Global Restructuring and Insolvency Guide - Austria

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*This content was last reviewed around October 2021.*

**Remark:** Austria is a member of the European Union. Please refer to the section "European Union" under Quick Links below to learn more about the implications with respect to the European rules that apply in the field of restructuring and insolvency. Austria has implemented the European Restructuring Directive in a law called (ReO,) which entered into force in July 2021. Please see below in "Restructuring regime under ReO" for more details.

# Initial Considerations

## Can you take security over all types of assets, including accounts receivable?

**Regular insolvency proceedings**

Austrian law allows security to be taken over any kind of property. This includes physical objects as well as rights, claims or receivables. However, certain requirements need to be met to create a security interest effectively. One of those requirements says that the assets to be taken as security must be specified to be identifiable. Referring to "working capital" as such would not be specific enough.

**Restructuring regime under European Restructuring Directive (ReO)**

Within the restructuring regime under the ReO, the same fundamental principles of Austrian security law apply.

## What is the nature of the insolvency process?

**Regular insolvency proceedings**

General and procedural rules on insolvency proceedings are set forth in the Austrian Insolvency Code (Insolvenzordnung — IO).

Typically, a court-appointed administrator controls the debtor's assets. However, in some cases, the debtor may retain control over its assets but would be supervised by an administrator (debtor in possession).

Insolvency proceedings aim to limit the creditors' losses in the event of insolvency. Relatively early on, the administrator will be required to assess whether the debtor's business operations can be continued or should be shut down. Any obligations coming into existence after the opening of the proceedings have priority over the claims of existing creditors (e.g., rent and utilities), which has to be considered when deciding whether or not to continue the business operations.

As an alternative to the liquidation of the debtor's assets, the debtor can propose a restructuring plan (Sanierungsplan) to the creditors, according to which the debtor would pay a minimum of 20% of the outstanding debt within two years, while any debt exceeding the quota offered in the plan would be absolved. If a restructuring plan is proposed upon the initiation of the proceedings, they are referred to as restructuring proceedings (Sanierungsverfahren).

The restructuring plan needs to be accepted by the creditors and the court. The creditors are represented in two institutions during the proceedings:

Creditors' committee (Gläubigerausschuss): This consists of three to seven court-appointed members. Approval is required for the disposal of certain assets and a regular decision requires a simple majority of votes.

Creditors' meeting: Any creditor whose claims have been accepted may participate in the meeting. The decision requires the approval of creditors representing a simple majority of claims accepted by the administrator and special majority requirements apply to the approval of a restructuring plan (a simple majority of creditors present in a meeting, representing more than 50% of accepted claims).

If no restructuring plan is proposed or accepted, the administrator will aim to liquidate the existing assets and distribute the proceeds to the creditors. Depending on the net proceeds (after priority claims, including the costs of the proceedings, have been paid), all creditors will receive a certain percentage of their accepted claims.

**Restructuring regime under European Restructuring Directive (ReO)**

The preventive restructuring framework ("Framework") introduced by the ReO aims at facilitating restructuring efforts of debtors, which are likely to become insolvent, but without the necessity to initiate formal (and public) insolvency proceedings. The core element of the Framework is the introduction of a new pre-insolvency procedure for the preventive restructuring of companies in financial difficulties (so-called "restructuring procedure" — Restrukturierungsverfahren).

During a Restructuring Procedure, the debtor remains in charge of the business. A court-appointed restructuring professional (Restrukturierungsbeauftragter) is only involved on the application of the debtor or in sensitive cases (e.g., if a debtor in possession leads to disadvantages for the creditors or if it is foreseeable that the restructuring objective can only be achieved by way of a cross-class cramdown).

The Framework provides for a number of restructuring measures that are to be used by the debtor in its own discretion during the Restructuring Procedure, such as the restructuring plan, a court-ordered enforcement stay ("moratorium"), and new financial support provided by an existing creditor or a new creditor subject to prior court approval (so-called interim financing). Additionally, the debtor can apply for a simplified restructuring procedure when only financial creditors are affected and a broad majority of the financial creditors have already approved the Restructuring Plan.

