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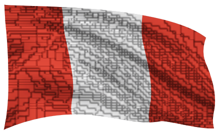
The implementation of the Directive in Austria - New opportunities for companies?



SUSANNE FRUHSTORFER
Partner, Taylor Wessing, Vienna, Austria

> *Whether the new preventive restructuring procedure will be accepted in practice remains to be seen*

Austria implemented the Directive on Restructuring and Insolvency (the Directive) on time on 17 July 2021.

The Directive's requirements were implemented in the Restructuring Regulation (*Restrukturierungsordnung*). Though not the first time Austria has introduced a preventive procedure, the "company reorganisation procedure" introduced in 1998 in the Company Reorganisation Act (*Unternehmensreorganisationsgesetz*) has rarely been used (c. 5 times). This is due to various disadvantages, such as the lack of enforcement, insolvency protection and the requirement that the company must not be insolvent. Moreover, entrepreneurs have tended to file too late for insolvency, rendering this procedure an insufficient incentive.

The new Restructuring Regulation now provides for a stay of enforcement on application by the debtor under certain conditions. The "likelihood of insolvency" in the sense of Article 4 of the Directive is defined as a threat to the company's existence, in particular if illiquidity is imminent or if certain key figures are not met (equity ratio <8%, notional debt repayment period >15 years). Restructuring procedures are not open to already illiquid companies, though significant over-indebtedness need not be detrimental, provided the proposed restructuring plan eliminates this.

The debtor retains self-administration powers. However, if necessary in the interest of the creditors or if the approval of interim/new financing is required, a restructuring trustee will be appointed to assist the debtor. In practice, it is assumed that insolvency courts will always appoint a restructuring trustee.

New to the Austrian insolvency culture is the creation of creditor classes and the possibility of a **cross-class cram-down**. The following creditor classes are in the legislation: secured creditors, unsecured creditors, bondholders, creditors in need of special protection (i.e. with claims of less than €10,000) and subordinated creditors. Voting within classes will require a majority of headcount and 75% majority of capital.

If approval of the restructuring cannot be obtained in all classes, a rejecting class may be outvoted, provided that the majority of the classes, including the secured creditors, have approved the restructuring and that rejecting classes of creditors are treated equally to other classes of the same rank and better than lower ranked classes. Nonetheless, rejecting creditors can apply for an examination of whether the criterion of "**best interest of creditors**" has been met, i.e. whether they have been placed by the restructuring plan in the same position as in the best possible scenario of insolvency proceedings.

On the occasion of the implementation of the Directive, Austria has taken the opportunity to create a **type of pre-pack** in the form of the **simplified restructuring procedure**. In this procedure, only financial creditors can be affected, although a broad interpretation is suggested, to include tax and social security granting payment deferrals due to the Covid-19 pandemic. As a pre-condition, the agreement of the affected creditors with declarations of consent of at least 75% in amount of the claims must be submitted to court together with an expert opinion stating the restructuring plan is compatible with the best interest of creditors. If all requirements are met, the court can confirm the restructuring plan without any publicity. The disadvantage of this simplified restructuring procedure is that, in the absence of publicity, recognition under the European Insolvency Regulation seems unlikely.

Outlook

Whether the new preventive restructuring procedure will be accepted in practice remains to be seen. It can be assumed that it will only be used by large companies due to the complexity, necessary preparation and associated costs. The possibility of cross-class cram-downs can help to ensure that rejecting creditors cannot block meaningful restructuring measures.