THE RESTRUCTURING REVIEW

Thirteenth Edition

Editor
Dominic McCahill

THE LAWREVIEWS

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PREFACE

I am very pleased to present this thirteenth edition of *The Restructuring Review*. As with the previous editions, our intention is to help general counsel, government agencies and private practice lawyers understand the conditions that have been prevailing in the global restructuring market in 2020 and to highlight some of the more significant legal and commercial developments and trends during that period.

In particular, I would like to thank Chris Mallon for his editorship of all 12 of the previous editions. Having retired from a long and distinguished career as a restructuring lawyer in private practice, Chris is now a Senior Advisor in the Financial Advisory Group at Lazard, based in London.

2020 began with many market observers expecting a year of overall modest growth for the global economy. Of course, there were political and economic clouds on the horizon, as there usually are, such as the ongoing trade hostilities between the United States and China and the uncertain outcome of the Brexit negotiations between the United Kingdom and the Member States of the EU as the United Kingdom finally withdrew from the EU on 31 January.

However, the world is now in the midst of the covid-19 pandemic. Much of the world is in lockdown or taking tentative steps to emerge from lockdown. While the human cost is paramount, the economic impact has been enormous. This has prompted a huge response from governments and central banks around the world in an effort to support businesses and workers given the unprecedented drop in supply and demand. In some industries, the drop has been precipitous and virtually total. The full extent of the damage is yet to be assessed and the length and trajectory of the road to recovery are uncertain.

One prominent reaction to the crisis has been the emergence of new laws, rules and practices in restructuring, perhaps reflecting the maxim that one should never let a good crisis go to waste. These measures – as can be seen in the following chapters – include not only ones specific to covid-19, but also include broader reform of insolvency and restructuring law. Notwithstanding increasing nationalism in certain parts, the world's economies remain highly connected and interdependent. International, as well as national, efforts will be required to lead towards a full recovery. I hope that *The Restructuring Review* will be a useful guide at a time of evolution for restructuring law and practice internationally.

I would like to extend my gratitude to all the contributors for the support and cooperation they have provided in the preparation of this work, and to our publishers, without whom this would not have been possible.

Dominic McCahill
Skadden, Arps, Slate, Meagher & Flom (UK) LLP
London
July 2020

Chapter 3

AUSTRIA

Thomas Trettnak and Heinrich Foglar-Deinhardstein[1]

I OVERVIEW OF RESTRUCTURING AND INSOLVENCY ACTIVITY

In 2019, the number of businesses filing for insolvency increased slightly: 5,018 companies filed for insolvency proceedings in Austria, up 0.8 per cent compared to 2018 (4,980). In total, 3,044 companies began insolvency proceedings, while a further 1,974 companies saw their proceedings dismissed because of a lack of assets to cover costs. However, the slight increase in the number of companies filing for insolvency proceedings is balanced out by the significantly decreased amount of liabilities and the number of employees affected. Statistics show that liabilities decreased by 18.1 per cent to a total of €1,697 million, which is attributable to the fact that numerous major insolvencies, such as Fly Niki and Waagner-Biro, were completed. Moreover, the number of employees affected by the insolvency of their employer decreased to 17,200 (down 9.5 per cent) compared to 2018 (19,000). In real terms, the number of people affected by insolvencies in Austria has therefore decreased rather than increased.[2]

II GENERAL INTRODUCTION TO THE RESTRUCTURING AND INSOLVENCY LEGAL FRAMEWORK

In insolvency law, Austria is generally considered a creditor-friendly jurisdiction. To prevent insolvencies, and to protect the companies themselves and their creditors, the Insolvency Law Amendment Act 2010 entered into force on 1 July 2010.[3] It quite comprehensively changed Austrian insolvency law. Since 2010, the Austrian Insolvency Act has provided for uniform insolvency proceedings.[4] First and foremost, the new insolvency law aims at encouraging companies in financial distress to use the various procedures for restructuring and protecting insolvency as early as possible. In combination with a mandatory filing requirement, delays in filing for insolvency shall be prevented. The Insolvency Law Amendment Act 2010 was well received throughout the insolvency community and has proved to be a success.

