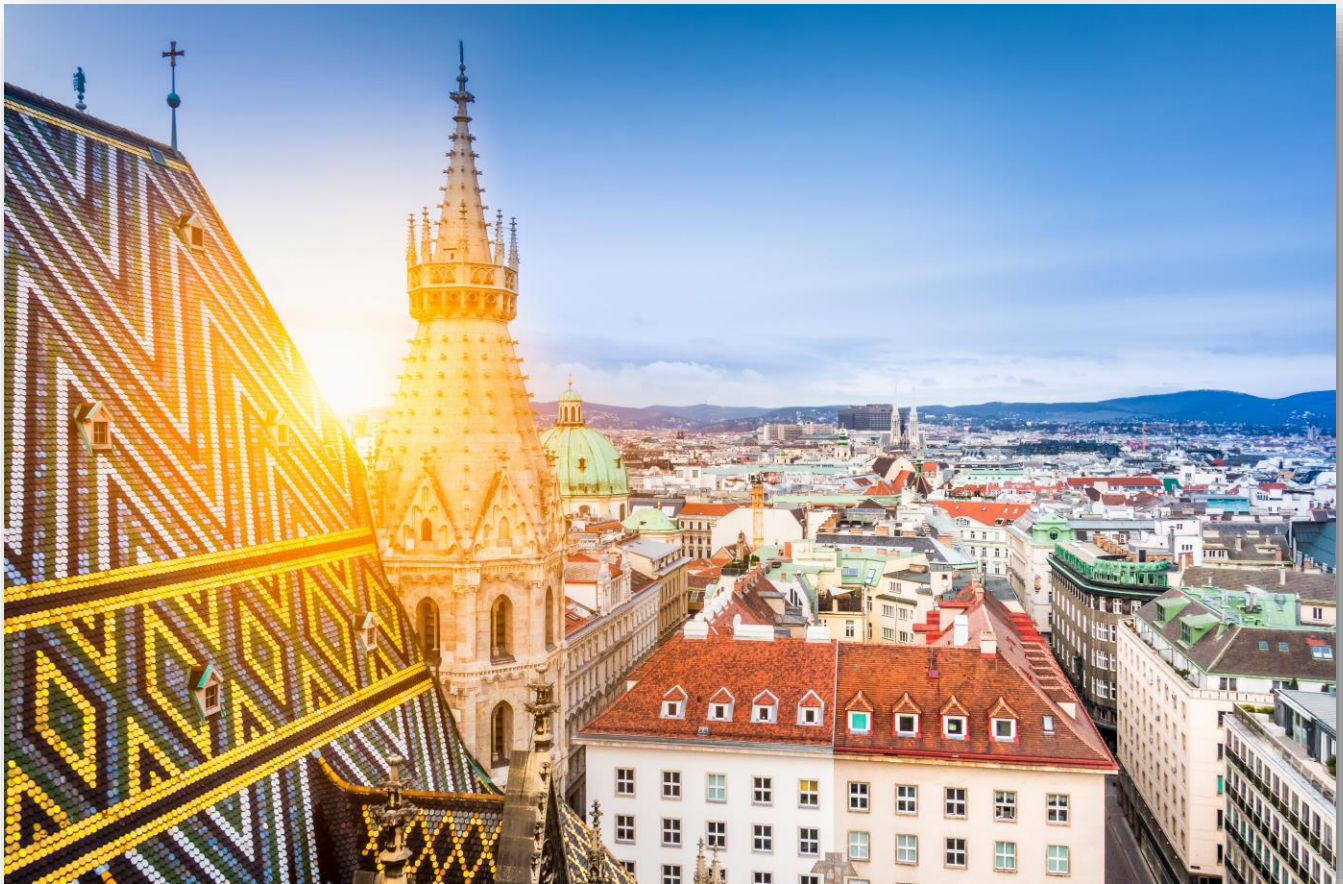




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Bankruptcy, Insolvency & Rehabilitation Proceedings in Austria

ILN RESTRUCTURING & INSOLVENCY GROUP

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KEY FACTS OF BANKRUPTCY, INSOLVENCY & REHABILITATION PROCEEDINGS UNDER AUSTRIAN LAW

1. Introductory Remarks on Austria's Legal System

Austria has a **civil law system**, as opposed to the common law system of e.g., the United States or the United Kingdom. Practically all Austrian law is codified in statutes. The most important statutes in the fields of civil and commercial law are the Austrian General Civil Code and the Austrian Code of Commerce.

