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Home Country or Recipient Country?—Confining the Extraterritorial Reach of Domestic Banking Law

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Abstract

Is a bank that provides cross-border services into a foreign country without being physically present in such country required to comply with such country's banking laws? Domestic legislatures in many countries have not addressed this issue, and the competent judicial and administrative authorities tend to rule on a case-by-case basis applying approaches that not only lack consistency and predictability, but also appear to be unfounded if not arbitrary. This article attempts to analyze the problem in accordance with nationally and internationally acknowledged principles of legal methodology. It combines the interpretive guideline drawn from the purposes of banking regulation with the implications of the territoriality principle. Thereby, it develops a staggered solution that is flexible enough to embrace the relevant circumstances of the case at issue and clear enough to provide for a high level of legal predictability.

I. Introduction—Description and Demarcation of the Problem

Domestic markets are growing together in a globalized world. Accordingly, the number of business activities that involve connections to more than one country is increasing rapidly.

A. In-Country International Business

A large part of this international business is done through the physical presence of companies in foreign countries. In particular, companies serve foreign customers through subsidiaries, branches, agencies, representative offices, and temporary visits from company

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1. *See* HAL S. SCOTT, INTERNATIONAL FINANCE: LAW AND REGULATION 68-69 (2004).

representatives to the foreign country.[1] Those entities or units are clearly engaged in business activities in the foreign country, and hence have to comply—principally—with foreign administrative (regulatory) law.

In the business of banking, for instance, a company that is incorporated in country A and has its principal place of business in country A (the home country), but that is also engaged in the business of banking in country B through a branch or a representative office in country B, must observe the banking statutes and regulations of country B (which hosts the physical presence and, hence, is called the host country). If country B requires a banking license for the conduct of banking business in its territory, then, in the absence of special legislation that exempts foreign companies under certain circumstances,[2] the aforementioned company has to apply and qualify for such banking license under country B's banking laws.

This compliance requirement is basically undisputed and follows from the territoriality principle:[3] Everyone who is physically present in the territory of a given country must, as a general rule, at least comply with the laws of that country.[4] However, companies and their business activities, particularly in the banking industry, are very likely already regulated by their home country and in several cases a double regulation (by both the home and the host country) appears to be neither efficient nor necessary.[5] Thus, countries have made considerable efforts to enter into international or supranational agreements which attempt to avoid, or at least alleviate, the negative consequences of multiple, differing regulations of internationally acting banking institutions. This has been accomplished by mutual recognition of home country oversight (e.g., by passporting the home country's banking license to other countries, particularly in the European Economic Area (EEA)),[6] through international harmonization of substantive regulatory law (as has been attempted regarding the minimum capital requirements through the Basel Accords),[7] or by combining these approaches.[8]

B. Cross-Border Business

While in the past most international business was conducted through on-site physical presence in the host country, international business activities increasingly are conducted without any physical presence abroad. In these cases it is not the company that crosses

2. Compare, in particular, the single license doctrine in the EU/EEA; *see infra* Part II and note 6.

3. *See infra* Part IV.D. (providing a detailed discussion of the territoriality principle).

4. *See* Mathias Hanten, *Aufsichtsrechtliche Erlaubnispflicht bei grenzüberschreitenden Bankgeschäften und Finanzdienstleistungen [The Regulatory License Requirement for Cross-Border Banking Activities and Financial Services]*, 2003 WM 1412, 1413 (F.R.G.).

5. *See* Andrew T. Guzman, *Choice of Law: New Foundations*, 90 Geo. L. J. 883 (2002) (discussing the problem of overregulation in cases of home country and host country oversight).

6. *See* the Second Banking Directive 2000/12/EC, March 20, 2000, as amended. *See* Scott, *supra* note 1, at 120-27; Christoph Ohler, *Aufsichtsrechtliche Fragen des electronic banking [Supervisory Law Issues of Electronic Banking]*, 2002 WM 162, 163-64 (F.R.G.); Hanten, *supra* note 4, at 1415; Alexander Schopper & Andreas Zahradnik, *Privat- und aufsichtsrechtliche Aspekte grenzüberschreitender Bankgeschäfte im Internet [Issues of Private and Regulatory Law on Cross-Border Banking Activities in the Internet]*, 2003 ÖBA 21, 27 (Austria).

7. *See* Scott, *supra* note 1, at 191-214.

8. Compare, for example, the U.S.-EU Financial Markets Regulatory Dialogue with regard to accounting standards; *see* Hal S. Scott, International Finance—Transactions, Policy, and Regulation 72-73, 98-109 (13th ed. 2006) (discussing the Regulatory Dialogue in general and the internationalization of accounting standards).

the border (through the establishment of a branch or office), but the service itself. Therefore, this form of international business conduct is referred to here as cross-border business. This is in contrast to the in-country international business operated through on-site physical presence. Since, in cases of cross-border business transactions, the foreign country that receives the cross-border services does not host any physical presence of the company, it shall be referred to as the non-home country or recipient country to distinguish it semantically from the host country in cases of in-country international business.

The rapid surge of cross-border banking business has been supported by the improvement of modern telecommunication systems, particularly the Internet, as well as by the increasing importance and popularity of structured financial products that, mostly for tax reasons, entail the set-up of a foreign legal entity that is supposed to perform certain cross-border banking services. A typical example of such cross-border business would be a U.S. bank offering its depository services via the Internet or telephone to Austrian customers, without ever being physically present in Austria. The Austrian customer makes her deposits to and withdrawals from her account with the U.S. bank by placing respective orders via the Internet—without ever physically entering the United States. The orders are executed between the U.S. bank and the customer's Austrian main bank by means of wire transfer. Is the U.S. bank engaged in the business of banking in Austria and hence subject to Austrian banking law?

Put more generally: Is an entity that is engaging in the business of banking in connection with a foreign country, but without being physically present in that foreign country, subject to the foreign country's banking laws? This is the critical question addressed by this article.

C. Structure of the Article

This article appears to be the first attempt to elaborate a solution to the problem surrounding the international applicability of domestic banking laws that is, instead of being driven by the desire to reach a certain outcome favorable to the domestic, commercial, or personal interests of the respective interpreter, entirely based on and analyzed in accordance with domestically and internationally acknowledged principles of legal methodology. It is structured as follows: Part II explores how and to what extent legislatures address cross-border issues, particularly in the field of banking law. Part III briefly describes how the competent authorities in selected jurisdictions deal with cross-border banking activities. Part IV, the main section of this article, provides a teleological analysis that offers—in the absence of explicit legislation on the international applicability of domestic banking laws—solutions to the question of whether a cross-border banking activity is covered by the extraterritorial reach of the recipient country's banking laws. Finally, Part V summarizes the main findings of the article.

II. Legislative Approaches to the International Applicability of Domestic Law

Complicated legal questions regarding the applicability of domestic law in international cases; i.e., in cases that have connections to more than one country, are not peculiar to administrative law. They also appear in the fields of private law and criminal law. The legal issues in those areas have early attracted considerable attention from legislatures. Since

the enactment of the first conflict-of-law rules in Ancient Egypt,[9] nearly every developed country has enacted, in one form or another, a detailed set of international private law[10] provisions which explicitly tell the courts what national private law governs a case that has connections to more than one country.[11] Likewise, most countries have adopted explicit rules in their criminal codes that govern domestic law applicability issues arising in connection with international criminal cases.

By contrast, clear statutory or regulatory provisions are rare in the field of international administrative law. Only in isolated areas, such as tax law, securities law,[12] or antitrust law, have some countries adopted provisions that focus on very special conflict-of-law situations. Often these provisions are strongly influenced by the lobbying efforts of certain domestic interest groups, which makes the enacted rules seem more like the result of a mere outcome-driven endeavor than of a thoroughly balanced application of general legal principles. Most areas of administrative law, however, do not provide for an explicit regulation of the international applicability of such laws to cross-border cases. This is particularly true for the regulation of banking services. The banking laws in Austria, Germany, the United States, and many other countries do not tackle crucial cross-border issues at all. While those laws contain some provisions that regulate the physical presence of a foreign bank through subsidiaries, branches, agencies, and representative offices[13] (the in-country international business), there is no provision in the examined laws that would address cross-border issues and name the conditions and circumstances under which a cross-border banking service is considered to fall within the scope of application of the domestic banking laws. Sections 9-17 of the Austrian Banking Act (BWG) and Section 53b of the German Banking Act (KWG), the provisions that come closest to touching upon cross-border issues, more or less merely extend the privileges granted to foreign EEA

9. *See* Hessel E. Yntema, *The Historic Bases of Private International Law*, 2 Am. J. Comp. L. 297, 300 (1953).

10. In accordance with the traditional European linguistic usage, the term "international private law" refers to national (domestic) law that determines which out of two or more involved national private laws shall apply to a given international case (a case with connections to more than one country). Likewise, the term international "administrative law" refers to national law that determines the international applicability of national administrative law. The same applies mutatis mutandis to the term "international criminal law".

11. *See, e.g., Bundesgesetz über das internationale Privatrecht* [A-IPRG] [International Private Law Act] Bundesgesetzblatt [BGBl] No. 304/1978, as amended, (Austria); *Bundesgesetz über das Internationale Privatrecht* [S-IPRG] [Swiss International Private Law Act] Dec. 18, 1987, SR 291, as amended, (Switz.).

12. *See* JAMES D. COX, et al., SECURITIES REGULATION 217 *et seq.*, 250-52 (4th ed. 2004); ANDREAS ZAHRADNIK, FINANZDIENSTLEISTUNGEN UND WERTPAPIERAUFSICHT [FINANCIAL SERVICES AND SECURITIES SUPERVISION] 40-45 (1997); SCOTT, *supra* note 1, at 58-66; *see* Securities Act of 1933, 17 C.F.R. 230.901-905; *see* Thomas Pfeifer, *Zum internationalen Anwendungsbereich des deutschen Kapitalmarktrechts [On the International Applicability of the German Capital Market Law]*, 2003 IPRax 233 (F.R.G.) (discussing German law); *see* GEORG FRÖLICHSTHAL, CHRISTIAN HAUSMANINGER, PETER KNOBL, MARTIN OPPITZ & WALTRAUD ZEIPELT, KOMMENTAR ZUM WERTPAPIERAUFSICHTSGESETZ [COMMENTARY ON THE AUSTRIAN SECURITIES SUPERVISION ACT] (1998) § 11 para. 30-35 (discussing Austrian law).