1 Thomas Trettnak and Heinrich Foglar-Deinhardstein are both equity partners at CERHA HEMPEL Rechtsanwälte GmbH.

2 Insolvency statistic 2019 of the Austrian creditors' representation organisation KSV1870: https://www.ksv.at/KSV1870_Insolvenzstatistik_Unternehmen_2019_final.

3 Insolvency Law Amendment Act 2010 dated 20 May 2010, BGBl I 2010/29.

4 Feil, Insolvenzordnung 7, Section 1 FN 1 et seq.

i Uniform insolvency proceedings

In Austria, insolvency proceedings are conducted either as restructuring proceedings or as bankruptcy (i.e., liquidation) proceedings.[5]

Bankruptcy proceedings

This is the most common form of insolvency proceedings in Austria. It aims at liquidating all assets and distributing the funds generated from liquidation to the debtor's creditors. In case of opening of bankruptcy proceedings, the debtor loses its rights of administration and disposition, which pass to the insolvency administrator. From that point in time onwards the debtor remains the owner of the assets, but the assets form the insolvency estate are to be used primarily to satisfy the claims of creditors.

Restructuring proceedings

One of the main objectives of the Insolvency Law Amendment Act 2010 was to improve the debtor's ability to continue as a going concern. Restructuring proceedings encourage a form of debt settlement that is better prepared and, therefore, rapidly finalised. It aims at continuing the operation of the business of the debtor during and after the proceedings, without liquidating the debtor. If restructuring proceedings fail, a court order will transform them into bankruptcy proceedings.[6]

Additionally, the Austrian Reorganisation Act[7] also provides – at least in theory – provisions for the restructuring of a company suffering financial difficulties. It is directed at companies that find themselves in an early stage of financial distress. According to the provisions of the Austrian Reorganisation Act, a debt-equity ratio of below 8 per cent and a debt amortisation period of more than 15 years indicate an impending insolvency. However, these provisions have little practical relevance, as the completion of such a procedure requires the consent of all creditors.[8] Nevertheless, the Austrian Reorganisation Act was prominently used during the Hypo Alpe Adria crisis when the Kärntner Landesholding[9] applied for reorganisation proceedings at the competent Regional Court Klagenfurt to take certain legal measures on behalf of the Kärntner Landesholding and Carinthia in its function as supervisor, as well as potential creditors of liabilities facing several claims in connection with the HETA settlement. The respective petition was withdrawn before a decision was made.

Apart from the aforementioned, out-of-court restructuring efforts and negotiations are very common and usually initiated prior to the opening of (in-court) insolvency proceedings, and conducted mostly on an informal basis. However, Austrian law does not know hybrid court-administered restructuring proceedings or insolvency proceedings, such as the German protective shield proceedings (i.e., special pre-insolvency, court-administered proceedings).

5 The Insolvency Law Amendment Act 2010 adapted Austrian insolvency law to the new economic developments and abolished the practically irrelevant composition proceedings. Now, Austrian law provides for certain types of insolvency proceedings that are, however, all governed by the same regulations subject to a few specifics in each case.

6 This is one of the results of uniform insolvency proceedings.

7 Unternehmensreorganisationsgesetz, BGBl. I Nr. 114/1997, as amended.

8 For a comprehensive summary of this 'stand-alone pre-bankruptcy proceeding', see Mohr, Unternehmensreorganisationsgesetz – URG (1997).

9 State Holding Law of Carinithia, LGBl No. 37/1991, as amended.

ii Test for insolvency

Under the Austrian Insolvency Act, the opening of insolvency proceedings requires either illiquidity[10] or over-indebtedness[11] of the debtor.

