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Cash Pooling

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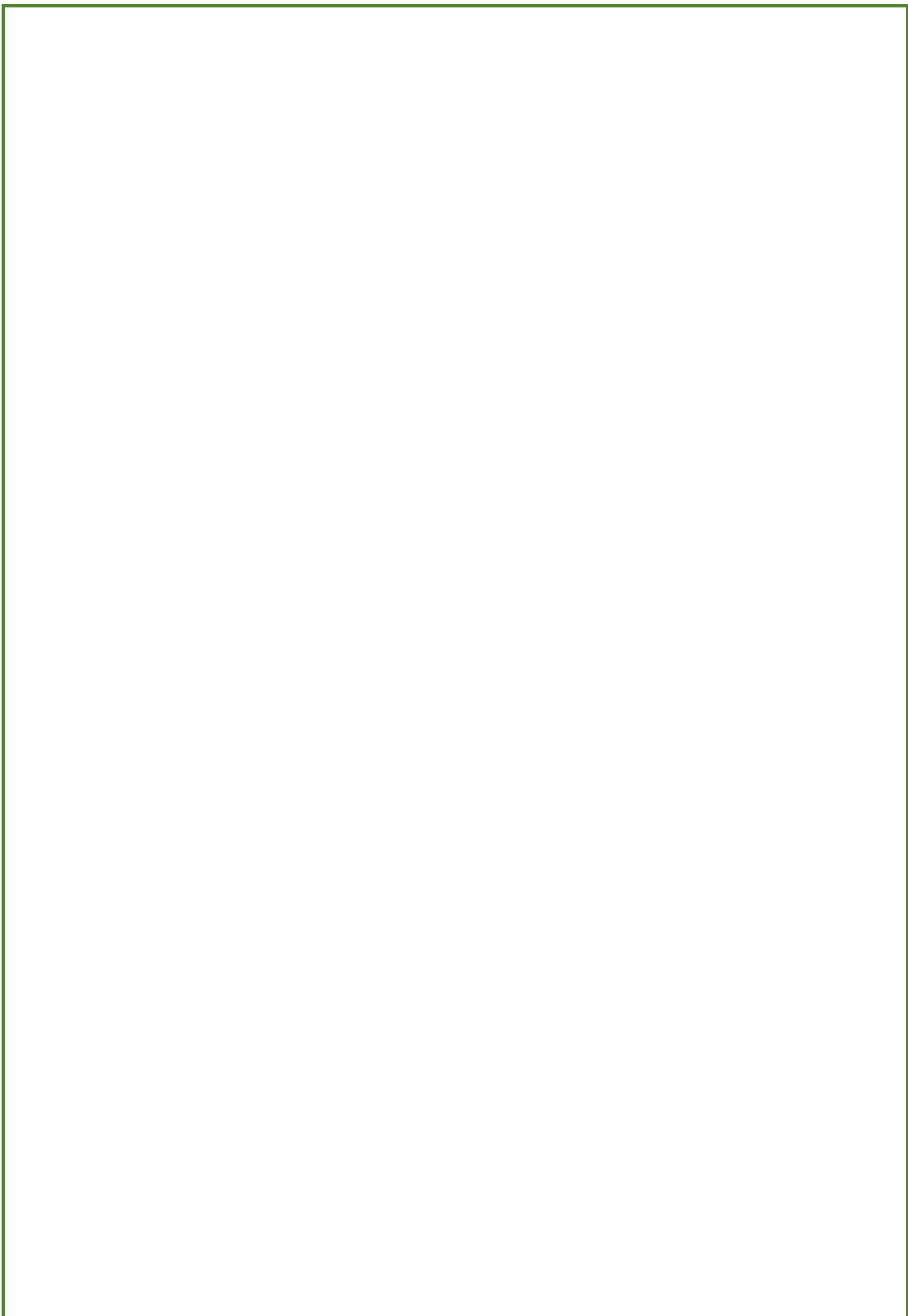

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B. List of abbreviations

Abl	Amtsblatt der Europäischen Union
AktG	Aktiengesetz
AnwBl	Österreichisches Anwaltsblatt
BEPS	Base Erosion and Profit Shifting
BGBl	Bundesgesetzblatt
BWG	Bankwesengesetz
cf	confer (compare)
CPL	Cash Pool Leader
CRD IV	Capital Requirements Directive
CRR	Capital Requirements Regulation
DZWIR	Deutsche Zeitschrift für Wirtschafts- und Insolvenzrecht
e.g.	exempli gratia (example given)
EC	European Comission
ed	editor
eds	editors
EKEG	Eigenkapitalersatzgesetz
EU	Europäische Union
EvBl	Evidenzblatt der Rechtsmittelentscheidungen in Österreichische Juristen-Zeitung
FCA	Federal Court of Australia
FMA	Finanzmarktaufsichtsbehörde
GES	Zeitschrift für Gesellschaftsrecht und angrenzendes Steuerrecht
GesRZ	Der Gesellschafter, Zeitschrift für Gesellschafts- und Unternehmensrecht
GmbHG	Gesetz über die Gesellschaft mit beschränkter Haftung
i.e.	id est
IBFD	International Transfer Pricing Journal

ICLG	The International Comparative Legal Guide
Intertax	International Tax Review
IO	Insolvenzordnung
JAP	Juristische Ausbildung und Praxisvorbereitung
JIBFL	Journal of International Banking & Financial Law
MLI	Multilateral Instrument
MTC	Model Tax Convention
n	numeral
NR	number
NZ	Österreichische Notariats-Zeitung
OECD	Organisation for Economic Co-operation and Development
OGH	Oberster Gerichtshof
par	paragraph
PSD II	Payment service directive II
RdW	Österreichisches Recht der Wirtschaft
RGBl	Reichgesetzblatt
SAT	State Administration of Taxation of the People's Republic of China
sec	section
TPI	Transfer Pricing International
UK	United Kingdom
VwGH	Verwaltungsgerichtshof
wbl	wirtschaftsrechtliche Blätter, Zeitschrift für österreichsiches und europäisches Wirtschaftsrecht
ZFR	Zeitschrift für Finanzmarktrecht
ZIK	Zeitschrift für Insolvenzrecht und Kreditschutz
ZIP	Zeitschrift für Wirtschaftsrecht

1. Introduction

It is one of the most essential and at the same time, one of the most challenging questions of entrepreneurship how to secure the liquidity needs of a company in the long term. With good reason, illiquidity is the most common reason for insolvency.

Manufacturing companies, in particular, often fail despite the best order situation because they cannot finance the production of the ordered goods in advance. Not only start-up companies but also established companies struggle with this problem.

Individual companies can regularly solve this problem only through various forms of external financing such as loans and are thus dependent on third parties (such as banks). Bank funding is currently more attractive than ever in terms of interest rates. However, the ever-increasing number of regulations is making the administrative burden on banks and borrowers increasingly burdensome. Especially for companies that have a significant need for liquidity but only a manageable administrative apparatus, these regulations often represent a challenge that cannot be mastered.

However, bank regulations do not only create administrative burdens. The supervisory authorities have learned from the economic crisis of 2008 and are imposing ever higher capital ratios on banks. Also, banks must demand more and more collateral from their customers. Personnel securities such as guarantees must regularly not be taken into account when calculating the collateral ratio. It seems that only tangible collaterals such as liens count. However, not every company can provide this type of collateral.

Investors can be an alternative to traditional bank financing. They usually do not require collateral for their investment, but either participation in the equity capital of the target company or enormously high interest rates, which reflect the risk of an unsecured loan (which a bank generally ought not to grant at all for regulatory reasons).

Both options are rarely attractive but are often the only way out if a company - for whatever reason - does not receive bank financing. You do not get money for nothing.

However, companies also face challenges that regularly have liquidity surpluses. The current interest rate environment makes it unattractive, to say the least, to entrust one's money to a traditional bank. Besides, in countries like Italy, it can no longer be ruled out that even systemically relevant banks will fail. With the failure of such a bank, the entire banking system is shaken, and the savings deposits entrusted to the banks are endangered.

Corporate groups often combine companies with liquidity needs and companies with liquidity surpluses under one roof.

It would be inefficient if group companies with liquidity needs had to seek expensive and/or costly external financing, while group companies with liquidity surpluses had to consider what to do with their money and in the worst case even endanger their money.

As this paper will show, the establishment of a cash pool in a group of companies can solve many of the problems described above.

Of course, a cash pool poses legal and economic challenges for the companies involved. This paper presents selected legal issues and shows how these are met. As a rule, the Austrian legal situation is examined as a starting point. In addition, approaches of selected other legal systems are presented.

2. Cash Pooling

2.1. Cash Management

Cash management is an essential part of the general financial management of groups of companies or multinational groups. It can be defined as the sum of all measures that provide for having the right amount of money on the right account at a certain point in time.[1] Thereby serving as a means to ensure the maintenance of necessary liquidity, to maximize interest income as well as to minimize different kinds of costs such as transaction costs and risks resulting from financial transactions. Cash management includes different practices such as netting and cash pooling, which have to be distinguished from one another.[2]

2.2. Netting

Netting is used as a tool in such instances as the settlement of deliveries and services as well as in the context of cash pooling.[3] It serves to limit the costs of financial transactions and to realize interest rate advantages. These objectives/results are accomplished by offsetting intra-group receivables and payables within predefined periods. The advantages of netting consist of avoiding individual payments and shortening the transfer times for the remaining net amounts or residual balances. In terms of the law, the transactions performed are netting transactions under civil law. Depending on the number of group entities involved, a distinction is made between bilateral and multilateral netting.[4]

2.3. Cash Pooling

Another instrument of cash management is cash pooling,[5] which consists of pooling the accounts of all pool companies together on one master account for the purpose

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[1] *Rieder* in *Polster-Grüll/Berghuber/Dolezel-Huber/Kremslehner/Polster/Rieder/Taucha/Zerwas*, Cash Pooling: Modernes Liquiditätsmanagement aus finanzwirtschaftlicher, rechtlicher und steuerlicher Sicht[2] (2004) 45; *Rapani*, Aufgaben und Haftung des Abschlussprüfers bei Unternehmen im Cash Pooling Verbund (2009) 4.
[2] *Sollanek* in *Pentz/Sollanek*, Cash-Pooling im Konzern: Ökonomische und juristische Hinweise für die Praxis (2005) 70f; *Rapani*, Aufgaben und Haftung des Abschlussprüfers 4.
[3] *Kremslehner/Polster* in *Polster-Grüll/Berghuber/Dolezel-Huber/Kremslehner/Polster/Rieder/Taucha/Zerwas*, Cash Pooling[2] 135; *Rapani*, Aufgaben und Haftung des Abschlussprüfers, 5.
[4] *Sollanek* in *Pentz/Sollanek*, Cash-Pooling im Konzern 78f; *Rapani*, Aufgaben und Haftung das Abschlussprüfers 5.
[5] *Morsch*, Probleme der Kapitalaufbringung und der Kapitalerhaltung im Cash-Pool, NZG 2003, 97 (97); *Rapani*, Aufgaben und Haftung des Abschlussprüfers 4 f.

of interest optimization. Cash pooling aims at covering negative balances in order to save debit interest and to achieve higher credit interest rates by bundling the available liquidity.[6]

Cash pooling almost exclusively takes place between affiliated group companies as it requires the exchange of highly sensitive data.[7] Different designs of contractual relationships between participating group companies can give rise to star-shaped or net-shaped cash pooling structures. Star-shaped cash pool structures arise when contractual relationships only exist between the master company and individual pool companies, whereas net-shaped structures entail additional contractual relationships between individual pool companies.[8] One thing that all pooling structures have in common is the existence of precisely one master account, which is influenced by the different balances of all participating group companies. It is possible to create different pooling circles within one pooling structure. One pooling circle has to consist of exactly one receiving and one transferring account.[9]

In terms of the law, cash pooling agreements may entail various types of contractual relationships. They may include agreements such as current account agreements, credit agreements, collateral agreements, and the right to obtain information and exercise control. The intensity of the contractual relationships depends on the status of the master company, specifically, whether the master company is a sister company of the other participating pool companies or the parent company of all participating pool companies.[10]

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[6] *Rieder* in *Polster-Grüll/Berghuber/Dolezel-Huber/Kremslehner/Polster/Rieder/Schwerdtfeger/Taucha/Zerwas*, Cash Pooling^2 46; *Rapani*, Aufgaben und Haftung des Abschlussprüfers 5.

[7] *Billek*, Cash Pooling im Konzern (2008) 1; *Rapani*, Aufgaben und Haftung des Abschlussprüfers 6.

[8] Cf *Kremslehner/Polster* in *Polster-Grüll/Berghuber/Dolezel-Huber/Kremslehner/Polster/Rieder/Schwerdtfeger/Taucha/Zerwas*, Cash Pooling^2 130, 134.

[9] Cf *Rieder* in *Polster-Grüll/Berghuber/Dolezel-Huber/Kremslehner/Polster/Rieder/Schwerdtfeger/Taucha/Zerwas*, Cash Pooling^2 46f; *Rapani*, Aufgaben und Haftung des Abschlussprüfers 6.

[10] *Kremslehner/Polster* in *Polster-Grüll/Berghuber/Dolezel-Huber/Kremslehner/Polster/Rieder/Schwerdtfeger/Taucha/Zerwas*, Cash Pooling^2 129ff; *Rapani*, Aufgaben und Haftung des Abschlussprüfers 6.

2.4. Types of Cash Pooling

Effective cash pooling and fictive cash pooling are two different types of cash pooling. Whereas effective cash pooling involves actual cash flows,[11] fictive cash pooling does not lead to any form of physical cash transfer to any kind of bank account.[12]

2.4.1. Effective Cash Pooling

This type of cash pooling is also known as physical cash pooling or cash concentrating.[13] As mentioned above, effective cash pooling occurs when cash is physically transferred from one bank account to another. Depending on whether the cash pool participants transfer all of their cash to the master account or only the amount of cash exceeding a certain balance at the end of a defined billing period, effective cash pooling can take the form of (i) zero balancing or (ii) target balancing respectively conditional balancing.[14] In the event that a cash pool participant has a negative balance or the amount of cash in its account falls below the target balance, cash is transferred from the master account to the cash pool participant concerned.[15] As Chand puts it: "*In essence, the arrangement ensures that the credit balances are moved (swept) into, and debit balances are covered (swept) out of a single master account.*"[16]

2.4.2. Fictive Cash Pooling

Fictive cash pooling, also known as notional or virtual cash pooling as well as compensation cash pool, does not involve any physical transfer of cash to or from the master account. Instead, the accounts of the pool participants are just fictitiously netted and following this the bank "*calculates the combined notional balance of all bank accounts*" at the end of a defined billing period, for instance on a weekly basis.

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[11] *Morsch*, Probleme der Kapitalaufbringung und der Kapitalerhaltung im Cash-Pool, NZG 2003, 97f; *Rapani*, Aufgaben und Haftung des Abschlussprüfers 7.

[12] *Chand*, Transfer Pricing Aspects of Cash Pooling Arrangements in Light of the BEPS Action Plan, International Transfer Pricing Journal (IBFD) 2016, 38 (39).

[13] *Sollanek* in *Pentz/Sollanek*, Cash-Pooling im Konzern 81; *Rieder* in *Polster-Grüll/Berghuber/Dolezel-Huber/Kremslehner/Polster/Rieder/Schwerdtfeger/Taucha/Zerwas*, Cash Pooling[2] 46ff; *Rapani*, Aufgaben und Haftung des Abschlussprüfers 7.

