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ARTICLE

COVID-19: Developments in Austrian Restructuring Law

Marcus Benes, Partner, and **Karoline Hofmann**, Attorney-at-law, Eisenberger & Herzog Rechtsanwalts GmbH, Vienna, Austria

Synopsis

In March and April 2020, Austria passed several COVID-19 laws aiming at avoiding the opening of insolvency proceedings over the assets of Austrian companies that were financially stable prior to the COVID-19 pandemic. This article provides a summary of the relief measures taken in the area of Austrian restructuring law, while also providing a comprehensive overview on Austrian insolvency proceedings, crisis financing, and associated management liability.

While the newly introduced measures undoubtedly are a first step in the right direction, it remains to be seen whether they will be sufficient to prevent a significant rise in insolvency proceedings over the summer. Although further restructuring measures are not yet currently in political discussion, we believe additional measures similar to the ones implemented in other European jurisdictions could be adopted in the upcoming weeks, because of economic and political pressure.

1. Introduction

The COVID-19 pandemic, and the measures taken to contain its negative impact on the Austrian health care system, present companies with far-reaching financial challenges. The Austrian government implemented a nationwide lockdown in mid-March, including the mandatory closure of most stores for four weeks. Larger stores were even closed for seven weeks. Ongoing fixed costs and payment obligations vis-à-vis suppliers can easily lead to a financial crisis, if pandemic-related sales losses occur, and the implementation of state aid measures takes time, and only covers a part of the realised shortfall in profits and cash-inflows. To prevent the COVID-19 pandemic from causing a wave of insolvencies in Austria (private individuals as well as companies), new laws have been introduced to provide remedial action in some areas.

2. Material insolvency

Under Austrian law, a debtor is regarded as materially insolvent if at least one of the following conditions is fulfilled:

(a) *Cashflow test – illiquidity*: based on the lack of readily available means of payment, the debtor is unable to pay its due and payable debts, and presumably cannot obtain the required means of payment shortly, provided that this situation constitutes not only a mere delay of payment:[1]

- (i) 'readily available means of payment' means in particular cash, deposit money, available facilities, assets that are typically accepted as payment by creditors (e.g. cheques issued by third parties and bills of exchange accepted by third parties or otherwise executed), and other easily realisable assets;
- (ii) 'unable' means that the debtor is objectively incapable of paying (and not just unwilling to pay) its debts because of the lack of readily available means of payment;
- (iii) 'due and payable debts' means that only obligations due and payable at a certain point of time are taken into consideration when assessing the status of illiquidity – however, if liquid funds will be available in the near future to cover all obligations then due and payable, this only constitutes a mere delay of payment, and not yet illiquidity (see below); and
- (iv) a 'mere delay of payment' relates to cases where the debtor will be able to organise liquid funds shortly (e.g., claims due to the debtor are not paid on time, the debtor has to make a large payment unexpectedly, or the expected increase of a facility is delayed). Austrian courts tend to grant the debtor a reasonable grace period to overcome its payment difficulties. The duration of such grace period varies between the courts and the circumstance, and typically lasts not

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1 Pursuant to Austrian Supreme Court 19.01.2011, 3 Ob 99/10w a mere delay of payment is present if the shortfall amounts to only 5% of the due and payable claims, or the debtor is able to obtain the required funds within three months (in particular cases even five months).

more than three months (only where it is almost certain the delay of payment is only temporary, it may last up to five months).

(b) *Balance sheet test – over-indebtedness*: insolvency relevant over-indebtedness requires both (i) a negative status of the entire assets and liabilities based on liquidation values[2] and (ii) the lack of a positive going concern forecast. The going concern forecast usually contains:

 (i) an analysis of the reasons for the financial losses;

 (ii) a financial plan; and

 (iii) the future prospects of the company.

