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Restructuring across borders

Austria

Corporate restructuring and insolvency procedures | February 2024

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Introduction

On 17 July 2021, the new Restructuring Regulation (**ReO**) entered into force. With this new law, the Austrian legislator implemented the Restructuring Directive (EU) 2019/1023. Following these reforms, the following six principal restructuring and insolvency regimes available for companies under Austrian Law are:

Insolvency regimes

1. bankruptcy proceedings (*Konkursverfahren*)
2. reorganization proceedings without self-administration (appointment of an insolvency administrator) (*Sanierungsverfahren ohne Eigenverwaltung*)
3. reorganization proceedings with self-administration (debtor in possession; *Sanierungsverfahren mit Eigenverwaltung*)

Restructuring regimes

1. restructuring proceedings according to the ReO (new)
2. business reorganisation according to the Business Reorganization Act (no practical relevance)
3. informal out-of-court settlement (*außergerichtlicher Ausgleich, stiller Ausgleich*)

Bankruptcy proceedings *(Konkursverfahren)*

Bankruptcy proceedings may be initiated either by the debtor himself or a creditor if the company is either illiquid (unable to pay its debts due; *zahlungsunfähig*) or over-indebted with no positive outlook to remain a going concern (*überschuldet*). Management is obliged to file for the opening of insolvency proceedings promptly and in any event within 60 days from the company having become insolvent.

Unlimited personal and potentially also criminal liability may accrue for failure of the management board to file a timely application to open insolvency proceedings.

The goal of bankruptcy proceedings (*Konkursverfahren*) is the liquidation and eventual sale of the business of the company and the distribution of proceeds to the creditors on a pro rata basis. The business may be continued (with limits in terms of time) only if continuation is not disadvantageous to the creditors (no reduction to expected quota) what is to be assessed by the insolvency administrator.

Prior to the commencement of bankruptcy proceedings, the court conducts a preliminary examination as to whether the application should be dismissed on certain formal grounds (e.g. if the debtor's estate is not sufficient to cover the costs of the bankruptcy proceedings). Usually, a deposit of approximately EUR4,000 is required; managing directors (including persons who held this position in the preceding three months) or shareholders with a participation exceeding 50% in the company are jointly and severally liable for the deposit of up to EUR4,000. If a deposit is paid by such persons, they are entitled to a priority claim (*Masseforderung*) in the bankruptcy proceedings.

With the opening of bankruptcy proceedings, an insolvency administrator is appointed by the court, without the involvement of creditors. He assumes control over the debtor's business; administration of the debtor's assets is conferred exclusively to him.

The court may additionally (either by its own initiative or by petition of the creditors' assembly) to appoint a creditors' committee (*Gläubigerausschuss*) to assist the insolvency administrator, which is in practice done in more complex cases and/or if the debtor's business shall be sold or leased. It may consist of three to seven members who are usually nominated by the creditors and who may be creditors or third parties (such as credit protection associations).

In its decision on commencing bankruptcy proceedings, the court will also set a deadline for filing insolvency claims against the debtor prior to the date of a creditors' hearing. The filing fee is EUR25. This deadline will usually end 14 days prior to the court hearing for the examination of claims (such court hearing must take place between 60 and 90 days after the commencement of the proceedings). If creditors fail to meet this deadline, a further creditors' hearing may be scheduled.

However, each creditor who fails to meet the initial deadline must pay an additional fee of EUR55 plus VAT. If a creditor fails to file a claim at all, it will be unable to participate in the distributions to creditors by the insolvency administrator.

At any time during the bankruptcy proceedings, the debtor can still submit a reorganisation plan, for example if the debtor finds an investor which would allow for the debtor to pay 20% or more within two years.

The bankruptcy proceeding will end either with a successful reorganisation (reorganisation plan approved by the creditors) or with the liquidation of the company.

In case of liquidation, the insolvency administrator will make – from time to time – distributions of the collected proceeds to the creditors whose claims have been accepted.