[14] *Pentz* in *Pentz/Sollanek*, Cash-Pooling im Konzern 79; *Rieder* in *Polster-Grüll/Berghuber/Dolezel-Huber/Kremslehner/Polster/Rieder/Schwerdtfeger/Taucha/Zerwas*, Cash Pooling[2] 46; *Rapani*, Aufgaben und Haftung des Abschlussprüfers 7.

[15] *Chand*, IBFD 2016, 38; *Tredicine*, Tax Treatment of International Cash Pooling Arrangements, Derivs.& Fin. Instrums. 2002, 151 (151); *Damji/Diakonova/Brügger*, Transfer Pricing DNA as a Tool to Achieve the Optimal Balance of Risks and Efficiency, Der Schweizer Treuhänder 2006, 185 (189).

[16] *Chand*, IBFD 2016, 38.

Under a compensation cash pool, the cash pool benefit is transferred to the master account, while under a model aiming at optimising interest rates, the interest advantage gets passed on to each individual cash pool participant.[17]

Since there occurs no actual transfer of cash, the master account does not assume the role of a counterparty to any kind of transaction or bears any risk associated with acting as a counterparty. However, other cash pool participants may be required to provide cross-guarantees to limit the bank's risk in the case of another cash pool participant defaulting. In terms of organisation and structure, the master account regularly serves as a service provider and tends to the necessary organisational tasks, such as offsetting debit and credit positions or coordinating the cash pool in general.[18]

2.5. Advantages and Disadvantages or Risks of Cash Pooling for the Participating Companies

2.5.1. Advantages of Cash Pooling

After looking at the different types of cash pooling, any serious analysis also has to consider the advantages and disadvantages of this kind of cash management strategy. It seems to be evident that a cash management instrument, so widely used, has to have a multitude of benefits for the group involved.

Cash pooling allows bundling the maximum financial strength of a group, thereby enabling the group to react quickly and flexibly to market opportunities as well as possible risks. In addition, this kind of financial strength can enhance the overall bargaining power of the master company vis-a-vis financial institutions, such as banks, and thereby lead to more favourable conditions for the group as a whole, when entering into contracts with such institutions. Generally, cash pooling arrangements lead to an optimization of interest income and a decrease in the costs for loans.[19] Hence, one can say that cash pooling puts a group in the position to optimize its outcomes when tapping financial markets while avoiding interest expense

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[17] *Oho/Eberbach*, Konzernfinanzierung durch Cash-Pooling, DB 2001, 825 (825ff); *Henze*, Konzernfinanzierung und Besicherung – Das Upstreamrisiko aus Gesellschafter- und Bankensicht, WM 2005, 717 (718); *Rapani;* Aufgaben und Haftung des Abschlussprüfers 7f.

[18] *Bakker*, Transfer Pricing and Intra-Group Financing: Low Hanging Fruit?, Derivs.& Fin. Instrums. 2013, 27 (30); *Chand*, IBFD 2016, 39f.

[19] Cf *Jansen*, International Cash Pooling, in *Jansen* (ed), International Cash Pooling: Cross-border Cash Management Systems and Intra-group Financing (2011) 1 (4f).

resulting from market inefficiencies. Overall, the group is put in a better position when interacting with financial markets to meet its financing needs.[20]

Furthermore, by bundling most of the available cash on the master account, the group can avoid undesired capital commitments, which may result from individual subsidiaries investing surplus cash on their own in the short term, because such short-term interim investments by individual group companies can lead to inefficient capital commitments.[21] Therefore, cash pooling helps to optimize the allocation of capital within a group.[22] In the case of cross-border cash pooling, another added benefit can result from cost reduction due to the possibility of hedging exchange rate fluctuations.[23]

It can also help to minimize the expenditures for banking services because the master account provides different kinds of services, which participating subsidiaries would otherwise need to obtain from banks.[24] Since the workload associated with this kind of management tasks is not directly proportional to the number transactions, cash pooling enables groups to benefit from economies of scale.[25] Moreover, cash pooling in and of itself requires participating members to provide all kinds of information,[26] which has the advantageous side effect that the parent company handling the master account usually has up-to-date information about the cash flow of participating group companies.[27]

2.5.2. Disadvantages or Risks associated with Cash Pooling

Cash pool participants that have to transfer their positive balance face the twofold risk of losing their capital due to crisis and insolvency of the parent company handling the master account and crisis and insolvency of multiple other participating group companies.[28] Furthermore, cash pool participants that provide collateral for loans

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[20] Cf *Vernimmen/Quiry/Dallochio/Le Fur/Salvi*, Corpoarte Finance: Theory and Practice[5] (2017) 886.

[21] *Taucha* in *Polster-Grüll/Berghuber/Dolezel-Huber/Kremslehner/Polster/Rieder/Schwerdtfeger/Taucha/Zerwas*, Cash Pooling[2] 73.

[22] *Jansen* in *Jansen* 5.

[23] Cf *Billek*, Cash Pooling 7; *Rapani*, Aufgaben und Haftung des Abschlussprüfers 9.

[24] Cf *Kremslehner,/Polster* in *Polster-Grüll/Berghuber/Dolezel-Huber/Kremslehner/Polster/Rieder/Taucha/Zerwas*, Cash Pooling[2] 141; *Jansen* in *Jansen* 4.

[25] See generally *Vernimmen/Quiry/Dallochio/Le Fur/Salvi*, Corpoarte Finance[5] 886f.

[26] Cf *Vernimmen/Quiry/Dallochio/Le Fur/Salvi*, Corpoarte Finance[5] 887.

[27] *Jansen* in *Jansen* 4f.

[28] Cf *Jansen* in *Jansen* 5.

taken out by other cash pool participants or the cash pool leader bear the risk of those other participants or the leader possibly defaulting.[29]

In addition, those transferring their positive balance are not able to freely dispose of their liquid assets or invest their surplus cash in a way that optimises their own financial results.[30] They might face liquidity shortages, because of liquidity required for their own liquidity flowing into the cash pool, hence their liquidity supply can be endangered.[31] In general, transferring all or most of the positive balance to the master account leads to low risk diversification, so that cash pool participants have to deal with potential problems associated with cluster risks.[32]

Ultimately, cash pool agreements risk being unbalanced to the detriment of the participating pool companies, for example, interest rates agreed upon might violate the arm's length principle.[33] Cash pooling agreements that violate the arm's length principle face being deemed void in certain jurisdictions, for example in Austria.[34]

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[29] *Rapani*, Aufgaben und Haftung des Abschlussprüfers 10; *Vetter* in *Lutter* (ed), Holding-Handbuch: Konzernrecht, Konzernsteuerrecht, Konzernarbeitsrecht, Betriebswirtschaft[5] (2015) § 8 par 3.

[30] Cf *Jansen* in *Jansen* 5.

[31] *Kremslehner,/Polster* in *Polster-Grüll/Berghuber/Dolezel-Huber/Kremslehner/Polster/Rieder/Taucha/Zerwas*, Cash Pooling[2] 151f; *Rapani*, Aufgaben und Haftung des Abschlussprüfers 9.

[32] *Engert*, Kreditgewährung an Gmbh-Gesellschafter und bilanzorientierter Kapitalschutz, BB 2005, 1951 (1956); *Kremslehner/Polster* in *Polster-Grüll/Berghuber/Dolezel-Huber/Kremslehner/Polster/Rieder/Schwerdtfeger/Taucha/Zerwas*, Cash Pooling[2] 151f; *Rapani*, Aufgaben und Haftung des Abschlussprüfers 10.

[33] *Billek*, Cash Pooling 8; *Rapani*, Aufgaben und Haftung des Abschlussprüfers 10.

[34] For Austria see *Kremslehner/Polster* in *Polster-Grüll/Berghuber/Dolezel-Huber/Kremslehner/Polster/Rieder/Schwerdtfeger/Taucha/Zerwas*, Cash Pooling[2] 153.

3. Transfer Pricing Aspects of Cash Pooling Arrangements

3.1. General Remarks

Transfer pricing describes all aspects of intra-group pricing agreements between members of a (multi)national group, including the transfer of tangible assets, services, intellectual property, loans, and other financial transactions.[35]

Prices are usually set by dependent partners within a group. It can be assumed that these prices do not reflect independent market prices but are over- or undervalued as needed. This poses significant problems for national tax authorities. It is feared that multinational companies will be able to set transfer prices for cross-border transactions in a way that significantly minimises their tax burden. Furthermore, company law concerns should not be neglected. As mentioned above, transactions between associated companies easily run the risk of violating capital maintenance rules. As a result, more and more transfer pricing rules and enforcement measures are being adopted.[36] These efforts seem necessary, considering that more than 60% of world trade takes place in multinational companies.[37]

However, as many countries have not (yet) adopted specific transfer pricing rules for cash pooling agreements, intra-group cash pooling transactions are generally based on the arm's length principle. The concept of arm's length principle is defined in Chapter 1, par 1 of Art. 9 OECD MTC. Accordingly, the relevant cash pooling transactions, e.g.

- the debit and credit interest rates,
- the remuneration of CPL, and

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[35] *Pricewaterhouse Coopers Middle East*, Transfer Pricing, https://www.pwc.com/m1/en/services/tax/transfer-pricing.html (seen 01.06.2019).
[36] *European Commission*, Verrechnungspreise in der EU, https://ec.europa.eu/taxation_customs/business/company-tax/transfer-pricing-eu-context_de (seen 01.06.2019).
[37] *Gao/Zhao*, Determining intra-company transfer pricing for multinational corporations, Int. J. Production Economics 2015, 340 (340).

- the distribution of the cash pool benefits among the cash pool participants is measured based on customary market conditions.[38]

3.2. Applying the Arm’s Length Principle to Physical Cash Pooling Arrangements

Within multinational companies, cash pooling agreements are considered to be one of the most essential tools to facilitate liquidity management. The application of the arm's length principle to cash pooling transactions is nevertheless, or primarily, for this reason, the subject of intensive discussion. Article 9(1) of the OECD and UN Model Conventions provides that transactions between associated enterprises must be conducted at arm's length. However, cash pooling agreements are generally limited to the members of a multinational group and are not entered into between independent parties. This raises the question of whether the arm's length principle should be applied to such agreements at all, although independent companies usually do not enter into such agreements.[39] The OECD, however, is well aware of this fact. Accordingly, it points out in the directive that there are practical difficulties in applying the arm's length principle to such situations.[40] For example, there is little or no direct indication of what conditions would have been created by independent companies. According to the OECD, the fact that independent companies do not necessarily carry out such transactions does not mean that the controlled transactions cannot be carried out under normal market conditions.[41] Conversely, the question is how to determine a fair transfer price.

In order to determine adequate consideration for such intragroup transactions, comparable transactions between independent entities in similar circumstances must be identified. The literature distinguishes between concrete and hypothetical arm's length comparison and direct and indirect arm's length comparison.[42] A concrete arm's length comparison is only possible if transfer prices for related transactions can be compared with real, actually concluded legal transactions between independent third parties. On the other hand, one speaks of hypothetical arm's length comparison

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[38] *De Robertis/Rosar*, Transfer Pricing Aspects of Cash Pooling, TPI 2018, (293) 293.
[39] *Chand*, Transfer Pricing Aspects of Cash Pooling Arrangements in Light of the BEPS Action Plan, International Transfer Pricing Journal 2016/1, (38) 40.
[40] *OECD*, Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2017 (2017) 98 f.
[41] *OECD,* Transfer Pricing Guidelines, 98 f.
[42] *Pühringer* in *Fraberger/Baumann/Plott/Waitz-Ramsauer* (eds), Handbuch Konzernsteuerrecht (2014) 307.

if no such transactions can be used comparatively. Direct arm's length comparison applies in those cases where products of the same type and quality can be compared with each other. Far more frequently, however, indirect arm's length comparison comes into consideration. For this purpose similar transactions are used for comparison, the differences identified are evaluated and the probable transaction price was found by adjusting the comparison prices.[43]

3.2.1. Intra-group loans

Physical cash pooling, as mentioned above in section 2.3, includes actual cash movements between the master company and the cash pool members. These flows can be classified as either cash pool members' deposits or loans.[44] These transactions usually replace the credit balances that the pool members would have with external banks without the cash pool agreement. The cash transfers thus result from intercompany financing agreements that must be classified and measured at arm's length.

This is done on the basis of two questions:

- Are the intercompany loans (deposits and drawdowns) granted at market conditions?
- Are the interest rates of such loans based on market conditions?[45]

The valuation of an arm's length price must take into account all circumstances of a cash transfer. A valuation based solely on the contractual arrangements cannot be deemed sufficient for transfer pricing purposes. The initial focus is on identifying the characteristics of the transaction, the functions performed, the risks assumed and the assets employed, and then determining the market price.[46] The principle of capital maintenance also requires that the qualification as an ascending or descending loan be taken into account.47 If the characteristics of a transaction differ substantially from those of a transaction that would be entered into by independent third parties, those characteristics shall be adjusted accordingly.

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[43] *Pühringer*, Konzernsteuerrecht 307.

[44] *Haller/Chand*, Application of the Arm's Length Principle to Physical Cash Pooling Arrangements in Light of the OECD Discussion Draft on Financial Transactions, Intertax 2019, 349 (352).

[45] *De Robertis/Rosar*, TPI 2018, 296f.

[46] *Steiness*, Transfer Pricing: Fundamentals of the arm's length principle and pricing of intercompany loans (2012) 20.

[47] *Obradovic/Wietrzyk* in *Haberer/Krejci* (eds), Konzernrecht (2016) 509.

The analysis includes the questions whether the borrowing entity could obtain a similar level of debt from a third party lender and whether the borrowing entity would actually borrow a similar amount at arm's length, given the performance of its business. Essentially, the first step involves an independent (stand-alone basis) credit assessment of the borrower. The second step deals with the determination of an arm's length interest rate in the light of the previous credit assessment.[48]

In practice, this is done by using a screening procedure that is otherwise used by economically independent banks to determine the borrower's creditworthiness. The result (i.e. the credit rating) forms the basis for the conditions under which a loan can be granted to affiliated companies and persons. However, this also means that the interest rates can vary within a pool company due to the creditworthiness of the borrower determined.[49] The determination of the interest rate also depends on other factors which must be taken into account when determining an appropriate interest rate. For example, the currency of the loan, the type of loan, the loan period, the repayment schedule and the collateral may influence the arm's length interest rate.[50]

The OECD-TPG provides traditional transactional methods as well as transactional profit methods that can be used to determine whether the conditions imposed in trade and financial relations between affiliates are consistent with the arm´s length principle.[51] The traditional transaction methods are the following:

- the comparable uncontrolled price method (CUP),
- the resale price method and
- the cost-plus method.

The transactional profit methods are as follows:

- the transactional net margin method and
- the transactional profit split method.

[48] *Otero*, Pricing of intra-group debt and arm´s length priciple Articel 9 OECD MC, in *Massoner/Storck/Stürzlinger* (eds), International Group Financing and Taxes, 176.
[49] *Polster-Grüll/Dolezel-Huber*, Steuerliche Aspekte von Cash Pooling Systemen in Österreich, *in Polster-Grüll/Berghuber/Dolezel-Huber/Kremslehner et al* (eds), Cash Pooling^2 (2004) 183.
[50] *Otero*, Pricing 176.
[51] *Otero*, Pricing 176.

