

AUSTRIA

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I INSOLVENCY LAW, POLICY AND PROCEDURE

i Statutory framework and substantive law

Introduction

Insolvency law in Austria is primarily regulated by the Austrian Insolvency Act, which entered into force in 2010. For businesses, the Austrian insolvency regime provides for the following types of insolvency proceedings:

- a* bankruptcy proceedings;
- b* restructuring proceedings where a bankruptcy administrator is appointed; and
- c* restructuring proceedings where the debtor retains the right to self-administration.²

While bankruptcy proceedings usually lead to a realisation or winding up of the debtor's estate, restructuring proceedings aim at the continuation of the debtor's business and the discharge of debts.

ii Policy

General

In general, the Austrian insolvency regime follows the principle of uniform and proportionate satisfaction of (unsecured) creditors. Likewise, debt-ridden businesses have the opportunity to engage in restructuring measures.

To enhance the chances of success of restructuring efforts, Austrian law provides various options for debtors:

Ahead of insolvency proceedings, solvent debtors may apply for reorganisation under the Business Reorganisation Act (Reorganisation Act). The Reorganisation Act aims at enabling otherwise economically stable businesses facing temporary financial difficulties to continue their business activities through a reorganisation process. However, the procedure set out in the Reorganisation Act has only been used in very few cases since its introduction.

After bankruptcy proceedings have been initiated, insolvent debtors may submit restructuring plans if certain preconditions are met. Additionally, Austrian insolvency law provides for specific safeguards that allow the debtor to continue pre-insolvency contractual

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2 For natural persons, additional types of proceedings are applicable: (1) insolvency proceedings applicable to natural persons; and (2) garnishment applicable to natural persons. This article will focus on the applicable regime for businesses only.

relationships, including the possibility for the administrator to apply for deferral of evictions regarding business premises or restrictions concerning contractual termination rights of business partners.

As a principle, bankruptcy proceedings that lead to a realisation or winding up of the debtor's estate should be considered an instrument of last resort.

Directive (EU) 2019/1023 and the Restructuring and Insolvency Directive Implementation Act

On 20 June 2019, the European Parliament and the Council of the European Union issued a directive on restructuring and insolvency (Directive [EU] 2019/1023). The Directive aims at providing restructuring tools available across Europe to enable debtors in financial distress to solve their problems at an early stage in order to avoid formal insolvency proceedings. Member States must implement the Directive by 17 July 2021.

On 22 February 2021, the ministerial draft of the Restructuring and Insolvency Directive Implementation Act was published. It includes a new Restructuring Code and amendments to the Austrian Insolvency Act (providing for facilitation of debt relief for private individuals and individual entrepreneurs within three years and – in relation to restructuring proceedings under the Restructuring Code – gives privileges to new or interim financing as well as other transactions under certain conditions and to provide (limited) protection against rescission in subsequent insolvency proceedings). After an evaluation procedure involving various stakeholders, the Austrian government on 16 June 2021 submitted an (updated) Restructuring and Insolvency Directive Implementation Act to the Austrian parliament; it passed the Austrian parliament in July 2021 and entered into force on 17 July 2021.

The Restructuring Code is basically applicable to all entrepreneurs excluding the financial sector. It should give the debtors the opportunity to achieve a turnaround by means of a restructuring plan during a non-insolvency procedure while generally retaining self-administration. The procedure may only be initiated upon application of the debtor and requires a likelihood of insolvency of the debtor. The application must be accompanied by various items of documentation, in particular by a restructuring concept, which must be expanded to a restructuring plan within 60 days.

The restructuring plan should regulate the reorganisation measures and contributions of the creditors concerned (notably, claims of employees are excluded; they remain unaffected by the restructuring). The restructuring plan is voted on in creditor classes; a double majority (head and claim majority) within each creditor class is required for acceptance. If the majorities are not reached, the approval of the dissenting creditor classes can be replaced by a (court-approved) cross-class cramdown (including minority protection). If only financial creditors are affected, of whom a large majority has already approved the restructuring plan, the debtor can apply for a simplified procedure.

iii Main effects of the opening of insolvency proceedings

General

Once insolvency proceedings are opened, the debtor loses its right to dispose assets that belong to the estate. Any obligations of the debtor that are not due at the time of the opening of the insolvency proceedings are accelerated and assumed to be due.

