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Corporate Restructuring in Austria

The Implementation of Directive (EU) 2019/1023 on Restructuring and Insolvency

Dr. Alexander Wilfinger, Vienna University of Economics and Business

Abstract

Implementing the Directive (EU) 2019/1023 on Restructuring and Insolvency, the Austrian Restructuring Act came into force on 17 July 2021. This paper introduces the new restructuring scheme and provides an overview of its concepts, advantages and weaknesses.

1. Introduction

The Austrian view on corporate restructuring has been ambivalent in the past, as the mechanisms available so far have been adopted very differently in practice. On the one hand, in the course of insolvency proceedings, the debtor has the opportunity to request the adoption of a recovery plan (*Sanierungsplan*) in which it has to offer to pay the creditors a quota of at least 20 % of their claims within a maximum of two years (§ 141 Austrian Insolvency Act, *Insolvenzordnung, IO*). This instrument proved to be very successful over the last decades, so that it is often referred to as an Austrian success story.[1] It is therefore quite common to use insolvency proceedings to initiate a fresh start. On the other hand, since 1997, Austrian law also provides for an opportunity to reorganize businesses prior to the occurrence of insolvency under the Business Reorganization Act (*Unternehmens-reorganisationsgesetz, URG)*. In contrast to the recovery plan, however, this scheme never set foot in practice and is even considered "dead law"[2] as there is only one known case in which business reorganization proceedings were carried out successfully.[3] Businesses tried to avoid insolvency rather by reaching out-of-court agreements with their creditors than by initiating formalized proceedings under the URG.[4]

Against this background, Directive (EU) 2019/1023 on Restructuring and Insolvency (RID) brought chances and challenges for the Austrian legislator. Given the failure of the URG, there still is an undisputed need for an attractive scheme to prevent insolvency, since the economic benefits of restructuring are not in question. The implementation of the directive, of course, had to avoid old mistakes and at the same time ensure that it provides for a valuable addition to reorganization in the course of insolvency proceedings by the conclusion of a recovery plan. The process took some time, as the RID had to be implemented by July 2021 and the first draft was published and put up for discussion only in February 2021. After some quite critical statements had been made in the course of this discussion process[5] and the draft had

[1] A. Klikovits, 'Der Zwangsausgleich – eine österreichische Erfolgsstory' [2004] Zeitschrift für Insolvenzrecht & Kreditschutz (ZIK) 12.
[2] W.H. Rechberger, Th. Seeber and M. Thurner, Insolvenzrecht (Facultas, 3. ed. 2018) para. 17, 505.
[3] See A. Reckenzaun and P. Hadl, 'Erste (positive) Erfahrungen mit dem Unternehmensreorganisationsverfahren' [2011] ZIK 90.
[4] E. Ringelspacher and M. Nitsche, 'Das StaRUG im Vergleich mit der Umsetzung der EU-Direktive in Österreich' [2021] Zeitschrift für Restrukturierung und Insolvenz (ZRI) 477, 480; for an overview of the out-of-court options see G. Kodek, Insolvenzrecht (Facultas 2021) para. 930 ff.
[5] Cf. St. Riel, 'Restrukturierungs- und Insolvenz-Richtlinie-Umsetzungsgesetz' [2021] Österreichisches Anwaltsblatt (AnwBl) 379; M. Trenker and M. Lutschounig, Comment on the ministerial draft, 42/SN-96/ME XXVII. GP (https://www.uibk.ac.at/zivilverfahren/publikationen/stellungnahme_rirl-ug.pdf, 5.11.2021).

therefore been slightly revised,[6] finally, the new Restructuring Act (*Restrukturierungs-ordnung, ReO*) came into force on 17 July 2021. As of now, the ReO contains options for preventive reorganization in addition to the unpopular URG that still is in force.[7]

The ReO visibly tries to combine well-known processes with new approaches. In short, in the event of probable insolvency, the debtor has the opportunity to request the opening of restructuring proceedings at court where the creditors vote on the adoption of a proposed restructuring plan (*Restrukturierungsplan*) that defines certain restructuring measures. Above all, to restore economic viability, claims of the affected creditors may be reduced or deferred. In this respect, there are visible similarities with the well-established recovery plan under the IO,[8] as a court is necessarily involved to moderate and confirm the vote of the creditors on a particular agreement. Not surprisingly, the procedural provisions of the IO are largely applicable (§ 5 ReO). Then again, the fact that the debtor still is solvent and that restructuring proceedings are not insolvency proceedings also calls for some significant differences to insolvency law. The debtor has much more influence on the shaping of the principally non-public proceedings and, for instance, can decide which creditors are included in the restructuring plan. At the same time, without the event of insolvency, it is more difficult to justify interventions in the positions of creditors, which is why the initiation of restructuring proceedings has no effect on existing contracts. These few examples alone show that the ReO strives to keep the balance between the interests involved. What follows is a closer look at the new restructuring scheme, focusing on its main cornerstones and principles.