 The going concern forecast assesses the probability of future illiquidity, taking into consideration intended restructuring measures. Over-indebtedness shall only apply to cases where the viability of the company as a going concern – even in the light of intended restructuring measures – is not secured sufficiently, and the short balance cannot be compensated by future positive developments. The *going concern forecast* must be based on a realistic estimate of the company's future income and expenses. For a positive forecast, the liquidity and viability of the company as a going concern must be predominantly probable. In practice, a going concern forecast contains a primary forecast regarding the liquidity of the company during the following 12 months, and a secondary forecast regarding the sustainable mid-term positive developments and/or turn-around (typically a period of 2–3 years).[3]

The management must monitor the financial situation of the company and check whether the above conditions are fulfilled on an ongoing basis. The obligation to apply for the opening of insolvency proceedings based on the fulfilment of one of the above conditions constitutes a non-dischargeable management duty.[4]

Furthermore, restructuring proceedings with or without self-administration can already be initiated if the debtor's illiquidity is imminent.

3. Insolvency proceedings

The Austrian Insolvency Code 2010 (Insolvency Code) provides for the following insolvency proceedings:

(a) *restructuring proceedings with self-administration* – designed as a special form of restructuring proceedings, for which a restructuring administrator is appointed to supervise the debtor's management of the business (the debtor-in-possession concept), requiring a restructuring plan offer with at least *30%* quota;

(b) *restructuring proceedings without self-administration* – designed as a special form of restructuring proceedings, for which a bankruptcy administrator is appointed, and in which only a few provisions differ from those for bankruptcy proceedings, requiring a restructuring plan offer with at least *20%* quota; and

(c) *bankruptcy proceedings* – for which a bankruptcy administrator is appointed, and which aims at the debtor's liquidation (the sale of the whole insolvency estate and distribution of sales proceeds).

The insolvency proceedings are summarised in Figure 1.

The main advantage of restructuring proceedings with self-administration lies in the fact that the management of the debtor would generally stay in control of the administration of the business; however, a restructuring administrator will be appointed, having a right to veto certain transactions out of the ordinary course of business.

It should be noted that (i) if restructuring proceedings with self-administration are initiated, the debtor can request to change the proceedings into restructuring proceedings without self-administration or bankruptcy proceedings, and (ii) if restructuring proceedings without self-administration are initiated, the debtor can request to change the proceedings into bankruptcy proceedings. However, it is generally not possible to 'better the deal' and go the other direction (e.g., once bankruptcy proceedings are initiated, this cannot be changed).

It should be also noted that, if insolvency proceedings are initiated as bankruptcy proceedings, the debtor still has the right to present a restructuring plan, with the effect of a stay of liquidation of the insolvency estate (i.e., similar to a restructuring proceeding without self-administration, the debtor continues trading under the control of an appointed bankruptcy receiver). However, it is not possible to change to restructuring proceedings.

4. Filing for the opening of insolvency proceedings

The debtor's management is obliged to apply for the opening of insolvency proceedings, 'without culpable

