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# Consumer Debt Issues - Austria

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**September 2021**

## Consumer Debt Issues - Austria

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### 1. Overview

#### 1.1 Introduction to the Austrian insolvency regime

In Austria, an amendment to the former Bankruptcy Act (*Konkursordnung*) in 2010<sup>1</sup> (*Insolvenzrechtsänderungsgesetz 2010*) abandoned the previous division between composition (*Ausgleich*) and bankruptcy (*Konkurs*). Instead, with the introduction of the Austrian Insolvency Act<sup>2</sup> (*Insolvenzordnung*, hereinafter IO) a unified insolvency proceeding was created.<sup>3</sup> The IO applies to natural persons, regardless of their entrepreneurial or consumer status, as well as to legal entities. It pursues two main objectives: namely, to provide the best possible satisfaction to creditors while giving the debtor a chance of a debt discharge.<sup>4</sup>

In Austria, the term “insolvency proceedings” (*Insolvenzverfahren*) is used as an overall expression for bankruptcy proceedings (*Konkursverfahren*) and reorganisation proceedings (*Sanierungsverfahren*). These are not separate proceedings, but rather procedural processes within the unified insolvency proceeding. In addition to that, there is a special kind of consumer bankruptcy proceeding called debt settlement proceedings (*Schuldenregulierungsverfahren*). In all these types of proceedings, the debtor can achieve debt discharge by means of a reorganisation plan.<sup>5</sup> For natural persons, there are two additional instruments for debt discharge: the settlement plan (*Zahlungsplan*) and the proceedings for income levy (*Abschöpfungsverfahren*). These instruments are open to all natural persons, regardless of whether they run an entrepreneurial business or not.<sup>6</sup> Distinctions are made however, between entrepreneurs and non-entrepreneurs regarding the structure of the procedure.<sup>7</sup>

The bankruptcy procedure forms the basis of the unified insolvency proceedings – thus reorganisation proceedings are basically “normal” insolvency proceedings that are subject to certain special provisions.<sup>8</sup> The general provisions of §§ 1 to 165 IO, the general procedural provisions of §§ 252 to 263 IO and the provisions of §§ 264 to 269 IO apply to both types of proceedings. Only specific provisions are limited to one of the procedural forms.<sup>9</sup> The reorganisation proceedings are limited to natural persons who are entrepreneurs and to legal entities (§ 166 IO).<sup>10</sup> Therefore, consumers can only offer a reorganisation plan within the framework of debt settlement proceedings.<sup>11</sup>

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\* The views expressed in this paper are the views of the authors and not of INSOL International, London.

<sup>1</sup> Insolvenzrechtsänderungsgesetz 2010 BGBl I 2010/29.

<sup>2</sup> Insolvenzordnung RGBl 1914/337.

<sup>3</sup> Nunner-Krautgasser in Nunner-Krautgasser/Reissner 1 (6 et seq); Rechberger/Seeber/Thurner, Insolvenzrecht<sup>3</sup> Rz 29; Dellinger/Oberhammer/Koller, Insolvenzrecht<sup>4</sup> Rz 20.

<sup>4</sup> Mohr, Privatinsolvenz<sup>3</sup> Rz 1.

<sup>5</sup> Dellinger/Oberhammer/Koller, Insolvenzrecht<sup>4</sup> Rz 20 et seq.

<sup>6</sup> Schneider, Privatinsolvenz<sup>3</sup> 1.

<sup>7</sup> Dellinger/Oberhammer/Koller, Insolvenzrecht<sup>4</sup> Rz 483; Schneider, Privatinsolvenz<sup>3</sup> 1.

<sup>8</sup> Rechberger/Seeber/Thurner, Insolvenzrecht<sup>3</sup> Rz 398; Dellinger/Oberhammer/Koller, Insolvenzrecht<sup>4</sup> Rz 22.

<sup>9</sup> Feuchtinger/Lesigang, Insolvenzrecht<sup>4</sup> 119; Dellinger/Oberhammer/Koller, Insolvenzrecht<sup>4</sup> Rz 22.

<sup>10</sup> Kodek, Insolvenzrecht<sup>2</sup> Rz 538; Dellinger/Oberhammer/Koller, Insolvenzrecht<sup>4</sup> Rz 483; Rechberger/Seeber/Thurner, Insolvenzrecht<sup>3</sup> Rz 30.

<sup>11</sup> Dellinger/Oberhammer/Koller, Insolvenzrecht<sup>4</sup> Rz 483.

Furthermore, through a recent legislative initiative, the Austrian legislator has simplified the transition between individual enforcement – regulated by the Enforcement Act<sup>12</sup> (*Exekutionsordnung*, hereinafter EO) – and general enforcement under insolvency law.<sup>13</sup> According to § 49a EO, enforcement proceedings of movable property have to be suspended if so-called “evident insolvency” (*offenkundige Zahlungsunfähigkeit*) is detected. In such cases, creditors have to request the opening of insolvency proceedings to collect their claims. Debt settlement proceedings that are opened at the request of a creditor must be designated as “general enforcement proceedings” (*Gesamtvollstreckung*); only when the debtor requests a debt relief instrument do the proceedings continue as “normal” debt settlement proceedings (§ 184a [1] IO).

## 1.2 What are the consumer bankruptcy / restructuring processes that are available?

### 1.2.1 Special provisions for natural persons

Part 7 of the IO deals with “special provisions for natural persons”. Here, the law explicitly refers to the provisions of the “ordinary proceedings” in § 181 IO and only stipulates certain variances with regard to the structure of the proceedings.<sup>14</sup> Until the amendment of the Insolvency Law of 1993<sup>15</sup> (*KO-Novelle 1993*), Austrian debtors were faced with the bleak prospect that all funds exceeding the unseizable subsistence minimum (*Existenzminimum*) would be payable until the death of the individual debtor. In most cases, the assets were not even sufficient for the initiation of bankruptcy proceedings, let alone for the fulfilment of a reorganisation plan (at that time called *Zwangsausgleich*).<sup>16</sup> Since the amendment to the Bankruptcy Act in 1993, residual debt discharge (*Restschuldbefreiung*) has been stipulated for natural persons in bankruptcy proceedings. The main considerations for this amendment were social aspects: namely, that people who find themselves in a hopeless economic situation ought to be freed from their debts within a relatively short time, at least compared to the previous regulation.<sup>17</sup> The aim of this “consumer bankruptcy” (*Privatkonkurs*) is therefore, among other things, to enable the debtor to make a fresh economic start.<sup>18</sup> Amendments to the law in 1997, 2002, 2006, 2007 and, finally, the “*Insolvenzrechtsänderungsgesetz 2017*” hereinafter IRÄG 2017)<sup>19</sup> have gradually provided additional relief for the debtor.<sup>20</sup> Since the IRÄG 2017, the debt relief of natural persons has been in the spotlight because every *bona fide* debtor is supposed to be granted debt relief after a specific period of time, even if the creditors do not receive any payment within this time.<sup>21</sup> The latest amendment to the provisions on insolvency proceedings (*Restrukturierungs- und Insolvenz-Richtlinie-Umsetzungsgesetz*) entered into force in July 2021. In particular, the provisions regarding the settlement plan and the proceedings for income levy had to be modified

<sup>12</sup> Exekutionsordnung RGBI 1896/79.

<sup>13</sup> *Mohr*, ÖRpfl 2020 H 2, 22 (24).

<sup>14</sup> *Kodek*, Insolvenzrecht<sup>2</sup> Rz 551; *Mohr*, Privatinsolvenz<sup>3</sup> Rz 3.

<sup>15</sup> Konkursordnungs-Novelle 1993 BGBl 1993/974.

<sup>16</sup> *Dellinger/Oberhammer/Koller*, Insolvenzrecht<sup>4</sup> Rz 478.

<sup>17</sup> *Dellinger/Oberhammer/Koller*, Insolvenzrecht<sup>4</sup> Rz 480.

<sup>18</sup> *Kodek*, Insolvenzrecht<sup>2</sup> Rz 551; *Mitterlehner/Moser* in *Reiffenstein/Blaschek* 17 (19); *Dellinger/Oberhammer/Koller*, Insolvenzrecht<sup>4</sup> Rz 480.

<sup>19</sup> Insolvenzrechtsänderungsgesetz 2017 BGBl I 2017/122.

<sup>20</sup> *Mitterlehner/Moser* in *Reiffenstein/Blaschek* 17 (18).

<sup>21</sup> *Mohr*, Privatinsolvenz<sup>3</sup> Rz 1; *Nunner-Krautgasser* in *Nunner-Krautgasser/Reissner* 1 (11); cf. *Dellinger/Oberhammer/Koller*, Insolvenzrecht<sup>4</sup> Rz 480.

to align the IO with the European Restructuring and Insolvency Directive (EU) 2019/1023. Among other measures, the duration of debt relief in proceedings for income levy was changed from five to three years within the framework of a repayment plan (*Tilgungsplan*), whereas the duration of "normal" proceedings for income levy was left at five years (§ 199 [2] IO). A reduction of the duration of the proceedings for income levy had already been planned in the context of the IRÄG 2017, but it had not been implemented due to the disapproval of creditor representatives and banks.<sup>22</sup>

### 1.2.2 Debt settlement proceedings

As has already been mentioned, there are special consumer bankruptcy proceedings that are called "debt settlement proceedings" (*Schuldenregulierungsverfahren*, §§ 181 et seq. IO).<sup>23</sup> If debt settlement proceedings are opened at the request of a creditor, they are designated as "general enforcement proceedings" (*Gesamtvollstreckung*) until the debtor requests a debt relief instrument (§ 184a [1] IO).

Usually, in debt settlement proceedings, no insolvency administrator is appointed (§ 190 [1] IO). Instead, the debtor is entrusted with the administration of the insolvency estate (§ 186 [1] IO). This is referred to as self-administration (*Eigenverwaltung*) and is mainly intended to make the proceedings more cost-effective.<sup>24</sup>

### 1.2.3 The three options for debt discharge

Under Austrian insolvency law, natural persons – and thus also consumers – have three different options for debt discharge:

- (a) reorganisation plans (*Sanierungsplan*, §§ 140 et seq. IO);
- (b) settlement plans (*Zahlungsplan*, §§ 193 et seq. IO); and
- (c) proceedings for income levy (*Abschöpfungsverfahren*, §§ 199 et seq. IO).<sup>25</sup>

#### (a) Reorganisation plans

A reorganisation plan may be submitted by any natural person, regardless of whether he or she is an entrepreneur or a consumer.<sup>26</sup> In general, it must be fulfilled within a period of two years, although, for consumers, the fulfilment period may be up to five years (§ 141 [1] IO).<sup>27</sup> In practice, the reorganisation plan plays only a minor role in consumer insolvencies because only very few debtors can realistically offer the –

<sup>22</sup> Cf. *Nunner-Krautgasser*, ZinsO 2017, 2525 (2525).

<sup>23</sup> *Kodek*, *Insolvenzrecht*<sup>2</sup> Rz 555; *Mohr*, *Privatinsolvenz*<sup>3</sup> Rz 3; *Dellinger/Oberhammer/Koller*, *Insolvenzrecht*<sup>4</sup> Rz 494.

<sup>24</sup> *Dellinger/Oberhammer/Koller*, *Insolvenzrecht*<sup>4</sup> Rz 494; *Kodek*, *Insolvenzrecht*<sup>2</sup> Rz 555.

<sup>25</sup> Cf. *Kodek*, *Insolvenzrecht*<sup>2</sup> Rz 551; *Mohr*, *Privatinsolvenz*<sup>3</sup> Rz 4; *Rechberger/Seeber/Thurner*, *Insolvenzrecht*<sup>3</sup> Rz 29; *Nunner-Krautgasser*, ZinsO 2017, 2525 (2525); *Feuchtinger/Lesigang*, *Insolvenzrecht*<sup>4</sup> 130 et seq; *Dellinger/Oberhammer/Koller*, *Insolvenzrecht*<sup>4</sup> Rz 438 et seq.

