec. 2 sub-para. 20 of the *(Austrian) Banking Act*), or
3. by cash

(substitute cover). Debentures shall only be used as substitute cover if they are traded on a regulated market in Austria or in any of the states mentioned in sec. 41

para. 1. The value attributed to the debentures may not exceed the amount resulting from the respective stock exchange or market price of the debentures, less five percent of their nominal value, provided that the resulting amount shall not exceed the nominal value of the debentures. The substitute cover shall not exceed 15 percent of the total amount of the "Hypothekendarfbriefe" (mortgage bonds) and "Kommunalschuldverschreibungen" (public sector bonds) in circulation."

"(5) Hedging transactions (derivatives contracts) which serve to reduce the risks of future interest or currency fluctuations or default - also in the event of the insolvency of the mortgage bank - with regard to the so-called "Deckungsstock", i.e., assets used as cover, for the "Hypothekendarfbriefe" (mortgage bonds) issued may also be used to provide preferential cover. In respect of the liabilities incurred by the mortgage bank under a derivatives contract, the bank's counterparty under such hedging transaction shall rank *pari passu* with the mortgage bond creditors as regards the assets entered into the "Hypothekenregister" (mortgage register) (sec. 22 para. 1)."

([Austrian] Federal Law Gazette Part I No. 2004/90)

**Sec. 7** (canceled, [Austrian] Federal Law Gazette No. 1993/532)

**Sec. 8** The conditions governing the legal relationship between the mortgage bank and the mortgage bond creditor, in particular the conditions governing the redemption of the "Hypothekendarfbriefe" (mortgage bonds), shall be shown in the "Hypothekendarfbriefe" (mortgage bonds).



(para. 2 canceled)

**"Sec. 9.** *"Hypothekendarfandbriefe"* (mortgage bonds) may be issued only if their maturities do not considerably exceed the period of time required in view of the maturities of the mortgage loans granted by the mortgage bank. The nominal value of the newly issued *"Hypothekendarfandbriefe"* (mortgage bonds) with maturities of more than 15 years shall not, at the end of a calendar-year quarter, over a *"Durchrechnungszeitraum"* (computing period) of three years, account for more than 60 percent of the nominal value of the entirety of the newly issued *"Hypothekendarfandbriefe"* (mortgage bonds). In making the computation, the nominal value of the *"Hypothekendarfandbriefe"* (mortgage bonds) with maturities of more than 15 years may be reduced by the nominal value of the *"Deckungswerte"* (cover assets) with maturities of more than 15 years newly acquired over the computing period. When computing the percentage share, the following *"Hypothekendarfandbriefe"* (mortgage bonds) shall under all circumstances be allocated to *"Hypothekendarfandbriefe"* (mortgage bonds) with a maturity of 15 years or less: *"Hypothekendarfandbriefe"* (mortgage bonds) where the mortgage bank is barred from repaying the *"Hypothekendarfandbriefe"* (mortgage bonds) for a period not exceeding one third of their maturity; *"Hypothekendarfandbriefe"* (mortgage bonds) the repayment of which must begin no later than after the expiration of one third of their maturity."

**Sec. 10.** Cover for *"Hypothekendarfandbriefe"* (mortgage bonds) may only consist of mortgages meeting the requirements stipulated in sections 11 and 12.

**Sec. 11** (1) Loans may be granted only on Austrian real property and, generally, such loans shall be entered in the land register as a first charge.

(2) The loan may not exceed 60 (sixty) percent of the value of the real property.

"(3) The FMA may permit lending on agricultural property in an amount of up to two thirds of the value of the property."

*([Austrian] Federal Law Gazette Part I No. 2001/97)*

"(4) Mortgages on real property located in any Contracting State to the Agreement on the European Economic Area other than Austria or in Switzerland shall be considered equal to mortgages on real property located in Austria, provided that, considering all circumstances, the legal and economic position of the mortgage bond creditors as regards such mortgages is comparable to the legal and economic position of the mortgage bond creditors as regards Austrian mortgages. In particular, such positions will be deemed comparable only if it has been ensured that, in the event of bankruptcy, the right of the mortgage bond creditors to repayment on a priority basis pursuant to sec. 35 para. 1 shall also extend to such mortgages, provided that failure of such comparability test by up to a total amount of ten percent of the mortgages on those pieces of real property for which such right has been ensured shall be tolerated.

