

ANNUAL REVIEW

Bankruptcy & restructuring

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Austria

■ **Q. Reflecting on the last 12-18 months, how would you characterise Austria in terms of failing businesses and bankruptcy filings?**

TRETTNAK: In 2017, the number of businesses filing for insolvency decreased slightly. There were 5079 applications for insolvency proceedings filed in Austria, down 2.8 percent compared to 2016. In total, 3025 companies began insolvency proceedings, while a further 2054 companies saw their proceedings dismissed due to lack of assets to cover costs. The approximately 5000 insolvent companies recorded in 2017 was the lowest number seen in the last 20 years. The decrease in failing businesses in 2017 becomes particularly clear when you consider that there are approximately 430,000 operating companies currently incorporated in Austria, excluding one-person businesses. Hence, in 2017, only 1.2 percent of Austrian businesses struggled with financial problems that ultimately resulted in insolvency. However, liabilities increased by as much as 35 percent compared to 2016, underlining the large amount of debt outstanding in Austria at this moment.

■ **Q. Could you outline the primary macroeconomic trends currently affecting businesses? Are any particular sectors demonstrating structural weaknesses, resulting in distress?**

TRETTNAK: The overall macroeconomic business climate in Austria is currently still very stable, as supported by recent figures from leading Austrian economists. While historically the Austrian construction business has been the industry with many, if not the most, defaulting companies, in recent years the banking and financial services industry was hardest hit by the global financial crisis and the downturn in Central and Eastern Europe, where many Austrian banks were and are heavily exposed. Currently, however, there are signs of recovery in the banking and financial services industry. The food and retail sectors are suffering from cost pressures and structural changes in the supply chain business, having been unduly influenced by online and web-based shipping and trade services.

■ **Q. Have any recent bankruptcy or insolvency cases in Austria captured your attention in particular?**

TRETTNAK: The most prominent insolvency case is that of Air Berlin subsidiary Niki. A showdown between German and Austrian insolvency administrators on where the centre of main interests (COMI) of Niki was located finally came to an end only recently. When it became clear that a deal for the sale of Niki's assets out of the Austrian insolvency process had the support of creditors, the German administrator dropped its challenge to the

competing proceedings in Vienna. The debate around the location of COMI is as relevant now as it has ever been before. Niki was an Austrian subsidiary of Air Berlin with registered offices in Vienna and additional offices in Berlin. Following its German parent's collapse, Niki filed for insolvency at the local insolvency court of Berlin in December, arguing that its COMI was in Germany and not in Austria. The local Berlin insolvency court agreed and opened preliminary insolvency proceedings, rejecting an immediate appeal by a passenger rights group. Subsequently, the group successfully challenged the decision in front of the regional court of Berlin. The court found that Germany did not have international jurisdiction under the EU Insolvency Regulation because Niki's COMI was in Austria. Shortly after, the Austrian regional court of Korneuburg opened insolvency proceedings in Vienna. The German administrator eventually decided to drop its challenge to these proceedings and instead opened secondary proceedings in Germany. The recast EU Insolvency Regulation gave creditors an express right to challenge COMI, but a debtor like Niki can only have one COMI. Before the German administrator dropped its challenge, there were seemingly an unprecedented two purported main insolvency proceedings pending. The German regional court had held that because its decision could be appealed to and overruled by the German Federal Court, the initial decision of the local Berlin court opening main proceedings would remain in place. Yet, following the appeal, the Austrian court opened main proceedings. COMI simply cannot be in two places at one time.



■ **Q. How easy is it to renegotiate existing debt in the current market? Is there funding available to support distressed companies and finance restructurings?**

TRETTNAK: In the current macroeconomic climate, with continuously low interest rates, and no substantial increases expected in the near future, it is still relatively easy to renegotiate existing debt. This, to a certain degree, depends on the financing banks of the debtors, however. In the highly practical case of so-called ‘silent insolvencies’ in Austria, out-of-court standstill agreements are being heavily renegotiated with financial lenders, and between the debtor and its creditors. During the standstill periods, typically lenders are in the driver’s seat and monitor the company’s activities and milestone achievements closely. It is quite common in Austria to look for funding in order to support distressed companies and finance restructurings.

■ **Q. What trends are you seeing in the market’s appetite to purchase troubled assets? How would you describe recent distressed M&A activity?**

TRETTNAK: Overall, the Austrian M&A market, including distressed M&A activity, has been very active. In recent years, distressed M&A has established itself in transactional legal work, and taken up a significant role. Financial, particularly PE houses, and strategic investors across all industries remain in the driver’s seat. The banking and financial services sector, as well as the real estate industry, has undergone heavy restructurings in recent times. In the real estate sector, a number of mergers and takeovers have

taken place or are expected to happen in the near future, such as the envisaged merger of CA Immo with Immofinanz or the acquisition of a large stake in S Immo by Immofinanz.

■ **Q. Could you outline some of the personal risks facing D&Os of a company that nears insolvency or enters bankruptcy in Austria?**

TRETTNAK: In Austria, directors, as well as supervisory board members of a company, are obliged to file for insolvency without any undue or culpable delay, but not later than 60 days after the respective insolvency criteria are met pursuant to the Austrian Insolvency Act. A violation thereof generally triggers the personal liability of directors *vis-à-vis* all creditors for damages caused by delay in filing for the opening of insolvency proceedings, since the respective provision of the Austrian Insolvency Act qualifies as a so-called ‘protective law’ to the benefit of the creditors. The protection only covers existing creditors, meaning creditors whose claims existed prior to the opening of insolvency proceedings. Such creditors are entitled to claim for ‘quota damage’, which is defined as the damage resulting from the late application for the opening of an insolvency proceeding. As for new creditors who only become creditors after the opening of insolvency proceedings, the Austrian Supreme Court has ruled in several cases that only the negative interest may be reimbursed.

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■ **Q. How do you expect restructuring and bankruptcy activity in Austria to unfold for the remainder of this year, and beyond?**

TRETTNAK: Due to the excellent shape of the macro-economy, as well as the low interest rates in Austria, we do not expect any major changes to occur in the remainder of 2018. Overall, the total number of insolvencies and restructurings, as well as the total outstanding debt, will

remain below the figures of the past few years. We believe that a major challenge in Austria in the years to come will be the handling of non-performing loan portfolios of companies across industries, as the total amount of outstanding debt has reached an all-time high in Austria, both in the private and public sector. It may well be expected that increases in interest rates will have a significant and negative impact on debt repayment, and will probably flood the Austrian market with NPL portfolios. ■

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Cerha Hempel Spiegelfeld Hlawati Rechtsanwälte GmbH is one of Austria's leading corporate law firms, with an integrated practice in Central and Eastern Europe. With a team of over 180 lawyers, Cerha Hempel has experience and expertise in all areas of corporate and commercial law, both in Austria and Central and Eastern Europe. The firm's focus is on supporting its clients in their corporate decision-making process. This means that the firm is not content with standard solutions, but instead strives to develop and provide the best possible solutions for every challenge, tailored to each client's needs.

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