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The Austrian Restructuring Code (ReO)

Marcus Benes, Partner, and **Karoline Hofmann**, Attorney, E+H Rechtsanwälte GmbH, Vienna, Austria

Synopsis

With the Restructuring and Insolvency Directive Implementation Act (RIRUG)[1], which entered into force on 17 July 2021, the Austrian legislator transposed the Directive (EU) 2019/1023 on restructuring and insolvency (Restructuring Directive)[2] into Austrian national law. The core part of the RIRUG is the introduction of the new Restructuring Code (*Restrukturierungsordnung – ReO*), providing for a pre-insolvency restructuring proceeding that allows debt relief by way of creditor majority decisions. Prior to the ReO, pre-insolvency debt relief required the consent of all affected creditors under Austrian law.

Under the ReO, companies in financial distress may avert insolvency by initiating a restructuring proceeding and securing the company's economic viability. The debtor may present a restructuring plan to certain (or all) of its creditors, which can be adopted by majority vote. The creditors are voting in classes, with a head-count majority and a 75% majority of claims being required in each creditor class. Under particular circumstances, a cross-class cramdown is possible. In general, the restructuring proceeding is not publicly published and therefore reduces reputational damage on the debtor. In contrast thereto, Austrian insolvency proceedings are published in the online insolvency edicts database (*Insolvenz-Ediktsdatei*). As a result, the new law intends to preserve jobs, restructure non-performing loans and promote the economy by averting insolvency.[3]

In addition to the general restructuring proceeding, the ReO provides for two special proceedings: (1) the European restructuring proceeding, which is published in the Austrian edicts database (*Ediktsdatei*) and is recognised under the Regulation (EU) 2015/848 (European Insolvency Regulation); and (2) the simplified restructuring proceeding, which allows for a speedier proceeding involving only financial creditors.

This article shall provide a brief overview on the main aspects of the new ReO.

Initiation upon the debtor's request

The restructuring proceeding can be initiated upon application of the debtor, while creditor applications are not permissible. The debtor must be an entrepreneur. Natural persons who are not entrepreneurs and certain financial institutions are explicitly excluded from its scope of application.[4]

Furthermore, the debtor may only initiate restructuring proceedings if there is a likelihood of the debtor's insolvency (*wahrscheinliche Insolvenz*).[5] This is the case if the existence of the company is at risk (in particular in the event of imminent illiquidity (*drohende Zahlungsunfähigkeit*)) and is presumed if (i) the debtor's equity ratio is below 8% and (ii) the debtor's notional debt repayment period is more than 15 years.[6] If insolvency proceedings are currently pending or a restructuring or reorganisation plan has been confirmed within the last seven years, the debtor is barred from initiating a restructuring proceeding.[7] In the event of a conviction under § 163a of the Criminal Code (addressing unjustifiable misrepresentations of substantial company information) within the last three years, additional initiation requirements apply.[8]

Employee claims, fines for criminal offences and claims coming into existence after the initiation of the

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1 Federal Act creating a Federal Act on the restructuring of companies to transpose the Directive on restructuring and insolvency and amending the Insolvency Act, the Court Fees Act, the Federal Law on the Collection of Court Fees Act, the Lawyers' Fees Act and the Enforcement Act, federal law gazette I no. 147/2021.

2 Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 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.

3 Explanatory remarks to the government bill 950 BlgNR XXVII. GP, 1.

4 § 2 para. 1 ReO.

5 § 6 para. 1 ReO.

6 § 6 para. 2 ReO.

7 § 6 para. 3 ReO.

8 § 6 para. 4 ReO.

restructuring proceeding are exempted from the restructuring proceeding.[9]

The restructuring plan

The filing for the initiation of a restructuring proceeding shall be accompanied by a restructuring plan or (at least) a restructuring concept. If only a restructuring concept is submitted together with the application, the debtor shall submit the restructuring plan within a period of not more than 60 days set by the court.[10]

The restructuring concept contains the planned restructuring measures and a list of the debtor's assets (including their valuation) and liabilities.[11] The content of the restructuring plan includes inter alia:[12]

- a description of the debtor's economic situation, including a list of the debtor's assets and liabilities (including a valuation of the business on a going concern basis and based on liquidation values)
- a list of the affected creditors and their claims
- the creditor classes, the aggregate claim amounts in each creditor class and the assignment of creditors to the respective creditor class
- a list or description of creditors that are not affected by the restructuring plan (including an explanation)
- the terms of the restructuring plan, in particular the proposed restructuring measures and their duration, a financial plan and any new financing
- a (conditional) going concern forecast, setting out the reasons why the restructuring plan will prevent insolvency and the occurrence of over-indebtedness and ensure the company's ability to continue as a going concern
- a comparison with the scenarios of the Austrian Insolvency Code

It is not mandatory to include all creditors in the restructuring proceeding: the debtor may select the affected creditors, whereas the debtor must explain why certain creditors are not included.