*([Austrian] Federal Law Gazette Part I No. 1998/88)*

*(para. 5 canceled ([Austrian] Federal Law Gazette Part I No. 2004/90)*

**Sec. 12** The value of the real property used as a basis for the loan may not exceed the prudently assessed market value. When establishing this value, only the permanent characteristics of the real property and the

yield which any tenant can sustainably ensure by orderly management shall be taken into account.

"(2) To the extent that before a loan is granted on real property such property is appraised by a public authority of the territory where the property is located, the FMA may order that the value of the real property used as a basis for the loan may also not exceed the value determined by such appraisal."

(*[Austrian] Federal Law Gazette Part I No. 2001/97*)

If mortgages on building land and on new buildings which are not yet completed nor capable of producing a yield are used as cover for "*Hypothekendarbriefe*" (mortgage bonds), such mortgages in the aggregate may exceed neither one tenth of the total amount of the mortgages used to cover the "*Hypothekendarbriefe*" (mortgage bonds) nor half the paid-in capital stock. Moreover, mortgages on real property which does not guarantee a permanent yield, especially on pits and quarries, shall be excluded from use as cover for "*Hypothekendarbriefe*" (mortgage bonds). The same shall apply to mortgages on mines. Mortgages on other rights to which the provisions relating to real property are applicable shall be excluded from use as cover for "*Hypothekendarbriefe*" (mortgage bonds) if the rights do not guarantee a permanent yield.

**Sec. 13** On the basis of the provisions of sec. 12, the mortgage bank shall issue valuation instructions, which shall be subject to the approval of the supervisory authority.

(*para. 2 obsolete*).

**Sec. 14** Mortgage loans shall be granted in cash.

The granting of loans in the form of the bank's own "*Hypothekendarfbriefe*" (mortgage bonds) at the nominal value shall only be allowed if the Articles of Association of the bank so permit and the debtor expressly agrees thereto. In such a case, the debtor shall be given the right by formal deed to repay the mortgage, at his option, either in cash or in such "*Hypothekendarfbriefe*" (mortgage bonds) of the bank as belong to the same class as those received, at the nominal value. For the purposes of this provision, "*Hypothekendarfbriefe*" (mortgage bonds) where no distinction is drawn when the official stock exchange price is established, shall always be deemed to belong to the same class.

**Sec. 15** The main characteristics of the terms and conditions of mortgage loans shall be established by the mortgage bank, and such main characteristics shall be subject to the approval of the supervisory authority. The said terms and conditions shall specify, in particular, the disadvantages incurred by the debtor in the event of non-payment on the due date and the conditions under which the bank is entitled to demand early repayment of the mortgage.

*(paragraphs 2 and 3 obsolete).*

**Sec. 16** The loan prospectuses and the application forms used by the mortgage bank shall contain all the provisions concerning the mode of disbursement of the loans, any deductions in favor of the bank, the amount and due dates of the interest, and the other obligations of the debtor, the start of redemption, the calling for repayment and repayment.

**Sec. 17\*)** If the security of the mortgage is endangered as a result of a deterioration in the state of the real property on which the loan has been granted, the

bank may grant the owner a reasonable period of time to eliminate such danger. After the expiration of such period, the bank shall have the right to immediately assert its right under the mortgage unless the danger has been eliminated by an improvement of the state of the real property or by the creation of other mortgages. However, if the deterioration in the state of the real property on which the loan has been granted is not caused by uneconomical conduct on the part of the person in possession, the bank may promptly assert its right under the mortgage only with regard to the amount for which the cover required by law or the Articles of Association is no longer available in the reduced value of the real property; beyond this amount, the bank may not reserve the right to require early repayment of the mortgage in the event of a reduction in the value of the property. Any deterioration in the state of appurtenances which also provide cover for the mortgage or the removal of such appurtenances from the real property contrary to the rules of orderly management shall also be deemed a deterioration in the state of the real property.

In case part of the real property is sold [and provided it is established by the competent authorities according to the provisions of the laws of the province ("*Land*") concerned that the sale is not detrimental to the beneficiaries\*\*)], the bank may not reserve any rights to security or settlement that go over and above those provided for by law.

The bank may not reserve the right to demand early repayment of the mortgage in the event of its dissolution.