13. In Austria, the *Bankwesengesetz* [BWG] [Austrian Banking Act], Bundesgesetzblatt [BGBl] No. 532/1993, as amended, (Austria), regulates the requirements to be complied with by foreign financial institutions that are licensed in another country of the EEA and intend to establish a physical presence in Austria in §§ 9, 9a, 11 (branches), and 13 (subsidiaries) (in connection with §§15-17), and it touches upon the license requirement for Austrian branches of foreign Non-EEA banks in § 4(4). It imposes obligations on Austrian banks that intend to establish a branch in another EEA country in § 10. In Germany, the *Gesetz über das Kreditwesen* [KWG] [German Banking Act], Sept. 9, 1998, Bundesgesetzblatt [BGBl.] I at 2776, as amended, (F.R.G.), addresses

banks with domestic branches to foreign EEA banks that wish to make use of the freedom to provide cross-border services.[14]

Those provisions, however, do not give any information about the legislature's position on the crucial question of what constitutes a cross-border banking service that reaches so far into the recipient country that the application of the recipient country's banking laws is, in the view of its legislature, desirable. The consequence of such determination is that a foreign bank must comply with such laws or, within the EEA, must look for a protection granted by the mentioned EEA privileges. Put another way, how weak and remote do the connections of such cross-border service to the recipient country have to be in order that such service is not covered by the reach of the recipient country's banking laws?

To illustrate the query, no country would seriously claim to be competent to supervise a loan granted from a foreign bank to a foreign borrower only because the borrower intends to spend the borrowed money on a vacation in such country (the non-home country). Although there is a certain connection to the non-home country, this link is obviously too weak to consider the granting of the loan as a cross-border banking activity that would justify regulatory oversight by the non-home country.

But what applies in the not-so-obvious cross-border cases? The legislatures have not answered this question yet. This article attempts to fill this legislative gap by drawing on the domestically and internationally acknowledged fundamental principles that generally govern the international applicability of domestic law.

III. Current State of Practice Regarding the International Applicability of Domestic Banking Law

Before we turn to the required analysis, it is worth taking a quick look at the current state of practice. How do the involved agencies use the wide leeway resulting from the lack of legislation and deal with cross-border issues in the field of banking law?

In Austria, the competent agency, the *Finanzmarktaufsicht* (Financial Market Authority (FMA)), applies a case-by-case assessment. It has neither issued general guidelines regarding the international applicability of the Austrian BWG, nor does it issue ex-ante assessments in specific cases that would help the involved parties determine their legal obligations under Austrian banking law before they start to engage in a certain business activity. The FMA tends to apply Austrian banking law extensively to foreign banking activity whenever such activity has some minimal point of contact to Austria. To merely mail a contractual declaration from Austrian soil to the foreign bank, for instance, would trigger the obligation of the foreign bank to comply with Austrian banking law, which, in particular, requires

German branches, representation offices, and subsidiaries of foreign banks in §§ 53, 53a, and 53d, respectively, and German branches of foreign EEA banks in § 53b; *see* Hanten, *supra* note 4, at 1413-15. In the United States, similar issues are addressed on the federal level in the International Banking Act of 1978 [IBA], 95 Pub. L. No. 369, 92 Stat. 607 (amended by the Foreign Bank Supervision Enhancement Act of 1991 [FBSEA], 102 Publ. L. No. 242, 105 Stat. 2236). The establishment of U.S. branches and agencies of foreign banks is regulated in 12 U.S.C. §§ 3102, 3103 (2006), the establishment of U.S. representative offices of foreign banks in 12 U.S.C. § 3107. Further, the FBSEA imposes restrictions on foreign banks that own or control a U.S. commercial lending company. *See* SCOTT, *supra* note 1, at 80-82.

14. As granted by art. 49 of the Treaty Establishing the European Community, Dec. 24, 2002, O.J. C 325, as amended.

qualification for a banking license.[15] The given arguments will be critically discussed in greater detail in the relevant context below.

In contrast to the FMA, the German *Bundesanstalt für Finanzdienstleistungsaufsicht* (Federal Financial Supervisory Authority (BaFin)) has issued a general statement regarding its interpretation of the reach of the German banking license requirement.[16] Contrary to the FMA's approach, the BaFin basically employs a kind of balancing approach that takes into consideration and weighs the conflicting interests involved. As a consequence, not every minor contact between a banking activity performed by a foreign bank and Germany is sufficient to trigger the banking license requirement—in contrast to the more rigid view of the Austrian FMA. Rather, the BaFin makes the applicability of the German KWG dependent on whether the foreign bank specifically targets the German market. In general, the BaFin's approach seems to be well-balanced. But, as will be seen in some detail below,[17] its main focus on the specific targeting of the domestic market appears to confuse the goals of creditor protection and consumer protection and, hence, generates in some cases undesirable results.[18]

It is difficult to draw an unambiguous picture of the regulators' position in the United States, given that fifty state bank regulators can deal with international issues in their very individual way, with a particular view to their own state's interest.[19] Nonetheless, it follows quite clearly from the wide acceptance of the home country principle in the United States with regard to foreign bank subsidiaries and branches[20] (in-country international business) that U.S. regulators generally abstain from imposing compliance with their domestic banking laws on the weaker[21] form of international business conduct—the cross-border business discussed in this article. But, under special circumstances, particularly when the U.S. financial market would appear to be critically exposed to a certain form of cross-border banking activity and the bank's home country supervision would be significantly inferior, U.S. regulators might apply their banking laws to such cross-border business, grounded on one of the prevailing general approaches to the extraterritorial application of U.S. administrative law: the effects approach or the balancing approach. According to the effects approach, the recipient country's law is applicable to any business conduct

15. *See* Walter Gapp & Kathrin Gfall, *Grenzüberschreitende Bankgeschäfte ohne inländische Niederlassung—Internationale Anknüpfung und Konzessionspflicht [Cross-Border Banking Activities without Domestic Branch—International Link and License Requirement]*, 2003 ECOLEX 244, 246-47 (Austria).

16. BaFin, Hinweise zur Erlaubnispflicht nach § 32 Abs. 1 KWG in Verbindung mit § 1 Abs. 1 und Abs. 1a KWG von grenzüberschreitend betriebenen Bankgeschäften und/oder grenzüberschreitend erbrachten Finanzdienstleistungen [German Federal Financial Supervisory Authority, Notice on the License Requirement Pursuant to § 32(1) in Connection with § 1(1) and (1a) of the German Banking Act for Cross-Border Banking Activities and/or Cross-Border Finance Services], April 2005, http://www.bafin.de/merkblaetter/050400.htm [hereinafter BaFin].

17. *See infra* Part IV.E.1.g.

18. For a general discussion of the situation in Germany compare Ohler, *supra* note 6, at 166 *et seq.*; Thomas Götting, *Anwendbares Aufsichtsrecht bei Finanzdienstleistungen im Internet [Supervisory Law Applicable to Financial Services in the Internet]*, 2001 CR 528 (F.R.G.); CHRISTOPH WEBER, MARKTZUGANG VON AUSLANDSBANKEN [MARKET ACCESS OF FOREIGN BANKS] 34 (1996).

19. *See generally* HOWELL E. JACKSON & EDWARD L. SYMONS, JR., REGULATION OF FINANCIAL INSTITUTIONS 51 *et seq.*, 122 *et seq.* (1999) (discussing the respective competence of state banking regulators as long as the entity that is providing banking services has not chosen to go for a national charter).

20. *See* SCOTT, *supra* note 1, at 73-96, 99.

21. This form of international business conduct is weaker in terms of intrusion into a foreign country.

that has effects in the recipient country and was intended to do so.[22] In contrast, the less rigid balancing approach weighs the relevant factors of the case to determine whether the interests of, and links to, the recipient country are sufficiently strong to justify an assertion of extraterritorial authority.[23] This approach is heavily supported by Section 403 of the Restatement (Third) of Foreign Relations Law, the relevance of which will be seen in the discussion below.

IV. Analysis of the International Applicability of Domestic Banking Law

A. Introductory Remarks—Scope and General Relevance of the Analysis

It is important to note that the following analysis does not discuss whether a country's legislature could deliberately expand the extraterritorial reach of its domestic banking laws to the desired extent by explicitly adopting a respective provision. For instance, the legislature of country A could explicitly require every foreign bank that merely makes a business related telephone call to a person who is at the time of the call present in country A to comply with country A's banking laws, and there would be no discussion at all that country A's financial market authority had to apply such provision. Of course, such legislation might violate international treaties or at least the internationally accepted and expected comity of nations.[24] It would probably trigger retaliation measures by other countries and might even cause other countries to terminate bilateral enforcement agreements to preclude country A from enforcing non-compliance sanctions that country A imposed on the foreign bank. And most likely, it would simply lead to a substantial decline in foreign banking services provided to the citizens of country A.

This scenario, however, is not the point of departure for the following analysis. Instead, this analysis will focus on a situation wherein the legislature has not specifically and explicitly addressed the question of applicability of the domestic banking laws to cross-border business activities. This legislative gap shall be filled in this analysis with a careful interpretation of existing legislative hints, purposes, involved interests, and domestically and internationally acknowledged fundamental legal principles.

In articulating such a solution, the findings made in this article can also serve as a specific guideline for legislatures intending to fill the mentioned gap in the future and, thereby, seeking to adopt a balanced, purposeful solution that is in accordance and consistent with basic national and international legal standards.