Illiquidity

The Austrian Insolvency Act does not provide any definition of illiquidity. Case law, however, qualifies illiquidity as a permanent lack of funds that prevents the debtor from discharging debts that have fallen due for repayment. Accordingly, the Austrian Supreme Court assumes illiquidity if the debtor suffers from a permanent lack of sufficient funds. A mere delay in payment does not amount to insolvency. Further, illiquidity is generally indicated if there is a liquidity gap of more than 5 per cent of the obligations of the debtor.[12]

Over-indebtedness

This criterion is assessed by means of a two-step test. Austrian law abstains from relying solely on the balance sheets, but rather also considers the future commercial opportunities and development of the debtor. Over-indebtedness thus means that the liabilities of a company exceed its assets and that the debtor has a negative going concern forecast. According to case law, the necessity to apply this two-step test is triggered by a finding of negative equity based on the balance sheet of the respective company. Meanwhile, the prevailing view[13] is that the assets are assessed based on their liquidation value rather than their going concern value. If the company is in a state of calculated over-indebtedness, the second step of the test must be performed, which has to show a positive going-concern forecast.[14] The going-concern forecast must assess the future solvency and economic viability of the company. A tool commonly used for preparing such a forecast is a standardised template of the Austrian Federal Chamber of Commerce detailing the key elements to be set forth therein as well as the methods to be used for the preparation the forecast.[15] In a nutshell, a business plan must be prepared, showing – with a preponderance of probability – that the company will (1) become and stay solvent within the first six to 12 months following the date of the going-concern forecast, and further, in the long term (i.e., two to three years), and (2) be able to achieve economic viability in the form of a sustainable turn-around.[16] With regard to the required 'preponderance of probability', Austrian literature recently criticised the lack of methods to help substantiate this factor. Thus, new ideas are currently being developed to help assess the preponderance of probability and, consequently, provide sufficient plausibility of the positive going-concern forecast.[17] One of the methods frequently discussed in Austria is the Monte Carlo simulation.

10 Section 66 of the Austrian Insolvency Act.

11 Section 67 of the Austrian Insolvency Act.

12 OGH 3 Ob 9910/w.

13 Burger, Entwicklungslinien der Rechtsprechung zum Überschuldungstatbestand, wbl 1988.

14 Trettnak/Heimel, Eine Prognose, die beim Weiterleben hilft, Der Standard, *Wirtschaft & Recht Journal*, 13 October 2016, 14 et seq.

15 Leitfaden Fortbestehensprognose Gemeinsame Stellungnahme, March 2016.

16 Karollus/Huemer, Die Fortbestehensprognose im Rahmen der Überschuldungsprüfung2 (2006).

17 Birgmayer-Baier/Piringer/Schützinger, Die Plausibilisierung der 'überwiegenden Wahrscheinlichkeit' bei Fortbestehensprognosen durch Monte-Carlo-Simulationen, ZIK 2016/224.

Given that there is a two-step test, the debtor is not obliged to file for insolvency if it provides a positive going-concern forecast, irrespective of whether or not calculated over-indebtedness has been identified.

According to Section 69, Paragraph 2 of the Austrian Insolvency Act, the directors of a company are obliged to file for the opening of insolvency proceedings without undue or culpable delay, but in no case later than 60 days after the insolvency criteria are met pursuant to the Austrian Insolvency Act. In bankruptcy proceedings, the application may either be filed by the debtor itself or by a creditor.[18] In contrast, an application for the opening of restructuring proceedings may only be filed by the debtor. Moreover, sufficient assets to cover the costs of the proceedings are required to open insolvency proceedings.[19] If no sufficient assets are available, the respective insolvency petition is rejected *a limine* and insolvency proceedings are not commenced.[20] As a consequence, the respective company is dissolved *ex officio* owing to the lack of funds and deleted from the Austrian Companies Register.

iii Insolvency and restructuring proceedings

The purpose of the Insolvency Law Amendment Act 2010 in particular was to facilitate the reorganisation of a distressed business.[21] Austrian law thus provides for two types of restructuring proceedings. Both are aimed at ensuring the continuing survival of the debtor by providing for the restructuring of (some of its) financial obligations. A restructuring plan must be submitted simultaneously with the application for the opening of restructuring proceedings.