<sup>26</sup> *Nunner-Krautgasser*, ZinsO 2017, 2525 (2525 et seq); *Mohr*, *Privatinsolvenz*<sup>3</sup> Rz 5; *Feuchtinger/Lesigang*, *Insolvenzrecht*<sup>4</sup> 130.

<sup>27</sup> *Kodek*, *Insolvenzrecht*<sup>2</sup> Rz 558; *Mohr*, *Privatinsolvenz*<sup>3</sup> Rz 5; *Nunner-Krautgasser*, ZinsO 2017, 2525 (2526); *Rechberger/Seeber/Thurner*, *Insolvenzrecht*<sup>3</sup> Rz 461; *Dellinger/Oberhammer/Koller*, *Insolvenzrecht*<sup>4</sup> Rz 484; *Feuchtinger/Lesigang*, *Insolvenzrecht*<sup>4</sup> 130.

comparatively high - minimum quota of 20% (see § 141 [1] IO).<sup>28</sup> In 2020, reorganisation plans were only accepted in about 0.4% of all consumer insolvencies.<sup>29</sup> If no reorganisation plan is adopted, the debtor's assets must generally be liquidated (§ 193 [2] IO). For small entrepreneurs, this does not apply to the assets necessary for the exercise of their profession and, to a certain extent, to raw materials.<sup>30</sup>

(b) *Settlement plans*

After the liquidation of the assets, a settlement plan can be concluded or subsidiary proceedings for income levy can be initiated.<sup>31</sup> In 2020, settlement plans were concluded in about 70% of all debt settlement proceedings.<sup>32</sup> A settlement plan is a modified form of a reorganisation plan provided for in bankruptcy proceedings for natural persons (cf. § 193 [1] IO).<sup>33</sup> Satisfaction under a settlement plan may extend over a maximum period of seven years (§ 194 [1] IO).<sup>34</sup> In contrast to a reorganisation plan, a settlement plan does not provide for a statutory minimum quota. Instead, the plan has to be adequate for the debtor's income situation.<sup>35</sup> As a basis for the assessment of adequacy, a forecast period of three years (previously five years<sup>36</sup>) is used (§ 194 [1] IO). The offer of a "zero quota" (*Nullquote*) is equally possible if the debtor is not expected to earn any seizable income within this period or if the income will only be slightly above the subsistence minimum (cf. § 194 [1] IO),<sup>37</sup> the latter being assessed according to the circumstances of the individual case (but can generally be assumed with regard to an amount of €10 per month).<sup>38</sup> It has been disputed whether the low-income debtor must offer a settlement plan with a "zero quota" at all or whether he or she can apply directly for the proceedings for income levy.<sup>39</sup> However, with the current amendment to the provisions regarding debt settlement proceedings,

<sup>28</sup> Kodek, *Insolvenzrecht*<sup>2</sup> Rz 551; *Dellinger/Oberhammer/Koller*, *Insolvenzrecht*<sup>4</sup> Rz 484; *Nunner-Krautgasser*, *ZinsO* 2017, 2525 (2526).

<sup>29</sup> *ASB Schuldenberatungen*, *Schuldenreport* 2021, 7.

<sup>30</sup> *Dellinger/Oberhammer/Koller*, *Insolvenzrecht*<sup>4</sup> Rz 485; cf. Kodek, *Insolvenzrecht*<sup>2</sup> Rz 462.

<sup>31</sup> *Fadinger*, *JAP* 2017/2018, 168 (169); *Feuchtinger/Lesigang*, *Insolvenzrecht*<sup>4</sup> 130 et seq; *Dellinger/Oberhammer/Koller*, *Insolvenzrecht*<sup>4</sup> Rz 486; *Mohr*, *Privatinsolvenz*<sup>3</sup> Rz 4; *Nunner-Krautgasser*, *ZinsO* 2017, 2525 (2526).

<sup>32</sup> *ASB Schuldenberatungen*, *Schuldenreport* 2021, 7.

<sup>33</sup> *Reckenzaun in Poltsch/Bertl/Fraberger/Reckenzaun/Isola/Petsch* 553 (563); *Dellinger/Oberhammer/Koller*, *Insolvenzrecht*<sup>4</sup> Rz 486; Kodek, *Insolvenzrecht*<sup>2</sup> Rz 551; *Nunner-Krautgasser*, *ZinsO* 2017, 2525 (2526).

<sup>34</sup> *Mohr*, *ZIK* 2017, 97 (98); *Dellinger/Oberhammer/Koller*, *Insolvenzrecht*<sup>4</sup> Rz 486; *Fadinger*, *JAP* 2017/2018, 168 (169); *Schneider*, *VbR* 2017, 188 (188); *Konecny*, *ecolex* 2017, 1160 (1161); Kodek, *Zak* 2017, 147 (148).

<sup>35</sup> *Nunner-Krautgasser*, *ZinsO* 2017, 2525 (2526); *Dellinger/Oberhammer/Koller*, *Insolvenzrecht*<sup>4</sup> Rz 486; *Riel*, *AnwBl* 2017, 275 (276).

<sup>36</sup> *Mohr*, *ZIK* 2017, 97 (98); *Dellinger/Oberhammer/Koller*, *Insolvenzrecht*<sup>4</sup> Rz 486; *Nunner-Krautgasser*, *ZinsO* 2017, 2525 (2526); *Fadinger*, *JAP* 2017/2018, 168 (169); *Schneider*, *VbR* 2017, 188 (188); *Konecny*, *ecolex* 2017, 1160 (1161); Kodek, *Zak* 2017, 147 (148).

<sup>37</sup> *Dellinger/Oberhammer/Koller*, *Insolvenzrecht*<sup>4</sup> Rz 486; *Schneider*, *VbR* 2017, 188 (188); *Fadinger*, *JAP* 2017/2018, 168 (169); *Nunner-Krautgasser*, *ZinsO* 2017, 2525 (2526); *Konecny*, *ecolex* 2017, 1161; *Mohr*, *Privatinsolvenz*<sup>3</sup> Rz 539; *Riel*, *AnwBl* 2017, 275 (276); *Konecny*, *ecolex* 2017, 1160 (1161); *Mohr*, *ZIK* 2017, 97 (98).

<sup>38</sup> Cf. *Schneider*, *VbR* 2017, 188 (188); *Dellinger/Oberhammer/Koller*, *Insolvenzrecht*<sup>4</sup> Rz 504; *Konecny*, *ecolex* 2017, 1160 (1161); Kodek, *Insolvenzrecht*<sup>2</sup> Rz 612; *ErläutRV* 1588 BlgNR 25. GP 11; *Mohr*, *Privatinsolvenz*<sup>3</sup> Rz 540; Kodek, *Zak* 2017, 147 (148); *Mohr*, *ZIK* 2017, 97 (99).

<sup>39</sup> Cf. *Dellinger/Oberhammer/Koller*, *Insolvenzrecht*<sup>4</sup> Rz 486; affirming *Konecny*, *ecolex* 2017, 1160 (1162); *Nunner-Krautgasser*, *ZinsO* 2017, 2525 (2527 et seq); Kodek, *Insolvenzrecht*<sup>2</sup> Rz 612; *Riel*, *AnwBl* 2017, 275 (276); *Schneider*, *VbR* 2017, 188 (188); negating *ErläutRV* 1588 BlgNR 25. GP 11; *Mohr*, *Privatinsolvenz*<sup>3</sup> Rz 539; Kodek, *Zak* 2017, 147 (148); *Mohr*, *ZIK* 2017, 97 (98); *Mitterlehner/Moser in Reiffenstein/Blaschek* 17 (20).



the Austrian legislator has clarified that the proceedings for income levy are subsidiary to the settlement plan in any case.<sup>40</sup>

(c) *Proceedings for income levy*

Only if an (admissible) settlement plan has been rejected by the creditors or was denied confirmation does the court have to decide on the debtor's application for the initiation of the proceedings for income levy.<sup>41</sup> In 2020, proceedings for income levy were initiated in about 29% of consumer bankruptcies.<sup>42</sup> The application to initiate the proceedings for income levy must be submitted to the court at the same time as the settlement plan proposal at the latest.<sup>43</sup> The creditors do not have to agree to this. They can only prevent the initiation of the proceedings if they (successfully) assert an obstacle to initiation.<sup>44</sup> According to the taxable enumeration of § 201 (1) IO, this includes, for example, intentional or grossly negligent violations of existing duties to provide information or to cooperate.<sup>45</sup> Another requirement for the initiation of the proceedings is that the costs of the trustee to be appointed must be covered by the proceeds of the proceedings.<sup>46</sup>

In proceedings for income levy, it is generally the seizable part of the income that is realised. The debtor must assign this portion of his or her income to a trustee.<sup>47</sup> As already mentioned above, in proceedings for income levy there is now a choice between two procedural instruments. Thus, in "normal" proceedings for income levy, the duration is still<sup>48</sup> five years. However, within the framework of the recently created repayment plan (*Tilgungsplan*), the duration of the procedure is only three years (§ 199 [2] IO). In return for the shorter duration of the proceedings, the debtor has to meet a higher standard of honesty (cf. § 201 [2] and § 210 IO). For insolvent consumers, the repayment plan will be available for a period of five years and, according to the current legal situation, will expire in July 2026 (§ 283 [9] IO). For insolvent entrepreneurs, however, so far, the availability of the repayment plan is not limited in time.

### 1.2.4 Discharge of residual debt and termination of proceedings

After the expiry of the three or five-year period, the court must generally grant the discharge of residual debt and terminate the proceedings.<sup>49</sup> A discharge of the residual

<sup>40</sup> ErläutRV 950 BlgNR 27. GP 28.

<sup>41</sup> *Schneider*, VbR 2017, 188 (189); *Dellinger/Oberhammer/Koller*, *Insolvenzrecht*<sup>4</sup> Rz 487; *Fadinger*, JAP 2017/2018, 168 (168); *Kodek*, *Insolvenzrecht*<sup>2</sup> Rz 632.

<sup>42</sup> *ASB Schuldenberatungen*, *Schuldenreport* 2021, 7.

<sup>43</sup> *Fadinger*, JAP 2017/2018, 168 (168); *Nunner-Krautgasser*, *ZinsO* 2017, 2525 (2526); *Konecny*, *ecolex* 2017, 1160 (1163); *Kodek*, *Insolvenzrecht*<sup>2</sup> Rz 612; *Feuchtinger/Lesigang*, *Insolvenzrecht*<sup>4</sup> 131.

<sup>44</sup> *Mohr*, ZIK 2017, 97 (101); *Nunner-Krautgasser*, *ZinsO* 2017, 2525 (2528); *Fadinger*, JAP 2017/2018, 168 (168); *Riel*, *AnwBl* 2017, 275 (277); *Dellinger/Oberhammer/Koller*, *Insolvenzrecht*<sup>4</sup> Rz 487.

<sup>45</sup> *Mohr*, ZIK 2017, 97 (101); *Konecny*, *ecolex* 2017, 1160 (1163); *Dellinger/Oberhammer/Koller*, *Insolvenzrecht*<sup>4</sup> Rz 518; *Kodek*, *Insolvenzrecht*<sup>2</sup> Rz 637.

<sup>46</sup> *Kodek*, *Insolvenzrecht*<sup>2</sup> Rz 340.

<sup>47</sup> *Nunner-Krautgasser*, *ZinsO* 2017, 2525 (2526); *Dellinger/Oberhammer/Koller*, *Insolvenzrecht*<sup>4</sup> Rz 488; *Fadinger*, JAP 2017/2018, 168 (168); *Kodek*, *Insolvenzrecht*<sup>2</sup> Rz 634.

<sup>48</sup> Cf. about the previous legislation *Nunner-Krautgasser*, *ZinsO* 2017, 2525 (2525); *Schneider*, *Privatinsolvenz*<sup>3</sup> 2; *Dellinger/Oberhammer/Koller*, *Insolvenzrecht*<sup>4</sup> Rz 534; *Fadinger*, JAP 2017/2018, 168 (168); *Schneider*, VbR 2017, 188 (190); *Konecny*, *ecolex* 2017, 1160 (1162); *Mohr*, ZIK 2017, 97 (97).

