GLOBAL FORUM ON LAW, JUSTICE AND DEVELOPMENT (GFLJD)
COMMUNITY OF PRACTICE
QUESTIONNAIRE ON INSOLVENCY LAW AND COMPANY LAW

Answers regarding the legal situation in Austria

I. Introductory questions on the insolvency procedures available in the relevant jurisdiction.

1. What insolvency procedures – either liquidation or reorganization procedures – are available for distressed or insolvent companies?

Generally speaking, Austrian insolvency law is still primarily creditor oriented. The IO provides for two different types of proceedings. The first, the bankruptcy proceeding (Konkursverfahren), is mainly a liquidation or winding-up proceeding, i.e., a proceeding involving the realization of the debtor’s assets and the subsequent distribution of the proceeds among the creditors. However, the bankruptcy proceeding also contains elements of debtor protection and rescue of the debtor’s business.

The other proceeding regulated in the IO, on the other hand, is a court-controlled reorganization proceeding (Sanierungsverfahren) of the debtor from the outset of the proceeding. Its goal is to rescue the insolvent debtor’s business by enabling the debtor to continue its business activities and, eventually, to be discharged from a part of its debts. The conditions for a discharge of residual debts are quite strict. If the debtor wants to remain in possession (“Sanierungsverfahren mit Eigenverwaltung”), the debtor has to offer the creditors upon filing for the commencement of the proceedings the payment of at least 30 percent of their claims within a maximum period of two years. In this case, the insolvency court (Insolvenzgericht) only appoints a reorganization administrator who mainly has controlling powers, although some transactions require the administrator’s approval.

2. Are there special insolvency procedures available for financial institutions or for other special classes of companies?

The reorganization of banks is regulated by the Financial Institutions Act of 1993 (Bankwesengesetz or BWG), while reorganization of insurance companies is regulated by the Supervision of Insurance Companies Act (Versicherungsaufsichtsgesetz or VAG).
3. Are there any specific legal provisions that apply to debt restructurings achieved without a full formal insolvency process?

There are no specific legal provisions that apply to debt restructurings achieved without a full formal insolvency process.

Out-of-court reorganizations of insolvent businesses (informal work-outs, in German: Außergerichtlicher Ausgleich or Stiller Ausgleich) are possible in principle but difficult to achieve in practice.

The main obstacles are the tight statutory deadlines to file for court insolvency proceedings,17 which leave little time for successful out-of-court negotiations, and the necessity to achieve unanimous acceptance by the creditors of the debtor’s reorganization plan. Additional obstacles are the risks of civil and criminal sanctions if the principle of equal treatment of creditors is not strictly observed.

4. What are the commencement criteria for insolvency procedures?

a. Illiquidity

The primary requirement for the opening of bankruptcy proceedings is the illiquidity of the debtor.24 There is no statutory definition of the term “illiquidity.” According to case law, a debtor is illiquid when, due to a lack of liquid funds, it is no longer able to pay its debts within a reasonable time as they fall due. In other words, a debtor is illiquid in the meaning of the IO, if the debtor can no longer meet its financial obligations. Illiquidity is determined according to objective criteria. It is irrelevant, whether the debtor is willing to pay. Illiquidity is assumed if the debtor ceases payment.25 Illiquidity does not require that the creditors be pursuing their claims.26 To serve as a ground for opening bankruptcy proceedings, the illiquidity must exist for a foreseeable amount of time. A mere temporary delay of payments (Zahlungsstockung) does not qualify as illiquidity.

b. Over-Indebtedness

Legal entities, such as corporations or co-operative societies, are deemed bankrupt not only when they are illiquid but, also, in the case of over-indebtedness. There is no statutory definition of “over-indebtedness.” Technically, a debtor is overly indebted when its liabilities exceed its assets. However, the commercial balance sheet test does not necessarily reflect the true value of a company. To determine whether a company is over-indebted in the sense of the Bankruptcy Act, a pre-bankruptcy balance sheet test must be performed. For the purpose of this test, the assets of the company must be valued at their present

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17 Sixty days from the time when the debtor recognizes, or could have recognized, that it is in a state of insolvency (IO § 69).
24 IO § 66 et seq.
25 IO § 66 ¶ 2.
26 IO § 66 ¶ 3.
market value assuming a bankruptcy sale, i.e., based upon liquidation values. This includes possible hidden reserves that are not shown on the commercial balance sheet. Additionally, eventual discounts on the book value of assets, which can, in practice, be quite substantial if the assets were to be sold in the course of a bankruptcy sale, must be taken into account.

