



## From debt to discharge: Consumer insolvency proceedings in Austria

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**Abstract:** *Recently, two legislative acts have significantly changed Austrian insolvency law: Firstly, the overall reform of enforcement law ("Gesamtreform des Exekutionsrechts – GREx")<sup>1</sup> has drastically altered the interface between individual and general enforcement. And secondly, the implementation of the European Restructuring and Insolvency Directive<sup>2</sup> has improved the framework for debt discharge not only for entrepreneurs but also for consumers. This article provides a detailed overview of the consumer insolvency proceedings in Austria and also addresses the activities of the recognised debt counselling agencies.*

**Keywords:** *Consumer debt proceedings; insolvency proceedings; bankruptcy proceedings; reorganisation proceedings; debt settlement proceedings; proceedings for income levy; GREx; RIRUG; Austrian Insolvency Act; debt discharge; general enforcement; recognised debt counselling agencies; evident insolvency.*

### I. Introduction to the Austrian insolvency regime

In Austria, an amendment to the former Bankruptcy Act ("*Konkursordnung*") in 2010<sup>3</sup> ("*Insolvenzrechtsänderungsgesetz 2010*") abandoned the previous division between composition ("*Ausgleich*") and bankruptcy ("*Konkurs*"); instead, with the introduction of the Austrian Insolvency Act<sup>4</sup> ("*Insolvenzordnung*", hereinafter IO) a **unified insolvency proceeding**

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<sup>1</sup> BGBl I 2021/86.

<sup>2</sup> Directive (EU) 2019/1023 of the European Parliament and of the Council of 20.06.2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency), ABl L 2019/172, 18.

<sup>3</sup> Insolvenzrechtsänderungsgesetz 2010 BGBl I 2010/29.

<sup>4</sup> Insolvenzordnung RGBl 1914/337.

was created.<sup>5</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: Best possible satisfaction of creditors and giving the debtor a chance of a debt discharge.<sup>6</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 proceedings. The bankruptcy proceedings serve as a prototype of the unified insolvency proceedings; thus, reorganisation proceedings are basically "regular" insolvency proceedings with certain special provisions.<sup>7</sup> The reorganisation proceedings are limited to natural persons who are entrepreneurs and to legal entities (§ 166 IO).<sup>8</sup> For consumers, there is a special kind of bankruptcy procedure called **debt settlement proceedings ("*Schuldenregulierungsverfahren*")**. 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 all types of proceedings. Only specific provisions are limited to one of the procedural forms.<sup>9</sup>

In all types of proceedings, the debtor can achieve **debt discharge** by means of a **reorganisation plan ("*Sanierungsplan*")**.<sup>10</sup> For natural persons, there are two more instruments for debt discharge: the **settlement plan ("*Zahlungsplan*")** and the **proceedings for income levy ("*Abschöpfungsverfahren*")**, the latter being an *ultima ratio* solution taking place following the actual insolvency proceedings. The settlement plan and the proceedings for income levy are open to all natural persons, regardless of whether they run an entrepreneurial business or not.<sup>11</sup> However, differences between entrepreneurs and non-entrepreneurs are made regarding the structure of the procedure.<sup>12</sup> Consumers can offer a settlement plan or a reorganisation plan within the framework of debt settlement proceedings.<sup>13</sup>

As many debtors in individual enforcement proceedings are in fact already insolvent, the Austrian legislator has recently modified the **transition between individual enforcement – regulated in the Enforcement Act<sup>14</sup> ("*Exekutionsordnung*", hereinafter EO) – and general**

<sup>5</sup> *Nunner-Krautgasser*, Allgemeines zum Insolvenzrecht: Grundlagen, Verfahrensarten, Schicksal des Schuldnerunternehmens und Rechtsdurchsetzung, in *Nunner-Krautgasser/Reissner* (Eds), Praxishandbuch Insolvenz und Arbeitsrecht<sup>2</sup> (2019) 1 (6 et seq); *Rechberger/Seeber/Thurner*, Insolvenzrecht<sup>3</sup> (2018) Rz 29; *Dellinger/Oberhammer/Koller*, Insolvenzrecht<sup>4</sup> (2018) Rz 20.

<sup>6</sup> *Mohr*, Privatinsolvenz<sup>3</sup> (2018) Rz 1.

<sup>7</sup> *Rechberger/Seeber/Thurner*, Insolvenzrecht<sup>3</sup> Rz 398; *Dellinger/Oberhammer/Koller*, Insolvenzrecht<sup>4</sup> Rz 22.

<sup>8</sup> *Kodek*, Insolvenzrecht<sup>2</sup> (2019) Rz 538; *Dellinger/Oberhammer/Koller*, Insolvenzrecht<sup>4</sup> Rz 483; *Rechberger/Seeber/Thurner*, Insolvenzrecht<sup>3</sup> Rz 30.

<sup>9</sup> *Feuchtinger/Lesigang*, Praxisleitfaden Insolvenzrecht<sup>4</sup> (2015) 119; *Dellinger/Oberhammer/Koller*, Insolvenzrecht<sup>4</sup> Rz 22.

<sup>10</sup> *Dellinger/Oberhammer/Koller*, Insolvenzrecht<sup>4</sup> Rz 20 et seq.

<sup>11</sup> *Schneider*, Privatinsolvenz<sup>3</sup> (2018) 1.

<sup>12</sup> *Dellinger/Oberhammer/Koller*, Insolvenzrecht<sup>4</sup> Rz 483; *Schneider*, Privatinsolvenz<sup>3</sup> 1.

<sup>13</sup> *Dellinger/Oberhammer/Koller*, Insolvenzrecht<sup>4</sup> Rz 483.

<sup>14</sup> Exekutionsordnung RGBl 1896/79.

**enforcement** under insolvency law:<sup>15</sup> According to the new § 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 then be designated as "**general enforcement proceedings**" ("*Gesamtvollstreckung*"): These are consumer insolvency proceedings that contain certain elements of enforcement proceedings (e.g. § 189a, § 189b IO). Only when the debtor himself requests a debt relief instrument, these proceedings continue as "regular" debt settlement proceedings (§ 184a [1] IO), otherwise the debtor remains in the general enforcement proceedings and thus in a state of "perpetual bankruptcy" ("*ewiger Konkurs*").<sup>16</sup>

## II. Consumer bankruptcy proceedings in Austria

### A. Introduction and amendments to the law

Until the Insolvency Act Amendment of 1993<sup>17</sup> ("*KO-Novelle 1993*"), insolvent consumers were faced with the bleak prospect of all funds exceeding the unseizable subsistence minimum ("*Existenzminimum*") being taken away from them until the end of their lives. Usually 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>18</sup>

Therefore, the Austrian legislator felt the urgent need to change the insolvency law in order to improve the framework conditions for a debt discharge. In 1993, an amendment to the Bankruptcy Act was created by which a new part 7 about "**special provisions for natural persons**" was added to the IO. The main cause for this amendment were of course **social aspects**: People who find themselves in a hopeless economic situation should be freed from their debts within a relatively short time, at least compared to the previous regulation.<sup>19</sup> The aim of such a "consumer bankruptcy" ("*Privatkonkurs*") is therefore, among other things, to enable the debtor to a **fresh economic start**.<sup>20</sup> These provisions have significantly improved the prospects of natural persons to obtain a debt discharge.

Additional amendments to the law in 1997, 2002, 2006, 2007, 2010 and finally in 2017<sup>21</sup> ("*Insolvenzrechtsänderungsgesetz 2017*", hereinafter IRÄG 2017) have gradually provided additional relief for the debtor.<sup>22</sup> Since the IRÄG 2017, the debt relief of natural persons has been in the spotlight again, because every *bona fide* debtor is supposed to be granted debt

<sup>15</sup> *Mohr*, ÖRpfl 2020 H 2, 22 (24).

<sup>16</sup> ErwGr 770 BlgNR 27. GP 70.

<sup>17</sup> Konkursordnungs-Novelle 1993 BGBl 1993/974.