<sup>49</sup> *Dellinger/Oberhammer/Koller*, *Insolvenzrecht*<sup>4</sup> Rz 488; *Mohr*, *Privatinsolvenz*<sup>3</sup> Rz 621 et seq.

debt must also occur in the (rare) situation that all filed insolvency claims have been satisfied in the course of the proceedings (§ 213 [1] IO). A minimum quota does not have to be achieved.<sup>50</sup> The debt discharge is only to be denied by the court if the proceedings are either prematurely discontinued or the debtor violates his or her obligations.<sup>51</sup> The creditors, however, do not have to agree to a debt discharge within the proceedings for income levy.<sup>52</sup> The residual debt discharge may be revoked if the debtor has intentionally impaired the satisfaction of the creditors significantly as a result of a breach of an obligation. In the case of the repayment plan, this also applies if the debtor has been convicted of certain criminal offences (see § 216 [1] IO).

### 1.3 Which is the competent court or other authority to apply to for consumer insolvency proceedings?

According to §§ 63, 64 IO, the regional court (*Landesgericht* or, in Vienna, *Handelsgericht Wien*) is responsible for “ordinary” insolvency proceedings in Austria.<sup>53</sup> Consumer debt settlement proceedings (*Schuldenregulierungsverfahren*) however take place before the district court (*Bezirksgericht*) (§ 182 IO).<sup>54</sup> Therefore, the assessment of the jurisdiction of the insolvency court depends on whether or not the debtor is operating a business,<sup>55</sup> a decision which is always based on a case-by-case assessment. A careful examination must be carried out to determine whether the operation of a business can (still) be assumed.<sup>56</sup> The sole fact that the debtor’s liabilities originate from a previous entrepreneurial activity does not establish entrepreneurial status.<sup>57</sup>

The district court in whose district the debtor has his or her habitual residence has local jurisdiction for the debt settlement proceedings (§ 182 in conjunction with § 63 [1] IO). If the habitual residence cannot be determined, according to § 63 (2) IO, the place of business or, in the absence of a place of business, the location of the debtor’s property is relevant.<sup>58</sup> If the debtor is an entrepreneur, the place of business is the place of operation of the business.<sup>59</sup>

According to § 17a (1) of the Austrian Law on Legal Officers<sup>60</sup> (*Rechtspflegergesetz*), the legal officer (*Rechtspfleger*), a specially trained federal civil servant, is responsible for debt

<sup>50</sup> *Mohr*, ZIK 2017, 97 (97); *Schneider*, *Privatinsolvenz*<sup>3</sup> 1; *Nunner-Krautgasser*, *ZinsO* 2017, 2525 (2525); *Kodek*, *Zak* 2017, 147 (147); *Dellinger/Oberhammer/Koller*, *Insolvenzrecht*<sup>4</sup> Rz 521; *Konecny*, *ecolex* 2017, 1160 (1162); *Fadinger*, *JAP* 2017/2018, 168 (169); *Schneider*, *VbR* 2017, 188 (190).

<sup>51</sup> *Dellinger/Oberhammer/Koller*, *Insolvenzrecht*<sup>4</sup> Rz 488.

<sup>52</sup> *Rechberger/Seeber/Thurner*, *Insolvenzrecht*<sup>3</sup> Rz 425; *Dellinger/Oberhammer/Koller*, *Insolvenzrecht*<sup>4</sup> Rz 480.

<sup>53</sup> *Rechberger/Seeber/Thurner*, *Insolvenzrecht*<sup>3</sup> Rz 33; *Kodek*, *Insolvenzrecht*<sup>2</sup> Rz 47; *Mohr*, *Privatinsolvenz*<sup>3</sup> Rz 26.

<sup>54</sup> *Kodek*, *Insolvenzrecht*<sup>2</sup> Rz 555; *Mohr*, *Privatinsolvenz*<sup>3</sup> Rz 26; *Rechberger/Seeber/Thurner*, *Insolvenzrecht*<sup>3</sup> Rz 30; *Schneider*, *Privatinsolvenz*<sup>3</sup> 4; *Feuchtinger/Lesigang*, *Insolvenzrecht*<sup>4</sup> 121; *Dellinger/Oberhammer/Koller*, *Insolvenzrecht*<sup>4</sup> Rz 497; *Konecny*, *ecolex* 2017, 1160 (1161).

<sup>55</sup> *Mohr*, ZIK 2017, 97 (97); *Pfandl/Schmid*, *Insolvenzrecht* 23; *Rechberger/Seeber/Thurner*, *Insolvenzrecht*<sup>3</sup> Rz 33; *Schneider*, *Privatinsolvenz*<sup>3</sup> 4; *Kodek*, *Privatkonkurs*<sup>2</sup> Rz 31; *Feuchtinger/Lesigang*, *Insolvenzrecht*<sup>4</sup> 121.

<sup>56</sup> *Schneider*, *Privatinsolvenz*<sup>3</sup> 6; *Mohr*, *Privatinsolvenz*<sup>3</sup> Rz 27; cf. *Dellinger/Oberhammer/Koller*, *Insolvenzrecht*<sup>4</sup> Rz 495 et seq.

<sup>57</sup> *Dellinger/Oberhammer/Koller*, *Insolvenzrecht*<sup>4</sup> Rz 483; *Kodek*, *Privatkonkurs*<sup>2</sup> Rz 31; *Schneider*, *Privatinsolvenz*<sup>3</sup> 5; *Mohr*, *Privatinsolvenz*<sup>3</sup> Rz 27.

<sup>58</sup> *Schneider*, *Privatinsolvenz*<sup>3</sup> 6; *Rechberger/Seeber/Thurner*, *Insolvenzrecht*<sup>3</sup> Rz 34; *Kodek*, *Insolvenzrecht*<sup>2</sup> Rz 47; *Mohr*, *Privatinsolvenz*<sup>3</sup> Rz 30.

<sup>59</sup> *Dellinger/Oberhammer/Koller*, *Insolvenzrecht*<sup>4</sup> Rz 42; *Rechberger/Seeber/Thurner*, *Insolvenzrecht*<sup>3</sup> Rz 34; *Mohr*, *Privatinsolvenz*<sup>3</sup> Rz 30.

<sup>60</sup> *Rechtspflegergesetz* BGBl 1985/560.

settlement proceedings before the district court.<sup>61</sup> For insolvency proceedings before the regional court, however, a judge is always responsible.<sup>62</sup>

An agreement on the place of jurisdiction cannot be effectively stipulated in insolvency proceedings pursuant to § 253 (2) IO. The places of jurisdiction defined by the IO are therefore compulsory.<sup>63</sup>

## 1.4 Who is the “boss” in consumer insolvency proceedings?

### 1.4.1 Self-administration by the debtor

In Austrian insolvency proceedings, the debtor generally loses the power of disposal over the insolvency estate (i.e. all assets subject to enforcement).<sup>64</sup> In debt settlement proceedings, however, in order to keep costs down, it is usual for no insolvency administrator (*Insolvenzverwalter*) to be appointed according to § 190 (1) IO. Rather, the debtor is entitled to self-administration according to § 186 (1) IO.<sup>65</sup> In over 90% of all debt settlement proceedings, administration is left to the debtor who is supervised by the court.<sup>66</sup> Within the scope of the debtor’s self-administration, the debtor is entitled to receive all of his or her postal correspondence and can accept payments with debt-discharging effect.<sup>67</sup> In this context, the debtor also has the power to conduct civil proceedings regarding the assets belonging to the insolvency estate.<sup>68</sup> However, the debtor requires the court’s authorisation to conduct such proceedings pursuant to § 187 (1) nos. 3 and 4 IO.

In the case of self-administration, the insolvency court must approve certain (or rather almost all) legal transactions of the debtor.<sup>69</sup> The decision on approval made by the court may be contested.<sup>70</sup> Activities requiring approval include, for example, the creation of new liabilities.<sup>71</sup> Furthermore, certain legal transactions also require the approval of the court,<sup>72</sup> including, for example, the sale or lease of the debtor’s company.<sup>73</sup> The legal transactions mentioned in § 116 IO must be notified to the insolvency court in all cases.<sup>74</sup>

<sup>61</sup> *Schneider*, *Privatinsolvenz*<sup>3</sup> 7; *Dellinger/Oberhammer/Koller*, *Insolvenzrecht*<sup>4</sup> Rz 42; *Kodek*, *Insolvenzrecht*<sup>2</sup> Rz 49; *Rechberger/Seeber/Thurner*, *Insolvenzrecht*<sup>3</sup> Rz 428.

<sup>62</sup> *Mohr*, *Privatinsolvenz*<sup>3</sup> Rz 78; *Dellinger/Oberhammer/Koller*, *Insolvenzrecht*<sup>4</sup> Rz 41.

<sup>63</sup> *Dellinger/Oberhammer/Koller*, *Insolvenzrecht*<sup>4</sup> Rz 40; *Rechberger/Seeber/Thurner*, *Insolvenzrecht*<sup>3</sup> Rz 35; *Mohr*, *Privatinsolvenz*<sup>3</sup> Rz 25.

<sup>64</sup> *Kodek*, *Insolvenzrecht*<sup>2</sup> Rz 561; *Dellinger/Oberhammer/Koller*, *Insolvenzrecht*<sup>4</sup> Rz 128.

<sup>65</sup> *Dellinger/Oberhammer/Koller*, *Insolvenzrecht*<sup>4</sup> Rz 483; *Mohr*, *Privatinsolvenz*<sup>3</sup> Rz 132; *Schneider*, *Privatinsolvenz*<sup>3</sup> 29; *Kodek*, *Insolvenzrecht*<sup>2</sup> Rz 558; *Kodek*, *Privatkonkurs*<sup>2</sup> Rz 33; *Feuchtinger/Lesigang*, *Insolvenzrecht*<sup>4</sup> 132.

<sup>66</sup> *Kodek*, *Insolvenzrecht*<sup>2</sup> Rz 562.

<sup>67</sup> *Dellinger/Oberhammer/Koller*, *Insolvenzrecht*<sup>4</sup> Rz 500; *Schneider* in *Koller/Lovrek/Spitzer*, IO § 157 Rz 2; *Kodek*, *Insolvenzrecht*<sup>2</sup> Rz 566.

<sup>68</sup> *Schneider* in *Koller/Lovrek/Spitzer*, IO § 157 Rz 8; *Schneider*, *Privatinsolvenz*<sup>3</sup> 82; *Mohr*, *Privatinsolvenz*<sup>3</sup> Rz 142.

<sup>69</sup> *Mohr*, *Privatinsolvenz*<sup>3</sup> Rz 145; *Schneider*, *Privatinsolvenz*<sup>3</sup> 29; *Dellinger/Oberhammer/Koller*, *Insolvenzrecht*<sup>4</sup> Rz 500; *Kodek*, *Insolvenzrecht*<sup>2</sup> Rz 563.

<sup>70</sup> *Kodek*, *Insolvenzrecht*<sup>2</sup> Rz 565.

<sup>71</sup> *Schneider*, *Privatinsolvenz*<sup>3</sup> 29; *Kodek*, *Insolvenzrecht*<sup>2</sup> Rz 563; *Mohr*, *Privatinsolvenz*<sup>3</sup> Rz 145.

<sup>72</sup> *Mohr*, *Privatinsolvenz*<sup>3</sup> Rz 350; *Schneider*, *Privatinsolvenz*<sup>3</sup> 29.

<sup>73</sup> § 117 Abs 1 Z 1 IO.

<sup>74</sup> *Jelinek* in *Koller/Lovrek/Spitzer*, IO § 116 Rz 12; *Schneider*, *Privatinsolvenz*<sup>3</sup> 29.