Creditors may not initiate or continue legal actions – specifically enforcement actions – against the debtor. Exceptions are (1) legal proceedings that do not affect the debtor's estate; (2) proceedings relating to creditors with a right to segregate assets and creditors with

existing rights to separate satisfaction (see below); (3) proceedings relating to claims disputed by the administrator; and (4) legal proceedings resulting from transactions concluded after the opening of the insolvency proceedings. In the first exceptional case, legal action may be brought or continued against the debtor; in all other cases, the plaintiff must bring the action against the debtor's estate represented by the administrator.

Contracts

The opening of insolvency proceedings does not terminate existing contracts automatically. Yet, the administrator may choose whether or not to fulfil contracts that (1) were agreed to between the contractual parties prior to the opening of insolvency proceedings; and (2) were not fully satisfied by both parties prior to the opening of the insolvency proceedings. The other contractual party may request the court to set a deadline for the administrator to make this decision. Where the administrator does not respond in timely manner, contracts are deemed terminated. If the administrator chooses to terminate the contract, the other contracting party may file a claim for damages resulting from such termination as a creditor in the insolvency proceedings, in which case he or she will receive the respective quota.

Contractual agreements that grant one contractual party the right to terminate the agreement in the event of insolvency are void.³

Contracts that are potentially necessary for the continuation of the debtor's business may not be terminated during a six-month period following the opening of insolvency proceedings, unless there is a compelling reason to do so. In this context, the mere worsening of the debtor's economic situation is not sufficient, and neither is late payment by the debtor of receivables that have become due and payable prior to the opening of insolvency proceedings. An exception is made only if the fulfilment of the contract would be detrimental to the economic situation of the creditor, with respect to employment agreements (to which a special termination regime applies) and credit agreements.

Priority of creditors' claims

Austrian law distinguishes between secured and unsecured creditors.

Secured creditors

Secured creditors are creditors (1) with a right to segregate assets; and (2) creditors with existing rights to separate satisfaction.

A creditor's right to segregate assets usually refers to assets in the creditor's property that are in the possession of the debtor. Creditors with a right to segregate assets are generally not affected by insolvency proceedings. The rightful owner of the property may bring an action against the administrator, respectively the debtor, (in restructuring proceedings where the debtor retains the right to self-administration – see below) for the return of its property.

A creditor's right to separate satisfaction concerns creditor security rights over assets of the debtor. Creditors with a right to separate satisfaction only take part as insolvency creditors (unsecured creditors – see below) to the extent their claims exceed the value of the secured assets.

Secured creditors may be barred by the court from enforcing their rights in respect of security for a maximum period of six months (as determined by the court) following the

³ Exceptions apply for certain financial instruments such as derivative contracts.

opening of insolvency proceedings, if such enforcement would jeopardise the continuation of the debtor's business and provided that such prohibition would not cause severe economic damage to the secured creditors.

Unsecured creditors

Unsecured creditors' claims must be filed as insolvency claims in order to take part in the insolvency proceedings. In this context, obligations of the debtor that are not due at the time of commencement of the insolvency proceedings are deemed accelerated and due for the purpose of the proceedings.

All unsecured creditors, whose claims are recognised, receive the same pro rata quota of their insolvency claim. As a class, they are subordinate to administrative expenses, consisting, generally, of the costs of the proceedings (including the remuneration and reimbursement awarded to the creditors' committee and the special creditors' associations), the fees of the administrator, and claims for labour, services and goods furnished to the estate after the commencement of the proceedings, and the rights of secured creditors to the extent the respective claims are secured by assets subject to security interests.

iv Insolvency procedures

Bankruptcy proceedings

Bankruptcy proceedings usually lead to a realisation or winding up of the debtor's estate. The proceeds remaining after the satisfaction of administrative expenses and secured claims (see above) are subsequently distributed among the (unsecured) creditors on a pro rata basis.