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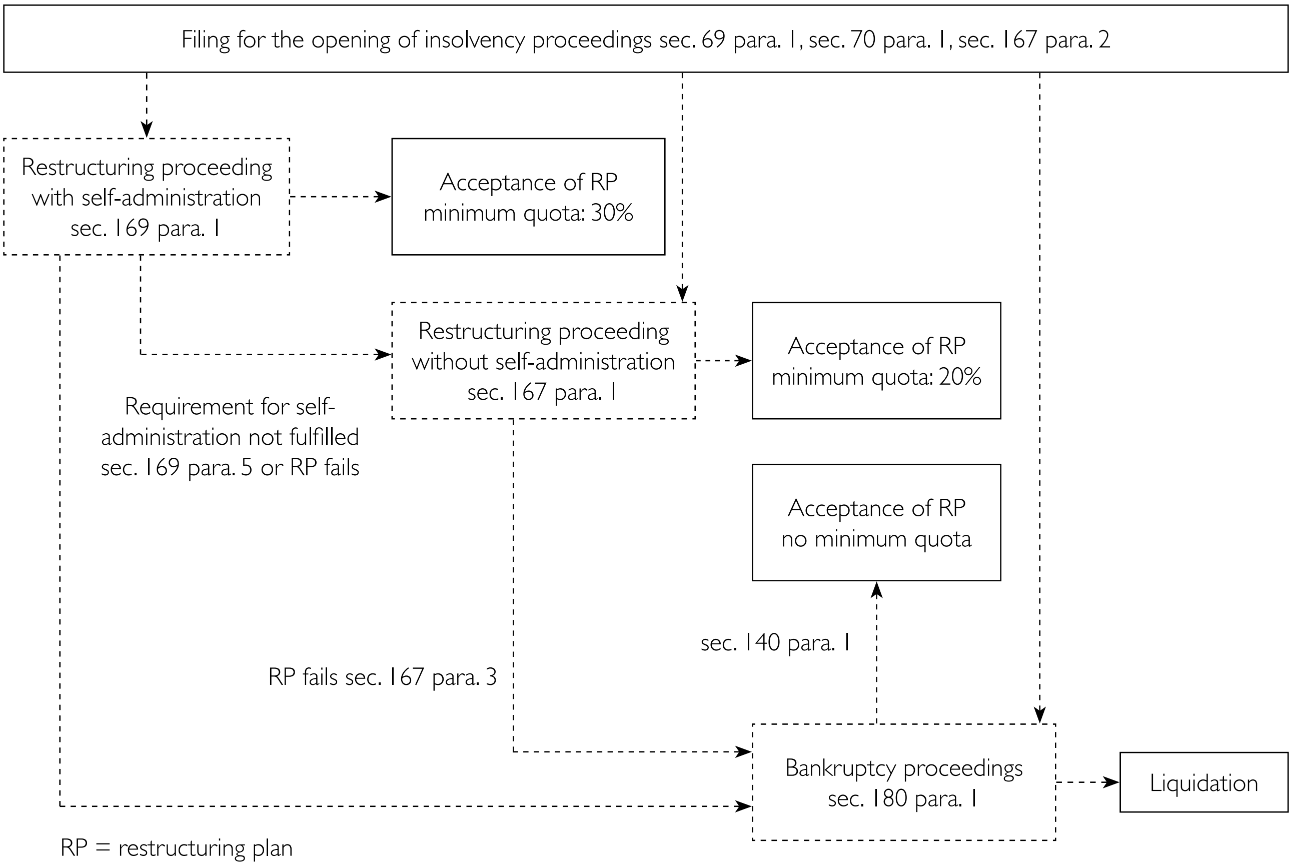
2 Equity replacing claims shall not be taken into consideration pursuant to section 67 para. 3 of the Insolvency Code.

3 See for example *Karollus/Kodek/Kvasnicka* Leitfaden Fortbestehensprognose, 10. ReTurn Jahrestagung, 15.04.2016; *Lichtkoppler/Reisch* Handbuch Unternehmenssanierung2 marginal notes 1.137ff.

4 Austrian Supreme Court 23.9.1987 1 Ob 608/87; Austrian Supreme Court 5.4.1989 1 Ob 526/89.

Figure 1



delay', but in any event no later than *60 days* after the insolvency effective date of material insolvency. During this 60-day period, the managing directors may make reasonable efforts to prepare for a filing of restructuring proceedings, or agree with the creditors on an out-of-court settlement. If the material insolvency is caused by a natural disaster (e.g. epidemics and pandemics such as COVID-19), this deadline is extended to *120 days*. The natural disaster need not be the sole cause of the material insolvency, but it is a necessary condition (without the natural disaster, insolvency would not have occurred). Typically, the insolvency proceedings are opened immediately upon application by the debtor (i.e., next Austrian business day).[5] Further, in the case of imminent illiquidity, the debtor has the right to apply for the opening of restructuring proceedings, but is not obliged to.

A creditor may also file for the opening of insolvency proceedings over the assets of a debtor. As a general rule, such creditor shall prove that it has a title for enforcement (e.g., final and binding court ruling or a valid settlement contract) or an acknowledged claim (e.g., a writing by the debtor confirming the due and payable claim).