### 1.4.2 Appointment of an insolvency administrator

The insolvency court may also appoint an insolvency administrator, but only for certain activities.<sup>75</sup> The insolvency administrator would only be active in a limited scope of business.<sup>76</sup> Such an insolvency administrator with limited powers may be appointed by the insolvency court under § 190 (2) IO with responsibility for individual activities that are associated with particular difficulties. This could include, for example, the conduct of proceedings regarding the submitted claims.<sup>77</sup>

### 1.4.3 Withdrawal of self-determination

The court has no powers to extend or (additionally) limit the debtor's powers in self-administration and it can only withdraw self-administration.<sup>78</sup> This decision has to be made by the insolvency court.<sup>79</sup> Pursuant to § 186 (2) IO, the court can only withdraw the debtor's self-administration in the following instances:

- if the debtor's financial circumstances are not transparent;
- if it is to be expected that the (continuation of) self-administration will lead to a disadvantage for the creditors; or
- if the debtor does not submit an exact inventory of assets.

In case of doubt, the court should not withdraw self-administration from the debtor.<sup>80</sup> The appointment of an insolvency administrator takes effect on the date of the announcement of the appointment decision. If the debtor's self-administration is withdrawn, the debtor loses the power of disposition over the insolvency estate. This power is then transferred to the insolvency administrator.<sup>81</sup>

### 1.4.4 Power of avoidance

All activities that are not covered by the debtor's self-administration are carried out by the insolvency court pursuant to § 190 (3) IO.<sup>82</sup> The only exception is the power of avoidance which cannot be given either to the court or to the debtor.<sup>83</sup> Therefore, in the absence of an insolvency administrator the creditors have the power of avoidance pursuant to § 189 IO.

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<sup>75</sup> *Schneider*, *Privatinsolvenz*<sup>3</sup> Rz 29; *Kodek*, *Insolvenzrecht*<sup>2</sup> Rz 574.

<sup>76</sup> *Mohr*, *Privatinsolvenz*<sup>3</sup> Rz 144; *Dellinger/Oberhammer/Koller*, *Insolvenzrecht*<sup>4</sup> Rz 499; *Kodek*, *Insolvenzrecht*<sup>2</sup> Rz 574.

<sup>77</sup> *Mohr*, *Privatinsolvenz*<sup>3</sup> Rz 91; *Kodek*, *Insolvenzrecht*<sup>2</sup> Rz 574.

<sup>78</sup> Cf. *Schneider* in *Koller/Lovrek/Spitzer*, IO § 186 Rz 4; *Mohr*, *Privatinsolvenz*<sup>3</sup> Rz 144.

<sup>79</sup> *Kodek*, *Insolvenzrecht*<sup>2</sup> Rz 573; *Dellinger/Oberhammer/Koller*, *Insolvenzrecht*<sup>4</sup> Rz 498; *Mohr*, *Privatinsolvenz*<sup>3</sup> Rz 134; *Schneider*, *Privatinsolvenz*<sup>3</sup> 29.

<sup>80</sup> OGH 8 Ob 114/16x ZIK 2017/49 = *ecolex* 2017/99; *Dellinger/Oberhammer/Koller*, *Insolvenzrecht*<sup>4</sup> Rz 498.

<sup>81</sup> *Mohr*, *Privatinsolvenz*<sup>3</sup> Rz 137 et seq.

<sup>82</sup> *Dellinger/Oberhammer/Koller*, *Insolvenzrecht*<sup>4</sup> Rz 500; *Kodek*, *Privatkonkurs*<sup>2</sup> Rz 125; *Kodek*, *Insolvenzrecht*<sup>2</sup> Rz 562.

<sup>83</sup> *Kodek*, *Insolvenzrecht*<sup>2</sup> Rz 571.

### 1.4.5 Appointment of trustees

In proceedings for income levy, the court must appoint a trustee (*Treuhänder*).<sup>84</sup> Pursuant to § 203 (1) IO, the trustee has to invest and distribute to the creditors the amount he or she obtains. Alternatively, however, the trustee may instead instruct the debtor to realise the assets (§ 203 [2] IO). In addition to the realisation of assets, the trustee may also be instructed by the court to check whether the debtor is fulfilling his or her obligations.<sup>85</sup>

## 1.5 What legal requirements are needed in order to enter into consumer insolvency proceedings?

Insolvency proceedings may only be initiated upon application, which can be submitted by a creditor or by the debtor, the latter being obliged to file for insolvency pursuant to § 69 (2) IO.<sup>86</sup> The initiation of insolvency proceedings requires the debtor's insolvency (*Zahlungsunfähigkeit*) as well as (in principle) cost-covering assets (*kostendeckendes Vermögen*).<sup>87</sup>

"Impending insolvency" is only a reason for initiating reorganisation proceedings (but not bankruptcy proceedings or - in the case of the debtor being a consumer - debt settlement proceedings). However, as has already been mentioned, reorganisation proceedings are limited to entrepreneurs and legal entities.<sup>88</sup>

### 1.5.1 The restructuring procedure

Recently, impending insolvency has become relevant for another type of proceedings. The Austrian legislator has created a new law, the Restructuring Act (*Restrukturierungsordnung*, hereinafter ReO), to implement the European Restructuring and Insolvency Directive. The restructuring procedure is primarily designed as a pre-insolvency procedure and is available not only to legal entities but also to individuals who operate a business.<sup>89</sup> The initiation of restructuring proceedings requires "probable insolvency" (*wahrscheinliche Insolvenz*) of the debtor (§ 6 [1] ReO). This applies in particular in the case of imminent insolvency but is also presumed if the equity ratio (*Eigenmittelquote*) falls below 8% and the fictitious debt repayment period (*fiktive Schuldentilgungsdauer*) exceeds 15 years (§ 6 [2] ReO).

The time of the filing of the application is decisive for the assessment of entrepreneurial status. Therefore, if the enterprise has already been completely shut down at the time of the filing, the debtor is regarded as a consumer.<sup>90</sup> The origin of the liabilities is irrelevant - they may even stem from the entrepreneurial activity.<sup>91</sup> Since the IRÄG 2017 came into force, a previous attempt at an out-of-court settlement is no longer required to enter into

<sup>84</sup> *Schneider*, *Privatinsolvenz*<sup>3</sup> 193; *Mohr*, *Privatinsolvenz*<sup>3</sup> Rz 557.

<sup>85</sup> *Kodek*, *Insolvenzrecht*<sup>2</sup> Rz 649.

<sup>86</sup> *Mohr*, *Privatinsolvenz*<sup>3</sup> Rz 45; *Kodek*, *Insolvenzrecht*<sup>2</sup> Rz 208.

<sup>87</sup> *Rechberger/Seeber/Thurner*, *Insolvenzrecht*<sup>3</sup> Rz 68; *Mohr*, *Privatinsolvenz*<sup>3</sup> Rz 38; *Schneider*, *Privatinsolvenz*<sup>3</sup> 10.

<sup>88</sup> *Kodek*, *Insolvenzrecht*<sup>2</sup> Rz 540; *Rechberger/Seeber/Thurner*, *Insolvenzrecht*<sup>3</sup> Rz 68; , *Privatinsolvenz*<sup>3</sup> 10.

<sup>89</sup> *Mohr*, *ÖRpfl* 2020 H 2, 22 (24).

<sup>90</sup> LGZ Wien 47 R 106/06w ZIK 2006/164, 131; LG Innsbruck 2 R 300/95 ZIK 1995, 120; *Schneider* in *Koller/Lovrek/Spitzer*, IO § 182 Rz 7.

<sup>91</sup> OLG Innsbruck 1 R 214/95 ZIK 1995, 160; *Dellinger/Oberhammer/Koller*, *Insolvenzrecht*<sup>4</sup> Rz 496; *Schneider* in *Koller/Lovrek/Spitzer*, IO § 182 Rz 9.

debt settlement proceedings.<sup>92</sup>

The term “insolvency” is not legally defined.<sup>93</sup> According to case law,<sup>94</sup> insolvency occurs if the debtor is no longer in a position to pay his or her due liabilities, and the debtor must also be unable to procure the necessary funds within a short period of time.<sup>95</sup> Insolvency cannot be excluded solely by the fact that the debtor is still paying the claims of individual creditors. On the other hand, insolvency is not assumed if a restructuring of the debt is possible and a financing commitment has already been given for this purpose.<sup>96</sup> In the case of a creditor application, the condition of insolvency is carefully examined by the insolvency court.<sup>97</sup>

### 1.5.2 The debtor's assets

The second prerequisite for the initiation of insolvency proceedings is, according to § 71 IO, the existence of assets that can cover the initial costs of the insolvency proceedings, which are the procedural costs that are necessary for an initial overview of the debtor's asset situation.<sup>98</sup> However, as many debtors would otherwise be denied the initiation of insolvency proceedings and thus the chance of a discharge,<sup>99</sup> under the conditions of § 183 (1) IO insolvency proceedings concerning natural persons may be initiated even if there are no cost-covering assets available.<sup>100</sup> For this, the debtor must submit a precise inventory of assets and a settlement plan proposal according to § 183 (1) IO, as well as certifying that his or her future income will at least suffice to cover the costs of the proceedings.<sup>101</sup> In the meantime, the costs of the proceedings are covered by the state.<sup>102</sup> However, an assessment of the existence of cost-covering assets is stipulated solely in those cases in which the requirements for the withdrawal of self-administration are fulfilled (§ 183b IO). Therefore, if the debtor is entitled to self-administration in debt settlement proceedings, the existence of cost-covering assets does not have to be examined, and the opening of the proceedings is thus facilitated. The legislator justifies this with the fact that no initial costs are incurred in self-administration.<sup>103</sup>

Another special provision concerning the opening of proceedings despite the lack of assets that can cover the costs of the proceeding is stipulated in § 183a IO. According to

<sup>92</sup> *Fadinger*, JAP 2017/2018, 168 (169); *Mohr*, *Privatinsolvenz*<sup>3</sup> Rz 8; *Nunner-Krautgasser*, *ZinsO* 2017, 2525 (2527); *Riel*, *AnwBl* 2017, 275 (276); *Dellinger/Oberhammer/Koller*, *Insolvenzrecht*<sup>4</sup> Rz 482; *Konecny*, *ecolex* 2017, 1160 (1161); *Mohr*, *ZIK* 2017, 97 (97).

<sup>93</sup> *Nunner-Krautgasser* in *Nunner-Krautgasser/Reissner* 1 (15); *Kodek*, *Insolvenzrecht*<sup>2</sup> Rz 212; *Rechberger/Seeber/Thurner*, *Insolvenzrecht*<sup>3</sup> Rz 61.

<sup>94</sup> *RIS-Justiz* RS0064528; *OGH* 8 Ob 118/11b RdW 2012/168 = *ZIK* 2012/157 = *ecolex* 2012/212; 3 Ob 99/10w *EvBl* 2011/105 (*Konecny*) = *ÖBA* 2011/1747 (*Bartlmä*).

<sup>95</sup> *Kodek*, *Insolvenzrecht*<sup>2</sup> Rz 213 et seq; *Nunner-Krautgasser* in *Nunner-Krautgasser/Reissner* 1 (15); *Mohr*, *Privatinsolvenz*<sup>3</sup> Rz 39; *Schneider*, *Privatinsolvenz*<sup>3</sup> 10; *Rechberger/Seeber/Thurner*, *Insolvenzrecht*<sup>3</sup> Rz 61.

<sup>96</sup> *Rechberger/Seeber/Thurner*, *Insolvenzrecht*<sup>3</sup> Rz 62; *Schneider*, *Privatinsolvenz*<sup>3</sup> 10; *Mohr*, *Privatinsolvenz*<sup>3</sup> Rz 39 et seq.

<sup>97</sup> *Schneider*, *Privatinsolvenz*<sup>3</sup> 11; *Mohr*, *Privatinsolvenz*<sup>3</sup> Rz 39.

<sup>98</sup> *Nunner-Krautgasser* in *Nunner-Krautgasser/Reissner* 1 (17); *Kodek*, *Insolvenzrecht*<sup>2</sup> Rz 231; *Rechberger/Seeber/Thurner*, *Insolvenzrecht*<sup>3</sup> Rz 69; *Schneider*, *Privatinsolvenz*<sup>3</sup> 12; *Mohr*, *Privatinsolvenz*<sup>3</sup> Rz 43.