In bankruptcy proceedings, an administrator is appointed by the court. At the beginning of bankruptcy proceedings, the administrator provides an overview of the debtor's assets and establishes whether the debtor's business can be continued. Generally, Austrian insolvency law follows the concept of reorganisation instead of the realisation of the debtor's assets. Only if the continuation of the debtor's business would increase the loss of creditors, the debtor's business is closed and its estate liquidated under the supervision of the court. After the proceeds of such liquidation have been distributed, the bankruptcy proceedings are terminated by court order.

In general, the termination of bankruptcy proceedings does not discharge the debtor of debts that have not been satisfied in full. Therefore, creditors whose claims have been recognised by the bankruptcy administrator, or after being disputed by the administrator, and confirmed by a court judgment, may bring actions against the debtor regarding the unsettled portion of their claims even after bankruptcy proceedings have been terminated. However, with corporate debtors, bankruptcy will eventually result in the ultimate dissolution of the company. Therefore, claims against the debtor for payment of outstanding amounts are usually prevented.

The bankrupt debtor may also apply for a restructuring scheme in the course of bankruptcy proceedings. In the application, the debtor has to submit a proposal for the satisfaction of at least 20 per cent of all insolvency debts within a maximum period of two years.⁴ Administrative expenses have to be paid in full and the rights of secured creditors remain in principle unaffected. Usually, such proposal presumes that the debtor's business

4 Section 141 Austrian Insolvency Act.

can be continued. After a preliminary formal examination by the court,⁵ the creditors decide at a creditors' hearing on the acceptance of the debtor's proposal. In this regard a quorum of both a simple majority of the creditors attending the hearing and a simple majority based on the value of their claims is required.

The quota of 20 per cent is a statutory minimum requirement for any restructuring scheme and needs to be proportionate to the debtor's actual economic and financial standing. Depending on the circumstances of the case, it may be necessary to offer a proposal with a higher quota or shorter payment period in order to obtain the creditors' acceptance. In practice, creditors usually request a payment plan that sets forth instalments, starting with a first payment immediately after the acceptance of the restructuring scheme.

Following the creditors' acceptance, the court confirms the restructuring scheme in case no grounds for denial are met.⁶ Once the debtor has fulfilled the restructuring scheme, it is discharged of its debts. Completed restructuring schemes are also effective against creditors who did not accept the proposal – respectively those who did not take part in the insolvency proceedings.

Restructuring proceedings (under the Austrian Insolvency Act)

In addition to applying for a restructuring scheme during already initiated bankruptcy proceedings, debtors may also apply for the opening of restructuring proceedings (as an alternative to bankruptcy proceedings). In this context, only the debtor may file for the opening of restructuring proceedings (a creditor's application for restructuring proceedings is not possible). There are two types of restructuring proceedings available: (1) a procedure where a bankruptcy administrator is appointed; and (2) a procedure where the debtor retains the right to self-administration.

In both cases, the application needs to contain a restructuring proposal, with a minimum quota of 20 per cent of all debts needing to be satisfied within a period of two years in the first (i.e., no self-administration) and of 30 per cent in the second case (i.e., self-administration). In the course of restructuring proceedings, the debtor's business may only be liquidated if the debtor's restructuring proposal has not been accepted by the creditors within 90 days of the opening of the proceedings.

In restructuring proceedings where a bankruptcy administrator is appointed, the debtor loses control over its business and the court-appointed insolvency administrator is in charge of all decisions. The procedure follows the process for restructuring schemes as described above. If the restructuring proposal is not accepted by the creditors, the court will reclassify and continue the proceedings as bankruptcy proceedings.⁷

In the case of restructuring proceedings where the debtor retains the right to self-administration, the debtor retains legal capacity to act and control over the business with supervision of a court-appointed restructuring administrator. Certain material actions and transactions require the consent of a restructuring administrator or the court. The right to self-administration may be withdrawn; that is, if action by the debtor could

5 Section 141 Austrian Insolvency Act. An application for a restructuring scheme is dismissed, inter alia, in the case of a final conviction of the debtor – or, in the case of a corporate debtor, (one of) its managing directors – for a fraudulent bankruptcy offence (Section 156 Austrian Criminal Code).

6 Section 152a Austrian Insolvency Act. A reason for denial is the non-payment of priority claims or of the bankruptcy administrator's compensation.