<sup>18</sup> *Dellinger/Oberhammer/Koller*, Insolvenzrecht<sup>4</sup> Rz 478.

<sup>19</sup> *Dellinger/Oberhammer/Koller*, Insolvenzrecht<sup>4</sup> Rz 480.

<sup>20</sup> *Kodek*, Insolvenzrecht<sup>2</sup> Rz 551; *Mitterlehner/Moser*, Entschuldung Neu – Alles über die Privatkonkursreform, in *Reiffenstein/Blaschek* (Eds), Konsumentenpolitisches Jahrbuch 2017 (2017) 17 (19); *Dellinger/Oberhammer/Koller*, Insolvenzrecht<sup>4</sup> Rz 480.

<sup>21</sup> Insolvenzrechtsänderungsgesetz 2017 BGBl I 2017/122.

<sup>22</sup> *Mitterlehner/Moser* in *Reiffenstein/Blaschek* 17 (18).

relief after a specific period of time; even if the creditors **do not receive any payment** within this time.<sup>23</sup>

The latest amendment to the provisions on insolvency proceedings ("*Restrukturierungs- und Insolvenz-Richtlinie-Umsetzungsgesetz*" – RIRUG) entered into force in July 2021. In particular, the provisions regarding the settlement plan and the proceedings for income levy had to be modified to align the IO with the European Restructuring and Insolvency Directive: Among other measures, the duration of debt relief in proceedings for income levy had to be changed from five to three years within the framework of a **repayment plan** ("*Tilgungsplan*"), whereas the duration of "regular" proceedings for income levy was left at five years (§ 199 [2] IO). The reduction of the duration of the proceedings for income levy to three years had already been planned in the context of the IRÄG 2017, but had not been implemented due to the disapproval of creditor representatives and banks;<sup>24</sup> instead, the duration of the proceedings was reduced to five years.<sup>25</sup>

## B. Debt discharge for consumers

As has already been mentioned, there are special consumer bankruptcy proceedings called "**debt settlement proceedings**" (§§ 181 et seq IO);<sup>26</sup> if debt settlement proceedings are opened at the request of a creditor, they have to be designated as "general enforcement proceedings" until the debtor requests a debt relief instrument (§ 184a [1] IO).

As described above, Austrian insolvency law offers **three different options** for natural persons (and thus also for consumers) **for debt discharge**: By means of a **reorganisation plan** (§§ 140 et seq IO), a **settlement plan** (§§ 193 et seq IO) or **proceedings for income levy** (§§ 199 et seq IO).<sup>27</sup>

### 1. Reorganisation plan

The **reorganisation plan** may be submitted by any natural person, regardless of whether that person is an entrepreneur or a consumer.<sup>28</sup> Within the framework of a reorganisation plan, the debtor must fulfil strict requirements: In principle, a minimum quota of 20% must be

<sup>23</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.

<sup>24</sup> Cf. *Nunner-Krautgasser*, Aktuelle Insolvenzreform in Österreich: Erleichterung der Restschuldbefreiung für natürliche Personen, *ZinsO* 2017, 2525 (2525).

<sup>25</sup> Cf. *Jürgens*, IRÄG 2017. Das Abschöpfungsverfahren an der Schnittstelle von Gerichten und Treuhändern, *ÖRPfI* 2019 H 2, 30 (30); *Senoner/Weber-Wilfert*, IRÄG 2017 – Änderungen des (Privat-) Insolvenzrechts (Teil 1), *RZ* 2017, 174 (174).

<sup>26</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>27</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>28</sup> *Nunner-Krautgasser*, *ZinsO* 2017, 2525 (2525 et seq); *Mohr*, *Privatinsolvenz*<sup>3</sup> Rz 5; *Feuchtinger/Lesigang*, *Insolvenzrecht*<sup>4</sup> 130.

offered within a period of 2 years (§ 141 [1] IO); for consumers, the fulfilment period may amount to up to five years (§ 141 [1] IO).<sup>29</sup> In addition to that, the reorganisation plan has to be reasonable, which means that the debtor's offer must be in due proportion to the actual economic circumstances (cf. § 154 IO). In practice, however, the reorganisation plan plays only a **minor role** in consumer insolvencies because only very few debtors can realistically offer the – comparatively high – minimum quota.<sup>30</sup> In 2020, a reorganisation plan was only accepted in about 0.4% of all consumer insolvencies.<sup>31</sup>

If no reorganisation plan is adopted, the **debtor's assets must generally be liquidated** before another way for debt discharge can be taken (§ 193 [2] IO)<sup>32</sup> Therefore, only after the liquidation of the assets a **settlement plan** can be concluded or (subsidiarily) **proceedings for income levy** can be initiated.<sup>33</sup>

## 2. Settlement plan

The **settlement plan** is a modified form of the reorganisation plan provided for in bankruptcy proceedings for natural persons (cf. § 193 [1] IO).<sup>34</sup> This debt discharge method is very well accepted in practice: In 2020, a settlement plan was concluded in about 70% of all debt settlement proceedings.<sup>35</sup> Satisfaction under the settlement plan may extend over a maximum period of seven years (§ 194 [1] IO).<sup>36</sup> In contrast to the reorganisation plan, the settlement plan does not provide for a statutory minimum quota; instead, the debtor has to offer a so-called "**relative minimum quota**" ("*relative Mindestquote*"), which has to be **adequate to the debtor's income situation**.<sup>37</sup> As a basis for the assessment of adequacy, a forecast period of three years (previously five years<sup>38</sup>) regarding the debtor's income is used

<sup>29</sup> *Kodek*, Insolvenzrecht<sup>2</sup> Rz 558; *Mohr*, Privatin solvenz<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.

<sup>30</sup> *Kodek*, Insolvenzrecht<sup>2</sup> Rz 551; *Dellinger/Oberhammer/Koller*, Insolvenzrecht<sup>4</sup> Rz 484; *Nunner-Krautgasser*, ZinsO 2017, 2525 (2526).

<sup>31</sup> *ASB Schuldenberatungen*, Schuldenreport 2021 (2021) 7.

<sup>32</sup> *Dellinger/Oberhammer/Koller*, Insolvenzrecht<sup>4</sup> Rz 485; cf. *Kodek*, Insolvenzrecht<sup>2</sup> Rz 462.

<sup>33</sup> *Fadinger*, Die neue Privatin solvenz, JAP 2017/2018, 168 (169); *Feuchtinger/Lesigang*, Insolvenzrecht<sup>4</sup> 130 et seq; *Dellinger/Oberhammer/Koller*, Insolvenzrecht<sup>4</sup> Rz 486; *Mohr*, Privatin solvenz<sup>3</sup> Rz 4; *Nunner-Krautgasser*, ZinsO 2017, 2525 (2526).

<sup>34</sup> *Reckenzaun*, Sonderprobleme des Schuldners als Einzelunternehmer und Zahlungsplan, in *Poltsch/Bertl/Fraberger/Reckenzaun/Isola/Petsch* (Eds), Praxishandbuch Insolvenzzabwicklung (2016) 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>35</sup> *ASB Schuldenberatungen*, Schuldenreport 7.

<sup>36</sup> *Mohr*, Neuerungen im Privatin solvenzverfahren – IRÄG 2017, ZIK 2017, 97 (98); *Dellinger/Oberhammer/Koller*, Insolvenzrecht<sup>4</sup> Rz 486; *Fadinger*, JAP 2017/2018, 168 (169); *Schneider*, Das neue Privatin solvenzrecht, VbR 2017, 188 (188); *Konecny*, IRÄG 2017 und Neues im Insolvenzrecht für natürliche Personen, ecolex 2017, 1160 (1161); *Kodek*, Reform des Privatkonkurses – Das Insolvenzsänderungsgesetz 2017, Zak 2017, 147 (148).