## What is the solvency requirement for a company to file a case in this jurisdiction?

**Regular insolvency proceedings**

Insolvency proceedings can be initiated if at least one of the following two requirements is met:

Illiquidity: A debtor is unable to meet due payment obligations.

Over-indebtedness:

A debtor's debt exceeds the value of its assets.

There is no positive outlook for the debtor's continued existence.

The debtor (and only the debtor) can further request the initiation of insolvency proceedings as restructuring proceedings if a case of imminent illiquidity (drohende Zahlungsunfähigkeit) is given (meaning that the debtor is still able to meet payment obligations but has reason to believe that this might change).

**Restructuring regime under European Restructuring Directive (ReO)**

**Restructuring requirement**

Likelihood of insolvency is required, meaning that the existence of the debtor would be threatened without restructuring, particularly in case of imminent illiquidity.

Likelihood of insolvency is in particular presumed if: (i) the debtor is facing imminent illiquidity; or (ii) the debt-to-equity ratio falls below 8% and the national debt amortization period exceeds 15 years.

## Is there a requirement to demonstrate COMI ("centre of main interests") for a company to file a case in this country?

**Regular insolvency proceedings**

Yes. Austria is a Member State of the European Union, and accordingly, the EU Insolvency Regulation applies. This means that Austrian courts only have jurisdiction in insolvency proceedings of debtors whose COMI is located in Austria.

**Restructuring regime under European Restructuring Directive (ReO)**

Yes, in line with the procedural rules of an insolvency proceeding.

## Is restructuring of both secured and unsecured claims possible?

**Regular insolvency proceedings**

No, secured claims are not affected by a restructuring plan. Unsecured claims may be partially written down or postponed as a result of a restructuring plan. To the extent that the relevant security does not cover secured claims, they are treated as unsecured claims and may be affected by the restructuring plan.

**Restructuring regime under European Restructuring Directive (ReO)**

Yes, but creditors of secured claims may not be treated worse than during an insolvency proceeding under the IO.

## Are the claims of creditors and shareholders put into separate classes for purposes of voting and treatment under the plan or scheme?

**Regular insolvency proceedings**

Yes. First, there is a differentiation between regular creditors of the debtor (Insolvenzgläubiger) and creditors of the estate (Massegläubiger). Creditors of the estate have preferential claims, including the costs of the proceedings, employee wages for the period subsequent to the opening of the proceedings, employees' claims for separation benefits and claims based on actions taken by the administrator after the opening of the proceedings. Distributions to other creditors are only possible once all such claims are satisfied.

The regular creditors can again be classified as follows:

Secured creditors, including:

Creditors with a right to segregation of assets from the estate

Creditors with a right to preferred satisfaction of claims

Unsecured creditors

Claims of shareholder creditors (for example, creditors under shareholder loans) are classified as lower ranking than other creditors' claims.

**Restructuring regime under European Restructuring Directive (ReO)**

Save for SMEs undergoing a Restructuring Procedure, a debtor must categorize its creditors whose claims are to be reduced or deferred and must categorize them into the following **creditor classes**:

Secured creditors (only up to the amount that is covered by the collateral)

Unsecured creditors

Bond creditors

Creditors in need of protection (claims under EUR 10,000)

Subordinated creditors

Creditors within the same creditor class have to be treated equally in relation to their claims. The restructuring plan has to be accepted within every creditor class (with the exception of a cramdown).

## Is shareholder approval needed to commence a case? Are shareholders entitled to vote on a plan?

**Regular insolvency proceedings**

No, the commencement of insolvency proceedings does not require shareholder approval. However, a restructuring plan needs to be proposed by the debtor, which the shareholders control. If the debtor is a partnership, every partner's approval of the restructuring plan is required.

**Restructuring regime under European Restructuring Directive (ReO)**

Generally, given that shareholders do not form a separate creditor class, there is no direct involvement of the shareholders in the process unless required by the constitutional documents of the debtor. However, if the restructuring plan does not affect shareholders, a consent requirement stipulated in the constitutional documents may be overruled by a decision of the restructuring court (Section 37 ReO).

## Is there an ability to bind minority dissenting creditors (i.e., cramdown)?

**Regular insolvency proceedings**

Minority creditors are bound by decisions taken by the relevant majority of creditors.