7 Section 167 Austrian Insolvency Act.

lead to a disadvantage for creditors. In this instance, the restructuring proceedings would again be reclassified and continued as restructuring proceedings without a debtor's right to self-administration.⁸ Proceedings would follow the process for restructuring schemes (see above).

v Starting proceedings

While a petition to open bankruptcy proceedings may be filed either by the debtor or a creditor, a petition for the commencement of restructuring proceedings may only be filed by the debtor.

In general, the management of a corporate entity is required to file for bankruptcy proceedings immediately, without culpable delay, as soon as it becomes apparent that the company is illiquid (liquidity gap of more than 5 per cent) or over-indebted (liabilities exceed value of assets based on a liquidation status and no positive continuation prognosis exists), but at the latest within 60 days of becoming insolvent (in exceptional cases, such as the covid-19 pandemic, this period is prolonged to 120 days).

Where a creditor attempts to put the debtor into (involuntary) bankruptcy, the creditor must provide evidence that the following statutory requirements are met:

- a* Existence of a claim against the debtor: The creditor's claim must be sufficiently specified and evidenced. In general, Austrian law does not require a final and enforceable judgment. Austrian legal practice, however, shows that there is the risk that a creditor's application, which is not based on a final and enforceable judgment, might be successfully objected to by the debtor.
- b* Insolvency of the debtor: The creditor must show that the debtor is insolvent – that is, over-indebted or illiquid.

The creditor that applies for the opening of insolvency proceedings bears the burden of proof that the requirements set forth above are met. Austrian insolvency courts take a strict approach in this regard. In cases of over-indebtedness, it can be especially difficult for the creditor to convince the court that the debtor is in fact insolvent, as the creditor often does not have substantial information on a debtor's financials. Therefore, creditor's petitions to open insolvency proceedings are in most cases based on the ground of illiquidity.

In the case of an application by the debtor, the court generally decides within a few days whether insolvency proceedings are opened. An application filed by a creditor will be served on the debtor and the debtor is given the opportunity to raise objections. In most cases, the insolvency court also schedules an oral hearing to give the debtor's managing directors an opportunity to be heard. The debtor may also file a restructuring plan in order to achieve that restructuring proceedings are opened instead of bankruptcy proceedings.

Insolvency proceedings are commenced by court decision if the court concludes that (1) the criteria for insolvency are fulfilled; and (2) the debtor's estate comprises sufficient assets to cover the initial costs of the insolvency proceedings (usually a deposit of €4,000 is required).

⁸ Section 170 Austrian Insolvency Act.

Court decisions on the opening or denying of insolvency proceedings can be appealed by any party whose rights are adversely affected. Appeals must be filed within a time period of 14 days following the publication of the court decision on the insolvency database.

vi Control of insolvency proceedings

Insolvency proceedings are generally controlled by the administrator and the competent insolvency court. In addition, creditors have certain rights of control:

Insolvency court

The insolvency court decides on the opening and termination of insolvency proceedings and takes all main decisions during ongoing proceedings. The insolvency court appoints the administrator and establishes – if provided for – a creditor’s committee. Certain actions in the insolvency proceedings are subject to the court’s approval – that is, the sale of the debtor’s business or the sale of a substantial portion of the debtor’s assets.

Insolvency administrator

The insolvency administrator is appointed by the court and has a central oversight and management function in insolvency proceedings. Administrators primarily represent the creditor’s interests.

Usually, insolvency administrators are chosen from a list of potential appointees.⁹ Most of the administrators appointed in Austria are attorneys.

The duties of a bankruptcy administrator – in both bankruptcy and restructuring proceedings – inter alia are:

- a* assessment of the debtor’s economic situation and determining reasons that led to the debtor’s insolvency;
- b* the preparation of an inventory, listing the debtor’s assets and liabilities as of the date of the commencement of the insolvency proceedings; and
- c* representation in all legal disputes concerning the debtor’s estate

In bankruptcy proceedings, a bankruptcy administrator must additionally:

- a* establish whether debtor’s business can be continued or, if applicable, reopened (at least for a limited period of time);
- b* assess whether a restructuring scheme is possible and would be in the common interest of the creditors; and
- c* liquidate the debtor’s estate.

