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Mapping Preventive Restructuring Frameworks and the EU Directive for the JCOERE Project

Country Report

Austria

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The Austrian Perspective on Restructuring

The Austrian legislation on Reorganisation of Enterprises (*Unternehmensreorganisationsgesetz* (the "URG")) seems to be a very 'light touch' restructuring process that seems quite similar to the Scheme of Arrangement insofar as it is essentially a restructuring process that can be used for a solvent restructuring or a restructuring where the company is likely to become insolvent. Within this, there seems to be some lack of clarity regarding what is meant by class formation. In most systems where differences between secured, unsecured and preferential creditors are acknowledged, this generates the formation of different classes. But this does not seem to be formally required. There is also no requirement for court confirmation of the scheme which is in contrast to the UK Scheme of Arrangement despite some similarities between these systems. There is no cross-class cram-down. In effect this would represent a minimum in terms of the requirements of the PRD. The Austrian legislative framework seems to be quite similar to the German legislative framework.

In terms of practise, and as described below, the legislative framework in Austria does provide for restructuring post formal insolvency. The Austrian Insolvency Code (*Insolvenzordnung*) contains two insolvent reorganisation procedures. One where the debtor remains in possession of, and in control of, the day to day administration of the business. The other where the debtor is not in possession (*Sanierungsverfahren ohne Eigenverwaltung*). In this case it is the insolvency trustee who becomes responsible for administering the debtor's assets and assumes control of the business under the supervision of the court and sometimes a board of creditors.

PART 1: The General Context of Preventive Restructuring

Function and Aims of Insolvency and Rescue

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The main objectives of the Austrian Insolvency Code (*Insolvenzordnung*) are to improve the debtor's ability to continue as a going concern and to enjoy protection against enforcement by creditors during the insolvency proceedings, while the two reorganisation procedures within the Insolvency Code aim to reorganise the debtor's business. The function and aims of the Austrian preventive restructuring framework within the URG are to reorganise enterprises in financial trouble before they become insolvent.

Existing Legislative Frameworks

The Austrian legal system provides both a preventive restructuring mechanism as well as a post-insolvency reorganisation procedure. The URG, which was introduced in 1997, contains the Austrian preventive restructuring framework.[2] It is a separate proceeding outside of the Austrian Insolvency Code and is not included in Annex A of the EIR Recast. The URG contains a non-insolvency procedure to deal with situations where preventive restructuring may be appropriate for a debtor who is definitionally still solvent, though to date this preventive restructuring procedure has not been popular with only 3 or 4 cases since its introduction. It has been suggested that its unpopularity and lack of use are due to the absence of a stay of enforcement actions and its high cost. Furthermore, most enterprises do not qualify for preventive restructuring as they are already insolvent, therefore the URG is not available to them.

The Austrian Insolvency Code (*Insolvenzordnung*) contains two insolvent reorganisation procedures available when a debtor is in actual or pending insolvency. Reorganisation can be done with or without the debtor remaining in possession of, and in control of, the day to day administration of the business. Where a debtor is not in possession (*Sanierungsverfahren ohne Eigenverwaltung*), it is the insolvency trustee who becomes responsible for administering the debtor's assets and assumes control of the business under the supervision of the court and sometimes a board of creditors. Reorganisation procedures in which the debtor remains in possession (*Sanierungsverfahren mit Eigenverwaltung*) is sometimes referred to as a self-administered reorganisation. The main difference between the two insolvent reorganisation procedures is the quota of debt that must be settled under the reorganisation plans. The debtor in possession version must provide a plan that includes a minimum settlement of 30% of the debt while the procedure in which the debtor is not in possession has a quota of 20% debt settlement. Both settlements must be paid within two years of approval of the plan.[3]

This Country Report will refer primarily to the provisions of the URG as Austria's true pre-insolvency preventive procedure. Where examples are drawn from the reorganisation options under the Insolvency Code, an explicit reference will be made.

PART II: Specific Substantive Aspects of Preventive Restructuring in Domestic Processes and in the Directive

The Stay of Individual Enforcement Actions

The URG does not provide for a stay of individual enforcement actions in its preventive restructuring procedure. The two reorganisation procedures under the Austrian Insolvency Code do, however, provide a stay. Under the stay, legal disputes over the debtor's assets such as debt enforcement claims may no longer be filed, and any pending lawsuits are suspended. Court orders in this regard are rendered void after the opening of insolvency proceedings. Any claims must then be filed with the insolvency court and examined by the insolvency administrator before any proceedings can be continued. Enforcement by secured creditors under the Insolvency Code is stayed for a period of six months under both insolvent reorganisation procedures, unless during this period the secured creditor applies to recommence their claim and only if they can show they are facing severe personal or economic disadvantages. This provision aims to protect the debtors' business against the impact that the exercise of these security rights might have, particularly if the business is intended to continue.[4]

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[2] *Bundesgesetzblatt* ("BGBl") 1997/114.

[3] See also Friedrich Jergitsch and Florian Klimscha, 'Austria Inventory Report' in Bob Wessels, Stephan Madaus, Gert Jan Boon, *Rescue of Business in Europe* (European Law Institute 2018) 363- 423.

[4] *ibid;* see also Markus Fellner, 'Restructuring and Insolvency: Austria' (Practical Law by Thomson Reuters 2011) <https://uk.practicallaw.thomsonreuters.com/4-385-2603?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1> accessed 30 March 2020.

The Adoption of Restructuring Plans

Austrian law does not empower creditors to vote on a restructuring plan in the course of a preventive restructuring procedure under the URG but does so provide for the two reorganisation plans under the Insolvency Code.

