monograph

PREVENTIVE FORMS OF SOLVING IMPENDING INSOLVENCY

(TRANSPOSITION OF DIRECTIVE (EU) 2019/1023 ON RESTRUCTURING AND INSOLVENCY FROM A COMPARATIVE PERSPECTIVE)

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Preventive forms of solving impending insolvency (Transposition of Directive (EU) 2019/1023 on restructuring and insolvency from a comparative perspective)

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ABGB	(österreichisches) Allgemeines bürgerliches Gesetzbuch JGS Nr. 946/1811
AktG	(österreichisches) Bundesgesetz über Aktiengesellschaften BGBl. Nr. 98/1965
Directive on Restructuring and Insolvency / Directive	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
EKEG	Eigenkapitalersatz-gesetz (Bundesgesetz über Eigenkapital ersetzende Gesellschafterleistungen BGBl. I Nr. 92/2003)
GmbHG	(österreichisches) Gesetz vom 6. März 1906, über Gesellschaften mit beschränkter Haftung RGBl. Nr. 58/1906
IO	(österreichische) Insolvenzordnung RGBI 1914/337
InsO	(deutsche) Insolvenzordnung vom 5.10.1994 dBGBI I 2866
OBZ	zákon č. 513/ 1991 Zb. Obchodný zákonník/ Act No. 513/1991 Coll. Commercial Code

RIRUG	Restrukturierungs- und Insolvenz-Richtlinie-Umsetzungsgesetz (Bundesgesetz, mit dem zur Umsetzung der Richtlinie über Restrukturierung und Insolvenz ein Bundesgesetz über die Restrukturierung von Unternehmen geschaffen wird sowie die Insolvenzordnung, das Gerichtsgebührengesetz, das Gerichtliche Einbringungsgesetz, das Rechtsanwaltstarifgesetz und die Exekutionsordnung geändert werden BGBl I 2021/147)
ReO	Bundesgesetz über die Restrukturierung von Unternehmen (Restrukturierungsordnung) BGBl. I Nr. 147/2021
StGB	(österreichisches) Strafgesetzbuch BGBl. Nr. 60/1974
UGB	(österreichisches) Unternehmensgesetzbuch dRGBl. S 219/1897
URG	(österreichisches) Unternehmensreorganisations-gesetz BGBl. I Nr. 114/1997
ZKR	zákon č. 7/ 2005 Z. z. o konkurze a reštrukturalizácii a o zmene a doplnení niektorých zákonov/ Act No. 7/2005 Coll. on Bankruptcy and Restructuri
ZoPR	Zákon č. 284/2023 Sb. o preventivní restrukturalizaci
ZoRHÚ	zákon č. 111/ 2022 Z. z. o riešení hroziaceho úpadku a o zmene a doplnení niektorých zákonov

	Act No 111/2022 Coll. on the resolution of impending bankruptcy
ZPO	Zivilprozessordnung RGBl. Nr. 113/1895

INTRODUCTION

Preventive forms of bankruptcy resolution are remedial instruments, the aim of which in Slovak law is to rescue the debtor's business in economic difficulties, to overcome them and to enable it to continue its business activities. Although recent experience from the covid or post-covid period has shown that in certain circumstances effective state support (aid packages) was also necessary for the rescue, such rescue is not possible by default, especially without timely measures taken by the debtor and without the cooperation of a substantial part of the debtor's creditors. The preventive form of bankruptcy resolution represents a second chance for the debtor, the form of which, or the measures taken, may be of a different nature, whether in the form of a change in the composition and structure of the debtor's assets or liabilities, a change in the debtor's capital structure, the sale of assets or part of the business, or organizational changes. Preventive forms of insolvency resolution are not insolvency proceedings which deal with a situation where the debtor is already insolvent. On the contrary, preventive forms aim at avoiding a state of insolvency and the related insolvency proceedings and at avoiding the loss of key assets, or at ensuring that their claims are not worse satisfied than their potential satisfaction rate in insolvency proceedings.

The basis for the legislation on preventive procedures was an initiative of the Commission, which identified a number of shortcomings negatively affecting the interest of entrepreneurs in second chances, in particular the differences in procedures between countries, the length of time limits and the conditions under which restructuring is possible, as well as the possibility to proceed to restructuring only at a later stage as a negative. It considered these differences to be reasons for increased economic and social costs and uncertainty in assessing investment risks. [1] The solution was the adoption of the Directive on restructuring and insolvency, thus creating a procedural platform for the debtor to negotiate with creditors on the most appropriate way to resolve the debtor's threat of insolvency, [2] with a balanced protection of the rights of all stakeholders, including employees.

The Directive is a general framework and gives Member States some freedom to transpose it into national law, subject to certain minimum requirements. The Directive thus provides considerable variability in setting up preventive restructuring processes, while the principle of consensus should prevail over formality.[3]

The transpositions already carried out by individual Member States (in the Czech Republic Act No 284/2023 Coll. on preventive restructuring, in Germany StaRUG , [4] in Austria through RIRUG,[5] in France Regulation No 2021-1193 of 15 September 2021,[6] in the Netherlands WHOA[7]) indicate that Member States have also made use of this freedom, which opens up a

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[1] 2014/135/EU: Commission Recommendation of 12 March 2014 on a new approach to business failure and insolvency Text with EEA relevance.

[2] DOLNÝ, J.: Nový spôsob riešenia reštrukturalizácie z pohľadu smernice o reštrukturalizácii a insolvencii. Justičná revue, 73, 2021, č. 2, s. 218.

[3] VÍTKOVÁ, K., ZEZULKA, O. O východiscích preventivní restrukturalizace a rozdílech oproti reorganizaci IN SCHÖNFELD, J. KUDĚJ, M., HAVEL, B., SPRINZ, P. a kol.: Preventivní restrukturalizace: Revoluce v oblasti sanací podnikatelských subjektů. 1. vydání. Praha: C. H. Beck, 2021, s. 62 – 63.

[4] Gesetz über den Stabilisierungs- und Restrukturierungsrahmen für Unternehmen účinný od 1.1.2021.

[5] Restrukturierungs- und Insolvenz-Richtlinie-Umsetzungsgesetz účinný od 17.7.2021.

[6] účinné od 1.10.2021.

[7] Wet Homologatie Onderhands Akkoord (WHOA) účinné od 1.1.2021.

new area for comparison and, after practical experience with their application, also for the evaluation of the effectiveness of the chosen options.
As of the end of 2023, no preventive restructuring has yet been initiated in Slovakia.[8] In Germany, since the adoption of the legislation (StaRUG), 22 preventive restructuring cases have been filed in 2021 and 24 in 2022.[9] The first completed preventive restructuring in Germany concerned a debtor logistics company and lasted two and a half months. [10] In Austria, the first preventive restructuring decision was in October 2023. [11]

Even before the ZoRHÚ was adopted, the Slovak legislation offered the possibility of a formal solution to the impending bankruptcy in the form of restructuring under the ZKR. However, the adoption of the Directive on restructuring and insolvency brought new impulses to insolvency or pre-insolvency law and the need for their transposition into Slovak legislation, while in terms of legislative procedure the alternative of adopting a new law was preferred to amending the ZKR. [12] Preventive proceedings under Slovak law are understood as *public preventive restructuring* and *non-public preventive restructuring*.[13] In Austria, preventive restructuring is regulated by the Federal Act on Business Restructuring - Restructuring Code ReO,[14] which entered into force on 17 July 2021. The ReO distinguishes three types of proceedings: *ordinary restructuring proceedings* which take place before a court (§§ 1-43 ReO) and in which all the minimum requirements of the Directive are applied, *public European restructuring proceedings* (§ 44 ReO) and *simplified restructuring proceedings* (§ 45 ReO). If the statutory conditions are met, preventive restructuring is available under Slovak law to an entrepreneur - a legal person who is registered in the Register of Public Sector Partners at the time of filing a proposal; under Austrian law, this process is available to entrepreneurs regardless of whether they are legal or natural persons.

The aim of this publication is to analyse the transposition of the Directive into Slovak and Austrian legislation in selected issues of the preventive restructuring process. In the Slovak legislation we focus on public preventive restructuring and in the Austrian legislation on the ordinary restructuring procedure, which for the first time in Austria provides entrepreneurs in economic difficulties with a legal framework for preventive restructuring under court supervision, which takes place outside the previously regulated insolvency procedure. [15] The

[8] searched in the Commercial Journal in the Preventive restructuring chapter.
[9] https://www.finance-magazin.de/transformation/restrukturierungstrends/praeventive-sanierung-so-viele-starug-faelle-gab-es-bislang-109121/.
[10] Amtsgericht Hamburg; in the case of the Hamburg logistics company, the subsidiaries gave up around 40 % of their claims and the shareholder loans were set at zero, with a capital increase eventually bringing in a new investor. In total, the preventive restructuring process of the logistics company lasted approximately two and a half months, the estimated costs associated with the preventive restructuring (for consultants, drawing up a plan, courts) are between EUR 100 000 and EUR 150 000 (closer to https://www.finance-magazin.de/transformation/deutschland/die-ersten-lessons-learned-bei-der-praeventiven-sanierung-43730/).
[11] Oberlandesgericht Wien, 6 R 200/22h (bližšie https://www.bindergroesswang.at/law-blog/2023/erste-entscheidung-zur-reo-liegt-vor-aber-ist-das-restrukturierungsverfahren-dadurch-auch-endlich-in-der-praxis-angekommen), in this case, the Oberlandesgericht Wien, as an appeals court, confirmed the decision of the first instance court, which rejected the petitioner's proposal to initiate preventive restructuring due to the petitioner's insolvency.
[12] Explanatory memorandum to ZoRHÚ, p. 5.
[13] § 1 ZoRHÚ.
[14] BGBl. I Nr. 147/2021.
[15] WETTER, P., SIMSA, M. Die neue Restrukturierungsordnung (ReO), Recht der Wirtschaft (2021), p. 825.

publication examines the position of the various parties to the preventive proceedings, their interests and the legal instruments for their fair arrangement and the achievement of the objective of preventive restructuring.
Which instruments or options offered by the Directive have been chosen by the above-mentioned legislation in its implementation and in what doctrinal foundations are they supported. The publication is divided into two main chapters, the first focusing primarily on the Slovak legislation with regard to the transposition of the Directive and the second on the Austrian legislation and its method of transposition of the Directive.

The publication examines selected issues related to the status of the parties to preventive proceedings with regard to selected procedural instruments, measures to protect the interests of the parties (in whose favor the measure is). We focus on the motivational elements influencing the willingness of the debtor and creditors to use preventive restructuring with regard to their procedural position, strengthening or forcing their willingness to support preventive restructuring (substituting the consent of the group - *cross-class cram-down*). In particular, we point to the differences between formal and informal procedures for dealing with impending bankruptcy (insolvency), the unresolved status of related parties in new financing. Separate subchapters are devoted to bankruptcy tests/early warning tools (for Slovak and Austrian regulation). We highlight the differences between formal and informal procedures for dealing with the impending bankruptcy (insolvency). We examine and compare simultaneously the common interest, best interest and distributional rules tests with respect to their purpose and application (absolute priority rule and relative priority rule). The aim of the publication is, among other things, to evaluate in depth (and comparatively) the key concepts of the Slovak and Austrian legislation, while the Slovak public preventive restructuring is still awaiting its practical application.

FIRST CHAPTER

Slovak legislation on preventive restructuring (transposition of the Directive)

I. Preventive restructuring - second chance policy

Restructuring is the result of a gradual evolution of the view of the function of insolvency law. The impetus for the new view of this function was the 1978 reform of US bankruptcy law, when reorganization, i.e. the creation of a space for a responsible debtor to resolve its situation with its creditors, came to the fore before the rapid monetization of the debtor's assets and their distribution to its creditors (liquidation of the debtor) .[16] Over the last 15-20 years, many EU Member States have modernised their national legislation with a focus on recovery processes and have experimented with revising both judicial and non-judicial preventive restructuring procedures.[17] The creation of a specific process distinct from insolvency proceedings can have a positive impact on the debtor's stakeholders (employees, creditors, the state) as a signal that a debtor using recovery is in better financial shape than one entering bankruptcy. This can, as *Epaularda* and *Zaphaa* argue, reduce the indirect costs of bankruptcy resolution and increase the debtor's chances of survival. [18]

The Slovak legislation has also undergone its own development in this respect and in the search for a suitable legal framework for the debtor's second chance, the current legislation offers two recovery tools for legal persons - entrepreneurs,[19] *preventive restructuring under the ZoRHÚ* and *restructuring under the ZKR*. It is typical for both these recovery processes that without the will of the debtor itself, the recovery cannot be successful and the essence is the preservation of the debtor's control over the day-to-day operation of the business. Apart from the above common theses and their terminological overlap, there is a significant difference between them in that they are designed to deal with different phases of the economic cycle. [20] Whereas preventive restructuring is designed to deal with the impending bankruptcy, i.e. a still reversible situation where bankruptcy can be avoided (or to resolve an insolvency if it occurred during an ongoing preventive public restructuring), restructuring is already an insolvency procedure, i.e. it deals with a situation where the impending bankruptcy has not been averted and the debtor is in bankruptcy. [21]

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[16] SCHÖNFELD, J. KUDĚJ, M.: Preventivní restrukturalizace: Nová etapa koncepce sanačních procesů a její implementace do českého právního řádu, 1. vydání. Praha: TRITON, s. 2021, s. 26 – 27.

[17] BALP, G. Early Warning Tools at the Crossroads of Insolvency Law and Company Law. DE GRUYTER Global Jurist. 2019, s. 1.

[18] EPAULARDA, A., ZAPHAA, CH. Bankruptcy Costs and the Design of Preventive Restructuring Procedures Journal of Economic Behavior & Organization. Volume 196, April 2022, Pages 229-250.

[19] The resolution of impending insolvency pursuant to § 2 ZoRHÚ applies only to the debtor - a legal entity, from preventive restructuring are excluded entities whose bankruptcy resolution is not possible by proceedings under the ZKR, *at the same time it must be a debtor who must be registered in the Register of Public Sector Partners* at the time of filing the proposal; between the transposed legislation (Austrian, German) is a difference from the Slovak one in that in these regulations can also solve the impending bankruptcy by preventive restructuring natural person - entrepreneur. The Czech ZoPR concerns only the resolution of a impending insolvency of a corporation.

[20] VÍTKOVÁ, K., ZEZULKA, O. O východiscích preventivní restrukturalizace a rozdílech oproti reorganizaci IN SCHÖNFELD, J. KUDĚJ, M., HAVEL, B., SPRINZ, P. a kol.: Preventivní restrukturalizace: Revoluce v oblasti sanací podnikatelských subjektů. 1. vydání. Praha: C. H. Beck, 2021, s. 68.

[21] on the current legal regulation of restructuring under the ZKR and its advantages and disadvantages in more detail KUBINEC, M. Obchodná spoločnosť v kríze. 1. vydanie. Praha: C. H. Beck, 2022, s. 18.

The difference between these restructurings lies not so much in the restructuring tools that can be used, but in their procedural grasp. The difference lies in the space available to the debtor and the creditors to reach a consensus on the method/instruments to deal with the impending bankruptcy, as well as in the range of parties concerned.[22] Preventive restructuring is not based on the principle of universality, [23] it does not affect all creditors but only a limited range. Not all creditors are affected by a preventive restructuring and may not be involved in the process at all.[24]

At the same time, preventive restructuring provides a so-called general moratorium, i.e. a time-limited temporary protection of the debtor from creditors, during which the debtor enjoys bankruptcy proceedings and enforcement immunity. However, both restructurings are formal procedures as both are regulated by legislation.

The legal regulation of these formal procedures does not mean that the debtor cannot also use informal restructuring using private law institutes, in particular civil or commercial law. In the context of individual negotiations with its creditors, it has greater flexibility to adjust the contractual terms, whether in the form of instalments, debt forgiveness, capitalisation of claims or the granting of new credit.[25] At the same time, the creditor can avoid stigmatisation. It is precisely for better protection of reputation that debtors usually prefer informal restructuring. On the other hand, such an informal restructuring is based only on the individual consent of the creditors concerned and is only binding on creditors who agree to it. [26] It also has the disadvantage of uncertainty on the part of the debtor and its creditors as to the consequences and liability in the event of a declaration of bankruptcy under the ZKR and criminal law, and the debtor (its management/statutory body) runs the risk of not complying with the statutory requirement to take into account the common interest of creditors (including employees and their representatives, shareholders and other persons who may be affected by the impending insolvency).[27] Also, the contractual freedom to resolve an economic crisis is limited in Slovak law by the provisions of a company in crisis and the prohibition on the repayment of the substitute equity financing. [28]

Formal restructuring procedures, as opposed to informal procedures, also include judicial supervision and tools to balance the enforcement of the individual interests of the participants in such processes (formation of creditor groups, professional supervision by the administrator/ practitioner, court disapproval of the restructuring/public plan, cross class cram down, restriction of the debtor's actions, etc.). They are set up to favor restructuring in the interest of all creditors collectively (*common interest of creditors/ general interest of creditors/ legitimate expectations of the general body of creditors/ general body of creditors*) and

[22] § 27 (3) ZoRHÚ defines the creditors who are unaffected by a preventive restructuring.

[23] Closer to the principle of universality in restructuring proceedings PATAKYOVÁ, M., DURAČINSKÁ, J. Autonómia vôle veriteľov pri schvaľovaní reštrukturalizačného plánu. Bulletin slovenskej advokácie. - Roč. 25, č. 7-8 (2019), s. 17-23.

[24] VÍTKOVÁ, K., ZEZULKA, O. O východiscích preventivní restrukturalizace a rozdílech oproti reorganizaci IN SCHÖNFELD, J. KUDĚJ, M., HAVEL, B., SPRINZ, P. a kol.: Preventivní restrukturalizace: Revoluce v oblasti sanací podnikatelských subjektů. 1. vydání. Praha: C. H. Beck, 2021, s. 65.

[25] BALP, G. Early Warning Tools at the Crossroads of Insolvency Law and Company Law. DE GRUYTER Global Jurist. 2019, s. 1.

[26] EPAULARDA, A., ZAPHAA, CH. Bankruptcy Costs and the Design of Preventive Restructuring Procedures Journal of Economic Behavior & Organization. Volume 196, April 2022, Pages 229-250.

[27] § 4a (5) ZKR.

[28] § 67a et seq. OBZ.

do not require unanimity on the part of creditors but the consent of a substantial part of creditors to succeed.

The aim of the Directive on Restructuring and Insolvency is to resolve the impending bankruptcy (insolvency) in a timely manner by giving the debtor a second chance. The timeliness of resolution is directly related to the ability to detect the debtor's impending economic problems and its ability to use the appropriate tools to overcome such problems. The debtor is not to be stigmatised, after all, he did not necessarily get into the bad economic situation through his own misconduct ('an honest businessman without business luck'), the essence is his motivation to actively address the situation and to signal to creditors that the debtor is genuinely interested in resolving the impending insolvency.