Austria is **part of the EU**. The EU currently consists of 27 member states. They have 27 distinct and often very different insolvency laws, i.e., the core of each insolvency law is different from country to country.

Austrian insolvency law is primarily codified in the **Austrian Insolvency Act ("Insolvenzordnung")**.¹

As of July 2021, Austria will enact an additional statute on insolvency proceedings and preventive measures in order to implement the EU Restructuring Directive (Directive EU 2019/1023, see below). The title of this statute will be **Restructuring Act ("Restrukturierungsordnung")**.

Apart from the Insolvency Act and the Restructuring Act, there exists also a statute called **Business Reorganization Act ("Unternehmensreorganisationsgesetz")**. It contains provisions for the restructuring of a non-insolvent debtor's business. It does not affect creditors' rights (no stay of proceedings, no preferential conditions for voiding contracts) and, in spite of its title, is not an insolvency statute in the strict sense.

Insolvency related provisions are also found in the **Criminal Code**, in the **Act on the Protection**

of Wages in Insolvencies, and in the **Equity Replacement Act**.

Cross-border insolvencies in regard of insolvencies vis-à-vis all EU countries except Denmark are regulated in the **European Regulation on insolvency proceedings**. Cross-border insolvency issues vis-à-vis third countries are regulated the Austrian **Insolvency Act** and in bilateral treaties.

Austria so far has not ratified the **UNCITRAL Model Law on Cross Border Insolvencies**.

COVID-19 related measures in insolvency law:

Austria has extended all its insolvency application deadlines during the COVID-19 crisis. Austria also temporarily changed some of the insolvency benchmarks. Thus, there currently occurred fewer insolvency cases in Austria than in the years before COVID-19.

2. Different types of insolvency proceedings under Austrian law and their main characteristics

Austrian insolvency law is still primarily creditor oriented. The Austrian Insolvency Act provides for different types of insolvency proceedings.

a) Liquidation oriented proceedings

The classic insolvency proceedings are **liquidation or winding-up-proceedings**. In these kinds of proceedings, the debtor's assets are sold, and the proceeds of such sale are subsequently distributed among the creditors.

b) Reorganization oriented proceedings

Austrian insolvency law, however, also provides for a **court-controlled reorganization proceeding**

¹ Insolvency-related provisions are also to be found in other statutes (e.g. regarding banks, insurance companies).

(“*Sanierungsverfahren*”). Its goal is to rescue the insolvent debtor’s business by enabling the debtor to continue his business activities and, eventually, to be discharged from a part of its debts.

The conditions for a discharge are quite strict. If the **debtor wants to remain in possession** (“*Sanierungsverfahren mit Eigenverwaltung*”), there is a **minimum dividend** requirement payable to unsecured creditors, of at least **30 percent within a maximum period of two years**. If a debtor stays in possession, a reorganization administrator is appointed. The scope of his duties is more limited than a general administrator (more of a supervisory role).

If a **debtor does not insist to stay in possession** (“*Sanierungsverfahren ohne Eigenverwaltung*”) a regular insolvency administrator is appointed. This insolvency administrator then acts on behalf of the insolvency estate. This kind of reorganization proceeding is possible with a **minimum dividend**, payable to unsecured creditors, of **20 percent over a maximum period of two years**.

In both cases the acceptance of the reorganization plan (“*Sanierungsplan*”) requires that the majority of the creditors vote in favor of the reorganization plan (double majority i.e., both by headcount and by value of debt).

c) New type of reorganization proceedings under the Reorganization Act

A new type of reorganization proceeding will be available under the Reorganization Act, which will implement the EU Restructuring Directive in Austria as of July 2021. The

present draft bill provides, among other features, for debtor in possession, no minimum dividends, and cram-downs.

d) Consumer bankruptcy

The Austrian Insolvency Act also **provides for a specific consumer insolvency proceeding**. It enables natural persons to achieve, under certain circumstances, an eventual discharge of debts (usually within five years or earlier).

e) Out of court reorganizations

Out-of-court reorganizations of insolvent businesses (informal work-outs) are possible in principle but difficult to achieve in practice. The main obstacles are the need for a unanimous solution and tight statutory deadlines to file for court insolvency proceedings.

Under Austrian insolvency law, a corporation (such as a GmbH) is deemed to be insolvent (as defined in the Austrian insolvency act) if it is either illiquid or over-indebted.