*\*) As regards sections 17 through 21, cf. Art. 4 para. 3 of the (Austrian) "HypBG EinfVO" (Introductory Ordinance to the Mortgage Bank Act).*

*\*\* ) Proof of the fact that the sale is not detrimental to the beneficiaries has been replaced by "separation free from any encumbrances" pursuant to the (Austrian) "LiegTeilG" (Act on the Separation of Real Property), Federal Law Gazette No. 1930/3.*

**Sec. 18** The debtor shall be given the right by formal deed to call for repayment of, and to repay, all or part of the mortgage.

*(paragraphs 2 through 4 canceled, [Austrian] Federal Law Gazette Part I No. 1998/88)*

**"Sec. 19** The debtor's right to call for repayment of, and to repay, all or part of the mortgage may be excluded only for such period of time for which the bank does not have an ordinary right to call for repayment. If this Federal Act does not permit the exclusion of the debtor's right to repay the mortgage, the credit institution may not reserve the right to demand a fee for early repayment of the loan or the granting of security in the case of a call for repayment."

*([Austrian] Federal Law Gazette Part I No. 1998/88)*

**Sec. 20** *(canceled)*

**Sec. 21** The right of the debtor to partial repayment of the mortgage may, in the case of redemption mortgages, be restricted in such a way that the bank must accept a payment only if it is intended and suited to reduce the redemption period by one or more years, while not affecting the amount of the annual installment paid so far by the mortgagor for interest and redemption. The provision shall not apply, however, if the amount of the payment reaches one tenth of the residual capital and the debtor requests that the subsequent annual installment be reduced, while

maintaining the original redemption period; in this case, with regard to the mortgages referred to in sec. 6 para. 2, the annual repayment installment may amount to less than one fourth percent of the original capital; the bank has to draw up a new repayment schedule.

The bank may not free itself in advance of the obligation, in respect of the amount repaid, to take the measures incumbent on it according to the provisions of civil law for the purpose of correcting the land register, canceling the mortgage [or establishing a part mortgage certificate\*)].

Following the publication of the annual balance sheet, the bank shall inform each debtor, at his request, of the amount of the mortgage which was repaid at the end of the previous year.

\*) *Obsolete.*

**"Sec. 22** (1) Each of the mortgages, substitute cover assets (sec. 6 para. 4) and hedging transactions (sec. 6 para 5) that are assigned as cover for the "*Hypothekpfandbriefe*" (mortgage bonds) and for the claims of the mortgage bank's counterparty under a hedging transaction (derivatives contract) shall be recorded separately by the mortgage bank in a mortgage register. Individual securities so entered shall be designated separately. The cash serving as substitute cover shall be held in safekeeping separately. If mortgages or parts of mortgages are held in trust for the mortgage bank (sec. 6 para. 1a), the credit institution acting as trustee in each case shall be recorded in the mortgage register. Hedging transactions (derivatives contracts) according to sec. 6 para. 5 may only be registered with the consent of the trustee and the mortgage bank's counterparty under the transaction; any registration to which such consent has not

been given shall be deemed not to have been made. The consent of the trustee to the registration confers the absolute presumption in the relationship between the mortgage bank and its counterparty that the derivatives contract has been entered into by the mortgage bank for the purpose of reducing the risks indicated in sec. 6 para. 5. The consent of the mortgage bank's counterparty may also be given for several derivatives contracts in advance.

(2) The mortgage bank shall keep secured transcripts from the mortgage register. Transcripts from the mortgage register shall be submitted to the FMA upon its request."

**Sec. 23** Within the second month of each calendar half-year, the bank shall publish in the ["*Deutscher Reichsanzeiger\**"] (Official Gazette of the German *Reich*)] and in the newspapers prescribed for publications of the bank the total amount of the "*Hypothekendarlehenbriefe*" (mortgage bonds) in circulation on the last day of the previous half-year, and the total amount of the mortgages recorded in the "*Hypothekenregister*" (mortgage register) on the last day of the previous half-year resulting after deduction of all repayments or other reductions, as well as the total amount of the securities entered in the register, and the funds in the safekeeping of the trustee on such day.

In the event that securities or any such mortgages are entered in the register the full amount of which is not eligible as cover for "*Hypothekendarlehenbriefe*" (mortgage bonds), the amount of the securities or the mortgages that is not considered an eligible cover shall be specified in the publication.