Creditors

Creditors also have certain rights of control in insolvency proceedings as the creditors’ committee needs to approve certain actions taken by the administrator. A creditor’s committee is, however, not established in all insolvency proceedings but rather in complex and large-scale cases.

⁹ The list of potential appointees is posted on the following website of the Federal Ministry of Justice: www.insolvenzverwalter.justiz.gv.at.

vii Measures taken by the legislature in the context of the covid-19 crisis

The efforts by the Austrian legislature to contain the global covid-19 pandemic brought some changes to the Austrian insolvency and restructuring regime. The Austrian legislator *inter alia* enacted the following measures:¹⁰

- a* An extended period to file for insolvency is applicable: According to the Austrian Insolvency Act, a debtor generally obliged to file for insolvency without undue delay, but at the latest within 60 days from the date grounds for insolvency are established (illiquidity or over-indebtedness (see above)). In the event of natural disasters, such as earthquakes, floods, storms or avalanches, Austrian law provides for an extended filing period of 120 days. Through the Austrian Second Covid-19 Act, it was made clear by the legislator that the already existing rules providing for this extended 120-day period shall also apply in the event of an epidemic, respectively a pandemic.
- b* Over-indebtedness occurring after 1 March 2020 was suspended as a ground to file for insolvency during the period from 1 March 2020 to 30 June 2021. Also, creditors were not able to file for insolvency of the debtor based on over-indebtedness during that time. If there is over-indebtedness on 30 June 2021, the debtor is obliged to file for insolvency without undue delay, but at the latest within 60 days of the end of 30 June 2021 or 120 days after the occurrence of over-indebtedness, whichever period ends later.

viii Special regimes

Under Austrian law, special insolvency regimes exist for banks,¹¹ insurance companies,¹² investment companies¹³ and cooperatives:¹⁴

For banks, special provisions on the recovery and resolution apply (Act on the Recovery and Resolution of Banks). Banks are under the obligation to implement appropriate conditions and procedures, in the form of restructuring plans, to ensure that restructuring measures can be taken in a timely manner in a crisis scenario. Such restructuring plans have to be renewed at least once a year and need to be submitted Financial Market Authority (FMA).

Insurance companies, banks and investment companies cannot file for opening of bankruptcy proceedings themselves but have to notify the FMA of their illiquidity or over-indebtedness. The FMA is subsequently obliged either to file for opening of bankruptcy proceedings or, if applicable, for placement under court-supervised management for a maximum period of one year.¹⁵

Austrian law does not provide for a procedure on insolvency of a group of companies. Instead each group entity has to be evaluated individually. Consequently, individual insolvency proceedings have to be opened with regard to each group entity and possibly different administrators are appointed.

10 Federal Law Gazette I No. 16/2020, latest amendment Federal Law Gazette I No. 106/2021; Federal Law Gazette I No. 24/2020, latest amendment Federal Law Gazette I No. 106/2021.

11 Section 81 et seqq. Austrian Banking Act.

12 Section 307 et seqq. Austrian Insurance Supervision Act 2016.

13 Section 77 et seqq. Austrian Securities Supervision Act 2018.

14 Austrian Cooperatives Insolvency Act.

15 Banks and investment companies are also entitled to file for placement under court-supervised management themselves.

ix Cross-border issues

The relationship with respect to EU Member States (except Denmark, to which the Regulation does not apply) is governed by the Regulation (EU) 2015/848 (Insolvency Regulation).¹⁶ The relationship with all other countries (i.e., non-EU countries and Denmark) is solely regulated by the Austrian Insolvency Act.

Insolvency proceedings within the application of the Insolvency Regulation are opened in the Member State where the debtor has its centre of main interest (COMI). Such proceedings embrace the debtor's asset in all other EU Member States (except Denmark) and are recognised in the other Member States.

The opening of foreign insolvency proceedings other than those governed by the Insolvency Regulation does not prevent the commencement of (additional) Austrian insolvency proceedings. Generally, foreign insolvency proceedings in respect of non-EU countries (and Denmark) are recognised if:

- a* the centre of main interests of the insolvent debtor is located abroad;
- b* the foreign insolvency proceedings are, in principle, comparable to Austrian insolvency proceedings; and
- c* the recognition does not result in a violation of Austrian ordre public.

