Q&A's on the new restructuring framework

On 22 February 2021 the ministerial draft of the Restructuring and Insolvency Directive Implementation Act (*Restrukturierungs- und Insolvenz-Richtlinie-Umsetzungsgesetz*) was published. The review period ends on 6 April 2021. The federal law is to come into force on 17 July 2021. The following is a practical description of some key points of the planned restructuring framework. The law contains regulations, among others, in respect to the access to the restructuring process with the restructuring plan as the core of the process which contains haircuts for creditor-claims, the involvement of a restructuring representative, a stay of execution and the contestation in case of failure of the restructuring plan.

Who can request the initiation of restructuring proceedings and when?

The initiation takes place at the request of the debtor and requires "probable insolvency". Insolvency is "probable" if the continued existence of the debtor's company would be at risk without restructuring. This is the case in particular if (a) insolvency is imminent (*drohende Zahlungsunfähigkeit*) or (b) the equity ratio falls below 8% and the notional debt repayment period exceeds 15 years. However, the company must be able to continue as a going concern despite the threat to its existence. This requires a going concern prognosis, which can also be subject to the condition of the restructuring plan.

What documents must be attached to the application?

The petition, which shall be filed with the court having jurisdiction over the debtor, shall be accompanied by the following documents: (a) a restructuring concept (*Restrukturierungskonzept*) or, if already available at the time of the application, a restructuring plan (*Restrukturierungsplan*), (b) a list of assets and liabilities (*Vermögensverzeichnis*) and (c) a financial plan (*Finanzplan*).

In addition, the debtor must demonstrate in the application that the restructuring concept can achieve the viability of the business (so called "conditional going-concern-prognosis"; *bedingte Fortbestehensprognose*). In order to demonstrate the viability of the company, the application must also include documents (if the debtor is obliged to prepare annual financial statements, for example, he must also submit these for at least the last 3 years).

A restructuring concept requires at least the following content: (a) envisaged restructuring measures, (b) a listing of assets and liabilities at the time of filing of the application, and (c) a valuation of assets.

The financial plan shall maintain an outlook of expenditures and revenues for the following 90 days, including the raising and use of funds to continue the debtor's business. The 90 days period shall be extended by such period the stay of execution (*Vollstreckungssperre*) is extended.

When is the restructuring plan to be submitted and what content must the financial plan have to show?

If the restructuring plan is not submitted together with the application for start of the restructuring proceedings, the court shall grant a period not exceeding 60 days for its submission. If the application for the granting of a time period for the submission of the restructuring plan is not filed at the same time as the application for the initiation of the restructuring proceedings, a restructuring officer (*Restrukturierungsbeauftragter*) shall be appointed to assist in the preparation of the restructuring plan.

The minimum content for the restructuring plan is set out in Section 23 ReO and includes, among others, the following elements: (a) the separation of creditors into classes (or a statement of the reasons for not separating into classes of creditors), (b) the creditors not affected by the restructuring, and (c) a statement of the reasons why the restructuring plan will prevent the insolvency of the debtor and the occurrence of over-indebtedness or elimination or over-indebtedness that has already occurred and will ensure the viability of the debtor's business.

What classes of creditors are to be formed?

For the so-called "affected creditors", i.e. creditors whose claims are to be reduced or deferred, the following five creditor classes are to be formed: (a) creditors with secured claims, (b) unsecured creditors, (c) bondholders, (d) "creditors in need of protection" (*schutzbedürftige Gläubiger*; in particular those with claims below EUR 10,000), and (e) creditors with subordinated claims.

What are the main legal consequences of the initiation of restructuring proceedings?

Appointment of a restructuring officer (*Restrukturierungsbeaftragter*): A restructuring officer must be appointed by the court to support the debtor, in particular for the preparation and negotiation of the restructuring plan.

Stay of execution (*Vollstreckungssperre*): At the debtor's request, the court may order a stay of execution to support the negotiations on the restructuring plan. The stay of execution may cover all types of claims (including secured claims and also the right to dispose of movable and immovable property of the debtor out of court). The duration of the stay of

execution must (initially) not exceed three months. It may be extended however upon application, but is generally limited to a maximum duration of six months. The stay of enforcement is effective in relation to individual creditors as soon as they have been notified thereof.

Suspension of the obligation to file for insolvency due to over-indebtedness: The debtor's obligation to apply for commencement of insolvency proceedings due to over-indebtedness shall be suspended during the stay of enforcement. On the other hand, no decision shall be taken on an application by a creditor for the opening of insolvency proceedings for the duration of the restructuring proceedings.