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22. The effects approach was first adopted by the U.S. Court of Appeals for the Second Circuit in 1945 in *U.S. v. Aluminum Co. of Am.* and was applied by the U.S. Supreme Court in 1993 in the court's 5-to-4 landmark decision in *Hartford Fire Ins. Co. v. California* on the extraterritorial reach of the Sherman Act. 148 F.2d 416, 444 (2nd Cir. 1945); 509 U.S. 764 (1993). *See also* Restatement (Third) of the Foreign Relations Law of the United States § 402(1)(c) (1987).

23. Timberlane Lumber Co. v. Bank of America, 549 F.2d 597, 613 (9th Cir. 1976). The balancing approach was applied in Hartford by the four dissenting U.S. Supreme Court Justices. *See* discussion *supra* note 22. *See* William S. Dodge, *Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism*, 39 Harv. Int'l. L.J. 101 (1998).

24. *See* Joseph Story, Commentaries on the Conflict of Laws § 38, at 37 (1st ed. 1834) (discussing comity of nations).

The following discussion will take the Austrian banking laws as a specific example for the illustration of the required analysis, with special references to and comparisons with German and U.S. laws where instructive. Nonetheless, the remarks and findings being made below are—in light of the article's recourse to the very general principles of national and international law as well as of legal methodology—intended to serve as guidance also in other countries that lack an explicit regulation of cross-border banking activities and pursue similar goals with their banking laws, to illustrate how the problem at hand might be properly addressed.

B. Wording of the Relevant Banking Law Provisions

Let us go back now to the foundational point that the legal systems under consideration do not provide for an explicit regulation of the international applicability of domestic banking law to cross-border banking activities. When a relevant administrative authority becomes aware of a foreign business activity that potentially is conducted into the authority's country, it must examine whether it can apply its domestic banking laws to such activity. The central norm of modern banking laws, and hence the starting point for the following analysis, is the requirement to obtain a banking license to be allowed to conduct a banking business. This is the "entry provision" in the world of banking regulation, to which most further banking provisions, as well as the exertion of administrative supervision, are linked. Thus, the crucial question for the authority is whether it can and should require the foreign company to apply for a banking license and to fulfill all obligations related thereto.

Given the lack of special legislation on cross-border issues, the authority first will have to refer to the ordinary domestic license requiring provision. The relevant Austrian provisions are found in BWG Section 4(1) in connection with Section 1(1). BWG Section 4(1) provides that the conduct of the businesses mentioned in BWG Section 1(1) requires a banking license issued by the FMA.[25] BWG Section 1(1) lists twenty-three businesses that are defined as banking businesses if they are conducted on a regular basis with the intent to make profits.[26] The most prominent of these banking activities are the receipt of deposits,[27] the granting of loans,[28] the deposit of securities,[29] the issuance of guarantees,[30] and the factoring of receivables.[31]

None of those provisions contain any reference to the place where such business is conducted.[32] Looking at the mere wording of the BWG, a Japanese bank receiving a deposit in Japan from a Japanese resident and citizen would fall under the Austrian banking

25. BWG § 4(1) is paralleled in Germany by KWG § 32(1) sentence 1.
26. KWG § 1(1) lists twelve banking activities.
27. *See* BWG § 1(1)(1); *likewise* KWG § 1(1)(1).
28. *See* BWG § 1(1)(3); *likewise* KWG § 1(1)(2).
29. *See* BWG § 1(1)(5); *likewise* KWG § 1(1)(5).
30. *See* BWG § 1(1)(8); *likewise* KWG § 1(1)(8).
31. *See* BWG § 1(1)(16). Factoring, however, is not a banking activity under the German KWG.
32. German KWG § 32(1), however, provides that a banking license is required for banking activities that are conducted in Germany. But this limitation does not clarify things at all, because the question at issue then simply is: When is a cross-border banking activity (deemed to have been) performed in Germany? What if the bank's counterparty is domiciled in Germany? What about when the underlying contract is signed in Germany? What about when payments are made to a German account, etc.? So the questions that must be addressed here are the same as those raised by the insofar completely silent Austrian BWG. *See infra*. *See also* Pfeifer, *supra* note 12, at 238.

license requirement, because it conducts a banking business within the wording of BWG Section 1(1)(1). But it is obvious for several reasons, which will be addressed in more detail below, that this would be an absurd result; no one would seriously allege that the Austrian legislature has meant the BWG to apply with such a far extraterritorial reach.

It follows that the literal reach of BWG Section 1(1) has to be narrowed down. A historic approach to interpretation, achieved by going through the legislative materials to the BWG, does not reveal any hints by the legislature regarding the intended international reach of the BWG.[33] Also, the direct transfer of explicit conflict-of-law provisions that have been adopted in the field of international private law, international criminal law, or special areas of administrative law—by applying a single analogy in the course of a systematic interpretation—is impeded by the strong differences between those areas with regard to purpose, content, and mechanisms of the respective laws.[34] A response to the question at hand that is objectively reasoned and, to the highest extent possible, free of arbitrariness and personal valuation—in short, a response that is in accord with the acknowledged principles of legal methodology—requires a teleological interpretation (here in the form of a teleological reduction) by examining the rationale, purpose, and policy behind the provision at issue.[35]

C. Telos of Domestic Banking Laws

What are the purposes, the *teloi*, of the Austrian banking license provision (standing representatively for the similar provisions in many other countries) and the thereto linked regulatory oversight? Pursuant to BWG Section 69, the FMA, when supervising the financial institutions under its oversight, must consider the economic interest in a functioning banking industry and in the stability of the financial market.[36] Banking laws attempt to ensure the safety and soundness of banking companies to protect bank creditors.[37] The banking industry needs special attention by regulators due to the systemic risk that a bank failure poses; given the importance of financial services and the integration of banks in (at least) their domestic markets, the collapse of a banking company could jeopardize the viability of the entire economy.[38]

Some banking law provisions are characterized by additional purposes,[39] as, for example, in the United States the Community Reinvestment Act,[40] which strongly incentivizes

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33. *See* Beilage Nationalrat [BlgNR] [National Council] Gesetzgebungsperiode [GP] 18 No. 1130 (Austria).

34. Even seemingly related areas such as securities regulation and banking regulation are guided by considerably differing purposes. While the latter primarily attempts to limit the systemic risk associated with bank failures and focuses on the oversight of firms rather than transactions, the former is not concerned with systemic risk but with investor protection and, accordingly, puts its regulatory focus more on transactions and less on company oversight. *See* Scott, *supra* note 1, at 99.

35. *See* Franz Bydlinski, Juristische Methodenlehre und Rechtsbegriff [Legal Methodology and Term of Law] 453 *et seq.*, 480-81 (2nd ed. 1991) (discussing legal methodology in general and teleological interpretation and teleological reduction in particular).

36. Schopper & Zahradnik, *supra* note 6, at 27-28. *Likewise*, for the German KWG, *see* Ohler, *supra* note 6, at 165; Herbert Schimansky, Hermann-Josef Bunte & Hans-Jürgen Lwowski, Bankrechts-Handbuch [Banking Law Handbook] § 125 para. 12 (2nd ed. 2001).

37. *Cf., e.g.*, BWG § 39. *See* Gapp & Gfall, *supra* note 15, at 246; Scott, *supra* note 1, at 77, 99.

38. *See* Scott, *supra* note 1, at 73-75.

39. For a general discussion of the social benefits of financial regulation, see Howell E. Jackson, *Regulation in a Multisectored Financial Services Industry: An Exploratory Essay*, 77 Wash. U. L. Q. 319 (1999).

40. 12 U.S.C.A. §§ 2901-2907 (West 2006).

lending into certain undersupplied markets in order to pursue certain redistributive goals,[41] or the Equal Credit Opportunity Act,[42] which prohibits, among other things, race-based credit practices. But the fact that such special legislative intent has found its way into formal banking law provisions is not, in general, determinative for the interpretation of the extraterritorial reach of the provision under consideration, the requirement to apply and qualify for a banking license.

Furthermore, regulatory bank oversight frequently has the effect of protecting consumers (among others) and preventing unfair competition. But the effects of a certain law are not to be confused with its purposes. As mentioned, the undisputed and fundamental reason for the requirement to obtain a banking license and to comply with a detailed set of rules regarding the organization, capitalization, and activities of a bank is to assure the safety and soundness of the bank and, hence, to protect its creditors (mainly, its depositors) who are not only, and not always, consumers. The protection of consumers, as well as the prevention of unfair competition, is particularly targeted by special consumer protection laws and laws against unfair competition, which apply irrespective of whether the involved company is a bank. The international applicability of those laws follows quite different considerations, as shown in more detail below.[43]

Though BWG Section 69 quite clearly lists the purposes of banking regulation, it does not contain any geographical reference. However, it is beyond doubt, given the territorial limitations of a country's enforcement power and in light of the self-conception of a sovereign country's legislature, that the Austrian legislature wants to protect the Austrian banking industry and the stability of the Austrian financial market.[44] But this answers only the question about the geographical reach of the protected area of domestic banking laws and says nothing about the geographical reach of the covered activities.

The operability and stability of the Austrian financial market is not only put at risk by business activities that are conducted entirely in Austria. Extraterritorial behavior—behavior that physically takes place outside of Austria—can also severely impact the operability and stability of the Austrian market if such behavior has certain links to this market. Hence, to protect the stability and operability of the domestic financial market, a purposefully interpreted domestic banking law might suggest the supervision even of such extraterritorial behavior.

Therefore, additional goals and policies need to be considered. A legislature that regulates cases that also involve non-domestic facts does not only pursue its own domestic goals, it also is concerned with the international consequences of its law making. In particular, it is safe to assume that a domestic legislature, in general, does not intend to breach an international treaty or any other agreement imposing international obligations.[45] Further, a legislature, under normal circumstances, is also keen to comply with non-binding rules of international legal conduct, be it so-called soft law or generally accepted unwritten international principles deriving from the general mutual respect among nations. The motivations for domestic legislatures to comply with such unwritten principles are manifold and strong. A country's international reputation is likely to depend on such compliance, as well

41. *See* Jackson & Symons, *supra* note 19, at 209-11.