**Restructuring regime under European Restructuring Directive (ReO)**

**Restructuring plan:**

Yes, if the restructuring plan is court-approved.

75% majority decisions within every class of creditors are possible.

Furthermore, there is a possibility of simple majority decisions between different creditor classes (so-called "cross-class cram down"), if

Rejected classes of creditors are treated the same as equal classes and better than subordinated classes.

No class of creditors receives more than the full amount of its claims.

A simple majority of the classes have approved the plan.

However, a rejecting creditor who is in a less favorable position compared to an insolvency proceeding can still object to the plan. This is particularly relevant for secured creditors (Section 35 ReO).

If the restructuring plan is not court-approved, it has a binding effect only on consenting creditors.

# Commencing the Process

## Who can commence?

**Regular insolvency proceedings**

The initiation of insolvency proceedings can be requested by:

The debtor (represented by its management)

Any creditor. In the event of imminent illiquidity, only the debtor can initiate restructuring proceedings.

The competent insolvency court reviews the case and opens insolvency proceedings if it has reason to believe that the insolvency requirements are met.

**Restructuring regime under European Restructuring Directive (ReO)**

Only the debtor.

## Is shareholder's consent required to commence proceeding?

**Regular insolvency proceedings**

No

**Restructuring regime under European Restructuring Directive (ReO)**

No

## Is there an ability to consolidate group estates?

**Regular insolvency proceedings**

No, insolvency proceedings for each legal entity are formally independent. However, in the event that related entities are subject to insolvency proceedings, the administrators may cooperate to a certain degree. Each administrator is required to act in the best interest of the creditors of their estate.

**Restructuring regime under European Restructuring Directive (ReO)**

No, restructuring procedures for each legal entity are formally independent.

## Is there any court involvement?

**Regular insolvency proceedings**

Yes, the court decides whether the debtor is insolvent and can open proceedings.

After the initiation of the proceedings, the court takes a supervising function. The court's approval is required for certain actions, including the disposal of certain assets and a potential restructuring plan.

**Restructuring regime under European Restructuring Directive (ReO)**

Yes; however, the scope and intensity of court involvement depend on the restructuring measure chosen by the debtor. The court is involved in particular in the following cases:

In case the debtor applies for some or all of the optional instruments of the restructuring framework (i.e., restructuring plan approval procedure, a preliminary judicial examination of issues relevant to the confirmation of the restructuring plan (preliminary examination), plan confirmation)

In case the debtor applies for the appointment of an optional restructuring professional

In case the appointment of a restructuring professional is mandatory

## Who manages the debtor?

**Regular insolvency proceedings**

Typically, the debtor is managed by a court-appointed administrator. The administrator is usually an attorney.

The debtor can, however, request to retain management control. If such request is granted, which is often the case if there is a chance for the debtor to continue and if an appropriate restructuring plan is provided, the debtor's management stays in control. An administrator is appointed in a supervisory function.

The administrator's approval is required for extraordinary transactions. The administrator may only take certain decisions. Such decisions include decisions on the avoidance of transactions and the review of creditors' claims.

**Restructuring regime under European Restructuring Directive (ReO)**

Generally, management retains control of the debtor's assets (debtor in possession). However, in most cases of a mandatory appointment of a restructuring professional by the restructuring court (i.e., if a debtor in possession leads to disadvantages for the creditors or if it is foreseeable that the restructuring objective can only be achieved by way of a cross-class cramdown), the restructuring court may order restrictions.

## What is level of disclosure of process to voting creditors?

**Regular insolvency proceedings**

The creditors' committee is required to supervise the administrator's or the debtor's activities and has a high level of access. The creditors' committee is further required to audit the estate's books under certain circumstances.

The creditors' meeting only has limited day-to-day access to the estate. Prior to deciding on the restructuring plan, the creditors do have access to the plan, which typically includes information on the debtor's financial situation.

**Restructuring regime under European Restructuring Directive (ReO)**

The restructuring plan addressed to all parties affected by the plan must particularly include the following:

The complete restructuring plan, together with annexes

The conditions of the plan

The restructuring plan offered must indicate with which claims or rights the affected party is included in the restructuring plan, to which groups the plan is assigned, and which voting rights the claims and rights grant.