While neither the URG nor the Insolvency Code provide for a mechanism to divide creditors into classes of common interest, Austria recognises secured, unsecured, and subordinate classes of creditors who are able to vote on a reorganisation plan under the Insolvency Code. Voting rights by these groups of creditors are also subject to examination. Secured creditors do not have voting rights unless they hold an under-secured claim (where the original debt is more valuable than the asset or security at the time of insolvency), in which case their vote relates solely to the unsecured part of the claim. In terms of potential reform in relation to bespoke class formation, it appears that there is an intention to create a new class of "worthy creditors" that will include groups such as small suppliers. This may align more closely with the provisions of the PRD.

Creditors with disputed or conditional claims are allowed to vote initially on reorganisation plans under the Insolvency Code. If the result of the plan approval varies based on those votes, then the insolvency judge conducts a preliminary examination and hearing of the parties and adjudicates the matter.[5] In order for a vote to pass in two reorganisation processes under the Insolvency Code, a majority of unsecured creditors holding more than 50% of the aggregate claims of those present at the hearing must vote in favour of the plan.[6]

The Confirmation of Restructuring Plans

A Reorganisation Plan within the preventive restructuring framework under the URG is not subject to court confirmation, although an application to open proceedings must be filed with the court.

Reorganisation plans under the Insolvency Code, however, must be confirmed by a court. In an insolvent reorganisation procedure, the court is empowered to refuse a plan if the benefits granted to the debtor under the plan are inappropriate under the circumstances, or if the plan conflicts with the common interests of creditors, or if the creditors will receive less than 30% of their claims as a result of dishonesty or recklessness of the debtor and its management.[7]

Cross-Class Cram-Down

There currently is no cross-class cram-down in Austria under the URG.

Reorganisation plans under the Insolvency Code are capable of binding dissenting creditors. As reorganisation plans only affect ordinary insolvency creditors and as bespoke class formation is not a feature of Austrian reorganisation procedures under the Insolvency Act, there is no call for a cross-class cram-down as there is only one class that has the ability to vote on the plan. It is yet unclear how Austria will approach legislating for the introduction of a cross-class cram-down and there are a number of features associated with this procedure that will also need to be introduced to make a cross-class cram-down possible.

Protection of New and Interim Financing

There is limited protection for new and interim financing under the URG. It takes the form of an exemption from avoidance actions for activities necessary to continue the business (*Überbrückungsmaßnahmen).* In addition, activities specified under the plan and executed during the reorganisation proceedings or within 30 days thereafter (*Reorganisationsmaßnahmen)* are not considered to be subordinated claims.[8]

Reorganisations under the Insolvency Code may also be supported by post-commencement financing arrangements in order to obtain loans or credit facilities for the purpose of managing the assets of the insolvency estate. Such finance is treated as privileged in an insolvency and ranks as senior to ordinary

[5] Insolvency Code, art 93.
[6] Jergitsch and Klimscha (n 3).
[7] Austrian Insolvency Code, s 154.
[8] URG, art 20.

insolvency creditors. It is also possible to grant security to new creditors over the insolvency estate, though this will not interfere with the priority of secured creditors in existence prior to the debtor entering insolvency. Post-commencement finance is also not subject to the avoidance provisions under the Insolvency Code. If the reorganisation is the self-administered type, the debtor must first seek approval of the reorganisation administrator before entering into post-commencement financing arrangements.[9]

PART III: Specific Procedural Aspects of Preventive Restructuring in Domestic Processes and in the Directive

The Threshold of Insolvency

The URG procedure is available if it can be credibly shown that a business is 'in need of reorganisation', which is when there has been a substantial and sustainable deterioration of the business' equity ratio. The presumption is that if the equity ratio drops below 8% and the notional debt repayment period exceeds 15 years, that a business is in need of reorganisation.

The threshold for insolvency to use procedures under the Insolvency Code is either illiquidity or over-indebtedness. Illiquidity is assumed when a debtor is unable to repay debts that are due within a reasonable time, essentially the "cash-flow test". Further, illiquidity is presumed if a company is unable to immediately liquidate assets in order to pay its liabilities, even if there are sufficient assets to cover the debts. Illiquidity will be presumed if a company defaults on more than 5% of its due debts. However, if the inability to pay debts due is considered only transitory, it may not be considered illiquidity for the purposes of the Insolvency Code.[10] The inability may be temporary if it is deemed highly probable that a debtor will be able to satisfy all of its liabilities within a short period of time.[11]

Over-indebtedness is the second threshold test under the Insolvency Code. It is essentially defined as a balance sheet test, tempered by the requirement that there is no "positive forecast" for the continued existence of the company. The value of assets over liabilities is determined by actual or potential sales of those assets under normal circumstances, rather than liquidation value. The "positive forecast" is predicated on the ability of the company to fulfil all due liabilities within the current and following financial year.

Debtor in Possession

The involvement of an insolvency practitioner is required in all insolvency and restructuring proceedings in Austria. However, one of the reorganisation proceedings is specifically identified as a "self-administered" reorganisation, which is described as a situation in which the debtor remains in control of the normal administration of its business and assets.

Rights *in Rem* under the EIR Recast and the PRD

Rights *in Rem* are often understood in relation to property, such as a mortgage, lien, retention of title, chattel mortgage, or assignment of claims. These rights cannot be infringed in the procedures under the Insolvency Code or under the URG without express and unanimous consent by secured creditors. A reorganisation under the Insolvency Code only includes ordinary creditors, so will not affect the rights of secured creditors in any event, apart from under circumstances in which such creditors are under-secured and must claim the additional debt as an ordinary unsecured creditor.[12]

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[9] Jergitsch and Klimscha (n 3).
[10] *ibid.*
[11] Austrian Supreme Court as of 19 January 2011, 3Ob99/10w; Austrian Supreme Court as of 22 November 2011, 8Ob118/11b.
[12] Jergitsch and Klimscha (n 3).