42. 15 U.S.C. §§ 1691 *et seq.* (2006).

43. *See infra* Part IV.E.1.g.

44. This conclusion is clearly evidenced, for instance, by taking a comparative look at the German KWG § 32(1); *see* discussion *supra* note 32. *See* Ohler, *supra* note 6, at 165.

45. Ohler, *supra* note 6, at 165.

as the country's prospects for becoming further integrated in the international community and thereby benefiting from enhanced international cooperation regarding all areas of life. Non-compliance may cause retaliation by other countries in one form or another. Therefore, anyone interpreting a domestic provision with a potential extraterritorial reach needs to consider those international principles with which a domestic legislature can be expected to wish to comply.

D. Territoriality Principle

1. *Content of the Territoriality Principle*

The oldest, most basic, and intuitive principle governing the demarcation of regulating powers among various countries is the territoriality principle.[46] It basically has two pillars. First, according to the territoriality principle, every sovereign state is entitled to regulate behavior and events happening on its soil,[47] unless such state has partially waived such right by entering into certain international agreements.[48] This is basically undisputed in the international community.[49] Second, as a flip side, a state is generally not competent to regulate behavior and events that are not happening on its soil, since the arrogation of regulatory power regarding foreign territory would interfere with the sovereignty of another, equal state. In the words of Joseph Story, it "would be wholly incompatible with the equality and exclusiveness of the sovereignty of all nations, that other nations should be at liberty to regulate either persons or things not within its own territories."[50]

But the second pillar of the territoriality principle, though very strong and widely accepted, is not carved in stone. Many countries have adopted laws that explicitly embrace the coverage of certain extraterritorial issues that are governed by other, stronger principles which contravene the idea of a regulatory abstinence in such cases. The most prominent of those contravening principles are the protection of a country and its institutions against certain criminal activities abroad, the protection of citizens abroad, and acts among citizens abroad.[51]

2. *The Diversity of Territorial Links in Cross-Border Cases and the Problem of Partial Territorial Connections*

Despite its general importance, the territoriality principle itself cannot provide a solution for cases in which it is unclear where the activity at issue took place. Those, however, are exactly the cross-border situations on which this article focuses. If X, who is located in the United States, grants a loan (via wire transfer) to Y, who is domiciled in Austria, and both parties never leave their home country until the loan agreement has been settled, where

46. *See* Ohler, *supra* note 6, at 165; Peter Knobl, *Rechtsfragen des Online-Broking [Legal Issues of Online-Broking]*, in Georg Graf & Michael Gruber (eds.), Rechtsfragen des Internetbanking [Legal Issues of Internet Banking] 148-50 (2002). *See, e.g.*, Restatement (Third) of Foreign Relations Law, *supra* note 22, Introductory Note preceding § 402.

47. *See, e.g.*, Restatement (Third) of Foreign Relations Law, *supra* note 22, § 402(1)(a)-(b).

48. Regarding, for instance, activities on the territory of an embassy or concerning activities of an ambassador.

49. *See* Restatement (Third) of Foreign Relations Law, *supra* note 22, § 402, cmt c.

50. Story, *supra* note 24, § 18, at 19.

51. *See, e.g.*, Restatement (Third) of Foreign Relations Law, *supra* note 22, § 402(2)-(3); *Strafgesetzbuch* [StGB] [Penal Code], Bundesgesetzblatt [BGBl] No. 60/1974, as amended, §§ 64, 65 (Austria); S-IPRG, *supra* note 11, art. 133(1).

has the banking activity of the granting of loans taken place? Obviously, this example has territorial connections to both the United States and Austria. Are those territorial links relevant in determining the scope of application of Austrian BWG Section 1(1)? Phrased from a broader angle, what are, in detail, the possible relevant territorial elements a banking activity can have?

To start, obvious territorial factors of a case are the residence, the corporate seat or place of principle business of the provider of the banking service, and the permanent residence of the recipient of such service. Further, the place where the loan agreement was signed by either party constitutes a territorial link to the case, since engagement in the business of lending funds immediately involves and is directed toward the conclusion of loan agreements. If the loan is agreed upon orally, the place where the offer was declared, as well as the place where the acceptance was declared represent potential territorial links. Likewise, other relevant places could include the place where the offer or the acceptance was received by the counterparty, the place where the contract was negotiated or solicited, the place where the contractual obligations are to be performed, and the place where suit can be brought regarding claims arising from the contract. And with some creativity, one can easily find further connecting factors that point to one territory or the other.

What the above discussion demonstrates is that the conduct of a banking business, as with any other business activity, can be fractionized into dozens of transactional and status-relating parts or elements that are all important, and even indispensable, in the course of such business activity. Asking in which territory each one of those parts took place creates several territorial links. In the given example, many of them point toward the United States, and many others point towards Austria.

Recall our initial question: Is Austrian BWG Section 1(1), in the absence of any explicit provision regarding its applicability to cross-border cases like the one at hand, to be interpreted to cover the U.S. lender's activities? In other words: Is the outlined partial territorial connection sufficient for the Austrian FMA to draw on the territoriality principle and claim its competence to regulate and supervise the U.S. lender?

3. *The Differing Gradual Intensity of Territorial Links*

The territoriality principle itself is not able to provide an answer to this question. It is blind with regard to the substance and importance of each territorial link. But it provides further assistance to consider that the territoriality principle, based on territorial links of a given case to a certain country, is not built on "either/or" facts, but rather on flexible, gradual elements that can have different weights on a sliding scale.[52] This weight correlates with the importance of the respective territorial link for the determination whether a country's domestic banking law should be interpreted to also apply to cases of extraterritorial activities. Hence, the stronger the link to a country, the stronger the argument for an extensive interpretation of such country's banking laws.

But how can such weight be determined for every potential link without assigning it more or less arbitrarily? In other words: How can one determine which territorial link is the most significant, which territorial links are relevant, and which are simply irrelevant? Again,

52. *See* Thomas Schobel, Der Ersatz frustrierter Aufwendungen—Vermögens-und Nichtvermögensschaden im österreichischen und deutschen Recht [Compensation for Frustrated Expenses—Pecuniary and Non-pecuniary Loss under Austrian and German Law] 180-83 (2003) (regarding the applied legal methodology).

in other words: Which of the fractionized parts of a business activity—and, therefore, the places where those parts occurred—are crucial, and which are not?

E. Combining Telos and Territoriality Principle

To answer this question, we have to get back to the telos of the provision under consideration. As noted above,[53] the Austrian BWG, as any other national banking law, is intended to protect and enhance the operability and stability of the domestic financial market. Any behavior that is capable of infringing on those goals is thus a potential target of domestic regulatory oversight.

Combining this insight with the implications of, and restrictions flowing from, the territoriality principle in an international setting (as outlined in the preceding discussion), it is possible to rationally determine what territorial links—and hence what places—are relevant for a prudent interpretation of a banking law's extraterritorial applicability. In other words, by merging the domestic telos with the territoriality principle we are reviving the territoriality principle with a new substance.[54]

Given that different banking activities potentially jeopardize a country's financial market operability and stability in different ways and with different intensity, the following analysis will have to distinguish, where appropriate, between different categories of banking services when assessing the potential relevance of a territorial link.[55] Further, the more complex a banking activity and the underlying transactions in an international environment become, the more potential territorial links will emerge. The following analysis attempts to focus on the obvious and most plausible possible territorial links in a typical, standardized setting of two parties, the bank and its counterparty, i.e., the recipient of the banking service. The basic example for reference purposes shall be the classic case, outlined above,[56] of a U.S. bank granting a loan to an Austrian borrower with neither of the parties being physically present in its counterparty's country.

1. *The Potential Territorial Links and Their Relevance*

a. Place of Permanent Physical Presence of the Bank

The most obvious relevant place where a banking activity occurs for purposes of regulatory oversight is where the bank is physically located, or more precisely, where the bank maintains a permanent physical presence from which it provides the banking service at issue. This can be the operating headquarters, any branch, or even the place where a representative office is engaged in processing banking services to customers (like a loan production office[57]). Given the typical integration of a banking company in the local market place where it is located (through the receipt of deposits from local residents and the lending of funds to local corporate and private borrowers), the conduct of banking activities and the

53. *See supra* Part IV.C.

54. In a certain way, this approach resembles to some extent the underlying idea of Currie's Interest Analysis in the field of international private law, by attempting to figure out which territorial links trigger a country's or a state's interest to govern a given cross-border case. *See infra* Part IV.E.1. *See* Brainerd Currie, Selected Essays on the Conflict of Laws 183-87 (1963). On Interest Analysis in general, see Lea Brilmayer & Jack Goldsmith, Conflict of Laws 181 et seq. (5th ed. 2002).

55. *Cf. similarly* Andreas Zahradnik & Florian Kremslehner in Otto Lucius & Andreas Zakostelsky (eds.), Internetbanking 183 (2002).

56. *See supra* Part IV.D.2.

57. *See* Scott, *supra* note 1, at 69.

well-being of the bank at stake are of immediate relevance for the operability and stability of the financial market where the bank is located.

b. Place of Incorporation of the Bank

In contrast to that, the mere incorporation of a bank in a certain country, without providing banking services to residents of said country, cannot affect such country's financial market in a comparable way. If this bank failed, no depositor or other creditor would be impaired in said country. Hence, the place of incorporation of the banking service provider is not a relevant territorial link for purposes of determining the potential extraterritorial reach of domestic banking law.[58]

c. Place of Domicile of the Counterparty

The place where the counterparty of the bank, the recipient of the banking service, is domiciled[59] is obviously relevant. Given that the recipient is typically well-integrated in its local market, irregularities in the conduct of the banking activities could negatively affect the recipient's local market, even when the bank is located in a foreign country.