The following restructuring measures can be implemented by way of majority vote and court confirmation on the restructuring plan: changes of the tenor of creditor claims, deferrals and claim reductions (cram-down).[13] The restructuring plan under the ReO does not require the debtor to offer a minimum quota. In contrast thereto, restructuring plans in insolvency proceedings under the Insolvency Code require minimum quotas of 20-30%, depending on the type of insolvency proceedings.[14] The restructuring plan may also extend to secured creditors' claims, however they are protected against a claim reduction (cram-down) that would not apply to them in insolvency proceedings by the best-interest-of-creditors test (see below).

Debtor in possession concept

In the restructuring proceeding, the general rule is that the debtor remains in control (debtor in possession). This is intended to provide the debtor with an incentive to apply for preventive restructuring proceedings at an early stage.[15] However, the court may restrict self-administration if this is necessary to safeguard the interests of creditors. Under certain circumstances, the court may appoint a restructuring officer.[16] This is mandatory, for example, if self-administration is expected to be detrimental to creditors or a cross-class cram-down is required.[17] The restructuring officer must be independent of the creditors and the debtor and must be selected and appointed based on sufficient expertise. His tasks are determined by the court and may range from merely assisting the debtor in the negotiation of the restructuring plan to taking partial control over the debtor's assets and business.[18] The costs of the restructuring officer shall be borne by the debtor. If the restructuring officer has been appointed at the request of the creditors, the latter shall bear the costs.

Protection of fresh money

At the debtor's request, the court shall approve new financial support provided by an existing creditor or a new creditor if it is reasonable as well as immediately necessary for the debtor's business to continue its operation or for the value of such business to be maintained or increased ('interim financing'). In addition, the court shall approve transactions (such as payment of fees and costs for the preparation of a restructuring

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9 § 3 para. 1 ReO.
10 § 8 para. 2 ReO.
11 § 8 para. 1 ReO.
12 § 27 ReO.
13 § 28 ReO.
14 § 141 para. 1 IO, § 169 para. 1 Z 1 IO.
15 § 16 ReO; explanatory remarks to the government bill 950 BlgNR XXVII. GP, 7.
16 § 9 ReO.
17 § 9 para. 1 and 2 ReO.
18 § 14 ReO.

plan, professional advice and certain employee claims) at the debtor's request if they are reasonable and immediately necessary for the negotiation of a restructuring plan.[19]

New financial support provided by an existing creditor or a new creditor in connection with a restructuring pursuant to the ReO for the implementation of a restructuring plan and contained in such restructuring plan, is referred to as 'new financing' under the ReO and the Insolvency Code.

In case of a subsequent insolvency proceeding over the debtor's assets, in particular the following avoidance protection applies regarding interim financing, new financing and transactions:

a) Court-approved interim financing and new financing pursuant to a restructuring plan that has been confirmed by the court are protected from avoidance based on the grounds that such financing constitutes an indirectly disadvantageous transaction[20] if the other party was not aware of the debtor's insolvency.[21]

b) Court-approved transactions during a restructuring proceeding are protected from avoidance based on knowledge of the debtor's insolvency[22] if the other party was not aware of the debtor's insolvency; in addition, payments of fees and costs for the preparation of a restructuring plan and professional advice within 14 days prior to the initiation of the restructuring proceeding are protected.[23]

The new avoidance restrictions can be summarised as a partial protection of certain court-approved measures in the restructuring proceeding. While these measures can still be challenged by an insolvency administrator based on other avoidance grounds, the new law provides a limited level of protection that is currently not available for comparable financing and transactions in a restructuring outside of restructuring proceedings. However, the new provisions in the Insolvency Code and the ReO do not provide for a super senior ranking of new financing or interim financing.[24]

Stay of enforcement and its effects

The debtor may request that the court impose a stay of enforcement (*Vollstreckungssperre*). The court may reject such request if a stay of enforcement is not necessary for reaching the restructuring objective, if it cannot support the negotiations regarding the restructuring plan or if the debtor is illiquid. The duration of the stay of enforcement is determined by the time required to achieve the restructuring objective. This duration is limited to a maximum of three months (and may be extended by court order to an aggregate maximum of six months).[25] During this period, filings for the granting of enforcement actions relating to the debtor's assets may not be granted and no judicial pledge or satisfaction right may be acquired.[26] Furthermore, out-of-court enforcements into moveable or immoveable assets are suspended.[27] The stay of enforcement may extend to all types of claims, even secured claims, and apply to certain creditors (creditor classes). Even creditors that would be entitled to preferential satisfaction or segregation rights in the debtor's insolvency may be affected under certain conditions.[28] The stay of enforcement becomes effective upon delivery of the court decision to the respective creditor.[29]