On the other hand, if the company's rescue is likely, then the company's market value must be calculated based upon going concern values. Whether the company's rescue is likely must be determined by a so-called “continuation forecast” (Fortführungsprognose). This forecast includes an evaluation of the capitalized value of the anticipated yield of the company. In practice, it must be determined whether the economic strength of the company is sufficient to overcome the current crisis. If that is the case, then no bankruptcy proceeding will be opened, even if the company is, technically speaking, over-indebted.

5. Who can propose a restructuring plan? (e.g. corporate bodies, insolvency representatives, creditors)

Under Austrian law, only the debtor may present a plan to the court.\(^1\) Austrian law does not provide for reorganization contrary to the debtor's wishes.

If a creditor applies for involuntary bankruptcy proceedings, the debtor may still file a reorganization plan, as long as the court has not opened the bankruptcy proceedings. The insolvency proceeding will then be conducted as a reorganization proceeding.

6. Please describe whether and to what extent shareholders’ rights can be affected by a situation of distress/insolvency of a company before and/or irrespective of the opening of a formal insolvency proceeding (e.g., are there any fiduciary duties of the shareholders to approve corrective measures/plans proposed by the board?)

The board has a duty to propose measures. Shareholders are under no duty or liability to approve the proposed measures.

7. Are shareholders notified of the initiation of an insolvency process? If notification is individualized, what are the mechanisms used to identify shareholders?

The opening of proceedings is published online at the Austrian judiciaries’ homepage (http://edikte.justiz.gv.at).

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\(^1\) § 140 Austrian Insolvency Act; Kodek, Von der KO zur IO, ÖBA 2010, 498 (499).
The insolvency registers of several EU countries\(^2\) can be searched via a single website (Insolvency Registers interconnection search interface: https://e-justice.europa.eu/content_interconnected_insolvency_registers_search-246-en.do?clang=en).

8. Are shareholders required to file claims in the insolvency proceeding? What are the consequences of not filing a claim?

Shareholders will normally not have a claim in insolvency proceedings of the respective company. If however there shall be a claim against the company it would have to be filed like any other claim.

Non-filing of a claim results in non-participation in the schedule of claim and in any possible recovery.

9. Can shareholders continue to trade and transfer shares after the initiation of an insolvency proceeding affecting the company?

Yes. Certain limitations in accordance with stock trading regulations of publicly traded shares in their respective stock exchange market may apply.

10. Do shareholders have the right to request that a shareholders' meeting is held, even if the company is insolvent? (If there are separate reorganization and liquidation procedures, does this affect the response?)

Yes, shareholders have the right to request that a shareholders' meeting is held, even if the company is insolvent.

11. Do shareholders have the right to request information in an insolvent company? Do they have information rights as to the progress of a reorganization procedure? Can they exercise that right vis-à-vis the directors of the company -if they remain in charge of the company-or vis-à-vis the insolvency representative?

They are allowed to review the court's files.

12. Can shareholders make proposals for nomination of directors, if the directors continue managing the company?

Yes. Shareholders can make proposals for nomination of directors, if the directors continue managing the company.

\(^2\) Czech Republic, Germany, Estonia, Netherlands, Austria, Romania, Slovenia.
13. If special categories of shares exist whose holders are granted additional governance rights, are these additional rights affected by the opening of an insolvency procedure? (If there are separate reorganization and liquidation procedures, does this affect the response?)

In general the effects of the opening of insolvency proceedings are the same for each category of share.

14. Can shareholders challenge the decisions of the shareholder meeting, if it is still active? Do they retain the possibility of taking action against the acts of the directors? And against the acts of an insolvency representative? Is any authorization by a judicial or administrative body required to do so or, more generally, to exercise corporate rights? (If there are separate reorganization and liquidation procedures, does this affect the response?)

Shareholders can challenge the decisions of the shareholder meeting.

They also retain the possibility of taking action against the acts of the directors.

The directors cannot however take action against the acts of the insolvency representative. They can however sue him for pecuniary losses incurred because of a lack of diligence pertaining to his management.

15. Do shareholders have the right to call a special investigation of the affairs of the insolvent company?

No, the shareholders do not have the right to call a special investigation of the affairs of the insolvent company.