But it is easy to see that this territorial link, against the background of the involved banking laws, is usually not as strong as the link established by the place where the bank is located. The bankruptcy of the U.S. bank in the above example obviously affects the U.S. economy much more than it affects the Austrian economy because—in a typical setting—the U.S. bank is much more deeply integrated in the U.S. market and has many more parties relying on the bank's soundness in the United States than it does in Austria. This might be different in a case where the foreign bank is located in a country bordering Austria and, hence, has extensive business contacts with thousands of other Austrian domiciliaries. In this case, the Austrian economy might be exposed to the safety and soundness of such foreign bank in a way similar to the exposure of the financial market in the country where such foreign bank maintains its permanent physical presence.

Furthermore, not every type of banking activity is capable of jeopardizing the recipient's market. Only activities that result in the bank being the debtor, such as the receipt of deposits, the issuance of notes, or the issuance of guarantees, put the recipient of the banking service and, as a result of such recipient's being integrated in her local market, also this local market at risk. The situation is different when the bank engages in activities that result in the bank being the creditor, such as the granting of loans or the factoring of receivables. To illustrate, recall again the above example of a U.S. bank granting a loan to an Austrian borrower: The Austrian borrower—and with her the operability and stability of the Austrian financial market—is, exceptional circumstances aside, unaffected by the U.S. bank's failure.

It follows that the relevance of the domicile of the bank's counterparty depends on the type of banking activity at issue. This distinction would, for example, give an objective reason to interpret the potential international applicability of BWG Section 1(1)(3) (granting of loans) and BWG Section 1(1)(16) (factoring of receivables) more restrictively than in

58. *See also* Ohler, *supra* note 6, at 164.

59. For a widely accepted definition of domicile *see* S-IPRG, *supra* note 11, art. 20; *see also* RESTATEMENT (FIRST) OF CONFLICTS OF LAWS §§ 9 *et seq.* (1934).

the case of BWG Section 1(1)(1) (receipt of deposits) or BWG Section 1(1)(8) (issuance of guarantees).

We have also seen that the domicile of the recipient generally constitutes a weaker territorial link than the place of the permanent physical presence of the bank,[60] unless the foreign bank is engaged in the recipient country's market with a similar intensity as in its home market, which hardly ever will be the case—keeping in mind that at issue is cross-border banking business where the bank is not physically present in the recipient country. Hence, the more banking services are provided to domiciliaries of the recipient country and the higher the amount of financial funds involved, the stronger the argument for an extensive interpretation of the recipient country's banking laws.[61]

d. Place of Signing

Of what relevance is the place where the agreement underlying the provision of a particular banking service is signed by the bank and the counterparty? Assume that the loan agreement between the U.S. bank and the Austrian borrower in our example was signed by a bank officer while being aboard a Canadian airplane flying over Mexican soil on a business trip to Chile. Clearly, neither Canada, Mexico nor Chile has any interest in regulating the loan between a U.S. resident and an Austrian resident. The same applies if the Austrian counterparty signs the loan agreement while on vacation in the Italian Dolomites. The operability and stability of Italy's financial market remain completely unaffected by this transaction. Hence, the place where a contract is signed does not constitute a relevant territorial link.

e. Place of Offer and Acceptance

The discussion above applies mutatis mutandis to cases in which the contract is concluded orally. The place where the offer is spoken, or heard, is as irrelevant as the place where the acceptance is spoken, or heard, when considered against the background of the regulatory purpose of the BWG. Nonetheless, some Austrian commentators, among them staff members of the FMA, claim that the Austrian BWG would govern any banking transaction in cases where the offer or the acceptance was declared in Austria.[62] In light of the lack of comprehensible reasoning, it seems unlikely that such commentators would stick to their assertion if they simply considered a loan given from a Canadian bank to a Norwegian resident who called to give her final okay while on a weekend skiing trip in the Austrian Alps. Austria has no interest in this banking activity whatsoever—its economy and financial market are not put at any risk by such transaction.

Hence, the FMA, by requiring the Canadian bank in this case to comply with the Austrian BWG (particularly to apply and qualify for an Austrian banking license), would severely misinterpret the BWG by giving it a content, regarding its geographical reach, that a reasonable legislature, which respects the equality and sovereignty of other countries in accordance with the territoriality principle, likely would not have given it in the absence of any overriding domestic interests in the case.

60. The relevance of this finding will be seen below. *See infra* Part IV.F.2.b.

61. This comparative sentence will be integrated in a comparative balancing approach below. *See infra* Part IV.F.2.c.i. and note 94.

62. Gapp & Gfall, *supra* note 15, at 245-47; WALTER FREMUTH, ET AL., KOMMENTAR ZUM BWG [COMMENTARY ON THE AUSTRIAN BANKING ACT] § 9 para. 1 (1999); LEO W. CHINI & GEORG FRÖLICHSTHAL, PRAXISKOMMENTAR ZUM BANKWESENGESETZ [PRACTICE COMMENTARY ON THE AUSTRIAN BANKING ACT] § 9 para. 18 (1997).

f. Place of Negotiations

For the very same reasons that have just been discussed regarding the place where an offer was made or accepted, the place where the contract that underlies the provision of a banking service was negotiated between the bank and its counterparty is not related to the geographical scope of the risk associated with a particular banking activity and, hence, is not a relevant territorial link.[63]

g. Place of Solicitation

What relevance does the place where banking activities are advertised and the conclusion of banking contracts is solicited have? The German BaFin, appearing to pay particular attention to the solicitation of banking services, announced to apply the KWG to any foreign bank that "specifically targets the German market."[64] But what threat does solicitation pose to the domestic financial market? First, if cross-border solicitation of a foreign bank finally results in the conclusion of banking contracts with domestic customers, then such transaction would already, and undisputedly, feature a relevant territorial link to the recipient country, namely the domicile of the bank's counterparty, as noted above.[65] And second, mere solicitation (solicitation that remains entirely unsuccessful in attracting domestic customers and hence does not lead to the conclusion of banking contracts with customers) does not, in general, jeopardize the domestic financial market since it has not created domestic creditors who would suffer losses from the foreign bank's bankruptcy.

Even aggressive advertising, possibly going along with price dumping, does not make it necessary to expand the international reach of the domestic banking laws. First, although such aggressive solicitation generally has the ability to irritate a market by potentially causing other banks to—possibly unhealthily—adapt their business models to match the aggressive pricing strategy of the foreign competitor, such irritation would only last for a very short time, given that the aggressive solicitation turns out to be entirely unsuccessful, as a premise of the above scenario. Second, and foremost, because the threat emanating from aggressive solicitation is not a bank-specific problem, it is already addressed by laws not specific to banking, such as laws against unfair competition and anti-dumping codes.[66] Those laws pursue different goals than the banking laws; they are not designed to improve the safety and soundness of certain companies, but rather to assure fair competition as the motor for innovation, efficiency enhancement, and price reduction. Hence, the question of international applicability of laws against unfair competition is governed by different considerations. Those laws would clearly be applicable to any form of domestic advertising by a foreign bank and would allow domestic competitors to file for injunctive relief and damages.[67]

Taking a closer look to the reasoning of the BaFin Notice on License Requirement (2005), it can be seen that the BaFin consequently distinguishes between cases where large institutional counterparties are targeted and cases where private retail customers

63. The German BaFin, however, suggests considering which side initiated entering into the contract; the reasons for this distinction are not made clear, but seem to be rooted in consumer protection considerations. *See* BaFin, *supra* note 16. Such concerns are discussed below. *See infra* Part IV.E.1.g.

64. *See* BaFin, *supra* note 16.

65. *See supra* Part IV.E.1.c.

66. *See, e.g.*, the Austrian *Bundesgesetz gegen den unlauteren Wettbewerb* [UWG] [Unfair Competition Act], Bundesgesetzblatt [BGBl] No. 448/1984, as amended, (Austria).

67. *See* Schopper & Zahradnik, *supra* note 6, at 24-26.

(consumers) are targeted.[68] Only if the latter group is solicited or contracted by the foreign bank does the BaFin require such bank to comply with German banking law. Hence, it seems that the BaFin is more concerned about the protection of consumers than it is about general creditor protection through regulatory enhancement of safety and soundness of banks. Though the viable operability and stability of a financial market also serves the interests of the consumers in such market, consumer protection is not the ultimate purpose of banking regulation, as was shown above.[69] This is most obviously demonstrated by the fact that special consumer protection legislation has been adopted in developed legal systems.[70] As noted, the international applicability of consumer protection laws is governed by considerations different from those relevant in the field of banking law. Consumer protection law is mostly private law,[71] and hence follows the conflict-of-law rules developed in international private law. Since consumer protection provisions typically are among the strictest layers of mandatory private law (so-called positive order public),[72] they are widely regarded to be applicable even in cases where the parties have agreed upon a choice-of-law clause that aims to put the contract entirely under the governance of a foreign law. Therefore, the consumer protection provisions of the German Civil Code already apply to the cross-border activities of a foreign bank vis-à-vis German consumers, no matter what choice-of-law clause the parties have incorporated in their contract. So, if the foreign bank tries to take advantage of unsophisticated German consumers by luring them into highly unfavorable contracts, the German consumers can rely on the remedies granted by the consumer protection provisions of the German Civil Code; they need not be particularly protected by the regulatory banking laws.

Summarizing the above, solicitation[73] is not a relevant territorial link for purposes of determining the international applicability of domestic banking law. This can be easily put to a plausibility test. Assume a Swiss bank plans to reinforce its efforts to target wealthy Swiss individuals by launching an advertising campaign in a classy golf resort in Germany, where most of the guests are from Switzerland because it lies right beyond the Swiss border. The campaign comprises billboard and event advertising that is supposed to create awareness for a new wealth management product. On every single piece of information it is noted that only Swiss domiciliaries are eligible to enter into this wealth management contract with the Swiss bank. Does this solicitation pose any threat to the German financial market? It clearly does not, even though the solicitation geographically takes place in Germany. Hence, there is no plausible reason to require the Swiss bank to comply with German banking law and, in particular, to qualify for a German banking license pursuant to KWG Section 32(1).[74]

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68. *See* BaFin, *supra* note 16, sections 1, 2.b.