<sup>99</sup> *Dellinger/Oberhammer/Koller*, *Insolvenzrecht*<sup>4</sup> Rz 489; *Kodek*, *Insolvenzrecht*<sup>2</sup> Rz 560.

<sup>100</sup> *Kodek*, *Insolvenzrecht*<sup>2</sup> Rz 559; *Nunner-Krautgasser* in *Nunner-Krautgasser/Reissner* 1 (18); *Mohr*, *Privatinsolvenz*<sup>3</sup> Rz 52; *Feuchtinger/Lesigang*, *Insolvenzrecht*<sup>4</sup> 122 et seq; *Nunner-Krautgasser*, *ZinsO* 2017, 2525 (2527); *Dellinger/Oberhammer/Koller*, *Insolvenzrecht*<sup>4</sup> Rz 482.

<sup>101</sup> *Mohr*, *Privatinsolvenz*<sup>3</sup> Rz 55; *Kodek*, *Insolvenzrecht*<sup>2</sup> Rz 560; *Dellinger/Oberhammer/Koller*, *Insolvenzrecht*<sup>4</sup> Rz 490.

<sup>102</sup> *Nunner-Krautgasser*, *ZinsO* 2017, 2525 (2527); *Dellinger/Oberhammer/Koller*, *Insolvenzrecht*<sup>4</sup> Rz 491.

<sup>103</sup> *ErläutRV* 770 *BlgNR* 27. GP 70.

this provision, the application of a creditor for the opening of debt settlement proceedings after the determination of "evident insolvency" (*offenkundige Zahlungsunfähigkeit*) within the meaning of § 49a EO is not to be rejected for reason of a lack of assets that can cover the costs of the proceeding (§ 183a IO).

## 1.6 Costs of the available procedures

The debt settlement procedure is simpler and less expensive than the other types of procedure, largely due to the debtor's self-administration<sup>104</sup> because an insolvency administrator is rarely appointed (cf. § 190 [1] IO). In general, the court fees and the remuneration of the insolvency administrator and the trustee must be distinguished from each other. The remuneration of the insolvency administrator represents the largest part of the costs of the proceedings.<sup>105</sup> (For the remuneration of the insolvency administrator and of the trustee see section 3.1.3.)

With regard to the court fees, the provisions of the IO differ, depending on whether an insolvency administrator has been appointed or not.<sup>106</sup> Insofar as an insolvency administrator has been appointed, the flat-rate fee for the court costs incurred amounts to 15% of the insolvency administrator's remuneration, but at least €444. The prerequisite for this is that the insolvency proceedings have been terminated either by final distribution, reorganisation plan, settlement plan, consent of the creditors or by initiation of the proceedings for income levy.<sup>107</sup>

In case of the debtor's self-administration in debt settlement proceedings, no flat-rate fee is to be charged. However, if there is no self-administration, the flat-rate fee is only half of the above amount.<sup>108</sup> The petition to open proceedings filed by the debtor is exempt from fees.<sup>109</sup> If the application is filed by a creditor, the creditor has to pay a flat-rate fee. During the course of the proceedings, some other fees (mainly concerning the creditors) are also charged, e.g. for the lodging of a claim.<sup>110</sup>

The costs of the insolvency proceedings are to be satisfied with priority like claims against the estate (*Masseforderungen*).<sup>111</sup> If a settlement plan is concluded, the debtor must pay the court fees within a maximum period of three years (§ 196 [2] IO). The costs of the proceedings for income levy are also satisfied with priority<sup>112</sup> and have to be settled during the course of the proceedings.<sup>113</sup> However, the costs of the proceedings may also be paid out of official funds.<sup>114</sup> Earlier page?

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<sup>104</sup> *Dellinger/Oberhammer/Koller*, Insolvenzrecht<sup>4</sup> Rz 494; *Kodek*, Insolvenzrecht<sup>2</sup> Rz 555.

<sup>105</sup> *Kodek*, Insolvenzrecht<sup>2</sup> Rz 196; cf. *Kodek*, Privatkonkurs<sup>2</sup> Rz 763 et seq.

<sup>106</sup> *Mohr*, Privatinsolvenz<sup>3</sup> Rz 77; *Kodek*, Insolvenzrecht<sup>2</sup> Rz 190.

<sup>107</sup> *Kodek*, Insolvenzrecht<sup>2</sup> Rz 190.

<sup>108</sup> *Mohr*, ZIK 2016, 19 (20); *Kodek*, Privatkonkurs<sup>2</sup> Rz 767; *Mohr*, Privatinsolvenz<sup>3</sup> Rz 77; *Kodek*, Insolvenzrecht<sup>2</sup> Rz 193; cf. *Konecny/Riel*, Entlohnung Rz 497 et seq.

<sup>109</sup> *Kodek*, Privatkonkurs<sup>2</sup> Rz 768; *Kodek*, Insolvenzrecht<sup>2</sup> Rz 195.

<sup>110</sup> *Mohr*, Privatinsolvenz<sup>3</sup> Rz 77; *Kodek*, Privatkonkurs<sup>2</sup> Rz 768; *Kodek*, Insolvenzrecht<sup>2</sup> Rz 195.

<sup>111</sup> *Kodek*, Privatkonkurs<sup>2</sup> Rz 764; *Mohr*, Privatinsolvenz<sup>3</sup> Rz 249; *Kodek*, Insolvenzrecht<sup>2</sup> Rz 191.

<sup>112</sup> *Mohr*, Privatinsolvenz<sup>3</sup> Rz 589; *Kodek*, Insolvenzrecht<sup>2</sup> Rz 191.

<sup>113</sup> *Kodek*, Privatkonkurs<sup>2</sup> Rz 766; *Kodek*, Insolvenzrecht<sup>2</sup> Rz 192.

<sup>114</sup> *Mohr*, Privatinsolvenz<sup>3</sup> Rz 590; *Schneider*, Privatinsolvenz<sup>3</sup> 202.

## 2. Means testing for insolvent individuals

### 2.1 What is means testing and how is it applied in bankruptcy proceedings?

Within the framework of a reorganisation plan, the debtor must fulfil strict requirements. In principle, a minimum quota of 20% must be offered within a period of two years (§ 141 [1] IO). In the reorganisation procedure with self-administration, a minimum quota as high as 30% must be offered (cf. § 169 [1] IO). Insolvent consumers may offer a reorganisation plan (with a minimum quota of 20%) in debt settlement proceedings.<sup>115</sup> In this case, the period of fulfilment may be up to five years (§ 141 [1] S 3 IO). But even if the minimum quotas are offered in the reorganisation plan, the court has the option to refuse confirmation of the reorganisation plan, especially if the reorganisation plan is unreasonable due to a contradiction between the offer and the debtor's actual economic circumstances (cf. § 154 IO).

In the settlement plan, the insolvency debtor has to offer a so-called "relative minimum quota" (*relative Mindestquote*), which is a quota that corresponds at least to the debtor's anticipated income situation in the following three (previously five)<sup>116</sup> years (§ 194 [1] IO).<sup>117</sup> Here, not only the income actually achieved is to be taken into account, but also income that can be achieved under strain (*Anspannung*) of the debtor.<sup>118</sup>

The settlement plan may be adjusted to take account of subsequent changes in the debtor's income and financial circumstances. Pursuant to § 198 IO, if the debtor's income or asset situation changes through no fault of his or her own so that the debtor is no longer able to comply with the settlement plan, the debtor may request a vote on a new settlement plan and the initiation of proceedings for income levy.<sup>119</sup> This must be requested within a period of 14 days after a reminder by a creditor. In contrast, an unexpected improvement in the debtor's income and asset situation does not entitle creditors to request a change in the settlement plan.<sup>120</sup>

In the proceedings for income levy, neither an absolute nor a relative minimum quota is required<sup>121</sup> (the former minimum quota of 10% was abolished by the IRÄG 2017, together with the problematic debt discharge on grounds of equity).<sup>122</sup> However, the debtor has to pursue (or at least to look for) an appropriate occupation (*angemessene Erwerbstätigkeit*) (§ 210 [1] IO),<sup>123</sup> and the debtor is not allowed to refuse any reasonable employment (*zumutbare Beschäftigung*) in this context.<sup>124</sup>

Within the framework of the repayment plan (*Tilgungsplan*), an increased standard of honesty must be met, expressed by the introduction of additional procedural obstacles (cf. § 201 [2, 3] and § 210 IO). Furthermore, the residual debt discharge in case of a

<sup>115</sup> Kodek, Privatkonkurs<sup>2</sup> Rz 497.

<sup>116</sup> Kodek, Insolvenzrecht<sup>2</sup> Rz 611; Dellinger/Oberhammer/Koller, Insolvenzrecht<sup>4</sup> Rz 504.

<sup>117</sup> Schneider, Privatin solventz<sup>3</sup> 129; Kodek, Insolvenzrecht<sup>2</sup> Rz 611.

<sup>118</sup> Dellinger/Oberhammer/Koller, Insolvenzrecht<sup>4</sup> Rz 504; Kodek, Privatkonkurs<sup>2</sup> Rz 361; dissenting opinion Schneider, Privatin solventz<sup>3</sup> 129 et seq; Schneider, VbR 2017, 188 (189); Pfandl/Schmid, Insolvenzrecht 231.

<sup>119</sup> Dellinger/Oberhammer/Koller, Insolvenzrecht<sup>4</sup> Rz 516; Kodek, Insolvenzrecht<sup>2</sup> Rz 620.

<sup>120</sup> Kodek, Insolvenzrecht<sup>2</sup> Rz 620.

<sup>121</sup> Dellinger/Oberhammer/Koller, Insolvenzrecht<sup>4</sup> Rz 480; Kodek, Insolvenzrecht<sup>2</sup> Rz 662.

<sup>122</sup> Riel, AnwBl 2017, 275 (277); Kodek, Zak 2017, 147 (147).

<sup>123</sup> Rechberger/Seeber/Thurner, Insolvenzrecht<sup>3</sup> Rz 475.

<sup>124</sup> ErläutRV 950 BlgNR 27. GP 31.



repayment plan may be revoked if the debtor has been convicted of certain criminal offences (see § 216 [1] IO).

## 2.2 Are there exemptions and allowances?

The insolvency estate comprises of all the debtor's assets subject to enforcement (§ 2 [2] IO). This principle is also applicable to debt settlement proceedings.<sup>125</sup> The insolvency estate does not include the unseizable portion of the debtor's earned income according to § 291a of the EO. The amount of the subsistence minimum depends on the amount of the income as well as the monetary support obligations of the individual debtor.<sup>126</sup> The court has the option to increase (§ 292a EO) or reduce (§ 292b EO) the subsistence minimum. The debtor has free power of disposal over the unseizable part of his or her earned income.<sup>127</sup>

Objects and claims that cannot be seized are generally not part of the insolvency estate either.<sup>128</sup> These include, among other things, pets and ordinary household items, as well as food and heating material for a period of up to four weeks (§ 250 EO).

Items that are necessary for the exercise of a profession are also exempt from enforcement, which is relevant to consumer debt settlement proceedings. In insolvency proceedings of entrepreneurs, however, such items belong to the insolvency estate despite being unseizable: This results from the fact that insolvency proceedings "draw an enterprise in its entirety to the insolvency estate".<sup>129</sup> Accordingly, the IO provides a well-thought-out system of going concern in the event of insolvency.

According to § 5 IO, the debtor is in principle not entitled to monetary support from the insolvency estate. Rather, the debtor must pursue his or her own activity in accordance with the principle of strain (*Anspannungsgrundsatz*) if able to do so.<sup>130</sup> What the debtor acquires during the proceedings (mainly from his or her own activity) is to be left to the debtor to the extent that it is indispensable for a modest lifestyle for the debtor and his or her dependents (§ 5 [1] IO). This provision is aimed primarily at entrepreneurs.<sup>131</sup> In the case of an insolvent debtor, however, the subsistence minimum does not actually belong to the insolvency estate (§ 2 [2] IO), thus it is allocated to the debtor anyway., In case of an acquisition from employment, a granting of means according to § 5 IO can only occur if the debtor's income exceeds the subsistence minimum.<sup>132</sup>

Insofar as the debtor lives in a house or flat which is part of the insolvency estate, the debtor and those family members who live with the debtor in the same household can be provided with the indispensable living quarters temporarily (§ 5 [3] IO). However, a

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<sup>125</sup> OGH 9 ObA 39/97v JBI 1997, 742 = RZ 1998/19 = ZIK 1997, 187 = SZ 70/105; *Rechberger/Seeber/Thurner*, *Insolvenzrecht*<sup>3</sup> Rz 219; *Kodek*, *Insolvenzrecht*<sup>2</sup> Rz 328; *Mohr*, *Privatinsolvenz*<sup>3</sup> Rz 112.

