

## DIRECTORS' DUTIES – CRISIS MANAGEMENT CHECKLIST – AUSTRIA

WHAT DUTY?	WHAT DOES IT MEAN?	WHEN DOES IT APPLY?
<p><b>MAINTENANCE OF SOLVENCY</b></p> <p><b>MANAGEMENT OF BUSINESS RISKS</b></p>	<ul style="list-style-type: none"> <li>best efforts to <b>preserve</b> company's <b>liquidity</b> and <b>sound financial structure</b></li> <li><b>duty to manage</b> and continuously assess <b>risks</b>, incl. <b>credit risk, market risk, operational risk</b> and <b>liquidity risk</b> (business judgement rule)</li> <li>specific <b>duty to take known crises into account</b> for liquidity management purposes <ul style="list-style-type: none"> <li><b>CAVEAT</b>: liquidity support via <b>shareholder loans</b> (to be interpreted broadly, e.g. also including loans granted by other group companies) if a company is in "crisis" may entail <b>equitable subordination</b> resulting in (i) a ban on repayment of such loans during the company's crisis (or in case repayment would cause a crisis); and (ii) subordinated status of such loans in potential subsequent insolvency proceedings</li> <li><b>COVID-19</b>: unsecured shareholder loans granted and disbursed in the period from 5 April until 30 June 2020 for no more than 120 days are not subject to equity substitution rules/subordination</li> </ul> </li> </ul>	<p><b>Pre-crisis and post-crisis</b></p> <p><b>Enhanced scrutiny in respect of known crises</b></p>
<p><b>CONVENE SHAREHOLDERS' MEETING</b></p>	<ul style="list-style-type: none"> <li>Obligation to immediately <b>convene a shareholders' meeting</b> if: <ul style="list-style-type: none"> <li>loss of at least half of the share capital (limited liability companies and stock corporations)</li> <li>equity capital ratio is below 8% <u>and</u> the fictitious debt repayment period (broadly, period within which existing financial debt could be repaid from projected net operating income) exceeds 15 years (limited liability companies only)</li> </ul> </li> <li><b>ongoing (in-)solvency assessment</b> upon indications of a crisis (e.g. negative equity)</li> </ul>	<p><b>Crisis on the horizon</b></p>
<p><b>ASSESSMENT OF NEED FOR REORGANISATION</b></p>	<ul style="list-style-type: none"> <li>assessment whether company is in <b>need for reorganisation</b> which is presumed if (i) equity capital ratio is below 8%; <u>and</u> (ii) fictitious debt repayment period exceeds 15 years</li> <li>obligation to <b>file for opening of reorganisation proceedings</b> in case company is in need for reorganisation</li> <li>in practice only very few reorganisation proceedings have been opened to date; however, in case of subsequent insolvency proceedings <b>risk of civil liability</b> of up to EUR 100,000</li> </ul>	<p><b>Crisis on the horizon</b></p>
<p><b>SUSPENSION OF NON-ESSENTIAL PAYMENTS</b></p> <p><b>PROHIBITION OF UNEQUAL TREATMENT OF EXISTING CREDITORS</b></p>	<ul style="list-style-type: none"> <li><b>non-essential payments</b> are <b>no longer permitted</b></li> <li><b>permitted payments</b> are <b>limited</b> and include: <ul style="list-style-type: none"> <li><b>employment-related expenses</b> such as wages and related social contributions, severance payments etc.</li> <li>regular <b>operating expenses</b> to maintain ordinary business (electricity, water, lease, insurance premium etc.)</li> <li><b>payment against immediate delivery</b> and</li> <li><b>payments to secured creditors</b> up to the amount of the secured claim</li> </ul> </li> <li>general <b>prohibition of unequal treatment of creditors</b></li> <li><b>COVID-19</b>: no civil liability of management for payments made during suspension of filing obligation due to over-indebtedness (see below)</li> <li>transactions resulting in <b>preferential treatment of certain creditors</b> and/or <b>reduction of value of company's assets</b> may be challenged/subject to claw-back in hypothetical subsequent insolvency proceedings</li> </ul>	<p><b>Onset of Insolvency * ("T")</b></p>
<p><b>FILING FOR INSOLVENCY</b></p> <p><b>PROHIBITION OF UNEQUAL TREATMENT OF ALL (UNSECURED) CREDITORS</b></p>	<ul style="list-style-type: none"> <li>if company is illiquid or over-indebted, obligation of <b>each director / board member</b> to (severally) file for insolvency</li> <li><b>filing period</b>: without culpable delay upon insolvency, in any case within <b>60 days</b>; the filing period may only be used for the purpose of eliminating insolvency by implementation of feasible (i.e. <i>ex ante</i> likely to be achieved) restructuring concepts</li> <li><b>COVID-19</b>: <ul style="list-style-type: none"> <li>if insolvency is (also) a result of the COVID-19 pandemic, filing period of <b>120 days</b> instead of 60 days</li> <li><b>suspension of filing obligation</b> if company becomes <b>over-indebted</b> from 1 March until 30 June 2020; after 30 June 2020 filing obligation within 60 days after 30 June 2020, or 120 days after company became over-indebted, depending on which period ends later</li> </ul> </li> </ul>	<p><b>T + 60 days OR 120 days for over-indebtedness occurring from 1 March until 30 June 2020:</b></p> <p><b>T (over-indebtedness) + 120 days OR 30 June 2020 + 60 days</b></p>