"(3) The FMA may release the credit institutions from their duty to make publications in the "*Amtsblatt zur Wiener Zeitung*" (Official Gazette to the Viennese daily



paper 'Wiener Zeitung') subject to the provisions of paragraphs 1 and 2, provided that it is ensured that the information specified in these provisions is publicized elsewhere in the "Amtsblatt zur Wiener Zeitung".

([Austrian] Federal Law Gazette Part I No. 2001/97)

\*) Now 'Amtsblatt zur Wiener Zeitung' (Official Gazette to the Viennese daily paper 'Wiener Zeitung').

**Sec. 24** (obsolete; cf. the accounting rules of the (Austrian) Banking Act.

**Sec. 25** If "Hypothekendarlehen" (mortgage bonds) have been issued at an amount below their nominal value, an amount equal to four fifths of the shortfall in proceeds may be entered on the assets side of the balance sheet; from the shortfall in proceeds shall be deducted the profit the bank has made by repurchasing "Hypothekendarlehen" (mortgage bonds) at an amount below their nominal value. At least a quarter of the asset item thus reported in the balance sheet shall be depreciated on an annual basis.

In no year may the asset items reported in the balance sheet pursuant to the provisions of paragraph 1 exceed, in the aggregate, twice the surplus resulting from the mortgage interest for the accounting year after deduction of the mortgage bond interest as well as a quarter percent of the total amount of the mortgages; furthermore, the designated asset items may, in the aggregate, not exceed the amount of the reserve earmarked exclusively as cover for a deficit balance.

The costs incurred in issuing the "Hypothekendarlehen" (mortgage bonds), including the commissions paid for their placement, shall be debited in full in the years in which they are incurred.

Claims of the bank to annual interest and redemption payments by the mortgagors for the time following the accounting year may not be entered on the assets side of the balance sheet.

**Sec. 26** "If "*Hypothekendarlehenbriefe*" (mortgage bonds) have been issued at a price exceeding their nominal value and if the bank has waived its right to redeem the "*Hypothekendarlehenbriefe*" (mortgage bonds) at any time, the surplus proceeds, insofar as they exceed the amount of one and a half percent of the nominal value, shall be entered on the liabilities side of the balance sheet." During the years for which the repayment of the "*Hypothekendarlehenbriefe*" (mortgage bonds) is excluded, the bank may in any given year only dispose of a percentage of the surplus proceeds that corresponds to the number of such years. Disposition is excluded for as long as a shortfall in proceeds of the type specified in sec. 25 para. 1 is reported on the assets side of the balance sheet; the surplus proceeds may at any time be employed for covering such shortfall in proceeds as well as for covering the loss incurred by the bank in repurchasing the "*Hypothekendarlehenbriefe*" (mortgage bonds) at a price exceeding their nominal value. (*German Reich Law Gazette of 1930, p. 108*)

**Sec. 27** (*canceled*)

**Sec. 28** (*canceled*)

### **"Trustee**

**Sec. 29** The (Austrian) Federal Minister of Finance shall appoint a trustee and a deputy trustee at each mortgage bank for a term of office of not more than five years; re-appointment shall be permissible. With regard to the appointment requirements, the grounds for revoking such appointment as well as with regard to the entitlement to

remuneration, sec. 76 para. 2, para. 3, first sentence and para. 9 of the (Austrian) Banking Act shall apply *mutatis mutandis*, with the trustee taking the place of the state commissioner ("*Staatskommissär*")."

**Sec. 30\*)** (1) "The trustee shall ensure that the prescribed cover for the "*Hypothekendarfandbriefe*" (mortgage bonds) and for the claims of the mortgage bank's counterparty under a hedging transaction (derivatives contract) exists at all times;" in so doing, provided that the value of the pledged real property is established in accordance with the instructions approved by the supervisory authority, the trustee shall not be required to investigate whether the value established corresponds to the actual value.

"(2) The trustee shall ensure that the mortgages, "*Ersatzdeckungswerte*" (substitute cover assets) and hedging transactions (derivatives contracts) that are assigned as cover for the "*Hypothekendarfandbriefe*" (mortgage bonds) and for the claims of the mortgage bank's counterparty under a hedging transaction (derivatives contract) are recorded in the mortgage register in accordance with the provisions of sec. 22 para. 1. The trustee shall inform the mortgage bank's counterparty of any registration of a hedging transaction (derivatives contract) without delay."