Under the COVID-19 legislation, a debtor is not required to file an insolvency petition for over-indebtedness occurring between 1 March 2020 and 30 June 2020. As long as the debtor is solely over-indebted, but not also illiquid, insolvency proceedings are not to be opened during this period, even at the request of a creditor. Given the current uncertainties in the valuation of company assets, and the impossibility of making a well-founded going concern forecast in the current market situation, companies that are essentially viable as a going concern should be protected from being crushed in insolvency.

If the debtor is over-indebted after 30 June 2020, they must petition for insolvency 'without undue delay', by the later of (i) 60 days after 30 June 2020, or (ii) 120 days from when the over-indebtedness started.

In sum, as of today we expect to see a rise in insolvency proceedings starting from mid-July 2020 (when the 120-day-period for insolvency filings due to illiquidity caused by COVID-19 lapses), and over the summer, when the above periods for insolvency filings based on over-indebtedness lapse. However, there could be additional relief measures. In particular, the obligation to file based on illiquidity may be suspended, similar to the

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5 There are no 'pre-insolvency proceedings' under Austrian Law.

system already implemented in comparable jurisdictions like Germany.

5. General procedural aspects

The following types of claims must be distinguished in an insolvency proceeding, and in the following order of priority:

(a) *Secured Claims* – claims of a creditor against the debtor for which an in rem security (by contract or operation of law) granting preferred right of satisfaction into the underlying collateral has been provided; these claims are not affected by the opening of insolvency proceedings.

(b) *Preferred Claims* – claims that are generally arising in the course of insolvency proceedings, and that have to be paid in full. Such claims can include:

   (i) employee claims for current wages during insolvency proceedings;

   (ii) claims for fulfilment of bilateral agreements assumed by the insolvency administrator;

   (iii) claims based on any legal acts of the administrator; and

   (iv) claims based on an unjust enrichment of the insolvency estate.

(a) *Insolvency Claims* – claims that will be cut down to a quota. Such claims include:

   (i) any claim of a creditor against the debtor, that has come into existence before the opening of insolvency proceedings, and that is not a Secured Claim; and

   (ii) certain claims from termination of an employment contract, even if they arise after the opening of insolvency proceedings.

(d) *Subordinated Claims* – claims under equity replacing loans.

In the current COVID-19 situation, until 31 December 2020, insolvency courts may reasonably extend procedural deadlines in insolvency proceedings by official means or upon request, for a maximum of additional 90 days (the COVID-19 Deadline Extension). This is of particular importance for complex cases, where the general period of 90 days for adoption of the restructuring plan is too short.

6. Adopting a restructuring plan

The restructuring plan is subject to the vote of the unsecured insolvency creditors in the common hearing on the restructuring plan, at the latest 90 days after the opening of the proceedings (subject to the COVID-19 Deadline Extension). Holders of Secured Claims are only entitled to vote (i) if they request to vote; and (ii) in the amount of their expected loss (i.e., the amount of their claim that is not covered by the security interest). Particular voting restrictions apply for shareholders of the debtor. The estate may only be realised by the insolvency receiver if the restructuring plan has not been approved within these 90 days (subject to the COVID-19 Deadline Extension).

In the creditors' meeting, the restructuring plan requires the approval of more than 50% of the aggregate claims of those creditors who are present at the creditors' meeting (value count), *and* the simple majority of the creditors present (head count), as well as the insolvency court's confirmation. Claims of shareholders are only considered if they are not subordinated or equity replacing.[6]

In order to effect the *cramdown*, the restructuring plan presented in the course of restructuring proceedings with self-administration must offer satisfaction of all Preferred Claims, and at least 30% of the Insolvency Claims. If a restructuring plan is to be adopted in the course of restructuring proceedings without self-administration, the minimum threshold is lowered to at least 20%.

The entire quota offered by the plan must be paid to the creditors within a period of not more than 2 years following the approval of the restructuring plan. In our experience, most professional creditor representatives will not approve the plan unless a certain percentage of the quota is deposited up-front with the court, together with the costs of insolvency proceedings.