From a legal point of view, the OECD Transfer Pricing Principles are a recommendation of the OECD Council.[52] This means that one is basically free to choose the appropriate transfer pricing method. However, the selection should always aim at choosing the most appropriate method for the particular case. To this end, the selection process should take into account the respective strengths and weaknesses of the methodologies recognised by the OECD. In addition, account should also be taken of the appropriateness of the method considered in relation to the type of transaction controlled, the availability of reliable information (in particular on uncontrolled comparability) and the degree of comparability between controlled and uncontrolled transactions, including the reliability of comparative adjustments. Hence, there is not one single method that can be applied to all cases.[53]

The (internal[54] or external[55]) CUP method is generally used to determine the interest rates for cash pool loans.[56] A distinction can be made between two investigative approaches: (i) the bank approach and (ii) the build-up approach.[57]

The activity of a master company is often referred to as that of a group bank.[58] In the absence of a cash pooling agreement, the individual cash pool members could maintain cash deposits and loans with an external bank. By establishing the cash pool, these agreements with external banks will be replaced by agreements with the master company.[59] Against this background, the question arises as to whether the interest rates of external banks can be applied to the current accounts of the individual group companies.[60] This would mean that the earnings (Net interest spread) would be similar to those of external banks. It is not essential, however, that these interest rates be taken into account at market rates. On the other hand, the interest rates of inter-group loans must correspond to the arm's length principle.

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[52] In view of the legal qualification of the OECD Transfer Pricing Principles as mere Recommendation of an international organisation does not in itself give them any legally binding force; *Damböck/Galla/Nowotny*, Verrechnungspreisrichtlinien (2012) 40.
[53] *OECD*, Transfer Pricing Guidelines 98.
[54] Analysis of loans to the borrower from unrelated parties; see Otero, Pricing 177.
[55] Analysis of loans between to unrelated third parties; see Otero, Pricing 177.
[56] *Ditz* in *Wassermeyer/Baumhoff* (eds), Verrechnungspreise international verbundener Unternehmen (2014) 753.
[57] *Haller/Chand*, Intertax 2019, 354.
[58] *Rieder/Hörlsberger* in *Polster* (ed), Handbuch Cash Pooling (2016) 103.
[59] *Haller/Chand*, Intertax 2019, 355.
[60] *Brüninghaus* in *Vögele/Borstell/Engler* (eds), Verrechnungspreise^3 (2011) 1543.

As mentioned above, market interest rates do not result from the contractual arrangements but from the actual circumstances of the transaction, such as the functions actually performed and the risk profile.[61] However, the master company's functions are only slightly similar to those of an external bank. For example, banks operate a more complex business model, have different cost structures and highly developed risk strategies. Looking at this question from the point of view of a cash pool depositor, the deposit in the cash pool differs from that in an external bank by the increased credit risk.[62] An independent company would therefore not readily agree to lower deposit conditions.

In this sense, the Danish Administrative Tax Court in the Bombardier case and the Norwegian Court of Appeal in the ConocoPhillips case did not accept the application of bank interest rates to physical cash pooling agreements, taking into account the particular circumstances. In particular, the application of bank interest rates should be rejected if the CPL is only partially operational, has a low level of capitalisation and bears limited risks.[63] However, bank interest rates can be used as an aid in valuing different options.[64]

Arm's length interest rates may also be determined by the application of a build-up approach, i.e. by adding a risk premium to a (short-term) risk-free base rate.[65] The risk-free base rate can be based on public information. The use of a reference interest rate such as Libor or Euribor would be conceivable.[66] Since these kind of interest rates serve as reference interest rates in interbank transactions, the risk premium is limited to a minimum. Accordingly, a corresponding risk premium must be added to determine an adequate interest rate. The specific credit risk is based on the identified rating of the borrower and the actual risk situation.[67]

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[61] *Puls* in *Wassermeyer/Baumhoff* (eds), Verrechnungspreise international verbundener Unternehmen (2014) 279 ff.
[62] *Haller/Chand*, Intertax 2019, 355.
[63] *Haller/Chand*, Intertax 2019, 355.
[64] *Ditz* in *Wassermeyer/Baumhoff* (ed), Verrechnungspreise international verbundener Unternehmen (2014) 749.
[65] *Haller/Chand*, Intertax 2019, 355 f.
[66] *Brüninghaus*, Verrechnungspreise[3] 1537.
[67] *Brüninghaus*, Verrechnungspreise[3] 1537.

An advantage of this approach is that the particular circumstances of the transaction are taken into account.[68] This includes aspects such as the borrower's industry or market and its possible volatility. However, the question arises as to how the creditworthiness of the borrower is to be determined within a business association in order to finally obtain an appropriate risk premium.[69] This is based on the idea that the creditworthiness of the borrower in the context of a multinational group could possibly be assessed differently. Against this background, three approaches can be distinguished:

- Application of the Group's credit rating,
- determination and application of a stand-alone credit rating and
- determination and application of a stand-alone credit rating adjusted for implicit support.

The first approach is based on the assumption that any shortfall in the borrower's payments within a group company will generally be offset. Accordingly, an increased risk would only exist if the group as a whole was at risk of default. The second approach conveys the need for a separate credit rating. Group membership has only a minor impact on the pricing of third-party providers, which is why it should not be taken into account.[70] The third approach strikes a balance between the approaches just mentioned. Accordingly, each Group company has an individual credit rating. However, group membership can have a positive or negative effect on the individual rating.

As the methods and instruments used by international rating agencies show, independent parties generally follow the last approach.[71] Against this background, it is precisely this approach that should be taken for the valuation of the arm's length interest rate. However, it should not be overlooked that members of a cash pool may benefit from advantages that would be denied to independent parties. Consequently, the independent pricing of individual cash pooling loans on the basis of a build-up

[68] *Haller/Chand*, Intertax 2019/47, 355.
[69] *Haller/Chand*, Intertax 2019/47, 355.
[70] *FEDERAL COURT OF AUSTRALIA*, Chevron Australia Holdings Pty Ltd v Commissioner of Taxation (No 4) [2015] FCA 1092, 167.
[71] *Haller/Chand*, Intertax 2019/47, 356.

approach can only be seen as a first step towards ensuring arm's length comparability of cash pool performance within a physical cash pool.[72]

3.2.2. Further reflection

According to the prevailing opinion, cash flows between participating companies qualify as loans or credits.[73] Against this background, intra-group payments within the framework of physical cash pooling agreements must be made at normal market conditions (financing itself and interest rates). As a rule, debt financing requires hedging of the default risk. If a participant in the cash pool provides the necessary guarantees on behalf of another participant, these must also comply with market conditions using the arm's length principle. In addition - as stated earlier - the remuneration of the cash pool leader and the distribution of the cash pool benefits must also comply with the arm's length principle.

A (financial) guarantee can generally be defined as 'a legally binding obligation of the guarantor to assume a specified obligation of the guaranteed debtor (beneficiary) if the debtor defaults on that obligation'.[74] External financing often requires group companies participating in cash pools to provide guarantees for other participating affiliates. This can result in various benefits for the affiliate, which raises the question of whether the provision of a guarantee can be classified as an intra-group service.[75] If an intra-group service has actually been provided, it must be clarified whether the guarantor's remuneration corresponds to normal market conditions.[76]

The answer to the first question depends on whether the guarantee provides the beneficiary with economic and commercial value to improve its economic position. [77]

An economic advantage is to be assumed if the provision of the guarantee has a direct impact on the level of the interest rate. However, mere membership in a group can also lead to improved conditions. Therefore, the economic advantage of the beneficiary of the guarantee must go beyond the level of mere implicit support. The Canadian Fiscal Court also followed this view, according to which the guarantee fee

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[72] *Haller/Chand*, Intertax 2019/47, 356.
[73] *Obradovic/Wietrzyk*, Konzernrecht 462 f.
[74] *Haller/Chand*, Intertax 2019/47, 357.
[75] *Brüninghaus*, Verrechnungspreise[3] 1558 f.
[76] *OECD*, Transfer Pricing Guidelines 320.
[77] *Chand*, International Transfer Pricing Journal 2016/1, 43.

must be adjusted for the effects of the implicit support, since the effects of group membership do not justify a separate payment.[78] OECD guidelines also deny the existence of an intra-group service if the advantages obtained are solely attributable to the fact that the borrower is part of a larger group and no particular activity was related to it.[79]

A compensation in line with the market therefore requires active action by an affiliated group company. However, this might not apply if the beneficiary would not receive the same amount of debt from external parties without the guarantee. Under this premise, the issuance of the guarantee could be described as a substitute for equity (i.e. shareholder activity), whereby the shareholder relationship requires that the guarantee be assumed.[80] Under these conditions, the remuneration of the guarantor could lead to a breach of capital maintenance rules.

In line with the above said, the market guarantee fees should be calculated as the difference between the interest rate that the subsidiary can receive on its own, adjusted for implicit support, and the intermediate interest rate that the subsidiary can receive under the guarantee.[81] The arm's length principle probably requires a balancing of potential savings. Otherwise, neither the guarantor nor the borrower would benefit from such an agreement, which is unlikely to happen between independent companies in this form.

The usual market remuneration of the master company is based on the functions it performs, the risks it assumes and the assets it uses.[82] The function of a master company may, for example, be that of a financial service provider or that of an internal bank.[83] While the master company's responsibility in the role of a financial services provider is limited to ensuring daily cash transfers, calculating interest expenses and reporting on the liquidity positions of the cash pooling members, the master company can play an entrepreneurial role and assume key functions in the role of an internal bank.[84] This usually correlates with the increased use of own

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[78] *Haller/Chand*, Intertax 2019/47, 357.
[79] *OECD*, Transfer Pricing Guidelines 324.
[80] *Haller/Chand*, Intertax 2019/47, 357; Varying: *Brüninghaus*, Verrechnungspreise[3] 1562.
[81] *Chand*, International Transfer Pricing Journal 2016, 43.
[82] *Chand*, International Transfer Pricing Journal 2016, 45.
[83] *De Robertis/Rosar*, TPI 2018, 295.
[84] *De Robertis/Rosar*, TPI 2018, 295.

assets and the assumption of larger risks (such as credit risk). In such a case, the remuneration should be based on the difference between the debit and credit interest rates, similar to an independent bank. [85] The level of remuneration of a master company in its role as a financial service provider needs to be carefully analysed, which could be determined using the cost-plus method.[86]

3.3. Impacts of OECD BEPS Recommendations on Cash Pooling

The impact of the OECD BEPS recommendations varies from country to country and depends on the efforts of each authority and the tax regimes in place. Against this background, a comparison that is worthwhile because of the different approaches and practices within the jurisdictions seems interesting.

3.3.1. Netherlands

The tax system in the Netherlands has specific tax characteristics which have contributed to its attractiveness to investors. For example, the Netherlands does not levy withholding tax on outbound interest and royalty payments, standardises an exemption from participation and has an extensive network of tax treaties.[87] The Netherlands is thus regarded as an attractive location for the establishment of holding companies and the structuring of international transactions worldwide. This fact was brought to the attention of the general public through the so-called Paradise Papers.

The core was a Commanditaire vennootschap (CV), the Dutch form of a limited partnership (*Kommanditgesellschaft*). The Netherlands, however, does not regard the CV as a whole, but as a partnership which bears the tax burden. If a partner is a US company, the Netherlands believes that the profits must be taxed in the United States. However, the US authorities consider that the Dutch company itself is liable for tax, which is why it does not levy any taxes either.

Due to the current social and political discourse on tax avoidance the Netherlands has begun to rethink its role and actively participated in the elaboration of the BEPS actions. The OECD welcomes the efforts of the Netherlands to change its image as a

[85] *Chand*, International Transfer Pricing Journal 2016, 45.
[86] *De Robertis/Rosar*, TPI 2018, 296.
[87] *Valderrama*, The Adoption of the BEPS in the Netherlands (2018) 2.

low-tax country.[88] Consequently, the implementation of the agreed minimum standards in national law has already begun. Pascal Saint-Amans, Director of the Centre for Tax Policy and Administration, welcomed the recent measures taken by the Dutch government to combat the erosion of the tax base and the profit shift and expressed his support for the ongoing tax reform.[89] For example, the Netherlands recently officially ratified the OECD's multilateral "super tax treaty".[90] The Multilateral Instrument (MLI) updates bilateral tax treaties with stricter global standards. The MLI is intended to amend 82 tax treaties previously referred to by the Netherlands as covered tax treaties (CTAs).[91]

The Netherlands is changing its policy of long-term tax treaties (treatment of outgoing interest and royalties) and introducing stricter substance requirements for companies operating in the Netherlands.[92] This is to prevent the Netherlands from being used as a pawn in tax optimisation. Against this background, some regulations go beyond the recommendations of the OECD. Neither the withholding tax nor the substance requirements for companies form part of the programme of measures.[93] The Netherlands is thus taking measures that are not only suitable but also desirable for combating BEPS.

3.3.2. **China**

China has actively participated in the development and implementation of the BEPS project.[94] This was mainly due to the fact that China suffered greatly from BEPS. China's tax base has been seriously eroded by aggressive international tax planning over the last four decades - despite or because of the impressive figures: second largest economy, world's leading commodity trader or the top country of outbound direct investment in the world - with the result that artificially profits are relocated to

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[88] *OECD*, OECD Economic Survey Netherlands, 10 ff.
[89] *OECD*, OECD and the Netherlands discuss developments in international tax co-operation, http://www.oecd.org/tax/oecd-and-the-netherlands-discuss-developments-in-international-tax-cooperation.htm (seen 17.06.2019).
[90] *Gottlieb*, Netherlands Ratifies OECD's Super Tax Treaty, https://news.bloombergtax.com/transfer-pricing/netherlands-ratifies-oecds-super-tax-treaty (seen 17.06.2019).
[91] *Ernst & Young Global Limited*, Dutch House of Representatives approves MLI, https://taxinsights.ey.com/archive/archive-news/dutch-house-of-representatives-approves-mli.aspx (seen 17.06.2019).
[92] *Valderrama*, Netherlands 20.
[93] *Valderrama*, Netherlands 20.
[94] *Avi-Yonah/Xu*, China and BEPS, Laws 2018/7, 1.

places where they are subject to non-taxation or reduced taxation.[95] China was well aware of this problem and explained to the Subcommittee on Base Erosion and Profit Shifting Issues for Developing Countries of the UN Committee of Experts on International Cooperation in Tax Matters that China does not currently have a system for quantitative analysis of base erosion in its country.[96] Nevertheless, it is obvious that the profit shifting of many MNE groups represents a major challenge for China.

The approach is often the same: first, intra-group transactions such as purchase and sale transactions, financial transactions, equity transfer transactions and service transactions are based on suitable transfer pricing principles and methods in order to reduce the profits of MNE subsidiaries in China. Subsequently, shell companies with no real economic substance are set up in low-tax countries to transfer profits.[97]

Under these circumstances, it is hardly surprising that China was particularly keen to implement the BEPS Action Plan. China celebrated with 67 other jurisdictions the signing of the new multilateral tax instrument (MLI), which was signed not only on its own behalf but also on behalf of the Hong Kong Special Administrative Region of the People's Republic of China.[98] Within this framework, the adaptation of the content of China's 47 bilateral treaties was agreed upon. This is remarkable in that bilateral treaties take precedence over national law in China. Moreover, in the opinion of the State Administration of Taxation, the tax treaties have direct legal effects on taxpayers beyond the contracting parties. Therefore, purely symbolic agreements also apply to the taxpayer.