<sup>37</sup> *Nunner-Krautgasser*, ZinsO 2017, 2525 (2526); *Dellinger/Oberhammer/Koller*, Insolvenzrecht<sup>4</sup> Rz 486; *Riel*, Insolvenzsänderungsgesetz 2017, AnwBl 2017, 275 (276).

<sup>38</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).

(§ 194 [1] IO). 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>39</sup>

The settlement plan may be adjusted due to 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 own so that he is no **longer able to comply with the settlement plan**, he may request a vote on a new settlement plan and the initiation of proceedings for income levy.<sup>40</sup> This must be done 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>41</sup>

The offer of a "**zero quota**" ("*Nullquote*") in the settlement plan is possible if the debtor is not expected to earn any seizable income within three years or if the income will only be slightly over the subsistence minimum (cf. § 194 [1] IO);<sup>42</sup> the latter is to be assessed according to the circumstances of the individual case (but can generally be assumed with regard to an amount of € 10).<sup>43</sup> There was a discussion about whether low-income debtors had to offer a settlement plan with a "zero quota" at all or whether he could apply directly for the proceedings for income levy.<sup>44</sup> However, with the current amendment to the provisions regarding debt settlement proceedings, the Austrian legislator has clarified that the proceedings for income levy are still **subsidiary to the settlement plan** in any case.<sup>45</sup>

### 3. Proceedings for income levy

**Proceedings for income levy** are to take place only if an (admissible) settlement plan was rejected by the creditors or denied confirmation by the court.<sup>46</sup> In 2020, proceedings for income levy were initiated in about 29% of consumer bankruptcies.<sup>47</sup> The application to initiate the proceedings for income levy must be submitted to the court with the settlement

<sup>39</sup> *Dellinger/Oberhammer/Koller*, Insolvenzrecht<sup>4</sup> Rz 504; *Kodek*, Privatkonkurs<sup>2</sup> Rz 361; **dissenting opinion** *Schneider*, Privatin insolvenz<sup>3</sup> 129 et seq; *Schneider*, VbR 2017, 188 (189); *Pfandl/Schmid*, Insolvenzrecht 231.

<sup>40</sup> *Dellinger/Oberhammer/Koller*, Insolvenzrecht<sup>4</sup> Rz 516; *Mohr*, Privatin insolvenz und RIRUG: Entschuldung nach drei Jahren, VbR 2021, 120 (122); *Kodek*, Insolvenzrecht<sup>2</sup> Rz 620.

<sup>41</sup> *Kodek*, Insolvenzrecht<sup>2</sup> Rz 620.

<sup>42</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*, Privatin insolvenz<sup>3</sup> Rz 539; *Riel*, AnwBl 2017, 275 (276); *Konecny*, ecolex 2017, 1160 (1161); *Mohr*, ZIK 2017, 97 (98).

<sup>43</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*, Privatin insolvenz<sup>3</sup> Rz 540; *Kodek*, Zak 2017, 147 (148); *Mohr*, ZIK 2017, 97 (99).

<sup>44</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*, Privatin insolvenz<sup>3</sup> Rz 539; *Kodek*, Zak 2017, 147 (148); *Mohr*, ZIK 2017, 97 (98); *Mitterlehner/Moser in Reiffenstein/Blaschek* 17 (20).

<sup>45</sup> ErläutRV 950 BlgNR 27. GP 28.

<sup>46</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>47</sup> *ASB Schuldenberatungen*, Schuldenreport 7.

plan proposal at the latest.<sup>48</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>49</sup> According to the taxative enumeration of § 201 (1) IO, this includes, for example, intentional or grossly negligent violations of existing duties to provide information or to cooperate.<sup>50</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>51</sup>

In the proceedings for income levy, usually the **seizable part of the income** is realised in particular. The debtor must assign this portion of his income to a trustee.<sup>52</sup> As already mentioned above, there is now the choice between two procedural instruments: In the **“regular” proceedings for income levy**, the duration is still<sup>53</sup> **five years**. Within the framework of the recently created **repayment plan**, however, 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**,<sup>54</sup> which is expressed by the introduction of additional procedural obstacles (cf. § 201 [2, 3] and § 210 IO). In particular, the debtor must apply for the initiation of insolvency proceedings within a period of 30 days from the date of the public announcement of the decision on evident insolvency (§ 201 [2] no. 1 IO). For insolvent consumers, the repayment plan (whose main purpose, according to the above-mentioned European Restructuring and Insolvency Directive, is an accelerated debt discharge for entrepreneurs) will only be available for five years, so according to the current legal situation, the relevant provisions for consumers will **expire in July 2026** (§ 283 [9] IO).

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>55</sup> a discharge of the residual debt must be granted as well in the (rare) situation that all filed insolvency claims have been satisfied in the course of the proceedings (§ 213 [1] IO). In the proceedings for income levy **neither an absolute nor a relative minimum quota is required**<sup>56</sup> (the former minimum quota of 10% was abolished with the IRÄG 2017, together with the problematic debt discharge on grounds of equity).<sup>57</sup> However, the debtor has to pursue (or at least to look for) an appropriate

<sup>48</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>49</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>50</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>51</sup> *Kodek*, Insolvenzrecht<sup>2</sup> Rz 340.

<sup>52</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>53</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>54</sup> Cf. *Mohr*, VbR 2021, 120 (120).

<sup>55</sup> *Dellinger/Oberhammer/Koller*, Insolvenzrecht<sup>4</sup> Rz 488; *Mohr*, Privatinsolvenz<sup>3</sup> Rz 621 et seq.

<sup>56</sup> *Dellinger/Oberhammer/Koller*, Insolvenzrecht<sup>4</sup> Rz 480; *Kodek*, Insolvenzrecht<sup>2</sup> Rz 662.

<sup>57</sup> *Riel*, AnwBl 2017, 275 (277); *Kodek*, Zak 2017, 147 (147).

occupation ("*angemessene Erwerbstätigkeit*") (§ 210 [1] IO);<sup>58</sup> he is not allowed to refuse any reasonable employment ("*zumutbare Beschäftigung*") in this context.<sup>59</sup>

The debt discharge is only to be denied by the court if the proceedings are either prematurely discontinued or the debtor violates his obligations.<sup>60</sup> The creditors, however, do not have to agree to a debt discharge within the proceedings for income levy.<sup>61</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).<sup>62</sup> In practice, however, such a revocation hardly ever occurs.

### C. Competent court to apply for consumer insolvency proceedings

Whereas according to §§ 63, 64 IO, the **regional court** ("*Landesgericht*" or in Vienna "*Handelsgericht Wien*") is responsible for "ordinary" insolvency proceedings in Austria,<sup>63</sup> consumer debt settlement proceedings take place before the **district court** ("*Bezirksgericht*") (§ 182 IO).<sup>64</sup> Therefore, the jurisdiction of the insolvency court depends on the debtor **operating a business or not**,<sup>65</sup> which is always a case-by-case assessment. It must be carefully examined whether the operation of a business can (still) be assumed.<sup>66</sup> The sole fact that the debtor's liabilities originate from a previous entrepreneurial activity does not establish entrepreneurial status.<sup>67</sup>

The district court in whose district the debtor has his habitual residence has **local jurisdiction** for the debt settlement proceedings (§ 182 in connection 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>68</sup>

**Functionally**, according to § 17a (1) Austrian Law on Legal Officers<sup>69</sup> ("*Rechtspflegergesetz*", hereinafter RpfLG), the legal officer ("*Rechtspfleger*"), a specially trained federal civil servant, is

<sup>58</sup> *Rechberger/Seeber/Thurner*, *Insolvenzrecht*<sup>3</sup> Rz 475.

<sup>59</sup> ErläutRV 950 BlgNR 27. GP 31.

<sup>60</sup> *Dellinger/Oberhammer/Koller*, *Insolvenzrecht*<sup>4</sup> Rz 488.

<sup>61</sup> *Rechberger/Seeber/Thurner*, *Insolvenzrecht*<sup>3</sup> Rz 425; *Dellinger/Oberhammer/Koller*, *Insolvenzrecht*<sup>4</sup> Rz 480.