3. Obligation to file for Insolvency

1. Illiquidity

Under Austrian insolvency law, a debtor is deemed insolvent if it is unable to meet due claims as they fall due (“illiquidity”). This is also the case if the creditors do not press for payments. In some borderline-cases the concept of a mere delay in payment (“*Zahlungsstockung*”) might be applicable. The company is seen as illiquid if it cannot pay more than approx. 5 % of all due debts.²

A debtor is considered to be insolvent if:

² Austrian Supreme Court (“Oberster Gerichtshof”), short: OGH; decision 3 Ob 99/10w.

- a debtor is not able to pay (all) his debts as they fall due for to a lack of ready means of payment, and
- if the debtor cannot obtain the necessary means of payment immediately.

2. Over-indebtedness

In case of corporations (such as a GmbH), not only illiquidity constitutes “insolvency” in the sense of the Austrian Insolvency Act, but also a state of over-indebtedness.

Please note that under Austrian insolvency law, a company is over-indebted if it has a negative asset status at break-up values (balance sheet over-indebtedness at break-up values).

Even if a company is over-indebted according to the applicable (very strict) standard, it might not be deemed to be insolvent under Austrian law if a prognosis (forecast) of its continued viability (henceforth short: “continuation forecast”) demonstrates a positive result: As part of a continuation forecast, the probability of the company's future is to be examined with the aid of careful analysis of the causes of losses, a financing plan and the company's future prospects. Planned restructuring measures can be included in these considerations.

The prognosis of the continued existence thus constitutes a possibility to avoid “insolvency” in the sense of Austrian insolvency law (with all associated legal consequences) in spite of balance sheet over-indebtedness.

The subject of the prognosis for the continued existence of the company is the assessment of

- the future solvency of the company within the primary planning period (primary forecast)
- and the company's ability to survive beyond this (secondary forecast).

The future solvency and viability of a company are the two decisive criteria for the survival prognosis.

The prognosis of the company's continued existence must result in a well-founded statement as to whether the company will predominantly be able to continue its business activities in the future in compliance with its payment obligations. The forecast must be prepared on the basis of suitable planning instruments under various aspects. The scope of a forecast of the company's continued existence depends above all on the size and special features of the company in question.

3. Legal obligation under Austrian law to file for formal, court-controlled insolvency proceedings if the corporation is illiquid or over-indebted (in the sense of Austrian insolvency law), risks of personal liability of directors

An application for the initiation of court-controlled insolvency proceedings must be filed as soon as possible (“without culpable delay”), if a corporation is either illiquid or over-indebted (in the sense of Austrian insolvency law). The maximum period of 60 days may only be used in justified exceptional cases (expedient and probably successful restructuring negotiations) and, important to note, creditors must also be treated equally within this period. Please note that these and some of the below mentioned deadlines were temporarily extended due to COVID-19.

In the event of insolvency (in the sense of Austrian insolvency law), the managing director(s) are obliged to apply for the opening of insolvency proceedings without culpable hesitation (maximum being sixty days after the occurrence of the insolvency). This 60-day period may only be used if management makes appropriate efforts to avert the insolvency and

only if this undertaking is not to be seen as futile from the outset.

If management does not apply for the opening of insolvency proceedings in due time and creditors suffer damages as a result, management may be held personally liable for the damages which creditors suffer as a result of the late filing and which would not have arisen if the insolvency proceedings had been opened in due time. Regarding "old creditors", i.e., creditors whose claims had arisen before the material insolvency (illiquidity or over-indebtedness), management will be liable for any deterioration in the insolvency dividend (so-called quota damage) if a managing director fails to file for insolvency in good time. Regarding "new creditors", i.e., creditors whose claims only arose after the material insolvency occurred, management can be held liable in the event of late filing for insolvency for the entire possible losses.

Furthermore, the following rules must be observed in a situation of insolvency (under Austrian insolvency law):

- The debtor must not incur any new debts.
- The debtor must not pay any old debts (as this would lead to a preferential treatment of creditors).
- Any goods or services needed to uphold the basic operation may only be purchased if payment for such goods or services is rendered immediately.

4. Protection granted to the debtor against its creditors

The Austrian Insolvency Act provides for an **automatic stay of proceedings** as soon as insolvency proceedings have been opened over the insolvent's estate. This is true for reorganization and liquidation-oriented proceedings („*Konkursverfahren*“ and

„*Sanierungsverfahren mit/ohne Eigenverwaltung*“).

There are **special rules and regulations for rights of segregation and separation** (they are generally speaking not affected by the opening of insolvency proceedings; certain exceptions might apply). Also, there are special rules on rent agreements regarding business premises, etc. In order for some of those exceptions to be applicable a court decision might be necessary.