In general, strict rules apply to the fulfilment of a restructuring plan adopted in insolvency proceedings. If the debtor defaults on fulfilment of its debt vis-à-vis individual creditors, the cramdown and the benefits of the restructuring plan lapse vis-à-vis these creditors in the pro rata share of the unpaid restructuring plan quota payments ('revival of the claim').[7] In general, such a default presupposes that the debtor has not paid a due debt, despite a written reminder for payment sent to it by the creditor, granting a grace period of at least 14 days. However, in order to protect debtors from defaulting on restructuring plan quota payments because of the COVID-19 crisis, the described consequences of

Notes

6 Equity replacing claims shall not be taken into consideration pursuant to section 67 para. 3 of the Insolvency Code.

7 Example: if the creditor's insolvency claim amounts to EUR 10,000 and the quota offered under the restructuring plan is 20%, the debtor would have to make restructuring plan quota payments in an aggregate amount of EUR 2,000. After having paid restructuring plan quota payments in an aggregate amount of EUR 1,000, the debtor defaults on the further payments. Since the debtor has fulfilled 50% of its quota payments, the insolvency claim revives in the amount of EUR 5,000 (= 50% of 10,000).

default in the restructuring plan will not occur in relation to a debt falling due at or after 22 March 2020, if the creditor's written reminder for payment is sent between 22 March 2020 and 30 April 2020.

The quota is also applied to claims of creditors that were not part of the proceeding. Omitting to file a claim in the proceeding does not invalidate the claim, but, in any event, a cram-down is effected. However, if the debtor is at fault for creditor claims not being able to be filed, the full amount can still be claimed. This is particularly relevant for tax and insurance claims that the authorities could not have filed because of incorrect or missing applications.

7. Avoidance rules – right of contestation

In the event of insolvency proceedings, the bankruptcy administrator (or, for restructuring proceedings with self-administration, the restructuring administrator) can contest legal actions and transactions which have taken place within certain time periods prior to the opening of insolvency proceedings over the assets of the debtor (referred to as hardening periods), and which relate to the assets of the insolvent debtor, provided that those acts have reduced the funds of the insolvency estate, or have otherwise caused a direct disadvantage to the creditors of the debtor, or an indirect disadvantage, if it was objectively foreseeable.

Some of the circumstances for contestation under the Insolvency Code include:

(a) *Intent to cause disadvantage to insolvency creditors* (section 28 items 1-3 of the Insolvency Code). Legal acts may be contested if:

   (i) they have disadvantaged the creditors of the debtor;

   (ii) the counterparty should have known of the debtor's intention to disadvantage (even slight negligence of the counterparty is sufficient); and

   (iii) the legal acts occurred during a hardening period of two years prior to the opening of insolvency proceedings.

   If the counterpart had actual knowledge of the intention to disadvantage, the hardening period is extended to ten years.

   If the debtor and the counterpart are members of the same affiliated group, the insolvency administrator's burden of proof is reduced. The counterpart must prove that it did not know and should not have known of the debtor's intention to disadvantage its creditors.

   The intention to disadvantage is fulfilled, not only if the satisfaction of another creditor is prevented, but also when it is delayed or aggravated.

(b) *Fraudulent conveyance* (section 28 item 4 of the Insolvency Code). Purchase, barter, and delivery agreements may be contested if:

   (i) they have disadvantaged the creditors of the debtor;

   (ii) the counterpart realised or must have realised that the transaction constitutes a fraudulent conveyance causing disadvantage to the creditors of the debtor (e.g., selling goods for an unusual and unjustified low price); and

   (iii) the agreements were executed during a hardening period of one year prior to the opening of insolvency proceedings.

(c) *Transactions free of charge* (section 29 item 1 of the Insolvency Code). Transactions free of charge may be contested, if they occurred during a hardening period of two years prior to the opening of insolvency proceedings.