iv Restructuring proceedings with self-administration

This restructuring regime gives the debtor the chance of retaining the administration of its own assets, especially being able to continue to manage its own company.[22] Generally speaking, the restructuring administrator's approval is required only for matters outside the ordinary course of business. Self-administration requires the debtor to file an application for self-administration supplemented by certain documents and a restructuring plan that provides for a minimum debt repayment quota to the creditors of 30 per cent of registered debt repayable within two years.[23] The restructuring plan in particular must provide: (1) that the rights of secured creditors as well as the rights of creditors holding a security interest in

18 See Section 70 of the Austrian Insolvency Act.

19 With regard to companies, the initial cost of the insolvency proceeding is estimated at €4,000. It is, however, not necessary that this amount is available in cash. Tangible assets as well as claims against creditors are considered sufficient for this purpose. Whether or not there are sufficient assets must be assessed *ex officio*. If there is a lack of sufficient assets, the competent court requests an advance payment from the applicant (debtor or creditor). The obligation to provide such an advance payment relates to the directors as well as shareholders holding a stake of more than 50 per cent.

20 In 2019, a total of 1,974 insolvency proceedings were rejected *a limine* because the petitioning entity did not have sufficient assets. This accounted for approximately 40 per cent of all insolvency proceedings in Austria in 2019.

21 Restructuring proceedings may already be applied for in case of impending illiquidity.

22 The debtor's right to keep administering its assets is governed by strict rules and is only possible for a very brief period (see Sections 169 and 170 of the Austrian Insolvency Act).

23 Section 169 of the Austrian Insolvency Act.

an asset will not be affected;[24] (2) full payment of all priority claims,[25] any monies advanced by a third party to cover the initial costs of the proceedings and the fees of the administrator; and (3) a quota of at least 30 per cent. Furthermore, the debtor must provide evidence in the application that it is able to fund the priority claims for a period of 90 days following the application.

To adopt the restructuring plan, a double majority must be achieved: (1) more than half of the creditors present must vote in favour of the restructuring plan; and (2) creditors holding more than 50 per cent of the total amount of all current creditors' claims must consent. The restructuring plan is only adopted if both majorities are achieved; in such a case, dissenting creditors are overruled and must accept the respective plan.

The restructuring plan must be approved by the creditors within 90 days of the commencement of restructuring proceedings,[26] otherwise the status of self-administration is lost. However, the proceedings as such still continue as restructuring proceedings, with the consequence that the right of administration and disposition passes on to the insolvency administrator.

v Administrated restructuring proceedings

If the debtor submits a restructuring plan, but does not ask for self-administration, proceedings called administrated proceedings are opened. The same is true if the court rejects the debtor's request for self-administration. In the case of administration by a restructuring administrator, the debt repayment quota may be as low as 20 per cent of the registered debt (repayable within two years).[27] Again, acceptance of the restructuring plan requires a double majority. Administrated restructuring proceedings offer the advantage of a longer period of time for preparing (and financing) a restructuring plan. Hence, the majority of restructuring proceedings are being conducted in this form.[28]

vi General principles

Against the backdrop of wanting to facilitate the reorganisation of businesses, the debtor is also able to submit a restructuring plan even if only ordinary bankruptcy proceedings have been initiated.[29] This is also in the creditor's interest, as the recovery quota is somewhat higher compared to ordinary bankruptcy proceedings. If the submitted restructuring plan is admissible the court will issue a formal edict opening the proceedings. The court must set a date for a hearing with regard to the restructuring plan within a period of not more than six weeks. In this hearing the creditors will take a vote on the proposed restructuring plan. In the light of achieving better results for creditors, there is a presumption for keeping the debtor's business in operation. The business itself may only be realised: (1) in case the restructuring

24 Section 149(1) of the Austrian Insolvency Act.

25 Section 150(1) of the Austrian Insolvency Act.

26 Regardless of this 90-day deadline, the court has the right to withdraw the debtor's right to self-administer its company inter alia if the debtor does not seem trustworthy, is not paying the priority claims in time or has made incorrect statements in its submission for the opening of restructuring proceedings.