The stigma attached to business failure and the issue of motivation of the debtor (its management/statutory bodies) and creditors to participate in restructuring processes is a particular problem in Central and Eastern European countries. [29] The Commission also considered social stigma as one of the adverse effects on entrepreneurship and on the exploitation of second chances.[30] *Tajti* points to differences in the intensity of stigma between countries (even at regional level), which he links to historical reasons and differences in economies, but also to inconsistencies in insolvency laws. As he points out, in general the intensity of the bankruptcy stigma is lower in Anglo-Saxon legal systems and an example is the German case of Schefenacker,[31] where a German company moved its centre of main interest (COMI) to England precisely because of the more favourable restructuring climate.[32] Another of the factors *Tajti* cites affecting the policy of dealing with impending insolvency and taking advantage of second chances is the approach of states to sanctioning late filing of bankruptcy petitions. In the US, for example, there is no sanction for late filing of a bankruptcy petition, in contrast to German law. Such flexibility allows for negotiations with creditors in the hope of finding a solution. Business failure is seen as normal in market economies and the role of the law should not be to penalise the debtor for his failure and exclude him from the market, but rather to give him the opportunity for a fresh start. Of course, should restructuring fail, to allow the debtor an easy but controlled exit from the market.[33]

The effectiveness of the resolution system depends on its ability to quickly identify problem businesses and adopt appropriate solutions. Unviable businesses should be wound down to

[29] TAJTI, T. Bankruptcy stigma and the second chance policy: the impact of bankruptcy stigma on business restructurings in China, Europe and the United States. China-EU Law J (2018) 6:1–31 https://doi.org/10.1007/s12689-017-0077-z. s. 3

[30] Recommendations Commission Recommendation 2014/135/EÚ of 12 March 2014on a new approach to business failure and insolvency.

[31] išlo o forum shopping prípad Schefenacker AG (*Recognition of the English CVA as a main proceeding was granted in the USA under chapter 15 in 2007: In re Schefenacker PLC, case no. 07-11482, order of June 14, 2007 (SDNY) unreported*).

[32] TAJTI, T. Bankruptcy stigma and the second chance policy: the impact of bankruptcy stigma on business restructurings in China, Europe and the United States. China-EU Law J (2018) 6:1–31 https://doi.org/10.1007/s12689-017-0077-z. s. 3

[33] TAJTI, T. Bankruptcy stigma and the second chance policy: the impact of bankruptcy stigma on business restructurings in China, Europe and the United States. China-EU Law J (2018) 6:1–31 https://doi.org/10.1007/s12689-017-0077-z s. 13

allow for an efficient reallocation of resources towards successful market participants, while viable businesses should be able to start the restructuring process.[34]
However, in the context of late filing of bankruptcy petitions, it cannot be overlooked that a frequent problem is the postponement of the resolution of financial problems. According to *Schönfeld* and *Kuděj*, their research in the Czech Republic has shown that the delay is so long that companies show signs of bankruptcy three years before a resolution is attempted or decided. At the same time, the authors state that it is quite likely that, if the data examined were older than three years, a substantial proportion of enterprises would show signs of bankruptcy even earlier. Their research on the impact of the existence of bank lending on the financial health of firms has shown that loaned firms adhere to higher standards of financial efficiency, which is true for both bankrupt and non-bankrupt firms.[35] This may imply that penalizing a debtor for delays in resolving its bankruptcy is not sufficiently motivating to intervene early. At the same time, however, delaying the resolution of a financial problem may reduce the satisfaction of creditors by aggravating its problems and reducing the mass of its assets. The willingness of creditors to agree to a second chance for the debtor also depends on the prospects for their satisfaction rate.[36]

1. Early Warning Tools

The success of the rescue of the debtor's undertaking or part of it is conditional on the necessary measures being taken in good time, while the rescue is still possible, so as to allow time for negotiations with creditors on the terms of the preventive restructuring to take place. Early warning tools are not a substitute for the actual rescue measures to be taken by the debtor, but are a useful complement to support their effectiveness.

The Directive places emphasis on the introduction of early warning tools to alert the debtor to the need for swift action. Early warning tools relate to the ability of the debtor (its statutory bodies) to detect economic problems (and the need to address them) at an early stage, when the chances of rescuing the business are higher. The Directive gives examples of warning mechanisms in the form of non-payment of taxes or social security contributions, leaving it to the Member States to define such instruments. It is also important that these tools are publicly available, considering the structure and functions of the debtor's business, that Member States can make use of IT technologies for notification and online communication, and that they are easily accessible and presented in a user-friendly manner. According to Article 3 of the Directive, warnings may include:
(a) warning mechanisms in case the debtor has failed to make certain types of payments;
(b) advisory services provided by public or private organisations;
(c) incentives under national law to third parties with relevant information about the debtor, such as accountants, tax and social security authorities, to alert the debtor to negative developments.

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[34] EPAULARDA, A., ZAPHAA, CH. Bankruptcy Costs and the Design of Preventive Restructuring Procedures Journal of Economic Behavior & Organization. Volume 196, April 2022, Pages 229-250.
[35] SCHÖNFELD, J. KUDĚJ, M.: Preventivní restrukturalizace: Nová etapa koncepce sanačních procesů a její implementace do českého právního řádu, 1. vydání. Praha: TRITON, s. 2021, s. 79 – 160.
[36] In Slovak conditions, data on the rate of satisfaction of unsecured/secured creditors in insolvency proceedings (in bankruptcy compared to restructuring) are not collected, or such data are not available - information provided by the Ministry of Justice of the Slovak Republic, Department of Data Analyses and Departmental Statistics | Analytical Centre of 23.7.2023 on the basis of a request by the authors.

Based on their own research, *Schönfeld* and *Kuděj* recommend the following as early warning procedures: the coverage gap, the operating EBITDA (margin) or another adequate profitability indicator, the Kralick's quick test or another synthetic indicator (Altman's Z-score or the IN05 index seem to be appropriate in their opinion). As they state, the aggregation of the three indicators together gives a plastic picture of the state of the business, where the coverage gap shows the cash flow of the business and distinguishes insolvency from payment hack (or payment unwillingness), the operating EBITBA margin is a ratio indicator that appropriately captures the profit-making ability and the Kralick's quick test shows the overall economic situation of the business. [37]
As the Explanatory Memorandum to the ZoRHÚ shows, the introduction of early warning tools has not been easy. Existing models for predicting the impending insolvency are not universally applicable to all types of economic activity. These are economic models that should be easily accessible and user-friendly in the sense of the Directive. Until the adoption of the ZoRHÚ, impending bankruptcy was formulated in the ZKR as a crisis of the company[38] by way of example, whereas under the OBZ a company in crisis was defined as bankrupt or threatened with bankruptcy, with the proviso that *'a company is threatened with bankruptcy if the ratio of equity to liabilities is less than 8 to 100'*. [39] The threat of bankruptcy was thus linked to negative equity.[40] The Slovak legislation transposed the Directive through the ZoRHÚ by amending the provisions of the ZKR and by linking impending bankruptcy by way *of example* to impending insolvency. [41,42] A debtor is threatened with bankruptcy if, taking all the circumstances into account, it becomes insolvent within 12 calendar months. A new economic indicator, *the coverage gap*, has been introduced to assess the impending insolvency. [43]

Another early warning tool signaling a possible impending bankruptcy is the registration of the debtor in the list of debtors according to special regulations, i.e. the list of debtors of the health insurance company or the list of natural persons and legal entities against whom the Social Insurance Institution registers debts, or the list of tax debtors. The registration of a debtor on one of the above lists is intended to give the debtor an incentive to assess whether it is at risk of insolvency. [44] It does not automatically imply an impending bankruptcy, but it does trigger a screening obligation on the debtor.

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[37] SCHÖNFELD, J. KUDĚJ, M.: Preventivní restrukturalizace: Nová etapa koncepce sanačních procesů a její implementace do českého právního řádu, 1. vydání. Praha: TRITON, s. 2021, s. 164.
[38] § 4 (1) ZKR in the wording effective from 16.7.2022.
[39] § 67a (2) OBZ in the wording effective from 16.7.2022.
[40] According to the analysis of economic indicators, registered social enterprises, for example, have a relatively low share of equity in the total sources of financing of their assets. The ratio of equity to liabilities was less than 0.8% for 24 % of the enterprises analysed and, according to the Commercial Code, they are enterprises in crisis, more specifically NEUBAUEROVÁ, E., PRIEHODA, A. Aspekty sociálneho podnikania, Bratislavské právnické fórum 2022: rekodifikácia práva obchodných spoločností - zdroje inšpirácie a očakávané riešenia pre výzvy tretieho milénia. - : 1. vyd. Bratislava : Právnická fakulta UK, 2022. - S. 79.
[41] § 4 (1) ZKR in the wording effective from 16.7.2022.
[42] Podľa § 4 ods. 2 ZKR *„A debtor is at risk of insolvency if, taking into account all the circumstances, it is reasonably foreseeable that insolvency will occur within 12 calendar months."*
[43] vyhláška MS SR č. 197/ 2022 Z. z., ktorou sa ustanovujú podrobnosti o spôsobe určenia platobnej neschopnosti, medzere krytia a hroziacej platobnej neschopnosti Ministerstva spravodlivosti Slovenskej republiky.
[44] § 4a (2) ZKR.

The transposition of the Directive has also made use of the possibility to include an obligation for the debtor's statutory/management body to seek professional assistance[45] to assess whether the debtor is at risk of bankruptcy and what measures need to be taken to overcome this risk.[46] Of course, other indications of impending insolvency are not excluded and will be at the discretion of the debtor. The Explanatory Memorandum to the ZoRHÚ states that *'the existence of other factors which may put the debtor at risk of bankruptcy is, of course, a matter for the debtor itself to assess in the context of its duty to keep its financial situation under review and its duty to act with professional diligence. The debtor is obliged to assess whether it is at risk of bankruptcy and, if it lacks the expertise or experience to make such an assessment, including the assessment of whether to take appropriate measures to remedy the impending bankruptcy, the debtor's statutory body is obliged to seek the assistance of an expert. In this case, an expert means any other person who has sufficient professional knowledge or experience to be competent to assess whether the debtor is threatened with bankruptcy."*

2. Definition of the impending bankruptcy

The impending bankruptcy is a relevant indicator for the debtor to intervene and to use "*all necessary, appropriate, effective and proportionate measures to avert the imminent bankruptcy, including the use of the option of a public preventive restructuring or a non-public preventive restructuring under a special law, or any other appropriate and effective measure that does not require the participation of all creditors. In any event, the resolution of the debtor's situation should be based on a dialogue with the parties concerned.*" [47] Early detection of impending bankruptcy is an essential prerequisite for averting bankruptcy. In doing so, the debtor's statutory body must act with professional diligence and consider the common interests of all stakeholders.[48] Preventive restructuring creates a formalised space for reaching agreement between the debtor and its creditors on the terms of rescuing the debtor's business, or a viable part of it, before it becomes bankrupt. [49][50]

a) Coverage gap

Among the appropriate early warning tools, the Slovak legislator chose the coverage gap, which is an analytical tool for the debtor - legal entity *to test its solvency*. With the coverage gap, the debtor demonstrates that it is not insolvent and is therefore able to pay its monetary obligations or that it is able to pay the majority of its outstanding obligations in the near future. The coverage gap is used to distinguish between insolvency and payment default.[51]

[45] SMALÍK, M. Nástroje napomáhajúce riešiť hroziaci úpadok z dôvodu hroziacej platobnej neschopnosti, Bratislavské právnické fórum 2022 [elektronický dokument] : rekodifikácia práva obchodných spoločností - zdroje inšpirácie a očakávané riešenia pre výzvy tretieho milénia. Bratislava : Právnická fakulta UK, 2022. - S. 83.
[46] § 4a (3) ZKR.
[47] Explanatory Memorandum to the ZoRHÚ.
[48] § 4 (5) ZKR.
[49] Closer to the solvency tests in Finnish law and in EU law GRAMBLIĆKOVÁ, B. Význam distribučných testov pri delení zdrojov spoločnosti Cofola 2023 [elektronický dokument] : část 1 : Financování obchodních korporací. Brno : Masarykova univerzita, 2023. - S. 33 a nasl. (Spisy Právnické fakulty Masarykovy univerzity : Edice Scientia).
[50] § 3 (1) ZKR „*A debtor is bankrupt i fit is insolvent or over - indebted. If a debtor files a petition in bankruptcy, it is assumed that they are bankrupt*."
[51] SCHÖNFELD, J. KUDĚJ, M.: Preventivní restrukturalizace: Nová etapa koncepce sanačních procesů a její implementace do českého právního řádu, 1. vydání. Praha: TRITON, s. 2021, s. 164.

The coverage gap thus has two functions: it is (i) a criterion for assessing whether the presumption of solvency of the corporate debtor has been met, and (ii) a projection of its monthly evolution is used to assess the imminence of insolvency.

(i) Coverage gap as a criterion for the fulfilment of the presumption of solvency.

The coverage gap is the difference between the amount of outstanding monetary liabilities and the monetary assets of the debtor. A debtor legal person shall be presumed to be solvent if it is reasonably foreseeable that it will be able to continue to operate its business or manage its assets and the coverage gap is less than one-tenth of the amount of its outstanding monetary liabilities or, within a period of not more than 60 days, the coverage gap falls below such a threshold. The coverage gap shall thus be sufficient to meet the presumption of solvency to show that the company has sufficient cash assets to cover at least 90 % of its liabilities as they fall due.
Details on the coverage gap, the method of determining insolvency and impending insolvency are set out in Decree of the Ministry of Justice of the Slovak Republic No. 197/ 2022 Coll. For the purposes of determining the coverage gap, the amount of outstanding monetary liabilities shall not be taken into account, a) which are connected with an obligation of subordination[52] or would be satisfied in the bankruptcy in order as subordinated claims, if the creditor has agreed in writing to their temporary non-performance[53], b) for which the debtor is in mutual negotiations with the creditor on a change of maturity or on a modification thereof, and the creditor has an interest in negotiating, which is also confirmed in writing to the debtor at the time of the negotiation.

Although the ZKR links the coverage gap to a presumption of solvency, in reality this means that the debtor lacks 10% of the value of its liabilities to cover the liabilities due and the debtor has not built up sufficient reserves. As *Schönfeld* and *Kuděj* point out, the existence of any coverage gap implies undeniable financial difficulties for the company. Thus, from an early warning perspective, they argue, it is preferable to look for sufficient *'excess cover'* to demonstrate the financial health of the debtor and its unproblematic existence. They consider a mirrored threshold of 10% to be appropriate, such that *the coverage gap would be more (not less as currently defined in the ZKR)* than one tenth of the amount of the debtor's outstanding liabilities.[54]

(ii) Coverage gap as a criterion for assessing the impending insolvency.

The impending insolvency is projected on the basis of the monthly evolution of the coverage gap for the next 12 months, but it may also be assessed on the basis of other similar evidence. The projection of the monthly development of the coverage gap may be based on (a) a projection of the interim financial statements, (b) a cash flow calculation using the direct method, (c) a cash flow statement or (d) a simplified monthly development of the coverage gap projection form published on the website of the Ministry of Justice of the Slovak

[52] § 408a OBZ , § 95 (2) ZKR.
[53] § 9 ZKR, § 95 ods. 3 ZKR.
[54] SCHÖNFELD, J. KUDĚJ, M.: Preventivní restrukturalizace: Nová etapa koncepce sanačních procesů a její implementace do českého právního řádu, 1. vydání. Praha: TRITON, s. 2021, s. 166 – 167.

Republic.[55] The debtor (its statutory body) has a precautionary duty to monitor its economic situation so that it can take the necessary measures in time to ensure the viability of the undertaking.

b) Impending bankruptcy and corporate crisis

As already mentioned in the previous subchapter, the impending bankruptcy is defined in the ZKR *in particular as impending insolvency*, while the ZKR at the same time regulates the debtor's obligations in the event of impending bankruptcy. At the same time, the impending bankruptcy is also defined in the OBZ *as one of the forms of a company crisis*. A debtor - a legal entity (in the case of forms of companies under §67i of the OBZ) which is threatened with bankruptcy is at the same time also in crisis under the OBZ. Thus, in addition to the provisions of the ZKR, the provisions of the OBZ on a company in crisis are still relevant, which contain additional obligations of the debtor, in particular in relation to the substitute equity financing and the prohibition on its return.

The shortcoming of the current regulation of a company in crisis under the OBZ is the explicit failure to address the relationship of the provisions of a company in crisis to the new ZoRHÚ and the failure to take into account preventive processes (preventive restructuring) in relation to the substitute equity financing - the OBZ currently only refers to the restructuring/restructuring plan under the ZKR, not to the preventive proceedings/public plan under the ZoRHÚ[56], in the case of exemptions from the substitute equity financing.
This shortcoming is particularly relevant when considering new financing[57] and crisis financing to ensure the proper functioning of the business during the temporary protection[58] granted under the ZoRHÚ, which would at the same time meet the criteria for substitute equity financing under the OBZ. In a literal application of § 67e OBZ, such financing/performances would not fall under the exceptions for substitute equity financing. This has an impact on the possible return of such financing and on its security in the event of a crisis/impending bankruptcy, because in the event of bankruptcy such financing will not be treated as a priority (or secured) claim[59] but as a subordinated claim which is satisfied only after all unsecured claims have been satisfied[60] (de facto, it remains unsatisfied). Such financing may also be objected in the event of bankruptcy, depending on the specific conditions.

We believe that the above deficiency can be remedied by interpreting or referring to the purpose of the legislation and subsuming under the statutory references in the OBZ to restructuring/restructuring plan (i.e. under the exceptions from the substitute equity financing) also the preventive restructuring/public plan under the ZoRHÚ, since both processes (restructuring under the ZKR and preventive restructuring under the ZoRHÚ)

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[55] Decree of the Ministry of Justice of the Slovak Republic No. 197/ 2022 Coll., which establishes details on the method of determination of insolvency, coverage gap and impending insolvency of the Ministry of Justice of the Slovak Republic.
[56] § 67e písm. a) OBZ.
[57] § 39 ZoRHÚ.
[58] § 21 ZoRHÚ.
[59] § 38 (2) ZoRHÚ, § 141 ZKR.
[60] § 95 (2) ZKR.

constitute a remedial solution to the company's crisis. [61] In order to preserve the purpose of the legislation, i.e. not to impede the recovery of the debtor and to give priority to preserving the viability of the company, the provisions of the ZoRHÚ on crisis and new financing *should take precedence* over the provisions of the OBZ on a company in crisis.

The Directive requires Member States, as minimum safeguards,[62] to provide adequate protection for new and temporary financing and to exclude such financing from being void, voidable, or unenforceable, as well as to exclude civil, administrative or criminal liability on the grounds that such financing is detrimental to the common interest of creditors. [63] On the other hand, however, the Directive expressly allows for an exception to that protection in the form of other grounds, which may include fraud, bad faith, but also a certain type of relationship between the parties involving a conflict of interest, such as transactions with related parties or between shareholders and the company.
In principle, substitute equity financing under the OBZ (provided during a company's crisis) are benefits provided by related parties[64], so it is not clear whether the deficiency identified by us was not the legislator's intention a priori to exclude funding by related parties from protection, even though there was no problem with this in the restructuring under the ZKR. It should be noted, however, that in times of company crisis it will be difficult for the debtor to obtain financing from external sources and it will be the shareholders (as related parties) who could provide such sources in the first instance[65]. Although in the context of new financing provided by a supervised financial entity under a non-public plan (in a non-public preventive restructuring), the legislator has explicitly formulated an exception in the ZoRHÚ that such a creditor is not considered a related creditor, even if it would otherwise be a creditor of a related claim[66]. This unambiguously worded exception only underscores the question of the legislator's intent, as the legislator must have seen the context of related-party financing in the formulation of such an exception and chose to exclude only financial institutions.

In any case, without an explicit legal regulation and elimination of the above-mentioned lack of conflict between the legal regulation of the OBZ and the ZoRHÚ, there is still legal uncertainty about the fate of crisis and new financing from related parties, which is at the same time a substitute equity financing, which may have a negative impact on the willingness to provide it.