2. Scope

The ReO governs corporate restructuring and is applicable only to debtors that are legal entities or individuals who operate a business. Individuals in their private capacity and certain companies operating in the financial sector or public bodies are excluded from its scope (§ 2 para. 1 ReO). As the aim is to avoid insolvency, the initiation of restructuring proceedings requires the likelihood of insolvency (§ 6 para. 1 ReO). According to § 6 para. 2 ReO, it is decisive whether the existence of the debtor's company would be at risk without restructuring, which especially is the case if illiquidity is imminent. Likelihood of insolvency is presumed if the equity ratio falls below 8 % and the notional debt repayment period exceeds 15 years. In addition, the proposed restructuring measures have to indicate a positive development of the enterprise to the extent that it will become viable upon acceptance of the restructuring plan.[9]

Remarkably, it is therefore possible to initiate restructuring proceedings in the case of overindebtedness,[10] although overindebtedness is a reason for opening insolvency proceedings against most legal entities (§§ 1, 67 IO). Under insolvency law, however, a negative prognosis on the continued existence of the company is required,[11] whereas, for the initiation of restructuring proceedings, the prognosis must be positive, at least conditional on the confirmation of the proposed restructuring plan.[12]

The initiation of restructuring proceedings is inadmissible if insolvency proceedings are pending (§ 6 para. 3 (1) ReO). Furthermore,

[6] On the changes made cf. M. Simsa and Ph. Kalser, 'Die (überarbeitete) Restrukturierungsordnung' [2021] Steuer- und WirtschaftsKartei (SWK) 1128.
[7] For critical remarks on this decision of the legislator see M. Trenker and M. Lutschounig (fn. 5) 19.
[8] If the restructuring attempt fails, the debtor still has the opportunity to reorganize in the course of insolvency proceedings.
[9] Explanatory remarks to the government bill of the ReO 950 BlgNR 27. GP 6 (https://www.parlament.gv.at/PAKT/VHG/XXVII/I/I_00950/index.shtml, 5.11.2021).
[10] Explanatory remarks (fn. 9) 1.
[11] G. Kodek (fn. 4) para. 238 ff.
[12] Explanatory remarks (fn. 9) 1; U. Reisch, 'Restrukturierungsordnung (ReO) – Erleichterung der Unternehmensrestrukturierung?' [2021] Zeitschrift für Wirtschaftsrecht (ecolex) 789, 790; G. Kodek (fn. 4) para. 962.

the procedure is not available for an unlimited number of times, as § 6 para. 3 (2) ReO prevents the initiation if a restructuring plan (§§ 27 ff. ReO) or a recovery plan (§§ 140 ff. IO) was confirmed less than seven years ago.[13]

3. Initiation of proceedings

Restructuring proceedings have to be initiated by the debtor (§ 1 para. 1 ReO). There is no corresponding option for creditors. This is consistent with the aim of restructuring, as efforts to that objective must come from the debtor.[14] The request must be submitted to the court of first instance in whose jurisdiction the debtor operates its business or, in the absence of such, has its habitual residence (§ 4 ReO, § 63 IO). The ReO does not contain provisions on international jurisdiction, which is why the ongoing discussion on the applicability of the European Insolvency Regulation (EIR) or the Brussels Ia Regulation is also relevant for Austria.[15]

In the request, the debtor must already set the essential course for the proceedings, as numerous issues have to be addressed. This is, again, consistent, since the debtor ideally elaborates the necessary measures in advance and turns to the court "only" for their implementation. Hence, pursuant to § 7 ReO, the debtor must not only state the likelihood of insolvency and give information on the financial situation,[16] but must also attach a restructuring plan or a restructuring concept.[17] The latter essentially is a draft restructuring plan, which is not yet final and cannot be put to the vote (§ 27 ReO), but at least contains the intended measures and a list of the assets and liabilities of the debtor (§ 8 para. 1 ReO).

In the course of proceedings, this preliminary concept must be completed into a final plan. For this purpose, the court shall grant the debtor, upon its request, a period of no more than 60 days to submit a restructuring plan. If such a request is not made, a practitioner in the field of restructuring shall be appointed who assists the debtor in the preparation of the restructuring plan within a period set by the court of no more than 60 days (§ 8 para. 2 ReO).

The court does not examine the procedural requirements in detail at this stage. For instance, no evidence is taken on the question of illiquidity.[18] The court only rejects the application as inadmissible if the restructuring plan or the restructuring concept is obviously unsuitable or the application is abusive. This is the case in particular if there obviously is no likelihood of insolvency or if, on the contrary, insolvency is evident from data on enforcement proceedings (§ 7 para. 3 ReO).

4. Debtor in possession and practitioner in the field of restructuring

The opening of restructuring proceedings generally has no direct impact on the debtor, as the debtor remains in control over its assets and the operation of its business in the course of restructuring proceedings (§ 16 para. 1 ReO). However, there are some additions and exceptions to this principle of a debtor in possession.

Firstly, in certain cases, the court must appoint a practitioner in the field of restructuring (*Restrukturierungsbeauftragter*). The purpose is either to assist the debtor and

[13] Lastly, § 6 para. 4 ReO restricts the possibility of restructuring if the debtor or an executive officer has been convicted of a specific accounting offence (§ 163a Austrian Criminal Code) within three years prior to the request.
[14] R. Bork, 'Neue Grundfragen des Restrukturierungsrechts' [2021] ZRI 345, 347.
[15] M. Trenker and M. Lutschounig (fn. 5) 29 ff.; U. Reisch (fn. 12) 789 f. On § 44 ReO governing European restructuring proceedings see below, 7.1.
[16] This information consists of a financial plan (a signed comparison of the expected income and expenditure for the following 90 days, showing how the funds necessary for the continuation of business and the payment of current expenses are to be raised and used; § 7 para. 1 (2) ReO) and of the annual accounts of the last three years (§ 7 para. 1 (3) ReO).
[17] If the debtor has not attached a restructuring plan to the request, it must state that the restructuring concept can achieve the viability of the business (§ 7 para. 2 ReO).
[18] U. Reisch (fn. 12) 790; for critical remarks cf. St. Riel (fn. 5) 380; M. Trenker and M. Lutschounig (fn. 5) 7.

creditors in the negotiation and preparation of the plan (§ 9 para. 1 ReO). This is why a restructuring practitioner *inter alia* has to be appointed upon request of the debtor or the majority of the creditors, or to prevent expected disadvantages of self-administration for the creditors (§ 9 para. 2 ReO). Apart from this, the appointment is at the discretion of the court if the involvement of an expert is expedient in certain matters such as the review of interim financing or challenged claims (§ 9 para. 3 ReO). The exact responsibilities of the restructuring practitioner are again to be determined by the court (§ 14 ReO).