(3) Prior to issue, the trustee shall confirm on the "*Hypothekendarfandbriefe*" (mortgage bonds) the existence of the prescribed cover and the recording in the mortgage register.

"(4) Any and all assets recorded in the mortgage register may only be canceled in the mortgage register with the consent of the trustee. The consent of the trustee must be in writing, and may be indicated by the trustee affixing his signature to the cancellation entry in the mortgage

register. Furthermore, before any hedging transaction (derivatives contract) recorded in the mortgage register has been fully implemented, such hedging transaction may be canceled in the register in an effective manner only with the consent of the mortgage bank's counterparty under the transaction. Any cancellation to which such consent has not been given shall be deemed not to have been made. The mortgage bank's counterparty shall be notified of the cancellation without delay."

*\*) cf. Art. 2 of the (Austrian) Introductory Ordinance to the Mortgage Bank Act.*

**Sec. 31\*)** "(1) The trustee shall ensure the safekeeping of the deeds relating to the assets recorded in the mortgage register and the funds earmarked as substitute cover for the "*Hypothekendarlehenbriefe*" (mortgage bonds) under dual control with the mortgage bank; he may hand over these documents and funds only in accordance with the provisions of this Federal Act.

(2) The trustee shall be required to hand over such deeds as well as the funds at the request of the mortgage bank and to assist in their cancellation in the mortgage register, provided that the other assets recorded in the mortgage register suffice as prescribed cover for the "*Hypothekendarlehenbriefe*" (mortgage bonds) and for the claims of the mortgage bank's counterparty under a hedging transaction (derivatives contract) or that the mortgage bank procures any other prescribed cover. If the mortgage is repaid, the cash paid shall be delivered to the trustee for safekeeping in accordance with paragraph 1."

(3) If the mortgage bank requires a mortgage deed solely for temporary use, the trustee shall hand over the deed without the mortgage bank being obligated to provide alternative cover.

*\*) cf. Art. 2 of the (Austrian) Introductory Ordinance to the Mortgage Bank Act.*

**"Sec. 32** (1) The trustee shall have the right to inspect the books and documents of the mortgage bank at any time, insofar as they relate to the "*Hypothekendarlehenbriefe*" (mortgage bonds) and to the assets recorded in the mortgage register.

(2) The mortgage bank shall be required to keep the trustee continually informed of the capital repaid on the assets recorded in the mortgage register as well as of any other changes relating to such assets that are of importance to the mortgage bond creditors and to the creditors of claims arising from derivatives (sec. 6 para. 5)."

**Sec. 33** Disputes between the trustee and the mortgage bank shall be resolved by the supervisory authority.

**Sec. 34** (*canceled*)

**"Sec. 34a\*)** "(1) The levying of execution against the assets recorded in the mortgage register shall be permitted only in favor of claims arising from the "*Hypothekendarlehenbriefe*" (mortgage bonds) and from derivatives contracts."

*(German Reich Law Gazette of 1927, p. 491)*

*\*) cf. Art. 2 of the (Austrian) Introductory Ordinance to the Mortgage Bank Act.*

"(2) Claims entered into the mortgage register shall not be subject to set-off. The claim may be entered into

the mortgage register of the credit institution only after the mortgage bank has notified the debtor of the claim's status as security and of such prohibition of setting-off. This shall not apply to the offsetting, permissible under the general rules of civil law, of claims and liabilities under derivatives contracts as per sec. 6 para. 5."

### **"Special Provisions Under Insolvency Law**

**Sec. 35** (1) If bankruptcy proceedings are instituted against the mortgage bank, the assets recorded in the mortgage register shall form a "*Sondermasse*" (i.e., a special estate for claims of secured creditors) for the claims of the mortgage bond creditors (sec. 48 of the [Austrian] "*Konkursordnung - KO*" (Bankruptcy Code).

(2) The bankruptcy court shall appoint a special administrator for the administration of the special estate (sec. 86 of the [Austrian] Bankruptcy Code) without delay. Prior to this appointment, the FMA shall be heard. The rights and obligations of the trustee shall not be affected. Sec. 82 through sec. 82d of the (Austrian) Bankruptcy Code shall not be applicable to the remuneration of the special administrator.

(3) The special administrator shall satisfy from the special estate any claims of the mortgage bond creditors which are already due and shall take any administrative measures which are necessary to that end with effect for the special estate, for instance by collecting mortgage claims which are already due, by selling individual cover assets or by interim financing.