China has significantly promoted the convergence of transfer pricing standards between China and other countries by implementing transfer pricing standards. Nevertheless, there is still a need for action that should not be underestimated. However, the voices on progress and implementation to date have been consistently positive. This is particularly true in view of the fact that China is not a member of the OECD.[99]

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[95] *Avi-Yonah/Xu*, Laws 2018/7, 1 f.
[96] *Avi-Yonah/Xu*, Laws 2018/7, 2.
[97] *Avi-Yonah/Xu*, Laws 2018/7, 2.
[98] *State Administration of Taxation of The People's Republic of China*, SAT Administrator Wang Jun Signs Multilateral BEPS Convention on Behalf of the Chinese Government, http://www.chinatax.gov.cn/eng/n2367751/c2742883/content.html (seen 06.07.2019).
[99] *OECD*, Did you know?, http://www.oecd.org/about/members-and-partners/ (seen 06.07.2019).

4. Capital Maintenance Rules

4.1. General Remarks

The participants in a cash pool usually have different creditors, such as suppliers. Each of these creditors chooses the counterparty to whom he performs. If the contractual partner is economically reliable, the creditor is more likely to make advance deliveries to him than an economically distressed company.

From the creditor's point of view, the assets available to him in the event of default play a particularly important role in assessing how a counterparty should be addressed in this respect. One of the main assets of a company is its available free cash.

As already shown in section 2 above, however, in a cash pool - to put it in a nutshell - the available free cash is transferred back and forth between the members. In certain constellations, this may lead to a reduction of assets available to creditors and therefore to a deterioration in creditors' interests.

Various legal systems have different concepts for dealing with this problem. Austrian capital maintenance law, for example, is characterised by an unusually strict prohibition on the repayment of the initial capital (*Verbot der Einlagenrückgewähr*). It will be illustrated that the concept of operational justification (*Betriebliche Rechtfertigung*) of a legal act plays an important role in determining whether cash pooling arrangements are in accordance with Austrian capital maintenance law. In assessing the admissibility of legal acts, UK law focuses primarily on the so-called corporate benefit.

In the following, the two models are initially presented individually and then compared with each other:

4.1.1. Prohibition on the Repayment of the Initial Capital

The prohibition on the repayment of the initial capital is a fundamental principle of Austrian corporate law.[100] Contributions to the share capital of a company may not be

[100] Cf *Sauer* in *Doralt/Nowotny/Kalss*, AktG[2] (2012) § 52 par 1; cf *Frotz* in *Polster* (ed), Handbuch Cash Pooling (2015) 78.

repaid. The purpose of this regulation is to compensate for the limitation of the liability of the shareholders of corporations, particularly in terms of creditor protection.[101]

The particularly strict capital maintenance rules concerning corporations are necessary because the creditors of a corporation cannot demand the satisfaction of their claims from the shareholders; as a consequence thereof, the assets of the company must be strictly separated from those of the shareholders.[102] Each benefit of the company to its shareholders, which does not represent a formal distribution of profits shown in the annual financial statements, may establish an offence against capital maintenance rules sections 82, 83 GmbHG; sections 52, 54, 56 AktG).

The prohibition on the repayment of the initial capital also applies within a group of companies.[103] Payments are only permissible on the basis of exceptions provided for by law, such as effective capital reduction, liquidation, partially in the case of the acquisition of own shares and partially in statutory reorganisation proceedings.[104]

The principle of capital maintenance does not prohibit legal transactions between a company and its shareholders as such, provided, however, that the conclusion of such transaction does not constitute an inadmissible transfer of assets to the detriment of the company. Payments by a company to its shareholder are permissible if they are in line with the arm's length principle (see section 3.2 above for details) and stand up to a third-party comparison.[105]

According to this standard, it must be assessed, on the one hand, whether an equivalent consideration matches the performance of the company to its shareholder.[106] On the other hand, it must be checked whether the company would have concluded the same transaction with a third party at all.[107] In general, it

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[101] Cf *Koppensteiner/Rüffler*, GmbHG[3] § 82 par 3; cf *Auer* in *Gruber/Harrer*, GmbHG[2] § 82 par 1; *Bauer/Zehetner* in *Straube/Ratka/Rauter*, GmbHG § 82 par 3, 46.

[102] Cf *Hartlieb/Saurer/Zollner*, Gründungsprivilegierte GmbH (2014) 5.

[103] Cf *Bauer/Zehetner* in *Straube/Ratka/Rauter*, WK-GmbHG § 82 par 2, 90; cf *Artmann* in *Jabornegg/Strasse*r, AktG I[5] § 52 sec 26.

[104] *Bauer/Zehetner* in *Straube/Ratka/Rauter*, WK-GmbHG § 82 sec 2.

[105] *Bauer/Zehetner* in *Straube/Ratka/Rauter*, WK-GmbHG § 82 sec 2.

[106] Cf *Bauer/Zehetner* in *Straube/Ratka/Rauter*, WK-GmbHG § 82 sec 61/1; cf *Auer* in *Gruber/Harrer*, GmbHG[2] § 82 sec 15; cf *Foglar-Deinhardstein* in *FAH*, GmbHG § 82 sec 87; cf *Koppensteiner/Rüffler*, GmbHG3 § 82 sec 15; *Köppl in U. Torggler*, GmbHG, § 82 sec 19; OGH 20.1.2000, 6 Ob 288/99t; OGH 4.3.2013, 8 Ob 20/13v.

[107] Cf *Bauer/Zehetner* in *Straube/Ratka/Rauter*, WK-GmbHG § 82 sec 59, 61/1; cf *Koppensteiner/Rüffler*, GmbHG[3] (2007) § 82 sec 15; OGH 13.9.2012, 6 Ob 110/12p; *Artmann* in *Jabornegg/Strasser*, AktG[5] § 52 sec 11; *Reich-Rohrwig*, Grundsatzfragen der Kapitalerhaltung 119.

depends on whether a managing director acting with the diligence of a prudent businessman (*Sorgfalt eines ordentlichen Geschäftsmannes*) would have concluded the transaction with a third party under otherwise identical circumstances and under the very same conditions.[108]

However, even an objectively inequivalent transaction between a company and a shareholder might be permissible if there is a special operational justification and if a prudent businessman (sec 25 par 1 and 1a GmbHG) would have concluded the transaction despite the disproportion also with a third party.[109] It depends on whether the company derives other advantages from the transaction, which subjectively compensate for the objective inequality of performance and consideration.[110]

4.1.2. Norm Addressee

The primary addressee of the capital maintenance rules stated in sections 52 and 54 AktG and sec 82 GmbHG is the direct or indirect shareholder, irrespective of the amount of his participation in the company.[111] In addition, payments to group companies that are directly or indirectly associated with a shareholder are also subject of the prohibition on the repayment of the initial capital; in this respect, payments to sister companies of the corporation concerned are also included.[112]

Payments to third parties, in particular banks, are generally not covered by the prohibition on the repayment of the initial capital unless the legal transaction is void according to the general principles of the abuse of power of representation.[113]

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[108] *Klampfl*, Cash Pooling (2008) 73.

[109] *Frotz* in *Polster* (ed), Handbuch Cash Pooling 79; cf OGH 7 Ob 35/10p; cf *Reich-Rohrwig*, Grundsatzfragen der Kapitalerhaltung 190; cf *Auer* in *Gruber/Harrer*, GmbHG^2 § 82 sec 38; cf *Koppensteiner/Rüffler*, GmbHG^3 § 82 sec 16; OGH 1.12.2005, 6 Ob 271/05d ÖBA 2006, 293 (*Karollus*) = GeS 2006, 164 = RdW 2006, 279 = JBl 2006, 388 (*Artmann*) = ecolex 2006, 398 = SZ 2005/178.

[110] *Frotz* in *Polster* (ed), Handbuch Cash Pooling 79; cf *Artmann* in *Jabornegg/Strasser*, AktG^5 § 52 sec 29.

[111] *Frotz* in *Polster* (ed), Handbuch Cash Pooling 80; cf *Bauer/Zehetner* in *Straube/Ratka/Rauter*, WK-GmbHG § 82 sec 78 ff.

[112] Cf *Bauer/Zehetner* in *Straube/Ratka/Rauter*, WK-GmbHG § 82 sec 84; cf *Frotz* in *Polster* (ed), Handbuch Cash Pooling 80.

[113] Cf *Bauer/Zehetner* in *Straube/Ratka/Rauter*, WK-GmbHG § 82 sec 83; cf OGH 2.5.2019, 17 Ob5/19p, sec 3.1; RIS-Justiz RS0105536.

4.1.3. **Legal Consequences of a Breach of Capital Maintenance Law**

If the legal transaction does not stand up to a third-party comparison or the arm's length principles and lacks operational justification, the legal transaction is absolutely null and void according to sec 879 par 1 ABGB.[114]

Besides the fact that the legal transaction has to be unwound, such a breach of capital maintenance rules can lead to claims for compensation of the company against its management (section 84 par 3 n 1 AktG and section 25 par 3 n 1 GmbHG). It is controversial which effects the infringement has on the concealed legal transaction in the case of a hidden (see section 4.3.1) payback of initial capital.[115] Literature holds the opinion that a company is only entitled to compensation in the form of return of money or property which belong to the company under capital maintenance rules..[116]

4.2. Capital Maintenance Aspects in Cash Pooling

4.2.1. General Remarks

In the context of cash pooling agreements, various issues may arise under capital maintenance law. It is, for example, crucial that any company transferring liquidity to an affiliated company has an enforceable repayment claim.[117]

In addition, pool companies may not suffer any interest disadvantages in favour of their shareholders and/or their affiliates as a result of transactions under the cash pool agreement. To ensure that a cash pooling agreement does not violate capital maintenance rules, the following conditions must be observed:

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[114] Cf *Bauer/Zehetner* in *Straube/Ratka/Rauter*, WK-GmbHG § 82 sec 71; cf *Reich-Rohrwig*, Grundsatzfragen der Kapitalerhaltung 133 ff; cf *Artmann* in *Jabornegg/Strasser*, AktG I[5] § 52 sec 72; cf *Kalss/Nowtny/Schauer*, Österreichisches Gesellschaftsrecht, sec 4/425; cf *Auer* in *Gruber/Harrer*, GmbHG[2] § 82 sec 62; OGH 25.6.1996, 4 Ob 2078/96h.

[115] *Bauer/Zehetner* in *Straube/Ratka/Rauter*, WK-GmbHG § 82 sec 72; *Kalss/Nowotny/Schauer*, Österreichisches Gesellschaftsrecht[2], sec 4/425; *Artmann* in *Jabornegg/Strasser*, AktG I[5] § 52 sec 72; *Saurer* in *Doralt/Nowotny/Kalss*, AktG I[2] § 52 sec 118; *Reich-Rohrwig*, Grundsatzfragen der Kapitalerhaltung 163 ff.

[116] Cf *Koppensteiner/Rüffler*, Die Bestellung von Sicherheiten durch eine Kapitalgesellschaft für Verbindlichkeiten ihrer Gesellschafter, 1. Teil GesRZ 1999, 86 (90); *Kastner/Doralt/Nowotny*, Grundriss des Österreichischen Gesellschaftsrechts (1998) 295; *Arnold*, Verdeckte Gewinnausschüttung im Handelsrecht, GesRZ 1985, 86 (96 ff); cf *Artmann* in *Jabornegg/Strasser*, AktG I[5] § 52 sec 72 with further evidence.

[117] Cf *Artmann* in *Jabornegg/Strasser*, AktG I[5] § 52 sec 29; cf *Bauer/Zehetner* in *Straube/Ratka/Rauter*, WK-GmbHG § 82 sec 91.

4.2.2. Credit Rating

As a matter of principle, it must be examined whether the respective company would also have concluded the cash pooling agreement with a not affiliated, third party outside of the group (arm's length comparison).[118] Since cash pooling among third parties does not occur in practice, a third-party comparison is not feasible in group law.[119] Nevertheless, the conclusion of unfavourable legal transactions may be permissible even amongst group companies due to operational justification.[120]

For this reason, the creditworthiness of the master company and the other pool companies and therefore the value retention and enforceability of the repayment claim are decisive under capital maintenance law.[121] It must be examined whether the risks can be outweighed by the advantages associated with a cash pool (such as better credit conditions, better liquidity management), with particular attention being paid to the creditworthiness of the master company and the other pool companies.[122]

If there are severe doubts about the creditworthiness and thus about the full value of any repayment claims against the master company or other pool companies, the conclusion of the cash pooling agreement must be omitted, unless the loan repayment claim is adequately secured.[123] In order to assess the creditworthiness of all related parties, the cash pool agreement must grant the pool partners extensive rights to obtain information and exercise control, as well as a termination right with immediate effect in the event of a deterioration in creditworthiness.[124] In any case, risks that could jeopardise the company's existence must under no circumstances be taken.[125]

The creditworthiness of the master company also plays an essential role if the cash pool companies are obliged to provide collaterals in favour of the pool bank or have

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[118] Cf *Artmann* in *Jabornegg/Strasser*, AktG I[5] § 52 sec 29.
[119] Cf *Artmann* in *Jabornegg/Strasser*, AktG I[5] § 52 sec 29; cf *Klampfl*, Cash Pooling 98; cf OGH 2.5.2019, 17 Ob5/19p, sec 2.3; cf *Winder*, Cash Pooling im Konzern, GesRZ 2019, 28.
[120] Cf OGH 2.5.2019, 17 Ob5/19p, sec 2.4; cf *Klampfl*, Cash Pooling 98; cf *Artmann* in *Jabornegg/Strasser*, AktG I[5] § 52 sec 29.
[121] *Frotz* in *Polster* (ed), Handbuch Cash Pooling 82; cf *Auer* in *Gruber/Harrer* (eds), GmbHG[2] § 82 sec 45, 48.
[122] *Artmann* in *Jabornegg/Strasser*, AktG I[5] § 52 sec 29.
[123] Cf *Frotz* in *Polster* (ed), Handbuch Cash Pooling 83; *Artmann* in *Jabornegg/Strasser*, AktG I[5] § 52 sec 29.
[124] *Frotz* in *Polster* (ed), Handbuch Cash Pooling 83 f; cf *Artmann* in *Jabornegg/Strasser*, AktG I[5] § 52 sec 29.
[125] Cf *Artmann* in *Jabornegg/Strasser*, AktG I[5] § 52 sec 19, 29; cf *Auer* in *Gruber/Harrer* (eds), GmbHG[2] § 82 sec 45; cf *Saurer* in *Doralt/Nowotny/Kalss*, AktG[2] § 52 sec 63; cf *Bauer/Zehetner* in *Straube/Ratka/Rauter*, WK-GmbHG § 82 sec 94; cf *Frotz* in *Polster*, Handbuch Cash Pooling 84; cf OGH 1.12.2005, 6 Ob 271/05d.

to join a contract between the master company and the pool bank as a co-debtor.[126] The creditworthiness of the master company must be secured in the long term.[127] Long-term security can be achieved, for example, by a guarantee from the top management of the group.[128] In the absence of such a guarantee, the risks associated with providing collateral by the pool company must be economically justified.[129]

For all of these reasons, the management of each pool company has to assess whether it draws concrete and verifiable pecuniary benefits from the security itself that outweigh the risks.[130] These pecuniary benefits must result from the cash pool, otherwise providing collaterals may violate the prohibition of the repayment of the initial capital.[131]

4.2.3. Adequate Return

Within the framework of effective cash pooling, the participants mutually grant each other short-term loans.[132] Once the result of the assessment of the creditworthiness of the cash pool partners is positive, the appropriateness of the credit interest that a pool company charges for providing liquidity and the debt interest that a pool company has to pay for using liquidity has to be assessed (arm`s length principle).[133]

When determining the group interest rates, the maturity, the amount, and the currency of the pool receivables or liabilities must be taken into account.[134] Participants must be treated as if they invested or borrowed funds independently, meaning without participating in the cash pool.[135] In addition, it has to be ensured