Secondly, pursuant to § 16 para. 2 ReO, the court may prohibit the debtor from certain legal acts at all or without the consent of the court or the restructuring practitioner for the duration of restructuring proceedings.[19] Whether and to what extent the debtor's power of disposal is restricted thus depends on the court.

The fate of legal acts performed by the debtor in breach of restrictions imposed by the court depends on the knowledge of the counterparty. § 16 para. 3 ReO governs the case that a requirement of consent of the restructuring practitioner or the court has been ordered and the debtor performs legal acts without such consent. If the counterparty knows that consent is absent, these acts are void and only become effective upon complete fulfilment of the restructuring plan. It follows that the legal act is effective from the outset if the counterparty was not aware of the restriction. In non-public restructuring proceedings, it will therefore regularly depend on whether the counterparty is affected by the restructuring plan or not, because only affected creditors are notified of the pending proceedings.[20]

5. Securing the restructuring efforts

5.1 Enforcement ban

Just like the provisions on the administration of the debtor's assets, the provisions on individual enforcement are distinctive characteristics of restructuring. The opening of restructuring proceedings does not lead to a general stay of individual enforcement actions. Rather, in principle, enforcement is not affected and creditors can further enforce their claims. However, § 19 ReO enables the debtor to request a stay of individual enforcement actions to support the negotiations of a restructuring plan. This possibility is also essential because the suspension of the debtor's obligation to file for insolvency in the case of overindebtedness (§ 24 ReO)[21] and of the liability of the debtor's directors (§ 25 ReO) as well as the protection of contracts (§ 26 ReO) are tied to the granting of an enforcement ban.[22]

Again, the concept differs from insolvency proceedings,[23] as non-public restructuring proceedings are not suited for a general enforcement ban and a general ban would not always be necessary. If all creditors shall be affected, the debtor has to file for the opening of so-called European restructuring proceedings (§ 44 ReO) that are further discussed below. Otherwise, the ban has to refer to specific creditors or classes of creditors and only becomes effective upon the individual notification of these creditors (§ 21 para. 2 ReO). It is up to the debtor to set the framework by naming the creditors or specifying classes of creditors in respect of

[19] However, the court may not go so far as to impose restrictions on the debtor that would affect it in bankruptcy proceedings (§ 16 para. 2 ReO). Hence, a complete withdrawal of the ability to dispose is not possible; F. Mohr, 'Das Restrukturierungsverfahren nach der ReO' [2021] ZIK 82, 87 fn. 31.
[20] Explanatory remarks (fn. 9) 10; M. Simsa and Ph. Kalser (fn. 6) 1130.
[21] Even due to illiquidity, insolvency proceedings will not be opened during a stay of enforcement actions if the court is of the opinion that the opening of insolvency proceedings would not be in the general interest of the creditors (§ 24 para. 3 ReO).
[22] For critical remarks on this concept see St. Riel (fn. 5) 380 f.
[23] On the enforcement ban in insolvency proceedings see R. Bork, Corporate Insolvency Law (Intersentia 2020) para. 5.16.

whose claims it seeks the stay of enforcement actions (§ 19 para. 3 ReO). Thereby, all types of claims that are not excluded from restructuring proceedings (such as employee or alimony claims, § 3 ReO) can be covered. However, secured claims that would constitute a right to separation[24] or separate satisfaction[25] in insolvency proceedings with regard to tangible objects may only be affected if the continuation of the debtor's business would otherwise be endangered and the interests of the creditor do not outweigh this interest of the debtor (§ 20 para. 1 ReO).[26] Securities with regard to intangible objects (e.g. claims of the debtor that were assigned to the creditor as collateral) may not be affected at all.[27]

The court decides on the request and must examine whether one of the grounds for refusal set out in § 19 para. 2 ReO applies. If a stay of individual enforcement actions is not necessary to reach the objective of restructuring or if it would not support the negotiations of a restructuring plan, the request has to be denied (§ 19 para. 2 (1) and (2) ReO). Furthermore, the debtor must not be insolvent on the basis of illiquidity (§ 19 para. 2 (3) ReO), which is examined at this stage of proceedings for the first time.[28] In this context, insolvency is presumed if enforcement actions are being conducted against the debtor for the collection of taxes or social security contributions, which have neither been discontinued, postponed nor terminated with full satisfaction of the creditor (§ 19 para. 4 ReO).

If the court grants the enforcement ban, it must determine its scope (which creditors are affected?) and duration (for how long?). With regard to the latter, § 22 ReO sets a maximum limit of three months. An extension upon request of the debtor or the appointed restructuring practitioner to a maximum of six months[29] is possible for specific reasons set out in § 22 para. 2 and 4 ReO.

