

Increase in debtor in possession proceedings in Austria - still no preventive restructuring proceedings



Although Austria introduced a new judicial procedure for preventive restructuring in July 2021 by way of implementation of Directive (EU) 2019/1023, there has not been a single such procedure under the new Restructuring Code (*Restrukturierungsordnung*) to date.

However, it has recently been noted that the number of restructuring proceedings with self-administration has been on the rise. One reason for the unexpected increase could be that larger companies have considered preventive restructuring proceedings, but ultimately decided against the new procedure, due to the even greater preparatory effort required in comparison to self-administered restructuring proceedings. In addition, the debtor must not yet be insolvent (illiquid) and this requirement is probably the greatest obstacle for preventive restructuring proceedings. Furthermore, in contrast to preventive restructuring proceedings, restructuring proceedings, whether with or without self-administration, offer the possibility of cancelling uneconomic contracts.

Restructuring proceedings with self-administration were introduced in Austria by the major amendment to insolvency law in 2010. The restructuring procedure with self-administration essentially corresponds to the old settlement code (*Ausgleichsordnung*), the biggest difference being the lower minimum quota that must be offered to unsecured insolvency creditors. Since 2010, this quota is 30% within two years, compared to 40% previously.

Just like the proceedings under the previous settlement code, the restructuring procedure

with self-administration has been little accepted in practice. Nonetheless, as noted, this has changed in recent months, with the number of restructuring proceedings with self-administration constantly increasing, including the largest proceedings ever opened in Austria in terms of liabilities.

So what are the advantages and disadvantages of debtor in possession proceedings?

In particular, well-known companies prefer self-administration due to the perceived lack of stigma. Self-administration however does not mean that debtors can do whatever they want. During proceedings, they are subject to the supervision of a restructuring administrator who must authorise all legal acts that are not part of normal business operations. The restructuring administrator is also authorised to carry out certain activities such as proving insolvency claims and take action to avoid legal acts.

One of the main advantages is the short duration of the proceedings; restructuring proceedings with self-administration can be concluded and legally binding within four months. However, this is also the main disadvantage of the procedure. Self-administration must be withdrawn, if the restructuring plan is not accepted by the creditors with the required majorities within 90 days of the proceedings being opened. However, the flexibility of the Austrian Insolvency Code allows the proceedings to be continued as restructuring proceedings without self-administration or bankruptcy proceedings after self-administration has been withdrawn.

Another advantage of the procedure is the possibility of

carrying out rationalisation of the workforce through employee redundancies within the first month of proceedings being opened. However, the restructuring procedure with self-administration is not suitable for a company sale in the form of an asset deal because, in contrast to other insolvency proceedings, the purchaser of the company must adopt existing employment relationships.

To be completed within the stipulated short timeframe, restructuring proceedings with self-administration require extremely thorough and consequently costly preparation. It is also necessary to explain which measures and in what period it will be possible to fulfil the quota offered in the restructuring plan. If this is not possible or if the quota offered does not appear appropriate according to the restructuring administrator's report, the creditors will not agree. The prerequisite for the acceptance of the restructuring plan is the approval of half of the creditors present and half of the claims represented by these creditors.

It remains to be seen whether the trend towards an increase in self-administered restructuring procedures will continue or whether the preventive restructuring proceeding created in 2021 will be accepted in practice after all. ■



DR. SUSANNE FRUHSTORFER
Partner, TaylorWessing,
Vienna, Austria



Well-known companies prefer self-administration due to the perceived lack of stigma