[126] Cf *Frotz* in *Polster*, Handbuch Cash Pooling 85.
[127] Cf *Frotz* in *Polster*, Handbuch Cash Pooling 85.
[128] Cf *Frotz* in *Polster*, Handbuch Cash Pooling 85.
[129] Cf *Frotz* in *Polster*, Handbuch Cash Pooling 86.
[130] Cf *Frotz* in *Polster*, Handbuch Cash Pooling 86.
[131] Cf *Frotz* in *Polster*, Handbuch Cash Pooling 86.
[132] *Riedler/Hörlsberger* in *Polster*, Handbuch Cash Pooling 114.
[133] *Frotz* in *Polster*, Handbuch Cash Pooling 84; cf *Artmann* in *Jabornegg/Strasser*, AktG I[5] § 52 sec 29; cf *Bauer/Zehetner* in *Straube/Ratka/Rauter*, WK-GmbHG § 82 sec 92.
[134] Cf *Frotz* in *Polster*, Handbuch Cash Pooling 84.
[135] Cf *Frotz* in *Polster*, Handbuch Cash Pooling 84; cf *Riedler/Hörlsberger* in *Polster* (ed), Handbuch Cash Pooling 115; cf *Saurer* in *Doralt/Nowotny/Kalss*, AktG[2] § 52 sec 86; cf *Winder*, Cash Pooling im Konzern, GesRZ 2019, 28 (29).

that the benefits from the cash pool are adequately distributed among the cash pool participants.[136]

4.2.4. Remuneration for the Master Company

Generally, the master company processes the entire payment transactions of the pool members. In return, the master company is, of course, entitled to adequate remuneration. Under capital maintenance law, however, the master company must not receive an unreasonably high remuneration for managing the cash pool. The fee must also be adequately distributed among the pool companies.[137]

4.3. Possible Variants of Payment Flows

4.3.1. Down-Stream Loan

A down-stream loan defines as a loan granted from a parent company to one of its subsidiaries. Since there is no transfer of assets from a company to its shareholder, this constellation does generally not constitute a violation of capital maintenance law.[138] A parent company may grant loans to its subsidiaries as well as provide collateral in favour of its subsidiaries.[139] However, section 82 par 1 GmbHG also prohibits "*hidden*" violations of capital maintenance rules.[140] Such a hidden violation can, for example, occur if the parent company is granted too much consideration for the transfer of the capital to the subsidiary (for example excessive interest rates) or if the subsidiary does actually not require any financing at all (lack of operational justification).[141]

4.3.2. Up-Stream Loan

An up-stream loan is the exact opposite of the down-stream loan: a daughter company grants a loan to or provides collateral in the interest of its parent or grandparent company. This constellation can lead to a large number of problems

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[136] Cf *Frotz* in *Polster*, Handbuch Cash Pooling 84.
[137] Cf *Frotz* in *Polster*, Handbuch Cash Pooling 85.
[138] *Bauer/Zehetner* in *Straube/Ratka/Rauter*, WK-GmbHG § 82 sec 90.
[139] *Bauer/Zehetner* in *Straube/Ratka/Rauter*, WK-GmbHG § 82 sec 90.
[140] Cf *Koppensteiner/Rüffler*, GmbHG[3] § 82 sec 15; cf *Artmann* in *Jabornegg/Strasser*, AktG I[5] § 52 sec 16; cf *Saurer* in *Doralt/Nowtny/Kalss*, AktG[2] § 52 sec 23 ff.
[141] Cf *Foglar-Deinhardstein* in FAH, GmbHG § 82 sec 106.

under capital maintenance law.[142] A down-stream loan increases the assets of the respective subsidiary and thus, the value of the parent company's investment in this subsidiary. As a result, the assets available to the lender's creditors are not reduced. With an upstream loan, on the other hand, such deterioration is precisely the case.[143]

Transferring a pool company's liquidity surplus to a (master) parent or grandparent company reduces in the first instance, the assets available to the lender's creditors. Such a measure is generally in the sole interest of the parent or grandparent company and may, therefore, constitute an infringement of capital maintenance rules. However, a subsidiary may lawfully grant an up-stream loan to its parent company if it complies with the criteria set out in Section 4.2 above (operational justification, creditworthiness, appropriate collateral, no threat to existence).

4.3.3. Side-stream loan

A side-stream loan qualifies as a loan granted by a sister company to another sister company. Like the up-stream loan, the side-stream loan is usually to the ultimate benefit of the joint parent company because this company, for example, avoids the costs of financing its subsidiary.[144] In addition, a loan to a sister company reduces the assets available to the creditors of the lending company again.

In order not to constitute a violation of capital maintenance law, a side-stream loan must therefore also fulfil the criteria described in section 4.2 above.

4.4. Conclusion

Entering into a cash pooling agreement may constitute an infringement of capital maintenance rules under section 82 GmbHG or section 52 AktG if a company, for example, suffers interest disadvantages to the ultimate benefit of its shareholder. A cash pool agreement is permissible under capital maintenance law if there is an operational justification for it. This means that each pool company has to examine whether the advantages (better credit conditions, better liquidity management) overweigh the risks associated with a cash pool.

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[142] Cf *Reich-Rohrwig*, Grundsatzfragen der Kapitalerhaltung 186; cf *Bauer/Zehetner* in *Straube/Ratka/Rauter*, WK-GmbHG § 82 sec 90.
[143] *Bauer/Zehetner* in *Straube/Ratka/Rauter*, WK-GmbHG § 82 sec 90.
[144] *Bauer/Zehetner* in *Straube/Ratka/Rauter*, WK-GmbHG § 82 sec 90.

For this examination, the creditworthiness of the master company and the other pool companies plays an important role. Under the terms of the cash pool agreement, participants may not under any circumstances assume risks that could threaten their very existence. The companies participating in the cash pool must be able to terminate the agreement if the creditworthiness of other pool companies deteriorates.

In order to be able to react in due time, appropriate information and control rights must be provided for all pool companies. If the creditworthiness of a participant is questionable, the risk can be reduced by providing sufficient collateral. Furthermore, the borrowing company has to pay an appropriate interest rate (equal consideration) to the lending companies. Furthermore, the remuneration for the master company must not be disproportionately high.

Only if all of these criteria are met, there are no objections to the admissibility of the cash pool agreement under capital maintenance law.

4.5. Corporate benefit

4.5.1. General Remarks

The corporate benefit is a basic legal construct demanding that any actions by officers or directors on behalf of a company have reasonably positive consequences for the company.[145] When a company is for example granting a guarantee, the guarantor must serve the guarantor company´s own commercial interests.[146] This means that the directors of the companies involved in a transaction must carefully consider the commercial benefits to their company when providing the guarantee.[147] The corporate benefit doctrine is partly intended to protect shareholders against an improper depletion of assets – an investor protection – and is partly intended to protect creditors for the same reason – a creditor protection.[148]

The principle according to which the board of directors must direct their power to the benefit of the company and its members is a key element in guarantee transactions

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[145] https://www.wisegeek.com/what-is-the-interest-of-the-company.htm (seen 26.6.2019).
[146] https://www.wisegeek.com/what-is-the-interest-of-the-company.htm (seen 26.6.2019).
[147] Cf *Petersen/Temko/Seimetz/Green/Smallhoover/Coq*, The economic and commercial benefit of corporate guarantees – an international comparison (2002) 6 JIBFL, 258; https://www.wisegeek.com/what-is-the-interest-of-the-company.htm (seen 26.6.2019).
[148] Wood, Principles of International Insolvency, sec 17-045.

in the United Kingdom and appears for the first time in Hutton v West Cork Railway Co (1883) 23 Ch D 654.[149] Nowadays, the Companies Act 2006 regulates, that directors of a company must continue to act in a way that benefits its members as a whole (section 172 par 1 Companies Act 2006).

In the United Kingdom, corporate guarantees and other transactions which do amount to a transaction at an undervalue during the relevant suspect period when the debtor is insolvent are saved if the guaranteeing company acted in good faith and for the purpose of its business and also at the time of the transaction there were reasonable grounds for believing that the transaction would benefit the company.[150] In assessing whether there is an economic benefit to the company in providing the guarantee, it is necessary to consider whether an intelligent and honest man in the director's position could, in the circumstances, reasonably believe that the guarantee transaction benefits the company (*Charterbridge Corpn Ltd v Lloyds Bank Ltd (1970) Ch 62*).[151] If this is not the case, such guarantee may entail costs. A guarantee may be declared invalid in insolvency if there is no commercial benefit to the guarantor.[152]

Furthermore, any transaction that does not meet this standard is deemed void and the director can be held financially responsible for any damages to the third party with whom the voided transaction was originally made.[153] Also, if a guarantor enters into a transaction which, whilst being within its capacity, is an abuse of powers, such a transaction may be set aside at the level of the shareholders, who may enjoin *ultra vires* acts.[154] The managing directors are therefore well advised to document precisely where exactly the economic benefit for the company lies.[155]

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[149] *Petersen/Temko/Seimetz/Green/Smallhoover/Coq*, The economic and commercial benefit of corporate guarantees – an international comparison (2002) 6 JIBFL, 258.
[150] Wood, Principles of International Insolvency, sec 17-045.
[151] Cf *Petersen/Temko/Seimetz/Green/Smallhoover/Coq*, The economic and commercial benefit of corporate guarantees – an international comparison (2002) 6 JIBFL, 258.
[152] *Petersen/Temko/Seimetz/Green/Smallhoover/Coq*, The economic and commercial benefit of corporate guarantees – an international comparison (2002) 6 JIBFL, 258.
[153] https://www.wisegeek.com/what-is-the-interest-of-the-company.htm (seen 26.6.2019), cf *Petersen/Temko/Seimetz/Green/Smallhoover/Coq*, The economic and commercial benefit of corporate guarantees – an international comparison (2002) 6 JIBFL, 258.
[154] *Petersen/Temko/Seimetz/Green/Smallhoover/Coq*, The economic and commercial benefit of corporate guarantees – an international comparison (2002) 6 JIBFL, 258.
[155] https://talkingfinance.gateleyplc.com/2015/11/27/whats-the-benefit-of-commercial-benefit (seen 26.6.2019).

A shareholders' resolution, passed before the guarantee is assumed, can prevent the shareholders from taking action against the guarantee.[156] In addition, lenders can take comfort that under the Act, if they have acted in good faith, they may be able to rely on the ability of directors to bind the relevant company anyway, even if they are acting outside their powers.[157]

To sum up, it can be said that it is the director's duty to make sure that granting a guarantee is to the benefit of its company.

4.5.2. Corporate Benefit in Group Financing

In the case of intra-group financing, it can sometimes be difficult to determine the actual corporate benefit for the guaranteeing company. The assessment of whether a benefit exists depends on whether guarantees have been given up-stream, down-stream or side-stream. It is not enough for the guarantee to only benefit the group, there has to be a benefit to each individual company granting a guarantee.[158]

In the case of a down-stream guarantee (a parent guarantees a loan granted by a lender to a subsidiary), the improvement in the value of the shares held by the parent in its subsidiary by virtue of additional finance put to profitable end often constitutes a benefit.[159] The success of the subsidiary will usually benefit the parent through an increase in the subsidiary`s value or improved performance, resulting in better dividends.[160]

In the case of up-stream guarantees, the directors may identify the commercial benefit based on the fact that principal subsidiaries often depend on their guarantor parent companies for support or the guarantee may result in a reduction of overall

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[156] Cf https://talkingfinance.gateleyplc.com/2015/11/27/whats-the-benefit-of-commercial-benefit (seen 26.6.2019).
[157] https://talkingfinance.gateleyplc.com/2015/11/27/whats-the-benefit-of-commercial-benefit (seen 26.6.2019).
[158] https://talkingfinance.gateleyplc.com/2015/11/27/whats-the-benefit-of-commercial-benefit (seen 26.6.2019).
[159] Wood, Principles of International Insolvency, sec 17-045.
[160] *Petersen/Temko/Seimetz/Green/Smallhoover/Coq*, The economic and commercial benefit of corporate guarantees – an international comparison (2002) 6 JIBFL, 258; https://talkingfinance.gateleyplc.com/2015/11/27/whats-the-benefit-of-commercial-benefit(seen 26.6.2019).

funding costs to the group where the parent incurs borrowings on behalf of the group as a whole.[161]

The economic benefit in the case of side-stream financing may consist in the successful continuation of the activities of the other subsidiaries, in particular if the companies have an economic relationship with each other and are dependent on each other. If there is a significant business relationship between the subsidiaries, there is, from the perspective of the individual company, a considerable interest in maintaining the integration in the group and the previous structure of the group.[162]

4.6. Comparison: Operational Justification and Corporate benefit

The economic benefit doctrine under UK law is comparable to the concept of operational justification under Austrian law. Both legal concepts demand for an advantage for the company that justifies a legal transaction.

In the UK, directors are required to assess whether guarantees given by the company are for the economic benefit of the guarantor.

Providing an up-stream or side-stream loan is only in compliance with Austrian capital maintenance rules if this financing is in the best interest of the company and fully justified by a business purpose, respectively operational justification.[163]

Therefore, both legal concepts play an important role in connection with group financing.

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[161] *Petersen/Temko/Seimetz/Green/Smallhoover/Coq*, The economic and commercial benefit of corporate guarantees – an international comparison (2002) 6 JIBFL, 258.
[162] Cf *Petersen/Temko/Seimetz/Green/Smallhoover/Coq*, The economic and commercial benefit of corporate guarantees – an international comparison (2002) 6 JIBFL, 258.
[163] Cf *Van Gerven*, Capital Derective in Europe: The Rules on Incorporation and Capital of Limited Liability Companies (2014) 81.

5. Insolvency Law Aspects

5.1. General Remarks

The main purposes of bundling liquidity in a cash pool is generally to ensure sufficient liquidity, minimise financing costs, optimize currency positions and increase independence from financial markets.[164] Nevertheless, (effective) cash pooling also bears certain risks:

Due to the actual transfer of money, an effective cash pool has a direct impact on the participating companies' financial constitution. Despite all capital maintenance issues discussed in section 4 before, an effective cash pool may in the worst case cause insolvency of one or more of its participants.

Although there are no special provisions under Austrian insolvency law explicitly dealing with cash pool agreements and transactions conducted thereunder, there are certain legal aspects to be considered.

The following chapter will examine the legal aspects of cash pooling under Austrian insolvency law. The first step is to analyse, whether cash pooling is covered by the Austrian Act on Equity Substitution (*Eigenkapitalersatz-Gesetz- EKEG*) and if a cash pooling agreement "survives" the opening of formal insolvency proceedings over the assets of one or more of the cash pool participants.

The second step is to evaluate, whether or not payments made under the cash pooling agreement may be challenged by an insolvency administrator. The presentation of the relevant Austrian legal framework is followed by a comparative analysis of insolvency aspects of cash pooling under Danish and Hungarian law:

5.2. Statutory Insolvency Proceedings

In Austria, there is a unified Insolvency Code (*Insolvenzordnung-IO*) governing the insolvency proceedings against companies. Depending on whether or not a restructuring plan (*Sanierungsplan*) is presented with the application for the opening of insolvency proceedings, insolvency proceedings are called restructuring

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[164] Cf for example *Klein*, Pflichten und Haftungsrisiken der Geschäftsleitung beim Cash Pooling, ZIP 2017, 258 (258).

proceedings (*Sanierungsverfahren*), otherwise they are called bankruptcy proceedings (*Konkursverfahren*). A debtor may also present such a restructuring plan in the course of a bankruptcy proceeding resulting in the bankruptcy proceeding to be continued as restructuring proceeding. The term "*insolvency proceedings*" used in the Insolvency Code covers both restructuring proceedings and bankruptcy proceedings.