The stay ends automatically when this period is over or the court closes the proceedings (§ 23 para. 2 ReO). Besides, the debtor can request the lifting of the ban at any time. The affected creditors, who are not heard before the court's decision on granting the enforcement ban (§ 19 para. 3 ReO), now also have the opportunity to request the lifting or limitation of the ban,[30] if the stay of enforcement actions is not necessary[31] or if it is particularly detrimental to (a) certain creditor(s) (§ 23 para. 1 ReO).[32]

5.2 Contracts

The ban of individual enforcement actions is not the only mechanism that aims to ensure an unimpeded restructuring attempt. Closely linked to this is the question of the fate of contracts, as the opening of restructuring proceedings and especially the court order of an enforcement ban might have negative impacts on current contractual relationships

[24] A right to separation exists if there is an object in the insolvency estate that does not belong to the debtor (§ 44 IO); cf. R. Bork (fn. 23) para. 7.22. Whether the object belongs to the debtor is determined by general civil law. In particular, ownership rights (also retained based on a retention of title clause, but not if the title is transferred by way of security) and claims of the trustor against the trustee are covered; cf. G. Kodek (fn. 4) para. 126 ff.

[25] This refers to creditors who have claims to separate satisfaction from certain assets of the debtor (§ 48 IO); cf. R. Bork (fn. 23) para. 7.15. The most important cases under Austrian law are in rem securities like mortgages or liens as well as ownership by way of security, assignment by way of security and rights of retention (on the latter § 11 para. 2 IO); cf. G. Kodek (fn. 4) para. 134 f.

[26] In this respect, § 20 para. 1 ReO refers to § 11 IO on certain restrictions of rights to separation and to separate satisfaction.

[27] Criticism in A. Reckenzaun, 'Vollstreckungssperre und Insolvenzschutz' in A. Konecny (ed.), ZIK Spezial: RIRUG (LexisNexis 2021) 115, 118 f.

[28] U. Reisch (fn. 12) 792; A. Reckenzaun (fn. 27) 117.

[29] Four months if the debtor has moved its center of main interests to Austria within three months prior to the request for the opening of restructuring proceedings, § 22 para. 4 ReO.

[30] For the following reasons, the court may also lift the enforcement ban ex officio or upon request of an appointed practitioner in the field of restructuring.

[31] That is the case, firstly, if the ban no longer supports the negotiations on the restructuring plan, in particular if a group of creditors that could prevent the adoption of the plan does not support the continuation of the negotiations (§ 23 para. 1 (1) ReO). Secondly, if the ban includes the realization of assets of the debtor that are not necessary for the continuation of the debtor's business (§ 23 para. 1 (4) ReO).

[32] In particular, if a creditor is not affected by a submitted plan (§ 23 para. 1 (2) ReO) or if the ban leads to insolvency of the creditor (§ 23 para. 1 (3) ReO).

of the debtor. The termination of contracts that the debtor depends on could hinder a successful reorganization from the outset. § 26 ReO addresses this issue in two ways.

Firstly, it protects the debtor against so called ipso facto clauses that provide for the automatic termination or modification of the contract in certain stipulated cases. Clauses that link the termination or modification to the opening of restructuring proceedings, to an enforcement ban or to a deterioration of the economic situation that enables the initiation of restructuring proceedings[33] are prohibited (§ 26 para. 3 ReO).[34] Restructuring proceedings therefore have no direct impact on contracts.

Secondly, the question arises whether creditors have the right to withhold their performance or to terminate the contract because the debtor has not paid outstanding debts. This is governed by civil law, according to which the creditor may refuse performance (§ 1052 Austrian General Civil Code, *Allgemeines Bürgerliches Gesetzbuch, ABGB*)[35] or terminate the contract in the event of delay (§ 918 ABGB).[36] The mere fact that restructuring proceedings are aspired or opened does not affect these principles. However, this changes if the court orders a stay of enforcement actions in the course of the proceedings, because it would be contrary to the purpose of the ban if the affected creditors would be able to terminate their contracts. Regarding claims that arose before the stay of enforcement actions and solely on the basis that the debtor has not satisfied them yet, these creditors may not refuse performance,[37] terminate or otherwise modify essential outstanding contracts to the detriment of the debtor. In this context, an essential outstanding contract is a contract under which the parties still have to perform obligations necessary for the continuation of the daily operation of business when the enforcement ban is granted (§ 26 para. 2 ReO). However, to prevent the debtor from accessing open credit lines, this does not apply to loan agreements (§ 26 para. 5 ReO).[38]

5.3 Finance and transactions avoidance

In the course of restructuring proceedings, the continuation of the debtor's business may depend on new financing. Besides, there regularly is no way around other transactions such as making payments in the ordinary course of business. Such transactions entail risks for the counterparty, as they could be subject to avoidance claims in subsequent insolvency proceedings if the restructuring attempt fails. Above all, in simplified terms, disadvantageous transactions entered into by the debtor can be set aside by the insolvency practitioner if the other party was aware or must have been aware of insolvency (§ 31 para. 1 (3) IO). This uncertainty may deter counterparties from agreeing to the transactions necessary for restructuring.