<sup>62</sup> Cf. *Mohr*, VbR 2021, 120 (121).

<sup>63</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>64</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>65</sup> *Mohr*, ZIK 2017, 97 (97); *Pfandl/Schmid*, *Insolvenzrecht* (2020) 23; *Rechberger/Seeber/Thurner*, *Insolvenzrecht*<sup>3</sup> Rz 33; *Schneider*, *Privatinsolvenz*<sup>3</sup> 4; *Kodek*, *Handbuch Privatkonkurs*<sup>2</sup> (2015) Rz 31; *Feuchtinger/Lesigang*, *Insolvenzrecht*<sup>4</sup> 121.

<sup>66</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>67</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>68</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>69</sup> Rechtspflegergesetz BGBl 1985/560.

responsible for debt settlement proceedings before the district court.<sup>70</sup> For insolvency proceedings before the regional court, however, a judge is always responsible.<sup>71</sup>

As the places of jurisdiction defined by the IO are compulsory, any **agreements on the place of jurisdiction** regarding insolvency proceedings are invalid pursuant to § 253 (2) IO.<sup>72</sup>

#### D. Self-administration in debt settlement proceedings

In Austrian insolvency proceedings, the debtor generally loses the power of disposal over the insolvency estate (i.e. assets subject to enforcement).<sup>73</sup> In debt settlement proceedings, however, for the purpose of lower costs usually **no insolvency administrator** ("Insolvenzverwalter") is appointed according to § 190 (1) IO; rather, the debtor is entitled to **self-administration** according to § 186 (1) IO.<sup>74</sup> In over 90% of all debt settlement proceedings, administration is left to the debtor, who is then supervised by the court.<sup>75</sup> Within the scope of the debtor's self-administration, the debtor is entitled to receive all of his postal correspondence and can accept payments with debt-discharging effect.<sup>76</sup> In this context, the debtor also has the power to conduct civil proceedings regarding assets belonging to the insolvency estate;<sup>77</sup> however, the debtor requires the court's authorisation to conduct such proceedings pursuant to § 187 (1) no. 3 and 4 IO.

In the case of self-administration, the insolvency court **must approve** most legal transactions of the debtor.<sup>78</sup> The decision on approval made by the court is contestable.<sup>79</sup> The acts requiring approval include, for example, the creation of new liabilities.<sup>80</sup> The legal transactions mentioned in § 116 IO must be notified to the court and legal transactions mentioned in § 117 IO must be approved by the court in any case.

The insolvency court may appoint an insolvency administrator **only for certain activities**,<sup>81</sup> the insolvency administrator will then only be active in a limited scope of business.<sup>82</sup> An insolvency administrator with a limited scope of activities may be appointed by the insolvency court

<sup>70</sup> *Schneider*, Privatin solvenz<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>71</sup> *Mohr*, Privatin solvenz<sup>3</sup> Rz 78; *Dellinger/Oberhammer/Koller*, Insolvenzrecht<sup>4</sup> Rz 41.

<sup>72</sup> *Dellinger/Oberhammer/Koller*, Insolvenzrecht<sup>4</sup> Rz 40; *Rechberger/Seeber/Thurner*, Insolvenzrecht<sup>3</sup> Rz 35; *Mohr*, Privatin solvenz<sup>3</sup> Rz 25.

<sup>73</sup> *Kodek*, Insolvenzrecht<sup>2</sup> Rz 561; *Dellinger/Oberhammer/Koller*, Insolvenzrecht<sup>4</sup> Rz 128.

<sup>74</sup> *Dellinger/Oberhammer/Koller*, Insolvenzrecht<sup>4</sup> Rz 483; *Mohr*, Privatin solvenz<sup>3</sup> Rz 132; *Schneider*, Privatin solvenz<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>75</sup> *Kodek*, Insolvenzrecht<sup>2</sup> Rz 562.

<sup>76</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>77</sup> *Schneider* in *Koller/Lovrek/Spitzer*, IO § 157 Rz 8; *Schneider*, Privatin solvenz<sup>3</sup> 82; *Mohr*, Privatin solvenz<sup>3</sup> Rz 142.

<sup>78</sup> *Mohr*, Privatin solvenz<sup>3</sup> Rz 145 and 350; *Schneider*, Privatin solvenz<sup>3</sup> 29; *Dellinger/Oberhammer/Koller*, Insolvenzrecht<sup>4</sup> Rz 500; *Kodek*, Insolvenzrecht<sup>2</sup> Rz 563.

<sup>79</sup> *Kodek*, Insolvenzrecht<sup>2</sup> Rz 565.

<sup>80</sup> *Schneider*, Privatin solvenz<sup>3</sup> 29; *Kodek*, Insolvenzrecht<sup>2</sup> Rz 563; *Mohr*, Privatin solvenz<sup>3</sup> Rz 145.

<sup>81</sup> *Schneider*, Privatin solvenz<sup>3</sup> 29; *Kodek*, Insolvenzrecht<sup>2</sup> Rz 574.

<sup>82</sup> *Mohr*, Privatin solvenz<sup>3</sup> Rz 144; *Dellinger/Oberhammer/Koller*, Insolvenzrecht<sup>4</sup> Rz 499; *Kodek*, Insolvenzrecht<sup>2</sup> Rz 574.

under § 190 (2) IO for individual activities that are associated with particular difficulties. This could include, for example, the conduct of proceedings regarding the submitted claims.<sup>83</sup>

Otherwise, the court has no possibility to extend or (additionally) limit the debtor's powers in self-administration; it can only **withdraw self-administration**.<sup>84</sup> This decision has to be made by the insolvency court.<sup>85</sup> Pursuant to § 186 (2) IO, the court can only withdraw the debtor's self-administration in the following cases: (1) If the debtor's financial circumstances are not transparent, (2) if it is to be expected that the (continuation of) self-administration will lead to a disadvantage for the creditors or (3) if the debtor does not submit an exact inventory of assets. In case of doubt, the court shall not withdraw self-administration from the debtor.<sup>86</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 power of disposition** over the insolvency estate is transferred to the insolvency administrator.<sup>87</sup>

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>88</sup> The only exception is the **power of avoidance** which can neither be given to the court nor to the debtor himself;<sup>89</sup> so in the absence of an insolvency administrator the creditors have the power of avoidance pursuant to § 189 IO.

In the **proceedings for income levy**, the court must appoint a **trustee** ("*Treuhänder*").<sup>90</sup> Pursuant to § 203 (1) IO, the trustee has to invest and distribute the amount he obtains to the creditors; however, the trustee may instead instruct the debtor to realise the assets him- or herself (§ 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 obligations.<sup>91</sup>

## E. Requirements 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>92</sup> The initiation of insolvency proceedings requires the **debtor's insolvency** ("*Zahlungsunfähigkeit*") as well as (in principle) **cost-covering assets** ("*kostendeckendes Vermögen*").<sup>93</sup> Impending insolvency is only a reason for initiating reorganisation proceedings

<sup>83</sup> *Mohr*, Privatin solvenz<sup>3</sup> Rz 91; *Kodek*, Insolvenzrecht<sup>2</sup> Rz 574.

<sup>84</sup> Cf. *Schneider* in *Koller/Lovrek/Spitzer*, IO § 186 Rz 4; *Mohr*, Privatin solvenz<sup>3</sup> Rz 144.

<sup>85</sup> *Kodek*, Insolvenzrecht<sup>2</sup> Rz 573; *Dellinger/Oberhammer/Koller*, Insolvenzrecht<sup>4</sup> Rz 498; *Mohr*, Privatin solvenz<sup>3</sup> Rz 134; *Schneider*, Privatin solvenz<sup>3</sup> 29.

<sup>86</sup> OGH 8 Ob 114/16x ZIK 2017/49 = *ecolex* 2017/99; *Dellinger/Oberhammer/Koller*, Insolvenzrecht<sup>4</sup> Rz 498.