If the company is insolvent[165], each director is (severally) obliged to file for insolvency proceedings without culpable delay - within 60 days at the latest. If a director violates his duty to (timely) file for insolvency proceedings, he is liable towards the creditors for any damages arising out of insolvency procrastination. Towards existing creditors (*Altgläubiger*) he is liable for the quota damage, i.e. for the difference between any damage actually occurred and any (minor) damage which would have occurred had the managing director filed for insolvency on time. As for the so-called "new creditors" (*Neugläubiger*) - i.e. creditors who contracted with the company in *statu cridae* - the managing director is liable for the negative interest. The creditor must be put in a position as if the relevant transactions had never been concluded with the subsequently insolvent debtor.

According to the Austrian Act on Limited Liability Companies (*Gesetz über Gesellschaften mit beschränkter Haftung – GmbHG*), the managing director shall pay damages to the company (represented by the insolvency administrator) if he made payments after the point in time when he was obliged to file an insolvency petition. From the date the managing director is obliged to file a insolvency petition, he may not make further payments, except for payments matching with deliveries, payments to secured creditors up to the amount of the security, payments against adequate consideration or payments which are necessary to prevent the company's immediate collapse (e.g. rental payments, taxes, social security contributions, wages) and which will not reduce the company's assets.

The managing directors may also be liable for unpaid taxes and social security contributions owed by the company.

There are several criminal offences stated in the Austrian Criminal Code (*Strafgesetzbuch – StGB*) that might affect directors for acts committed in connection

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[165] See section 5.5.

with insolvency. The most important provision regards the grossly negligent encroachment of a creditor's interest (*Grob fahrlässige Beeinträchtigung von Gläubigerinteressen, section 159 StGB*). This includes effectuating insolvency in a grossly negligent manner. There are provisions for fraudulent interference with creditor's claims (*Betrügerische Krida, section 156 StGB*), withholding of social security duties (Vorent*halten von Dienstnehmerbeiträgen zur Sozialversicherung, section 153c StGB*) and preferential treatment of creditors (*Begünstigung eines Gläubigers, section 158 StGB*).[166]

5.3. Cash Pooling and the Austrian Act on Equity substitution (*Eigenkapitalersatz-Gesetz- EKEG*)

In 2004, the EKEG[167] entered into force. The EKEG legally deems loans that were granted by a shareholder to a company during a corporate crisis to be equity.

A shareholder under the EKEG defines as a person that controls a company or holds a minimum share of 25% in a company. The application of the EKEG to group companies is explicitly provided for in the law and extends to all companies under joint control.[168]

With regard to the definition of a corporate crisis, the EKEG refers to the reasons for the opening of statutory insolvency proceedings (illiquidity and over-indebtedness) according to sections 66 and 67 of the Austrian Insolvency Act (*Insolvenzordnung-IO*),[169] as well as to the crisis indicators of the Austrian Corporate Reorganisation Act (*Unternehmensreorganisationsgesetz- URG*)[170]. The URG deems a company to be in crisis if its equity ratio is below 8% and the fictive debt repayment period is longer than 15 years.

If a shareholder of a company who classifies as a shareholder under the EKEG grants a loan to "his" company during a crisis, section 14 EKEG provides for a repayment block (*Rückzahlungssperre*). This means that the loan cannot be repaid until the corporate crisis has been overcome.

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[166] *Höller/Wielinger Georg,* ICLG to: Corporate Recovery & Insolvency 2013 – Austria, 30 (31).
[167] BGBl I Nr 92/2003 in its version BGBl Nr 58/2010.
[168] Cf § 9 EKEG.
[169] Insolvenzordnung RGBl Nr 337/1914 in its version BGBl I Nr 38/2019.
[170] BGBl I Nr 114/1997 in its version BGBl I 43/2016.

Section 3 EKEG provides for an exemption for short term restructuring loans. If such a restructuring loan can be paid back by the company to its shareholder within 60 days, the repayment block foreseen in section 14 EKEG shall not apply.

Looking at the definition of a cash pool in section 2.3 above, the question arises, whether transactions under a cash pooling agreement are covered by the EKEG.

Soon after the EKEG's introduction in 2004, a controversial discussion arose in legal doctrine about whether cash pooling is within the scope of application of the EKEG.[171]

The prevailing doctrine is of the opinion that, if all criteria described in section 5.2 above are met, down-stream loans under a cash pool agreement clearly qualify as loans under the EKEG.[172]

A lot of time may pass between the signing of the cash pool agreement and the actual transfer of money under the cash pool agreement. The decisive moment for assessing whether the loan was granted during the crisis (and triggers the repayment block) is therefore not the signing date of the cash pool agreement, but the actual date of the transfer of the money from the pool or master account to the pool company in crisis.[173]

The EKEG may cover down-stream, side-stream and, under certain circumstances, even up-stream cash flows. The EKEG's applicability depends on the company's position within the group, the direction of payment (up-, down- or side-stream) and whether the parent company has issued an order according to section 9 EKEG.[174]

5.4. Legal Consequences of Insolvency Proceedings

According to section 57a IO, claims resulting from payments that are deemed to be equity-substituting under the EKEG are subordinated to all other insolvency claims. Subordinated claims have to be filed with the insolvency court like ordinary insolvency claims. However, such claims will only be registered by the insolvency

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[171] Cf for example *Klampfl*, Cash Pooling (2008) 118; *Billek*, Cash Pooling im Konzern (2009) 150; *Kirchlechner/Klewan*, Konzerne in der Krise, CFOaktuell 2013, 118 (118).

[172] Cf for example *Billek*, Cash Pooling 148 ff; *Klampfl*, Cash Pooling 183 ff; *Faßbender*, Cash Pooling und Kapitalersatzrecht im Konzern (2004) 56 ff.

[173] *Klampfl*, Cash Pooling 261.

[174] *Billek*, Cash Pooling 186; *Klampfl*, Cash Pooling 261.

court once it is to be expected that subordinated claims will be (partially) satisfied (section 57a par 2 IO).

As a consequence of the repayment block under section 14 sec 1 EKEG, a shareholder cannot demand repayment of his loan as long as the company has not been restructured and, if the insolvency proceedings ended in a statutory restructuring plan, cannot demand repayment if his claim exceeds the restructuring plan quota. Payments made despite the repayment block must be paid back to the company or the insolvency estate by the shareholder.

5.5. Cash pooling in the Event of Material Insolvency

A company is qualified as insolvent under Austrian law if it is illiquid (*zahlungsunfähig*) or over-indebted in terms of insolvency law (*insolvenzrechtlich überschuldet*) [175].

Illiquidity (*Zahlungsunfähigkeit*) means that the debtor is unable to pay all its debts in due time and is not in a position to acquire the necessary funds to satisfy its due liabilities within a reasonable period of time. The examination of illiquidity must refer solely to matured liabilities. A forecast is not required and liabilities maturing in the future can be disregarded[176].

A company is considered to be over-indebted in terms of the insolvency law if the company's liabilities exceed its assets and the company has a negative prospect (*negative Fortbestehensprognose*). For the determination of over-indebtedness, a special over-indebtedness balance sheet (*Insolvenzstatus*) must be drawn up. In this over-indebtedness balance sheet, the company's assets and liabilities have to be evaluated by assuming the liquidation of the company. The liquidation values of the company's assets shall be compared with the company's liabilities.

If the over-indebtedness balance sheet based on the liquidation values shows over-indebtedness of the company, it will be the management's responsibility to examine whether such over-indebtedness constitutes over-indebtedness in terms of the insolvency law (*insolvenzrechtliche Überschuldung*) by drawing up a forecast on the

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[175] *Höller Wielinger Georg*, ICLG to: Corporate Recovery & Insolvency 2013 – Austria, 30 (31); *Gassner/Wabl*, Insolvenzverschleppung und Zahlungsverbot, ecolex 2018, 908 (909).

[176] *Höller/Wielinger Georg*, ICLG to: Corporate Recovery & Insolvency 2013 – Austria, 30 (31); see in detail for example *Dellinger* in *Konecny* (ed), Kommentar zu den Insolvenzgesetzen (2018) § 66.

company's continued existence (*Fortbestehensprognose*). This forecast examines whether the company will be solvent and thus viable in the future[177].

After the material insolvency has occurred, the corporate bodies of a company are faced with the question, whether they have to terminate or whether they may continue the cash pool agreement.

5.6. Continuation of the Cash Pool after Opening of Insolvency Proceedings?

After the opening of formal insolvency proceedings, the question arises, what happens to the cash pool agreement and the transactions conducted thereunder.

5.6.1. The Cash Pooling Agreement during Insolvency Proceedings

Like other bilateral legal acts, the cash pooling agreement has to be assessed under section 21 IO. Under this provision, a bilateral contract, which has not yet been fully performed by the debtor and the other party at the time of the opening of insolvency proceedings, enables the insolvency administrator either to stick to the contract on behalf of the debtor and demand performance from the other party or to withdraw from the contract.[178]

5.7. Prohibition of Payments According to section 25 par 3 n 2 GmbHG and section 84 par 3 n 6 AktG

Section 25 par 3 n 2 GmbHG[179] and section 84 par 3 n 6 AktG[180] state a special liability for payments made by the managing directors of a corporation after a company becomes insolvent. However, payments, which are compatible with the diligence of a prudent and conscientious businessman, are excluded and shall not lead to a liability of the managing directors.[181]

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[177] *Höller/Wielinger Georg*, ICLG to: Corporate Recovery & Insolvency 2013 – Austria, 30 (31); see in detail for example *Dellinger in Konecny*, IO § 67.

[178] For further details regarding section 21 IO cf for example *Widhalm-Budak* in *Konecny*, Insolvenzgesetze § 21.

[179] GmbHG RGBl Nr 58/1906 in its version BGBl I Nr 71/2018.

[180] AktG RGBl I Nr 114/1997 in its version BGBl I Nr 76/2018.

[181] Like payments that are necessary for the continuation of the company (rent, energy costs, wage); cf for example OGH 6 Ob 164/16k GES 2017, 367 = GesRZ 2017, 402 (*Feltl*) = wbl 2017, 712 = ecolex 2017, 1178 (*Reich-Rohrwig*) = *Rauter*, JAP 2017/2018, 167 = RdW 2018, 90 = *Csoklich*, ZIK 2018, 8 = ZIK 2018, 37 = EvBl 2018, 360 = AnwBl 2018, 270 = *Trenker*, JBl 2018,354 = *Robertson*, ecolex 2018, 150 = NZ 2018, 196*; Reich-Rohrwig* in *Straube/Ratka/Rauter* (eds), Wiener Kommentar zum GmbHG § 25 sec 141 (1.6.2015).

After the opening of statutory insolvency proceedings over a company's assets, it is the duty of the insolvency administrator to enforce this claim for damages against the company's managing directors. Such claim is a part of the insolvency estate.[182]

Liquidity transfers in the context of a cash pool may qualify as prohibited payments under this provision: According to the prevailing opinion in doctrine, the term "*payments*" under to section 25 par 3 n 2 GmbHG and section 84 par 3 n 6 AktG does not only mean payments in a literal sense, but must be interpreted broadly in the light of the provision's purpose (i.e. protection of creditors[183]).[184]

"*Payments*" according to section 25 par 3 n 2 GmbHG and section 84 par 3 n 6 AktG are all kinds of payments that may reduce the insolvency assets[185] such as cash payments, bank transfers, delivery of goods, set-off agreements, reduction of the credit balance, provision of collateral and also transactions within the group, such as payments under a cash pooling agreement.[186]

5.7.1. Result

Payments made under a cash pool agreement can qualify as "*payments*" according to section 25 par 3 n 2 GmbHG and section 84 par 3 n 6 AktG.[187] If a managing director conducts such payments after the company becomes insolvent, he, therefore, may be liable to the company according to those provisions. As already mentioned, there is an exception when the payment is compatible with the diligence of a prudent businessman.

5.7.1.1. Exculpation due to the Diligence of a Prudent Businessman

In order avoid liability, payments must be compatible with the diligence of a prudent businessman (section 84 par 3 n 6 AktG [analog]).[188] The managing director bears the burden of proof that his conduct was not subjectively negligent.[189] The standard

[182] Cf for example OGH 6 Ob 164/16k GES 2017, 367 = GesRZ 2017, 402 (*Feltl*).
[183] Cf for example OGH 6 Ob 164/16k GES 2017, 367 = GesRZ 2017, 402 (*Feltl*).
[184] Cf for example OGH 6 Ob 164/16k GES 2017, 367 = GesRZ 2017, 402 (*Feltl*); *Gassner/Wabl*, ecolex 2018, 909; *Jaufer*, Das Unternehmen in der Krise[3] (2014) 164.
[185] Cf for example OGH 6 Ob 164/16k GES 2017, 367 = GesRZ 2017, 402 (*Feltl*).
[186] Cf for example *Gassner/Wabl*, ecolex 2018, 909.
[187] Cf for example *Gassner/Wabl*, ecolex 2018, 909; *Klein*, ZIP 2017, 267.
[188] Cf for example OGH 6 Ob 164/16k GES 2017, 367 = GesRZ 2017, 402 (*Feltl*).
[189] Cf for example OGH 8 Ob 6/10f ÖBA 2011, 341 = RdW 2011, 139 = ZFR 2011, 175 = *Graf*, ZFR 2011, 175 = GesRZ 2011, 230 (*Ratka*) = *Podlesak*, ecolex 2011, 505 = wbl 2011, 385.

of care to be observed by the managing director is derived from the purpose of section 25 par 3 n 2 GmbHG and section 84 par 3 n 6 AktG. After the company is qualified insolvent, the managing director is no longer obliged to act in the sole interest of the company, but must protect the interests of the company's creditors.[190] The managing director complies with the standard of care if the payments prevent the insolvency estate from disadvantages.[191]

Payments under a cash pool agreement are in principle not likely to avert disadvantages from the insolvency estate. Should the parent company – as a master company – be qualified insolvent, the cash pool has failed.

The entire group-wide liquidity is not available anymore. The master company can no longer cover the liquidity requirements of the other pool companies. Therefore, the master company's insolvency regularly also affects the other pool companies and results in group insolvency.

It would be advisable for the management of the master company not to make any payments to the cash pool in this situation in order not to risk personal liability according to the aforementioned liability provisions. If the master company continues to pay, no disadvantages for the insolvency estate will be avoided. The opposite is the case because the company's assets are reduced.

Cash pool payments are generally not necessary to maintain the reorganisation or continuation possibilities of the master company. Again, the opposite is frequently the case, because reorganisation or continuation options are usually only maintained by terminating the cash pool agreements and thus eliminating the payment obligations.[192]

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[190] Cf for example *Klein*, ZIP 2017, 267; OGH 6 Ob 164/16k GES 2017, 367 = GesRZ 2017, 402 (*Feltl*).
[191] Cf for example *Klein*, ZIP 2017, 267.
[192] Cf. *Klein*, ZIP 2017, 267 f.

5.7.2. Avoidance of Legal Transactions

Insolvency proceedings are characterised by the principle of equal treatment of all creditors.[193] Transactions may therefore be subject to an avoidance claim by an insolvency administrator according to the avoidance rules (*Anfechtungstatbestände*) in sections 27 ff IO.