From the point of view of the systematics of the legal regulation, after the transposition of the Directive into the Slovak legal order, the early warning instruments and the debtor's obligations under the threat of bankruptcy are thus regulated in the ZKR, the crisis of the

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[61] A company's crisis may take the form of (i) a impending bankruptcy, (ii) bankruptcy, (iii) a qualifying equity/liability ratio.
[62] Recital 68 of the Directive.
[63] Art. 17 of the Directive.
[64] § 67c OBZ.
[65] A closer look at shareholders' incentives to lend to the company in times of crisis DURAČINSKÁ, J. Plnenie nahradzujúce vlastné zdroje financovania – verzia podľa slovenskej právnej úpravy IN Kšenžighová, A. (ed.) Neštandardné legislatívne zásahy štátu v neštandardných situáciách. Pocta profesorovi Milanovi Ďuricovi. Banská Bystrica: Belanium. Vydavateľstvo Univerzity Mateja Bela v Banskej Bystrici Právnická fakulta UMB, 2023, s. 143.
[66] § 54 (2) ZoRHÚ.

company as a form of the threat of bankruptcy/ bankruptcy and the debtor's other related obligations are regulated in the OBZ, and the process of resolving the threat of bankruptcy through preventive procedures is regulated in the ZoRHÚ.

II. Related parties in a preventive restructuring

In this chapter, we focus in particular on how the Directive has been transposed in relation to the status of related parties and the satisfaction of their claims, and on the impact of national legislation (defining the scope of related parties) on the status of such parties as creditors in the preventive restructuring process. The objective of the Directive to mitigate differences between Member States and to avoid speculative relocation of the centre of main interests is confronted with differences in national laws and their approach to the definition of related parties, which include, inter alia, equity holders. In the following, we will not focus specifically on the status of equity holders/partners, although their status may also vary depending on the transposition of the Directive. The Directive grants them the protection of legitimate interests, but at the same time requires ensuring that they cannot unduly impede the adoption of a public (restructuring) plan[67] and the restoration of the debtor's viability. We will focus on the broader group of affected related creditors with regard to their procedural position in a preventive restructuring.

Following the above presented objectives of the Directive, we focus on the position of a specific group of so-called related parties/creditors in preventive restructuring processes, from the perspective of the Directive and consequently from the perspective of the transposition of selected national regulations. We point out that, despite the efforts to ensure predictability and legal certainty and to blur the differences between the legal arrangements, the national definition of related parties itself has a fundamental impact on the status of the above-mentioned group of creditors and, consequently, on the overall course and outcome of the preventive restructuring proceedings and the status of other creditors. The definition of the range of such related creditors is also reflected in the formation of the groups for the approval of the restructuring plan and in the degree of satisfaction of all types of creditors. National legislation on the definition of related creditors thus continues to create differences between jurisdictions and, despite the Directive's attempt to unify processes, may influence the choice of the centre of main interests and also the decision-making of investors. We compare the definitions of related parties (the range of entities covered by the definitions) in selected legal regimes (Slovak, Austrian and German), as well as the legal regime for the satisfaction of related party claims in preventive restructurings following the transposition of the Directive.

The Directive distinguishes terminologically between (i) *equity holders*,[68] i.e. persons who have an ownership interest in the debtor or in the debtor's business, including shareholders (hereafter also referred to as "equity holders" or "shareholders"), (ii) *affected parties*,[69] i.e. creditors comprising employees or equity holders whose claims or interests are directly

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[67] § 66 ZoRHÚ.

[68] Art. 2(3) of the Directive, "equity holder" means a person who has an ownership interest in the debtor or in the debtor's undertaking, including a shareholder, unless that person is a creditor."

[69] Art. 3(2) of the Directive, "affected parties" means a person who has an ownership interest in the debtor or in the debtor's undertaking, including a shareholder, unless that person is a creditor. "

affected by the restructuring plan, and (iii) *related persons/parties*.[70] In doing so, the Directive considers the treatment of related party claims to be a matter of particular importance and national law should contain rules dealing with contingent claims and disputed claims. [71] The Directive does not further define the concept of related party, leaving the definition of related parties to national regulation.

The Directive creates room for Member States to regulate related party transactions, [72] in particular in the creation of creditor groups, in the context of temporary or new financing, in the voting on the adoption of a restructuring plan. The claims of related creditors, as mentioned above, are considered by the Directive to be a matter of particular importance which should be considered when forming creditor groups. New or temporary financing may be declared void, voidable or unenforceable on the basis of a certain type of relationship between the parties that could involve a conflict of interest, e.g. a transaction with related parties or between shareholders and the company. [73] At the same time, the Directive allows for the exclusion from the right to vote on the adoption of a public plan of, inter alia, equity holders or any party related to the debtor or the debtor's business with a conflict of interest under national law. [74]

At the same time, differences in the definitions of related parties imply differences in their position in preventive restructuring processes. Certain persons may fall under different categories (e.g. if the holder of an equity holding will also be a creditor of the debtor, he will also fall under the category of affected persons under the Directive and, depending on the national definition, may also be a related party[75]).

The Slovak legislation has adopted the above terminology of the Directive by working with the concepts of (i) *shareholders* (shareholders, partners, members of a cooperative or other persons with a financial interest in the debtor) , [76] (ii) *related party/related claim* and (iii) *affected creditor*, which is any creditor, whose claim arose prior to the record date and is not an unaffected creditor, and a shareholder if the public plan contemplates the sale, transfer or issuance of new shares in the debtor, a merger, acquisition, division or change in the legal form of the debtor, or a change in the debtor's memorandum, articles of association or other similar documents. [77] A creditor who is not an affected creditor is an *unaffected creditor*. The definition of unaffected creditors is both exhaustive for a certain range of entities[78] and at the same time dispositive, where it will depend on the public plan which entity among those permitted by law will also be included among the unaffected creditors.[79]

Affiliation will be relevant under the Slovak legislation in several aspects of the status of such a creditor, namely in terms of increased transparency (the list of affiliated persons is a mandatory annex to the public plan, as well as the list of transactions with affiliated persons over the last three years) and in terms of procedural aspects:

[70] Recital 46 of the Directive, Recital 67 of the Directive, Art. 9(3)(c) of the Directive.

[71] Recital 46 of the Directive.

[72] in the English version of the Directive the term related parties/ equity holders is used, in the German version nahestehende Parteien/ Anteilsinhabern, in the Czech version spříznené strany/ akcionáři..

[73] Recital 67 of the Directive.

[74] Art. 9 (3) of the Directive.

[75] Also MORAVEC, T. Evropské insolvenční právo. Vydání první. Praha: C. H. Beck, 2021, s. 131.

[76] § 2 (1) (s) ZoRHÚ.

[77] § 27 ZoRHÚ.

[78] § 27 (3) ZoRHÚ.

[79] § 27 (4) ZoRHÚ.

(a) a separate group/groups of creditors of related claims are created,
(b) their consent to temporary protection is not considered,
(c) during temporary protection, priority is given to the payment of the unrelated debt over the related debt,
(d) a related claim may not be set off against the debtor during the temporary protection; the same shall apply to unilateral set-off or set-off by agreement with the debtor,
(e) they may be members of the creditors' committee, but at least 3 of them must be unrelated (note: unlike in insolvency proceedings, where related creditors cannot be members of the creditors' committee), if the number of creditors is 5.
(f) are not excluded from voting on the public plan (in this respect, the option of the Directive to exclude such persons from voting on the public plan has not been used).

In defining a related party, the ZoRHÚ refers to the general regulation on insolvency proceedings (ZKR) [80], while the criteria for relatedness are linked to:
1. position in the debtor legal entity (member of the statutory body, member of the supervisory board, proxy, senior employee),
2. qualified direct/indirect participation (at least 5 % of the legal entity's share capital or voting rights),
3. exercising influence on the management of the company (directly or indirectly),
4. family ties (close person of the natural person as well as of the legal entity in which the natural person or a close person of the natural person has a qualified participation),
5. a rebuttable presumption of affiliation.
The ZKR automatically subordinates all claims that belong or belonged to a related person, regardless of the reason for their origination, whether they are claims arising from ordinary business dealings or whether they are disguised capitalization) and regardless of the degree of affiliation, since affiliation is already present at 5% of the shareholding, without distinguishing between shareholder-investors and shareholders actively participating in the management of the company. [81]

The question of whether a bank creditor can be a related party has been discussed in the literature in relation to the exercise of influence over the management of a company following a court decision. [82] In the case in question, the court inferred the existence of the affiliation of the financing bank with the debtor from the bank's security instruments, with the consequences of disregarding the bank's security right in bankruptcy and satisfying the

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[80] § 2 (1) (a) ZoRHÚ.
[81] On the current problems of the related party concept DOLNÝ, J. Uspokojovanie pohľadávok spriaznených osôb v konkurznom konaní; Justičná revue, 72, 2020, č. 3, s. 361 – 369, who summarized "*the problematic nature of automatic subordination of claims into three areas: the low percentage of qualified participation, the effect on ordinary course of business transactions, and the acquisition of a claim by a related party from an unrelated creditor*." p. 362.
[82] Judgment KS KE sp. zn. 4 CoKR 27/2018 z 27.2.2019: "*...the adoption of certain significant decisions or the performance of legal acts in the bankrupt company was expressly conditional on the prior written consent of the plaintiff, which would otherwise have been within the express competence of the general meeting of the bankrupt. In this way, the applicant (the bank) is indirectly placed in a position equivalent to that of a majority shareholder. The conditions and restrictions thus agreed upon by the bankrupt, even if only for the purpose of securing the claim, appear to the Court of Appeal, in view of the existence of other security institutions (pledge agreements) which were concluded in favour of the applicant as creditor, to be a procedure which allows the exercise of a qualified influence over a legal person, notwithstanding the applicant's assertions that, in the present case, it was a standard procedure which did not fall outside the framework of the general practice of credit institutions'.*"

bank's claims only as subordinates. The above decision was subject to criticism, which was eventually reflected in the amendment to the ZKR[83], effective from 1 March 2024, which explicitly excludes from the possibility of exercising influence over the management of the debtor *'contractual arrangements or legal authorisations of the creditor, the purpose of which is to protect the rights or legitimate interests of the creditor in connection with the provision of financial services to the debtor, including the provision of security for them'*.

A specific feature of the Slovak legislation is the *rebuttable presumption of affiliation*, where affiliation is presumed if (i) the claim is filed in excess of EUR 1 million, and (ii) the claim is filed in excess of EUR 1 million. (iii) the debtor is a person registered in the register of public sector partners or a person who was registered in this register in the last five years before the declaration of bankruptcy or the authorisation of restructuring (positive definition of the debtor's subject), (iii) the creditor is not a public administration body, bank, electronic money institution, insurance company, reinsurance company, health insurance company, trust company, securities dealer, stock exchange or central securities depository (negative definition of creditor entity). The presumption may be rebutted by the creditor by certifying its entry in the Register of Public Sector Partners to the administrator.
At the same time, the Slovak legislation exhibits an unjustified internal inconsistency in the view of a related party with regard to different legal norms which define a related party differently (differences in the range of entities falling under the "related party" under §9 of the OBZ, §67c(2) of theOBZ §220ga of the OBZ) and there is no complete overlap between the definition of a related party under the provisions of a company in crisis under the OBZ and the definition under the ZKR.

In general terms, a related party could be characterised as a person who, by reason of certain specific links, can be presumed to be involved in the matter under consideration. This does not mean that a related person is automatically dishonest, only that an informational advantage or conflict of interest can be expected by virtue of his relationship with the debtor. There is a difference in the definitions of related parties between selected foreign jurisdictions.

The Austrian legislation does not exhibit inconsistencies in the legislation and the ReO refers to the IO legislation, which defines subordinated claims (*nachrangige Forderungen*) as claims for benefits in lieu of own funds and thus follows the legislation of a company in crisis (EKEG). In a preventive restructuring, a separate group is created for related creditors (*Gläubiger nachrangiger Forderungen*) and also the option has not been used in the transposition of the Directive and such persons are not excluded from voting on the restructuring plan.[84] The definition of a related party[85] is narrower than the Slovak definition and basically rests on criteria linked to (i) the exercise of control (shareholder with majority voting rights, right to appoint/remove management and control bodies, has the right to be a member of the management body himself, contractual exercise of control), (ii) a qualified holding of at least 25% and (iii) the exercise of influence, with the explicit exclusion of rights (information, exercise of influence, security) typically linked to loan agreements.

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[83] Zákonom č. 309/ 2023 Z. z. o premenách obchodných spoločností a družstiev/ Act No. 309/ 2023 Coll. on the transformation of commercial companies and cooperatives.
[84] § 29, § 33 ReO.
[85] § 5 EKEG.

German law also does not exclude related creditors (*Nachrangige Insolvenzgläubiger*) [86] from voting on the restructuring plan and a separate group is created for such creditors. [87] The group of related creditors includes shareholders who are entitled to the repayment of a loan to the company or of claims that are economically equivalent to such a loan. That group shall not include shareholders who do not participate in the management of the company and have a qualifying holding of less than 10 %.

It is thus clear from the above comparisons that the status of a person in a precautionary restructuring (his/her inclusion in the class of creditors) will depend on the definition of related party/creditor in the national legislation in question. While under the ZoRHÚ a shareholder with a 5% qualifying share will already be a related party, under the Austrian legislation up to a 25% shareholding and in the German legislation a shareholder participating in the management or a shareholder with more than 10% qualifying shareholding will be a related party (whereas neither the German legislation nor the Austrian legislation links relatedness to the ultimate beneficial owner nor to family ties as in the Slovak legislation). The classification into groups is then relevant in relation to the application of the *common interest test* or the interest of the creditors as a group and in the application *of the best-interest-of-creditors test and* the determination of the order of their satisfaction.

III. Common interest of creditors

The common interest of creditors is a concept that the Slovak legislation was familiar with even before the amendment of the ZKR through the ZoRHÚ and represented a corrective to regulate conflicts between different interests of creditors in insolvency proceedings. In insolvency proceedings, members of the creditors' committee and the administrator are the bearers of the obligation to pursue the common interest of creditors. In a restructuring, a positive test of the common interest of creditors is a condition for the court's approval of the restructuring plan. ZoRHÚ amended the ZKR by explicitly extending the obligation to monitor the interest of creditors to the statutory body of the debtor at the time of the threat of bankruptcy, i.e. before the debtor would enter into any insolvency proceedings on the grounds of bankruptcy. The corrective in the form of an obligation to pursue the common interest of creditors at the time of the debtor's economic difficulties or at the time of their threat fulfils its function of protecting their interests. At that stage of the debtor's existence, it is clear that creditors will not be satisfied in full of their claims, which may lead to escalating conflicts between them, as each will naturally have an interest in being satisfied as much as possible. In view of the preferentially consensual nature of preventive restructuring, in which, unlike restructuring, the principle of universality does not apply, we focus on the function of the common interest of creditors at the time of the threat of bankruptcy and subsequently in the preventive restructuring process and its impact on the statutory body's duty to pursue the common interest of creditors. We compare the application of this corrective in restructuring and preventive restructuring and the impact on the position of creditors, as well as the relationship between the common interest of creditors test and the *best-interest-of-creditors test* in preventive restructuring.

[86] § 39 InsO.
[87] § 9 STARUG.

1. Common interests of creditors at the time of impending bankruptcy

The impending bankruptcy is a relevant indicator for the debtor to intervene and, according to the explanatory memorandum to the ZoRHÚ, to use "*all necessary, appropriate, effective and proportionate measures to avert impending bankruptcy, including the use of the option of a public preventive restructuring or a non-public preventive restructuring pursuant to a special law, or any other appropriate and effective measure that does not require the participation of all creditors. In any event, the resolution of the debtor's situation should be based on a dialogue with the parties concerned*." [88] The legislator thus prefers a consensual solution to the impending bankruptcy, whether formal or informal, not involving all creditors. At the time of the impending bankruptcy, the duties of the statutory body are modified and, in principle, its loyalty should be redirected towards increased creditor protection and the gradual reduction of the shareholders as residual creditors. [89,90] This is also the basis for the current legislation on companies in crisis, according to which shareholders (related parties) are in principle creditors in waiting for repayment until the crisis is resolved. If the crisis is not resolved, the shareholders (related parties)[91] become subordinated creditors in the bankruptcy, once again only waiting to see whether anything of the property mass remains to satisfy them. Into this fiduciary direction enters the ZKR, which imposes on the statutory body the duty to pursue the common interests of creditors, while conceiving creditors broadly as employees and their representatives, other persons who may be affected by the impending bankruptcy and also shareholders. [92]

The ZKR uses the term common interest/common interests of creditors but does not define it further. While observing terminological precision, we cannot fail to notice that, unlike the term "common interest of creditors", the legislator has modified the plural term to "common interests of creditors" in the event of a threat of bankruptcy. It is not clear from the explanatory memorandum whether the legislator's intention is merely a terminological inaccuracy or the objective of the legislation. However, we believe that the legislator was not interested in changing the content of the concept of the common interest of creditors, but rather in using the plural form to better express the essence of the concept, taking into account the hierarchical arrangement of creditor groups in the collective form of satisfaction of claims and the difference in the interests of creditors between their groups, or the proximity of the individual interests of creditors within one group (in other words, each group of creditors may have its own common interest).

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[88] Explanatory Memorandum to the ZoRHÚ.

[89] HAVEL, B. Odpovědnost členů orgánů obchodní korporace v době preventivní restrukturalizace IN SCHÖNFELD, J. KUDĚJ, M., HAVEL, B., SPRINZ, P. a kol.: Preventivní restrukturalizace: Revoluce v oblasti sanací podnikatelských subjektů. 1. vydání. Praha: C. H. Beck, 2021, s. 82.

[90] DURAČINSKÁ, J. Povinnosť lojality (fiduciárne povinnosti) spoločníkov kapitálových spoločností. Bratislava: Wolters Kluwer, 2020, s. 14.

[91] On the inconsistency of the definition of a related party under the ZoRHÚ and the ZKR, see in more detail DURAČINSKÁ, J. Plnenie nahradzujúce vlastné zdroje financovania – verzia podľa slovenskej právnej úpravy IN Kšenžighová, A. (ed.) Neštandardné legislatívne zásahy štátu v neštandardných situáciách. Pocta profesorovi Milanovi Ďuricovi. Banská Bystrica: Belanium. Vydavateľstvo Univerzity Mateja Bela v Banskej Bystrici Právnická fakulta UMB, 2023, s. 152.

[92] On the tension between the interests of shareholders and creditors GRAMBLIĆKOVÁ, B. Význam distribučných testov pri delení zdrojov spoločnosti Cofola 2023 [elektronický dokument] : část 1 : Financování obchodních korporací. - : 1. vyd. ISBN 978-80-280-0405-7. - Brno : Masarykova univerzita, 2023. - S. 27 (Spisy Právnické fakulty Masarykovy univerzity : Edice Scientia).

The concept of the common interest of creditors has been defined by court decisions concerning restructuring as the interest of all creditors (or creditors within a group) overriding their individual interests. The criteria are fairness and profitability compared to other methods of resolving impending insolvency/bankruptcy and the interest in the highest possible satisfaction of claims. [93] The common interest of the creditors should be the projection of the individual interests of the creditors, which results in an acceptable satisfaction of all the individual interests of the creditors concerned. [94] The content of the concept of the common interest of creditors may differ from one debtor to another, depending on the individual or group interests of the individual (groups of) creditors.[95,96] The majority decision-making principle has been formulated by the Constitutional Court as a prerequisite for the supremacy of the common interest of all creditors, although the consent of the majority does not necessarily mean compliance with the common interest of creditors in all circumstances.[97]
The requirement to pursue common interests may be relevant precisely when choosing how to deal with impending bankruptcy. As mentioned above, the legislator prefers a consensual resolution of impending bankruptcy (formally in the form of preventive proceedings or other appropriate measures) and does not require the participation of all creditors. Preserving the common interests of creditors may be problematic precisely when other appropriate measures are chosen, or when informal restructuring is chosen, which will not be the result of a common consensus of creditors but will be based on individual agreements with individual creditors. In our view, majority consensus is excluded with individual agreements with individual creditors implemented outside preventive proceedings. In the case of individual agreements with creditors, the element of control and coordination between creditors is absent and the promotion of the individual interests of individual creditors may quite naturally prevail. At the same time, allowing such agreements only with certain creditors runs into the risks described in subchapter I (Preventive restructuring - second chance policy).
The requirement of majority consensus is based on the plurality of creditors and their collective satisfaction, thus excluding their individual satisfaction and limiting the creditor's interest to *maximum satisfaction or the highest possible satisfaction*. However, the statutory body may initiate a preventive procedure under the ZoRHÚ, which constitutes a consensual instrument for resolving an impending bankruptcy.