27 Section 141(1) of the Austrian Insolvency Act.

28 In 2019, 342 administrated restructuring proceedings were initiated compared to 32 restructuring proceedings with self-administration. For further details, see the insolvency statistics for 2019 compiled by the Austrian creditors' representation organisation KSV1870.

29 This can be done until the termination of the proceedings. See Section 140(1) of the Austrian Insolvency Act.

plan is not approved within 90 days; (2) if the restructuring plan no longer corresponds to the common interest of the creditors; or (3) the requirements for carrying on with the business are no longer fulfilled. In practice, the continuation of the operations of the debtor's business is only possible if there are additional sources of financing and any further losses can be avoided.

If the restructuring plan has been approved with the necessary double majority, it is further required to receive the confirmation of the competent insolvency court. The court, however, must not force the creditors to accept the plan. Following the acceptance and confirmation of the restructuring plan, the debtor will (again) be vested with all rights in and to the estate. In certain cases, however, the restructuring plan may also provide for a trustee to be appointed to: (1) supervise the fulfilment of the restructuring plan by the debtor; (2) take over the estate with the mandate to fulfil the restructuring plan; or (3) liquidate the estate.

vii Bankruptcy proceedings

In 2019, a total of 2,670 bankruptcy proceedings were initiated in Austria,[30] making this liquidation proceeding still the most common type of insolvency proceedings in the country. In bankruptcy proceedings, the application might either be filed by the debtor itself or by a creditor. The insolvency court must assess whether the conditions for the opening of the proceedings are fulfilled. To prevent the creditor from using filing for insolvency as leverage, the court must continue with its assessment even if the application has been withdrawn by the creditor, as the withdrawal alone does not suffice to rebut the debtor's illiquidity.

If bankruptcy proceedings are initiated, the insolvency court must in any event appoint an insolvency administrator. The debtor's right to administer and dispose of the assets passes to the insolvency administrator. Any acts taken by the debtor after the opening of insolvency proceedings are legally void with regard to the insolvency creditors.

The opening of insolvency proceedings is tied to a number of substantive legal consequences that are applicable to all kinds of insolvency proceedings. Once insolvency proceedings are commenced, creditors can only enforce their claims using the rules provided for in the proceedings. Court proceedings and litigation with regard to the insolvency estate are suspended *ex lege* with the opening of insolvency proceedings; they cannot be commenced or continued. Creditors are further prohibited from obtaining court-ordered security; executions against claims in insolvency are inadmissible.[31] Further, Austrian insolvency law stipulates a bar on dissolving contracts that are essential for carrying on with the business. Such contracts – within six months of the opening of insolvency proceedings – may only be dissolved for good cause. In this regard, the deterioration of the economic situation of the debtor as well as the debtor's default in fulfilling claims due before opening insolvency proceedings are not considered to be good causes within the meaning of this provision.[32] Further, there are certain limitations on the creditor's ability to use insolvency as grounds for termination of contractual agreements.[33] With regard to bilateral contracts that neither party has completely fulfilled at the time of the opening of the insolvency proceedings, Section 21

30 Insolvency statistics for 2019 compiled by the Austrian creditors' representation organisation KSV1870.

31 See Sections 6 et seq. of the Austrian Insolvency Act.

32 The restriction set forth in Section 25a of the Austrian Insolvency Act does inter alia not apply to claims for payments from loans and employment contracts.