Therefore, restructuring law now provides for opportunities to avoid such risks. According to § 18 ReO, the court, upon request of the debtor, shall approve financial support provided by a creditor if it is reasonable as well as immediately necessary to enable the debtor's business to continue or to preserve the value of that business. Other transactions that are reasonable and immediately necessary, such as the payment of fees and

[33] This does not apply to loan agreements (§ 26 para. 5 ReO).
[34] The request for the initiation of proceedings or the imposition of a stay of enforcement actions is also included.
[35] § 1052 ABGB: "Whoever intends to demand the transfer, has to have satisfied or be ready to satisfy his obligation. […]". Translation according to P. A. Eschig and E. Pircher-Eschig, Das österreichische ABGB – The Austrian Civil Code (LexisNexis, 2nd ed. 2021).
[36] § 918 para. 1 ABGB: "If a contract for consideration is not performed by one party at the due time, the due place, or in the agreed way, the other party can request either performance and damages due to the delay or declare rescission from the contract subject to a reasonable period of time to deliver performance." Translation according to P. A. Eschig and E. Pircher-Eschig, Das österreichische ABGB – The Austrian Civil Code (LexisNexis, 2nd ed. 2021).
[37] However, there are good reasons for suspending rights to refuse performance only to the extent that they arise from liabilities for services already rendered by the creditor (e.g. in the case of water or power supply contracts); cf. Ph. Anzenberger, 'Vertragsschutz und unwirksame Vereinbarungen nach der ReO' in A. Konecny (ed.), ZIK Spezial: RIRUG (LexisNexis 2021) 127, 134 ff.
[38] Explanatory remarks (fn. 9) 15.

costs for the negotiation of a restructuring plan, the payment of employee wages or other payments in the ordinary course of business, shall also be approved upon request. This approval protects creditors from avoidance actions in insolvency proceedings, as the newly implemented § 36a and § 36b IO largely exclude the application of avoidance law to the approved transactions if the creditor was not aware of insolvency.[39]

6. Restructuring plan

6.1 Possible measures

Ultimately, the aim of restructuring proceedings is to adopt a restructuring plan that implements the measures necessary to restore the economic viability of the debtor. It is upon the debtor to determine these measures in its plan proposal which must contain the detailed conditions (§ 27 para. 2 (7) ReO).

Of course, the possibilities are limited, as only certain measures can be implemented via a restructuring plan.[40] The focus naturally lies on claims of the creditors that may be reduced or deferred (§§ 28, 39 para. 1 ReO).[41] The debtor has to name the affected creditors and their claims covered by the restructuring plan in the proposal (§ 27 para. 2 (4) ReO) and must justify why other creditors are not included (§ 27 para. 2 (6) ReO). Besides, § 28 ReO requires the specification of the proposed payment term or the quota to which the reduction shall be made. There is neither a maximum payment period nor a minimum quota,[42] whereas the adoption of a recovery plan in the course of insolvency proceedings requires a quota of at least 20 % (§ 141 IO). However, other modifications or interferences with contractual agreements such as debt-equity-swaps or the termination of contracts cannot be implemented through a majority decision but require consent of the affected creditor (§ 39 para. 3 ReO).[43] In this respect, restructuring proceedings offer fewer options than insolvency law.[44]

Furthermore, if the debtor considers measures under company law necessary, the consent of affected equity holders cannot be replaced (§ 37 para. 1 ReO). Hence, shareholders are excluded from the restructuring plan and contributions by the owners cannot be forced by vote of the creditors, which has already been identified as a key weakness of the new scheme.[45] In order to comply with Art. 12 RID, § 37 para. 1 ReO only forbids equity holders from unreasonably preventing or creating obstacles to the adoption and confirmation of a restructuring plan.[46] Unfortunately, more detailed specifications on this problem and consequences of violations of are not provided.[47] If the restructuring plan does not interfere with the legal or economic position of the shareholders, consent can be substituted by order of the court.

Apart from the latter case, the feasibility of a restructuring plan thus may depend on the consent of the debtor's shareholders. In order to ensure that this is already determined at the time of the creditors' vote, the vote only takes

[39] Transactions that are part of the restructuring plan benefit from the protection as well (§ 36a, § 36b para. 2 IO). In this case, there is no need for a separate approval by the court. However, there is uncertainty when it comes to avoidance actions regarding the counterparty's knowledge of overindebtedness; cf. M. Trenker and M. Lutschounig (fn. 5) 76; U. Reisch (fn. 12) 791.
[40] F. Mohr (fn. 19) 83.
[41] More precisely, according to § 28 ReO, the contractual conditions concerning the payment can be modified. The restructuring plan may therefore also concern interest rates, for example. There are no tax privileges for restructuring profits; cf. U. Reisch (fn. 12) 789; M. Simsa and Ph. Kalser, 'Die neue Restrukturierungsordnung' [2021] SWK 642, 646.
[42] St. Riel, 'Der Restrukturierungsplan' [2021] ecolex 786.
[43] See, however, F. Mohr (fn. 19) 83, who considers a dept-equity-swap to be permissible under § 28 ReO.
[44] St. Riel (fn. 42) 786.
[45] M. Trenker and M. Lutschounig (fn. 5) 66; St. Riel (fn. 5) 383; M. Simsa and Ph. Kalser (fn. 41) 648; cf. also Ph. Fidler, 'Die Ruhe vor dem Sturm' [2020] Zeitschrift für Finanzmarktrecht (ZFR) 541.
[46] On relevant principles and provisions under company law (§ 1184 para. 2 ABGB) see M. Trenker, 'Was will und kann die ReO? – Anwendungsbereich, Zweck und Mittel von Restrukturierungsverfahren' in A. Konecny (ed.), ZIK Spezial: RIRUG (LexisNexis 2021) 33, 42 f.
[47] For critical remarks see M. Trenker and M. Lutschounig (fn. 5) 64 f.; G. Wabl and G. Gassner, 'Geschäftsleitung und Anteilsinhaber' in A. Konecny (ed.), ZIK Spezial: RIRUG (LexisNexis 2021) 201, 212 ff.

place when the required shareholder resolutions are effective (§ 37 para. 3 ReO). In this respect, the creditors do not have to "pay in advance".[48]