The Directive does not regulate the duties of statutory bodies in the stage of threatened bankruptcy in terms of their duty to pursue the *common interests of creditors*, as the Slovak legislation does. The Directive provides for a duty to pay due regard to the *interests* of creditors, equity holders and other interested parties. Pursuing the common interests is, in our view, more difficult than pursuing the interests of creditors, because outside a preventive

[93] More on the common interest and related case law PATAKYOVÁ, M., DURAČINSKÁ, J. Individuálny vs. spoločný záujem veriteľov v reštrukturalizačnom konaní. Právny obzor. roč. 101, č. 5 (2018), s. 455-474.
[94] Tamtiež, s. 473.
[95] Ústavný súd SR, I. ÚS 16/2017 – 34, II. ÚS 34/ 2016 – 41, I. ÚS 311/2014-21, I. ÚS 367/2015-25
[96] PATAKYOVÁ, M., DURAČINSKÁ, J. Individuálny vs. spoločný záujem veriteľov v reštrukturalizačnom konaní. Právny obzor. roč. 101, č. 5 (2018), s. 460.
[97] Ústavný súd SR, II. ÚS 273/2012-85 – the Constitutional Court did not automatically identify the approval of the restructuring plan by the majority with the expression of their common interest with regard to the court's power under section 154(1) of the ZKR to reject the restructuring plan for conflict with the common interest of the creditors.

restructuring, which is a collective form of satisfaction, it will be difficult for the statutory body to assess/ or secure the common interests of creditors by private law means. Collective resolution of the threat of bankruptcy is the only tool to achieve the common interest of creditors or their interest as a whole.

2. The common interest of creditors in (Slovak) preventive restructuring

The Slovak legislation on preventive restructuring, in using the "common interest of creditors",[98] basically tries not to distort the above concept as it has been created by the court practice in the context of restructuring, but to align its application with the presented priority consensual character of preventive proceedings. The common interest is the starting point for the fairness of the plan; without a commonality of economic interests and the legal position of creditors, there can be no projection/overlap between them. It is of course easier to achieve such a situation in individual groups than across the board in relation to all the creditors concerned. The common interest of creditors must therefore (in accordance with the Directive) [99] already be considered in the formation of creditor groups on the basis of verifiable rules. [100] As in a restructuring, the members of the creditors' committee are the holders of the duty to act in the common interest.

A key distinguishing feature of preventive restructuring from restructuring is the absence of the court's ex officio power to examine the common interest of creditors when approving a public plan. [101] In a restructuring, the approval of a restructuring plan by the creditors does not in itself automatically constitute respect for the common interest of the creditors and the court may reject the restructuring plan despite the majority consensus of the creditors.[102]

In a preventive restructuring, compliance with the rules on the preparation, drafting and approval of a public plan[103] may be subject to judicial review when the court decides whether to confirm or reject it. Compliance with the common interest of creditors in the creation of creditor groups will also be relevant to the court's decision. However, the court does not examine the above ex officio, but only on the objection of a dissenting creditor. Only a creditor who has been or may be adversely affected has standing to raise such an objection.

The court's approach to reviewing a public plan thus reflects its consensual nature by assuming that the rules for its preparation (including the common interest of creditors) are preserved if the necessary majority is reached to approve it. At the same time, however, it protects creditors from being individually prejudiced by the collective vote of the majority when the court proceeds to its examination on the objection of a dissenting creditor.

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[98] The English language version of the Directive uses only related terms which, however, show ambiguity or multiplicity (*general interest of creditors*, *sufficient commonality of interest*, *legitimate expectations of the general body of creditors/ general body of creditors*, *interest of creditors*, *equitable interest of creditors*) in the context of the provisions in question, where the Slovak language version uses the term *common interest of creditors.*

[99] Recital 44 of the Directive.

[100] § 37 ZoRHÚ.

[101] Compare § 154 (1) ZKR.

[102] On the approval of the restructuring plan in restructuring MAŠUROVÁ A. Voraussetzungen für die Genehmigung und Wirksamkeit des Restrukturierungsplans im slowakischen Recht In: WINNER, CIERPIAL-MAGNOR (Hg.) Sanierung, Reorganisation, Insolvenz : internationale Beiträge zu aktuellen Fragen. 2018. s. 129 – 153.

[103] § 45 (1) (a) ZoRHÚ.

At the same time, the confirmation of a public plan means[104] that the providers of new or crisis financing cannot, inter alia, be held liable for damage to the common interest of creditors, nor can legal acts performed in connection with the negotiation of a public plan or the implementation of a confirmed public plan be subject to the sanction of nullity, repugnancy or unenforceability on the grounds that they are detrimental to the common interest of creditors and that they were proportionate and strictly necessary to achieve the purpose of the preventive public restructuring. [105] It is therefore also a case of convalidation of the possible absence of a common interest during the preventive restructuring process itself, or we consider that this may be the case even before the process itself if the negotiations on the public plan have started earlier (we assume that the draft public plan is already annexed to the proposal for permission of the preventive restructuring and that it would be reasonable to discuss the plan in advance with the creditors concerned, if possible, in view of the consensual nature of the proceedings). An exception for convalidation is made for legal acts carried out in connection with the negotiation of a public plan which took place after the debtor became bankrupt.[106]

Another specificity of preventive restructuring is that, despite the collective nature of satisfaction, the principle of universality does not apply and preventive restructuring may not affect all creditors of the debtor.[107] *How then is the common interest of creditors affected when the interests of all (unaffected) creditors are not reflected?* The common interest of creditors in a preventive restructuring concerns only the affected creditors, but for the unaffected creditors this does not imply a threat to their interests because, as 'unaffected' by the remediation measures (preventive restructuring), they should be fully satisfied and there is no need to protect their interests. The formality and institutionalisation of the process rehabilitates the absence of universality, which, unlike informal ways of dealing with the threat of insolvency, is thus not at the discretion of the debtor's statutory body or the bargaining power of individual creditors.

3. Common interest of creditors vs. best interest of creditors

The role of the best-interest-of-creditors test (hereinafter referred to as "the best interest test") is different from that of the common interest of creditors, but they are complementary. While the common interest of creditors pursues the fairness of the plan within groups of creditors with related (economic) interests and legal status, or creditors as a whole, the 'best interest of creditors' requirement is intended to guarantee a certain degree of satisfaction. The best interests of creditors represent the protection of minority individual rights in a preventive restructuring process. [108]

In restructuring processes, the best-interest-of-creditors test is applied in such a way that the creditors within each group are supposed to achieve *a better/higher satisfaction (or the highest possible satisfaction)* than they would have achieved in a liquidation bankruptcy. [109] However,

[104] If there are no grounds for rejection of the plan by the court according to § 45 ZoRHÚ.
[105] § 46 ZoRHÚ.
[106] § 46 (7) ZoRHÚ.
[107] § 27 ZoRHÚ (creditors affected and unaffected by the public plan).
[108] FIDLER/KONECNY/RIEL/TRENKER, ReO § 35 Rz 3.
[109] PATAKYOVÁ, M., DURAČINSKÁ, J. Individuálny vs. spoločný záujem veriteľov v reštrukturalizačnom konaní. Právny obzor. roč. 101, č. 5 (2018), s. 459.

this concept of the best interest test does not correspond to the definition of the best-interest-of-creditors test contained in the Directive.[110] In defining the best-interest-of-creditors test, the Directive assumes that the position of any dissenting creditor *will be no worse than it would have been in a liquidation bankruptcy or in a best-case alternative scenario if the public plan had not been approved*. This means that, under the Directive, the same position will be sufficient to pass the test, it need not be a better position. *Thus, the Directive has a lower, less stringent expectation for a positive best interest test than the Slovak approach to the test in a restructuring.* [111]

ZoRHÚ works with the concept of the best-interest-of-creditors test, but does not explicitly define it, apart from the not very well formulated (undeveloped) definition of the best alternative scenario[112], which, given the overlap with the definition of the best scenario test under the Directive in the reference to the best alternative scenario, should probably be the basis for the best interest test. This is likely, not least in view of the formulation of one of the exhaustive grounds for rejecting a plan, which is a claim by a dissenting creditor that it would be worse off if the public plan were confirmed than under the best alternative scenario, unless the debtor proves otherwise.[113] Thus, the best interest test in a restructuring will not be the same as the best interest test in a preventive restructuring, where, following the model of the Directive, *an equal position (not necessarily better or maximum possible) will also suffice.*
The Explanatory Memorandum is scant on reasoning in relation to the best interest test and not consistent, as it demonstrates as an objective of the ZoRHÚ the maximalisation of the overall value for creditors compared to what they would have received in an eventual bankruptcy. Which is not entirely consistent with the text of the Act itself, where a "no worse position" is sufficient to evaluate the creditor's position. The question of the extent to which the accounts give an accurate and unambiguous picture of the state of the business will also enter into the assessment of standing, considering alternative approaches to accounting for intangible assets and the differences between the book and market value of the business.[114]

In a preventive restructuring, the court does not test the best interest of the creditors as well as the common interest ex officio, except for the aforementioned objection of a dissenting creditor (otherwise, in essence, the collective vote of the majority heals even its possible absence). Again, the initiative is thus left to the individual creditors alone in the event of their individual disagreement with the draft public plan. This approach is based on the preference

[110] The definition in Article 2(1)(1) of the Directive reads: '*best-interest-of-creditors test' means a test that is satisfied if no dissenting creditor would be worse off under a restructuring plan than such a creditor would be if the normal ranking of liquidation priorities under national law were applied, either in the event of liquidation, whether piecemeal or by sale as a going concern, or in the event of the next-best-alternative scenario if the restructuring plan were not confirmed;*
[111] Also DOLNÝ, J.: Nový spôsob riešenia reštrukturalizácie z pohľadu smernice o reštrukturalizácii a insolvencii. Justičná revue, 73, 2021, č. 2, s. 223.
[112] The definition in Article 2(1)(n) of the ZoRHÚ reads*: 'the best alternative scenario position of the creditor in the case of the next best alternative scenario if the public precautionary restructuring plan ("public plan") is not confirmed by the court'.*
[113] § 45 (1) (e) ZoRHÚ.
[114] NEUBAUEROVÁ,E., PRIEHODA, A. Vybrané aspekty transparentnosti vo finančnom a obchodnom práve. Bratislavské právnické fórum 2023 : transparentnosť vo finančnom a obchodnom práve / Regina Šťastová, Veronika Ťažká (zost.). Bratislava : Právnická fakulta Univerzity Komenského v Bratislave, 2023. s 106.

for not harming the individual creditor's interest by a collective majority vote on the public plan[115] and is in line with the wording of the Directive.

The importance of the best alternative scenario cannot be underestimated as it will be an important baseline benchmark. In the case of restructuring, this benchmark/state of affairs is liquidation bankruptcy, as there is in principle no other scenario left in the event of failure. However, it is different in a preventive restructuring, where there may be several scenarios for further developments, which is also reflected in the definition of the test in the Directive. This greater variability of other scenarios is again not reflected in the Explanatory Memorandum to the ZoRHÚ, where the best alternative scenario is compared only in relation to liquidation bankruptcy[116], and not, for example, also in relation to restructuring. The Decree[117] specifies *the time and percentage of satisfaction of each affected creditor should the public plan not be confirmed by the court and if the best alternative scenario reasonably foresees the bankruptcy of the debtor, the reasons for which no other solution to the debtor's situation can be foreseen shall be stated.* As we have already stated, the best interest test in a preventive restructuring does not require a better, but an equal position compared to the best alternative scenario is sufficient.

We refer to the Austrian legislation, which explicitly links the satisfaction of the creditors' interest by comparison to the position of the affected creditor under the restructuring plan, so that it cannot be worse than in insolvency proceedings under the IO. [118] The benchmark used is the best alternative scenario if the restructuring plan is not confirmed. The court also examines the satisfaction of the interest only on the objection of the adversely affected creditor. In doing so, the possible alternative scenarios may be (i) monetization in liquidation bankruptcy, (ii) rehabilitation plan in insolvency proceedings, (iii) rehabilitation plan in reorganization proceedings (with or without self-administration). [119] Apart from the differences of the Austrian insolvency/reorganisation legislation, the Austrian legislation does not only foresee bankruptcy in the alternative scenario, but also other possible rehabilitation instruments.

IV. Enforced preventive restructuring (consensus vs. enforceability of preventive restructuring)

The Directive offers *a specific tool to enforce preventive restructuring*, where a plan can be imposed by a court decision also on dissenting classes by replacing their consent (*cross-class cram-down*). [120] This will be a different situation than in the case of approval of a public plan by the necessary majority in each class, where the basis for confirmation of the plan by the

[115] DOLNÝ, J.: Nový spôsob riešenia reštrukturalizácie z pohľadu smernice o reštrukturalizácii a insolvencii. Justičná revue, 73, 2021, č. 2, s. 222.
[116] Explanatory Memorandum in the § 43 ZoRHÚ.
[117] § 2 vyhlášky MS SR č. 195/2022 Z. z., ktorou sa vykonávajú niektoré ustanovenia zákona č. 111/2022 Z. z. o riešení hroziaceho úpadku a o zmene a doplnení niektorých zákonov/ Decree No. 195/2022 Coll., implementing certain provisions of Act No. 111/2022 Coll. on the resolution of impending bankruptcy and on amendment and supplementation of certain acts.
[118] § 35 ReO.
[119] FIDLER/KONECNY/RIEL/TRENKER, ReO § 35 Rz 24.
[120] MORAVEC, T. Evropské insolvenční právo. Vydání první. Praha: C. H. Beck, 2021, s. 154.

court will be the consensus of the creditors and the public plan will thus be the (ideal) result of negotiations between the debtor and the creditors concerned.

A preventive restructuring represents the collective satisfaction of individual creditors interests when their full satisfaction may be at risk. The success of a preventive restructuring depends in principle on the will of the debtor and on the will of the creditors (within the involuntary community/groups formed by them) based on the majority decision-making principle (creditor democracy). The role of the creditors concerned in a preventive restructuring should not be limited to their agreement or disagreement with the plan submitted (as in a restructuring), but on the debtor's negotiation with them.

The so-called hold-out problem[121] is cited as an obstacle or weakness of preventive restructuring, where there is a deadlock associated with a blockage by some creditors who refuse a reasonable restructuring because they expect more than they would be entitled to in a fair 'split' (usually a creditor who has acquired a claim against the debtor from the original creditor). If nothing can be imposed on the creditors (group of creditors), they will not be inclined to agree to a solution which, although in the best interest of all creditors, will not be favourable to them. Failure to reach the necessary consensus within the group does not automatically mean the failure of a preventive restructuring, but allows for judicial interference with the autonomy of the creditors' will and the enforcement of a preventive restructuring despite disagreement. The conditions for intervention will of course be stricter. Intervention is justified by the overriding (public) interest in preserving the viability of the debtor and the pursuit of an optimal (fair) solution for all creditors and not to unreasonably impede the implementation of the public plan.
Interference with the autonomy of the will may take the form of:
1. *interference with creditor democracy* ⇢ substitution of the court for the consent of the dissenting class when the court, on the debtor's motion, confirms the plan and makes it binding on the dissenting classes (*cross-class cram down*); [122] or
2. *interference with shareholder democracy* ⇢ restriction of shareholders' rights under corporate law,[123] e.g. through exclusion of the right to decide on an increase/decrease of the share capital at a general meeting, exclusion of the right to call an extraordinary general meeting by the board of directors when a loss of 1/3 of the share capital is achieved).

1. Substituting the consent of the group (cross-class cram-down) in preventive restructuring under the Directive

The court or the administrative authority may confirm the plan on the debtor's motion, despite the disagreement of the voting group, if at least the conditions defined by the directive are met. This is thus the minimum standard that should be respected when transposing the Directive into national legislation. This includes the following conditions:
(a) a positive *best interests test*,

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[121] M. SEYMOUR, M., SCHWARCZ, S. L. Corporate Restructuring underRelative and Absolute Priority Default Rules:A Comparative Assessment. s. 44 dostupné na https://bankruptcyroundtable.law.harvard.edu/2020/02/11/corporate-restructuring-under-relative-and-absolute-priority-default-rules-a-comparative-assessment/.
[122] Art. 11 of the Directive, § 43 ZoRHÚ.
[123] Recital 96 of the Directive, § 66 ZoRHÚ.

(b) equal treatment of creditors within a single group with a sufficient level of common interests (*common interest test*),
(c) majority consent of at least one group of secured creditors,
(d) no group of affected parties can accept or retain more than the full amount of its claims or shares/receive more than its due under the restructuring plan,
(e) the dissenting group shall be treated at least as favourably as any other group of the same level and more favourably than any subordinated group (*relative priority rule*).

The Directive allows for an alternative and replacement of the relative priority rule by an absolute priority rule, according to which *the claims of the affected creditors in the dissenting group are fully satisfied if the subordinated group is to receive any payment/retain any share.*

2. Distribution rules (absolute priority rule vs relative priority rule)

The relative priority rule and the absolute priority rule are two different concepts,[124] distribution rules for the satisfaction of creditors in insolvency/pre-insolvency proceedings, in which the collective satisfaction of creditors takes place, who, according to the affinity of their economic interests and legal status, form groups that are in a certain hierarchy among themselves (e.g. secured creditors, related parties/partners, unsecured creditors, creditors from day-to-day business, etc.).
The absolute priority rule is a rule representing full satisfaction of the senior class of creditors over any satisfaction of the junior class of creditors[125] and is an expression of the principle that debts come before equity, or subordination of the claims of the shareholders.
The relative priority rule, unlike the absolute priority rule, does not require full satisfaction of the senior class of creditors; a more favourable (not full) satisfaction of such class is sufficient. It also allows the partners to retain certain benefits, shares.

The original proposal for a Directive contained an absolute priority rule, as opposed to the adopted text with a preference for a relative priority rule.[126] However, the relative priority rule is not formulated as a general distributional rule covering all groups. The Directive allows for an extension of the absolute priority rule to all groups of creditors, not just the dissenting ones. [127] The application of the distribution rules is formulated in the Directive to protect dissenting groups of creditors from unfair prejudice, i.e. an unfair reduction in the value of their claims. [128] The adoption of the Directive has triggered a debate concerning the merits of preventive restructuring in the context of the application of the distribution rules, in particular the fairness (vagueness) [129] of the relative priority rule.