33 Trettnak, Vertragsauflösung bei Insolvenz erleichtert, *Der Standard*, 7 April 2014.

of the Austrian Insolvency Act stipulates that the insolvency administrator may elect to either assume or withdraw from said contract. If the insolvency administrator assumes the contract, any claims of the contractual partner arising out of this contract constitute priority claims.

viii The taking and enforcement of security

The effect of insolvency on security arrangements depends on the exact type of security. The Austrian Insolvency Act distinguishes between the right of separation of assets and the right of separate satisfaction. Generally speaking, both – subject to voidance claims (see below) – are not affected by the opening of insolvency proceedings. In the case of an absolute right *in rem*, such as, in particular, retention of title, the respective secured creditor has a claim of separation to receive the asset, as this asset does not form part of the insolvency estate.[34] Claims relating to an absolute right *in rem* are made against the insolvency administrator. Where the insolvency administrator does not release the asset, an action may be brought against the administrator. With regard to claims for separate satisfaction (such as pledges and other types of security), the creditors are entitled to receive the value of the assets if they are sold by the insolvency administrator. The amount received when selling such assets serves as a pool of separate assets and the respective creditors are entitled to preferential satisfaction from the sale proceeds. If the proceeds are insufficient to satisfy the claim, the creditor must declare the remaining amount as an insolvency claim with the insolvency court.

ix Duties of directors of companies in financial difficulties

With regard to management liability, a distinction needs to be made between a director's internal liability concerning the company and potential external liability to third parties. Under Austrian law, directors are obliged to perform their duties with the care of a prudent and diligent business manager.[35] Directors may be held personally liable if they negligently or wilfully cause damage to the company. Generally speaking, only the company itself, represented by the (remaining) directors, the shareholders or the insolvency administrator, is entitled to claim compensation for such damage. Direct claims may be brought by third parties only in specific cases where the director has violated a law protecting the interest of said third parties.

The violation of the director's duty to file for the opening of insolvency proceedings without undue or culpable delay triggers the liability of directors with regard to all creditors for damage caused by such delay, since the respective provision of the Austrian Insolvency Act qualifies as a protective law to the benefit of the creditors. On one side, the protection covers existing creditors (i.e., creditors whose claims existed prior to the opening of insolvency proceedings). Such creditors are entitled to claim the quota damage, which is defined as the damage resulting from the late application for the opening of an insolvency proceeding.

34 If the discharge of a secured claim could endanger the business carrying on, secured creditors are barred from enforcing their claim prior to the expiry of six months after the restructuring proceedings were opened if such enforcement might endanger the continuation of the debtor's business operations. See Section 11 (2) of the Austrian Insolvency Act.

35 See Section 25 of the Austrian Act on Limited Liability Companies and Section 84 of the Austrian Stock Corporation Act.

Further, also new creditors (who only become creditors after the opening of insolvency proceedings) are protected. In this regard the Austrian Supreme Court has ruled in several cases that (only) the negative interest may be reimbursed.[36]

The Austrian Criminal Code also contains provisions on insolvency proceedings. The most important provisions are: (1) grossly negligent interference with creditors' interests;[37] (2) fraudulent intervention with a creditor's claims;[38] (3) preferential treatment of creditors;[39] and (4) withholding of social security payments.[40]

x Clawback actions

The Austrian Insolvency Act states that transactions that unduly decrease the assets of the debtor prior to the opening of insolvency proceedings may be contested. All clawback provisions aim to secure the debtor's assets prior to the opening of proceedings. In this regard, transactions entered into by the debtor and a third party that discriminate against other creditors may be contested.[41] The general principles for contesting transactions are as follows: (1) there is a transaction; (2) the transaction is entered into prior to the opening of insolvency proceedings; (3) the transaction unduly decreases the assets of the debtor; (4) the transaction discriminates against other creditors; and (5) a specific contesting provision of the Austrian Insolvency Act is fulfilled. The Austrian Insolvency Act provides for the following contesting provisions:

a Intent to discriminate: This provision applies to transactions concluded by the debtor to intentionally discriminate against certain creditors with regard to the others within the past 10 years prior to the opening of insolvency proceedings and if the other contracting party knew of this intent. If the other contracting party should have known of such intent, the period in which to contest the transaction is reduced to two years. Regarding related persons, a statutory law provides for a reversal of the burden of proof.