69. *See supra* Part IV.C.

70. *See, e.g.*, *Konsumentenschutzgesetz* [KSchG] [Consumer Protection Act], Bundesgesetzblatt [BGBl] No. 140/1979, as amended, (Austria); *Bürgerliches Gesetzbuch* [BGB] [Civil Code], Jan. 1, 2002, Bundesgesetzblatt [BGBl.] I at 42, 2909, as amended, §§ 13-14, 305-310, 312-312f, 346-359, 474-479 (F.R.G.).

71. Compare, for example, its implementation in the German Civil Code. *See supra* note 70.

72. *See, e.g.*, Convention on the Law Applicable to Contractual Obligations, opened for signature in Rome on June 19, 1980 (80/934/EEC), art. 5(2) [hereinafter Rome Convention].

73. Remember, we are discussing the relevance of a *mere solicitation*—a solicitation that does not result in the conclusion of contracts with domestically domiciled counterparties. Once a solicitation leads to the conclusion of a contract, the territorial link of domicile of the counterparty comes into play.

74. The BaFin appears to agree with this conclusion. *See* BaFin, *supra* note 16.

h. Place of Performance of Contractual Obligations

The place where the contractual obligations between the bank and its counterparty are to be performed is no relevant territorial link either. Assume a German bank takes deposits from an Austrian depositor. It would not make any material difference for BWG purposes if the bank were supposed to repay the deposit via wire transfer to the depositor's account with an Austrian bank or to her account with a Dutch bank. If the German bank fails, the Austrian depositor and, as a possible consequence, the depositor's creditors, who are most likely Austrian residents, are affected, no matter where the payment, as a technical matter pursuant to the contractual terms, was supposed to be received.

i. Applicable Private Law and Place of Personal Jurisdiction

Does the applicable private law that is governing the underlying banking transaction have any relevance in determining whether the cross-border banking activity is governed by the recipient country's banking law? A choice-of-law clause in a loan agreement, which opts for the applicability of a particular private law regime, has no influence on the applicable regulatory law. The contractual intent of private parties is not, in the absence of special legislation to the contrary, able to modify the regulatory competence of an administrative authority. Regulatory banking law is, in the diction of private law, mandatory law, and not default law.

But even when the applicable private law is not determined by a contractual conflict-of-law clause, but rather by the state's legislative or common law conflict-of-law rules, it does not create a relevant territorial link that goes beyond the already determined links. Assume that a loan agreement between a French bank and an Austrian borrower is governed by French law, because the applicable conflict-of-law rules point to the domicile or principle place of business of the party that provides the characteristic service.[75] The applicable private law, as can be seen in this example, follows from a territorial link that was already considered above as being a major territorial link for purposes of interpreting the extraterritorial reach of a regulatory statute. Considering the applicable private law as an additional link would thus lead to an illegitimate double count of the territorial link constituted by the bank's place of permanent physical presence. The fact that the courts of a particular country have authority to sit over contractual claims flowing from banking contracts (be it pursuant to statutory provisions or contractual choice-of-jurisdiction clauses) also has, for the same reasons, no relevance for the applicability of regulatory banking law.

2. *Summary: The Relevant Territorial Links*

The above list of possible territorial links does not claim to be exhaustive. With some creativity, one can fractionize a banking activity into further parts and can construe additional theoretical connections that point to one territory or another. But the above analysis clearly focuses on the obvious and most plausible of the possible territorial links. It was easy to see that the more far-fetched the territorial links became, the more obvious it was that they were irrelevant for the interpretation of the international reach of domestic banking laws.

Only two elements of a cross-border case could be identified that represent a relevant territorial link when the telos of the banking law being interpreted is taken into consideration. The first, and strongest of the two, is the place where the provider of the banking service

75. Rome Convention, *supra* note 72, art. 4.

is located.[76] The second relevant territorial link is the domicile of the banks' counterparty, with two caveats. First, if the underlying banking transaction puts the counterparty in the debtor position, then the counterparty's domicile normally does not constitute a convincing argument for an extensive extraterritorial reach of the counterparty's domestic banking laws. Second, even if the business activity at issue puts the counterparty in the creditor position, the territorial link constituted by the counterparty's domicile is weaker than the bank's place of business, unless the bank is engaged in the recipient country's market with a similar intensity (with a similar amount of customer contacts and involved funds) as in its home market.[77]

This conclusion, finding relevant only the places where the bank and its counterparty are physically located, can be easily put to the test. Assume those two territorial links point to the same country, whereas all other links examined above point to another country. To illustrate, assume a bank located in Austria grants a loan to a borrower domiciled in Austria, but the underlying agreement is negotiated and signed by both parties in the United States, payments are made from and to U.S. accounts, U.S. private law governs the agreement pursuant to a choice-of-law clause, and all the other links mentioned above involve the United States. Despite this large number of links to a foreign country, it is beyond doubt that the mentioned bank would have to comply with Austrian banking law. In the reverse case where a U.S. bank grants a loan to a U.S. borrower, but the other mentioned elements are linked to Austria, it is obvious that the Austrian BWG is not supposed to apply, because the operability and stability of the Austrian economy in general, and the financial market in particular, are not jeopardized or otherwise affected by the banking activity at issue. Hence, Austria has no interest in overseeing such banking business, and the BWG must be interpreted accordingly.

F. The Required Strength of the Relevant Territorial Links

The above findings narrow the problem of international applicability of domestic banking law substantially, for they sharpen the focus on two relevant territorial links and remedy the wide-spread confusion about the other, irrelevant, links. But the main question that still remains is whether each link is per se sufficient to argue for the respective country's competence to regulate the cross-border conducted banking business in a case where the two territorial links are split between two countries.

1. *International Applicability of Home Country's Banking Laws*

The answer is easily found for the stronger link. The banking laws of the country where the bank is located (home country) apply—in accordance with the domestic telos as well as the territoriality principle—not only to the purely domestic business of the bank, but also to any kind of international activities in which the bank engages. Otherwise the bank's

76. This finding is supported by the European Commission, which states in an Interpretative Communication that a banking service, in general, shall be deemed to take place where the "'characteristic performance' of the service, *i.e.*, the essential supply for which payment is due," occurred. Commission Interpretative Communication: Freedom to Provide Services and the Interest of the General Good in the Second Banking Directive, June 20, 1997, O.J. C 209/04, SEC (97) 1193 final. The concept of the prevalence of the characteristic performance was developed in the field of international private law. It points to the place where the party whose obligation is not the payment of money is domiciled. *See, e.g.*, Rome Convention, *supra* note 72, art. 4(2); S-IPRG, *supra* note 11, art. 117(2).

77. *See supra* Part IV.E.1.c.

home country supervisor could not examine and evaluate the bank's safety and soundness, which is a resultant of both the bank's national and international activities, and, as a consequence, would not be able to care for the operability and stability of the domestic financial market.[78]

2. *International Applicability of Recipient Country's Banking Laws*

But what about the weaker link, pointing to the country of domicile of the bank's counterparty? Is it, though weaker than the bank's place of business, still strong enough to extend the reach of domestic banking law to banking activities that partly occur extraterritorially?

a. The Principle of Appropriateness, Reasonableness, and Efficiency

To answer this question, we need to consider a further basic principle that governs the adoption of legislation and, likewise, the interpretation of ambiguous provisions: the principle of appropriateness, reasonableness, and efficiency (hereinafter the principle of reasonableness). This widely accepted principle,[79] though not explicitly laid down in many countries' legal systems, is considered a fundamental constitutional[80] guideline restraining the legislature's liberty to adopt any legislation it sees fit. Basically, the principle of reasonableness is asking whether a certain law is capable of and necessary for achieving the legislature's goal and whether the measures taken appear to be appropriate vis-à-vis the aspired goal. In other words, the social costs of the law shall not be greater than its attempted social benefits. A statute, regulation, or merely a single provision that does not comply with these three requirements of efficient legislation is voidable. Equally important, the principle of reasonableness is used as a guideline for the interpretation of ambiguous provisions. If the wording of a certain provision allows for two possible interpretations, the one that is in compliance with the principle of reasonableness shall prevail.[81]

b. Equivalent (or Stronger) Supervision by Home Country

Let us return now to the task of interpreting BWG Section 1(1) and its ambiguous extraterritorial reach. According to the principle of reasonableness, we must ask whether the application of BWG Section 1(1) is capable, necessary and appropriate to protect and enhance the operability and stability of the Austrian financial market. To illustrate, assume a U.S. bank is taking deposits from an Austrian depositor. From the discussion above we know that this banking activity is, in any event, covered by U.S. banking laws and,

78. *See* SCOTT, *supra* note 1, at 77-84.

79. The RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW highlights the importance of the principle of reasonableness, actually, for the particular problem of international applicability of domestic law:

> Territoriality and nationality remain the principal bases of jurisdiction to prescribe, but in determining their meaning rigid concepts have been replaced by broader criteria embracing principles of reasonableness and fairness to accommodate overlapping or conflicting interests of states, and affected private interests. Courts and other decision makers, learning from the approach to comparable problems in private international law, are increasingly inclined to consider various interests, examine contacts and links, give effect to justified expectations, search for the 'center of gravity' of a given situation, and develop priorities. This Restatement follows this approach in adopting the principle of reasonableness.

RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, *supra* note 22, Introductory Note preceding § 402. *See also* BYDLINSKI, *supra* note 35, at 330-35.

80. In Austria, for instance, the principle of reasonableness is derived from the constitutional principle of equal treatment.