6.2 Classes of creditors

With a few exceptions such as employees (§ 3 para. 1 ReO), all creditors of the debtor may be affected. For instance, it is principally also possible to reduce claims of secured creditors.[49] For the further proceedings, however, it is relevant to which group the affected creditors belong. Therefore, the debtor must form different classes of creditors in the plan proposal and at the same time assign the individual creditors to a specific class (§ 27 para. 2 (5) ReO). The different classes are set out in § 29 ReO: secured creditors, who are all placed in one secured class[50] and are included in this class only with the amount of their claim covered by the value of the collateral (§ 29 para. 2 ReO); unsecured creditors; bondholders; creditors in need of protection; subordinated creditors.[51] It is especially noteworthy that, according to § 29 para. 1 (4) ReO, creditors in need of protection particularly are creditors with claims of less than EUR 10.000,-, regardless of the person of the creditor. Based on this understanding, e.g. a bank can be just as "vulnerable" as a small supplier, which is an unconvincing simplification the legislator did not provide a justification for.[52]

In contrast, debtors operating a micro, small or medium-sized enterprise (SME) do not have to form classes (§ 29 para. 3 ReO). An SME is a debtor of any legal form that does not exceed two of the three size criteria of § 221 para. 1 Austrian Commercial Code (*Unternehmensgesetzbuch, UGB*): a balance sheet total of EUR 5 mio.; a turnover of EUR 10 mio. in the twelve months preceding the balance sheet date; an annual average of 50 employees.

The debtor does not have to treat all creditors equally. In principle, it is thus possible to reduce the claims of bondholders to a greater extent than the claims of unsecured creditors or creditors in need of protection, for example.[53] However, the debtor must treat all creditors of the same class equally. Otherwise, the court must refuse to confirm the restructuring plan (§ 34 para. 1 (2) ReO). If there are no different classes, all creditors have to be treated equally.

6.3 Creditors' vote and conformation by the court

The court examines the proposed plan for its completeness, legality, plausibility and appropriateness (§ 30 ReO)[54] and schedules a hearing for the creditors' vote on the restructuring plan (§ 31 para. 1 ReO). All affected creditors have the right to vote on its adoption. This right is calculated according to the amount of each creditor's affected claim(s). Since the weight of their vote therefore depends on the information provided by the debtor, the affected creditors may raise objections to the claims of other creditors. If the result of the vote depends on these contested claims, the court has to decide on the voting rights. For this purpose, it may appoint a restructuring practitioner who examines the existence and amount of the disputed claims (§ 9 para. 3 (4) ReO).[55]

In order for the restructuring plan to be adopted, a majority of the affected creditors present in each class must approve the plan and the aggregate claims of the creditors approving the plan in each class must equal at least 75 % of the aggregate claims of the affected creditors present in that class. If no

[48] St. Riel (fn. 42) 787.
[49] Of course, secured creditors regularly have the opportunity to prevent the confirmation of the plan by initiating a best-interests-of-creditors test (§ 35 ReO); see below, 6.3.
[50] There are no different classes for different types of securities; critical in this respect St. Riel (fn. 5) 382.
[51] Cf. F. Mohr (fn. 19) 84.
[52] Cf. Explanatory Remarks (fn. 9) 17 f; critizism in M. Trenker and M. Lutschounig (fn. 5) 61.
[53] On the prerequisites of a cross-class cram down (§ 36 ReO) below, 6.3.
[54] If the requirements are not met, the debtor shall be ordered to improve the restructuring plan within the time limit set by the court (§ 30 para. 2 ReO).
[55] F. Mohr (fn. 19) 92.

classes have been formed, the required majorities are calculated on the basis of the total creditors present (§ 33 para. 1 ReO).

However, the result of this vote does not yet finally decide on the adoption. A restructuring plan that was initially rejected can still be adopted, and a plan that has been adopted can still fail out of consideration for individual creditors.

As regards the former case, if not all classes of creditors agree to the plan, the debtor has the opportunity to request a cross-class cram down according to § 36 ReO. Upon such request, the court shall confirm the plan if the dissenting classes of affected creditors are treated at least as favorably as any other class of the same rank and more favorably than any junior class.[56] In this context, the ranks of the different classes are determined in accordance with insolvency law.[57] The ReO thus implements the so-called relative priority rule: Senior classes must be treated more favorably than junior classes, but, in contrast to insolvency law, junior classes do not get their share only if the senior ones are fully satisfied.[58] A further requirement of a successful cram down is that the restructuring plan has been accepted by a majority of the classes (§ 36 para. 2 ReO). Part of this majority must be either the secured class or the majority of classes that would at least be partially satisfied in insolvency proceedings ("in the money" classes).[59] If only two classes of creditors have been formed, the consent of the secured class or of one class which would receive a quota in insolvency proceedings is sufficient.[60]

As regards the latter case, individual dissenting creditors who have been outvoted have the opportunity to initiate a best-interests-of-creditors test. Upon request of a dissenting affected creditor, the court has to examine if no dissenting creditor (not only the objecting creditor) would be worse off under a restructuring plan than such a creditor would be in insolvency proceedings (§ 35 ReO). The benchmark is the case that would likely occur if the restructuring plan is not confirmed. Since the debtor usually faces insolvency if the restructuring attempt fails, it is particularly relevant how the creditors would be treated in that scenario. To perform the best-interests test, the court therefore regularly must value the company and the assets of the debtor, for which it may consult an expert or appoint a restructuring practitioner (§ 38 ReO).[61] If the adoption of a recovery plan in insolvency proceedings is likely (§§ 140 ff. IO), the valuation is made under a going concern assumption.[62]