<sup>126</sup> *Mohr*, *Privatinsolvenz*<sup>3</sup> Rz 113; *Dellinger/Oberhammer/Koller*, *Insolvenzrecht*<sup>4</sup> Rz 174.

<sup>127</sup> *Neumayr/Nunner-Krautgasser*, *Exekutionsrecht*<sup>4</sup> 278 et seq; *Kodek*, *Insolvenzrecht*<sup>2</sup> Rz 328; *Mohr*, *Privatinsolvenz*<sup>3</sup> Rz 113.

<sup>128</sup> *Rechberger/Seeber/Thurner*, *Insolvenzrecht*<sup>3</sup> Rz 219; *Mohr*, *Privatinsolvenz*<sup>3</sup> Rz 117; *Kodek*, *Insolvenzrecht*<sup>2</sup> Rz 325.

<sup>129</sup> OGH 2 Ob 732/55 SZ 29/82.

<sup>130</sup> *Schneider*, *Privatinsolvenz*<sup>3</sup> 114; *Rechberger/Seeber/Thurner*, *Insolvenzrecht*<sup>3</sup> Rz 223.

<sup>131</sup> *Rechberger/Seeber/Thurner*, *Insolvenzrecht*<sup>3</sup> Rz 223; *Schneider*, *Privatinsolvenz*<sup>3</sup> 114.

<sup>132</sup> *Kodek*, *Insolvenzrecht*<sup>2</sup> Rz 581.

sale of the respective house or flat is still possible. Furthermore, the insolvency court shall give the debtor the tenancy and other rights of use to residential property at his or her free disposal if they concern living quarters which are indispensable for the debtor and the debtor's family members living in the same household (§ 5 [4] IO). The rent is not a claim against the estate but, rather, must be paid from the debtor's insolvency-free assets.<sup>133</sup>

The debtor may also be given objects of minor value at his or her free disposal. This provision includes claims whose collection does not stand a good chance of success, as well as mortgaged property. Such objects are then permanently excluded from the insolvency estate. A mere temporary exclusion is not possible.<sup>134</sup>

### 3. Priority / secured and preferential claims

#### 3.1 How are the various claims treated?

As early as 1982, the Austrian insolvency regime established the principle of classless bankruptcy ("*klassenloser Konkurs*"). This means that, in general, neither public law creditors nor employees of the debtor are given preferential treatment in insolvency proceedings.<sup>135</sup> Insolvency claims with priority still exist only in certain areas of law, for example concerning the tenant's deposit in the insolvency of the landlord (§ 16b [3] MRG) or concerning those assets which can be allocated to an investment and risk community in the insolvency of a pension fund (§ 37 [4] PKG).

Furthermore, a distinction is made between different groups of creditors whose position – and treatment under insolvency law – depends on the type of claim. In particular, a distinction must be made between creditors with a preferential position (creditors with a claim for segregation of property, secured creditors, creditors entitled to set-off and creditors with claims against the estate), regular insolvency creditors, subordinated creditors (i.e. claims from equity-substituting benefits according to § 57a IO) and creditors with excluded claims (§ 58 IO).<sup>136</sup> A creditor may also have a dual status, specifically if the debtor is simultaneously an insolvency creditor and a secured creditor.<sup>137</sup>

Insolvency creditors (*Insolvenzgläubiger*) are at the centre of the proceedings. These are creditors who have a pecuniary claim against the debtor at the time of the opening of insolvency proceedings. Insolvency creditors are primarily threatened with default because their claims are neither secured nor satisfied with priority.<sup>138</sup> The insolvency creditors form a collective of creditors who receive aliquot satisfaction based on the *pari passu* principle.<sup>139</sup>

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<sup>133</sup> Cf. Zoppel in Koller/Lovrek/Spitzer, IO § 5 Rz 17.

<sup>134</sup> Nunner, Freigabe 112; Mohr, Privatinsolvenz<sup>3</sup> Rz 118; cf. Kodek, Insolvenzzrecht<sup>2</sup> Rz 338 et seq.

<sup>135</sup> Dellinger/Oberhammer/Koller, Insolvenzzrecht<sup>4</sup> Rz 179.

<sup>136</sup> Dellinger/Oberhammer/Koller, Insolvenzzrecht<sup>4</sup> Rz 170 et seq; Kodek, Insolvenzzrecht<sup>2</sup> Rz 110 et seq; Mohr, Privatinsolvenz<sup>3</sup> Rz 198.

<sup>137</sup> Mohr, Privatinsolvenz<sup>3</sup> Rz 199; Kodek, Insolvenzzrecht<sup>2</sup> Rz 133.

<sup>138</sup> Schneider, Privatinsolvenz<sup>3</sup> 51; Nunner-Krautgasser in Nunner-Krautgasser/Reissner 1 (39); Dellinger/Oberhammer/Koller, Insolvenzzrecht<sup>4</sup> Rz 170; Mohr, Privatinsolvenz<sup>3</sup> Rz 251 et seq; Kodek, Insolvenzzrecht<sup>2</sup> Rz 142 et seq.

<sup>139</sup> Dellinger/Oberhammer/Koller, Insolvenzzrecht<sup>4</sup> Rz 170; Nunner-Krautgasser in Nunner-Krautgasser/Reissner 1 (4).

### 3.1.1 **Super priority / secured claims / other statutory priorities**

#### *Creditors with a claim for segregation of property*

Creditors with a claim for segregation of property (*Aussonderungsgläubiger*) have a right *in rem* or a personal right for segregation of an asset which is *de facto* in the insolvency estate but does not belong to the debtor in full or in part (§ 44 [1] IO). Grounds for segregation are, specifically, ownership and co-ownership.<sup>140</sup> Pursuant to § 11 (1) IO, claims for segregation of property are in principle not affected by the initiation of insolvency proceedings (but see § 11 [2, 3] IO). Therefore, such claims do not qualify for participation in the insolvency proceedings. Accordingly, persons entitled to segregation of property do not have the right to vote on the reorganisation plan or the settlement plan.<sup>141</sup>

#### *Secured creditors*

Secured creditors (*Absonderungsgläubiger*) are creditors who have claims for separate satisfaction from certain items of the debtor (§ 48 [1] IO). They have insolvency-proof claims to preferential satisfaction from the sale of specific items that are part of the insolvency estate (so-called separate estates).<sup>142</sup> The other insolvency creditors are excluded from the proceeds from these items up to the value of their claims. They participate only insofar as there is a surplus (so-called *Hyperocha*) after the payment of the costs for the separate managing, realising and distributing of the asset and the satisfaction of the secured creditors. In particular, secured claims tend to be liens or withholding rights.<sup>143</sup> In principle, they are not affected by the opening of insolvency proceedings (but see § 11 [2, 3] IO). In exceptional cases, however, even secured creditors can be affected by insolvency proceedings. According to § 12 (1) IO, preferential claims for secured creditors newly acquired within the last 60 days prior to the opening of insolvency proceedings through enforcement for payment or for providing a security expire with the opening of insolvency proceedings. However, they are revived should the insolvency proceedings be terminated pursuant to § 123a IO.

#### *Special rules for creditors with a claim for segregation of property and secured creditors*

Creditors with a claim for segregation of property and secured creditors whose claim is for the debtor's income are subject to special rules.<sup>144</sup> If the insolvency proceedings are initiated by the 15th of the month, those liens on the income of the debtor acquired by enforcement by a court, administrative authority or financial authority shall expire at the end of the month. If the insolvency proceedings are initiated on or after the 16th of the month, they shall expire at the end of the following month (§ 12a [3] IO). However, if the income was ceded or pledged before the initiation of the insolvency proceedings, these claims for segregation of property and secured claims shall expire after the end of a

<sup>140</sup> Kodek, *Insolvenzrecht*<sup>2</sup> Rz 114; Mohr, *Privatinsolvenz*<sup>3</sup> Rz 200; Schneider, *Privatinsolvenz*<sup>3</sup> 36; Dellinger/Oberhammer/Koller, *Insolvenzrecht*<sup>4</sup> Rz 199 et seq; cf. Spitzer, *Aussonderung* 13 et seq.

<sup>141</sup> Mohr, *Privatinsolvenz*<sup>3</sup> Rz 201; cf. Schneider, *Privatinsolvenz*<sup>3</sup> 37.

<sup>142</sup> Dellinger/Oberhammer/Koller, *Insolvenzrecht*<sup>4</sup> Rz 172; Kodek, *Insolvenzrecht*<sup>2</sup> Rz 121; Mohr, *Privatinsolvenz*<sup>3</sup> Rz 207; Schneider, *Privatinsolvenz*<sup>3</sup> 38.

<sup>143</sup> Mohr, *Privatinsolvenz*<sup>3</sup> Rz 207 et seq; Dellinger/Oberhammer/Koller, *Insolvenzrecht*<sup>4</sup> Rz 212; Kodek, *Insolvenzrecht*<sup>2</sup> Rz 121 et seq; cf. Schneider, *Privatinsolvenz*<sup>3</sup> 38 et seq.

<sup>144</sup> Dellinger/Oberhammer/Koller, *Insolvenzrecht*<sup>4</sup> Rz 207; Mohr, *Privatinsolvenz*<sup>3</sup> Rz 219; Kodek, *Insolvenzrecht*<sup>2</sup> Rz 453; Schneider, *Privatinsolvenz*<sup>3</sup> 40.

period of two years. The two-year period shall commence at the end of the month in which the insolvency proceedings were initiated (§ 12a [1] IO). The term “income” is to be understood in a wide sense;<sup>145</sup> for example, it also includes royalty claims of artists,<sup>146</sup> claims for child support and private supplementary pensions.<sup>147</sup>

#### *Creditors with claims against the estate*

Creditors with claims against the estate (*Massegläubiger*) have claims which usually arise after the opening of the insolvency proceedings. They are to be satisfied preferentially and in full.<sup>148</sup> These claims are listed in § 46 IO.<sup>149</sup> They must be satisfied without delay as soon as they are established and due. In the case of self-administration, this can be done either by the court or by the debtor. If self-administration has been withdrawn, the satisfaction of mass claims is a task of the insolvency administrator.<sup>150</sup> Creditors with claims against the estate do not have to lodge their claims in the proceedings but can demand payment directly from the debtor or the insolvency administrator respectively. Should satisfaction of the claim be refused, creditors with claims against the estate can turn to the insolvency court or sue to enforce their claim.<sup>151</sup>

#### *Creditors entitled to set-off*

A special position is also held by creditors entitled to set-off (*Aufrechnungsberechtigte*). An insolvency creditor does not have to lodge his or her claim in the insolvency proceedings if the debtor holds a counterclaim against the creditor and both claims were already opposed to each other at the time of opening the insolvency proceedings (§ 19 IO). The claims do not have to be due and may also be conditional, and the creditor’s claim may even be non-monetary (see also § 14 [1] IO).<sup>152</sup> The set-off is not bound by any time limit and can be declared either to the debtor in self-administration or to the appointed insolvency administrator.<sup>153</sup> Should the insolvency proceedings end with a reorganisation plan or a settlement plan, however, the creditor’s right to set-off is limited to the respective quota.<sup>154</sup>

### **3.1.2 Legislated priorities for wages, pensions etc.**

Claims for unpaid wages established before the opening of insolvency proceedings are in principle only insolvency claims (§ 51 [1] IO). The same goes for claims arising from

<sup>145</sup> Kodek, *Insolvenzrecht*<sup>2</sup> Rz 578; *Dellinger/Oberhammer/Koller*, *Insolvenzrecht*<sup>4</sup> Rz 207; *Schneider*, *Privatinsolvenz*<sup>3</sup> 41; *Mohr*, *Privatinsolvenz*<sup>3</sup> Rz 219.