(4) With the approval of the "*Kurator*" (special representative) appointed for the mortgage bond creditors, and after the receiver and the creditors' committee have been heard, the assets entered into the mortgage register

shall be sold collectively to a suitable credit institution by the special administrator, provided that such credit institution shall at the same time take over any and all liabilities arising under the "*Pfandbriefe*" (mortgage bonds). The transferee credit institution is entitled to maintain the "*Deckungsstock*" (*i.e.*, assets serving as cover) thus taken over separately from its own "*Deckungsstock*". The transferring mortgage bank shall continue to be responsible for the liabilities arising under the "*Pfandbriefe*" (mortgage bonds) in addition to the transferee credit institution. The sale of the special estate shall be subject to the approval of the bankruptcy court. The transfer shall be publicized by entry into the insolvency file (sec. 14 of the [Austrian] "*Insolvenzrechtseinführungsgesetz - IEG*" [Introductory Act to Insolvency Law]) upon the resolution approving such sale becoming final and absolute.

(5) The proceeds from transferring the special estate together with the liabilities arising under the "*Pfandbriefe*" (mortgage bonds) will be included in the bankrupt's estate divisible amongst all creditors. Prior to the transfer of the special estate, only those assets of the special estate that are obviously not needed to cover the claims of the mortgage bond creditors and the costs of the special estate and to maintain the securing excess cover pursuant to sec. 6 para. 1 shall be passed on to the bankrupt's estate divisible amongst all creditors.

(6) The mortgage bond creditors may only assert their claims as creditors of the bankrupt in the amount of the loss or, as long as such loss has not been finally established, the presumable loss. Sec. 14 para. 2 of the (Austrian) Bankruptcy Code is applicable to the claims of the mortgage bond creditors only in so far.

(7) In lieu of a transfer according to para. 4, all claims of the mortgage bond creditors that have not yet become due shall be redeemed by the special administrator already before the agreed due date at the discounted present value ("*Barwert*"), if the Articles of Association so require in the event of bankruptcy and provided that the cover assets are expected to be sufficient for this purpose. This shall be subject to the approval of the bankruptcy court. The discounted present value ("*Barwert*") shall be determined on the basis of the market data applicable so many banking days before the redemption as are customary in the market plus a premium or discount that is customary in the market. The assets entered into the mortgage register ("*Hypothekenregister*") shall not be sold below the market value. Any and all claims arising under "*Pfandbriefe*" (mortgage bonds) shall be redeemed at the same time, at their discounted present value ("*Barwert*"), as soon as the proceeds realized are sufficient for this purpose. The remaining proceeds as well as any unsold cover assets will be included in the bankrupt's estate divisible amongst all creditors.

(8) If a collective sale according to para. 4 is impossible and the assets entered into the mortgage register are insufficient for satisfying the claims of the mortgage bond creditors, the bankruptcy court at the request of the special administrator shall approve the realization of the special estate. In such case, the claims under the "*Pfandbriefe*" (mortgage bonds) shall be accelerated in their entirety. From the proceeds, the special administrator shall satisfy the claims of the mortgage bond creditors on a *pro-rata* basis. If the bankrupt's estate includes any number of the mortgage bank's own "*Pfandbriefe*" (mortgage bonds), such bonds shall be included in the calculation of the *pro-rata* shares in the proceeds from the special estate which are attributable to the individual "*Pfandbriefe*" (mortgage bonds).



(9) The realization according to paragraphs 7 and 8 shall be effected by the special administrator pursuant to sec. 119 of the (Austrian) Bankruptcy Code. Mortgage bond creditors are not deemed secured creditors ("*Absonderungsberechtigte*") within the meaning of sec. 120 of the (Austrian) Bankruptcy Code."

**Sec. 36** (*canceled*)

**"Sec. 37** (1) Any person who, on behalf of a mortgage bank, knowingly issues "*Hypothekendarlehenbriefe*" (mortgage bonds) in an amount which exceeds the amount duly covered by the assets recorded in the mortgage register commits an administrative offense and shall be liable to pay a fine of up to EUR 20,000.00 imposed by the FMA.