## What entities are excluded from customary insolvency or reorganisation proceedings, and what legislation applies to them?

**Regular insolvency proceedings**

Special insolvency rules apply to banks and securities firms, subject to the rules set out in the Act on Bank Recovery and Resolution (BaSAG) implementing the EU Bank Recovery and Resolution Directive (BRRD).

**Restructuring regime under European Restructuring Directive (ReO)**

Natural persons who are not entrepreneurially active, as well as entities from the banking, financial and insurance sector, are excluded from the scope of the ReO.

## How long does it generally take for a creditor to commence the procedure?

**Regular insolvency proceedings**

How long it takes creditors to commence insolvency proceedings is heavily dependent on the specifics of each case. However, the debtor's management is typically quick to initiate proceedings since insolvent trading is a criminal offense and can lead to the managers being personally liable.

Once insolvency is reported to the competent court, the court is usually quick to issue its decision and open the proceedings. The court does not have to perform a full review on whether the debtor is insolvent but may open proceedings if it has reasons to believe that the debtor is insolvent.

**Restructuring regime under European Restructuring Directive (ReO)**

N/A, due to lack of empirical value, the law just recently entered into force.

# Effect of Process

## Does debtor remain in possession with continuation of incumbent management control?

**Regular insolvency proceedings**

Management control over the debtor is typically transferred to a court-appointed administrator. However, under certain circumstances, the debtor can request that its management remains in control. Among others, the following requirements need to be met:

A restructuring plan offering a quota exceeding 30% needs to be offered.

An exact list of assets needs to be provided.

A cash flow prognosis for the next 90 days needs to be provided.

The debtor needs to lay out how it intends to fulfill the restructuring plan and what measures it intends to take.

**Restructuring regime under European Restructuring Directive (ReO)**

Generally, management retains control of the debtor's assets (debtor in possession). However, in most cases of a mandatory appointment of a restructuring professional by the restructuring court (i.e., the court suspends foreclosure or if it is foreseeable that the restructuring objective can only be achieved by way of a cross-class cramdown), the restructuring court may order restrictions.

## What is the stay/moratorium regime (if any)? Is the stay or moratorium worldwide?

**Regular insolvency proceedings**

All ongoing court proceedings and foreclosure or collection activities against the debtor are to be suspended.

The court can order a stay on the enforcement of certain security rights if such enforcement would be detrimental to the estate's financial and economic situation.

**Restructuring regime under European Restructuring Directive (ReO)**

Upon request of the debtor, the court can order a stay on the enforcement actions (Vollstreckungssperre). A filing for such a moratorium may be made at the same time as filing for the commencement of the Restructuring Procedure. Creditors may not terminate material contracts during the term of the moratorium. The moratorium, which can be extended to different creditor classes, generally may not exceed three months. However, upon request of the debtor, the moratorium may be extended to six months.

## Is there a provision for debtor in possession or rescuer financing or superpriority or priming financing?

**Regular insolvency proceedings**

No

**Restructuring regime under European Restructuring Directive (ReO)**

Yes, there is a provision in respect to financing granted to the debtor by existing or new creditors during the restructuring proceeding, which must be approved by the restructuring court (so-called bridge financing). Such financings can, in principle, not be challenged in case they have been laid down in the underlying restructuring plan.

## Can procedure be used to implement a debt-to-equity swap?

**Regular insolvency proceedings**

No, a debt-to-equity swap is generally not allowed under Austrian insolvency law.

**Restructuring regime under European Restructuring Directive (ReO)**

No, a debt-to-equity swap is generally not allowed.

## Are third party releases available?

**Regular insolvency proceedings**

The release of third-party debtors (including guarantors) requires the express consent of the relevant creditor (Section 151 IO).

**Restructuring regime under European Restructuring Directive (ReO)**

The release of third-party debtors (including guarantors) requires the express consent of the relevant creditor (Section 151 IO icw Section 39 para 4 ReO).

## Are the proceedings recognised abroad?

**Regular insolvency proceedings**

EU Member States recognize the proceedings on the basis of the EU Insolvency Regulation. The recognition by other countries may be based on domestic conflict-of-law provisions or principles or bilateral or multilateral agreements.