If such insolvency proceedings are recognised, a foreign administrator has the same powers in Austria as in his or her own jurisdiction. However, in exercising his or her powers, the administrator must obey Austrian law. In particular, employment law matters (e.g., notification duties) need to be taken into account.

Foreign insolvency proceedings are published on the online insolvency database of the Ministry of Justice (<http://www.edikte.justiz.gv.at/>).

II INSOLVENCY METRICS

i Metrics for 2020

In 2020, corporate insolvencies decreased significantly. A total of 3,304 insolvent companies were registered in 2020, which is less than 39.5 per cent compared to the 2019 figure. The number of proceedings opened dropped by 40.7 per cent to 1,804 cases, while the number of proceedings not opened due to lack of assets fell by 37.7 per cent to 1,230. Overall, 16,300 employees (compared to 2019, this number dropped by only 5.2 per cent) were affected by insolvencies of their employers. The estimated insolvency debts increased considerably by 80.1 per cent to €3.057 billion. In 29 cases, the debt was more than €10 million.

An analysis of sectors most affected by insolvencies in Austria traditionally ranks the top three sectors by cases and by liabilities. Over the years and also due to the covid-19 crisis, there have been hardly any surprises or changes, because of the specific nature of the respective businesses (capital intensity) and the total number of companies active in these sectors.

The hotel and restaurant sector is traditionally among the top three sectors of insolvency cases. The same is true for the construction industry. Yet, as in previous years, the

16 For insolvency proceedings opened before 26 July 2017, the Insolvency Regulation 1346/2000 continues to apply.

‘business-related services’ sector, which includes all service companies, real estate businesses and holding companies, occupied both the highest number of bankruptcies and the highest number of liabilities in 2020.¹⁷

ii Metrics for the first and second quarters of 2021

The analysis of corporate insolvencies for the first half of 2021 resembles a paradox. The current figures on corporate insolvencies show a total drop of roughly 45 per cent (including proceedings that have not been opened due to a lack of assets) and a drop of 36 per cent in proceedings opened compared with the first half of 2020, which is the lowest number in more than 40 years. Yet, these figures do not reflect the actual situation; rather, this is mainly the result of governmental measures to minimise the economic effects of the global pandemic. These measures taken make it possible to postpone insolvency applications and might have negative effects for creditors.¹⁸ In the long term, it remains to be seen whether governmental measures will in fact help the Austrian economy to recover from the effects of the covid-19 crisis.

III PLENARY INSOLVENCY PROCEEDINGS

i Commerzialbank Mattersburg im Burgenland Aktiengesellschaft

Commerzialbank Mattersburg im Burgenland Aktiengesellschaft (Commerzialbank) was an Austrian regional bank founded in 1995, providing retail banking products and services to private and business customers. On 28 July 2020, insolvency proceedings were opened following an application of the FMA. Around 370 creditors registered claims amounting to roughly €812 million.¹⁹ It was the biggest insolvency in Austria in 2020.

Due to the circumstances leading up to the insolvency and its effects, wide public attention is given to this insolvency. Notably, from 2015 to 2017, the FMA/Austrian National Bank discovered irregularities during on-site inspections of Commerzialbank, which have been regarded as rectified in future inspections. Also, criminal authorities in 2015 investigated allegations of dubious loans made by a whistleblower, but terminated these investigations. On 14 July 2020, the FMA ordered Commerzialbank to be closed immediately after inconsistencies were found in its accounting.²⁰

Apparently, a scheme of pretending deposits with other banks and forging respective supportive documentation and drawing up fake credit agreements with customers (without their knowledge) was set up at Commerzialbank. The effects of the insolvency of Commerzialbank are intense: for instance, individual persons with bank accounts at Commerzialbank could not dispose of their money sitting in bank accounts at Commerzialbank; further, various companies had large deposits at Commerzialbank that are effectively lost. At the time of writing, criminal investigations have been opened, various civil proceedings have been initiated and even political investigations in the regional parliament were conducted.²¹

17 Kreditschutzverband 1870, final insolvency statistics for 2020, available (in German) at https://www.ksv.at/KSV1870_Insolvenzstatistik_Unternehmen_2020_final.