b Squandering of assets: A transaction falls under this provision if the other contracting party must or should have known that the transaction squanders the company's assets and the transaction was entered into within the last year prior to the opening of insolvency proceedings.

c Dispositions free of charge: This provision relates to transactions that were made free of charge (gifts) and were entered into within the last two years prior to the opening of insolvency proceedings.

d Preferential treatment of creditors: Transactions concluded within the last year preceding the commencement of insolvency proceedings but after material insolvency or the petition for opening insolvency proceedings or in the last 60 days may be challenged if said transaction was objectively preferential or was intended to be preferential and thus discriminates against one creditor with regard to the others.

e Knowledge of illiquidity: A transaction carried out within the last six months preceding the commencement of insolvency proceedings but after material insolvency or the petition for opening insolvency proceedings may be challenged if the other contracting party knew or was negligent in not knowing of the debtor's illiquidity or the filing of

36 OGH 4 Ob 31/07y.

37 Section 159 of the Austrian Criminal Code.

38 Section 156 of the Austrian Criminal Code.

39 Section 158 of the Austrian Criminal Code.

40 Section 153c of the Austrian Criminal Code.

41 See Sections 27 to 32 of the Austrian Insolvency Act.

the petition for opening insolvency proceedings, respectively. Further, it is necessary that the respective legal act either constitutes satisfaction or securing of a creditor or is deemed to be disadvantageous.

The claim contesting a transaction must be filed within one year of the opening of insolvency proceedings by claim or objection by the insolvency administrator. It must seek a declaration of ineffectiveness of the contested transaction.

III RECENT LEGAL DEVELOPMENTS

Importantly, in the course of the covid-19 pandemic, the deadline for filing for insolvency if a business is illiquid within the meaning of the Austrian Insolvency Code has been extended from 60 to 120 days in accordance with Section 69 para. 2a of the Insolvency Code. In addition, the obligation to file for insolvency in the event of over-indebtedness has been suspended until 30 June 2020. Further, a number of legal developments in neighbouring legal areas, such as lease law, finance law and state aid law, have been implemented to secure the liquidity of enterprises and private households during the covid-19 crisis.[42]

In addition to certain specific topics in company insolvency law, such as the possibility for a call for a debt-to-equity swap for creditors, the introduction of specific hybrid preventative proceedings (similar to the German protective shield proceedings), and group insolvency proceedings are being discussed on an ongoing basis. However, the above are very specific topics that are generally found to be applicable in too few instances to merit the creation of a specific profound legal basis in Austria. In addition, similar topics are often also discussed at an international or EU level; for example, group insolvency proceedings (see Section V).

IV SIGNIFICANT TRANSACTIONS, KEY DEVELOPMENTS AND MOST ACTIVE INDUSTRIES

In 2019, the most prominent insolvency case in Austria was that of the SFL Group, which filed for bankruptcy with the Regional Court of Graz on 3 April 2019. According to the Austrian creditors' representation organisation KSV 1870, this was also the biggest insolvency of the year, with liabilities of just €92.1 million. This was considerably greater than Sanochemia AG, a manufacturer of pharmaceutical products, which had debts amounting to €49 million. The reasons for the insolvency of the SFL Group lie in 2017, as restructuring proceedings had already been opened for SFL at that time. The debts were due to the failed Belvedere project. However, the insolvency was avoided by concluding a reorganisation plan. Nevertheless, the SFL Group was not able to fulfil this plan and had to apply for insolvency proceedings again in 2019 due to the high financing costs of the electric vehicle ELI. This time it was filed as bankruptcy proceedings.

The restructuring proceedings of Alufix Folienverarbeitungs GmbH, a supplier of aluminium foil and household articles, was the third biggest insolvency in 2019, with recorded liabilities of €41 million. Less extensive in scope, but nonetheless strongly represented in the media, were the insolvencies of Thomas Cook Austria AG and Charles Vögele Austria GmbH.

