1. Restructuring on the rise

The idea of restructuring companies at an early stage has become more widespread in recent decades. There has been a development from an insolvency law designed for liquidating companies to a restructuring law to preserve (viable) companies.

Individual states have taken on a pioneering role in creating a comprehensive regulatory framework for companies in economic difficulties. One of the proceedings that has arguably had the most impact on the restructuring culture as we know it today is the Chapter-11-proceeding.

The European legislator has meanwhile taken up these developments and is attempting to help this restructuring culture to achieve a breakthrough at European level. The European legislator has taken a first step towards a harmonized insolvency law with REGULATION (EU) 2015/848 ("EU Insolvency Regulation"). This directive primarily contains conflict-of-law provisions for cross-border insolvency proceedings. With the Directive (EU) 2019/1023 ("Directive on Restructuring and Insolvency"), the European legislator has taken a further step towards a unified European restructuring and insolvency law: the creation of harmonized (pre-insolvency) restructuring proceedings. The harmonization that has started is being continued with the directive harmonizing certain aspects of insolvency law, which, among other things, provides for substantive harmonization at the line between pre-insolvency restructuring and judicial insolvency proceedings with the pre-pack proceeding.

Due to increasing international interdependencies in restructuring, especially in the restructuring of large companies, there is a multitude of possibilities to restructure according to the respective national law. For this reason, the individual national restructuring regimes are to be presented below using the following criteria, which could become relevant in practice for all stakeholders involved (especially debtors,

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creditors such as customers, suppliers and financial creditors, and also employees):

(i) Application;
(ii) Prerequisites;
(iii) Self-Administration/Restructuring Officer;
(iv) Effects of the opening of the proceedings;
(v) Restructuring tools/Restructuring measures;
(vi) New financing;
(vii) Classes of Creditors;
(viii) Approval;
(ix) Publicity/Confidentiality;
(x) Special forms of restructuring proceedings; and
(xi) Recognition.

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2. Austria

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2.1 Introduction

Austria implemented the Directive on Restructuring and Insolvency into national law with the Restructuring and Insolvency Directive Implementation Act (Restrukturierungs- und Insolvenz-Richtlinie-Umsetzungsgesetz) and the Restructuring Act (Restrukturierungsordnung), which came into force on 17 July 2021.

The Restructuring Act implemented the preventive restructuring framework, which is the core element of the Directive on Restructuring and Insolvency, and therefore provides Austria with pre-insolvency restructuring proceedings. Restructuring proceedings aim at enabling the debtor to avoid insolvency, continue operating and ensure the viability of its company (Sicherstellung der Bestandsfähigkeit).

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Restructuring proceedings are systematically found in the triad of out-of-court restructuring (on the basis of a restructuring agreement), pre-insolvency restructuring proceedings and judicial insolvency proceedings (especially in the form of reorganization proceedings). The parallelism of out-of-court, pre-insolvency and (in part) judicial restructuring is particularly evident in the initial economic situation, the onset of a crisis, and the aim of a successful restructuring and reorganization.

2.2 Application

If the debtor gets into financial difficulties (with a likelihood of insolvency), the debtor is obliged to take appropriate restructuring measures. With the introduction of the restructuring proceedings, a further alternative has been added to the possible restructuring measures. If the debtor does not take the necessary actions to counteract the crisis, civil (and criminal) charges may result.

The restructuring proceedings are available to all debtors (all entrepreneurs including sole proprietors), with the exception of the debtors listed in Section 2 para 1 Restructuring Act such as certain insurance companies, pension funds, credit institutions pursuant to Section 1 para 1 of the Austrian Banking Act, public bodies or natural persons who do not qualify as an entrepreneur.

The right to apply for the initiation of restructuring proceedings is only available to the debtor and not third parties and only the debtor can submit a restructuring plan.