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[124] To compare the rules BAIRD, D. G. Priority Matters: Absolute Priority, Relative Priority, and the Costs of Bankruptcy. University of Pennsylvania Law Review, march 2017, No. 4, s. 785 – 829.
[125] M. SEYMOUR, M., SCHWARCZ, S. L. Corporate Restructuring underRelative and Absolute Priority Default Rules:A Comparative Assessment. s. 3 dostupné na https://bankruptcyroundtable.law.harvard.edu/2020/02/11/corporate-restructuring-under-relative-and-absolute-priority-default-rules-a-comparative-assessment/.
[126] KROHN, A. Rethinking Priority: The Dawn of the Relative Priority Rule and a New 'Best Interest of Creditors' Test in the European Union, s. 1, dostupné na https://onlinelibrary.wiley.com/doi/abs/10.1002/iir.1398.
[127] Art. 11(2) of the Directive.
[128] Recital 55 of the Directive.
[129] M. SEYMOUR, M., SCHWARCZ, S. L. Corporate Restructuring underRelative and Absolute Priority Default Rules:A Comparative Assessment. s. 24 dostupné na

The absolute priority rule is a judicial rule, regarded as an expression of "fairness and reasonableness," that originated in the U.S. Supreme Court's decisions in the *Kansas City Terminal Ry railroad restructurings. Co. v. Central Union Tr. Co., 271 U.S. 445 (1926)/Northern Pac. Ry. Co. v. Boyd, 228 U.S. 482 (1913).*[130] That decision created the essence of the rule "*a shareholder (whether a close corporation or a public corporation) cannot receive any consideration unless the unsecured creditors are satisfied in full or unless he reaches an agreement with all classes of unsecured creditors.*" However, the application of the rule was limited to the situation where a group of creditors did not accept the plan (in the case of 'plan forcing'), otherwise it could be avoided by agreement with the creditors.
The absolute priority rule protects against unfair "imposition" of a public plan and provides a clear rule of satisfaction. It is possible to encounter views that it is more appropriate for a situation where there is a sale of the enterprise, not for a restructuring with new financing. The disadvantages are that it does not provide for the possibility of satisfying the shareholders even if it were a new financing/ does not motivate them sufficiently to support the restructuring and is too rigid and complicates possible negotiations (the difference between a sale/liquidation and negotiations "in the shadow of a judicial review"). In Slovak law, the absolute priority rule is applied in liquidation bankruptcy. [131]

The relative priority rule gives Member States more flexibility and allows for the satisfaction of shareholders even if other creditors are not satisfied. It has been criticised that the Directive thus protects shareholders not creditors, their opportunistic behaviour at the expense of creditors and encourages debt financing by shareholders instead of equity. It was cited as a negative that it also does not protect creditors from day-to-day business and is based on a misunderstanding of the American Bankruptcy Institute's efforts to improve the absolute priority rule. [132] In Slovak law, the relative priority rule is applied in restructuring and preventive restructuring.[133]

3. Distribution rules and the best-interests-of-creditors test

The distribution rules, like the best interest test, [134] are concerned with the satisfaction of creditors and, at the same time, are intended to guarantee the fairness of the plan in relation to the affected creditors. Both categories (distribution rules and the best interest test) are at the same time a protection of minority rights in a preventive restructuring process (they are

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https://bankruptcyroundtable.law.harvard.edu/2020/02/11/corporate-restructuring-under-relative-and-absolute-priority-default-rules-a-comparative-assessment/.

[130] LUBBEN, S. J. The Overstated Absolute Priority Rule. Fordham Journal of Corporate & Financial Law Volume 21 Issue 4 Article 1, 2016, s. 587.

[131] § 94 (2) ZKR.

[132] On the disadvantages of the relative priority rule JONKERS, A.L., MALAKOTIPOUR, M. DE WEIJS, R.J. The Imminent Distortion of European Insolvency Law: How the European Union Erodes the Basic Fabric of Private Law by allowing 'RELATIVE PRIORITY' (RPR), dostupné na https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3350375.

[133] § 43(4) of the ZoRHÚ reads: *The court shall substitute a class consent only if the class whose consent is to be substituted is treated at least as favorably as any other class of the same class and more favorably than any subordinate class, and no class under the public plan is to receive more than the original consideration.*

[134] recital 52 of the Directive*: that no dissenting creditor is worse off under a restructuring plan than it would be either in the case of liquidation, whether piecemeal liquidation or sale of the business as a going concern, or in the event of the next-best-alternative scenario if the restructuring plan were not to be confirmed. (Member States may choose one of the alternatives).*

reviewed by the court in the case of a dissenting creditor/dissenting group), otherwise they can be healed by consensus among creditors (i.e. by approval of the plan by the necessary majority within the creditor groups). *In light of the overlap between these categories, we have sought to clarify what is the relationship between the above rules and the test, what is their application, do the rules operate only vertically between creditor groups?*
The absolute priority rule operates only vertically because it determines the order of satisfaction of groups of creditors (senior and junior groups) and is based on the "waterfall" principle.[135] However, the relative priority rule operates both vertically and horizontally (it ensures the position of a group of creditors both in relation to another group of the same level and in relation to another group of the same level/and in relation to a subordinate group).[136]
The best interest test tests the position of the dissenting creditor, which must not be worse under the plan than it would have been if the normal ranking of claims in insolvency under national rules or the next best scenario had been applied. [137]
The difference between these categories lies in *the purpose of their application*, while the distribution rules ensure fairness and the degree of satisfaction between the different classes (vertically or horizontally), i.e. how the benefit will be distributed between the different classes, the best interest test tests the convenience/benefit (ensures the degree/amount of satisfaction), i.e. how the benefit will be distributed between the different classes, i.e. how much will be satisfied in relation to the dissenting creditor (also taking into account the distribution rule that would apply in a different scenario in relation to him, i.e. taking into account his position in the distribution chain).

4. Substituting the consent of the group (cross-class cram-down) in (Slovak) preventive restructuring

The transposition of the Directive into Slovak law has shown inconsistency in the legislation and the approach of the Slovak legislator in departing from the best interest test and creativity in incorporating a special condition in relation to the beneficial owner (just as Slovak law is non-standard in the various presumptions concerning the beneficial owner in the case of related parties under the OBZ and under the ZKR).
According to ZoRHÚ, the court will substitute the consent of the dissenting group upon the debtor's motion if the following cumulative conditions are met:

1. the public plan has been approved by a supermajority of the groups and at least one of the groups is a group of secured creditors and a group of unsecured creditors or at least a supermajority of the groups that could be satisfied at least in part in the best alternative scenario.

Thus, a positive best interest test is not needed to substitute for consent because the statutory requirement is for *at least partial satisfaction* of a supermajority of the groups in the best alternative scenario. Thus, *it is not a best interest test*, *which requires no worse position* under the public plan than under the best alternative scenario. Why the legislature chose this formulation is unclear because it linked the substitution of consent to partial satisfaction under the alternative scenario. Under this statutory formulation, it means that if the best

[135] KROHN, A. Rethinking Priority: The Dawn of the Relative Priority Rule and a New 'Best Interest of Creditors' Test in the European Union, s. 5, dostupné na https://onlinelibrary.wiley.com/doi/abs/10.1002/iir.1398.
[136] Art. 11(1)(c) of the Directive.
[137] Art. 2(6) of the Directive.

alternative scenario is liquidation bankruptcy and the consenting creditors would not be satisfied at all in such a bankruptcy, the condition for substitution of consent is not met. The objective of the legislation is thus missed.

2. The dissenting group shall be treated at least as favourably as and more favourably than any other group of the same level, and no group shall receive more than the original fulfilment (*relative priority rule*).

3. At the same time, the legislation contains *a special condition* that links the substitution of the consent of the group to the replenishment of the debtor's own resources with a cash payment by the shareholders of at least 20% of the amount of the creditors' claims to be forgiven, if the public plan provides for the forgiveness of the claims of the groups of each secured creditor and of the group of unsecured creditors and the debtor's benefit owners do not surrender all their shares to the creditors for the purpose of satisfying the creditors, without any compensation. [138] In doing so, the beneficial owners of the debtor may or may not be identical to the shareholders, they may be at the end of the corporate chain, again not so obvious as to how such a transfer of shares should be affected in more complicated structures. The funds corresponding to the replenished resources must be used in full to satisfy the affected creditors without undue delay after confirmation of the public plan.

Creditor haircuts are a common restructuring tool in restructurings, so it is to be expected that this will also be the case in preventive restructurings. The Slovak legislator has thus adopted from the Directive the alternative of the relative priority rule, the essence of which is linked precisely to the motivation of the shareholders (by the fact that they will have something left) in the preventive restructuring (preserving the viability of the company), but by the above-mentioned special condition it simultaneously demotivates such shareholders (we already take into account the provisions of the company in crisis and the related interference with the position of the shareholders). For the Slovak legislation on the resolution of the threat of bankruptcy/insolvency, the challenge of how to motivate shareholders to rescue the company in time remains unresolved (in a company in crisis, they are blocked from the funds provided to the company, in bankruptcy their claims are subordinated, restructuring under the current legislation is tied to at least 50% satisfaction of creditors, in a preventive restructuring, they lose control of the company to some extent through interference with shareholder democracy, and they must replenish the equity under certain conditions). Despite this exemplary strictness of the Slovak legislation, there is still a high proportion of bankruptcies that end for lack of assets.[139]

[138] § 43 ods. 5 ZoRHÚ.

[139] DURAČINSKÁ, J. Plnenie nahradzujúce vlastné zdroje financovania – verzia podľa slovenskej právnej úpravy IN Kšenžighová, A. (ed.) Neštandardné legislatívne zásahy štátu v neštandardných situáciách. Pocta profesorovi Milanovi Ďuricovi. Banská Bystrica: Belanium. Vydavateľstvo Univerzity Mateja Bela v Banskej Bystrici Právnická fakulta UMB, 2023, s. 154.

SECOND CHAPTER

Austrian legislation on preventive restructuring (transposition of the Directive)

I. Sources of legislation

This chapter focuses only on the Ordinary Preventive Restructuring Proceedings, which for the first time in Austria provides a legal framework for a court-supervised, preventive restructuring for entrepreneurs in economic difficulty outside the previously regulated insolvency proceedings.[140] Its aim is, as is also directly apparent from the Directive, to prevent insolvency proceedings and to (re)restore the viability of companies.[141] If the legal conditions are met, preventive restructuring is available to entrepreneurs, regardless of whether they are legal or natural persons. However, the ReO provides for special cases where specific business entities (§ 2 ReO) and specific claims (§ 3 ReO) are not covered by the legislation on preventive restructuring.
As regards procedural rules, the ReO refers to the Federal Law on Insolvency Proceedings - Insolvency Code IO)[142], which, pursuant to § 5 of the ReO, applies in the appropriately, unless otherwise provided.

II. Prerequisites for the opening of restructuring proceedings

1. Impending insolvency

The basic prerequisite for initiating restructuring proceedings is impending or probable insolvency (*wahrscheinliche Insolvenz*) of the debtor. The Directive leaves the definition of this concept to the national legislators. Under § 6 (2) ReO, impending insolvency occurs if the existence of the debtor's business would be threatened without restructuring, especially in the case of debtor's impending inability to pay debts (*drohende Zahlungsunfähigkeit*). At the same time, the law provides for impending insolvency if the equity ratio (*Eigenmittelquote*)[143] falls below 8 % and the repayment period of the notional debt exceeds 15 years.[144] This is a broad definition intended to allow the debtor to file for a preventive restructuring as soon as possible.[145] However, the above definition implies that preventive restructuring is not an option for debtors who are unable to pay their debts – insolvent debtors (*zahlungsunfähige Schuldner*) - but this is subject to limited ex ante scrutiny.[146] On the other hand, the over-indebtedness of capital companies is not an obstacle to the initiation of restructuring proceedings, as long as they can be expected to be effectively remedied within the

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[140] WETTER, P., SIMSA, M. Die neue Restrukturierungsordnung (ReO), Recht der Wirtschaft (2021), p. 825.
[141] Explanatory memorandum to ReO.
[142] RGBl. Nr. 337/1914.
[143] For the exact definition of "Eigenmittelquote" in German, see § 23 URG: *„Eigenmittelquote im Sinne dieses Gesetzes ist der Prozentsatz, der sich aus dem Verhältnis zwischen dem Eigenkapital (§ 224 Abs. 3 A UGB) einerseits sowie den Posten des Gesamtkapitals (§ 224 Abs. 3 UGB), vermindert um die nach § 225 Abs. 6 UGB von den Vorräten absetzbaren Anzahlungen andererseits, ergibt (§ 23 URG).*"
[144] The Austrian legislator thus chose to base the concept of impending insolvency on concepts already established in its legal order: *Bestandsgefährdung des Schuldners* (§ 273 (2) UGB); *drohende Zahlungsunfähigkeit* (§ 167 (2) IO); *Eigenmittelquote - 8 %, fiktive Schuldentilgungsdauer - über15 Jahre hinaus* (§ 22 (1) (1) URG).
[145] WETTER, P., SIMSA, M. Die neue Restrukturierungsordnung (ReO), Recht der Wirtschaft (2021), p. 826.
[146] See in particular § 7 (3) ReO; § 19 (2) (3) in conjunction with § 19 (4) ReO.

framework of such proceedings.[147] In the event of an over-indebtedness, the debtor therefore has the choice between restructuring proceedings under the ReO or remediation proceedings under the IO.[148]
However, restructuring proceedings cannot be initiated if an insolvency petition has already been filed under the IO or if the debtor's restructuring or remediation plan was confirmed less than seven years ago[149] A further restriction arises from § 6 (4) ReO, since this provision provides that if the debtor or a member of the debtor's body entitled to represent the debtor (*ein Mitglied von dessen vertretungsbefugtem Organ*)[150] has been convicted of a criminal offence under § 163a StGB within three years prior to the filing of the petition for the initiation of restructuring proceedings, restructuring proceedings may only be opened if the debtor proves that adequate measures have been taken to remedy the problems that led to the conviction.

2. Debtor's petition

Restructuring proceedings under the ReO can only be initiated on the debtor's petition pursuant to § 7 (1) ReO. In principle, the competent court examines the petition only from a formal point of view and in the event of formal deficiencies, which may also consist of insufficient submission of mandatory annexes, the court shall invite the petitioner to remedy the deficiencies within a time limit set by the court, which may not exceed 14 days. If the proposer fails to do so, the court shall dismiss the application.[151] In addition to the above, the court shall initially take into account only whether the restructuring plan or restructuring concept is manifestly inappropriate (*offensichtlich untauglich*) or whether the petition constitutes an abuse of rights (*missbräuchlich*), since it is clear that impending insolvency is not given or because the relevant enforcement data clearly show that the debtor is unable to pay debts/insolvent (*zahlungsunfähig*).[152]
The Austrian legislator has thus made use of the possibility provided by Article 4 (3) of the Directive, under which Member States may maintain or introduce a viability test under national law, provided that such a test has the purpose of excluding debtors that do not have a prospect of viability, and that it can be carried out without detriment to the debtors' assets. Otherwise, the substantive control (in particular as to whether the restructuring plan or concept is also feasible) takes place only at a later stage of the proceedings.[153]
In his petition, the debtor is obliged to disclose the existence of impending insolvency pursuant to § 7 (1) ReO. As regards the annexes to the petition, the debtor does not have to submit a complete restructuring plan at the time of filing the petition for preventive restructuring, but only a restructuring concept. However, a financial plan (i.e. a comparison of expected income and expenses for the next 90 days, signed by the debtor, showing how the funds necessary to continue the business and to pay current expenses will be obtained and used) and the financial statements which the debtor is required by law to draw up are

[147] See in particular § 27 (2) (8), § 34 (4), § 41 (2) (8) ReO.
[148] Explanatory memorandum to ReO.
[149] § 6 (3) ReO.
[150] In contrast to the Slovak legal system, the Austrian legal system does not regulate the statutory body in the case of commercial companies, whose actions are the direct actions of the company, but the legal representative of these companies.
[151] § 7 (4) ReO.
[152] § 7 (3) ReO.
[153] Explanatory memorandum to ReO.

mandatory annexes; if the debtor has been operating the company for more than three years, it is sufficient to submit the financial statements for the last three years.
In contrast to the restructuring plan, the restructuring concept must, pursuant to § 8 (1) ReO, contain only the following elements: the envisaged restructuring measures and a list of the debtor's assets and obligations at the time of the filing of the petition for the initiation of restructuring proceedings, including a valuation of the assets. In relation to creditors, it is important to point out that the restructuring concept does not necessarily have to contain the names of the creditors to be covered by the envisaged restructuring. If the debtor has only submitted a restructuring concept, the court will, on the basis of the debtor's petition, give the debtor a maximum of 60 days to submit a restructuring plan. If such a petition is not submitted at the same time as the petition for the initiation of the restructuring proceedings or within the time limit set for the payment of the advance on the fees of the practitioner in the field of restructuring (when it is already apparent at this stage that the restructuring will not be carried out solely under the debtor's own management), the court shall appoint a practitioner in the field of restructuring to assist the debtor in drawing up the restructuring plan within a period to be determined by the court, which may be up to 60 days.[154]

III. Stay of individual enforcement actions

The possibility of interruption of individual proceedings to enforce claims against the debtor ('*Vollstreckungssperre*') constitutes a legal device in favour of the debtor to enable him to continue to operate the business or to preserve the value of his estate during the negotiations.[155] According to Art. 6 (1) of the Directive, Member States shall ensure that debtors can benefit from a stay of individual enforcement actions to support the negotiations of a restructuring plan in a preventive restructuring framework. Member states are in this respect obliged to ensure that a stay of individual enforcement actions can cover all types of claims, including secured claims and preferential claims.[156] On the other hand, Member States may provide that judicial or administrative authorities can refuse to grant a stay of individual enforcement actions where such a stay is not necessary or where it would not achieve the required objective.[157] Grounds for refusal might include a lack of support by the required majorities of creditors or, where so provided under national law, the debtor's actual inability to pay debts as they fall due.[158] Member States may also provide that a stay of individual enforcement actions can be general, covering all creditors, or can be limited, covering one or more individual creditors or categories of creditors. In the second case, the stay shall only apply to creditors that have been informed, in accordance with national law, of negotiations on the restructuring plan or of the stay.[159] The Austrian legislator also made use of this possibility.
In order to support the negotiation of a restructuring plan in the restructuring proceedings, the court may, on the basis of § 19 (1) ReO, order on the debtor's petition that applications for the approval of execution on the debtor's assets may not be granted and that no court-ordered pledge or other right of satisfaction determined by a court order may be acquired

[154] § 8 (2) ReO.
[155] Point No. 32 of the Recital of the Directive.
[156] Art. 6 (2) of the Directive.
[157] Art. 6 (1) *in fine* of the Directive.
[158] Point No. 32 *in fine* of the Recital of the Directive.
[159] Art. 6 (3) of the Directive.

over the debtor's assets. In the petition, the debtor must state the names and addresses of the creditors or indicate the categories of creditors whose claims are to be covered by the stay of enforcement proceedings.[160] The court is not bound by the application in the sense that it may apply the stay to a smaller number of creditors than the debtor proposes in the petition.[161] However, in any event, the court must, pursuant to § 21 (1) ReO, in the decision to grant the stay of individual enforcement actions, specify the creditors or classes of creditors whose claims are subject to the stay of individual enforcement actions.
Another mandatory element of the decision approving the stay of individual enforcement actions is the indication of the period of time during which the stay is to last. According to Art. 6 (6) of the Directive, the initial duration of a stay of individual enforcement actions shall be limited to a maximum period of no more than four months. However, Member States may subsequently enable judicial or administrative authorities to extend the duration of a stay of individual enforcement actions or to grant a new stay of individual enforcement actions, at the request of the debtor, a creditor or, where applicable, a practitioner in the field of restructuring. Such extension or new stay of individual enforcement actions shall be granted only if well-defined circumstances show that such extension or new stay is duly justified, such as:

(a) relevant progress has been made in the negotiations on the restructuring plan;
(b) the continuation of the stay of individual enforcement actions does not unfairly prejudice the rights or interests of any affected parties; or
(c) insolvency proceedings which could end in the liquidation of the debtor under national law have not yet been opened in respect of the debtor.[162]
However, according to Art. 6 (8) of the Directive, the total duration of the stay of individual enforcement actions, including extensions and renewals, shall not exceed 12 months.