18 Kreditschutzverband 1870, insolvency statistics for the first and second quarters of 2021, available (in German) at https://www.ksv.at/KSV1870_Insolvenzstatistik_Unternehmen_HJ2021_final_PDF.

19 <https://burgenland.orf.at/stories/3070494/>.

20 <https://www.profil.at/wirtschaft/commerzialbank-martin-pucher-und-die-akte-mattersburg/400981721>.

21 <https://burgenland.orf.at/stories/3070494/>.

ii Anglo Austrian AAB AG (AAB)

Insolvency proceedings against Anglo Austrian AAB AG (AAB) were opened on 2 March 2020 following AAB's petition. The liabilities amount to approximately €500 million. AAB, formerly named Meinel Bank AG, was founded by the Meinel family in 1923.²²

AAB hit the headlines due to allegations of various difficulties with regulatory authorities, eventually leading to the withdrawal of the banking licence. Due to the withdrawal of the banking licence, a dispute arose whether the AAB, who filed for insolvency in the first place, was actually competent to do so. Due to the special regulations applicable in relation to banks, the authority to file for the opening of insolvency proceedings generally lies with the FMA (see above). The FMA repeatedly argued that AAB was no longer a bank since the withdrawal of its licence and would, therefore, not be subject to the special insolvency regime applicable to banks.

In this regard, the Austrian Supreme Court overruled lower-instance decisions and held that the monopoly on filing bankruptcy petitions for banks lies with the FMA – even after the banking licence had been revoked. Following this decision and a petition to open insolvency proceedings filed by the FMA, the Vienna Commercial Court decided that the effects triggered by the decision to open insolvency proceedings dated 2 March 2020 will remain in place.²³ In February 2021, it was decided to finally close the operation of AAB.²⁴

iii Kremsmüller Gruppe

Kremsmüller is an Austrian family business based in Upper Austria which was founded in 1961. The company operates mainly in the fields of process technology and electrical engineering, control technology, pipe and plant construction – employing a total of 1,800 in Austria, Germany and Romania.

On 15 June 2020, restructuring proceedings were opened concerning Kremsmüller Industriebauanlagenbau KG. Additionally, on 30 June 2020, restructuring proceedings were commenced regarding Kremsmüller Industrieservice KG, which serves as the group's internal service provider. Not affected by the insolvencies are Kremsmüller Beteiligungs GmbH and other subsidiaries of the group, which most recently generated a turnover of about €300 million.

The background that led to the two insolvencies is a large-scale engagement that got out of hand involving a sewage sludge drying plant for Wien Energie. The original project volume of €22 million threatened to expand to €60 million to €65 million.

In October 2020, the creditors approved a restructuring plan by means of which a quota of 25 per cent was offered. This approval eventually led to the termination of the restructuring proceedings. According to media reports of early 2021, Kremsmüller is performing well and partly exceeding economic expectations.²⁵

22 <https://www.standard.at/story/2000124413813/ehemalige-meinel-bank-wird-ganz-zugedreht>.

23 <https://www.ksv.at/presse/laufende-insolvenzfaelle/anglo-austrian-aab-ag>.

24 <https://edikte.justiz.gv.at/edikte/id/idedi8.nsf/suchedi?SearchView&subf=e&SearchOrder=4&SchuldnerS=aab&BMAZ=NUL&ftquery=&query=%28%5BSchuldnerS%5D%3D%28aab%29%29#1627033015106>.

25 <https://ooe.orf.at/stories/3092372/>.

iv Odebrecht E&P GmbH

Insolvency proceedings over Odebrecht E&P GmbH were opened on 20 January 2020 following a creditor's application. The Vienna Commercial Court as insolvency court had previously ordered interim measures to protect creditors' interests in December 2019.