<sup>146</sup> OGH ZIK 2004/262 = EvBl 2005/60 = ÖJZ-LSK 2005/26 = ÖBA 2005/1276 = RdW 2005/207 = SZ 2004/140.

<sup>147</sup> *Schneider*, *Privatinsolvenz*<sup>3</sup> 41.

<sup>148</sup> *Kodek*, *Insolvenzrecht*<sup>2</sup> Rz 136; *Dellinger/Oberhammer/Koller*, *Insolvenzrecht*<sup>4</sup> Rz 187.

<sup>149</sup> *Nunner-Krautgasser* in *Nunner-Krautgasser/Reissner* 1 (37); *Dellinger/Oberhammer/Koller*, *Insolvenzrecht*<sup>4</sup> Rz 188; *Kodek*, *Insolvenzrecht*<sup>2</sup> Rz 137; *Mohr*, *Privatinsolvenz*<sup>3</sup> Rz 244; *Schneider*, *Privatinsolvenz*<sup>3</sup> 34.

<sup>150</sup> *Mohr*, *Privatinsolvenz*<sup>3</sup> Rz 245; *Schneider*, *Privatinsolvenz*<sup>3</sup> 34 et seq; *Dellinger/Oberhammer/Koller*, *Insolvenzrecht*<sup>4</sup> Rz 194.

<sup>151</sup> *Nunner-Krautgasser* in *Nunner-Krautgasser/Reissner* 1 (37); *Schneider*, *Privatinsolvenz*<sup>3</sup> 35; cf. *Dellinger/Oberhammer/Koller*, *Insolvenzrecht*<sup>4</sup> Rz 195.

<sup>152</sup> *Schneider*, *Privatinsolvenz*<sup>3</sup> 49; *Dellinger/Oberhammer/Koller*, *Insolvenzrecht*<sup>4</sup> Rz 186; *Mohr*, *Privatinsolvenz*<sup>3</sup> Rz 237; *Kodek*, *Insolvenzrecht*<sup>2</sup> Rz 282.

<sup>153</sup> *Mohr*, *Privatinsolvenz*<sup>3</sup> Rz 238; *Schneider*, *Privatinsolvenz*<sup>3</sup> 49.

<sup>154</sup> OGH 6 Ob 179/14p Zak 2016/279 (*Nunner-Krautgasser*).

the termination of employment contracts according to § 25 IO (which provides a special regime for the termination of employment contracts after the opening of insolvency proceedings).<sup>155</sup> For unpaid wages and such claims arising from the termination of employment contracts, the employee would therefore only receive a quota.

However, the Austrian legislator has enacted special provisions to protect employees.<sup>156</sup> The Insolvency Remuneration Protection Act<sup>157</sup> (*Insolvenz-Entgeltsicherungsgesetz*), which has been in existence in Austria since 1978, serves to protect employees' claims (e.g. salary, company pension entitlements) in the event of the employer's insolvency.<sup>158</sup> This largely safeguards the employee's salary claims because the employee typically depends on the salary for his or her livelihood.<sup>159</sup> The administration and assertion of claims in insolvency proceedings is carried out by the Insolvency Remuneration Fund (*Insolvenz-Entgelt-Fonds*), represented by the IEF-Service GmbH.<sup>160</sup>

Other employees' claims are classified as claims against the estate which must effectively be paid in full. These include above all claims for wages for the period after the opening of the insolvency proceedings (§ 46 no. 3 IO). In addition to that, some claims arising from the termination of employment contracts also qualify as claims against the estate (§ 46 no. 3a IO). Should the insolvency estate turn out to be insufficient to settle all claims against the estate, the claims of employees are to be satisfied preferentially (cf. § 47 [2] no. 4, 5 IO).

### 3.1.3 Costs of administration

In consumer debt settlement proceedings generally no insolvency administrator is appointed. Instead, the debtor is entitled to self-administration (*Eigenverwaltung*),<sup>161</sup> which makes the proceedings more cost-effective.<sup>162</sup> Should there be the need to appoint an insolvency administrator (§ 186 [2] and § 190 [2] IO), he or she is entitled to remuneration plus value-added tax. The law provides for a standard remuneration, which consists of a minimum compensation as well as further remuneration for the realisation of a reorganisation plan or a settlement plan.<sup>163</sup> If an insolvency administrator is appointed in debt settlement proceedings, the administrator's minimum compensation must be €1,000 according to § 191 (1) IO,<sup>164</sup> while outside of the debt settlement procedure it would be €3,000.<sup>165</sup> The IO stipulates a degressive remuneration system for the realisation of the debtor's assets and the settlement plan, which can be increased (§ 82b

<sup>155</sup> *Dellinger/Oberhammer/Koller*, *Insolvenzrecht*<sup>4</sup> Rz 494; *Haider in Nunner-Krautgasser/Reissner* 185 (192); *Kodek*, *Insolvenzrecht*<sup>2</sup> Rz 314.

<sup>156</sup> *Reissner/Sundl in Nunner-Krautgasser/Reissner* 85 (85); *Kodek*, *Insolvenzrecht*<sup>2</sup> Rz 315; *Dellinger/Oberhammer/Koller*, *Insolvenzrecht*<sup>4</sup> Rz 325.

<sup>157</sup> *Insolvenz-Entgeltsicherungsgesetz* BGBl 1977/324.

<sup>158</sup> *Sundl in Jauffer/Nunner-Krautgasser/Schummer* 133 (134); *Liebeg*, *Insolvenz-Entgeltsicherungsgesetz*<sup>3</sup> Einleitung Rz 6; *Dellinger/Oberhammer/Koller*, *Insolvenzrecht*<sup>4</sup> Rz 325.

<sup>159</sup> *Liebeg*, *Insolvenz-Entgeltsicherungsgesetz*<sup>3</sup> Einleitung Rz 1; *Rechberger/Seeber/Thurner*, *Insolvenzrecht*<sup>3</sup> Rz 485; *Sundl in Jauffer/Nunner-Krautgasser/Schummer* 133 (134).

<sup>160</sup> *Pfandl/Schmid*, *Insolvenzrecht* 174; *Reissner/Sundl in Nunner-Krautgasser/Reissner* 85 (85); *Rechberger/Seeber/Thurner*, *Insolvenzrecht*<sup>3</sup> Rz 485.

<sup>161</sup> *Kodek*, *Insolvenzrecht*<sup>2</sup> Rz 558; *Dellinger/Oberhammer/Koller*, *Insolvenzrecht*<sup>4</sup> Rz 483.

<sup>162</sup> *Dellinger/Oberhammer/Koller*, *Insolvenzrecht*<sup>4</sup> Rz 494; *Kodek*, *Insolvenzrecht*<sup>2</sup> Rz 555.

<sup>163</sup> *Mohr*, *Privatinsolvenz*<sup>3</sup> Rz 89; *Dellinger/Oberhammer/Koller*, *Insolvenzrecht*<sup>4</sup> Rz 112 et seq; *Kodek*, *Insolvenzrecht*<sup>2</sup> Rz 94 et seq; *Poltsch in Poltsch/Berti/Fraberger/Reckenzaun/Isola/Petsch* 845 (846 et seq).

<sup>164</sup> *Kodek*, *Insolvenzrecht*<sup>2</sup> Rz 95; *Mohr*, *ZIK* 2017, 97 (97); *Mohr*, *Privatinsolvenz*<sup>3</sup> Rz 89.

<sup>165</sup> *Konecny/Riel*, *ZIK* 2017, 175 (175); *Kodek*, *Privatkonkurs*<sup>2</sup> Rz 769; *Mohr*, *Privatinsolvenz*<sup>3</sup> Rz 89.

IO) or reduced (§ 82c IO) by the court.<sup>166</sup> A decision on the remuneration of the insolvency administrator must be taken no later than at the hearing at which the final account is discussed (*Schlussrechnungstagsatzung*) or beforehand at the end of the insolvency administrator's activities.<sup>167</sup>

If proceedings for income levy are initiated, the court has to appoint a trustee.<sup>168</sup> In practice, a privileged creditor protection association (e.g. *Alpenländischer Kreditorenverband*) or the umbrella organisation of recognised debt-counselling agencies (*ASB Schuldenberatungen GmbH*) are regularly appointed as trustees.<sup>169</sup> The trustee is entitled to remuneration in the debt settlement procedure. This depends – similarly to the insolvency administrator – on the amounts that accrue to the trustee,<sup>170</sup> however, the trustee receives at least €15 per month (§ 204 [1] IO). The standard remuneration may either be increased or reduced by the insolvency court upon application,<sup>171</sup> but the minimum remuneration cannot be reduced (§ 204 [2] IO). If the amounts received by the trustee are insufficient for the remuneration, the remaining amount may be compensated from official funds.<sup>172</sup>

## 4. Consumer credit counselling

### 4.1 Is “credit counselling” available and is it provided for in the legislation?

§ 267 IO provides for the option of the recognition of debt-counselling agencies. For this, all the requirements of § 267 IO must be fulfilled.<sup>173</sup> According to § 267 (1) IO, the prerequisites for this process include the unpaid nature of the service, reliability, financial security, permanent establishment and up-to-date quality management. The state recognition entitles the holder to use a seal of quality, which is awarded by the competent higher regional court.<sup>174</sup>

In insolvency proceedings, according to § 254 (1) no. 6 IO, there is no obligation to be represented by a lawyer. In fact, the debtor does not have to be represented at all.<sup>175</sup> However, in debt settlement proceedings debtors may be represented by recognised debt-counselling agencies (*Schuldenberatungsstellen*), according to § 192 IO. This is not possible in other insolvency proceedings.<sup>176</sup> In the appeal proceedings (of the debt settlement proceedings), representation by a recognised debt-counselling agency is also possible, but the signature of a lawyer is required for filing the appeal to the

<sup>166</sup> *Dellinger/Oberhammer/Koller*, *Insolvenzrecht*<sup>4</sup> Rz 113; *Poltsch* in *Poltsch/Bertl/Fraberger/Reckenzaun/Isola/Petsch* 845 (848); *Kodek*, *Privatkonkurs*<sup>2</sup> Rz 774; *Mohr*, *Privatinsolvenz*<sup>3</sup> Rz 89; *Kodek*, *Insolvenzrecht*<sup>2</sup> Rz 96.

<sup>167</sup> *Poltsch* in *Poltsch/Bertl/Fraberger/Reckenzaun/Isola/Petsch* 845 (850); *Mohr*, *Privatinsolvenz*<sup>3</sup> Rz 89.

<sup>168</sup> *Mohr*, *Privatinsolvenz*<sup>3</sup> Rz 557; *Schneider*, *Privatinsolvenz*<sup>3</sup> 193.

<sup>169</sup> *Schneider*, *Privatinsolvenz*<sup>3</sup> 193 et seq; *Mohr*, *Privatinsolvenz*<sup>3</sup> Rz 557.

<sup>170</sup> *Kodek*, *Privatkonkurs*<sup>2</sup> Rz 780; *Mohr*, *Privatinsolvenz*<sup>3</sup> Rz 563; *Kodek*, *Insolvenzrecht*<sup>2</sup> Rz 202; *Schneider*, *Privatinsolvenz*<sup>3</sup> 197.

<sup>171</sup> *Schneider*, *Privatinsolvenz*<sup>3</sup> 198; *Mohr*, *Privatinsolvenz*<sup>3</sup> Rz 564.

<sup>172</sup> *Mohr*, *Privatinsolvenz*<sup>3</sup> Rz 568; *Kodek*, *Insolvenzrecht*<sup>2</sup> Rz 202; *Schneider*, *Privatinsolvenz*<sup>3</sup> 198.