Under Austrian law, the initial stay of individual enforcement actions may not exceed three months, while such stay may take a maximum of six months in total.[163] Thus, the Austrian legislator has set shorter time limits than those allowed by the Directive. The Austrian law, in § 22 (2) ReO, provides only the following two grounds for allowing the extension or reintroduction of a stay of individual enforcement actions, which may only be made at the petition of the debtor or the practitioner in the field of restructuring and on condition that such extension or reintroduction is sufficiently justified and that the financial plan covers the period of the extension:

1. significant progress has been made in the negotiations on the restructuring plan and they are nearing completion,
2. an appeal (*Recurs*) has been lodged against the confirmation of the restructuring plan.

The decision to approve the stay of individual enforcement actions shall be served on the creditors whose claims are subject to the stay of individual enforcement actions as well as on

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[160] § 19 (3) first sentence ReO.
[161] Explanatory memorandum to ReO.
[162] Art. 6 (7) of the Directive.
[163] If the debtor has moved the centre of its main interests to Austria from another Member State of the European Union or from a third country within the three months prior to the filing of the petition for the initiation of the restructuring proceedings, the total duration of the stay of individual enforcement actions is limited to a maximum of four months. See in this respect § 22 (1) and (4) ReO.

the debtor, and the legal effects of the stay shall only take effect upon service of the approval on the creditor concerned. The enforcement court competent for the execution of movable property as well as the practitioner in the field of restructuring must also be informed of the approval of the stay of individual enforcement actions.[164]

In accordance with the requirements of the directive, § 20 (1) first sentence ReO stipulates that the stay of individual enforcement actions may also apply to secured claims. Based on § 20 par. 2 ReO it also applies to the right to out-of-court monetization of the debtor's movable and immovable objects. The stay of individual enforcement actions does not apply to already established judicial liens.[165]

As the decision on the stay of individual enforcement actions may in practice be issued before the debtor submits a restructuring plan, it may also happen that the stay of individual enforcement actions will apply to claims that are subsequently not included in the restructuring plan. In this case the stay of individual enforcement actions on that claim must be cancelled once the restructuring plan has been submitted.[166]

In accordance with the Directive, the ReO provides for a number of exceptions[167] where the court is obliged to reject the debtor's petition to stay the individual enforcement actions. These are cases where a stay of individual enforcement actions is not necessary to achieve the restructuring objective, or where it would not be conducive to promoting the negotiation of a restructuring plan – e.g. the restructuring plan does not find support from the required majority[168] - or where the debtor is insolvent.[169]

Thus, the court does not examine the special interest of creditors when approving the stay of individual enforcement actions and on the basis of § 21 (3) ReO creditors do not even have the possibility to appeal against such a decision.[170] The creditors concerned are not to be heard at all before a decision is taken on the stay of individual enforcement actions.[171]

However, in accordance with the Directive[172], the stay of individual enforcement actions may be pursuant to § 23 (1) ReO (partially) lifted prematurely on the basis of a petition by the creditor, the practitioner in the field of restructuring or also *ex officio* if:

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[164] § 21 (2) ReO.

[165] Explanatory memorandum to ReO.

[166] Explanatory memorandum to ReO.

[167] § 19 (2) ReO.

[168] Explanatory memorandum to ReO.

[169] The court shall examine whether the debtor is insolvent by looking at the execution data. Insolvency shall be presumed if the debtor is the subject of enforcement proceedings for levies or social security contributions which have not been suspended, postponed or terminated to the full satisfaction of the creditor. The tax authorities and social insurance institutions are obliged to provide information on this (§ 19 (4) ReO). A similar obligation is provided for in point No. 33 of the Recital of the Directive, under which Member States should be able to establish, on a rebuttable basis, presumptions for the presence of grounds for refusal of the stay, where, for example, the debtor shows conduct that is typical of a debtor that is unable to pay debts as they fall due — such as a substantial default vis-à-vis workers or tax or social security agencies — or where a financial crime has been committed by the debtor or the current management of an enterprise which gives reason to believe that a majority of creditors would not support the start of the negotiations.

[170] WETTER, P., SIMSA, M. Die neue Restrukturierungsordnung (ReO), Recht der Wirtschaft (2021), p. 828.

[171] § 19 (3) second sentence ReO.

[172] Compare Art. 6 (9) of the Directive: *"Member States shall ensure that judicial or administrative authorities can lift a stay of individual enforcement actions in the following cases:*

(a) the stay no longer fulfils the objective of supporting the negotiations on the restructuring plan, for example if it becomes apparent that a proportion of creditors which, under national law, could prevent the adoption of the restructuring plan do not support the continuation of the negotiations;

(b) at the request of the debtor or the practitioner in the field of restructuring;

– the negotiations on the restructuring plan are no longer supported by the majority of creditors necessary for the adoption of the restructuring plan (No. 1),
– it unduly prejudices one or more creditors or one or more classes of creditors, in particular if the plan submitted does not concern one of the creditors (No. 2),
– stay of individual enforcement actions leads to the insolvency of a creditor (No. 3), or
– the assets to which the stay of individual enforcement actions applies are not at all necessary for the continued operation of the debtor's company (No. 4).

During the stay of individual enforcement actions, the interest of creditors is also taken into account in the context of the obligation to file for insolvency (*Insolvenzantragspflicht*). According to Art. 7 (1) of the Directive, where an obligation on a debtor, provided for under national law, to file for the opening of insolvency proceedings which could end in the liquidation of the debtor, arises during a stay of individual enforcement actions, that obligation shall be suspended for the duration of that stay. Similarly, under Art. 7 (2) of the Directive, a stay of individual enforcement actions shall suspend, for the duration of the stay, the opening, at the request of one or more creditors, of insolvency proceedings which could end in the liquidation of the debtor. However, Member States may derogate from both of these principles in situations where a debtor is unable to pay its debts as they fall due. In such cases, Member States shall ensure that a judicial or administrative authority can decide to keep in place the benefit of the stay of individual enforcement actions, if, taking into account the circumstances of the case, the opening of insolvency proceedings which could end in the liquidation of the debtor would not be in the general interest of creditors.[173]
Pursuant to the aforementioned principles, the debtor's obligation to file for insolvency proceedings due to the over-indebtedness is suspended on the basis of § 24 (1) ReO of the ReO during the stay of individual enforcement actions. § 24 (2) ReO provides that during the stay of individual enforcement actions, the courts shall not rule on the creditor's petition for insolvency proceedings due to the debtor's over-indebtedness. It is irrelevant when the debtor's over-indebtedness occurs, i.e. whether before the commencement of the restructuring proceedings or after the approval of the stay of individual enforcement actions, and it is also irrelevant whether the stay applies to the majority of creditors or only to some of them.[174]
The situation is different in the case of insolvency of the debtor (when the debtor is unable to pay debts). Here, the debtor's obligation to file for insolvency proceedings pursuant to § 69 (2) IO is in principle preserved. This provision, in the context of the options given by the Directive, reflects the fact that preventive restructuring is in principle not available to insolvent debtors. The interests of creditors in the light of the options provided by the Directive are also taken into account in this case. Insolvency proceedings will not be opened during the stay of individual enforcement actions due to the debtor's insolvency/inability to pay debts (only if), taking into account the circumstances of the case, the opening of such insolvency proceedings *is not* in the general interest of creditors. The court must decide in the restructuring proceedings whether the general interest of creditors is at stake. The insolvency court must be informed of the final decision. However, the restructuring proceedings will not

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(c) where so provided for in national law, if one or more creditors or one or more classes of creditors are, or would be, unfairly prejudiced by a stay of individual enforcement actions; or
(d) where so provided for in national law, if the stay gives rise to the insolvency of a creditor."
[173] Art. 7 (3) of the Directive.
[174] Explanatory memorandum to ReO.

automatically be terminated at this point. This will only occur after the formal opening of insolvency proceedings pursuant to § 41 (2) (7) ReO.[175]
A situation where the opening of insolvency proceedings despite the insolvency of the debtor is not in the general interest of creditors may arise, for example, if a restructuring plan has been accepted by the necessary majority of creditors but has not yet been validly confirmed, or if in case of an immediate opening of the insolvency proceedings the achievable level of satisfaction of creditors (*Insolvenzquote*) would be lower than on the basis of the restructuring plan.
Insofar as the debtor's obligation to file a petition for initiation of insolvency proceedings is not applied in accordance with § 24 ReO, the liability of the statutory bodies of limited liability companies within the meaning of § 25 (3) GmbHG and § 84 (3) (6) AktG for providing financial benefits to third parties cannot be invoked either, insofar as such benefits are in accordance with the due diligence of a prudent and conscientious entrepreneur (*Sorgfalt eines ordentlichen und gewissenhaften Geschäftsleiters*). At least such new transactions as are necessary for the continuation of the company's business are therefore permissible, while any advantage to creditors is not permissible. However, in § 25 (1) *in fine* ReO, the Austrian legislator has specifically emphasised that the insolvency liability of the members of statutory body pursuant to § 25 (3) GmbHG and § 84 (3) (6) AktG applies in relation to creditors and claims that are subject to the stay of individual enforcement actions. Such a course of action would lead to unequal treatment in relation to creditors.[176]

IV. Protection of contractual relations of the debtor

The interest of creditors in the context of the stay of individual enforcement actions is also affected by the fact that they are not entitled to terminate for non-performance by the debtor their contracts with the debtor which are relevant for the debtor's further business activities. This obligation derives in particular from the first subparagraph of Art. 7 (4) of the Directive, under which Member States shall provide for rules preventing creditors to which the stay applies from withholding performance or terminating, accelerating or, in any other way, modifying essential executory contracts to the detriment of the debtor, for debts that came into existence prior to the stay, solely by virtue of the fact that they were not paid by the debtor. 'Essential executory contracts' shall be understood to mean executory contracts which are necessary for the continuation of the day-to-day operations of the business, including contracts concerning supplies, the suspension of which would lead to the debtor's activities coming to a standstill. Member States may provide that this duty also applies to non-essential executory contracts.[177]
The Austrian legislator regulated this special protection of the debtor against the termination of contracts in § 26 (1) ReO, limiting it to so-called "essential contracts still to be performed", which are defined as contracts between the debtor and one or more creditors under which the parties to the contract still have to perform the obligations necessary for the continuation of the day-to-day operation of the business at the time when the stay of individual enforcement actions is allowed. These are supply contracts whose termination or cancellation would lead to the cessation of the debtor's business activities, in particular in the case of gas, electricity and water supplies, as well as telecommunications or card payment

[175] WETTER, P., SIMSA, M. Die neue Restrukturierungsordnung (ReO), Recht der Wirtschaft (2021), p. 829.
[176] Explanatory memorandum to ReO.
[177] Third subparagraph of Art. 7 (4) of the Directive.

services.[178] It follows from the legal regulation that the main types of contract will be contracts with repeated or continuous performance. On the other hand, contracts with target obligation performance and multilateral contracts cannot be automatically excluded either. However, articles of association (bylaws) of companies cannot be considered to be essential contracts.[179] Based on the express text, § 26 (1) ReO does not apply to claims for repayment of credits under credit agreements.[180] The creditor of credit agreements may therefore continue to exercise his statutory right of withdrawal for an important reason (§ 987 ABGB) or his contractual right of withdrawal in the case of payments that have yet to be made.[181]
However, as *Anzenberger*[182] rightly points out, in practice it can often be difficult for the debtor's creditors to assess whether they are parties to an essential contract, given that the *day-to-day* operation of the business is crucial/decisive. Therefore, if the debtor or, pursuant to § 16 (2) ReO, the practitioner in the field of restructuring asks them to perform with reference to § 26 (1) ReO they will - in view of the threat of claims for damages - think carefully whether or not they will continue to perform, even if there are doubts as to whether the contract is an essential contract.
As it is provided for in the first subparagraph of Art. 7 (4) of the Directive and based on a grammatical interpretation,[183] § 26 (1) ReO applies to claims against the debtor which arose before the approval of the stay of individual enforcement actions and which have not been paid by the debtor despite their due date. In this context, we would also like to refer to point no. 41 of the Recital of the Directive, which explicitly states: „*Member States should provide that creditors to which a stay of individual enforcement actions applies, and whose claims came into existence prior to the stay and have not been paid by a debtor, are not allowed to withhold performance of, terminate, accelerate or, in any other way, modify essential executory contracts during the stay period, provided that the debtor complies with its obligations under such contracts which fall due during the stay. Executory contracts are, for example, lease and licence agreements, long- term supply contracts and franchise agreements*".
In addition, Member States are obliged to ensure that creditors are not allowed to withhold performance or terminate, accelerate or, in any other way, modify executory contracts to the detriment of the debtor by virtue of a contractual clause providing for such measures, solely by reason (i.e. performance by the debtor is not relevant here) of a request for the opening of preventive restructuring proceedings, a request for: a stay of individual enforcement actions, the opening of preventive restructuring proceedings or the granting of a stay of individual enforcement actions as such.[184] The justification for this requirement is to be found in no. 40 of the Recital of the Directive: „*Where such clauses are invoked when the debtor is merely negotiating a restructuring plan or requesting a stay of individual enforcement actions or invoked in connection with any event connected with the stay, early termination can have a negative*

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[178] Explanatory memorandum to ReO.
[179] ANZENBERGER, P. Vertragsschutz und unwirksame Vereinbarungen nach der ReO IN Konecny (Hrsg), RIRUG - Neuerungen im Restrukturierungs- und Insolvenzrecht (2021), p. 130.
[180] § 26 (5) ReO.
[181] WETTER, P., SIMSA, M. Die neue Restrukturierungsordnung (ReO), Recht der Wirtschaft (2021), p. 829.
[182] ANZENBERGER, P. Vertragsschutz und unwirksame Vereinbarungen nach der ReO IN Konecny (Hrsg), RIRUG - Neuerungen im Restrukturierungs- und Insolvenzrecht (2021), p. 129.
[183] Compare: „*Creditors who are subject to the stay of individual enforcement actions may not, with respect to claims that arose prior to the stay and solely on the basis of the debtor's failure to pay those claims, refuse to perform under essential contracts yet to be performed or accelerate, terminate, or otherwise modify those contracts to the debtor's detriment.*"
[184] Art. 7 (5) of the Directive.

impact on the debtor's business and the successful rescue of the business. Therefore, in such cases, it is necessary to provide that creditors are not allowed to invoke ipso facto clauses which make reference to negotiations on a restructuring plan or a stay or any similar event connected to the stay."
This obligation is provided for in § 26 (3) ReO which as a further (fifth) example of an invalid contractual clause regulates contractual agreements to refuse performance under contracts that are still to be performed or to prematurely mature, terminate or otherwise modify them to the detriment of the debtor on account of such a deterioration in the economic situation that makes it possible to commence restructuring proceedings. This last exception shall not apply to claims for repayment of credits under credit agreements.[185] The entire provision of § 26 (3) ReO does not apply to the so-called „*Nettingmechanismen*" within the meaning of § 26 (4) ReO. By this regulation, the Austrian legislator has made use of the possibility of the exception provided for in Art. 7 (6) of the Directive, under which Member States may provide that a stay of individual enforcement actions does not apply to netting arrangements, including close-out netting arrangements, on financial markets, energy markets and commodity markets if such arrangements are enforceable under national insolvency law. The stay shall, however, apply to the enforcement by a creditor of a claim against a debtor arising as a result of the operation of a netting arrangement.

V. Restructuring plan

1. General content of the restructuring plan

In insolvency proceedings under the ReO, the restructuring plan is the fundamental document on which the entire procedure is based. Pursuant to § 27 (1) ReO, only the debtor is entitled to submit and request the approval (conclusion) of the restructuring plan, which must be submitted either together with the petition for the commencement of the restructuring proceedings or within the additional period granted by the court for its submission.[186] The Austrian legislator thus did not make use of the possibility provided by Art. 9 (1) of the Directive for the practitioner in the field of restructuring or the creditor to submit a restructuring plan. This approach of the Austrian legislator is regarded as sensible, particularly by legal practitioners, because the debtor is the person who has all the information necessary for the restructuring plan. Moreover, any restructuring would be impracticable without his cooperation considering the predominant type and size of undertakings in Austria where small and medium-sized undertakings predominate.[187]
The mandatory content of the restructuring plan is laid down in § 27 ReO which transposes Art. 8 of the Directive into Austrian law. In particular, the following information is required:

- data on the debtor - in particular name and address (§ 27 (2) (1) ReO);

[185] § 26 (5) ReO.
[186] In accordance with this provision, the petiotion in question always includes a petition for confirmation of the plan by the court in the event that a cross-class cram-down is necessary under the conditions laid down in § 36 ReO, unless the debtor expressly waives this option.
[187] REISCH, U. Restrukturierungsverfahren – Planinhalte, Planwirkungen IN Konecny (Hrsg), RIRUG - Neuerungen im Restrukturierungs- und Insolvenzrecht (2021), p. 143.

- details of the practitioner in the field of restructuring – in the case that the restructuring is to be supervised by the practitioner at the request of the debtor or for other legal reasons (§ 27 (2) (2) ReO);
- information on the debtor's economic situation – in particular, an indication of the valuation of the assets and liabilities, including the valuation of the business, both at going concern value and liquidation value, an indication of the number of employees and the nature of their activities, and a description of the extent of the economic problems (Art. 27 (2) (3) ReO);
- information concerning the creditors to be covered by the restructuring plan – these are to be listed either by name or, where this is not possible,[188] by the class of claims, and information concerning the claims covered by the restructuring plan, together with interest accrued up to the date of its submission, must also be listed, as well as information on the total amount to be generated as a result (§ 27 (2) (4) ReO);[189]
- information on the classification of the creditors covered by the restructuring plan into different classes, as well as the amount of the claims in each class, or information that no creditor classes will be created (§ 27 (2) (5) ReO);[190]
- information on the creditors who will not be covered by the restructuring plan – these are to be listed either by name or, where this is not possible, by classies of claims,[191] together with a justification as to why these creditors should not be covered by the restructuring plan (§ 27 (2) (6) ReO);
- terms of the restructuring plan – in particular the proposed restructuring measures and their duration, the method of notification and discussion with the employees' bodies and employees' representatives, the impact on labour relations, the financial plan for the duration of the restructuring measures, as well as any new financing and the reasons for its necessity (§ 27 (2) (7) ReO);
- submission of at least a conditionally positive forecast for the continued existence of the business, depending on the acceptance and confirmation of the restructuring plan – an indication of the reasons why the restructuring plan will prevent the debtor from becoming insolvent or over-indebted or will eliminate a over-indebtedness that has already occurred and ensure the viability of the company (§ 27 (2) (8) ReO);
- comparison with the scenarios under § 35 (1) IO (§ 27 (2) (9) ReO).

At least a financial plan (see § 27 (2) (7) ReO) and a conditionally positive forecast (see § 27 (2) (8) ReO) should be submitted as separate annexes. In addition, a list of the creditors covered by the plan, with their names, addresses and e-mail addresses or, if these are not known,

[188] For example, for holders of special bonds (*Anleihegläubiger*), see REISCH, U. Restrukturierungsverfahren – Planinhalte, Planwirkungen IN Konecny (Hrsg), RIRUG - Neuerungen im Restrukturierungs- und Insolvenzrecht (2021), p. 144.
[189] The Explanatory Memorandum states that, unlike the IO proceedings, interest continues to accrue even after restructuring proceedings have been initiated. In order to avoid having to calculate the accrued interest in the restructuring plan meeting in order to review voting rights, the decisive date for calculating the accrued interest is the date of submission of the restructuring plan. See Explanatory Memorandum to ReO.
[190] On the basis of § 29 (3) ReO, small and medium-sized entrepreneurs, i.e. entrepreneurs who do not exceed two of the three size criteria according to § 221 (3) UGB, are not obliged to classify creditors into specific classes.
[191] For example, for holders of special bonds (*Anleihegläubiger*), see REISCH, U. Restrukturierungsverfahren – Planinhalte, Planwirkungen IN Konecny (Hrsg), RIRUG - Neuerungen im Restrukturierungs- und Insolvenzrecht (2021), p. 144.

other individual identification and contact details, shall be attached to the restructuring plan pursuant to § 27 (3) ReO. This list is not part of the restructuring plan.