16. Does the law provide for the establishment of a shareholders’ committee (or several committees, in case of different share classes)? What are their powers? Who bears the related costs?

No. The law does not provide for the establishment of a shareholders’ committee.

17. Can shareholders voluntarily transfer shares of the company undergoing insolvency proceedings against any provisions in the articles/bylaws restricting transfers of shares?

No. Shareholders cannot voluntarily transfer shares of the company undergoing insolvency proceedings against any provisions in the articles/bylaws restricting transfers of shares.
18. Can outstanding shares of the company undergoing insolvency proceedings be assigned to third parties without the consent of the relevant shareholders? If yes, under what conditions? Are existing shareholders entitled to compensation? What other safeguards are provided? (e.g., does the law include a principle according to which the affected shareholders should not receive less than in a liquidation procedure?)

No. There are no provisions under Austrian insolvency law governing debt-equity swaps.

19. Can outstanding shares of the company undergoing insolvency proceedings be cancelled without the consent of the relevant shareholders? If yes, under what conditions? Are existing shareholders entitled to compensation? What other safeguards are provided? (e.g., does the law include a principle according to which the affected shareholders should not receive less than in a liquidation procedure?)

No. Outstanding shares of the company undergoing insolvency proceedings cannot be cancelled without the consent of the relevant shareholders.

20. Do shareholders of the company undergoing insolvency proceedings have pre-emption rights over new issues of shares? (2) Are there special conditions for the suppression of pre-emption rights if the company is insolvent (if there are separate reorganization and liquidation procedures, does this affect the response?).

They have the same rights as if there were no insolvency proceedings ongoing.

As a consequence, shareholders generally have pre-emption rights over new issues of shares (except in certain cases of pre-authorized new shares and convertible options issued). There are no special conditions for the suppression of pre-emption rights in insolvency.

21. Can shareholders retain a participation in the company that has emerged from an insolvency process (or in the company to which the insolvent company’s assets have been transferred) even if the company was insolvent according to a balance-sheet test? (i.e., where the value of its liabilities exceeds the value of its assets) If yes, under what conditions? (If there are separate reorganization and liquidation procedures, does this affect the response?)

Yes. There are no particular conditions. If only the debts of the company are restructured, the shareholder will remain the same, provided no other agreement is made. In all other cases, the participation of the shareholders will depend on the terms of the restructuring agreement.
22. Are the ranking of classes of shares and the preferential rights of classes of shares affected (and if yes, to what extent) by the fact that the company is undergoing an insolvency process? (If there are separate reorganization and liquidation procedures, does this affect the response?)

No. The ranking of classes of shares and the preferential rights of classes of shares are not affected by the fact that the company is undergoing an insolvency process.

23. Can shareholders, in the course of an insolvency procedure, supply goods, services or financial resources to the company? If yes, under what conditions (e.g., judicial authorization)? What would their ranking position be towards other creditors?

Yes, under the same conditions as any other providers. However, payments of the company to them will be under particular scrutiny in terms of possible avoidance actions. The ranking of their claims will be essentially the same.

24. Can shareholders, in their capacity as counterparties, be under a duty to continue a contractual relationship with the insolvent company during an insolvency procedure? (If there are separate reorganization and liquidation procedures, does this affect the response?).

There are no specific rules for shareholders.

According to Sec 25a Austrian Insolvency Act however in principle any counterparty cannot terminate a contract for 6 months if doing so jeopardized the viability of the insolvent company. There are however certain exceptions to this rule.

25. Can shareholders (or companies of the same group) holding credit claims against the company under insolvency procedure participate in the creditors’ meeting and vote on the insolvency plan without restrictions? (If there are separate reorganization and liquidation procedures, does this affect the response?)

Yes.

26. If shareholders (or companies of the same group) do not hold credit claims against the company under insolvency procedure, must/can they participate in the creditors’ meeting? If that is the case, what rights or duties do they have in that meeting? (If there are separate reorganization and liquidation procedures, does this affect the response?)

No.
27. Do shareholders in an individual company have information rights as to the filing of insolvency proceedings by the parent or other related companies?

No.

28. Does the shareholders’ meeting continue to exist in insolvency proceedings? (If there are separate reorganization and liquidation procedures, does this affect the response?)