(d) *Preferential treatment* (section 30 of the Insolvency Code). The following acts that occurred (1) after the debtor became materially insolvent, or (2) after the application for the opening of insolvency proceedings over the debtor's assets had been filed, or (3) within a period of 60 days prior to these points in time can be contested if:

   (i) a creditor has obtained a security interest, or the satisfaction of a claim, that the creditor was not entitled to receive in this way, or at this time, unless the creditor has not been treated preferentially, compared to other creditors of the debtor; or

   (ii) the debtor has provided a creditor with a security interest, or satisfied a claim, with the intention to treat this creditor preferentially, and the creditor knew, or should have known, of the debtor's intent to treat it preferentially; and

   (iii) the acts occurred during a hardening period of one year prior to the opening of insolvency proceedings.

(e) *Knowledge of insolvency of the debtor* (section 31 of the Insolvency Code). The following legal acts that occurred after the debtor had become materially insolvent or after the application for the opening of insolvency proceedings had been filed can be contested if:

   (i) they involved providing a security interest or satisfying a claim *vis-à-vis* an insolvency creditor, or any legal transaction entered into by the debtor with any third party to the direct detriment of its other creditors, and the third party counterpart knew, or should have known, of the debtor's material insolvency, or the application for the opening of insolvency proceedings; or

(ii) they were legal transactions entered into by the debtor with any third party to the indirect detriment of its other creditors, and the third party counterpart knew, or should have known, of the debtor's material insolvency, or the application for the opening of insolvency proceedings, and the occurrence of such detriment to the insolvency estate was objectively foreseeable. According to the Insolvency Code, an indirect detriment to other creditors is in particular foreseeable if the restructuring concept is obviously unfit; and

(iii) they occurred during a hardening period of six months prior to the opening of insolvency proceedings.

(f) *COVID-19 Bridge Loan Protection* (see section 10, 2. COVID-19 Judicial Accompanying Act). Since the short-time work subsidy from the Austrian Labor Market Services is only paid out retrospectively, companies have to finance their employees' salaries temporarily, and they often use bridge loans. Such loans, granted between 1 March 2020 and 30 June 2020, in the amount of the subsidy, and their immediate repayment upon receipt of the subsidy, are not subject to challenge under section 31 of the Insolvency Code, provided that (i) no collateral was provided by the borrower, and (ii) the lender was not aware of the borrower's illiquidity at the time the loan was granted.

8. Crisis financing in Austria

Austrian law does not provide a super senior ranking for a new third party lender providing bridge financing to overcome a company's liquidity shortfall. A super senior ranking would have to be agreed upon by all other creditors of the company.

Because of the Austrian avoidance rules outlined above, bridge financing in a financial crisis is typically granted as a term loan, and not as a revolving loan. In a revolving facility, each drawdown and repayment is regarded as a separate legal act, that is subject to contestation by the insolvency administrator. Collateral to be provided by the borrower should be granted and perfected as a condition precedent for disbursement under the loan, in order to strengthen the argument that the borrower and lender are performing concurrently, and to avoid an avoidance argument based on preferential treatment of the lender.

Finally, equity replacement rules play an important role in crisis financing in Austria. Essentially, if a shareholder extends a loan to its subsidiary in a financial crisis, the loan is equity replacing, and must not be repaid until the subsidiary has overcome its financial crisis. Under the Austrian COVID-19 laws, a new exemption has been introduced for cash loans that are granted and disbursed, for no more than 120 days, between 5 April and 30 June 2020, where the borrowing company has not provided a pledge or comparable security from its assets.

Equity replacement rules also apply to shareholder security for loans granted by third party lenders, when the subsidiary's crisis was known or evident to the third party lenders. The third party lender may only demand repayment from the subsidiary in crisis, to the extent enforcing the shareholder security would not provide for full recovery of the loan amount.

9. Management liability

If the management fails to file for the opening of insolvency proceedings in a timely manner, each managing director may become personally liable to its company for damages caused to the company. However, as a relief measure under the new Austrian COVID-19 laws, for a period starting on 1 March 2020 and ending on 30 June 2020, the management liability for payments made after the occurrence of over-indebtedness does not apply. This is only for over-indebtedness, and not for illiquidity!