The termination of the proceedings does not have a discharging effect regarding claims of creditors which have not been satisfied in full. Creditors may enforce the unsettled portion of their claims for a period of 30 years (if the debtor comes into possession of any assets within such period). In case of a corporate debtor, however, bankruptcy will eventually result in the ultimate dissolution of the company, thus preventing later recourse against the debtor for payment of outstanding amounts.

Reorganisation proceedings without self-administration
(Sanierungsverfahren ohne Eigenverwaltung)

Reorganisation proceedings aim at preserving the insolvent company as a going concern on the basis of a reorganisation plan (*Sanierungsplan*). The debtor can apply to open reorganisation proceedings in case the company is insolvent or if illiquidity is imminent (*drohende Zahlungsunfähigkeit*). Together with the application the debtor has to submit:

– a reorganisation plan which – as a minimum – needs to offer to the creditors a quota of 20% payable within two years;

– a detailed list of assets/information concerning financial status of company; and

– a financial plan for the first 90 days of reorganisation proceedings.

The debtor's creditors are not entitled to file for the commencement of restructuring proceedings.

With the commencement of the proceedings, the court appoints an insolvency administrator and the managing directors of the company largely lose the power to dispose over the assets of the debtor. The managing directors are supposed to cooperate with the insolvency administrator. For a period of 90 days, the insolvency administrator is not entitled to start the liquidation procedure (sale of the debtor's assets).

The reorganisation plan needs to be (a) accepted by the creditors within 90 days of the opening of reorganisation proceedings with (i) simple majority based on value of claims and (ii) simple majority of creditors based on headcount present at the creditors' meeting and (b) approved by the court. In this regard the insolvency administrator provides a fairness statement, i.e. whether the sell-off of all assets would lead to a higher quota. Secured creditors have no vote as their position is not affected. In case security covers only part of a claim, that creditor has a vote on the unsecured portion of its claims.

The quota of 20% is a statutory minimum requirement for the restructuring plan and needs to be proportionate to the debtor's actual economic and financial standing. Hence, depending on the circumstances, it may be necessary to offer a higher quota and/or shorter payment period in order for the creditors to accept the proposal.

In practice, creditors rarely accept that the amount to be paid may be disbursed within the maximum term of two years. Usually, creditors demand to be provided with a payment plan, according to which the debtor is obliged to pay the amounts in instalments, starting immediately after the acceptance of the proposal and continuing periodically over a period of two years.

Reorganisation proceedings can be converted into bankruptcy proceedings if (i) the debtor withdraws the reorganisation plan, (ii) the creditors reject the proposed reorganisation plan or (iii) the court refuses approval of the reorganisation plan.

Further, if the reorganisation plan is confirmed by the court, it will issue an order setting out the terms of the agreement reached and the portion of debts to be repaid by the debtor.

After complete fulfilment of the reorganisation plan, the debtor is discharged from the remaining debts that the creditors established prior to the opening of restructuring proceedings.

Completed restructuring plans are also effective vis-à-vis creditors who did not accept the proposal, creditors who did not take part in the restructuring proceedings or creditors who were unaware of the restructuring proceedings.

Creditors are often inclined to accept proposals for a restructuring plan since the quota in that case will generally be higher than the quota ultimately generated by undergoing regular bankruptcy proceedings. However, the requirement that the debtor must demonstrate that it is capable of fulfilling a minimum quota of 20% often limits the possibility of achieving a reorganisation by a restructuring plan in practice.

It is worth noting that reorganization proceedings do not include the equity position and thus a reorganization plan cannot interfere with shareholder rights and thus cannot impose a debt-equity swap on shareholders.

Reorganisation proceedings with self-administration *(Sanierungsverfahren mit Eigenverwaltung)*

The debtor may also apply for reorganisation proceedings with self-administration (*Sanierungsverfahren mit Eigenverwaltung*).

In this case, the debtor needs to submit a qualified reorganization plan proposing a quota of 30% payable within two years.