The test is especially relevant with regard to secured creditors, as interventions in their position are only permissible to a very limited extent under insolvency law. Rights to separation (e.g. based on ownership)[63] are not affected at all, rights to separate satisfaction (e.g. based on in rem security rights)[64] may only be slightly affected if a recovery plan (§§ 140 ff. IO) is adopted, as they are limited to the value of the object in this case (§ 149 para. 1 IO).[65] Creditors whose collateral's value only covers their claim partially only participate in the recovery plan with the part of their claim that is not covered. Against this insolvency law

[56] In addition, the general requirements for court confirmation must be met and no class of creditors may receive more than the full amount of their claims (§ 36 para. 1 (1) and (3) ReO).
[57] Therefore, secured creditors have priority, unsecured creditors, bondholders and vulnerable creditors are of equal rank, and subordinated creditors have subordinate priority; cf. Explanatory Remarks (fn. 9) 20. On questions that remain unanswered cf. St. Riel (fn. 5) 383.
[58] Cf. G. Kodek (fn. 4) para. 1008.
[59] U. Reisch, 'Restrukturierungsverfahren – Planinhalte, Planwirkungen' in A. Konecny (ed.), ZIK Spezial: RIRUG (LexisNexis 2021) 143, 157.
[60] Explanatory Remarks (fn. 9) 21.
[61] Cf. U. Reisch (fn. 59) 154 ff.
[62] Cf. A. Isola, St. Weileder and D. Seidl, 'Strategische Sanierungsplanung – Kriterien für die Verfahrenswahl' in A. Konecny (ed.), ZIK Spezial: RIRUG (LexisNexis 2021) 19, 26.
[63] See above, fn. 24.
[64] See above, fn. 25.
[65] Cf. B. Nunner-Krautgasser and Ph. Anzenberger in Ch. Koller, E. Lovrek and M. Spitzer (eds.), Insolvenzordnung (Verlag Österreich 2019) § 149 para. 4 ff. Besides, according to § 11 para. 2 IO, rights to separation and to separate satisfaction are compulsorily deferred for six months if the object is necessary for the continuation of the business and the creditor's interests do not prevail.

background, the best-interests test gives secured creditors a very strong position in restructuring proceedings as well.[66] If the restructuring plan contains restrictions on these creditors that exceed those available under § 149 IO, the secured creditors regularly can prevent the plan from being confirmed, as they would not have to face these restrictions in the alternative scenario of insolvency. As a result, it is very risky from the debtor's perspective to include secured creditors in the plan.[67]

In any case, the adoption of the plan must ultimately be confirmed by the court (§ 34 ReO). Confirmation depends on several preconditions. Among others, this involves examining whether the adoption by the creditors was lawful, a requested best-interest-of-creditors test is satisfied and whether it isn't obvious that the restructuring plan fails to prevent the insolvency of the debtor.

6.4 Legal effects

Upon confirmation by the court, the restructuring plan becomes binding on all affected creditors named in the plan and on the debtor (§ 39 para. 1 ReO). It follows in particular that reductions and deferrals of claims become effective. In this context, § 39 para. 1 ReO expressly clarifies that the debtor is released from the obligation to subsequently compensate the affected creditors for the default they suffer or to subsequently pay for the benefit otherwise granted. This obligation only revives if the debtor falls into qualified default[68] in fulfilling the restructuring plan (§§ 39 para. 5 ReO, § 156a IO). In addition, it is clarified that only those creditors are covered by the effects who were involved in the adoption or at least were duly notified of the restructuring plan and the court hearing (§ 39 para. 2 ReO).

However, other measures (e.g. the termination or modification of contracts)[69] cannot be implemented by the confirmation.[70] If such measures are sought, the general legal and contractual requirements must be complied with (§ 39 para. 3 ReO).

6.5 Appeal

The confirmation of the restructuring plan may be challenged by appeal of the dissenting affected creditors; the refusal of confirmation may be appealed against by the debtor and by any consenting affected creditor (§ 40 para. 1 ReO). In principle, the appeal has no suspensive effect (§ 40 para. 2 ReO). Only in exceptional cases shall the court grant suspensive effect to the appeal upon request in order to prevent the appellant from suffering particularly serious and disproportionate disadvantages (§ 40 para. 3 ReO). Even if an appeal against the confirmation of the plan is successful, the court may uphold the confirmation if this is in the common interest of the creditors (§ 40 para. 4 (2) ReO). In this case, the appealing creditor must be compensated by the debtor for financial losses (§ 40 para. 5 ReO).

7. Special types of proceedings

7.1 European restructuring proceedings

Restructuring proceedings are generally not public and thus allow the debtor to maintain confidentiality. However, this is also accompanied by disadvantages. Non-public proceedings do not fall within the scope of the EIR (Art. 1 EIR), which makes questions of international jurisdiction and recognition that are not addressed by the ReO more difficult. Besides, the effects of non-public proceedings are limited to creditors who are notified individually. Other creditors cannot be affected.

[66] St. Riel (fn. 42) 787; M. Trenker (fn. 46) 43.
[67] M. Trenker (fn. 46) 43.
[68] The debtor must have failed to pay a debt due despite a written reminder sent by the creditor granting a period of grace of at least fourteen days (§ 156a para. 2 IO).
[69] Explanatory Remarks (fn. 9) 22.
[70] See above, 6.1.