81. So-called constitution-compliant interpretation. *See* BYDLINSKI, *supra* note 35, at 455-57.

hence, by U.S. regulatory oversight. Given that, would supervision by the Austrian FMA really be necessary to protect the Austrian financial market? In a scenario in which the U.S. banking laws provide for an equal or even stronger supervision that ensures an equal or even higher degree of safety and soundness of the supervised bank, the answer is clearly no. And it is likewise obvious that additional oversight by the FMA and the requirement to comply with additional regulations in the mentioned scenario would not be appropriate given that the additional costs caused by such double regulation would not be paralleled by additional benefits.

Hence, if the protection provided by the home country's banking laws and their enforcement is equivalent to the recipient country's oversight, application of the recipient country's banking laws is not reasonable.[82] Quite to the contrary, the costs caused by such additional regulation could negatively impact the safety and soundness of the affected banks, or could at least lead to an increase of the price of banking services, particularly of cross-border services, which in turn would reduce competition in the domestic market. So, eventually, the additional costs of unnecessary additional regulation would be borne by the group of people that domestic banking laws actually intend to benefit—the domestic counterparties of foreign banks.

To assess the equivalence of a bank's home country supervision and the potentially applicable recipient country supervision, the concrete circumstances of the case at hand, particularly the type of banking service involved, must be examined. If, for example, the receipt of deposits is at issue, it is important not only to compare bank capital requirement provisions, disclosure and notification requirements, internal risk assessment systems, and other precautions, but also to look into the characteristics of the statutory deposit insurance systems. If it turns out that the home country's deposit insurance does not cover the cross-border deposit or covers it to a substantially smaller amount, then the application of the recipient country's regime obviously would create a benefit for the depositor and the financial market in which she is located and would therefore make the extension of the extraterritorial reach of the relevant banking laws reasonable.

Summarizing the above, we can conclude that if the applicability of two essentially equivalent regulatory regimes is at issue, the principle of appropriateness, reasonableness, and efficiency commands that only one of those regimes is to govern the case. This applicable regime is determined by the stronger territorial link of the case, which points, as already demonstrated, to the country where the bank is located.

This conclusion is again supported by the European Commission's Interpretative Communication on Freedom to Provide Services and the Interest of the General Good in the Second Banking Directive.[83] In general, the harmonization of domestic banking law in the EEA and the mutual recognition of each country's banking supervision among EEA member states, as provided for in the Second Banking Directive, will usually bar an EEA country from claiming that the banking laws of another EEA country are inferior. Hence, cross-border banking services provided within the EEA should normally not be subject to the recipient country's banking supervision. But, as mentioned, the question as to whether the home country's oversight is equivalent must be assessed for every single case. If, for instance, a particular business activity is not a banking activity pursuant

82. Compare the similar considerations adopted by the BaFin. *See* BaFin, *supra* note 16, section 2.a. *See also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, *supra* note 22, § 403(1).

83. *See supra* note 76.

to the home country's banking laws, and is therefore not covered by the oversight of the banking regulator, then, even within the EEA, the recipient country's banking authority can reasonably argue to require the foreign entity to comply with its banking laws if those laws classify the entity's activity as banking business. A similar situation might occur when the bank's home country defaults on its obligation to implement EU directives that further harmonize the member states' banking laws.

c. Weaker Supervision by Home Country

We have now limited the unresolved cases to cross-border banking transactions where the bank is the debtor[84] and the bank's home country establishes a weaker form of regulatory oversight than the recipient country's banking laws would provide. In these remaining cases, the additional oversight by the recipient country's financial market authority would indeed enhance the protection of the operability and stability of the recipient country's financial market and would therefore create a valuable social benefit. But the question still is whether this benefit outweighs the social costs triggered by the requirement to additionally comply with the recipient country's banking laws. If this question were, according to empirical economic evidence that distinguishes between the different circumstances in different cases, to be answered in the affirmative, the relevant banking law provisions should be interpreted in favor of their applicability to the respective case under consideration. The economic analysis of law, the judicial relevance of which is rooted particularly in the principle of reasonableness outlined above, is more frequently an accepted instrument for the interpretation of ambiguous legal provisions.[85] But as long as the required empirical set of data on this point is not available (the social benefits of the additional supervision by the recipient country are particularly difficult to quantify) with the required level of certainty and reliability,[86] the solution to the problem at issue has to be found by comparatively balancing the interests involved.

i) Comparative Balancing Approach The theoretical framework behind the comparative balancing approach (which, methodologically, is a form of general analogy)[87] is simple, conclusive, and convincing. When the balanced elements of an unresolved case have the same weight (i.e., they point with the same strength to a certain legal consequence) as the balanced elements of a case that is unambiguously governed by a particular statute, then the specific legal consequence that is provided for in such statute shall apply also to the unresolved case.[88] Applied to the problem at hand, this means to compare an unresolved cross-border business case with an in-country international business case in which, as outlined above,[89] the application of domestic banking law is, in the absence of

84. *See supra* Part IV.E.2.

85. *See* Bydlinski, *supra* note 35, at 331-32; *see also* Thomas Schobel, *The Presumption of Profitability on Expenditures*, 2002 ERPL 458 (Netherlands).

86. *But see* Howell E. Jackson, *Variation in the Intensity of Financial Regulation: Preliminary Evidence and Potential Implications*, The Harvard John M. Olin Discussion Paper Series, Discussion Paper No. 521, August 2005. In this recent insightful study, Jackson elaborates on the difficulties of measuring regulatory costs and benefits of financial regulation, but still manages to draw some interesting international comparisons between the costs of financial regulation in different countries and thereby prepares the basis for future studies that might produce the required data for the problem at hand.

87. *See* Bydlinski, *supra* note 35, at 536-43; Schobel, *supra* note 52, at 179-83.

88. *See* Schobel, *supra* note 52, at 181-82, 211-14.

89. *See supra* Part I.A.

legislation to the contrary, beyond question because the bank is physically present in the counterparty's country.

A weak form of such physical presence is the operation of a representative office, like a loan or deposit production office.[90] These offices neither issue contractual offers or acceptances, nor make business decisions regarding the granting of loans or receipt of deposits. Rather, they provide support in the distribution of banking services by generating loan and deposit requests and coordinating the respective contractual declarations between their headquarters (or other decision making units) and the counterparty. Therefore, a representative office takes part in the business of banking. Since such banking activity is conducted through a physical presence in the territory of the host country, it clearly falls under the scope of application of the host country's banking laws, which requires the foreign bank that the representative office is part of to comply with the host country's banking license requirement.

The argument being developed here is the following: Suppose a cross-border banking service potentially jeopardizes the operability and stability of the recipient country's financial market in a similar way and to a similar extent as does the in-country international banking services conducted by the same foreign bank through a representative office that is located in the recipient country. To illustrate, assume that Turkish bank X is operating a representative office in Austria in order to attract deposits from Austrian depositors, whereas Turkish bank Y is offering its deposit taking services solely via Internet to Austrian depositors. Further assume that deposit taking services are considerably less intensely regulated and supervised by Turkish authorities than they would be pursuant to the Austrian banking laws.[91] Since X is, without doubt, engaged in the business of banking on Austrian soil pursuant to BWG Section 1(1)(1), such activity is—in full accordance with the territoriality principle—governed by Austrian regulatory oversight.[92] If we can find that the relevant balanced interests involved in this case (the solved case), expressed by the balanced social costs and benefits of a potential regulation, are more or less equal to the balanced interests involved in Y's case (the unsolved case), then the principles of consistency and equity require that BWG Section 1(1) be interpreted to apply to the cross-border banking activity in the unsolved case, as well.

To assess the similarity of the costs and benefits—and, in particular, their balance—in the solved case and the unsolved case, the concrete circumstances must be taken into consideration individually for every single case. In the example above, the potential costs of compliance with an additional regulatory regime (the Austrian) are the same for both bank X and bank Y, assuming that the hypothetical banks have a similar size, corporate structure, and organization. But the social benefits stemming from the additional regulation might be different, depending on the intensity and scope of X's and Y's respective conduct of business with regard to Austrian counterparties. To illustrate, assume X is contracting through its representative office with 10,000 Austrian counterparties, accumulating deposits in the total amount of EUR 200 million, whereas Y, because of a less successful business

90. *See* Scott, *supra* note 1, at 69.

91. If the Turkish banking laws provided for a comparable oversight, the case would be covered by the discussion regarding equivalent oversight by the home country (*see supra* Part IV.F.2.b) and, in accordance with the findings made there, Austrian banking law would not be applicable to the cross-border service provided by bank Y.

92. In the absence of bilateral agreements to the contrary.

model, an intentionally restricted focus, or whatever other reason, manages to enter into deposit agreements via the Internet with only ten Austrian domiciliaries for total deposits amounting to EUR 100,000. Assume further that Y has entered into an irrevocable private deposit insurance system that unlimitedly covers all deposits taken by Y and that is provided by a strong, well-known international insurance company. It is obvious from the mentioned facts that the risk posed by X's banking activities to the operability and stability of the Austrian financial market (and the Austrian economy in general) is much bigger than the risk associated with Y's activities. Hence, the benefits that would be achieved if the BWG were applied to Y's cross-border banking activities are considerably smaller than the benefits that are achieved by requiring X to comply with Austrian banking law.