42 Refer to https://www.cerhahempel.com/fileadmin/docs/COVID_19/Insolvenzrecht-Update..pdf.

Thomas Cook is a global tour organiser and was the third largest tour provider in Austria. Charles Vögele GmbH was a retail company in the clothing industry, and its insolvency was in the media spotlight mainly because of its large number of employees.

While, historically speaking, the Austrian construction business has been the industry with the greatest number of defaulting companies per year, construction businesses were pushed into second place in the insolvency statistics for 2019. The business-related services industry occupied first place in this unfavourable statistic. This is certainly due to the fact that the business-related services sector is a very large industry, including professions regularly carried on by small companies or natural persons (e.g., insurance brokers, real estate brokers, real estate developers) without a healthy financial base. The third most affected sector in 2019 was the hospitality industry. Likewise, this can be explained by the sheer number of companies operating in this sector – the hospitality industry is Austria's largest industry sector by number of competitors – and the small size of the companies in this sector.

V INTERNATIONAL

On 24 May 2018, a revised version of the European Commission's proposal for a directive on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures[43] was published by the Council of the European Union.[44] The Council's draft is now referred to as the 'Directive on restructuring, insolvency and discharge of debt'. If enacted, the Directive would be the first serious step towards the harmonisation of the domestic insolvency laws of EU Member States. The core element of the proposal sets out rules aimed at ensuring 'that viable enterprises in financial difficulties have access to effective national preventative restructuring frameworks which enable them to continue operating'. The basic idea is to create a pre-insolvency reorganisation procedure in which the debtor negotiates a plan with creditors or select classes of creditors and that – if voted on by the prescribed majority and approved by designated national administrative agencies – becomes binding, even on dissenting parties to the plan. To facilitate negotiations, the debtor would be able to apply for a stay on enforcement action by creditors, and the commencement of insolvency proceedings. Further, the proposal provides for a safe harbour for transactions that are made in connection with the restructuring and are not carried out fraudulently or in bad faith. Protection is awarded in particular to interim financing and new financing that is granted in connection with a restructuring process. The grantors of such financing are afforded protection against voidance action, as well as liability under criminal or civil law, to which they could be exposed under the existing laws of certain Member States. The Council's Amendment affects, in particular, the proposed articles on the access to discharge of debt, the discharge period, the disqualification period for insolvent entrepreneurs and the use of electronic means of communication to increase the efficiency of restructuring and insolvency procedures. Those proposals and recommendations are mostly unknown to Austrian insolvency law. Thus, it remains to be seen how the Austrian legislator will transpose those recommendations into national law.

43 COM(2016) 723 final.

44 9236/18 ADD 1.

VI FUTURE DEVELOPMENTS

Besides the recent covid-19 legislation, there are no substantial insolvency law reforms currently in preparation in Austria. Some minor changes were introduced in 2018 by the Civil Law and Civil Procedure Amendment Act 2019. For example, the amendment clarified that not only natural persons and legal entities but also partnerships can be appointed as administrators in bankruptcy proceedings. Any previous substantial reform projects, such as, the introduction of a debt-equity swap scheme, are currently in abeyance.

The number of insolvencies will largely depend on the development of the global and European economy in view of the covid-19 crises as well as interest rates. A massive impact on the economy from covid-19 is expected in the summer and autumn of 2020 going forward. As a result of the measures taken to contain the spread of the virus, many companies have been closed and corporate rescue packages have been prepared to prevent insolvencies. Nevertheless, the number of insolvencies is expected to increase significantly due to the crisis. To weather the crisis, a number of legislative changes have been made, including those in insolvency law and corresponding regulations in neighbouring fields of law.

The aftermath of the covid-19 crisis will be by far the most difficult challenge of the coming years. In addition, a major challenge in Austria in the coming years will be the handling of non-performing loan portfolios of companies in all industries, as the total amount of outstanding receivables in Austria has reached a historic high in both the private and public sectors. It may be assumed that interest rate increases might also have a significant and negative impact on debt repayment and may flood the Austrian market with NPL portfolios.

Appendix 1

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