Against this background, according to § 44 ReO, the debtor has the opportunity to request the public announcement of the initiation of proceedings via the so-called *Ediktsdatei*, a public register.[71] This variation of restructuring proceedings will be included in Annex A of the EIR and therefore fall within its scope.[72] Hence, § 44 ReO speaks of European restructuring proceedings. Of course, the term "public restructuring matter" that is used in Germany (§§ 84 ff. StaRUG)[73] would have been more suiting, as § 44 ReO also applies to solely domestic cases.[74]

The public announcement replaces the individual notification and also makes it possible to impose a general enforcement ban on the creditors in the course of restructuring proceedings (§ 44 para. 3 ReO), whereas the stay of enforcement actions otherwise can only relate to the specific creditors affected.[75] Furthermore, at the debtor's request, the creditors may be publically called on to lodge their claims (§ 44 para. 4 ReO). In this case, creditors may only participate in the proceedings after filing their claims in due time. In addition, the restructuring plan confirmed by the court will also be binding for affected creditors who did not file their claims in time despite being requested to do so.[76]

7.2 Simplified restructuring proceedings

Finally, the ReO provides for simplified proceedings if only financial creditors are involved in the restructuring efforts (§ 45 ReO). In this context, according to the legislative materials, the term "financial creditors" should be seen broadly. It includes all claims with a financing character, i.e. typically interest-bearing claims, claims arising from bonds and other comparable instruments and even claims of suppliers with untypically long payment terms (more than 180 days).[77] Often the debtor will try to reach an out-of-court agreement with such creditors. However, this attempt may already fail due to the lack of consent of a single creditor or a minority.

Simplified proceedings, which some consider to have great practical potential,[78] are designed for such cases.[79] If the debtor manages to present a restructuring agreement that is supported by a majority of the affected financial creditors (at least 75 % of the total amount of claims in each creditor class, § 45 para. 3 (3) ReO), this agreement may be confirmed by the court so that it has the same effect as a restructuring plan (§ 45 para. 7 ReO). After hearing the affected creditors, the court decides on the confirmation of the restructuring agreement without holding a formal session on this issue (§ 45 para. 1 ReO).[80] To this purpose, in addition to the restructuring agreement, the debtor must *inter alia* also submit the opinion of an expert confirming the fulfilment of the essential requirements such as the satisfaction of the best-interest-of-creditors test (§ 45 para. 8 (3) ReO). The confirmation of the plan may be challenged by appeal of the dissenting affected creditors (§ 40 ReO).[81]

8. Conclusion

Overall, the conclusion is just as ambivalent as the introduction. While the ReO contains some quite progressive approaches like the implementation of a relative priority rule or the possibility of simplified proceedings, it remains rather conservative at the same time.

[71] Accessible online under edikte.justiz.gv.at.
[72] F. Mohr (Fn. 19) 94; R. Weber-Wilfert, 'Das Europäische Restrukturierungsverfahren' in A. Konecny (ed.), ZIK Spezial: RIRUG (LexisNexis 2021) 173, 179 ff.
[73] See T. Pogoda and Ch. Thole, 'The new German "Stabilisation and Restructuring Framework for Businesses"' [2021] European Insolvency and Restructuring Journal (EIRJ) 6, sec. 7.
[74] St. Riel (fn. 5) 384.
[75] See above, 5.1.
[76] Cf. R. Weber-Wilfert (fn. 72) 177 ff.
[77] Explanatory Remarks (fn. 9) 24 f.
[78] E. Ringelspacher and M. Nitsche (fn. 4) 483; M. Simsa and Ph. Kalser (fn. 41) 647; on the numerous questions left open cf. St. Riel (fn. 5) 384.
[79] Explanatory remarks (fn. 9) 24.
[80] Cf. W. Höller, M. Simsa and Ph. Wetter, 'Das vereinfachte Restrukturierungsverfahren' in A. Konecny (ed.), ZIK Spezial: RIRUG (LexisNexis 2021) 187, 197 ff.
[81] W. Höller, M. Simsa and Ph. Wetter (fn. 80) 200.

The court is strongly involved; there are exceptions to the principle of a debtor in possession and other reasons for the appointment of a restructuring practitioner; only measures to reduce and defer claims are available to the debtor, other interventions in contracts or a reorganization of the debtor's shareholder structure are not possible; proceedings are largely oriented towards insolvency law. Therefore, proceedings under the ReO have already been aptly referred to as a "light version" of insolvency law's recovery possibilities.[82]

In addition, the ReO is relatively short[83] and inevitably leaves many questions unanswered. Consequently, it is widely doubted whether the new restructuring option will establish itself or whether the ReO will meet the same fate as the "dead" URG that never was able to set foot.[84] In any case, the legal discourse is still at the very beginning. Although it may be unlikely that the ReO will become a new "Austrian success story", it remains to be seen for which areas the new proceedings can be made practical after all.[85] From an international perspective, however, Austria will probably not place itself as a popular forum for restructuring.[86]

[82] Ph. Fidler, 'Die ReO tritt in Kraft: Doch nur ein "Sanierungsverfahren light"?' [2021] ZFR 313.
[83] It consists of 50 paragraphs, whereas e.g. the German StaRUG is twice as long (102 paragraphs).
[84] Cf. F. Mohr (fn. 19) 94.
[85] Cf. A. Isola, St. Weileder and D. Seidl (fn. 62) 32.
[86] On the international competition of jurisdictions in the context of restructuring recently J.-Ph. Hoos, D. Schwartz and H. Schlander, 'Handlungsoptionen für Unternehmen – Internationale Zuständigkeit und Anerkennung von präventiven Restrukturierungsverfahren' [2021] Zeitschrift für Wirtschaftsrecht (ZIP) 2214.