



# THE AUSTRIAN “CHAPTER 11”: RESTRUCTURING PROCEEDING WITH SELF-ADMINISTRATION UNDER THE NEW AUSTRIAN INSOLVENCY CODE

Austria has implemented radical changes to its insolvency law and introduced a new restructuring proceeding with self-administration (*Sanierungsverfahren mit Eigenverwaltung*) in its newly adopted Insolvency Code (*Insolvenzordnung*, or “IO”).<sup>1</sup> One of the main features of the new type of insolvency proceeding is that the insolvent company (the “Debtor”) largely remains in control of its business, but under the supervision of a restructuring administrator.

## STEP-BY-STEP GUIDE TO THE NEW AUSTRIAN SELF-ADMINISTRATION PROCEEDING

The Austrian Insolvency Code sets forth the following applicable steps:

The Debtor (i) files an application to the insolvency court for the opening of restructuring proceeding with self-administration, and (ii) submits, along with a number of other documents, a restructuring plan (*Sanierungsplan*) that offers a recovery rate of at least 30 percent, payable to the creditors over a maximum period of two years.

The court may, under certain circumstances, reject the Debtor’s application for restructuring proceeding with self-administration or demand further information or documents. If the proposed restructuring plan has been duly filed and fulfils all formal criteria, the court will convene a creditors’ assembly within a time period of up to six weeks.

The creditors’ assembly may adopt the restructuring plan with a “double” majority, *i.e.*, more than

<sup>1</sup> The Austrian Insolvency Code came into force on July 1, 2010. The current proceeding involving the listed company A-Tec Industries AG, the Austrian holding entity of the international industrial conglomerate majority-owned by Mirko Kovats, has been opened on October 20, 2010 and is the first significant case of applying the new legislation. Thus, quite a number of details will still have to be resolved in practice.

50 percent of the creditors present at the meeting have to approve the plan, and such majority needs to represent more than 50 percent of the net amount of all filed claims held by the present creditors.

The court will revoke the Debtor's self-administration and appoint an insolvency administrator if:

- circumstances make it appear likely that the self-administration will negatively affect the creditors (e.g., if the Debtor fails to cooperate, disregards imposed restrictions, etc.);
- any of the following criteria (the "Out-criteria") are fulfilled:
  - (i) the insolvency administrator has notified the court that the Debtor's assets are not sufficient to cover the privileged claims creditors have against the insolvency estate (*Masseforderungen*);
  - (ii) the Debtor withdraws its restructuring plan application or the court rejects the application;
  - (iii) the restructuring plan is finally rejected by the creditors; or
  - (iv) the court refuses to confirm the restructuring plan that has been adopted by the creditors' assembly;
- the creditors' assembly does not adopt the restructuring plan within 90 days after opening of the restructuring proceeding; or
- the Debtor requests a revocation of self-administration.

As a general rule, the Debtor may only be liquidated (e.g., the Debtors' assets being sold) if any of the following criteria (the "Liquidation Requirements") are fulfilled:

- the restructuring plan is not adopted within 90 days after opening of the restructuring proceeding (for further details, please see below);
- the restructuring is not any more in line with the joint interests of the creditors; or
- the requirements for a continuation of the Debtor's business are not fulfilled any more.

Upon opening of the restructuring proceeding, the Debtor may not shut down (or reopen) its business without the court's approval.

Under self-administration, the Debtor may, with certain exceptions, continue to make legal transactions in the ordinary course of business, unless such transactions are vetoed by the restructuring administrator. The restructuring administrator may act in lieu of the Debtor if the Debtor is prohibited from acting in a given legal transaction (e.g., business transactions outside the ordinary scope). The restructuring administrator may liquidate the assets of the estate only with the Debtor's approval.

The court confirms the restructuring plan only if (i) the creditors have approved the plan, (ii) the remuneration of the insolvency administrator and certain creditor protection associations are paid or secured, (iii) all privileged claims against the insolvency estate (*Masseforderungen*) have been settled, and (iv) the conditions set forth in the restructuring plan are fulfilled.

Provided that all general unsecured claims against the Debtor (insolvency claims; *Insolvenzforderungen*) have been settled in accordance with the recovery rate set forth in the plan (plan quota), the restructuring proceeding is terminated and the Debtor may continue to freely continue its business or dispose of its assets. Furthermore, the Debtor is relieved from the obligation to pay to its creditors for the remaining shortfall in their claims (*i.e.*, the difference between the net amount of such claims and the amount according to the recovery rate).

## WHAT HAPPENS DURING THE 90-DAY PERIOD?

Creditors have a 90-day period during which they can decide on the restructuring plan (*Sanierungsplan*).

The assets of the Debtor may be liquidated only if any of the Liquidation Requirements described above are fulfilled. For instance, in the absence of these circumstances, the Debtor's participations in other entities may not be sold as a liquidation measure. In general, material participations in affiliated entities (e.g., participations which represent more than 20 percent of the stated capital of such entity) held by the Debtor can be sold only by the restructuring administrator and upon approval of the creditors and the court.

## WHAT IF SELF-ADMINISTRATION FAILS?

If the self-administration proceeding should fail, the court will revoke the Debtor's self-administration and appoint an insolvency administrator to take over the restructuring. In this case, it will still be a restructuring proceeding (*Sanierungsverfahren*), not a liquidation proceeding (*Konkursverfahren*).

If, however, the Out-criteria described above are fulfilled, the restructuring proceeding will be turned into a regular liquidation proceeding. In such case, the insolvency administrator will usually try to sell the Debtor's assets—including its subsidiaries—as a going concern in one or several transactions in order to obtain additional proceeds for distribution to the creditors.

## NO PROTECTION OF DEBTOR THROUGH MORATORIUM; RESTRICTIONS POSSIBLE UNDER COURT ORDERS

The 90-day waiting period described above does not involve a moratorium, *i.e.*, a prohibition of creditors to enforce their claims against the Debtor and/or the prohibition of the Debtor to make payments to any of its creditors.

However, the court may prohibit the Debtor from entering into certain transactions (e.g., effect payments above a certain threshold) as such or without the consent of the restructuring administrator, if and to the extent such restriction of the Debtor's rights is necessary in order to prevent disadvantages for the creditors. In the event that the Debtor is prohibited from making certain transactions, the restructuring administrator is authorized to act in lieu of the Debtor. For any liquidation of assets, however, the restructuring administrator requires the Debtor's approval.

Under Austrian insolvency law, secured creditors of the Debtor may not enforce their collateral prior to the lapse of six months after opening of the restructuring proceeding if

such enforcement might endanger the continuation of the Debtor's business operations. However, this restriction does not apply if (i) the enforcement of the collateral in question is required in order to avoid personal or economical disadvantages of the creditor concerned, and (ii) enforcement in other assets of the Debtor has not resulted in, or cannot be expected to result in, a full satisfaction of such creditor's claims.

## LAWYER CONTACTS

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