**Restructuring regime under European Restructuring Directive (ReO)**

Yes, it is based on European Insolvency Regulation (if public process) and/or Brussels I Regulation (if non-public).

## Has the UNCITRAL Model Law been adopted?

**Regular insolvency proceedings**

No

**Restructuring regime under European Restructuring Directive (ReO)**

No

## Can a debtor continue to carry on business during insolvency proceedings?

**Regular insolvency proceedings**

Shortly after the opening of the insolvency proceedings, the administrator will assess the debtor's situation and then decide whether the business is suitable for carrying on operations. If the administrator believes that carrying on operations is in the creditors' interest, they will do so. Otherwise, they will request the court's permission to shut down operations.

**Restructuring regime under European Restructuring Directive (ReO)**

Yes

# Other Factors

## Are there any wrongful or insolvent trading restrictions and what is the directors' liability?

**Regular insolvency proceedings**

Yes, Austrian law imposes both civil and criminal sanctions on the debtor's management's wrongful or insolvent trading activities.

Section 158 of the Austrian Criminal Code sets out criminal consequences for favoring certain creditors at the expense of others in an insolvency situation. This offense is punishable by up to two years in prison. Section 159 of the criminal code punishes the grossly negligent impairment of creditors' interest with prison sentences of one year.

**Restructuring regime under European Restructuring Directive (ReO)**

Same as in regular insolvency proceedings. However, certain modifications apply during restructuring proceedings (Section 24 ReO).

## What is the order of priority of claims?

**Regular insolvency proceedings**

Rights to segregation (Aussonderungsrechte):

If an asset does not belong to the estate, creditors can assert a right to segregation concerning that very asset. This concerns objects that are not the debtor's property (for example, leased assets or assets subject to a retention of title) but also assets confided to the debtor as a trustee.

Right of separation (Absonderungsrechte): especially secured creditors

Claims against the estate (Masseforderungen): Certain claims listed in Section 46 IO have priority over other claims. Such claims include the following:

The costs of the insolvency proceedings (including compensation for the administrator and creditor organizations)

Costs and expenses (including taxes and employees' wages) arising from actions taken or periods after the opening of the insolvency proceedings

Costs arising from the termination of employment (under certain circumstances)

Claims arising from existing contracts that the administrator stepped into after the opening of the proceedings

All claims based on actions taken by the administrator

Claims based on unjustified enrichment of the estate

**Restructuring regime under European Restructuring Directive (ReO)**

In practice, same as in insolvency proceedings, since the insolvency ranking needs to be reflected for the restructuring plan to pass the relevant comparison tests that apply if a creditor would challenge the restructuring plan (Kriterium des Gläubigerinteresses, Section 35 ReO).

## Do pension liabilities have any priority over other unsecured claims?

**Regular insolvency proceedings**

Company pension schemes constitute a supplement to statutory pensions. A company grants them on a voluntary basis. If the company pension is paid directly by the debtor (and not by a third party, such as an insurance company), the company can make no more pension payments. The pension will be partially covered by an entity established to ensure employee compensation in the event of insolvency.

To the extent that the said entity does not cover pension claims, they can be registered in the debtor's insolvency as claims against the debtor and are subject to the same procedure as any other claims.

**Restructuring regime under European Restructuring Directive (ReO)**

Same as in regular insolvency proceedings, noting that it is prohibited to reduce claims of current or former employees under the Restructuring Procedure.

## Is it possible to challenge prior transactions?

**Regular insolvency proceedings**

Yes, prior transactions can be challenged as a result of the basic principle that all creditors are treated equally in the debtor's insolvency proceedings. This means that prior transactions can be challenged for the following reasons:

Intention to discriminate against other creditors

Preferential treatment of one or more creditors

Transactions with no consideration

A counterparty's knowledge of the debtor's illiquidity or over-indebtedness

Dissipation of assets

The administrator may challenge transactions for the reasons above. Proceeds generated by such challenges increase the estate and will be used to satisfy the creditors' claims.

**Restructuring regime under European Restructuring Directive (ReO)**

Same as in regular insolvency proceedings. However, certain modifications apply for bridge financings approved by the restructuring court (Section 36a, Section 36b IO).

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