During restructuring proceedings with self-administration, the debtor remains entitled to dispose of its assets. A reorganization administrator (appointed by the court) supervises the ordinary business activities of the debtor; it may veto transactions within the ordinary course of business and needs to approve transactions outside the ordinary course of business as well as the termination of and rescission from contracts that remain unperformed by both sides.

Avoidance actions and the acceptance/non-acceptance of creditors' claims also fall within the exclusive competence of the insolvency administrator.

The right to self-administration is granted for a maximum period of three months. The court may withdraw the right to self-administration at an earlier point in time under certain circumstances, in which case the reorganization proceedings will be re-classified and continued as reorganization proceedings without self-administration (the reorganization administrator will be re-classified as an insolvency administrator).

Otherwise, the reorganization proceedings follow the procedure as explained above under "Restructuring proceedings without self-administration".

Restructuring proceedings (ReO)

The Restructuring Act *(Reorganisationsordnung)* ("**ReO**") provides for an in-court but in principle non-public restructuring procedure (no publication in the official insolvency database, except if the debtor so requests, eg if a comprehensive stay of enforcement actions is necessary). However, only published proceedings qualify as "**European restructuring proceedings**" and are recognised under the European Insolvency Regulation (as only such proceedings are explicitly mentioned in Annex A of the European Insolvency Regulation).

In principle, the debtor will remain in possession and continues to run the business.

In many cases however, the court appoints a restructuring expert, which limits the debtor's self-administration right.

The ReO is applicable to all companies and entrepreneurs that are not already insolvent. To qualify for such proceedings, at least a likelihood of insolvency (eg fulfilment of the figures as provided for in the Business Reorganisation Act or imminent illiquidity) is required. Only the debtor is entitled to initiate restructuring proceedings, but not the creditors.

With the application to initiate restructuring proceedings, the debtor must submit the following documents to the court:

– list of assets

– annual financial statements (for the last three years)

– financial plan for the next 90 days

– restructuring plan or at least a restructuring concept (submission of restructuring plan required after 60 days at the latest)

Over-indebted debtors may apply for restructuring proceedings as well, provided they submit a positive business forecast (that may be contingent on a successful restructuring).

The main difference to the informal out-of-court settlement (see below) is that the consent of all creditors is no longer necessary to implement restructuring measures via a restructuring plan, but (only) the consent of a qualified majority of creditors (simple majority in numbers and majority of 75% in value) in each creditor class.

Under certain circumstances, the court may confirm the restructuring plan, even if the qualified majority is not reached in every class (cross-class cram-down). This cram-down possibility shall finally remove the disruptive potential of hold-out creditors outside of insolvency proceedings. In the best case, this will make it easier in the future to conclude out-of-court agreements with the creditors (via a silent settlement) that in practice often only fail because of one or a few dissenting creditors. Because of the ReO, they now need to expect to be crammed-down in restructuring proceedings.

Restructuring proceedings (ReO) (Cont.)

The Austrian legislator provided for five different possible creditor classes in the restructuring proceedings: (i) secured creditors, (ii) unsecured creditors, (iii) bondholders, (iv) particularly vulnerable creditors (with claims below EUR10,000) and (v) subordinated creditors.

Shareholders are subject to a general obligation not to unreasonably prevent restructuring measures. However, there is no possibility of including the shareholders as a separate class in the restructuring plan (with the consequence that they could be outvoted in a cross-class cram-down). Therefore, the restructuring plan cannot interfere with their legal and economic position against their will. Thus, a debt-equity swap, for example, is not possible against the will of the shareholders (i.e., only consensual).

To support negotiations on a restructuring plan, the debtor can apply for a stay on individual enforcement actions for a period of three to a maximum of six months, which can cover all types of claims. In practice, this is particularly relevant in cases involving tax and duty payables, which are usually immediately enforceable. The court may refrain from imposing the stay on individual enforcement actions if it is not necessary or if the debtor is illiquid.

During the stay on individual enforcement actions, contracts of the debtor necessary for the continuation of the business may not be terminated or amended just because of outstanding payments or because of the restructuring. The restructuring shall not be jeapordised in this regard. Special termination rights to the benefit of the debtor are not provided for in the ReO.