<sup>87</sup> *Mohr*, Privatin solvenz<sup>3</sup> Rz 137 et seq.

<sup>88</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>89</sup> *Kodek*, Insolvenzrecht<sup>2</sup> Rz 571.

<sup>90</sup> *Schneider*, Privatin solvenz<sup>3</sup> 193; *Mohr*, Privatin solvenz<sup>3</sup> Rz 557.

<sup>91</sup> *Kodek*, Insolvenzrecht<sup>2</sup> Rz 649.

<sup>92</sup> *Mohr*, Privatin solvenz<sup>3</sup> Rz 45; *Kodek*, Insolvenzrecht<sup>2</sup> Rz 208.

<sup>93</sup> *Rechberger/Seeber/Thurner*, Insolvenzrecht<sup>3</sup> Rz 68; *Mohr*, Privatin solvenz<sup>3</sup> Rz 38; *Schneider*, Privatin solvenz<sup>3</sup> 10.

(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>94</sup>

As stated above, 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>95</sup> The origin of the liabilities is irrelevant; they may therefore stem from the entrepreneurial activity.<sup>96</sup> Since the IRÄG 2017, a previous attempt at an out-of-court settlement is no longer required to enter into debt settlement proceedings.<sup>97</sup>

The term "insolvency" is not legally defined.<sup>98</sup> According to case law,<sup>99</sup> insolvency occurs if the debtor is **no longer in a position to pay his due liabilities**; he must also be unable to procure the necessary funds within a short period of time.<sup>100</sup> If the debtor can meet 95% or more of his liabilities, it can be assumed that he is (still) solvent; however, if the debtor is unable to meet more than 5% of his due liabilities, he is considered to be insolvent.<sup>101</sup> In this context, the insolvency must be present for some time, and is therefore to be distinguished from a mere **stagnation of payments** ("*Zahlungsstockung*").<sup>102</sup> The latter is the case when the debtor is currently unable to pay his due debts, but is very likely to be able to do so in the near future. Case law generally assumes a maximum period of three months to constitute only a stagnation of payments (and thus not insolvency). An even longer period of time would require that the likelihood of the due debts being paid borders on certainty.<sup>103</sup> Furthermore, insolvency cannot be excluded solely by the fact that the debtor still pays the claims of individual creditors; however, insolvency is not assumed if a restructuring of the debt is possible and a financing commitment has already been given for this purpose.<sup>104</sup> In the case of a creditor application, the condition of insolvency is carefully examined by the insolvency court.<sup>105</sup>

<sup>94</sup> *Kodek*, Insolvenzrecht<sup>2</sup> Rz 540; *Rechberger/Seeber/Thurner*, Insolvenzrecht<sup>3</sup> Rz 68; *Schneider*, Privatsolvenz<sup>3</sup> 10.

<sup>95</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>96</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.

<sup>97</sup> *Fadinger*, JAP 2017/2018, 168 (169); *Mohr*, Privatsolvenz<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>98</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>99</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>100</sup> *Kodek*, Insolvenzrecht<sup>2</sup> Rz 213 et seq; *Nunner-Krautgasser* in *Nunner-Krautgasser/Reissner* 1 (15); *Mohr*, Privatsolvenz<sup>3</sup> Rz 39; *Schneider*, Privatsolvenz<sup>3</sup> 10; *Rechberger/Seeber/Thurner*, Insolvenzrecht<sup>3</sup> Rz 61.

<sup>101</sup> RIS-Justiz RS0126559; OGH 3 Ob 99/10w ÖJZ EvBl 2011/105, 726 (*Konecny*) = ÖBA 2011/1747, 742 (*Bartlmä*); 2 Ob 117/12p ZIK 2013/174, 117; *Rechberger/Seeber/Thurner*, Insolvenzrecht<sup>3</sup> Rz 62.

<sup>102</sup> *Rechberger/Seeber/Thurner*, Insolvenzrecht<sup>3</sup> Rz 63; *Kodek*, Insolvenzrecht<sup>2</sup> Rz 214.

<sup>103</sup> RIS-Justiz RS0126561; OGH 3 Ob 99/10w; *Schuhmacher*, Neues zur Zahlungsunfähigkeit und Zahlungsstockung, ÖBA 2012, 816 (816); *Kodek*, Insolvenzrecht<sup>2</sup> Rz 214.

<sup>104</sup> *Rechberger/Seeber/Thurner*, Insolvenzrecht<sup>3</sup> Rz 62; *Schneider*, Privatsolvenz<sup>3</sup> 10; *Mohr*, Privatsolvenz<sup>3</sup> Rz 39 et seq.

<sup>105</sup> *Schneider*, Privatsolvenz<sup>3</sup> 11; *Mohr*, Privatsolvenz<sup>3</sup> Rz 39.

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>106</sup> However, as many debtors would otherwise be denied even the initiation of insolvency proceedings and thus the chance of a discharge,<sup>107</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>108</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 certify that his future income at least will suffice to cover the costs of the proceedings.<sup>109</sup> In the meantime, the costs of the proceedings are covered by the state.<sup>110</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 is not to be examined; 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>111</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 this provision, a creditor's application for the opening of debt settlement proceedings after the determination of "evident insolvency" in enforcement proceedings according to § 49a EO is not to be rejected only because of a lack of assets to cover the costs of the proceeding (§ 183a IO).

## F. Insolvency estate and legal position of the debtor

The insolvency estate is basically composed of **all the debtor's assets subject to enforcement** (§ 2 [2] IO). This principle is also applicable to debt settlement proceedings<sup>112</sup> even if the debtor is entitled to self-administration.<sup>113</sup> The insolvency estate does not include the unseizable portion of the debtor's earned income according to § 291a 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>114</sup> The court has the possibility to increase (§ 292a EO) or reduce (§ 292b EO) the subsistence minimum. The debtor has free power of disposal over

<sup>106</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>107</sup> *Dellinger/Oberhammer/Koller*, Insolvenzrecht<sup>4</sup> Rz 489; *Kodek*, Insolvenzrecht<sup>2</sup> Rz 560.

<sup>108</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>109</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>110</sup> *Nunner-Krautgasser*, ZinsO 2017, 2525 (2527); *Dellinger/Oberhammer/Koller*, Insolvenzrecht<sup>4</sup> Rz 491.

<sup>111</sup> ErläutRV 770 BlgNR 27. GP 70.

<sup>112</sup> OGH 9 ObA 39/97v JBl 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>113</sup> *Kodek in Koller/Lovrek/Spitzer*, IO § 2 Rz 26; *Kodek*, Insolvenzrecht<sup>2</sup> Rz 328.

<sup>114</sup> *Mohr*, Privatinsolvenz<sup>3</sup> Rz 113; *Dellinger/Oberhammer/Koller*, Insolvenzrecht<sup>4</sup> Rz 174.

the unseizable part of his earned income.<sup>115</sup> Objects and claims that cannot be seized are generally not part of the insolvency estate either.<sup>116</sup> These include – among other things – pets, ordinary household items as well as food and heating material for a period of up to four weeks (§ 250 EO).

Insofar as the debtor **lives in a house or flat** which is part of the insolvency estate, he and those family members who live in the same household can be provided with the indispensable living quarters temporarily (§ 5 [3] IO), however, a 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 free disposal if they concern living quarters which are indispensable for the debtor and family members living in the same household (§ 5 [4] IO). The rent is then not a claim against the estate, but must be paid from the debtor's insolvency-free assets.<sup>117</sup>

The debtor may also be given **objects of minor value** at his free disposal; this includes claims whose collection does not promise success as well as mortgaged property. Such objects are then permanently excluded from the insolvency estate; a merely temporary exclusion is not possible.<sup>118</sup>

## G. Costs of the proceedings

In general, the **court fees** and the **remuneration of the insolvency administrator** as well as of the **trustee** must be distinguished from each other. Should an insolvency administrator be appointed, his or her remuneration typically represents the largest part of the costs of the proceedings.<sup>119</sup> Especially due to the principle of the debtor's self-administration and the fact that an insolvency administrator is rarely appointed (cf. § 190 [1] IO), however, debt settlement proceedings are usually simpler and less expensive than the other types of insolvency proceedings.<sup>120</sup>

### 1. Costs of administration

As has been mentioned, in consumer debt settlement proceedings generally no insolvency administrator is appointed; instead, the debtor is entitled to self-administration ("*Eigenverwaltung*").<sup>121</sup> An (exceptionally) appointed administrator (§ 186 [2] and § 190 [2] IO) 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

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<sup>115</sup> *Neumayr/Nunner-Krautgasser*, Exekutionsrecht<sup>4</sup> (2018) 278 et seq; *Kodek*, Insolvenzrecht<sup>2</sup> Rz 328; *Mohr*, Privatin solvenz<sup>3</sup> Rz 113.