Creditors covered by the stay of enforcement who have entered into an essential contract with the debtor that is still to be fulfilled when the stay of enforcement is granted, are subject to termination restrictions: they are not entitled to refuse their performance, to declare the contract due and payable, and to terminate or modify the contract to the detriment of the debtor based on payments existent prior to the stay of enforcement being overdue.[30] Corresponding contractual provisions that refer to the restructuring proceeding as termination event are not legally valid and binding.[31] Essential contracts are contracts that are necessary for the continuation of the day-to-day operations of the debtor's business.[32] However, this restriction does not apply to claims for the disbursement of loans.[33]

While the ReO restricts the termination rights of the debtor's counterpart, it does not provide for special termination rights that can be exercised by the debtor. In

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19 § 18 ReO.
20 § 31 para. 1 item 3 of the Insolvency Code.
21 § 36a of the Insolvency Code.
22 § 31 of the Insolvency Code.
23 § 36b of the Insolvency Code.
24 Explanatory remarks to the government bill 950 BlgNR XXVII. GP, 26.
25 § 22 ReO.
26 § 19 ReO.
27 § 20 para. 2 ReO.
28 § 20 ReO.
29 § 21 para. 2 ReO.
30 § 26 para. 1 ReO.
31 § 26 para. 3 ReO.
32 § 26 para. 2 ReO.
33 § 26 para. 5 ReO.

contrast thereto, in insolvency proceedings the debtor / insolvency administrator may prematurely terminate certain agreements (inter alia, employment contracts, lease agreements and contracts that have not been fulfilled by both parties yet).

For the duration of the stay of enforcement, the debtor's obligation to file for insolvency based on over-indebtedness is suspended.[34] Accordingly, the management's liability for payments made in the status of over-indebtedness is suspended.[35] Furthermore, creditor filings for the opening of insolvency proceedings shall not be granted during this period.[36] If the debtor is illiquid, insolvency proceedings shall be opened unless the opening of insolvency proceedings is not in line with the general interests of the creditors.[37]

Head count majority and 75 % capital majority in each creditor class

In the restructuring plan, the debtor must form five creditor classes (secured creditors, unsecured creditors (including *Schuldscheine*), bondholders, creditors requiring protection and creditors of subordinated claims).[38] This obligation does not apply to SMEs as debtors.[39] In order to adopt the restructuring plan, each creditor class must obtain the approval of the majority of the affected creditors present at the restructuring plan hearing (head count majority) and at least 75% of the total amount of their claims (capital majority).[40] The adopted restructuring plan must subsequently be confirmed by the court. Confirmation requires, among other things, that the creditors of each class are treated equally in relation to their claims. Upon request, the court shall examine whether the restructuring plan satisfies the best-interest-of-creditors test. This requirement is met if no dissenting creditor is worse off under the restructuring plan than in insolvency proceedings under the Insolvency Code (next best alternative scenario).[41]

If the restructuring plan is not accepted by every creditor class, the restructuring plan may nevertheless be confirmed by the court (so-called 'cross-class cramdown'): This requires that dissenting voting classes are treated at least as favourably as any other class of the same rank and more favourably than any junior class. In addition, a majority of the creditor classes, including the class of secured creditors, or a majority of in-the-money creditor classes must have accepted the restructuring plan.[42]

The confirmed restructuring plan is binding on all affected creditors. The legal effects result from the content of the restructuring plan. In particular, claims may be deferred or reduced.[43] Other contractual adjustments and contract terminations are not facilitated by the ReO and require an agreement with the affected creditors.

Restructuring contribution of shareholders?

Under the Restructuring Directive, member states may choose to exclude equity holders from the effects of the restructuring plan.[44] The ReO does not require a restructuring contribution by the debtor's shareholders; thus, corporate law restructuring measures affecting the shareholders' position (e.g. debt-equity-swaps) require an agreement with all affected shareholders under Austrian law.

Shareholders may not prevent or impede the adoption, confirmation and implementation of a restructuring plan without cause. Necessary shareholder approvals required for the intended restructuring measures shall be obtained, but can be replaced by court decision if the shareholders' legal or economic interests are not affected.[45]

Conclusion of restructuring proceedings

The creditor or debtor may appeal against the confirmation or refusal of the restructuring plan.[46] The appeal generally does not have a suspensive effect, however, such effect may be granted upon request.[47] If the appeal court upholds the appeal, it may either (i) annul the confirmation of the restructuring plan or (ii) in accordance with the common interests of the creditors, uphold the confirmation.