Limited right of creditors to request opening of insolvency proceedings due to inability to pay (*Zahlungsunfähigkeit*): Insolvency proceedings shall not be opened at the request of a creditor during the period in which stay of enforcement is granted if this would not be in the general interest of the creditors.

Restriction of actions in respect of "material contracts": Creditors who are subject to a stay of enforcement must not, in respect of claims arising prior to the stay of enforcement and solely on the basis of the fact that the claims have not been paid by the debtor, refuse performance under material contracts that have yet to be performed, accelerate the maturity of such contracts, terminate them or otherwise modify them to the detriment of the debtor. Whether a contract is "material" is to be determined on whether the performance of the contract is necessary for the continuation of the debtor's daily operations. Exception with regard to loans: However, in line with section 25a para 2 cif 2 of the Insolvency Act claims for the disbursement of loans shall not be covered by the ban on dissolution, so that lenders shall continue to have the rights of termination for good cause (section 987 Austrian Civil Code) and due to material deterioration (section 23 of the General Banking Conditions).

When and how to vote on the restructuring plan?

The restructuring plan shall be voted on at a restructuring plan meeting (*Restrukturierungsplantagsatzung*), which shall be held generally within 30 to 60 days after the restructuring plan has been submitted, and the debtor shall submit the plan to the creditors at least two weeks ahead to such hearing

A restructuring plan shall be deemed to be accepted by the affected creditors if in each class (a) a majority of the affected creditors present approve the plan and if (b) the aggregate amount of the claims of the approving creditors in each class is at least 75% of the aggregate amount of the claims of the affected creditors present in such class.

In addition, the restructuring plan requires confirmation by the court, which requires, among others, equal treatment of all creditors within a class (or all creditors if no classes have been

formed) and compliance with the "creditor interest criterion" (*Kriterium des Gläubigerinteresses*).

What does "cross-class cram-down" mean?

A restructuring plan that has not been accepted by the affected creditors in each class shall nevertheless be confirmed at the debtor's request if all of the following conditions are met: (a) the requirements for court confirmation are met, (b) rejecting classes of creditors are placed in the same position as *pari passu* classes and are placed on a better footing than subordinated classes, and (c) no class of creditors receives more than the full amount of its claims.

A further requirement is that the restructuring plan has been accepted by a majority of the classes of creditors, including the class of secured creditors, or by a majority of the classes of creditors whose creditors can be expected to receive a distribution quota in the event of a valuation of the debtor as a going concern in the insolvency proceedings. If only two classes of creditors have been formed, the assumption by one of these classes shall suffice.

Are there special protection mechanisms in favor of individual creditors who do not agree to the restructuring plan?

Yes, among other things, creditors have the right to file an application for a review of compliance with the "creditor interest criterion" (*Kriterium des Gläubigerinteresses*) at the restructuring plan meeting, at the latest, however, within a period of seven days thereafter. This criterion is met if no dissenting affected creditor is placed in a worse position by the restructuring plan than in the insolvency proceedings under the Insolvency Act.

A dissenting affected creditor may also file an appeal (*Rekurs*) against the confirmation of the restructuring plan. However, such appeal shall only have suspensive effect if the implementation of the restructuring plan would entail serious, disproportionate and irretrievable damage for the dissenting affected.

Against whom does an accepted and confirmed restructuring plan act?

A restructuring plan that has been adopted and confirmed by the court shall be effective for all affected creditors named in the restructuring plan, but not against creditors who did not participate in the adoption of the restructuring plan (however, all those creditors who did not participate despite having received the restructuring plan or having been summoned to the restructuring plan meeting shall also be deemed to be participants). Shareholders may furthermore not refuse or impede the acceptance, confirmation and implementation of a restructuring plan without good cause.

Are there any changes in respect to rescission law, especially with regard to interim and new financings?

Yes. The risk of avoidance of interim and new financing and restructuring-related transactions in the event of the failure of the restructuring plan is to be limited by an amendment to the Insolvency Act (new sections 36a, 36b and 36c). Such measures, provided that they are also part of the confirmed restructuring plan or (otherwise) approved by the court, shall not be voidable as an adverse legal transaction due to over-indebtedness pursuant to section 31 para 1 cif 3 of the Insolvency Act. On the other hand, the time limits to be calculated from the date of the reopening of the insolvency proceedings are to be extended by the duration of any insolvency or over-indebtedness existing during the restructuring proceedings (also by way of an amendment to the Insolvency Code) if these proceedings have been discontinued during the avoidance period.

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