2. Specific features of the restructuring plan

Compared to the remediation procedure under the IO, the restructuring plan under the ReO is characterised by the following specific features:[192]

- the possibility of reducing the claims of secured creditors;
- there is no minimum quota or duration of payment periods;
- the required financial plan must be drawn up not only for the duration of the proceedings, but also for the duration of the restructuring measures and must indicate the origin and use of the funds for the implementation of the restructuring measures and thus also the restructuring plan;
- the possibility of cross-class cram-down;
- the choice on the part of the debtor as to which creditors are to be covered by the restructuring plan and their classification into different classes - however, as is also clear from the Explanatory Memorandum, the selection of creditors to be covered by the restructuring plan must be made according to objectively comprehensible criteria and there must also be objectively comprehensible justification as to why the other creditors are not to be affected by the restructuring plan; the Explanatory Memorandum gives as an example for substantive reasons why the debtor has not included certain creditors in the restructuring plan that these creditors would be fully satisfied also in insolvency proceedings under the IO or that the inclusion of these creditors is not necessary to avert insolvency and ensure the debtor's viability as well as the fact that the distinction between creditors is objectively justified by the circumstances - for example, if only financial creditors are included or if the claims of consumers of small and medium-sized enterprises remain unaffected.[193]

3. Restructuring measures

Restructuring measures are one of the mandatory elements of a restructuring plan (§ 27(2) (7) ReO) On the basis of § 1 (2) ReO and in accordance with the Directive, they may include measures aimed at changing the composition, terms or structure of the debtor's assets and liabilities or any other part of his capital structure, as well as any necessary operational changes or a combination of these elements. In this context, the ReO also allows for the reduction or deferral of claims and the reduction in the number of employees and even the sale of the enterprise of the company, which is provided for only as an option under Art. 2 (1) (1) of the Directive.[194]

A specific possibility of introducing measures in relation to the claims of the creditors is provided for in § 28 ReO. The provision in question regulates the permissibility of changes to contractual terms relating to payment, which may also apply to interest and payment terms. Reduction of claims is also possible and the restructuring plan must specify the amount by

[192] See also REISCH, U. Restrukturierungsverfahren – Planinhalte, Planwirkungen IN Konecny (Hrsg), RIRUG - Neuerungen im Restrukturierungs- und Insolvenzrecht (2021), p. 142 and following.
[193] Explanatory Memorandum to ReO.
[194] Explanatory Memorandum to ReO.

which the claim is to be reduced. The permissibility of a change in the terms and conditions does not include an obligation to maintain credit lines or to grant new credits.[195] § 14 (2), § 15, § 19 to § 20 and § 21 (4) IO shall apply unless the restructuring plan provides otherwise. The reference to these provisions ensures that the restructuring plan may also affect claims not yet due and contingent claims. Claims that are not due and are included in the plan are deemed to be due unless the restructuring plan provides otherwise.[196]
In connection with § 28 ReO, we consider it important to point out that a restructuring plan may in principle also provide for the reduction and deferral of secured creditors' claims. Secured creditors have the possibility to object to a breach of the creditor's interest criterion in connection with a planned reduction of their claims by filing an application pursuant to § 35 (2) ReO as they would probably not be affected by a reduction of claims to the extent covered by the security in any alternative scenario according to the IO.[197]

VI. Classes of creditors

§ 29 (3) ReO makes it clear that the classification of creditors into specific classes is not mandatory if the debtor is a small or medium-sized entrepreneur, i.e. an entrepreneur who does not exceed two of the three size criteria pursuant to Section 221 (3) UGB. Other debtors are obliged to classify creditors whose claims are reduced or deferred (hereinafter referred to as „affected creditors") into the following classes on the basis of § 29 (1) ReO:

1. creditors with claims on which a pledge or comparable security has been created over the debtor's assets (secured claims),[198]
2. creditors with unsecured claims,
3. for bondholders (*Anleihegläubiger*[199]),
4. for creditors in need of protection, in particular for creditors with claims up to EUR 10 000, and
5. for creditors with subordinated claims.

The classification of creditors into individual classes represents a new instrument in the Austrian legal system. The Austrian legislator therefore decided to transpose the class formation requirements laid down in Art. 9 (4) of the Directive to the minimum extent possible by exempting small and medium-sized enterprises from this obligation. On the other hand, other debtors are obliged to create more mandatory classes than prescribed by the Directive as it only requires as a minimum that creditors of secured and unsecured claims shall be treated in separate classes for the purposes of adopting a restructuring plan.[200]

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[195] Explanatory Memorandum to ReO.
[196] § 14 (2) IO.
[197] REISCH, U. Restrukturierungsverfahren – Planinhalte, Planwirkungen IN Konecny (Hrsg), RIRUG - Neuerungen im Restrukturierungs- und Insolvenzrecht (2021) p. 145 f.
[198] On the basis of § 29 (2) ReO creditors with secured claims are only entered in this class with the amount covered by the security. The unsecured amount must be allocated to another corresponding creditor class. This procedure is provided for in Recital no. 44 of the Directive and the Austrian legislator has decided to make use of it, see the Explanatory Memorandum to ReO.
[199] Under „Anleihe" fall all kinds of securities that materialize a right of obligattion. It is irrelevant whether they are admitted to trading on a stock exchange or not.
[200] Explanatory Memorandum to ReO.

VII. practitioner in the field of restructuring versus debtor's self-administration

In accordance with the requirements of the Directive, in restructuring proceedings under the ReO a special emphasis is placed on debtor's self-administration. This fact also results from the legal status of practitioner in the field of restructuring (*Restrukturierungsbeauftragter*; hereinafter referred to as „restructuring practitioner") whom the court is not always obliged to appoint, but only in the cases required by law. Under Art. 5 (1) of the Directive Member States shall ensure that debtors accessing preventive restructuring procedures remain totally, or at least partially, in control of their assets and the day-to-day operation of their business. The purpose of keeping control of the assets and the day-to-day operation of the business at the debtor's disposal is to avoid unnecessary costs, to reflect the early nature of preventive restructuring and to encourage debtors to apply for preventive restructuring at an early stage of their financial difficulties.[201]

The debtor's right to self-administration has been transposed into Austrian law through the provision of § 16 (1) ReO which provides that the debtor retains control over his assets and the operation of his business in restructuring proceedings unless specific tasks have been entrusted to a restructuring practitioner.

Concerning the issue of the appointment of the restructuring practitioner, ReO also takes into account the interests of creditors. § 16 (2) provides that, to the extent necessary to protect the interests of the creditors concerned, the court may prohibit the debtor from performing certain legal acts in their entirety or the court may make them a subject to the consent of the court or the restructuring practitioner.[202] Legal acts carried out by the debtor in violation of the court's decision shall only become effective upon complete fulfilment of the restructuring plan if the third party knew that consent had not been granted.[203]

As discussed above, the possibility of appointing a restructuring practitioner is already regulated by the ReO at the stage of filing the petition for the commencement of restructuring proceedings when it provides that if the debtor has only submitted a restructuring concept, the court will grant him, on the basis of his petition, a maximum of 60 days to submit a restructuring plan. If such an petition is not made at the same time as the petition for the opening of restructuring proceedings or within the time limit set for the payment of the advance on the restructuring practitioner's fees, the court shall appoint a restructuring practitioner to assist the debtor in drawing up a restructuring plan within a period to be determined by the court which may be up to 60 days.[204]

During restructuring proceedings, the court must appoint a trustee pursuant to § 9 (1) ReO to support the debtor and creditors in the negotiation and preparation of a restructuring plan if:

- the court authorises the stay of individual enforcement actions, provided that the appointment of a restructuring practitioner is necessary to protect the interests of the creditors,
- the confirmation of the restructuring plan requires a cross-class cram-down,

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[201] Point no. 30 of the Recital of the Directive.

[202] However, the court may not impose on the debtor the same restrictions that apply to a debtor by law in bankruptcy proceedings.

[203] § 16 (3) ReO. The decision to restrict the debtor's self-administration must be served on the debtor and the restructuring officer. The decision may not be contested, but may be amended upon application (§ 16 (4) ReO).

[204] § 8 (2) ReO.

- the appointment of a restructuring practitioner is requested by the debtor or by a majority of creditors, calculated according to the amount of the claims; in the latter case, however, the creditors requesting the appointment of a restructuring practitioner are obliged to bear the costs of the restructuring practitioner's activities and are also obliged to make an advance payment to cover the costs in question, the amount of the advance payment being not subject to appeal unless it exceeds EUR 2 000.

On the basis of § 9 (2) ReO, the restructuring practitioner must be appointed by the court also in situations when there are known circumstances that indicate that the self-administration of the debtor will result in the disadvantage of creditors, especially if:

- the debtor violates the obligation to cooperate or provide information,
- the debtor acts contrary to the interests of the creditors,
- an investigation has been initiated against the debtor or a member of the body authorized to represent the debtor on suspicion of committing a criminal offense in connection with business relations,
- information in the financial plan must be verified in the interests of creditors,
- the debtor fails to fulfill the claims incurred after the start of the proceedings or secures or settles the claims of the affected creditors.

Based on § 9 par. 3 ReO, the court has the discretion to appoint an administrator in the following cases:

- in order to examine whether it is necessary to approve temporary financing or a transaction or whether new financing is suitable for the implementation of the restructuring plan (§ 36a IO),
- for the purpose of submitting a report on the expected results of the procedure,
- when determining restrictions on handling the debtor's property,
- when examining claims against which objections were raised.

Austrian legislation thus goes beyond the scope of the Directive, which in Art. 5 (3) a mandatory appointment of a restructuring practitioner requires only in the cases which are governed by § 9 (1) ReO.
In accordance with Art. 26 (1) letter a) and c) of the Directive, as a restructuring practitioner must be appointed a person from the list of practitioners in the area of restructuring who is at the same time a reliable and business-savvy person of integrity. It is also possible to appoint a legal entity or so-called *eingetragene Erwerbsgesellschaft* as a restructuring practitioner. In this case the court must be informed which natural person represents the legal entity of *the eingetragene Erwerbsgesellschaft* in the performance of the task of administrator. The restructuring practitioner must have sufficient expertise in the field of restructuring and insolvency law, commercial law or company law. The provision of § 80a IO also applies,[205] based on which the court is obliged to select a suitable person for each individual case who will ensure the speedy course of the proceedings. In particular, the court must take into account the existence of adequate organization of the office and modern technical equipment, as well as the burden of the ongoing restructuring procedure. In addition, the court must also take into account the special knowledge of the restructuring

[205] § 11 (1) ReO.

practitioner, especially in the field of business economics, as well as in the field of insolvency, tax and labor law, his previous activities and professional experience.[206]
The adequate application of § 80a (3) IO allows the court in special situations to appoint a person other than a person from the list of practitioners in the area of restructuring as restructuring practitioner. These are cases when none of the persons entered in the list is willing to perform the function of restructuring practitioner or when, taking into account the legal requirements, there is a more suitable person who is willing to perform the function of restructuring practitioner and this person is not entered in the list. Another important requirement for the administrator's performance is his independence. Based on § 11 (2) ReO, the restructuring practitioner must be independent of the debtor and the creditors. This primarily means that he must not be their close relative and also cannot be in a competitive relationship with the debtor.[207] He may not give special advice to the debtor or creditors.[208]
The restructuring practitioner performs his activities under the supervision of the court. The court is obliged to monitor the restructuring practitioner's activities and is authorized to give him written and oral instructions, obtain reports and explanations, inspect invoices or other documents and carry out the necessary investigations.[209] Judicial supervision is also applied in the case of dismissal of the restructuring practitioner which cannot occur without the cooperation of the competent court. On the basis of § 13 ReO, the court can dismiss the restructuring practitioner either at his request or at the request of the debtor or creditor and for important reasons also *ex officio*. Before making a decision, the court must, if possible, hear the administrator.
When appointing the restructuring practitioner, the court must also determine his tasks within the framework of the restructuring procedure. On the basis of § 14 ReO he can be assigned the following tasks in particular:

1. support of the debtor or creditors in the drawing up or negotiation of the restructuring plan,
2. monitoring of the debtor's activities during the negotiation of the restructuring plan and submission of related reports to the court,
3. takeover of a partial control over the debtor's property or business during negotiations, in particular to grant consent to the debtor's legal acts according to § 16 (2) ReO.

The restructuring practitioner is entitled to perform all legal acts in relation to third parties which include the fulfilment of obligations associated with his tasks. He is obliged to perform his activities with the care required by the subject of his business management in accordance with § 1299 ABGB.[210] In this context, § 12 (4) ReO emphasizes that he is responsible to all participants for the financial disadvantages caused to them by improper performance of his function. According to § 12 (3) ReO, the restructuring practitioner must take special account of the common interests of all creditors and protect them against special interests of individual creditors.

[206] § 80a (1) and following IO.
[207] For the restructuring practitioner 's information obligation in this context see § 80b (2) and following IO.
[208] RIEL, S. Die neue Restrukturierungsordnung (ReO) IN Konecny (Hrsg), RIRUG - Neuerungen im Restrukturierungs- und Insolvenzrecht (2021), p. 105.
[209] See in more detail § 84 IO that in conjunction with § 12 (2) second sentence IO applies appropriately in this context.
[210] § 12 (1) and following ReO.

Based on § 17 par. 1 ReO, the debtor is obliged to provide the restructuring practitioner with all the information necessary for the performance of his tasks and to enable him to inspect all the documents necessary for this purpose.
The costs of the restructuring practitioner's remuneration and expenses are generally borne by the debtor, who is obliged to make an advance payment in the amount determined by the court.[211] The restructuring practitioner is entitled to an adequate reward for his efforts, the right to payment of value added tax, as well as to reimbursement of his out-of-pocket expenses. The remuneration depends on the scope and difficulty of the administrator's duties.[212]

VIII. Examination, approval and confirmation of the restructuring plan

1. Examination of the restructuring plan by the court

Each restructuring plan must be examined by the court after it is submitted by the debtor. The scope of the judicial examination and therefore also its interference in the restructuring procedure at this stage is governed by § 30 (1) ReO:

1. all mandatory data in the restructuring plan in accordance with § 27 (2) ReO in terms of their completeness and legality,
2. credibility of reasons according to § 27 (2) (8) ReO, that means reasons from which it should follow that the restructuring plan will prevent the debtor from becoming insolvent or over-indebted or will eliminate a over-indebtedness that has already occurred and ensure the viability of the company,[213]
3. suitability of creating creditor classes according to § 27 (2) (5) in conjunction with § 29 and
4. appropriateness of the selection of affected creditors according to § 27 (2) (4) and (6).

If the restructuring plan does not meet the above requirements, the court will order the debtor to correct the restructuring plan within the period specified by the court. Otherwise, the restructuring procedure will be terminated according to § 41 (2) (2) ReO.

2. Approval of the restructuring plan by creditors

Creditors vote on the approval of the restructuring plan at a meeting which, according to § 31 (1) ReO, the court has to order generally 30 to 60 days after the submission of the restructuring plan. The debtor must attend the meeting in person. In addition to him, the affected creditors and the restructuring practitioner, the invitation to the meeting is also sent to persons who have assumed responsibility for the debtor's claims.[214] The approval meeting

[211] For more detail see § 10 ReO.
[212] For more detail regarding the restructuring practitioner's claims see § 15 ReO.
[213] The court can entrust the restructuring practitioner or an expert with the examination of these reasons. This option is regulated by Art. 8 (1) letter h) second sentence of the Directive. However, if the administrator cooperated with the debtor in the drawing up of the restructuring plan, he will not be able to be considered a suitable person for its examination. See also the Explanatory Report to the ReO.
[214] § 145 (2) second sentence and (3) IO.

can also take place using appropriate technical means of communication for the transmission of words and images.[215] The approval meeting can be postponed in the following cases:[216]

- if only one majority of votes is reached and the debtor requests to vote again at a new meeting before the end of the approval meeting; in the case of a new meeting, creditors are not bound by their statements at the first meeting,
- if the court did not allow voting on the amended or new proposal of the restructuring plan,
- if it can be expected that the postponement of the approval meeting will lead to the adoption of the restructuring plan.

The debtor must present the restructuring plan to the affected creditors no later than two weeks before the date of the voting meeting. The debtor is entitled to propose changes to the content of the restructuring plan or submit a new proposal during the meeting. In such a case, the court will allow voting only if all creditors entitled to vote are present, or if the amended or the new restructuring plan is not less favourable for the affected creditors than the original one.[217]

If a restructuring practitioner has been appointed, he has the obligation to submit a report on the debtor's economic situation and past management, as well as on the causes of the loss of his assets and on the expected results of the restructuring procedure.[218]

The voting rights of affected creditors are calculated according to the amount of claims covered by the restructuring plan plus the interest accumulated up to the date of submission of the restructuring plan. Affected creditors are entitled to raise objections against claims covered by the restructuring plan.[219] In this case, a restructuring practitioner must be appointed by the court[220] who is authorized to inspect the debtor's books and records to check the amount of claims.[221] In connection with the consideration of voting rights in the case of disputed claims, the provisions of § 93 (3) and following IO will apply appropriately. According to this provision, the creditors whose claims are disputed or conditional will first participate in the voting. If it turns out that the voting result is different, namely according to whether and to what extent the creditors' votes are taken into account, the court will determine after a preliminary examination and hearing of the parties whether and to what extent the vote of these creditors should be taken into account.[222]

Based on § 33 (1) ReO, for the adoption of the restructuring plan it is necessary that the majority of the affected creditors present in each class approve the plan and that the sum of the claims of the approving creditors in each class is at least 75% of the total amount of the claims of the affected creditors present in that class. If no classes have been formed, the required majorities are calculated based on the total number of creditors present.

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[215] § 31 (3) ReO.

[216] § 31 (5) ReO in connection with § 147 (2) and 3 IO and with § 148a (1) IO.

[217] § 31 (6) ReO in connection with § 145a IO.

[218] § 31 (4) ReO in connection with § 146 IO.

[219] § 32 (1) and following ReO.

[220] Compare § 9 (3) (4) ReO.

[221] § 32 (3) and following ReO.

[222] The provisions of § 144 and § 148 IO shall be applied appropriately.