<sup>116</sup> *Rechberger/Seeber/Thurner*, Insolvenzrecht<sup>3</sup> Rz 219; *Mohr*, Privatin solvenz<sup>3</sup> Rz 117; *Kodek*, Insolvenzrecht<sup>2</sup> Rz 325.

<sup>117</sup> Cf. Zoppel in *Koller/Lovrek/Spitzer*, IO § 5 Rz 17.

<sup>118</sup> *Nunner*, Die Freigabe von Konkursvermögen: Grundfragen des Massebegriffes und der Haftungsordnung im Konkurs (1998) 112; *Mohr*, Privatin solvenz<sup>3</sup> Rz 118; cf. *Kodek*, Insolvenzrecht<sup>2</sup> Rz 338 et seq.

<sup>119</sup> *Kodek*, Insolvenzrecht<sup>2</sup> Rz 196; cf. *Kodek*, Privatkonkurs<sup>2</sup> Rz 763 et seq.

<sup>120</sup> *Dellinger/Oberhammer/Koller*, Insolvenzrecht<sup>4</sup> Rz 494; *Kodek*, Insolvenzrecht<sup>2</sup> Rz 555.

<sup>121</sup> *Kodek*, Insolvenzrecht<sup>2</sup> Rz 558; *Dellinger/Oberhammer/Koller*, Insolvenzrecht<sup>4</sup> Rz 483.

for the realisation of a reorganisation plan or a settlement plan.<sup>122</sup> If an insolvency administrator is appointed in debt settlement proceedings, the minimum compensation is € 1,000 according to § 191 (1) IO;<sup>123</sup> whereas in other types of insolvency proceedings it is € 3,000.<sup>124</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 IO) or reduced (§ 82c IO) by the court.<sup>125</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>126</sup>

If proceedings for income levy are initiated, the court has to appoint a **trustee**.<sup>127</sup> In practice, a privileged creditor protection association (e.g. "*Alpenländischer Kreditorenverband*") or the umbrella organisation of the recognised debt counselling agencies ("*ASB Schuldenberatungen GmbH*") are regularly appointed as trustees.<sup>128</sup> The trustee is as well entitled to **remuneration**, which depends on the amounts that accrue to the trustee.<sup>129</sup> The standard remuneration may either be increased or reduced by the insolvency court upon application.<sup>130</sup> The minimum compensation is € 15 per month (§ 204 [1] IO) and 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>131</sup>

## 2. Court fees

With regard to the **court fees**, the IO distinguishes whether an insolvency administrator has been appointed or not.<sup>132</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>133</sup>

<sup>122</sup> *Mohr*, Privatsolvenz<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*, Entlohnung, Barauslagen und Prozesskosten, in *Poltsch/Bertl/Fraberger/Reckenzaun/Isola/Petsch* (Eds), Praxishandbuch Insolvenzabwicklung (2016) 845 (846 et seq).

<sup>123</sup> *Kodek*, Insolvenzrecht<sup>2</sup> Rz 95; *Mohr*, ZIK 2017, 97 (97); *Mohr*, Privatsolvenz<sup>3</sup> Rz 89.

<sup>124</sup> *Konecny/Riel*, Nur ein Mal Mindestentlohnung von 3.000 € beim Sanierungsplan, ZIK 2017, 175 (175); *Kodek*, Privatkonkurs<sup>2</sup> Rz 769; *Mohr*, Privatsolvenz<sup>3</sup> Rz 89.

<sup>125</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*, Privatsolvenz<sup>3</sup> Rz 89; *Kodek*, Insolvenzrecht<sup>2</sup> Rz 96.

<sup>126</sup> *Poltsch* in *Poltsch/Bertl/Fraberger/Reckenzaun/Isola/Petsch* 845 (850); *Mohr*, Privatsolvenz<sup>3</sup> Rz 89.

<sup>127</sup> *Mohr*, Privatsolvenz<sup>3</sup> Rz 557; *Schneider*, Privatsolvenz<sup>3</sup> 193.

<sup>128</sup> *Schneider*, Privatsolvenz<sup>3</sup> 193 et seq; *Mohr*, Privatsolvenz<sup>3</sup> Rz 557.

<sup>129</sup> *Kodek*, Privatkonkurs<sup>2</sup> Rz 780; *Mohr*, Privatsolvenz<sup>3</sup> Rz 563; *Kodek*, Insolvenzrecht<sup>2</sup> Rz 202; *Schneider*, Privatsolvenz<sup>3</sup> 197.

<sup>130</sup> *Schneider*, Privatsolvenz<sup>3</sup> 198; *Mohr*, Privatsolvenz<sup>3</sup> Rz 564.

<sup>131</sup> *Mohr*, Privatsolvenz<sup>3</sup> Rz 568; *Kodek*, Insolvenzrecht<sup>2</sup> Rz 202; *Schneider*, Privatsolvenz<sup>3</sup> 198.

<sup>132</sup> *Mohr*, Privatsolvenz<sup>3</sup> Rz 77; *Kodek*, Insolvenzrecht<sup>2</sup> Rz 190.

<sup>133</sup> *Kodek*, Insolvenzrecht<sup>2</sup> Rz 190.

In case of the debtor's self-administration in debt settlement proceedings, no flat-rate fee is to be charged; if there is no self-administration, the flat-rate fee is only **half of the above amount**.<sup>134</sup> The petition to open proceedings filed by the debtor himself is exempt from fees;<sup>135</sup> whereas a creditor filing an application has to pay a flat-rate fee. During the course of the proceedings, some other fees (mainly concerning creditors) are also charged, e.g. for the lodging of a claim.<sup>136</sup>

The costs of the insolvency proceedings are **claims against the estate** ("*Masseforderungen*") and are thus **to be satisfied with priority**.<sup>137</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>138</sup> they have to be settled during the course of the proceedings.<sup>139</sup> In case of lack of means, however, the costs of the proceedings might also be paid out of official funds.<sup>140</sup>

### III. Creditors in insolvency proceedings

#### A. Groups of creditors

Austrian insolvency law distinguishes between **different groups of creditors** whose position and treatment depends on the respective 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** (e.g. claims from equity-substituting benefits according to § 57a IO) and **creditors with excluded claims** (§ 58 IO).<sup>141</sup> A creditor may also have a **dual status**, namely if he is simultaneously an insolvency creditor and a secured creditor.<sup>142</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>143</sup> The insolvency creditors form a

<sup>134</sup> *Mohr*, GGN 2015 – Änderungen bei den Rechtsmittelgebühren im Insolvenzverfahren, 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 im Insolvenzverfahren (1999) Rz 497 et seq.

<sup>135</sup> *Kodek*, Privatkonkurs<sup>2</sup> Rz 768; *Kodek*, Insolvenzrecht<sup>2</sup> Rz 195.

<sup>136</sup> *Mohr*, Privatinsolvenz<sup>3</sup> Rz 77; *Kodek*, Privatkonkurs<sup>2</sup> Rz 768; *Kodek*, Insolvenzrecht<sup>2</sup> Rz 195.

