INSOLVENCY & RESTRUCTURING - AUSTRIA

New group insolvency law

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The Insolvency Code(1) was recently amended in response to the introduction of the EU Insolvency Regulation,(2) creating – for the first time – specific rules for the insolvency of corporate groups in Austria. As these rules were incorporated into the Insolvency Code only recently, no practical experience can yet be demonstrated. Nevertheless, this update gives an initial overview of the new provisions.

Old legal framework

Until the changes were introduced, generally there could be only one debtor in insolvency proceedings. Therefore, corporate groups had to 'separate' from each other and isolate the insolvency proceedings of their group companies.

This form of handling the insolvency of corporate groups created a number of practical problems. The assets of individual companies were often interconnected in such a way that made it impossible to attribute them to the individual entities of a group comprehensively. In addition, members of a corporate group often needed so-called 'synergies' in order to survive economically. These synergies were frequently eliminated when insolvency proceedings were opened which, in turn, made the continuity of the company impracticable. Further, the insolvency of a corporate group involved liability issues which sometimes resulted in the insolvency of other members of the group.

Updated legislation

Due to these and many other problems affecting insolvency practitioners, national rules for the insolvency of corporate groups have long been called for. While the EU regulation raises the issue of group insolvencies at an EU level, the Austrian legislature has also incorporated rules into the Insolvency Code for the insolvency of corporate groups. The approach to doing so was pragmatic, simply providing that the comprehensive provisions of the EU regulation on cooperation and communication (Articles 55 to 60) and on coordination (Articles 61 to 77) apply whenever insolvencies involve "members of a group of companies". As for the individual provisions of the EU regulation, reference is made to the corresponding legal literature.

This update highlights the general application of the new national provisions, as well as any uncertainties and particularities which may arise in connection with the application of Articles 55 to 60 and Articles 61 to 77 of the EU regulation to national situations.

The scope of the application of the new rules may at first appear questionable, as the EU regulation overrides national law anyway. However, a closer look reveals that the national rules have a separate sphere of application because the EU regulation generally requires that insolvency proceedings be opened in respect of the assets of different members of a corporate group in more than one member state. Accordingly, the EU regulation does not govern purely domestic situations. The new provision guarantees this applicability. The abovementioned provisions of the EU regulation therefore apply to purely domestic situations in which at least two insolvency proceedings have been opened in respect of the assets of members of a corporate group. On the other hand, in addition to where insolvency

proceedings have been opened in respect of members of the group in Austria, the EU regulation applies if such proceedings were opened only in third states.

It is still unclear which companies would qualify as "members of a group of companies" according to national legislature, since Austrian insolvency law provides no definition in this regard. Most likely, a qualifying criterion is the debtor's obligation to draw up consolidated accounts or its inclusion in the consolidated accounts of a parent company. If this is the case, the entity will certainly be a member of a corporate group. If not, the criterion will be whether the debtor is a directly or indirectly controlled subsidiary – for example, control being exercised by the holding of a majority of voting rights. This opens up a sphere of applicability for the EU regulation in domestic situations that should not be underestimated, since many corporate groups in Austria need not draw up consolidated accounts due to their level of economic output.

Interestingly, there will also be limitations at a national level to insolvency practitioners' obligations to cooperate and communicate. Although insolvency practitioners must generally pass on information, their obligations as insolvency practitioners may not be affected by their obligation to cooperate and communicate as stipulated by the EU regulation. For example, an insolvency practitioner need not disclose information which would be disadvantageous to his or her proceedings. The provisions on the insolvency of corporate groups cannot force the continuity of the insolvent entity either.

Comment

The recent changes in the Austrian legislature have widened the scope of application of the EU regulation to domestic insolvency proceedings. From a practical standpoint, this approach is welcome, as it may lead to faster and more efficient insolvency proceedings. It remains to be seen how the new rules will affect insolvency practice and whether coordination proceedings according to Articles 62 to 77 of the EU regulation will be applied in practice; theoretically, the Austrian legal environment would certainly allow it to be applied.

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Endnotes

(1) Sections 180b and following of the Insolvency Code; *Federal Law Gazette I* 122/2017.

(2) EU Regulation 2015/848 of the European Parliament and of the Council of May 20 2015 on insolvency proceedings.