2.3 Prerequisites

The prerequisite for initiating restructuring proceedings is a “likelihood of insolvency”. A “likelihood of insolvency” is the case if the debtor’s business is at risk without restructuring, especially if insolvency is imminent. A “likelihood of insolvency” is presumed if the equity ratio falls below 8 % and the debt repayment period exceeds 15 years.

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In the application for the initiation of restructuring proceedings, the debtor has to state the "likelihood of insolvency" and submit the following documents:

(i) A restructuring plan or a restructuring concept;
(ii) an income and expenditure account for the following 90 days, which shows that sufficient liquid funds are available; and
(iii) the annual financial statements for the last three years.

The application is inadmissible in particular if the restructuring plan or the restructuring concept is not suitable for ensuring the viability of the company or if the debtor is already illiquid (obvious illiquidity).

Restructuring proceedings are furthermore not to be initiated if insolvency proceedings against the debtor's assets are pending or a restructuring plan (Restrukturierungsplan) or a reorganization plan (Sanierungsplan) was confirmed less than seven years ago.

The court competent for the opening of the restructuring proceedings is the same as in insolvency proceedings. The procedural law is largely taken over from the Austrian Insolvency Act.

2.4 Self-Administration/Restructuring Officer

The restructuring proceeding is basically designed as a proceeding with self-administration. The debtor retains full control over its assets and can continue its business and make all decisions of the day-to-day business.

However, the court shall appoint a restructuring officer if

(i) the court grants a moratorium and it is necessary to protect the interests of the creditors;
(ii) confirmation of the restructuring plan requires a cross-class cram-down;
(iii) the debtor or the majority of the creditors, to be calculated according to the amount of the claims; so requests or

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(iv) circumstances are known which indicate that the self-administration will lead to disadvantages for the creditors.

The restructuring officer has to assist the debtor and the creditors in the negotiations of a restructuring plan, monitor the debtor and report regularly to the court.

Notwithstanding this, the court may appoint a restructuring officer to deal with individual matters: to consider whether an interim financing or transaction is to be approved or whether new financing is suitable for the implementation of the restructuring plan.

2.5 Effects of the Opening of the Proceedings

At the request of the debtor, the court has to order a stay of execution proceedings to support the negotiations on a restructuring plan. The stay of execution proceedings may only be approved for the period necessary to achieve the restructuring goal. The duration may be three months (or six months if significant progress has been made in the negotiations on the restructuring plan).

During the stay of execution proceedings:

(i) The obligation of the debtor to apply for the opening of insolvency proceedings due to over-indebtedness is suspended;
(ii) correspondingly, no decision is to be taken on an application by a creditor to open insolvency proceedings based on over-indebtedness;
(iii) insolvency proceedings based on illiquidity are not to be opened if, taking into account the circumstances of the case, the opening is not in the general interest of the creditors. In the restructuring proceedings, the court has to decide whether there is a general interest; and
(iv) the liability for delaying insolvency on the basis of over-indebtedness is suspended.

Creditors who are subject to the stay of enforcement may not, with regard to claims that arose prior to the stay of enforcement and based

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solely on the fact that the claims have not been paid by the debtor, refuse performance under material contracts or make these contracts prematurely due, terminate or otherwise change to the detriment of the debtor.

2.6 Restructuring Tools/Restructuring Measures

In restructuring proceedings, the debtor must submit to the restructuring court a restructuring plan.

The restructuring plan must contain

(i) a description of the debtor's economic situation, in particular its assets and liabilities as well as a valuation of the company going-concern and gone-concern;

(ii) the affected creditors (including classification into creditor classes) as well as the unaffected creditors together with a factual justification for their inclusion/non-inclusion in the restructuring plan;

(iii) the proposed restructuring measures and their duration, the reduction and deferral of claims as well as any new financial support;

(iv) a conditional going-concern prognosis of the company's continued existence and a description of the necessary preconditions for the success of the plan; and

(v) an explanation why restructuring proceedings under the Restructuring Act are in the best interest of the creditors compared to insolvency proceedings.