<sup>137</sup> *Kodek*, Privatkonkurs<sup>2</sup> Rz 764; *Mohr*, Privatinsolvenz<sup>3</sup> Rz 249; *Kodek*, Insolvenzrecht<sup>2</sup> Rz 191.

<sup>138</sup> *Mohr*, Privatinsolvenz<sup>3</sup> Rz 589; *Kodek*, Insolvenzrecht<sup>2</sup> Rz 191.

<sup>139</sup> *Kodek*, Privatkonkurs<sup>2</sup> Rz 766; *Kodek*, Insolvenzrecht<sup>2</sup> Rz 192.

<sup>140</sup> *Mohr*, Privatinsolvenz<sup>3</sup> Rz 590; *Schneider*, Privatinsolvenz<sup>3</sup> 202.

<sup>141</sup> *Dellinger/Oberhammer/Koller*, Insolvenzrecht<sup>4</sup> Rz 170 et seq; *Kodek*, Insolvenzrecht<sup>2</sup> Rz 110 et seq; *Mohr*, Privatinsolvenz<sup>3</sup> Rz 198.

<sup>142</sup> *Mohr*, Privatinsolvenz<sup>3</sup> Rz 199; *Kodek*, Insolvenzrecht<sup>2</sup> Rz 133.

<sup>143</sup> *Schneider*, Privatinsolvenz<sup>3</sup> 51; *Nunner-Krautgasser* in *Nunner-Krautgasser/Reissner* 1 (39); *Dellinger/Oberhammer/Koller*, Insolvenzrecht<sup>4</sup> Rz 170; *Mohr*, Privatinsolvenz<sup>3</sup> Rz 251 et seq; *Kodek*, Insolvenzrecht<sup>2</sup> Rz 142 et seq.

collective of creditors who receive aliquot satisfaction in the sense of the *pari passu* principle.<sup>144</sup>

Regarding insolvency creditors, the Austrian insolvency regime has established the principle of **classless bankruptcy** ("*klassenloser Konkurs*") in 1982. This means that, in general, neither public-law creditors nor employees of the debtor are given preferential treatment in insolvency proceedings.<sup>145</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).

## B. Creditors with preferential treatment

**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, in particular, ownership and co-ownership.<sup>146</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 to participate in the insolvency proceedings; accordingly, persons entitled to segregation of property do not have the right to vote on a reorganisation plan or a settlement plan.<sup>147</sup>

**Secured creditors** ("*Absonderungsgläubiger*") have claims for preferential satisfaction from the sale of specific items that are part of the insolvency estate (so-called "separate estates").<sup>148</sup> Therefore insolvency creditors are excluded from the proceeds from such items up to the value of the claims of secured creditors; they participate only insofar as there is a surplus (so-called "*Hyperocha*") after the payment of the costs for the separate managing, realizing and distributing of the asset ("*Sondermassekosten*") as well as the satisfaction of the secured creditors. Secured claims are in particular liens or withholding rights.<sup>149</sup> In principle, these claims are not affected by the opening of insolvency proceedings (but see § 11 [2, 3] IO). In some 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; they are only

<sup>144</sup> Dellinger/Oberhammer/Koller, *Insolvenzrecht*<sup>4</sup> Rz 170; Nunner-Krautgasser in Nunner-Krautgasser/Reissner 1 (4).

<sup>145</sup> Dellinger/Oberhammer/Koller, *Insolvenzrecht*<sup>4</sup> Rz 179.

<sup>146</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, *Das persönliche Recht auf Aussonderung* (2017) 13 et seq.

<sup>147</sup> Mohr, *Privatinsolvenz*<sup>3</sup> Rz 201; cf. Schneider, *Privatinsolvenz*<sup>3</sup> 37.

<sup>148</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>149</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.

revived should the insolvency proceedings be terminated pursuant to § 123a IO. This provision serves to safeguard the *pari passu*-principle.

In addition to that, creditors with claims for segregation of property and secured creditors are subject to special rules which aim at facilitating debt discharge by extinguishing preferential rights relating to the **debtor's income**.<sup>150</sup> If insolvency proceedings are initiated before the 15th of the month, liens on the income of the debtor acquired by enforcement by a court, administrative authority or financial authority expire at the **end of the month**; if insolvency proceedings are initiated on or after the 16th of the month, these liens expire at the **end of the following month** (§ 12a [3] IO). If the income was ceded or pledged before the initiation of the insolvency proceedings, however, the respective preferential rights expire only after the end of a **period of two years**, calculated from the end of the month in which insolvency proceedings were initiated (§ 12a [1] IO). The term "income" is to be understood in a wide sense;<sup>151</sup> for example, it also includes royalty claims of artists,<sup>152</sup> claims for child support and private supplementary pensions.<sup>153</sup>

**Creditors with claims against the estate** ("*Massegläubiger*") have claims which regularly arise after the opening of insolvency proceedings; they are to be satisfied **preferentially and in full**.<sup>154</sup> These claims are listed in § 46 IO.<sup>155</sup> Such claims 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 (or, if self-administration has been withdrawn, by the insolvency administrator).<sup>156</sup> Creditors with claims against the estate can directly demand payment from the debtor (respectively the insolvency administrator); should satisfaction of the claim be refused, such creditors can turn to the insolvency court or sue to enforce their claim.<sup>157</sup>

A special position is held by insolvency creditors **entitled to set-off** ("*Aufrechnungsberechtigte*"): Such insolvency creditors do not have to lodge their claims in the insolvency proceedings either (§ 19 IO). Unlike under general civil law, the claims do not have to be due and may also be conditional; the creditor's claim may even be of a non-monetary nature (see also § 14 [1] IO).<sup>158</sup> The set-off is not bound by any time limit and can be declared either to the debtor in self-administration or to an appointed insolvency

<sup>150</sup> *Dellinger/Oberhammer/Koller*, Insolvencyrecht<sup>4</sup> Rz 207; *Mohr*, Privatinsovenz<sup>3</sup> Rz 219; *Kodek*, Insolvencyrecht<sup>2</sup> Rz 453; *Schneider*, Privatinsovenz<sup>3</sup> 40.

<sup>151</sup> *Kodek*, Insolvencyrecht<sup>2</sup> Rz 578; *Dellinger/Oberhammer/Koller*, Insolvencyrecht<sup>4</sup> Rz 207; *Schneider*, Privatinsovenz<sup>3</sup> 41; *Mohr*, Privatinsovenz<sup>3</sup> Rz 219.

<sup>152</sup> OGH ZIK 2004/262 = EvBl 2005/60 = ÖJZ-LSK 2005/26 = ÖBA 2005/1276 = RdW 2005/207 = SZ 2004/140.

<sup>153</sup> *Schneider*, Privatinsovenz<sup>3</sup> 41.

<sup>154</sup> *Kodek*, Insolvencyrecht<sup>2</sup> Rz 136; *Dellinger/Oberhammer/Koller*, Insolvencyrecht<sup>4</sup> Rz 187.

<sup>155</sup> *Nunner-Krautgasser* in *Nunner-Krautgasser/Reissner* 1 (37); *Dellinger/Oberhammer/Koller*, Insolvencyrecht<sup>4</sup> Rz 188; *Kodek*, Insolvencyrecht<sup>2</sup> Rz 137; *Mohr*, Privatinsovenz<sup>3</sup> Rz 244; *Schneider*, Privatinsovenz<sup>3</sup> 34.

<sup>156</sup> *Mohr*, Privatinsovenz<sup>3</sup> Rz 245; *Schneider*, Privatinsovenz<sup>3</sup> 34 et seq; *Dellinger/Oberhammer/Koller*, Insolvencyrecht<sup>4</sup> Rz 194.

<sup>157</sup> *Nunner-Krautgasser* in *Nunner-Krautgasser/Reissner* 1 (37); *Schneider*, Privatinsovenz<sup>3</sup> 35; cf. *Dellinger/Oberhammer/Koller*, Insolvencyrecht<sup>4</sup> Rz 195.