<sup>173</sup> *Kodek*, *Privatkonkurs*<sup>2</sup> Rz 9; *Pfandl/Schmid*, *Insolvenzrecht* 65; *Schneider*, *Privatinsolvenz*<sup>3</sup> 33; *Kodek*, *Insolvenzrecht*<sup>2</sup> Rz 60.

<sup>174</sup> *Bundesministerium für Arbeit, Soziales, Gesundheit und Konsumentenschutz*, *Ausweg* 29.

<sup>175</sup> *Schneider*, *Privatinsolvenz*<sup>3</sup> 33; *Mohr*, *Privatinsolvenz*<sup>3</sup> Rz 104; *Kodek*, *Insolvenzrecht*<sup>2</sup> Rz 59.

<sup>176</sup> *Mohr*, *Privatinsolvenz*<sup>3</sup> Rz 103; cf. *Pfandl/Schmid*, *Insolvenzrecht* 65.

supreme court (*Oberster Gerichtshof*, § 192 IO).<sup>177</sup> If the debtor does not seek representation by a recognised debt-counselling agency, the debtor has to be represented by a lawyer in the appeal proceedings in any case.<sup>178</sup>

#### 4.1.1 Who are the providers?

The common interests of the debt-counselling agencies are represented by an umbrella organisation.<sup>179</sup> This umbrella organisation unites (all) 10 recognised debt-counselling agencies<sup>180</sup> and is financed by subsidies from the government and by its activities as trustee in the proceedings for income levy.<sup>181</sup> Only the umbrella association of debt-counselling agencies may perform this function and individual debt-counselling agencies are not allowed to do so due to their lack of independence.<sup>182</sup> In 2020, the umbrella organisation was appointed as trustee in 1,205 proceedings, which corresponds to about 55% of all proceedings.<sup>183</sup>

#### 4.1.2 Who are the users?

In 2020, 54,688 people received support from one of the 10 recognised debt-counselling agencies in Austria. Of the 7,296 consumer insolvency proceedings opened, 67% of all debtors were accompanied by a recognised debt-counselling agency. Of these individuals, 38% had no income from employment, and 27% of the individuals accompanied by the recognised debt-counselling agencies did not receive more income than the statutory subsistence minimum. On average, the accompanied debtors were in debt to about €60,000.<sup>184</sup> Practice shows that it is mainly debtors with no or below-average income who are represented by a debt-counselling agency.<sup>185</sup> At the same time, the number of those seeking advice from a recognised debt-counselling agency is steadily increasing.<sup>186</sup>

Reasons for insolvency in 2020 were, in particular, unemployment or deterioration of income (32.9%), poor or unplanned handling of money (20.1%), failed self-employment (19.6%), divorce or separation (13.9%), personal hardship (such as the death of relatives or an accident) (10.7%) and housing (9.6%).<sup>187</sup> Can this sentence be taken up?

#### 4.1.3 What is the quality of existing credit counselling and credit counsellors?

In addition to the direct support of debtors in debt settlement or insolvency proceedings, emphasis is also placed on the long-term stabilisation of the financial situation of the debtor.<sup>188</sup> Debt-counselling agencies are also active in financial

<sup>177</sup> *Pfandl/Schmid*, *Insolvenzrecht* 65; *Schneider*, *Privatinsolvenz*<sup>3</sup> 23; *Kodek*, *Insolvenzrecht*<sup>2</sup> Rz 62; *Kodek*, *Privatkonkurs*<sup>2</sup> Rz 9.

<sup>178</sup> *Ballon/Nunner-Krautgasser/Schneider*, *Zivilprozessrecht*<sup>13</sup> Rz 190.

<sup>179</sup> *Kodek*, *Insolvenzrecht*<sup>2</sup> Rz 61; *Kodek*, *Privatkonkurs*<sup>2</sup> Rz 9; *Pfandl/Schmid*, *Insolvenzrecht* 65.

<sup>180</sup> *Pfandl/Schmid*, *Insolvenzrecht* 65; *Kodek*, *Privatkonkurs*<sup>2</sup> Rz 9; *Kodek*, *Insolvenzrecht*<sup>2</sup> Rz 61.

<sup>181</sup> *Kodek*, *Insolvenzrecht*<sup>2</sup> Rz 61; *Kodek*, *Privatkonkurs*<sup>2</sup> Rz 9.

<sup>182</sup> *Kodek*, *Insolvenzrecht*<sup>2</sup> Rz 648.

<sup>183</sup> *ASB Schuldenberatungen*, *Schuldenreport* 2021, 22.

<sup>184</sup> *ASB Schuldenberatungen*, *Schuldenreport* 2021, 3.

<sup>185</sup> *Pfandl/Schmid*, *Insolvenzrecht* 65.

<sup>186</sup> *Maly*, *juridikum* 2019, 114 (115).

<sup>187</sup> *ASB Schuldenberatungen*, *Schuldenreport* 2021, 17; for the causes of debt see also *Maly*, *ZIK* 1995, 47 (47 et seq).

<sup>188</sup> *ASB Schuldenberatungen*, *Schuldenreport* 2021, 12; *ifs Schuldenberatung*, *30 Jahre Schuldenberatung* 2.

education through special provisions for children, young people and adults. The objective is to provide financial education early and prevent over-indebtedness later on.<sup>189</sup> The debt-counselling agencies therefore fulfil not only legal but also economic and social work activities.<sup>190</sup>

The staff of the recognised debt-counselling agencies have been specially trained for the job and are subject to an obligation for regular further training.<sup>191</sup> The organisation of staff training is undertaken by the umbrella organisation.<sup>192</sup>

According to a study by the Vienna University of Economics and Business Administration, every euro invested in recognised debt-counselling agencies creates an economic and social equivalent of €5.30. The study concludes that the activities of the recognised debt-counselling agencies in Austria are very effective.<sup>193</sup> The activities of the recognised debt-counselling agencies also create added value for creditors in that the agencies act as contact partners and links between debtors, the court and creditors. Through the activities of debt-counselling agencies, information about the debtor's financial situation can be obtained and the probability of a higher repayment rate increases.<sup>194</sup> For these reasons, there is an urgent need to increase the staffing levels of the recognised debt-counselling agencies because currently debtors usually have to wait a significant length of time for an appointment.

#### **4.2 What are the best practices in the field of credit counselling? Who oversees the effort and assesses success?**

The debt-counselling agencies operate on a public mandate and are financed from public budgets. All debt-counselling agencies operate under the internationally recognised ISO 9001<sup>195</sup> quality management system and certification is conducted by the umbrella organisation.<sup>196</sup> An ISO 9001 quality management system ensures that both legal requirements and client satisfaction are guaranteed. A process-oriented approach is taken, and opportunities and risks are evaluated on an ongoing basis.<sup>197</sup>

State-recognised debt-counselling agencies are identified by their own quality seal, which is awarded by the Republic of Austria (as mentioned above).<sup>198</sup> According to § 268 (2) IO, this seal may only be used by recognised debt-counselling agencies.

The supporting services of the recognised debt-counselling agencies are structured according to the so-called self-help principle (*Selbsthilfeprinzip*). All those activities that debtors can carry out themselves are left to them. Only when this is no longer possible due to the specific circumstances will the recognised counselling agencies intervene.<sup>199</sup>

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<sup>189</sup> *ifs Schuldenberatung*, 30 Jahre Schuldenberatung, 2; *ASB Schuldenberatungen*, Schuldenreport 2021, 24.

<sup>190</sup> *Kodek*, *Insolvenzrecht*<sup>2</sup> Rz 60.

<sup>191</sup> *ASB Schuldenberatungen*, Schuldenreport 2021, 12.

<sup>192</sup> See [www.schuldenberatung.at/fortbildung](http://www.schuldenberatung.at/fortbildung).

<sup>193</sup> *More-Hollerweger/Pervan-Al Soquarer/Pervan*, Studie 87.

<sup>194</sup> *ASB Schuldenberatungen*, Schuldenreport 2021, 12.

<sup>195</sup> DIN EN ISO 9001:2015.

<sup>196</sup> *ASB Schuldenberatungen*, Schuldenreport 2021, 14.

<sup>197</sup> *Quality Austria*, ISO 9001, 1.

<sup>198</sup> Cf. § 268 Abs 1 IO; *Kodek*, *Insolvenzrecht*<sup>2</sup> Rz 60; *Kodek*, *Privatkonkurs*<sup>2</sup> Rz 9.

<sup>199</sup> *Bundesministerium für Arbeit, Soziales, Gesundheit und Konsumentenschutz*, *Ausweg*, 30.



### 4.3 What changes and reforms are needed?

The umbrella organisation of recognised debt-counselling agencies is demanding various changes that should lead to an improvement in the situation of debtors. Among other things, it is calling for: an increase in the legal subsistence minimum; a reform of the enforcement on wages; and a clarification of the rules for and a general expansion of the debt-counselling agencies.<sup>200</sup> Debt-counselling agencies ought to be provided with more resources in the long term in order to guarantee competent and comprehensive support for debtors.<sup>201</sup> In 2020 a total of 10 recognised debt-counselling agencies were in operation with a total of 134 counsellors working full-time., In the same year they supported 54,688 persons, which means that on average each individual debt counsellor supported more than 400 individuals. For this considerable support activity, all recognised debt-counselling agencies only received a total funding of €15,580,974 in 2020 to financially support their activities. Of this, almost 89% was financed by the individual Austrian provinces, just under 7% was subsidised by the Austrian Labour Market Service, and almost 5% came from other public funding.<sup>202</sup> In particular, for 2021 – due to the termination of deferments, subsidies and short-time work models – a massive increase in clients of the recognised debt-counselling agencies is to be expected.<sup>203</sup> For this reason, an increase in funding is not only sensible but urgently needed.

### 4.4 Are there viable alternatives to credit counselling, and, if so, are they compatible with existing programmes or can they be substituted?

In addition to a consultation with a recognised debt-counselling agency, representation by a lawyer is, of course, a possible option. However, this often involves high legal costs and advice. The option of representation by a lawyer is most commonly taken up by former self-employed entrepreneurs.<sup>204</sup> Business and legal counselling is also offered by numerous chambers of commerce for their members.<sup>205</sup>

Another opportunity for debtors to receive debt-counselling is the so-called “official office days” at the district courts (*Amtstage*). These offer a direct contact opportunity between people seeking legal advice and the court. On certain days of the week, it is possible to get information and legal instructions and to submit oral applications, complaints or declarations at the district court.<sup>206</sup>

Finally, in addition to counselling by recognised debt-counselling agencies, which offer their services free of charge and on a non-profit basis, there are also agencies that offer debt-counselling for a fee. These are primarily credit brokers who facilitate debt restructuring.<sup>207</sup>

<sup>200</sup> *ASB Schuldenberatungen*, Wege aus der Schuldenfalle, 5; see as well *Maly*, *juridikum* 2019, 114 (119 et seq).

<sup>201</sup> *ASB Schuldenberatungen*, Wege aus der Schuldenfalle, 14.

<sup>202</sup> *ASB Schuldenberatungen*, *Schuldenreport* 2021, 3.

<sup>203</sup> *ASB Schuldenberatungen*, *Schuldenreport* 2021, 4.

<sup>204</sup> *Maly*, *ZIK* 1995, 47 (49).

<sup>205</sup> *Feuchtinger/Lesigang*, *Insolvenzrecht*<sup>4</sup> 160.

<sup>206</sup> *Rechberger/Simotta*, *Zivilprozessrecht*<sup>9</sup> Rz 536; *Ballon/Nunner-Krautgasser/Schneider*, *Zivilprozessrecht*<sup>13</sup> Rz 212; *Ciresa/Widerin/Hofmeister*, *AnwBl* 1994, 415 (415); critical *Ertl*, *RZ* 2010, 201 (201 et seq).

<sup>207</sup> Cf *Bundesministerium für Digitalisierung und Wirtschaftsstandort*, *Schuldenberatungsstellen*, available at [www.oesterreich.gv.at/themen/steuern\\_und\\_finanzen/privatkonkurs/Seite.830080.html](http://www.oesterreich.gv.at/themen/steuern_und_finanzen/privatkonkurs/Seite.830080.html).

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