The Austrian subsidiary, which was established in Austria only for tax reasons, is part of the Brazilian Odebrecht group, which is involved in one of the biggest corruption scandals in Latin America. In 2016, the Brazilian group, which faces liabilities amounting to billions, pleaded guilty for corruption and bribery and accepted a fine of US\$3.5 billion in the US. Odebrecht E&P GmbH has no employees and solely acts as holding company for subsidiaries in Angola, Peru and Venezuela.²⁶ According to its last financial statement, Odebrecht E&P GmbH's liabilities amount to €117 million. Professional creditors' organisations estimate the Odebrecht E&P GmbH's liabilities exceed €100 million, ranking it among the biggest insolvencies in 2020 liability-wise.²⁷ On 26 April 2021, the insolvency proceedings were terminated.²⁸ In August 2021, the Vienna Commercial Court opened new bankruptcy proceedings over Odebrecht E&P GmbH.²⁹

v Vapiano

With €33.2 million in liabilities, the insolvency of the restaurant franchise company Vapiano, whose restaurants offer pizza, pasta and salads, ranks among the more prominent insolvency cases within Austria. In Germany, Vapiano SE applied for the opening of insolvency proceedings in Cologne at the end of March 2020. The Austrian subsidiary followed shortly after in April 2020. In Austria, 14 Vapiano locations and more than 700 employees are affected, excluding international franchisees. The company already faced financial difficulties in the autumn of 2019. The increasing competition from competitors and eventually the collapse of the share price by two-thirds, as a result of the national coronavirus lockdowns, brought heavy losses.³⁰

The initial restructuring proceedings of Vapiano Restaurant Betriebs- und Beteiligungs GmbH with 612 employees and Walfischgasse 11 'Moulin Rouge' Gastronomie GmbH with 61 employees were eventually converted into bankruptcy proceedings. Twelve Vapiano restaurants throughout Austria have been taken over by the Donhauser group, which operates restaurants, cafes, bars and catering services.³¹ The Austrian branch of the German Vapiano SE with 52 employees applied for secondary insolvency proceedings on 15 June 2020.³²

26 <https://www.sn.at/wirtschaft/oesterreich/odebrecht-skandal-konkurs-ueber-wiener-tochterfirma-eroeffnet-82320526>.

27 <https://www.derstandard.at/story/2000113581658/odebrecht-skandal-zieht-grosse-kreise-in-oesterreich>.

28 <https://edikte.justiz.gv.at/edikte/id/idedi8.nsf/suchedi?SearchView&subf=e&SearchOrder=4&SchuldnerS=odebrecht&BMAZ=NUL&ftquery=&query=%28%5BSchuldnerS%5D%3D%28odebrecht%29%29#1627043445440>.

29 <https://edikte.justiz.gv.at/edikte/id/idedi8.nsf/suchedi?SearchView&subf=e&SearchOrder=4&SchuldnerS=odebrecht&BMAZ=NUL&ftquery=&query=%28%5BSchuldnerS%5D%3D%28odebrecht%29%29#1628600034633>.

30 <https://www.diepresse.com/5798331/vapiano-auch-in-osterreich-insolvent>; <https://www.reuters.com/article/us-vapiano-bankruptcy/german-restaurant-chain-vapiano-files-for-insolvency-idUSKBN21K14M>.

31 <https://www.falstaff.at/nd/multi-gastronom-donhauser-uebernimmt-vapiano/>.

32 https://wien.arbeiterkammer.at/beratung/arbeitsrecht/insolvenz/aktuellefaelle/Vapiano_Insolvenz_in_Oesterreich.html

IV ANCILLARY INSOLVENCY PROCEEDINGS

Despite the insolvency of the Vapiano franchise, where ancillary proceedings were opened on 15 June 2020 against certain group companies (Vapiano SE Austrian branch, see above), there have not been considerable ancillary insolvency proceedings opened in Austria over the past 12 months.

V TRENDS

The covid-19 crisis will continue to have impact on the number of insolvencies in Austria. While it is not expected that Austria will be hit by a wave of insolvencies, it is expected that in the autumn of 2021 the weekly insolvencies will increase to the level of the time prior to the covid-19 crisis. For 2022, it is expected that numbers will in general return to the level of the time prior to the covid-19 crisis.³³

³³ Kreditschutzverband 1870, insolvency statistics for the first and second quarters of 2021, available (in German) at https://www.ksv.at/KSV1870_Insolvenzstatistik_Unternehmen_HJ2021_final_PDF.

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