New or interim financing as well as other transactions closely related to the restructuring (especially those necessary for the continuation of the business) shall only be subject to limited avoidance actions in a possible subsequent insolvency proceeding. In particular, avoidance protection applies if the opposing party was "not aware of the debtor's illiquidity".

The new law also provides for a simplified fast-track restructuring procedure that can be used by the debtor if only financial creditors shall be subject to restructuring measures.

In such simplified proceedings, the debtor remains entirely in possession (no appointment of a restructuring expert). Further, creditors do not need to vote on a restructuring plan in a court hearing. Instead, the debtor submits to the court a restructuring agreement that has already been signed by at least a 75% majority in value of each financial creditor class (no head majority is required). Ultimately, such restructuring agreement can be sanctioned by the court without the initiation of formal restructuring proceedings being necessary. Thus, it is also not possible to apply for an enforcement stay in such fast-track proceedings. A cross-class cram-down will most likely not be possible in such proceedings (controversially discussed in legal literature).

Business reorganisation (URG)

The concept of business reorganisation was introduced in 1997 by the Business Reorganisation Act (the **Reorganisation Act**). However, the procedure set out in the Reorganisation Act has only been used in very few cases since its introduction and is thus practically irrelevant.

Still, the Austrian legislator decided to uphold the Reorganisation Act when introducing the new Restructuring Regulation (**ReO**) (see above).

The Reorganisation Act essentially provides for a voluntary reorganisation procedure available only to solvent enterprises facing temporary financial difficulties.

A reorganisation need is presumed by law if the equity ratio is less than 8% and the debt settlement period exceeds 15 years.

Only a debtor may file an application for business reorganisation, which must include a reorganisation plan.

If no reorganisation plan is filed with the application, the court will request that such a plan be submitted within 60 days.

The reorganisation plan must, inter alia, state:

a) the reasons for reorganisation,

b) measures for the improvement of the financial/profit situation,

c) measures for obtaining new financial funds,

d) the effect of the reorganisation on employees, and

e) the period of time necessary for the reorganisation (which must not exceed two years).

Furthermore, in the event that third-party rights are affected by the reorganisation plan, the debtor must provide evidence of such third parties' approval of the reorganisation plan.

Upon receiving the application, the court initiates business reorganisation proceedings by appointing a temporary reorganisation auditor (*Reorganisationsprüfer*). Such a decision is not publicly announced to avoid jeopardising the reputation of the debtor. The reorganisation auditor needs to state whether the debtor is still solvent and, in such a case, is required to produce a positive expert opinion on the likelihood of the success of the reorganisation plan within 30 days of receiving it. Once this opinion has been produced court involvement in monitoring the execution of the reorganisation plan ends.

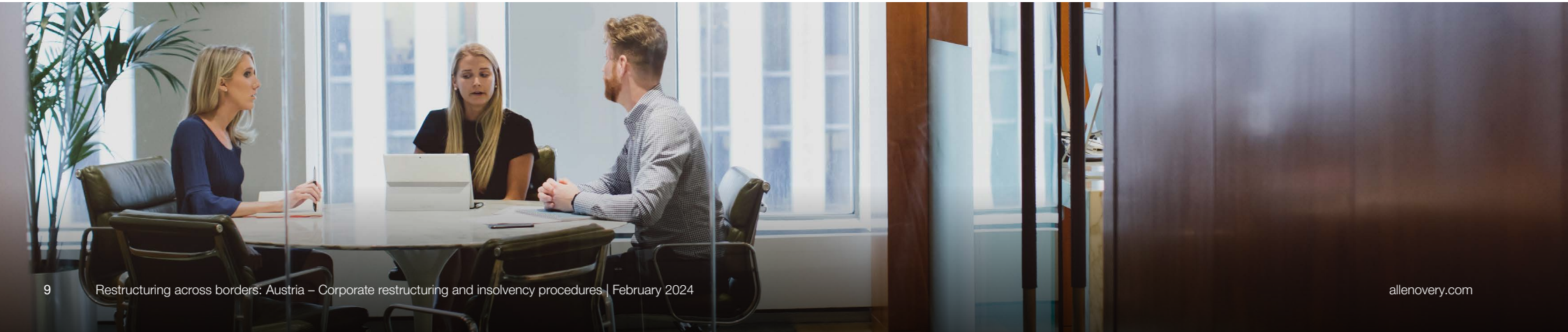
While the reorganisation plan is in force, the debtor has to report to the creditors on the status of its enterprise and the progress of the reorganisation every six months, or if the circumstances underlying the reorganisation plan have changed.