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34 § 24 para. 1 ReO.
35 § 25 ReO.
36 § 24 para. 2 ReO.
37 § 24 para. 3 ReO.
38 § 29 para. 1 ReO.
39 § 29 para. 3 ReO.
40 § 33 para. 1 ReO.
41 § 35 para. 2 ReO.
42 § 36 para. 2 ReO.
43 § 39 para. 1 ReO.
44 See Art 2 para. 1 item 2, Art 9 and Art 12 of the Restructuring Directive.
45 § 37 para. 1 ReO.
46 § 40 para. 1 ReO.
47 § 40 para. 3 ReO.

Once the confirmation of the restructuring plan becomes legally effective, the restructuring proceeding is concluded.

However, the proceedings shall be terminated prematurely if the restructuring plan is not submitted in due time or the petition for acceptance of the restructuring plan is withdrawn by the debtor. The persistent breach of obligations by the debtor to cooperate and provide information as well as the opening of insolvency proceedings over the debtor's assets may also lead to the termination of the restructuring proceeding.

Special types of proceedings

European restructuring proceeding

Upon the debtor's request (prior to or together with the filing for the initiation of the restructuring proceeding), the initiation of the restructuring proceeding is published as a 'European Restructuring Proceeding' in the online edicts database. Once the restructuring proceeding has been initiated, a change in the form of the proceeding is not permissible any more;[48] therefore, debtors should assess carefully whether recognition of their restructuring proceeding in other EU member states may be required. Pursuant to Regulation (EU) 2021/2260 amending the Insolvency Regulation, the European Restructuring Proceeding under the ReO has been included in Annex A of the Insolvency Regulation and as such will be recognised in the other EU member states. Any stay of enforcement ordered in the European restructuring proceeding may cover all creditors (general stay of enforcement), whereas in a regular restructuring proceeding the stay of enforcement may only relate to certain creditors.[49]

Simplified restructuring proceeding

In addition to the European restructuring proceeding, it is also possible to initiate a simplified restructuring proceeding with financial creditors.[50] This proceeding is particularly relevant in cases where an out-of-court restructuring agreement between the debtor and the financial creditors fails due to a single creditor or a minority of creditors (hold-out creditor).[51] The lack of consent of a hold-out creditor is replaced by the court's confirmation after hearing the affected creditors. In the simplified restructuring proceeding, no formal restructuring proceeding is initiated and there is no vote on the acceptance of the restructuring plan. The initiation of a simplified restructuring proceeding requires that:

- only financial creditors are affected creditors
- a written consent of a majority of at least 75 % of the total amount of claims in each creditor class (capital majority) has already been obtained (no head count majority required)
- the debtor and the consenting creditors have already signed the restructuring agreement at the time of the filing (sort of pre-pack).

Along with the petition for initiation of a simplified restructuring proceeding the debtor shall submit a confirmation by a court-certified expert verifying that the designation of the creditor classes into secured and unsecured claims has been made taking into account the fair market value of the collateral, the creditors in the same class are treated equally in relation to their claims and, in case new financing is required for the implementation of the restructuring plan, such financing does not unreasonably prejudice the interests of the creditors. In addition, the expert shall certify that the best-interests-of-creditors test is satisfied and that the restructuring agreement prevents the debtor's illiquidity as well as the occurrence of over-indebtedness or that the agreement eliminates over-indebtedness that has already occurred and ensures the viability of the company.[52] In any simplified restructuring proceeding, the debtor's self-administration remains intact and is not subject to any restrictions. No restructuring officer shall be appointed; however, no stay of enforcement is imposed.[53] The simplified restructuring proceeding may be initiated as a European Restructuring Proceeding upon the debtor's request.[54]

Conclusion

It remains to be seen how the new ReO will be applied in Austrian restructuring practice. So far, no European restructuring proceedings have been published in the Austrian online edicts database, which may be due to the required high capital majority (75%) and the initial lack of recognition within the EU (as noted above, this has changed recently). As regards regular restructuring proceedings, there is no publicly available

Notes

48 *Reisch*, Das neue Restrukturierungsverfahren, taxlex 2021/78 (364).
49 § 44 para. 3 ReO.
50 § 45 ReO.
51 Explanatory remarks to the government bill 950 BlgNR XXVII. GP, 24.
52 § 45 para. 8 item 3 ReO; explanatory remarks to the government bill 950 BlgNR XXVII. GP, 25.
53 § 45 para. 5 and 6 ReO.
54 *Reisch*, Das neue Restrukturierungsverfahren, taxlex 2021/78 (364).

information since their initiation is not published in the online edicts database.

We believe that due to the complex structure of the restructuring proceeding and the necessary extensive preparation work, the ReO will rather be used by larger debtors. In any case, the debtor's possibility to enter into a restructuring proceeding with majority decisions will incentivise creditors to agree on out-of-court restructuring measures. Furthermore, we see potential for the simplified restructuring proceeding in cases of financial restructurings where hold-out creditors reject an out-of-court restructuring against a majority of consenting lenders.