(2) The same punishment shall be incurred by any person

1. who, on behalf of a mortgage bank, knowingly sells or pledges any asset recorded in the mortgage register, even though the remaining assets recorded in the mortgage register are not sufficient for the prescribed cover of the "*Hypothekendarlehenbriefe*" (mortgage bonds) and of claims of the mortgage bank's counterparty under a hedging transaction (derivatives contract), or
2. who in case of repayment of a mortgage omits, contrary to the provisions of sec. 31 para. 2 sentence 2, to deliver the funds thus paid to the trustee for safekeeping."

**"Sec. 38** Any person who, on behalf of a mortgage bank, issues "*Hypothekendarlehenbriefe*" (mortgage bonds) without the confirmation required in accordance with sec. 30 para. 3 commits an administrative offense and shall

be liable to pay a fine of up to EUR 7,000.00 imposed by the FMA."

**"Sec. 39** Any person who acts contrary to the provisions of sec. 2 commits an administrative offense and shall be liable to pay a fine of up to EUR 20,000.00 imposed by the FMA."

**"Sec. 40** (1) An administrative offense pursuant to sec. 37 through sec. 39 is not committed if the relevant act constitutes a criminal offense subject to the jurisdiction of courts of law.

(2) The limitation period for administrative offenses pursuant to sections 37 through 39 shall be 18 months instead of six months as provided for in sec. 31 para. 2 of the (Austrian) "VstG" (Act on Administrative Offenses).

**"Sec. 41\*)** (1) If, on the basis of loans which are not secured by a mortgage and which have been granted to Austrian corporations governed by public law or to any Contracting State to the Agreement on the European Economic Area other than Austria or to Switzerland as well as to their regional governments and local authorities, for which the competent authorities, in accordance with Article 43.1.b.5 of Directive 2000/12/EEC, have set a weighting of 20 percent, at the most, or against the guarantee by one of the above-mentioned authorities, (public sector loans), debentures (public sector bonds/public sector certificates) are issued by a mortgage bank, then sec. 6 paragraphs 1, 1a, 4 and 5, sec. 8, sec. 9, sec. 22, sec. 23, sec. 25, sec. 26 and sections 29 through 40 shall be applicable to such debentures and the underlying loan claims. Public sector bonds/public sector certificates may also be issued by the mortgage bank under the name of "*Öffentlicher Pfandbrief*" (public sector mortgage bond)."

([Austrian] Federal Law Gazette Part I No. 1998/88,  
[Austrian] Federal Law Gazette Part I No. 2004/90)

\*) cf. Art. 2 of the (Austrian) Introductory Ordinance  
to the Mortgage Bank Act.

"(2) The following assets shall be considered equal to  
loans not secured by a mortgage that have been granted by  
the mortgage bank to the Austrian corporations governed by  
public law, states, regional governments and local  
authorities mentioned in para. 1:

1. debentures issued by any one of the  
aforementioned authorities or
2. debentures guaranteed by any one of the  
aforementioned authorities.

The total amount of the loans and debentures for which  
it has not been ensured that, in the event of bankruptcy,  
the right of the creditors of the public sector bonds to  
repayment on a priority basis pursuant to sec. 35 para. 1  
also extends to the claims of the mortgage bank under such  
loans and debentures may not exceed ten percent of the  
total amount of the loans and debentures for which such  
right has been ensured."

**Sec. 42** If debentures are issued by a mortgage bank  
on the basis of loans granted to small-scale railway  
companies against pledging of the railway, the provisions  
set forth in sec. 41 para. 1 shall apply *mutatis mutandis*  
to these debentures and the underlying loan claims. The  
debentures issued by the mortgage bank in the manner  
described shall, within the meaning of the provisions of  
sec. 7 and of sec. 41 para. 2, rank equal with the  
"Hypothekpfandbriefe" (mortgage bonds).

The Articles of Association of the mortgage bank may  
stipulate that, on the basis of the claims arising under

the loans granted in accordance with para. 1 and on the basis of the claims arising under loans granted to small-scale railway companies against the guarantee by an Austrian corporation governed by public law "or a local authority from any Contracting State to the Agreement on the European Economic Area other than Austria or from Switzerland", debentures of one and the same class shall be issued for which both types of claims shall serve as cover. The annual report or the balance sheet, shall specify the total amount of both types of claims.

(*[Austrian] Federal Law Gazette Part I No. 1998/88*)

Otherwise, the principles governing the granting of loans to small-scale railway companies shall be established by the mortgage bank and shall be subject to the approval of the supervisory authority. [The provisions of sec. 31 para. 2 shall apply *mutatis mutandis*\*)].