In both cases, the shareholders’ meeting of the company still exists, however divested.

In theory, it is possible to convene a shareholder’s meeting in the case of reorganization proceedings. In practice, it very rarely happens.

29. Does the shareholders’ meeting preserve all of its competences, generally? (If there are separate reorganization and liquidation procedures, does this affect the response?)

Yes, the shareholders’ meeting does preserve all of its competences, generally.

They cannot however influence the (independent) insolvency representative who is the de facto decision maker.

30. Does the shareholders’ meeting need to approve the accounts of the distressed/insolvent company?

No.

31. Does the shareholders’ meeting have the power to dismiss directors – if directors are still in charge of the insolvent company? Can the shareholders’ meeting request the removal of the insolvency representative? (If there are separate reorganization and liquidation procedures, does this affect the response?)

The shareholders’ meeting still has the power to dismiss directors – if directors are still in charge of the insolvent company.

The shareholders' meeting does not have standing to request the removal of the insolvency representative.

32. Is a shareholders’ meeting authorisation required to start an insolvency procedure? (If there are separate reorganization and liquidation procedures, does this affect the response?)

No.
33. Does the shareholders’ meeting need to approve an insolvency or reorganization plan? Can shareholders, even individually, challenge an insolvency or reorganization plan?

The shareholders’ meeting does not need to approve an insolvency or reorganization plan. (Individual) shareholders cannot challenge an insolvency or reorganization plan.

34. Is a shareholders’ meeting decision required to issue new shares of the company undergoing insolvency proceeding? Can a new share issue be decided by the board? Can a new share issue be decided by the insolvency representative? (3) If a capital increase has to take place through the conversion of claims into new shares, does this affect the response?

A shareholders’ meeting decision is required to issue new shares of the company undergoing insolvency proceedings. A new share issue cannot be decided by the board or the insolvency representative.

35. Can an insolvency/reorganization plan affect the structure of the corporate entity (e.g., by merger, spin-off, or change of the legal form)? Is a shareholders’ meeting authorization required for this?

No an insolvency/reorganization plan cannot affect the structure of the corporate entity.

36. On what conditions can the company carry on business during an insolvency procedure? (If there are separate reorganization and liquidation procedures, does this affect the response?) Is a shareholders’ meeting authorization required?

This is only possible in the case of reorganization proceedings and provided that and as long as a reasonable prospect of successful reorganization exists.

During a reorganization plan the company may carry on business under the condition that it will be supervised by a so-called reorganization administrator, whose primary goal is to secure the estate.

He will approve, or disapprove, transactions concluded by the debtor which need approval, in particular, transactions which are not in the ordinary course of the debtor’s business or appear to be contrary to the interests of the creditors.

A shareholders’ meeting authorization is not required.
37. In the course of an insolvency procedure, what provisions apply to the sale of specific assets out of the ordinary course of business and to the sale of the entire business operation of the company? Is a shareholders’ meeting authorisation required? (If there are separate reorganization and liquidation procedures, does this affect the response?)

Any important transaction out of ordinary (and, in certain cases even within ordinary course of business) will generally be subject to the approval of the insolvency administrator, and, if the transaction involves the sale of part of or the whole business, of the competent insolvency court.

In liquidation proceedings involving the sale of the business as a whole to the body of or to part of the creditors, the insolvency court will also have to approve the plan proposed by the insolvency administrator.

In any event, no shareholders’ meeting authorization is required.

38. Does the shareholders’ meeting have any power in relation to a decision of the board or the insolvency representative to continue or reject any favourable, unfavourable or essential contract during an insolvency procedure? (If there are separate reorganization and liquidation procedures, does this affect the response?).

No.

39. If an insolvency plan can be presented for a whole corporate group, must that plan be approved by the shareholders’ meetings of each company of the group, including of those that are balance-sheet insolvent? How are the different meetings’ decisions coordinated? Are there specific safeguards (e.g., any veto power or other remedy) for the minority shareholders of the companies that are not insolvent?

There is no possibility for a plan to be presented for a whole group

40. If companies belonging to the same group file separate insolvency proceedings, are there specific requirements/mechanisms to provide for coordination of those proceedings? Are shareholders’ meetings of the relevant companies involved in the coordination mechanisms, if any?

41. Please list any other legal provision in company law that, in your opinion or in your experience, may interfere with the insolvency procedure of a company in your jurisdiction.