A condition to an assertion of avoidance rights is that:

i. the challenged legal act took place within a certain "suspect period" prior to the commencement of insolvency proceedings;

ii. the challenged legal action caused a discrimination of the other creditors (*Gläubigerbenachteiligung*); and

iii. the effect of a successful avoidance claim would be to increase the insolvent's estate (*Befriedigungstauglichkeit*).[194]

The avoidance rules shall prevent the intentional disadvantage or favouring of individual creditors to the detriment of the insolvency estate. Payments which fulfil the requirements of sections 27 ff IO have to be unwound once an avoidance claim was successfully enforced by the insolvency administrator.[195]

Challenging effective cash pooling payments pursuant to sections 27 ff IO is still a matter of dispute in doctrine and jurisprudence.[196] The Austrian Supreme Court (*Oberster Gerichtshof- OGH*) has not taken a position on this issue so far.

In the context of cash pooling, there are two particularly noteworthy avoidance claims. The relevant facts and questions in connection with effective cash pooling will be summarised below:

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[193] Cf for example *Riel* in *Konecny*, Insolvenzgesetze § 150 sec 10 ff.

[194] Cf for example *Höller/Wielinger Georg*, ICLG to: Corporate Recovery & Insolvency 2013 – Austria, 30 (30).

[195] Cf for example *Rebernig* in *Konecny*, Insolvenzgesetze § 27 sec 7 ff.

[196] Cf for example *Billek*, Cash Pooling 179 ff*; Göcke/Rittscher*, Cash Pooling in Krise und Insolvenz, DZWIR 2012, 356 f.

5.7.2.1. Preferential Treatment according to section 30 IO

Transactions concluded within the last year preceding the opening of insolvency proceedings but after material insolvency or a motion on the initiation of insolvency proceedings or in the last 60 days may be challenged if the transaction was either objectively preferential or was intended to be preferential. A transaction is qualified as objectively preferential if a creditor acquires a security or satisfaction to which he is not entitled to at all, or in this form or at this time. A transaction is qualified as intended to be preferential if the beneficiary knew or was deemed to know of the intent of the insolvent party to favour a certain creditor.[197]

If a claim is settled before it was due, such settlement qualifies to be objectively preferential under section 30 IO. In the context of cash pooling, the question therefore arises, when a claim under the cash pool agreement becomes actually due, since the pool participants are in a current account relationship (*Kontokorrentverhältnis*) to each other.

Although the pool companies are basically allowed to settle their liabilities whenever they want to, the master company can generally not yet demand payment before the due date. At first glance, it therefore appears that payments under the cash pool agreement are subject to an avoidance claim. However, jurisprudence and doctrine are both (but for different reasons) of the opinion that this is not the case:

While jurisprudence[198] generally negates the contestability of payments in a current account relationship, because the borrowing companies are generally obliged to process all payment transactions with the lender, literature[199] almost entirely assumes that payments in the context of current account credits are generally not contestable, because a payment already becomes due when the debtor is allowed to make payments and the repayment of outstanding amounts is in the interest of the borrower, also for reasons of lower interest charges.[200]

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[197] *Höller/Wielinger Georg*, ICLG to: Corporate Recovery & Insolvency 2013 – Austria, 30 (30).
[198] OGH 24.9.1986, 3 Ob 575/86; OGH 21.2.1990, 1 Ob 684/89.
[199] Cf *König*, Kontokorrent und Anfechtung gemäß § 30 Abs 1 Z 1 KO, ÖJZ 1982, 459*; Schuhmacher, in Straube/Ratka/Rauter* (eds), Wiener Kommentar zum Unternehmensgesetzbuch § 355 sec 36 (1.12.2017) with further evidence; different opinion *Rebernig*, Konkursanfechtung des Kontokorrentkredites (1998) sec 147 ff.
[200] Cf for example *Billek*, Cash Pooling 180.

The jurisprudence is based on the argument that the creditor has an enforceable right to set-off when payments are received if all monetary transactions are settled via its accounts; the company concerned is thus obliged at the same time.[201] As a result, such repatriations will lack the intention to benefit.[202]

5.7.2.2. Knowledge of Insolvency according to section 31 IO

Legal acts carried out within the last six months preceding the opening of insolvency proceedings but after material insolvency or a motion on the initiation of insolvency proceedings may be challenged if (i) the legal act constitutes satisfaction or securing of a creditor (*Befriedigung oder Sicherstellung*), or (ii) the act is considered to be a disadvantageous legal transaction (*nachteiliges Rechtsgeschäft*). The legal act by which a creditor's claim is satisfied or secured may be challenged if the creditor knew or was negligent in not knowing of the debtor's insolvency or pending insolvency petition.

Legal transactions of the debtor that are directly disadvantageous to the creditors may be challenged if the other party knew or was negligent in not knowing of the debtor's insolvency or pending insolvency petition. Legal transactions are considered as being directly disadvantageous if the parties' considerations are objectively unbalanced.

Legal transactions of the debtor that are indirectly disadvantageous to creditors may only be challenged if (i) the other party knew or was negligent in not knowing of the debtor's insolvency or pending insolvency petition, and (ii) the disadvantage for the insolvency estate was objectively predictable at the time of the transaction. Such objective predictability is, in particular, on hand if a restructuring plan is obviously unqualified (*offensichtlich untaugliches Sanierungskonzept*). A legal transaction is considered as indirectly disadvantageous (*mittelbare Nachteiligkeit*) if the transaction is objectively balanced at the time of its conclusion but becomes objectively unbalanced later on.[203]

In the case of disadvantageous legal transaction, the decisive moment in time is the conclusion of the transaction. For all other legal acts, the decisive moment is the

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[201] OGH 24.9.1986, 3 Ob 575/86.

[202] *Billek*, Cash Pooling 180.

[203] *Höller/Wielinger Georg*, ICLG to: Corporate Recovery & Insolvency 2013 – Austria, 30 (31).

provision of satisfaction or guarantee – for example, the completion of a transaction.[204] This is remarkable as cash pooling is based on a framework agreement that was typically concluded long before the crisis.[205]

5.7.3. Set-off in Insolvency Proceedings

Claims that can be set-off against claims of the debtor at the time of the opening of formal proceedings must not be filed with the insolvency court. The creditor simply has to declare his intention to offset.

In order to avoid abuse, set-off is not permitted if:

- the creditor became a debtor after the opening of formal procedures;
- the debtor obtained his claim after the opening of formal procedures; or
- the creditor obtained his claim within the last six months before the opening of formal procedures and at this point had knowledge, or should have had knowledge, of the insolvency.[206]

However, it is not possible to set-off claims that are equity-substituting under the EKEG (see section 5.2 above).[207]

Clauses in cash pool agreements, that provide for a master company's right to set-off with claims of the insolvent group company irrespective which group actually has the counterclaim, are invalid in the event of insolvency.[208] Due to the condition of reciprocity, a claim and counterclaim have to exist at the same time before the opening of insolvency proceedings in order be set-off against each other.[209]

5.7.4. Prohibited Repayment of Initial Capital

As already stated under section 3 above, cash pooling agreements may constitute a prohibited repayment of initial capital, if they violate capital maintenance rules. In this case, the cash pool agreement in question would be null and void, and the insolvent

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[204] *Koziol/Bollenberger* in *Buchegger* (ed), Österreichisches Insolvenzrecht (2009) § 31 sec 3.
[205] *Billek*, Cash Pooling 182.
[206] Cf *Schubert* in *Konecny*, IO Sec 20 par 1; *Höller/Wielinger Georg*, ICLG to: Corporate Recovery & Insolvency 2013 – Austria, 30 (32).
[207] Cf *Schubert* in *Konecny*, IO sec 20 par 6.
[208] *Billek*, Cash Pooling 178.
[209] Cf *Schubert* in *Konecny*, IO sec 20 par 1.

company would be entitled to a restitution claim against the recipient,[210] which has to be asserted by the insolvency administrator.[211]

5.8. Legal Comparison

5.8.1. Insolvency Law Aspects under Danish law

Like in Austria, there are no specific statutory insolvency related regulations for cash pooling under Danish law.

However, any claim for repayments of loans, which the insolvency estate might have against the master company, will have to be paid to the insolvency estate. Such repayments will take place in accordance with the provisions of the respective cash pool agreement, although the insolvency estate in certain specific scenarios might be able to obtain an order to deviate from the terms of the repayment as set out in the cash pool agreement. Any claims against the insolvency estate from other parties to the cash pool agreement will be treated and ranked as an ordinary creditor claim.[212]

5.8.2. Insolvency Law aspects under Hungarian Law

There are two types of insolvency proceedings under Hungarian insolvency law: Bankruptcy[213] and Liquidation[214].

Bankruptcy on the one hand is a court procedure initiated by the debtor company, which aims to restructure and save the company. Liquidation, on the other hand, is a court procedure that can be initiated by a creditor and/or the debtor. Liquidation, in principle leads to the company's dissolution and the sale of its remaining assets. Liquidation only affects the insolvent company, so other members of a group participating in a cash pool may not be liquidated in the same proceeding.[215]

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[210] Cf for example *Artmann*, Einlagenrückgewähr und Cash Pooling im Konkurs, in *Konecny* (ed) Insolvenz-Forum 2009 (2010) 131 (144).
[211] Cf for example *Artmann* in *Artmann/Karollus* (eds), Kommentar zum Aktiengesetz[6] (2018) § 56 sec 7.
[212] *Mads Ilum*, Denmark, in *Jansen* (ed), International Cash Pooling (2011) 93 (97).
[213] Chapter II of Act XLIX of 1991 on Bankruptcy Proceedings, Liquidation Proceedings (hereinafter Bankruptcy Act).
[214] Chapter III of the Bankruptcy Act.
[215] *Görgènyi/Wellmann*, Hungary, in *Jansen*, Cash Pooling 157 (162).

5.8.2.1. Liability of the Qualified Shareholder

In accordance with the Hungarian Company Act,[216] a shareholder that directly or indirectly holds seventy-five percent or more of voting rights in a company is deemed as a qualified shareholder of the given company.[217]

In many (or most) cash pooling agreements, the master company holds more than seventy-five percent in the subsidiaries participating in the cash pool. Therefore, the master company likely qualifies under this provision.[218] If the qualified shareholder takes a "*series of unfavourable business decisions*" on behalf of the company, the creditors can file a claim for compensation against him.[219] The claim must be filed during the liquidation proceedings or within a ninety-day deadline following the conclusion of the liquidation proceedings. The qualified shareholder is responsible without limitation for the companies' assets during the liquidation proceedings, if the court has established its unlimited and full responsibility.[220]

The Hungarian Supreme Court defined the term "*series of unfavourable business decisions*" in detail: Accordingly, imprudent risk management, concealing assets, agreements highly disproportional in value, assignment of the subsidiaries' assets without security and using the assets of the subsidiary as security without any contribution or benefit may qualify as unfavourable business decisions.[221]

The question, whether a cash pool may qualify as a series of unfavourable business decisions can only be answered on a case-by-case basis. However, the following preconditions are necessary to establish the unlimited liability of a qualified shareholder: The cash pool agreement hast to qualify as a series of unfavourable business decisions; the liquidation of the subsidiary shall be initiated; certain claims shall not be covered by the subsidiaries' assets; a causal link is established between the unfavourable business decisions and the insolvency of the subsidiary.[222]

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[216] Act IV of 2006 on Business Associations (hereinafter Company Act).
[217] Sec 52 par 2 of the Company Act.
[218] *Görgènyi/Wellmann*, Hungary, in *Jansen*, Cash Pooling 165.
[219] Sec 63 par 2 of the Bankruptcy Act.
[220] *Görgènyi/Wellmann*, Hungary, in *Jansen*, Cash Pooling 165.
[221] Cf. for example Hungarian Supreme Court LB Pfv X 22.341/2003 No EBH 2004/1/1038; *Görgènyi/Wellmann*, Hungary, in *Jansen*, Cash Pooling 165.
[222] *Görgènyi/Wellmann*, Hungary, in *Jansen*, Cash Pooling 166.

5.8.2.2. Avoidance of Legal Transactions

A creditor and the liquidator (on behalf of the debtor), may submit a claim within ninety days from the time of gaining knowledge or within a one-year deadline from the date of publication of the notice of liquidation.[223]

Agreements concluded within five years preceding the date when the court received the petition for opening liquidation proceedings or thereafter can be challenged, if the transaction was intended to conceal the debtor's assets and the other party had or should have had knowledge of such intention.[224]

Also, agreements concluded within two years preceding the date when the court received the petition for opening liquidation proceedings or thereafter can be challenged, if they were intended to transfer the debtor's assets without any compensation or to undertake to encumber any part of the debtors' assets, or if the stipulated consideration constitutes unreasonable and extensive benefits to a third party.[225]

If the avoidance claim is successful, a cash pool agreement shall be deemed invalid, and the original situation must be restored. If the original situation cannot be restored, the agreement shall be terminated as of the day of the judgment.[226] In the case of planned or already implemented cash pooling, the question is, whether the cash pooling agreement is intended to transfer the subsidiaries' assets without any or reasonable consideration. If the cash pool agreement is concluded at arm's length, it is improbable to be challenged successfully.[227]

5.8.2.3. Avoidance of Payments

The insolvency administrator (on behalf of the debtor) is entitled to reclaim within the time limit referred to under point 5.8.2.2 any payment that the debtor conducted within a sixty-day period preceding the date when the court received the petition for

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[223] Sec 40 par 1 of the Bankruptcy Act.
[224] Sec 40 par 1 point a of the Bankruptcy Act.
[225] Sec 40 par 1 point b of the Bankruptcy Act.
[226] Sec 40 par 1 of the Bankruptcy Act and Sec 237 par 1-2 the Act IV of 1959 oh the Hungarian Civil Code (hereinafter Civil Code).
[227] *Görgènyi/Wellmann*, Hungary, in *Jansen*, Cash Pooling 169.

opening liquidation proceedings or, if it was provided to give preference to any creditor and if such a transfer is not part of ordinary business activity.[228]

The daily transfer of liquidity of the company under a cash pool agreement shall be deemed as part of the ordinary business. Unless the cash pool agreement gives preference to a creditor of the company, such an agreement cannot be successfully challenged.[229]

[228] Sec 40 par 2 of the Bankruptcy Act.

[229] *Görgènyi/Wellmann*, Hungary, in Jansen, Cash Pooling 170.

6. Licencing requirements

6.1. General remarks

The implementation of a cash pooling system within a group requires a close look at the banking regulations of the country in which it operates. This is considered necessary since the activity of a master company is often described as that of a group bank.[230]

The single licence principle allows credit institutions/insurance undertakings/securities firms authorised in an EEA Member State to carry out their activities in their home country on the basis of an authorisation/licence from another Member State.[231] The cross-border activity can be carried out either through a branch ("freedom of establishment") or through the free movement of services ("freedom to provide services").[232] The intention to carry out cross-border activities under the freedom of establishment or the freedom to provide services must be notified to the relevant supervisory authority. The right to provide cross-border banking transactions or investment services in member states arises after the competent authority, in the case of Austria the Financial Market Authority (*Finanzmarktaufsicht*), has carried out a notification procedure and is also referred to as the "European passport".[233]

6.2. The example of Austria

Legally, the structure of an effective cash pool requires a division of legal relationships into two parts: (i) the contractual relationship between the master company and the credit institution (pool bank) and (ii) the contractual relationship between the master company and the participants or between the participants themselves.[234]

In comparison to an external contractual relationship, an internal cash pooling agreement between the master company and the participants entails classification

[230] *Rieder/Hörlsberger*, Handbuch 103.
[231] *FMA*, EU-Pass für Kreditinstitute, Versicherungen und Wertpapierfirmen, https://www.fma.gv.at/glossar/eu-pass-fuer-kreditinstitute-versicherungen-und-wertpapierfirmen/ (seen 02.07.2019).
[232] *FMA*, EU-Pass für Kreditinstitute, Versicherungen und Wertpapierfirmen, https://www.fma.gv.at/glossar/eu-pass-fuer-kreditinstitute-versicherungen-und-wertpapierfirmen/ (seen 02.07.2019).
[233] *FMA*, EU-Pass für Kreditinstitute, Versicherungen und Wertpapierfirmen, https://www.fma.gv.at/glossar/eu-pass-fuer-kreditinstitute-versicherungen-und-wertpapierfirmen/ (seen 02.07.2019).
[234] *Rieder/Hörlsberger*, Handbuch 102.

difficulties which make it necessary to precisely distinguish the internal liquidity balancing of the group from the banking transactions within the scope of section 1 (1) of the Austrian Banking Act (*Bankwesengesetz- BWG*).