*\*)Sec. 13 para. 2 obsolete.*

*(In Austria, only sections 1 through 42 of the Mortgage Bank Act have been introduced; thus, sections 43 through 53 of the said Act have never been in force; cf. German Reich Law Gazette of 1938, I 1574 (= Law Gazette for the province ("Land") of Austria 1938/648))*

### **"Equal Treatment in Language**

**Sec. 42a** Insofar as designations referring to persons are given in this Federal Act only in their masculine form, they shall relate equally to both women and men. When applying such designations to specific persons, the respective gender form shall be used."

### **"References**

**Sec. 42b** Insofar as this Federal Act makes reference to other Federal Acts, these shall, unless provided otherwise, be applicable as amended from time to time."

**Entry into force**

*([Austrian] Federal Law Gazette Part I No. 2004/90)*

**"Sec. 43** (1) Sec. 7 and sec. 41 para. 2, as amended by the (Austrian) "*Bundesgesetz BGBl. Nr. 532/1993*" (Federal Act published in the Federal Law Gazette No. 532/1993), shall enter into force on January 1, 1994."

*([Austrian] Federal Law Gazette No. 1993/532)*

"(2) Sec. 5 para. 1 sub-para. 2, sec. 5a, sec. 6 para. 3, sec. 11 paragraphs 4 and 5, sec. 19, sec. 28 para. 1, sec. 35 para. 2, sec. 41 and sec. 42 para. 2, as amended by the (Austrian) Federal Act published in the Federal Law Gazette Part I No. 88/1998, as well as the cancellation of sec. 18 paragraphs 2 through 4 shall enter into force on July 1, 1998."

*([Austrian] Federal Law Gazette Part I No. 1998/88)*

"(3) Sec. 1 para. 1, the cancellation of sec. 1 para. 2, sec. 1 para. 3, the cancellation of sec. 3, sec. 5a para. 3, sec. 11 para. 3, sec. 12 para. 2, sec. 23 para. 3, sec. 29 para. 2 and the second sentence of sec. 34, as amended by the (Austrian) Federal Act published in the Federal Law Gazette Part I No. 97/2001, shall enter into force on April 1, 2002."

*([Austrian] Federal Law Gazette Part I No. 2001/97)*

(4) Sec. 5 paragraphs 1 through 3, sec. 5a paragraphs 1 and 2, sec. 6 paragraphs 1 through 5, sec. 11, paragraphs 1, 2 and 4, sec. 41, the heading to sec. 43, and

sec. 43 paragraphs 1 and 2 as well as the cancellation of sec. 11 para. 5, as amended by the (Austrian) Federal Act published in the Federal Law Gazette Part I No. 90/2004, shall enter into force on August 1, 2004.

*([Austrian] Federal Law Gazette Part I No. 2004/90)*

(5) The title of the Act, sec. 5 para. 1 sub-para. 7, sec. 6 paragraphs 1, 1a, 4 and 5, sec. 9 first and fourth sentences, sec. 11 para. 4, sec. 22, sec. 29 (plus heading), sec. 30 paragraphs 1 through 4, sec. 31 paragraphs 1 through 3, sec. 32, sec. 34a paragraphs 1 and 2, sec. 35 (plus heading), sec. 37, sec. 38, sec. 39, sec. 40, sec. 41 paragraphs 1 and 2, sec. 42a (plus heading) as well as sec. 42b (plus heading), as amended by the (Austrian) Federal Act published in the Federal Law Gazette Part I No. xxx/XXXX), shall enter into force on June 1, 2005.

(6) The second and third sentences of sec. 9, as amended by the (Austrian) Federal Act published in the Federal Law Gazette Part I No. xxx/XXXX, shall apply to "*Hypothekendarlehenbriefe*" (mortgage bonds) issued after May 31, 2005, with the first computing period commencing on that date."

(7) Sections 37 through 39, as amended by the (Austrian) Federal Act published in the Federal Law Gazette No. 509/1974, shall continue to be applicable to punishable acts committed prior to the entry into force of the (Austrian) Federal Act published in the Federal Law Gazette Part I No. xxx/XXXX).

### **Repeal**

**Sec. 44** Sec. 8 para. 2, sec. 20, sec. 27, sec. 28, sec. 34 and sec. 36 shall cease to be in force upon the expiration of May 31, 2005."