If Y, however, had taken deposits in a similar amount from a similar number of Austrian depositors as X did, then it would be perfectly reasonable and consistent to apply the legal consequence in the solved case of X also to the unsolved case of Y, in other words, to interpret BWG Section 1(1) to cover the particular cross-border banking service provided by Y and, in particular, to require Y to apply and qualify for the issuance of an Austrian banking license.

ii) A Comparative Guideline—Factors to Consider Since the solved case, as has just been demonstrated, is supposed to serve as a standard of comparison—an interpretative guideline that exemplifies the legislature's intent—, the concrete facts constituting such case have to be chosen to represent the typical risk and threat that is posed to the financial market by the weakest form of international business conduct that is just within the undisputed territorial reach of the host country's banking laws. The unresolved cases of cross-border provided business are then measured against this standard.[93]

As mentioned, the comparison and balancing of the relevant elements must be done on a case-by-case basis. Hence, there is no general solution for those remaining cases. But it is still possible, and not less valuable, to offer a general guideline for solving those cases by pointing out the factors that a prudent interpretation based on the comparative balancing of involved interests will have to take into consideration. Given that high costs and small benefits point in the same direction, we can combine such factors in the following comparative sentence:[94] *The smaller* (a) the number of counterparties of the foreign bank in the recipient country, (b) the amount of funds involved in the cross-border banking activities, (c) the negative[95] difference of the home country's banking supervision (on the legislative as well as on the enforcement side) compared to the potential recipient country's supervision (particularly regarding minimum capital requirements and mandatory safety nets), and (d) the differences in the corporate structure and corporate governance regimes for banks in the home country and banks in the recipient country, *and the higher* (x) the level of individually acquired insurance coverage or other measures taken voluntarily by the foreign bank to enhance creditor protection and (y) the routineness of the provided banking services

93. *See* SCHOBEL, *supra* note 52, at 208-14 (regarding the applied methodology).

94. *See* Gerhard Otte, *Zur Anwendung komparativer Sätze im Recht [On the Application of Comparative Sentences in the Law]*, *in* FRANZ BYDLINSKI, ET AL., DAS BEWEGLICHE SYSTEM IM GELTENDEN UND KÜNFTIGEN RECHT [THE FLEXIBLE SYSTEM IN CURRENT AND FUTURE LAW] 271 (1986) (regarding the relevance and structure of comparative sentences); Schobel, *supra* note 52, at 180.

95. If the difference were zero or even positive (in other words, if the home country's supervision is stronger than the recipient country's supervision), then—according to the remarks made in Part IV.F.2.b above—the extraterritorial applicability of the recipient country's banking laws need not be considered from the outset.

regarding involved risk, price, and transparency (measured against the market standard present in the recipient country), *the more restrictively* BWG Section 1(1) is to be interpreted, i.e., the more narrowly the boundaries of its applicability should be drawn.

d. A Summarizing Illustration

For a final, summarizing illustration, let us apply this analysis to the following example. The solution outlined below shall, at the same time, provide an overview of the conclusions of this article.

In the course of an international securitization of pooled receivables owned by originators from different countries, a special purpose vehicle (SPV) is set up on the Cayman Islands (mainly due to tax reasons). Among the originators is X, an Austrian car dealer, who wishes to refinance her outstanding receivables vis-à-vis her customers amounting to a total of EUR 10 million. As part of the securitization, the SPV purchases the receivables from X without recourse. Let us further assume, for purposes of this example, that the purchase price is due two days after delivery of the receivables. To secure X's claim, a well-known U.K. bank issues a respective guarantee. Is the SPV engaged in the business of banking pursuant to BWG Section 1(1) and, as a result, does it have to apply and qualify for an Austrian banking license pursuant to BWG Section 4(1)?

The purchase of receivables as part of a regular business and for profit, generally, constitutes factoring, which is considered a banking activity pursuant to BWG Section 1(1)(16). But does the applicability of the BWG reach so far that it also embraces a cross-border factoring activity like the one in our example? A territorial link that is pointing to Austria in this case is the domicile of SPV's counterparty, X. Normally, factoring without recourse does not put the seller in the position of a creditor, which challenges the relevance of the counterparty's domicile as a valid territorial link for purposes of a teleological interpretation of BWG Section 1(1)(16).[96] In the case at hand, however, the advance delivery of X puts her, even though only for two days, in the position of a creditor. X will be directly affected if the SPV fails after X delivers the receivables. This generally could give reason to the Austrian banking regulator to protect X and the market in which she is integrated (here the Austrian market). But is this link strong enough to justify the extraterritorial applicability of BWG Section 1(1)(16)? According to the principle of reasonableness, the first question to ask in a cost-benefit analysis applied to this problem is whether the cross-border banking activity is already governed by the regulatory supervision of the SPV's home country banking authority and whether such supervision is comparable to the potential oversight by the Austrian FMA.[97] Since the Cayman regulator does not consider factoring to be a banking activity subject to supervision, this question must be answered in the negative as applied to the case at hand. Hence, supervision by the FMA would likely create benefits for the operability and stability of the Austrian market, which are the main teloi of the BWG.[98] But without examining the extent of those expected benefits under the specific circumstances of the case at issue, comparing them to solved cases,[99] and balancing them with the expected costs of potential Austrian oversight, the determination of the BWG's international applicability would be arbitrary. Measured against the above

96. *See supra* Part IV.E.1.c.
97. *See supra* Part IV.F.2.a.
98. *See* BWG, *supra* note 13, § 69; *see also supra* Part IV.C.
99. *See supra* Part IV.F.2.c.i.

guideline of factors to be considered in this kind of comparative balancing approach, the case at hand appears to show high costs and small benefits. The SPV has only one Austrian counterparty and the amount of money involved is rather small given the size of the Austrian financial market. Furthermore, the counterparty's claim was secured by a guarantee of a sound and strongly supervised U.K. bank, and the factoring of receivables by specially set-up entities (in the course of a securitization) is an increasingly usual and accepted form of refinancing. Hence, even though the SPV is not covered by banking supervision in its home country at all, the operability and stability of the Austrian financial market and, in general, the Austrian economy does not appear to be put at a risk that would reasonably require the applicability of the Austrian banking laws. Therefore, it follows from a teleological interpretation that BWG Section 4(1), in connection with Section 1(1)(16), does not cover the SPV's factoring activity in the case at hand. The SPV, hence, is not required to apply and qualify for an Austrian banking license.

G. Legal Certainty

The comparative balancing approach, as outlined and illustrated above, does not provide a clear-cut rule. It is geared to a general guideline that allows for the consideration of numerous factors of the case at issue. One might argue that this flexibility of the proposed approach would jeopardize the predictability of regulatory decisions and, thereby, would conflict with the principle of legal certainty, which is, at least implicitly, laid down in most countries' constitutions and, hence, has to be considered when ambiguous provisions are interpreted. It might be true that the outcome of an application of the proposed comparative balancing approach is not as predictable as a decision based upon a rigid, inflexible approach pursuant to which domestic banking law is always and only applicable when the offer or acceptance to enter into a banking contract is declared while being on domestic soil.[100]

But by no means does this suggest repudiation of an interpretative approach that promises to accommodate the legislative purposes much better than any rigid clear-cut rule. Furthermore, in the legal field under consideration, legal certainty can be easily established even when a comparative balancing approach is applied. By issuing ex-ante assessments regarding concrete business activities planned by market participants, the relevant domestic banking regulator can create legal predictability regardless of the interpretative method the regulator applies. Banking authorities in many countries[101] already engage in the issuance of statements in which they inform a potential provider of banking services whether they would consider the contemplated business activity to be covered by domestic banking law and, hence, would require the provider to apply and qualify for a banking license. The obvious benefit, in terms of a considerable increase in legal certainty, should prompt those banking authorities that do not yet issue ex-ante assessments[102] to change their respective practice or, where necessary, to push for an amendment of the respective legislation.

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100. *See, e.g.*, Gapp & Gfall, *supra* note 15, at 246-47.

101. Compare, for example, the so-called No-Action Letters in the United States or the possibility to apply a priori for exemption from the applicability of certain provisions of the KWG in Germany (*see* KWG, *supra* note 13, § 2(4)).

102. As, for example, the Austrian FMA.

V. Conclusions

Cross-border banking activities—banking services that are provided by a foreign bank into the recipient country without the bank being physically present in the recipient country—are not explicitly addressed by the banking laws in many countries. Closing this legislative gap in accordance with the acknowledged standards of legal methodology requires analysis of the purpose (telos) of the regulatory banking laws and consideration of the governing fundamental principles of domestic and international law. It has been demonstrated that, as a general rule, the higher the risk posed by a certain cross-border banking activity to the operability and stability of the recipient country's financial market, the more legitimate the extensive interpretation of such country's banking laws to govern the extraterritorial behavior becomes.

Among the potential links that a cross-border banking activity can have to a certain country, only two have been identified in the course of a teleological interpretation as being relevant: (1) the place of the physical presence of the bank and (2) the domicile of the bank's counterparty. The former creates, beyond doubt, a sufficiently strong territorial link to the bank's home country to justify the application of that country's banking laws also to cross-border (and hence partially extraterritorial) transactions. By contrast, the latter link (the domicile of the counterparty) normally does not extend the reach of the recipient country's banking laws to cross-border transactions that do not put the bank's counterparty in a creditor position. The same applies, according to the principle of reasonableness, to the remaining banking activities—those in which the counterparty would suffer direct losses from the bank's bankruptcy—in cases where the banking supervision provided by the bank's home country regulator is equivalent to, or stronger than, the potential supervision by the recipient country's bank regulator. Only if this is not the case can the territorial link to the recipient country, constituted by the counterparty's domicile, possibly justify the extraterritorial application of the recipient country's banking laws. For that situation, this article suggests application of a comparative balancing approach that compares the balanced social costs and benefits of a potential additional oversight by the recipient country's bank regulator in any given unsolved case, with the respective balanced costs and benefits of such additional regulation in the solved cases of in-country international banking business (conducted, in particular, through representative offices). As a general guideline, *the smaller* (i) the scope and size of the foreign bank's cross-border business in the recipient country, (ii) the differences between banking and corporate laws and enforcement between home country and recipient country, (iii) the actual default risk of the bank in light of mandatory and voluntary safety nets, and (iv) the unusualness of the provided cross-border banking services, *the more restrictively* the extraterritorial applicability of the recipient country's banking laws should be interpreted.

The potentially lower predictability of agency decisions that are based on a flexible balancing approach, as opposed to a rigid, inflexible clear-cut rule, can be easily avoided by banking authorities issuing ex-ante assessments regarding specific business activities contemplated by market participants.