<sup>158</sup> *Schneider*, Privatinsovenz<sup>3</sup> 49; *Dellinger/Oberhammer/Koller*, Insolvencyrecht<sup>4</sup> Rz 186; *Mohr*, Privatinsovenz<sup>3</sup> Rz 237; *Kodek*, Insolvencyrecht<sup>2</sup> Rz 282.

administrator.<sup>159</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>160</sup>

## IV. Consumer credit counselling

### A. Introduction to credit counselling in Austria

According to § 254 (1) no. 6 IO, there is no obligation to be represented by a lawyer in insolvency proceedings; the debtor does not have to be represented at all.<sup>161</sup> However, in debt settlement proceedings a debtor **may be represented by a recognised debt counselling agency** ("*Schuldenberatungsstelle*") according to § 192 IO, which is not permitted in other insolvency proceedings.<sup>162</sup> In the appeal proceedings of debt settlement proceedings, representation by a recognised debt counselling agency is permitted as well, but the signature of a lawyer is required for filing the appeal to the supreme court ("*Oberster Gerichtshof*", § 192 IO).<sup>163</sup>

§ 267 IO provides for the **recognition of debt counselling agencies**; for this, all the requirements of § 267 IO must be fulfilled.<sup>164</sup> According to § 267 (1) IO, the prerequisites for a recognition 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>165</sup>

In Austria, the common interests of the debt counselling agencies are represented by an **umbrella organisation**.<sup>166</sup> This umbrella organisation unites (all) ten recognised debt counselling agencies;<sup>167</sup> it is financed by subsidies from the government and by its activity as trustee in the proceedings for income levy.<sup>168</sup> Only the umbrella association of debt counselling agencies may perform this function; individual debt counselling agencies are not allowed to do so due to their lack of independence.<sup>169</sup> In 2020, the umbrella organisation was appointed as trustee in 1,205 proceedings, which corresponds to about 55% of all proceedings.<sup>170</sup>

<sup>159</sup> *Mohr*, Privatsolvenz<sup>3</sup> Rz 238; *Schneider*, Privatsolvenz<sup>3</sup> 49.

<sup>160</sup> OGH 6 Ob 179/14p Zak 2016/279 (*Nunner-Krautgasser*).

<sup>161</sup> *Schneider*, Privatsolvenz<sup>3</sup> 33; *Mohr*, Privatsolvenz<sup>3</sup> Rz 104; *Kodek*, Insolvenzrecht<sup>2</sup> Rz 59.

<sup>162</sup> *Mohr*, Privatsolvenz<sup>3</sup> Rz 103; cf. *Pfandl/Schmid*, Insolvenzrecht 65.

<sup>163</sup> *Mohr*, VbR 2021 120 (120); *Pfandl/Schmid*, Insolvenzrecht 65; *Schneider*, Privatsolvenz<sup>3</sup> 23; *Kodek*, Insolvenzrecht<sup>2</sup> Rz 62; *Kodek*, Privatkonkurs<sup>2</sup> Rz 9.

<sup>164</sup> *Kodek*, Privatkonkurs<sup>2</sup> Rz 9; *Pfandl/Schmid*, Insolvenzrecht 65; *Schneider*, Privatsolvenz<sup>3</sup> 33; *Kodek*, Insolvenzrecht<sup>2</sup> Rz 60.

<sup>165</sup> Bundesministerium für Arbeit, Soziales, Gesundheit und Konsumentenschutz, *Ausweg gesucht. Schulden und Privatkonkurs* (2019) 29.

<sup>166</sup> *Kodek*, Insolvenzrecht<sup>2</sup> Rz 61; *Kodek*, Privatkonkurs<sup>2</sup> Rz 9; *Pfandl/Schmid*, Insolvenzrecht 65.

<sup>167</sup> *Pfandl/Schmid*, Insolvenzrecht 65; *Kodek*, Privatkonkurs<sup>2</sup> Rz 9; *Kodek*, Insolvenzrecht<sup>2</sup> Rz 61.

<sup>168</sup> *Kodek*, Insolvenzrecht<sup>2</sup> Rz 61; *Kodek*, Privatkonkurs<sup>2</sup> Rz 9.

<sup>169</sup> *Kodek*, Insolvenzrecht<sup>2</sup> Rz 648.

<sup>170</sup> *ASB Schuldenberatungen*, *Schuldenreport* 22.

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. 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 with about € 60,000.<sup>171</sup> Practice shows that mainly debtors with no or below-average income are represented by a debt counselling agency;<sup>172</sup> at the same time, the number of those seeking advice from a recognised debt counselling agency is steadily increasing.<sup>173</sup>

## B. Quality of the existing credit counselling

The debt counselling agencies operate on a **public mandate** and are also financed from public budgets. All debt counselling agencies operate under the internationally recognised **ISO 9001**<sup>174</sup> quality management system; the certification is conducted by the umbrella organisation.<sup>175</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>176</sup>

The supporting services of the recognised debt counselling agencies are structured according to the so-called **self-help principle** ("*Selbsthilfeprinzip*"). All those activities that the debtor can carry out himself are left to him; only when this is no longer possible due to the specific circumstances the recognised counselling agencies will intervene.<sup>177</sup>

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>178</sup> Debt counselling agencies are also active in **financial education**: Special offers for children, young people and adults are intended to provide financial education and prevent over-indebtedness later on.<sup>179</sup> The debt counselling agencies therefore fulfil not only legal but also economic and social work activities.<sup>180</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

<sup>171</sup> *ASB Schuldenberatungen*, Schuldenreport 3.

<sup>172</sup> *Pfandl/Schmid*, Insolvenzrecht 65.

<sup>173</sup> *Maly*, Der neue Privatkonkurs funktioniert... jetzt aber noch die Exekutionsordnung reformieren! 23 Jahre persönliche Praxiserfahrungen eines Schuldnerberaters, *juridikum* 2019, 114 (115).

<sup>174</sup> DIN EN ISO 9001:2015.

<sup>175</sup> *ASB Schuldenberatungen*, Schuldenreport 14.

<sup>176</sup> *Quality Austria*, ISO 9001 Qualitätsmanagement (2020) 1.

<sup>177</sup> Bundesministerium für Arbeit, Soziales, Gesundheit und Konsumentenschutz, Ausweg 30.

<sup>178</sup> *ASB Schuldenberatungen*, Schuldenreport 12; *ifs Schuldenberatung*, 30 Jahre Schuldenberatung (2018) 2.

<sup>179</sup> *ifs Schuldenberatung*, 30 Jahre Schuldenberatung 2; *ASB Schuldenberatungen*, Schuldenreport 24.

<sup>180</sup> *Kodek*, Insolvenzrecht<sup>2</sup> Rz 60.

counselling agencies in Austria are very effective.<sup>181</sup> The activities of the recognised debt counselling agencies also create added value for creditors: They 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>182</sup> For these reasons, there is an urgent need to increase the staff of the recognised debt counselling agencies; debtors usually have to wait a substantial amount of time for an appointment.

## V. Conclusion

Recent legislative acts have further improved the framework for a debt discharge for consumers in Austria: In particular, the proceedings for income levy can be concluded within a period of only three years as part of a repayment plan. As compensation for the shortened duration of the proceedings, the debtor must meet a higher standard of honesty. Regarding consumer credit counselling, however, there is still work to be done: Due to the termination of deferments, subsidies and short-time work models, a massive increase in clients is to be expected any time soon,<sup>183</sup> therefore a significant improvement in the funding of the recognised debt counselling agencies is urgently needed.

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<sup>181</sup> *More-Hollerweger/Pervan-Al Soquarer/Pervan*, Studie zum gesellschaftlichen und ökonomischen Nutzen der staatlich anerkannten Schuldenberatungen in Österreich mittels einer SROI-Analyse (2013) 87.

<sup>182</sup> *ASB Schuldenberatungen*, Schuldenreport 12.

<sup>183</sup> *ASB Schuldenberatungen*, Schuldenreport 4.