\* **ONSET OF INSOLVENCY**: Deemed to have occurred when the debtor is insolvent within the meaning of Austrian law. Under Austrian law, a company is **insolvent** if it is either **illiquid** (cashflow insolvency) or **over-indebted** (balance-sheet insolvency and no positive going concern prognosis).

- **Illiquidity** – if a company is unable to pay its debts when due, and is not in a position to obtain the necessary funds to satisfy its due liabilities within a reasonable period of time. Illiquidity is presumed if company is unable to pay at least 95% of all its due debt. In that case, company is not presumed unable to pay its debt if it can prove that, from an *ex ante*-perspective, it will be in the position to pay all (100% of) its due debt within a period of three months (high likelihood) or – in exceptional cases – within five months (with almost certain likelihood).

- **Over-indebtedness** – presumed if (i) company's liabilities exceed its assets (based on liquidation values; no going-concern valuation); and (ii) there is no positive going concern prognosis (that must comply with the [Austrian guidelines](#) that reflect the market standard and Austrian case-law). In a nutshell, a going concern prognosis must show that (i) company will be able to pay its due liabilities within approx. twelve months (liquidity plan; primary prognosis); and (ii) positive results from the ordinary business activities are likely within the next two to three years (secondary prognosis).

## RESTRUCTURING TOOLBOX – CRISIS MANAGEMENT CHECKLIST – AUSTRIA

WHAT TOOL?	WHAT DOES IT DO?	WHAT IS REQUIRED?
<b>OUT-OF-COURT RESTRUCTURING</b>	<ul style="list-style-type: none"> <li>arrangement between <b>company</b> and <b>its creditors</b> (typically financial creditors) where: <ul style="list-style-type: none"> <li>creditors agree to postpone enforcement of payment claims for limited period of time such that terms of restructuring can be agreed ("<b>stand-still</b>") <i>and</i></li> <li>if negotiations are successful, creditors and company enter into restructuring agreement ("<b>RA</b>")</li> </ul> </li> <li>freedom of contract: <ul style="list-style-type: none"> <li>parties are <b>free to shape contents</b> of standstill/RA (e.g. contributions by shareholders / beneficial owners, certain restructuring measures, deferral of payments, etc) <i>but</i></li> <li><b>all affected parties</b> (company, relevant creditors, shareholders/beneficial owners) <b>must agree to stand-still and RA</b></li> </ul> </li> <li><b>no special legal framework</b> (yet) available, but out-of-court restructurings typically consider the (non-binding) <a href="#">guidelines for restructurings in Austria</a> reflecting the market standard</li> </ul>	<b>Consent by all affected parties (agreement)</b>
<b>REORGANISATION PROCEEDINGS</b>	<ul style="list-style-type: none"> <li>legal tool aimed at enabling <b>distressed (but still solvent) Austrian companies</b> to implement a <b>reorganisation plan</b></li> <li>management's filing for <b>reorganisation proceedings</b> if the company is in need of reorganisation which is presumed if the company's <ul style="list-style-type: none"> <li><b>equity ratio</b> is below 8% <i>and</i></li> <li><b>fictitious debt repayment</b> period is more than 15 years</li> </ul> </li> <li><b>reorganisation plan</b> includes measures