Although the (voluntary) reorganisation proceeding according to the URG has very little relevance in practice, insolvency administrators often assert liability claims against directors pursuant to Sec 22 URG, because such liability is independent of fault (strict liability) and therefore comparably easy to enforce.

Directors can avoid liability if they:

– have obtained an expert opinion from a certified auditor that proves that the company does not require reorganisation (although the URG criteria are met); and/or

– can prove that the insolvency occurred for reasons other than the failure to apply for reorganisation proceedings.



Informal settlement
(außergerichtlicher Ausgleich, stiller Ausgleich)

An informal settlement does not involve the courts and is achieved by agreement among the creditors and the debtor to reduce the level of the debtor's outstanding debts. This procedure is aimed at ultimately saving the debtor from bankruptcy. As there is no formal procedure, the process is quicker and less expensive than insolvency proceedings. Furthermore, informal settlements are not made public and may thus spare the debtor from unwelcome publicity.

In practice, an informal settlement is in particular feasible, if the debtor intends to restructure its financial debts only or aims at agreeing a haircut with his (few) largest creditors.

Informal settlements are on a purely contractual basis, there are no minimum quotas or similar. Usually, the debtor negotiates separate agreements with its creditors that shall be subject to the haircut (usually financial creditors or the largest creditors), which results in the debtor being released from its obligation to repay a certain part of the debt, while agreeing payment of the remaining portion of the debt in instalments.

However, contrary to the court-controlled restructuring scheme or restructuring proceedings in which the consent of a majority of creditors is sufficient to accept the proposal, an informal settlement needs to be reached with all of the debtor's creditors that shall be subject to the haircut. This may be difficult to achieve, particularly in cases in which a debtor has many creditors, or contributions are owed to social security authorities, who generally do not consent to such proposals. If even one creditor that shall be subject to the haircut refuses to consent to a partial discharge of its claim, an informal settlement may not be concluded. This situation may sometimes be avoided by paying the respective creditor a higher quota, provided that all other creditors that shall be subject to the haircut agree to such preferential treatment.

Furthermore, creditors often render informal settlements impossible by filing for involuntary bankruptcy proceedings.

Finally, additional important obstacles to a successful informal settlement are the tight statutory deadlines for filing for insolvency proceedings (60 days), which usually leave little time for the debtor to negotiate informal settlements.

Due to the newly enacted cram-down possibility in restructuring proceedings pursuant to the ReO, it is likely that this will also have a (positive) effect for future informal settlement negotiations. This is because individual hold-out creditors need to expect to be crammed-down in restructuring proceedings anyway and thus could be incentivised to agree on the informal settlement.

European Insolvency Regulation

The EU Regulation on Insolvency Proceedings 2015 (Regulation (EU) 2015/848) (the **Recast Regulation**) applies to all proceedings opened on or after 26 June 2017. Its predecessor, the EC Regulation on Insolvency Proceedings 2000 (Regulation (EC) 1346/2000) (the **Original Regulation**) continues to apply to all proceedings opened before 26 June 2017. One of the key changes in the Recast Regulation is that it brings into scope certain pre-insolvency "rescue" proceedings and these are now listed alongside the traditional insolvency procedures in Annex A to the Recast Regulation. The Recast Regulation retains the split between main and secondary/territorial proceedings but secondary proceedings are no longer restricted to a separate list of winding-up proceedings – secondary proceedings can now be any of those listed in Annex A. By contrast, the Original Regulation listed main proceedings in Annex A and secondary proceedings (which were confined to terminal proceedings) in Annex B.