Restructuring measures may include any measure aimed at restructuring the debtor's business, which involves changing the composition, conditions or structure of the assets and liabilities or any other part of the capital structure of the debtor's business, such as the sale of assets or business units and the entire disposal of the company and any necessary operational measures or a combination of these elements. By means of a majority decision (against the will of

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the dissenting minority), however, only a debt-write off (haircut) is possible.

If the debtor has not prepared a restructuring plan at the time when the restructuring proceedings are initiated, he can submit with the application for the initiation of restructuring proceedings a restructuring concept as a first step. A restructuring concept must contain at least the planned restructuring measures and a list of the debtor's assets and liabilities, including a valuation of the assets at the time the application for the initiation of the restructuring process is made. The debtor, as the next step, has to submit a restructuring plan within a period of 60 days.

2.7 New Financing

The Restructuring Act differentiates between "new financing" and "interim financing". "New financing" means financial measures taken to implement a restructuring plan, whereas "interim financing" are financial measures necessary to continue the day-to-day business during the negotiations of a restructuring plan. Both new financing and interim financing are protected from voidance claims by Section 36a and Section 36b of the Austrian Insolvency Act.

2.8 Classes of Creditors

In restructuring proceedings under the Restructuring Act claims are classified as follows:

(i) secured claims;
(ii) unsecured claims;
(iii) bondholders;
(iv) unsecured claims of vulnerable creditors; and
(v) subordinated claims.

Claims of employees, claims arising after the initiation of the restructuring proceeding, fines for criminal acts of any kind and legal maintenance claims are generally excluded from restructuring proceedings.

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2.9 Approval

The restructuring plan needs to be adopted by the affected creditors and confirmed by court; then it is legally binding and the debtor is relieved of the obligation to pay to the creditors the amount exceeding the quota.

The approval of a suggested restructuring plan by the affected creditors is subject to a "double majority requirement" in the restructuring plan hearing (i.e., majority of creditors present at the hearing approves the plan and the total sum of claims of the approving creditors amounts to more than 50 % of the total sum of the claims of the creditors present at the hearing).

The court has to examine the completeness of the information contained in the restructuring plan as well as the appropriateness of the formation of the classes of creditors and the selection of the creditors affected as well as

(i) whether the restructuring plan was approved by the creditors with the required majorities;

(ii) whether the principle of equal treatment of creditors (in the respective class) is observed;

(iii) the proper notification of the affected creditors;

(iv) whether the agreed new financing is necessary for the implementation of the restructuring plan and does not unduly impede the interests of the creditors.

The restructuring plan is binding on the parties if it is confirmed by court (Section 34 para 1 Restructuring Act).

Once the restructuring plan is approved, confirmed and legally binding, the debtor is relieved of his obligation to pay the creditors the amount exceeding the quota as provided in the restructuring plan. The effects of the legally binding restructuring plan also apply to those creditors that did not approve the restructuring plan or who did not participate at all.

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If a debtor defaults on the payment of a quota according to the restructuring plan, the respective creditor's claim comes into effect again, but only proportional to the unpaid quota.

2.10 Publicity/Confidentiality

In principle, restructuring proceedings are not public.

The only exception is if the debtor applies for public disclosure pursuant to Section 44 Restructuring Act (European Restructuring proceedings).

2.11 Special Forms of Restructuring Proceedings

The Restructuring Act provides pursuant to Section 45 a special form of a restructuring process if only financial creditors are involved. The debtor needs a restructuring agreement with the same content as a restructuring plan, which needs to be signed by the financial creditors before opening of the proceedings. The restructuring agreement is adopted, provided that at least 75 % of the total sum of the claims of the creditors included agree.

2.12 Recognition

Restructuring proceedings are not listed in Annex A to the EU Insolvency Regulation and are therefore not automatically recognized under this Regulation in other countries. The recognition of restructuring proceedings is based on national Austrian law.

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