A managing director failing to file for the opening of insolvency proceedings in a timely manner may also become personally liable to the creditors of its company. For existing creditors, they can be liable for reducing a quota (cut-off date is the effective date). For new creditors, they can be liable for the damage suffered because the creditor trusted in the company not being insolvent. Again, this liability does not apply if debtors become over-indebted, and management does not petition for insolvency, during a period starting on 1 March 2020 and ending on 30 June 2020. Management liability for a delayed filing based on illiquidity is not affected!

Under the Austrian Business Reorganisation Act 1997, the members of the management board are jointly and severally liable for the company's debts that are not covered by the insolvency estate, up to a maximum amount of EUR 100,000 per managing director. This applies if, during the two years prior to the filing for the opening of insolvency proceedings, they (i) received an auditor's report showing the equity ratio to be less than 8%, with a hypothetical period of over 15 years needed to repay the debt, and they did not initiate or continue a voluntary business reorganisation proceeding without undue delay; or (ii) have not prepared annual accounts, or have not engaged the auditor to audit the annual accounts, in a timely manner.

Members of a supervisory board may become liable for not properly fulfilling their supervisory duties, especially in a crisis. If a company becomes materially insolvent, the supervisory board must make sure that the management board files for insolvency in a timely manner. While the supervisory board is not entitled to file for insolvency on behalf of the company, it must take adequate steps towards a timely filing by the management (e.g. discussions regarding insolvency filing by the management, threatening the replacement of management board members).

The managing directors may also become liable for unpaid taxes, or pursuant to social security laws, if taxes or social security contributions were not paid because of their negligence, or not retained pro rata when making payments to employees of the company. In the latter case, the managing directors may even be subject to criminal liability under the social security laws.

Under certain circumstances, the managing directors of a company may become subject to criminal charges as follows:

(a) fraudulently causing an insolvency, pursuant to section 156 of the Act on Crimes;

(b) preferential treatment of a creditor, pursuant to section 158 of the Act on Crimes; or

(c) grossly negligent impairment of creditor interests, pursuant to section 159 of the Act on Crimes.

10. COVID-19 civil law relief measures

For consumers and small businesses (with less than 10 employees, and annual turnover or budget not exceeding EUR 2 million), the Austrian COVID-19 laws have introduced a statutory standstill for payments under credit agreements, during a period starting on 1 April 2020 and ending on 30 June 2020, if circumstances arising from the COVID 19 pandemic render the borrower unable to pay.

Additional relief measures have been introduced in the area of general contract law.

(a) If a payment due in the period starting on 1 April 2020 and ending on 30 June 2020 is not made on time, because of the debtor's impaired economic capacity as a result of the COVID-19 pandemic, default interest is limited to the statutory default interest rate of 4% per annum.

(b) If a contractual party is in default on its obligation because of their impaired economic capacity, or restrictions in their ability to carry on their business, as a result of the COVID-19 pandemic, that party is not obliged to pay agreed contractual penalties, including no-fault penalties.

11. Future outlook

It remains to be seen whether these selective measures taken under the new Austrian COVID-19 legislation will be sufficient to avoid a surge of insolvencies following the pandemic. During the past seven weeks, we have mostly seen insolvency proceedings being opened over companies that were already experiencing financial difficulty before the COVID-19 crisis hit Austria. However, continued revenue losses due to protection measures (e.g., maximum number of customers per store), and the restrictions and complex details of state aid measures, do not create a very optimistic outlook. The ongoing restrictions on international travel strongly affect hotel and leisure businesses, and the food service industry. Some businesses have found new ways to operate during the lock-down; we have seen a boom in digitalisation, online shops, and delivery services. While the current crisis provides opportunities for certain sectors, we believe that we will see the need for restructuring in sectors that have already experienced a massive hit by the COVID-19 crisis, such as the automotive industry, hotel and leisure business, and the food service industry, in the upcoming months.

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