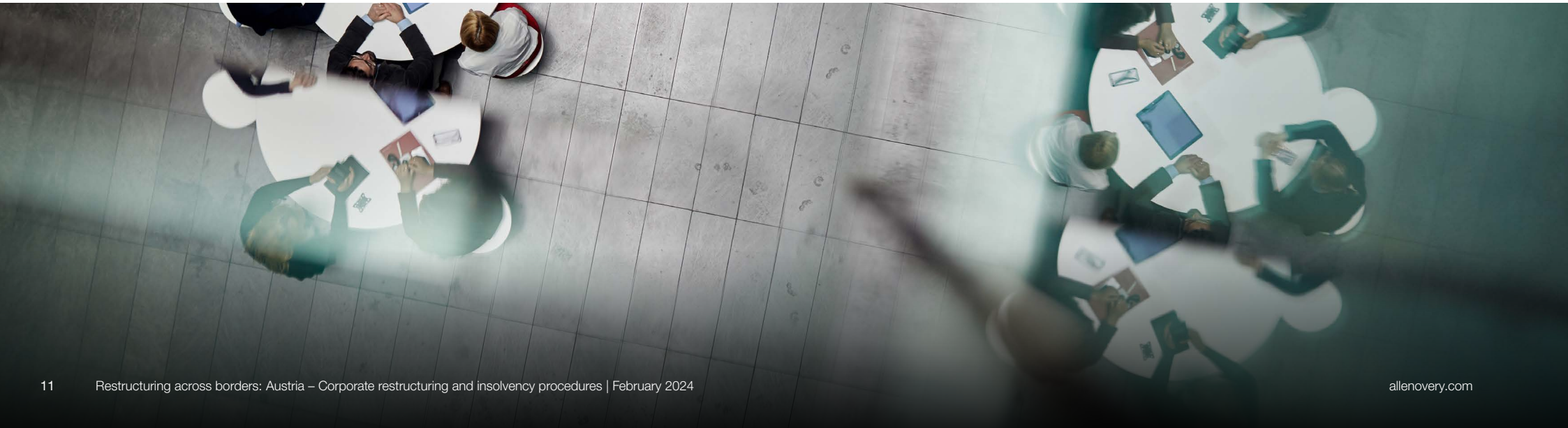
Of the above restructuring and insolvency regimes, bankruptcy proceedings (*Konkursverfahren*); reorganisation proceedings where a bankruptcy receiver is appointed (*Sanierungsverfahren ohne Eigenverwaltung*); and reorganisation proceedings where the debtor retains the right to self-administration (*Sanierungsverfahren mit Eigenverwaltung*) were available as main proceedings under the Original Regulation.

Only bankruptcy proceedings (*Konkursverfahren*) were available as secondary proceedings under the Original Regulation.

Under the Recast Regulation, bankruptcy proceedings (*Konkursverfahren*), reorganisation proceedings where a bankruptcy receiver is appointed (*Sanierungsverfahren ohne Eigenverwaltung*), and reorganisation proceedings where the debtor retains the right to self-administration (*Sanierungsverfahren mit Eigenverwaltung*) are listed in Annex A.

Further to an amendment to the Recast Regulation, published proceedings pursuant to the ReO ("European restructuring proceedings") are now also listed in Annex A ("European restructuring proceedings").

We note that the Recast Regulation does not apply to the UK anymore due to Brexit.



Key contacts

If you require advice on any of the matters raised in this document, please contact any of our partners or your usual contact at Allen & Overy, or email **rab@allenovery.com**

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Further information

Developed by Allen & Overy's market-leading Restructuring group, "**Restructuring Across Borders**" is an easy-to-use website that provides information and guidance on all key practical aspects of restructuring and insolvency in Europe, Asia, the Middle East and the U.S.

To access this resource, please **click here**.

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