The master company's activities focus on managing the group's financial resources, which are distributed or invested as needed.[235] The question, therefore, arises as to whether this activity is subject to banking regulations, i.e. the Austrian Banking Act. In this case, every master company operating in Austria would have to apply for a licence under the Banking Act and fulfil all the requirements (minimum capital, organisational regulations, participation in a deposit guarantee, etc.).

Banking transactions are the commercial activities listed in section 1 par 1 BWG.[236] These include, among other things, giro business, deposit-taking business, securities business, and significant lending business.

Whether someone carries out a banking transaction is traditionally judged according to the civil law content of the contract.[237] If this standard applies, it is evident that every master company at least conducts the giro business, the deposit business, and the lending business if it receives payments from the participants in the context of effective cash pooling and forwards them to other cash pool companies.[238] Nevertheless, the fact must not be underestimated that the external activities of a master company differ significantly from those of a credit institution as defined by the Austrian Banking Act (BWG). Banking business, for example, is conducted exclusively within the group and, unlike banks, thus covers a closed circle of customers.[239] The payment transactions of a commercial bank typically take place for its own and third-party customers, whereas a group bank only processes these for the cash pool members.

In the terminology of the Banking Act, this factual difference between a master company and a credit institution could be taken into account when examining the commercial nature of master company's activities.[240] According to the Austrian Banking Act, an activity is carried out commercially if it serves to generate

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[235] *Obradovic/Wietrzyk*, Konzernrecht 452.
[236] *Obradovic/Wietrzyk*, Konzernrecht 452.
[237] *Rieder/Hörlsberger*, Handbuch 103.
[238] *Rieder/Hörlsberger*, Handbuch 103.
[239] *Billek*, Cash Pooling im Konzern (2008) 47.
[240] *Rieder/Hörlsberger*, Handbuch 103.

sustainable income, even if there is no intention to make a profit or if an association of individuals only acts on behalf of its members.[241] The legislator deliberately chose the concept of commercial activity in order to establish a specific distinction from the occasional granting of credit or loans in private and business transactions.[242] The master company's activities, however, are usually both long-term and aimed at generating income (even if this is only cost-covering), which means that it can be said that it is a commercial activity.[243]

Against this background, the only argument that remains is that the master company’s activities are confined to a certain group of customers and that it merely performs functions which in this form resemble the management and control functions of a parent company - which, according to the general opinion in literature, does not require a bank licence for this purpose.[244] However, it could theoretically be argued that even specialist banks with a very limited clientele and much-specialised tasks are credit institutions within the meaning of the Banking Act and are therefore subject to the licensing obligation.[245] But the Federal Ministry of Finance does not see any unrestricted comparability of intra-group financing with that of commercial banks, as the entrepreneurial objectives of banks and those of other economic groups are different.[246] While in the case of bank financing the credit institution pursues the goal of investing the funds deposited with it with the greatest possible profit, the goal of a group is to take up liquid funds in the group and pass them on in a demand-oriented manner within the group in such a way that the individual group companies can achieve their own entrepreneurial goals.[247] While the banking sector, therefore, aims to achieve a commercial profit by granting loans, the group financing company is concerned with providing the best possible financial support for the implementation of the investment decisions of the group companies in the interests of the group as a whole.

However, the limited circle of persons does not present an argument against the commercial nature of activities carried out by an economic entity, as the Financial

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[241] *Oppitz* in *Chini/Oppitz* (eds), BWG (2011) Sec 1 par 4.
[242] VwGH 20.06.2012, 2008/17/0226.
[243] *Obradovic/Wietrzyk*, Konzernrecht 452.
[244] *Karas/Träxler/Waldherr* in *Dellinger* (ed), BWG Sec 1 par 11; *Rieder/Hörlsberger*, Handbuch 104.
[245] *Rieder/Hörlsberger*, Handbuch 103.
[246] *Obradovic/Wietrzyk*, Konzernrecht 452 f.
[247] *Obradovic/Wietrzyk*, Konzernrecht 453.

Market Authority rightly recognised.[248] The commercial activity does not depend on participation in general economic transactions. This is not even necessary, since the cash pooling is technically handled by credit institutions, which in turn have a bank licence and make it superfluous for master companies.[249] It is also unusual for banking transactions that the granting of credit is conditional on the obligation to pay any liquidity surpluses, which is exactly what happens under cash pooling agreements..

All arguments against a concession obligation have in common that the activities of a master company should be distinguished from those of a commercial bank.[250] In this respect, the question arises whether the concept of banking can be considered separately from the other provisions of the Banking Act. In this context, the intention of the legislator must be borne in mind, and the activities of the master company must be measured against the protective purpose of the Banking Act. This consists of protecting the banking system and the interests of investors.[251] Confidence in a functioning banking system does not appear to be jeopardised by the fact that the master company does not operate directly on the financial market as a bank.[252] Investor protection, on the other hand, does not require further consideration due to the networked structure of a cash pool.[253] Rather, the liquid funds remain within the group and thus within a risk community. There is no risk diversification between investors and borrowers as it would be typical for commercial banks. Against this background, the application of banking law provisions to intra-group banking transactions does not appear to be objectively justified.

If one follows the remarks of the Administrative Court, the application of the exception mentioned by the legislator can be considered in principle for intra-group banking transactions within the framework of a cash pool.[254] From a practical point of view, the classification of an intra-group banking transaction as an exception requires the

[248] *Obradovic/Wietrzyk*, Konzernrecht 453.
[249] *Billek*, Cash Pooling 47.
[250] *Obradovic/Wietrzyk*, Konzernrecht 453.
[251] *Schrank/Meister*, Cash Pooling im Lichte des BWG, ZFR 2013/150, 256 (258).
[252] *Rieder/Hörlsberger,* Handbuch 104 f.
[253] *Rieder/Hörlsberger,* Handbuch 105.
[254] VwGH 20.06.2012, 2008/17/0226.

discussion as a preliminary question within the course of administrative or civil proceedings.[255]

Under German law, intra-group banking transactions are explicitly excluded from the application of banking law from the outset.[256] Many other legislators followed this approach and expressly exempted companies that grant loans within the framework of a cash pool system from the requirement of a banking licence. The basis for this is the so-called "group privilege", which is based on the consideration that financial transactions within the framework of a cash pool agreement are generally not carried out for the benefit of the public, but exclusively in the interest of a group of companies.[257]

Austrian law does, however, not provide for such group privilege. Rather, the considerations mentioned above must be made in order to exclude the activities of the master company as an intra-group banking business from the application of the Banking Act. As already noted, the Administrative Court considers intra-group banking transactions within the scope of a cash pool to be in principle within the scope of application of the exception as standardised by the legislator. The prerequisite, however, is that the company granting the credit does not extend such services to third parties or that other particular circumstances preclude the applicability of the exception mentioned above.[258] It is irrelevant whether the loan is granted in return for payment or instalments. The commercial nature of the activity is generally lacking.[259]

Particular circumstances may, however, exclude the applicability of the exception and thus affirm the commercial nature of the activity in question. In particular, constructions could be conceivable which were created to abuse or circumvent the provisions of banking law. The Financial Market Authority appears to conclude that this is the case if master company's transactions do not serve to control the main functions of the group and the profit purpose of the group. However, these conclusions are not conclusive and seem artificial.[260] For example, the management

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[255] *Rieder/Hörlsberger,* Handbuch 106.
[256] *Billek*, Cash Pooling 48.
[257] *Jansen*, International Cash Pooling (2011) 6.
[258] *Obradovic/Wietrzyk*, Konzernrecht 456.
[259] For more information, see *Obradovic/Wietrzyk*, Konzernrecht 456.
[260] *Obradovic/Wietrzyk*, Konzernrecht 458.

of the group's main functions by means of cash pooling would question the applicability of the Banking Act by itself. An exact examination of whether this is abuse or a circumvention of the concession obligation therefore appears superfluous.

In conclusion, it can be stated that the provision of banking business within the group is generally not subject to the licensing obligation. The exception only does not apply if the granting of credit goes beyond regular private or business transactions. It does not appear necessary to resort to an abuse clause.

6.3. Payment Factory (EU Regulations)

The banking sector was subject to even stricter regulation following the 2008 financial crisis. The European Union has issued numerous regulations and directives to protect the market and investors, raising the question of whether a master company may require a banking licence under European law.

6.3.1. CRD IV and CRR

The Capital Requirements Regulation (CRR) and the Capital Requirements Directive (CRD IV) are probably the two most critical regulatory provisions within the European Community. Basel III forms the basis of further development of the international banking supervisory rules by the Basel Committee 2010 on behalf of the G20.[261] The agreement aimed to create a banking sector that is uniform for all members and resistant to financial crises.

The CRD IV contains, inter alia, provisions on the authorisation of the institutions concerned, the acquisition of qualifying holdings, the exercise of freedom of establishment and freedom to provide services, the powers of home and host supervisors in this respect, as well as provisions on initial capital and supervision of credit institutions and investment firms.[262] The applicability of the CRD IV provisions is therefore determined by the legal classification of a company as an institution (credit institution and investment firm).

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[261] *Pangl*, Die Umsetzung von Basel III in Europa geht in die Endphase, https://www.raiffeisen.at/raiffeisenblatt/121809748930559302_634134742433495613-774182146246896906-NA-30-NA.html (seen 03.07.2019).

[262] Recital 2 Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC, ABl L 2013/176, 338.

An investment firm is any legal person who, in the ordinary course of its business or profession, provides one or more investment services to third parties on a professional basis and/or carries out one or more investment activities.[263] By contrast, a credit institution is an undertaking whose business is to receive deposits or other repayable funds from the public and to grant credit for its own account.[264]

The qualification of a master company as an investment firm can probably be excluded from the outset. It is not typical to provide investment services for third parties, nor is it typically a regular professional or business activity of a master company. Classification as a credit institution, on the other hand, appears more probable, but must also be denied. A master company does usually not act as a bank on the financial market and therefore cannot accept money from the public. The loans within the cash pool are also not granted for its own account in the real sense. Rather, all loans granted within the group also have (at least indirect) effects on the group's own risk pool. There is no risk diversification between investors and borrowers that is typical for commercial banks. From this point of view, the applicability of the CRD IV and CRR provisions to a master company must be ruled out as a matter of principle.

6.3.2. PSD II

On 13 January 2018, the Payment Services Directive II (PSD II) entered into force, replacing the Payment Services Directive I. The PSD II aims to further develop the integrated internal market for payment services, focusing on consumer protection and risk minimisation.[265] The framework conditions for the implementation of new technical innovations in connection with payment services are also to be created. These objectives are to be achieved by the uniform application of the PSD II requirements throughout the European Union. Complete harmonisation should prevent the Directive from being transposed in a way that deviates from the

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[263] Art 4 (1) point 1 Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012, ABl L 2013/176, 1.
[264] Art 4 (1) point 2 Regulation (EU) No 575/2013.
[265] *Federal Ministry of Finance,* Payment Services Directive (PSD II), https://www.bmf.gv.at/finanzmarkt/finanz-kapitalmaerkte-eu/PSD_II.html (seen 03.07.2019).

requirements, whereby neither additional requirements nor restrictions may be laid down.[266]

The scope of PSD II covers payment services provided within the European Union. A "payment service" shall mean one or more of the commercial activities listed in Annex I. However, payment transactions between a parent undertaking and its subsidiary, or between subsidiaries of the same parent undertaking and related services without the involvement of a payment service provider, do not, in principle, fall within the scope of the PSD II.[267] Payment transactions involving payment service providers are excluded from the scope if the payment service provider itself is a member of the group. The collection of payment orders on behalf of the group by a parent company or its subsidiary for transmission to a payment service provider is also excluded from the provisions of PSD II.[268]

However, the applicability of the PSD II provisions is presumably already affected by the lacking commercial nature of the activity. One of the decisive factors here is whether the activity fulfils its purpose in a competitive market.[269] A master company does not, however, operate on the market with its intra-group banking transactions. Although it can be argued that a master company's activities deprive competitors of potential customers, this must be relativized against the background that only group companies with an imminent connection to the master company are no longer potential customers for the market. Companies without such a relationship with the master company will generally not participate in cash pooling and will remain available to other market participants. Under these circumstances, the PSD II does not apply to the CPL, which therefore does not require a licence.

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[266] Recital 8 and 9 Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC, ABl L 2015/337, 35.
[267] Art 3 lit n Directive (EU) 2015/2366.
[268] Recital 17 Directive (EU) 2015/2366.
[269] ECJ 05.10.2017, C-567/15 (LitSpecMet/Vilniaus lokomotyvų remonto depas) Nr 43.

C. Abstract

The establishment of a cash pool raises a number of economic and especially legal questions. Especially, since cash pooling as a cross-sectional subject covers almost all areas of commercial law, it would be presumptuous to even try to deal with all the questions that arise by writing a master thesis.

This paper therefore deals with selected legal issues of cash pooling. After a presentation of the different concepts of cash pools and their basic principles, transfer pricing aspects of cash pool agreements are discussed.

In the following, selected aspects of capital maintenance rules as well as insolvency law issues shall be addressed. Finally, this thesis deals with the question whether and if so, which licensing requirements have to be considered when establishing a cash pool.

As a rule, the Austrian legal situation is examined as a starting point. In addition, approaches of selected other legal systems are presented.

D. Curriculum Vitae

Georg Wielinger was born on 19 March 1986 in Graz, Austria. After primary school (*Ferdinandeum*, Graz), he visited the *Bischöfliches Gymnasium,* Graz, where he graduated in 2004.

Subsequently, he studied law at the *Karl-Franzens* University of Graz and obtained his master‘s degree in 2008. After the compulsory internship at the Higher Regional Court in Graz, he began his apprenticeship as a lawyer with Kaan Cronenberg und Partner, Graz. In 2012 he passed the bar exam and moved to Schönherr Rechtsanwaelte GmbH in Vienna.

After his return to Kaan Cronenberg und Partner in Graz as the youngest attorney at law of Styria in 2014, he was appointed - again the youngest - equity partner at the beginning of 2016.

Georg Wielinger focuses on corporate/M&A and insolvency law. In these areas he currently holds teaching positions at three different universities in Austria. In the recent past he was appointed together with another partner of his law firm as insolvency administrator in Austria's largest insolvency proceedings.

Georg Wielinger is married and the father of a daughter.

E. Declaration of Authorship

I hereby declare

- that I have written this paper without any help from others and without the use of documents and aids other than those stated above,
- that I have mentioned all the sources used and that I have cited them correctly according to established academic citation rules,
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