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A giant leap forward?

The new draft for a restructuring code in Austria

On 22 February 2021, the ministerial draft of the Restructuring and Insolvency Directive Implementation Act was published. The law is the eagerly awaited implementation of the Restructuring Directive. In addition to the introduction of a new Restructuring Code (**RC**), *inter alia* the Insolvency Code (**IO**) is to be amended. The review period ended on 6 April 2021; it is expected to come into force **in the third quarter of 2021**.

Objective

According to the RC, debtors should be given the opportunity to achieve a turnaround by means of a restructuring plan during a non-insolvency procedure while generally retaining self-administration. Such a plan may be implemented, if necessary, against the resistance of individual "disrupters of the agreement". The RC tries to close the existing gap between insolvency proceedings and consensual out-of-court restructuring and to overcome the obstruction potential of individual creditors.

For private individuals and individual entrepreneurs, debt relief shall be facilitated within three years. The IO is to be amended accordingly.

Expected effects on practice

The new RC represents a new era for restructuring law outside of insolvency. Restructuring measures are now also possible against the will of individual creditors. The concept of the *cross-class cram-down* is also new.

Since the previous attempts of the Austrian legislator to prevent insolvency by means of a pre-insolvency restructuring process have not been accepted and - like the recent Corporate Reorganisation Act - remained largely "dead" law, it remains to be seen whether the new restructuring process will become important in actual practice.

Of course, it remains to be seen what the final law will be and to what extent there will be changes from the draft version in its current form.

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About Wolf Theiss

Wolf Theiss is one of the leading European law firms in Central, Eastern and South-Eastern Europe with a focus on international business law. With 340 lawyers in 13 countries, over 80% of the firm's work involves cross-border representation of international clients. Combining expertise in law and business, Wolf Theiss develops innovative solutions that integrate legal, financial and business know-how.

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Key points - a first overview

When can a restructuring process be initiated?

The initiation of proceedings is linked to the likelihood of insolvency of the debtor. This is the case if the debtor's existence would be endangered without restructuring, such as in the case of his/her imminent illiquidity or if the ratios under the Corporate Restructuring Act (quota of own funds less than 8% and fictious duration of debt redemption more than 15 years) are triggered.

The debtor may therefore be over-indebted in the sense of insolvency law; however, in the event of illiquidity, insolvency proceedings must generally be initiated. If restructuring or reorganisation proceedings have already been initiated in the last seven years, new restructuring proceedings are not permissible. Certain debtors (such as credit institutions or natural persons who are not entrepreneurs) are per se excluded from the scope of the application of the RC.

Which documents are required?

The application for the initiation of proceedings must be accompanied by a list of assets, (generally) a 90-day financial plan, the annual financial statements (of the last three years) and a restructuring plan inter alia with a conditional (i.e. dependent on the acceptance and confirmation of the restructuring plan) going-concern prognosis. As an alternative to the restructuring plan, initially only a restructuring concept with minimum content can be submitted, which must then be expanded (with the help of a practitioner in the field of restructuring) into a restructuring plan.

What is a restructuring plan?

The restructuring plan is the core of the process. It should be a valid plan to regulate the reorganisation measures and contributions of the creditors concerned. When drawing up the plan, the debtor is not subject to excessively rigid rules. For example, the debtor can decide which creditors are to be included (except for certain claims). It is not necessary to include all the debtor's creditors. In any case, claims of employees are excluded from the scope of the RC; they remain unaffected by the restructuring.

The primary instruments for restructuring involved claims are the reduction and deferral of receivables.

How is the restructuring plan voted on?

The creditors are to be divided into classes, whereby five creditor classes can be formed: (i) secured creditors, (ii) unsecured creditors, (iii) bondholders (bonds being all forms of debt securities irrespective of whether they are listed on a stock exchange), (iv) certain vulnerable creditors with claims below EUR 10,000 and (v) creditors of subordinated claims. If the debtor is an SME, no class formation needs to take place.

The voting takes place in a meeting of creditors. If there is an affirmative total majority of 75% combined with a simple head majority in each creditor class, the plan is approved.

If the majorities are not reached, the approval of the dissenting creditor classes can be replaced by a *cross-class cram-down*. The protection of minorities is ensured by means of the *relative priority rule*. According to this rule, dissenting creditor classes must be treated at least like classes with equal rank in the insolvency proceedings and better than classes with a lower rank.

What effects does the restructuring plan have?

Every restructuring plan requires court confirmation. With this confirmation, it only influences the creditors concerned.

In order to ensure achieving the restructuring goal, the debtor can apply for a three (extendable to six) month suspension of enforcement. During the suspension of enforcement, the debtor's obligation to file for insolvency due to over-indebtedness is suspended. Nor can insolvency proceedings be opened by creditors for this reason. If the debtor is however unable to pay its debts when they fall due, this insolvency block does not apply (with exceptions). Following on from the ban on enforcement, the draft law limits the possibility of terminating or amending contracts still to be performed. It is not possible to deviate from these limitations by means of a private autonomous agreement between the parties (with exceptions, such as netting mechanisms).

Are (interim) financing arrangements protected?

Yes, the planned amendments to the IOs are intended to give 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.

Is there a simplified restructuring procedure?

If an out-of-court restructuring between the debtor and his/her financial creditors fails due to only one or more "disruptors of the agreement" and if all the necessary consent majorities (i.e. at least 75% in the respective class) are nevertheless given, the debtor can have the missing consents substituted in court within the framework of a simplified restructuring procedure.

Only financial creditors may be affected by the simplified restructuring procedure; this includes all receivables with a financing character (such as interest-bearing receivables, receivables from bonds, loans from institutional funds, shareholders or private individuals as well as supplier receivables with unusually long terms (more than 180 days)).

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