to improve the company's financial situation, must be presented to the court and will be assessed/approved by reorganisation auditor</li> <li>reorganisation proceedings <b>seldom opened</b> in Austria as they do <b>not offer useful restructuring tools</b>; however, (only) in case of subsequent insolvency proceedings (e.g. because out-of-court restructuring was not successful), failure to file for reorganisation proceedings may trigger management's, supervisory board's, and shareholders' <b>civil liability</b></li> </ul>	<ul style="list-style-type: none"> <li><b>Filing for reorganisation proceedings</b></li> <li><b>Reorganisation plan to be assessed by reorganisation auditor</b></li> </ul>
<b>RESTRUCTURING PROCEEDINGS</b>	<ul style="list-style-type: none"> <li>legal tool available during <b>insolvency proceedings</b> aimed at the <b>continuation of a company's business</b>; only available upon company's application</li> <li>restructuring proceedings <b>without self-administration</b> (i.e. with appointment of insolvency administrator) if company presents restructuring plan offering a <b>quota of 20%</b> to unsecured creditors payable within two years; <b>self-administration</b> may be approved by court if quota of <b>30%</b> is offered (but certain transactions are still subject to approval by insolvency court and restructuring administrator)</li> <li><b>approval</b> of restructuring plan requires <b>majority of at least 50%</b> of (i) unsecured creditors in number present at the respective hearing <i>and</i> (ii) the total sum of the claims of unsecured creditors present at the respective hearing</li> <li>if restructuring plan is accepted, confirmed by insolvency court and fulfilled by debtor, the debtor is <b>released from remaining debt</b> ("<b>hair-cut</b>" of unsecured creditors' claims in excess of restructuring quota)</li> </ul>	<ul style="list-style-type: none"> <li><b>Formal declaration of insolvency</b></li> <li><b>Filing of restructuring proceedings</b></li> <li><b>Minimum quota (20%/30%)</b></li> <li><b>Approval by majority of creditors</b></li> </ul>
<b>UPCOMING: PREVENTIVE RESTRUCTURING FRAMEWORK</b>	<ul style="list-style-type: none"> <li>implementation of Restructuring Directive 2019/1023 ("<b>RD</b>") by 17 July 2021; yet no draft bill publicly available</li> <li><b>key features</b> of preventive restructuring frameworks according to RD: <ul style="list-style-type: none"> <li><b>suspension</b> of <b>enforcement</b> and <b>insolvency</b> proceedings</li> <li>(cross-class) <b>cramdown</b> <i>and</i></li> <li><b>protection of new and interim financing</b></li> </ul> </li> </ul>	<b>Not yet available in Austria</b>
<b>COVID-19 SUPPORT MEASURES</b>	<ul style="list-style-type: none"> <li><b>various support measures</b> available that aim at preventing companies from becoming insolvent due to the COVID-19 pandemic</li> <li>financing support measures include <b>state guarantees for bridge loans</b> and <b>subsidies relating to operating losses</b> due to the COVID-19 pandemic</li> <li>an ongoing updated <b>overview</b> of most relevant COVID-19 support measures at State level can be found <a href="#">here</a></li> </ul>	<ul style="list-style-type: none"> <li><b>Application</b></li> <li><b>Company must fulfil certain requirements</b></li> </ul>

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