3. Cross-class cram-down

Under the Directive, laws of Member States should make it possible for a restructuring plan which is not supported by the required majority in each affected class to be confirmed by a judicial or administrative authority, upon the proposal of a debtor or with the debtor's agreement. For the plan to be confirmed in the case of a cross-class cram-down (*klassenübergreifender cram-down*), it should be supported by a majority of voting classes of affected parties. At least one of those classes should be a secured creditor class or senior to the ordinary unsecured creditors class.[223] It should be possible that, where a majority of voting classes does not support the restructuring plan, the plan can nevertheless be confirmed if it is supported by at least one affected or impaired class of creditors which, upon a valuation of the debtor as a going concern, receive payment or keep any interest, or, where so provided under national law, can reasonably be presumed to receive payment or keep any interest, if the normal ranking of liquidation priorities is applied under national law. In such a case, Member States should be able to increase the number of classes which are required to approve the plan, without necessarily requiring that all those classes should, upon a valuation of the debtor as a going concern, receive payment or keep any interest under national law. However, Member States should not require the consent of all classes. Accordingly, where there are only two classes of creditors, the consent of at least one class should be deemed to be sufficient, if the other conditions for the application of a cross-class cram-down are met. The impairment of creditors should be understood to mean that there is a reduction in the value of their claims.[224]
In the case of a cross-class cram-down, Member States should ensure that dissenting classes of affected creditors are not unfairly prejudiced under the proposed plan and Member States should provide sufficient protection for such dissenting classes. Member States should be able to protect a dissenting class of affected creditors by ensuring that it is treated at least as favourably as any other class of the same rank and more favourably than any more junior class. Alternatively, Member States could protect a dissenting class of affected creditors by ensuring that such dissenting class is paid in full if a more junior class receives any distribution or keeps any interest under the restructuring plan (the 'absolute priority rule'). Member States should have discretion in implementing the concept of 'payment in full', including in relation to the timing of the payment, as long as the principal of the claim and, in the case of secured creditors, the value of the collateral are protected. Member States should also be able to decide on the choice of the equivalent means by which the original claim could be satisfied in full.[225]
The concrete conditions for cross-class cram-down are regulated by Article 11 of the Directive, which has been transposed into Austrian law by § 36 ReO. It follows from this provision that a restructuring plan which has not been accepted by the creditors concerned in each creditor class will be confirmed by the court at the request of the debtor if the general conditions for a preventive restructuring within the meaning of § 36 ReO as well as the following specific conditions are met:

- classes with rejecting creditors have the same status as classes of the same level and at the same time have a more favourable status than subordinated classes, the ranking of

[223] Point No. 53 of the Recital of the Directive.
[224] Point No. 54 of the Recital of the Directive.
[225] Point No. 55 of the Recital of the Directive.

the classes being determined according to the order of satisfaction under insolvency law, i.e. §§ 50 and 57a IO;

- no creditor classes receives more than the full value of its claim (para. 1);
- the restructuring plan has been accepted by a majority of the creditor classes, including the class of secured creditors, or by a majority of the creditor classes for which it can be assumed that their creditors would receive a distribution quota in the event of a valuation of the debtor as a going concern in insolvency proceedings;[226] if only two creditor classes have been formed, acceptance by one of these classes is sufficient (para. 2).

In the context of § 50 and § 57a IO, the classes under § 29 (1) no. from 2 to 4 have the same status. Class no. 1 has priority status and class no. 5 is a subordinate group. The Austrian legislator has made use of the relative priority rule under Article 11 (1) letter c) of the Directive, but not of the absolute priority rule under Article 11 (2) of the Directive under which Member States may provide that the claims of affected creditors in a dissenting voting class are satisfied in full by the same or equivalent means where a more junior class is to receive any payment or keep any interest under the restructuring plan. Given that rejecting creditors have the possibility to request a review of compliance with the creditor interest criterion under § 35, even in the event of cross-class cram-down, it is ensured that no rejecting creditor receives less than in the next best alternative scenario under the IO. The Austrian legislator also made use of the possibility to increase the minimum number of consenting creditor classes provided for in Art. 11 (1) last subparagraph of the Directive by making the consent of a majority of the classes of creditors who would receive a quota in the insolvency proceedings (and not just the consent of one such class) a condition in Art. 36 (2) ReO in the latter case.[227] § 36 ReO gives the debtor the possibility, if the statutory conditions are met, to break a disagreement between classes of creditors through the courts and thus also contributes to the promotion his self-administration. On the other hand, the ReO in accordance with the Directive overrides this debtor's self-administration in connection with the cross-class cram-down by requiring the mandatory appointment of a restructuring practitioner in § 9 (1) (2) ReO and by requiring the mandatory valuation of the debtor's assets according to § 38 ReO. If the confirmation of the restructuring plan requires a cross-class cram-down, a restructuring practitioner must always be appointed, although in principle, preventive restructuring takes place without the restructuring practitioner's interference in the debtor's self-administration. A similar situation arises with regard to the compulsory valuation of the debtor's assets, although this does not occur automatically by law but only at the request of a creditor who has not agreed to the restructuring plan and who objected directly at the restructuring meeting or seven days thereafter that there has been a breach of the conditions laid down in Article 36 (2) ReO.[228] In such a case, the court may either entrust the valuation to a competent expert or entrust it directly to the restructuring practitioner,[229] whereby the payment of the expert's fees and the restructuring practitioner's costs shall be governed by § 41 and following ZPO. The creditor at whose request the valuation is carried out, may be ordered to pay an

[226] The amount of the distribution quota is not decisive, see REISCH, U. Restrukturierungsverfahren – Planinhalte, Planwirkungen IN Konecny (Hrsg), RIRUG - Neuerungen im Restrukturierungs- und Insolvenzrecht (2021), s. 156.

[227] Explanatory memorandum to ReO.

[228] § 38 (1) (2) ReO.

[229] § 38 (2) ReO.

advance.[230] The final bearing of costs depends on whether a breach of § 32 (2) ReO is proved.[231]

4. Prerequisites for court confirmation of the restructuring plan

The restructuring plan must be confirmed by the court which is, pursuant to § 34 (5) ReO, obliged to decide on the confirmation of the restructuring plan in an efficient manner in order to deal with the case quickly. When the court's confirmation becomes final the restructuring proceedings is terminated on the basis of § 41 (1) ReO.
Under § 34 (1) ReO, the court is only entitled to confirm the restructuring plan if it has been adopted in accordance with the procedure under § 31 to § 33 ReO and if creditors in the same class – or where no classes have been created all affected creditors – are treated equally in respect of their claims. Furthermore, for the confirmation of the plan by the court, it is necessary that the debtor confirms that he has sent the restructuring plan to all affected creditors in accordance with § 31 (1) ReO. If new financing has been approved, it is necessary for the confirmation of the restructuring plan that such financing does not unreasonably harm the interests of the creditors. It is also necessary for the court to determine the restructuring practitioner's remuneration accrued up to the time of the approval meeting.
A mandatory reason for refusal of confirmation is also the fact that at this stage of the proceedings it becomes apparent that the restructuring plan is manifestly inappropriate within the meaning of § 7 (3) ReO because it is clear that impending insolvency is not given or the relevant enforcement data clearly show the debtor's insolvency or if there is an advantage to creditors[232] or if the debtor has knowingly concealed creditors when determining the creditors who were not to be affected by the restructuring plan. Furthermore, if the debtor has failed to pay outstanding and established claims which are not covered by the restructuring plan or if, on the basis of legitimate objections raised by the creditor at the latest at the approval meeting, a review of the restructuring plan has taken place which has shown that the restructuring plan does not comply with the requirements pursuant to § 30 (1) ReO.
Finally, the court is obliged to refuse the confirmation of the restructuring plan if it is clear that the restructuring plan will not prevent the debtor's insolvency or the debtor's over-indebtedness or that it will not eliminate the over-indebtedness that has already arisen or guarantee the debtor's viability,[233] as well as if one of the rejecting creditors has asked the court to examine whether the criterion of the interest of the creditors pursuant to § 35 ReO has been complied with and the court has come to the conclusion that the criterion in question has not been complied with.[234]

IX. Interest of creditors as an additional corrective

The ReO further defines the specific concept of the 'best interest of creditors test' which is set out in Art. 2 (1) (6) of the Directive as a test "*that is satisfied if no dissenting creditor would be worse off under a restructuring plan than such a creditor would be if the normal ranking of*

[230] § 38 (3) ReO.
[231] Explanatory Memorandum to ReO.
[232] See § 150a IO for more details.
[233] § 34 (4) ReO.
[234] § 34 (2) ReO.

liquidation priorities under national law were applied, either in the event of liquidation, whether piecemeal or by sale as a going concern, or in the event of the next-best-alternative scenario if the restructuring plan were not confirmed …". Pursuant to § 35 (1) ReO, the criterion of the interest of creditors (*Kriterium des Gläubigerineresses*) is fulfilled if no affected dissenting creditor acquires a worse position within the framework of the restructuring plan than in the insolvency proceedings according to the IO. For comparison purposes, the next best alternative scenario, depending on the circumstances of the case, shall be the one that would be likely to take place in the circumstances in the absence of confirmation of the restructuring plan. For comparison purposes, the following proceedings are taken into account: insolvency proceedings with individual, partial or full sale and remediation proceedings under the IO.[235] Compliance with the criterion of the interest of creditors is not examined by the court *ex officio*, but only on the basis of the petition by the dissenting creditor concerned. Pursuant to § 34 (2) ReO, only in the case of such a petition is compliance with the creditor's interest criterion a condition for confirmation of the restructuring plan by the court. The provisions in question correspond to the requirements of the Directive in Art. 10 (2) *in fine*. The ReO also provides for a time limit within which such a creditor is obliged to submit a petition: either immediately at the meeting at which the restructuring plan is approved, or subsequently within seven days after that meeting.[236]
The Directive does not address the very important question for practice of who bears the cost of such a valuation. Under Austrian law, they are borne by the dissenting creditor in case that the expert or the restructuring practitioner does not find a breach of the creditors' interest and the court may order the creditor to pay an advance.[237]

X. Effects of court confirmation of the restructuring plan

A court-confirmed restructuring plan is according § 39 (1) first sentence ReO binding on all affected creditors and the debtor named in the restructuring plan. Creditors who did not participate in the adoption of the restructuring plan are not affected by the plan only if they did not attend the approval meeting because the restructuring plan was not duly communicated to them in accordance with § 31 (1) ReO or if they were not duly invited to the approval meeting.[238]
According to § 28 ReO, special measures in relation to the claims of the creditors concerned shall take effect upon confirmation of the restructuring plan unless the restructuring plan provides otherwise. If the claims of the creditors concerned have been reduced, the debtor shall be exempted from the obligation to compensate the creditors concerned for the loss of the claim they have suffered or to pay for the benefit otherwise granted.[239] However, this seemingly definitive exemption of the debtor from payment of the remainder of the original claim is relativized by the provision of § 42 ReO. According to this provision if the debtor knowingly concealed some creditors when determining the creditors not affected by the restructuring plan, each affected creditor who, through no fault of his own, did not have the opportunity to bring an action before the confirmation of the restructuring plan, shall be entitled, within three years of the confirmation of the restructuring plan becoming final, to

[235] WETTER, P., SIMSA, M. Die neue Restrukturierungsordnung (ReO), Recht der Wirtschaft (2021), p. 830.
[236] § 35 (2) ReO.
[237] § 38 ReO.
[238] § 39 (2) ReO.
[239] § 39 (1) second and following sentence ReO.

bring an action for payment of his loss on the claim without losing the other rights granted to him by the restructuring plan.
In this context, it is also important to refer to § 156a (1 to 3) of the IO[240] which addresses the situation where the debtor falls into default in contravention of the restructuring plan. Default is provided for by law when the debtor fails to pay his due obligation despite the creditor having granted him an additional period of at least fourteen days. In this case, the creditor's claim against the debtor is renewed.
However, on the basis of § 39 (3) ReO, the confirmation of the plan by the court does not replace the fulfilment of statutory and contractual requirements necessary for the implementation of other restructuring measures. Nor can the restructuring plan oblige creditors to submit contractual declarations. This means that in the case of other restructuring measures - such as terminations or modifications of contracts - individual agreements must be concluded separately with the relevant counterparties. These cannot be replaced by a confirmation of the plan.[241]

XI. Remedy

Art. 16 of the Directive in particular lays down the obligation for Member States to ensure that any appeal provided for under national law against a decision to confirm or reject a restructuring plan taken by a judicial authority is brought before a higher judicial authority and that appeals shall be resolved in an efficient manner with a view to expeditious treatment. In accordance with Art. 16 of the Directive, § 40 (1) ReO and following provides that in the event of a refusal to confirm a restructuring plan, the debtor as well as any affected consenting creditor and, in the event of confirmation of the restructuring plan, any rejecting creditor may file a *Rekurs* which in principle has no suspensive effect. The *Rekurs* must be decided in an efficient manner so as to ensure its speedy disposal. By introducing this obligation, the Austrian legislator has also taken into account the requirements in Art. 25 letter b of the Directive which requires Member States to ensure that procedures concerning restructuring, insolvency and discharge of debt are dealt with in an efficient manner, with a view to the expeditious treatment of procedures.[242]
Rekurs has suspensive effect only on the basis of a specific creditor's petition and only then when in case of the implementation of the restructuring plan the claimant would be threatened with serious, irreparable and disproportionate harm that would be disproportionate to the benefits of the immediate implementation of the plan. At the same time, the court shall determine, at its discretion, whether the debtor is obliged to post a security to secure the creditor's claims for possible compensation for financial loss. If the debtor provides security, the suspensive effect of the *Rekurs* shall be lifted and the court decision on the ground of which the *Rekurs* was lifted shall not be subject to further appeal.[243]
If the *Rekurs* against the confirmation of the restructuring plan is successful, the Court of Appeal may either annul the confirmation in question or, alternatively, may uphold it if the common interest of the creditors so requires.[244] In the latter case, the debtor is obliged, upon the creditor's request, to compensate the creditor who has successfully lodged the appeal for

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[240] § 39 (5) ReO.
[241] Explanatory Memorandum to ReO.
[242] Explanatory Memorandum to ReO.
[243] § 40 ods. 3 ReO.
[244] § 40 (4) ReO.

the amount of its financial loss. The amount of the compensation shall be determined by the court in its discretion in accordance with section 273 of the ZPO.[245]

[245] § 40 (5) ReO.

CONCLUSION

The Directive has opened the way for Member States with some variability to develop national legislation on preventive restructuring as a tool to deal with the impending insolvency of a debtor. Already the transpositions that have been carried out show differences between the national arrangements and how they have conceived the 'offer' of the Directive. In the present publication, we have focused primarily on the Slovak and Austrian legislation and how (with regard to selected institutes) they have proceeded to transpose the Directive and what is the position of the debtor and creditors in a preventive restructuring, in which the debtor is allowed to retain some control over its assets and the day-to-day operation of the business. At the same time, we have tried to reveal the dogmatic basis of the selected institutes and to point out the differences when, in the case of terminological correspondence (e.g. the best interest test in restructuring and in preventive restructuring), the tests are substantively different or, conversely, when there is not complete terminological unity (*common creditor interest, common interests of creditors, interest of creditors as a whole*), the concepts are substantively identical.

In preventive restructuring processes, it remains primarily for the creditors to act (oppose) the protection of their individual interests, while at the same time the plan may be imposed on them by the court against their will (the will of a certain group of creditors) under certain conditions. At the same time, we have pointed out that the status of persons in a preventive restructuring also depends on the very definition of a related party/creditor/subordinated creditor in the relevant national legislation and on the differences in the definitions of the Slovak ZoRHÚ and the Austrian ReO with reference to the IO. The differences in the definitions (which persons/creditors will be subsumed under the national legislation as related parties) will have an impact on their classification in the different groups. The grouping is then relevant in relation to the application of the common interest test or the interest of the creditors as a group and in the application of the best interest test and the determination of the order of satisfaction (application of the distribution rules).

In Slovak law, this is a formalised process in which the court authorises a preventive restructuring and simultaneously approves (confirms/rejects the public plan). Preventive restructuring differs from restructuring in that it lacks universality, i.e. it may involve only some (affected) creditors of the debtor, but still retains the features of collective satisfaction. The creditors' interest is tested by their common interest and the best interest test, which has a different content in restructuring than in preventive restructuring. In a restructuring, the best interest test requires *a better or maximum possible satisfaction of creditors* than in bankruptcy; in a preventive restructuring, following the example of the Directive, *the same position of creditors* as in the best alternative scenario will also suffice. Contrary to the Explanatory Memorandum to the ZoRHÚ, we consider that such a scenario may not only be bankruptcy but also restructuring (similar to the Austrian approach). The role of the best interest test is different from the common interest of creditors test, but they are complementary. While the common interest of creditors pursues the fairness of the plan within groups of creditors with related (economic) interests and legal status, or creditors as a whole, the 'best interest of creditors' requirement is intended to guarantee a certain degree of satisfaction of creditors.

In the aforementioned interference with the autonomy of creditors, where a court can impose a public plan even on a dissenting group, distribution rules are relevant, and the Directive offered an alternative between a relative priority rule and an absolute priority rule. We have discussed the differences between these approaches and the objections to their application, with the Slovak legislator opting for the relative priority rule (the same rule is also applied in the Slovak restructuring).
We have examined the difference between the categories (distribution rules and the best interest test) with respect to certain common elements they exhibit. The difference between them lies *in the purpose of their application*, while the distribution rules ensure fairness and the degree of satisfaction between classes (vertically or horizontally), i.e. *how the benefit will be distributed between the different groups*, *the best interest test* tests the convenience/benefit (ensures the degree/amount of satisfaction), i.e. *i.e. how much the dissenting creditor will be satisfied* (also taking into account the distribution rule that would apply in a different scenario in relation to it, i.e. taking into account its position in the distribution chain).
Although we did not explicitly address this in the publication, one cannot help but point to the so-called paradox of the key subordinate conditions as identified by *Smrčka*, which is the absence of a solution in the Directive to the tax consequences for creditors but also for debtors. Failure to address the tax impact of preventive restructuring, or failure to equate preventive restructuring with insolvency proceedings, may have an adverse impact on the use of this type of the preinsolvency tool.[246]

The debtor's position under the European model is characterised by a considerable degree of autonomy in the context of preventive restructuring under the Austrian ReO, which is primarily characterised by the fact that only the debtor can initiate a preventive restructuring and it is primarily up to the debtor to determine which creditors and which claims (in addition to those creditors and claims that are compulsorily exempted from the scope of the ReO) are to be covered by the restructuring plan. It is also primarily up to the debtor to determine the appropriate restructuring measures in relation to the claims in the restructuring plan, even the reduction of secured claims is permissible. The debtor thus has the right to choose which creditors it wants to include in the plan. However, he is also obliged to disclose in the restructuring plan which creditors should not be covered by the plan and the reasons why. This disclosure obligation is intended to prevent the debtor from abusing its self-administration. Another, even more important tool to prevent abuse of self-administration is the sanction of the right of the individual creditors concerned to claim compensation from the debtor if the debtor has deliberately concealed some of its creditors. Although the appropriateness of the creation of individual creditor groups as well as the entire restructuring plan must be reviewed by the court and the debtor is required to justify in the restructuring plan in a factual and comprehensible manner why it has not included certain creditors in the restructuring plan, the legislation allows the debtor to strategically create groups and, in this way, also create the conditions for breaking the dissent among the groups. Last but not least, the debtor has the right to propose to the court which claims asserted against it are to be subject to a recovery block.
In addition to judicial supervision, situations where an administrator/ practitioner has to be involved in the restructuring procedure can be seen as another important aspect of the

[246] SMRČKA, L. K některým vnitřním rozporům evropské směrnice o restrukturalizaci a insolvenci IN SCHÖNFELD, J. KUDĚJ, M., HAVEL, B., SPRINZ, P. a kol.: Preventivní restrukturalizace: Revoluce v oblasti sanací podnikatelských subjektů. 1. vydání. Praha: C. H. Beck, 2021, s. 49 – 51.

limitation of the debtor's self-government. The position and competences of the trustee depend on the circumstances of the particular case. He may be entrusted with overseeing the entire restructuring process from the outset, or he may be entrusted with only certain tasks by the court.

Despite the considerable self-administration of the debtor, the interest of creditors is also emphasised in the various stages of the restructuring procedure, but this is in principle only applied as an additional corrective, e.g. in cases where the blocking of the recovery of claims substantially limits the interest of one or more creditors, or when the restructuring plan is confirmed by the court. However, it is up to the creditors to actively assert their interest before the court and to demonstrate the threat to their interest.

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