Mapping Preventive Restructuring Frameworks and the EU Directive for the JCOERE Project

Country Report

Denmark

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The Danish Perspective on Restructuring

Of key importance in considering the position of Denmark are Articles 1 and 2 of Protocol No 22 on the position of Denmark annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union.[2] Therefore, the Danish legislative framework as it currently stands is not covered by the EIR- Recast as per Recital 88. Nevertheless, Denmark is obliged to follow the provisions of the PRD as it is not covered by the opt out provided under Protocol No 22. Reflecting the German approach, the Danish legislative framework provides for a restructuring plan but only after a formal declaration of insolvency has been made. Therefore, our Danish contributor, as with our German contributor, does not describe the restructuring process as being preventive in nature. Thus, the issues surrounding the threshold beyond which a preventive restructuring process can be availed of are important. The stated policy aim is to enable the debtor to exit insolvency which is distinguished from preventing insolvency. The process by which the court can approve a restructuring plan seems quite constrained and less flexible than in other jurisdictions. In this context, the rules in relation to class formation are more constrained and as a consequence the concept of cross-class cram down-does not arise.

PART 1: The General Context of Preventive Restructuring

Existing Legislative Frameworks

Danish law provides for two formal insolvency proceedings, which are available upon petition by either the debtor or a creditor:

(i) Bankruptcy proceedings, which is a liquidation proceeding; and
(ii) Restructuring proceedings, which aim to overcome insolvency by negotiating a restructuring plan consisting of either a compulsory composition or for the debtor's assets to be sold as a going concern.

Though restructuring proceedings provide tools for the debtor to overcome insolvency, it is not a preventive restructuring framework *per se*. This is because the framework is not intended

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[2] Treaty on the Functioning of the European Union, Title V of Part Three; Consolidated Version of the Treaty on the Functioning of the European Union of October 26 2010, Protocol (No 22) on the Position of Denmark [2010] OJ C 326/47, art 1 & 2.

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to avoid insolvency, rather insolvency is a requirement for the opening of the proceedings. In Denmark, insolvency is defined as the inability of the debtor to meet its liabilities as and when they fall due, except if this 'inability' is deemed to be temporary.[3]

PART II: Specific Substantive Aspects of Preventive Restructuring in Domestic Processes and in the Directive

The Stay of Individual Enforcement Actions

Despite there not being preventive restructuring proceeding in Danish Law, the tools, rights and obligations that exist within restructuring proceedings are quite similar to what is typically found in preventive restructuring frameworks. When opening a restructuring proceeding in Denmark, there is an automatic stay of individual enforcement, which lasts for as long as the procedure continues.[4] This stay is general in nature, in that it covers all types of claims, i.e. secured and unsecured claims and privileged and non-privileged claims.[5] By virtue of the Danish Bankruptcy Act, however, credit secured by a security interest in the debtor's 'floating claims' are exempt from this automatic stay.[6] 'Floating claims' refers to debt claims both present and future. Denmark also permits secured creditors to request regular payments while the stay is in place.[7] Danish law does not, however, empower the stay to be lifted by the courts.

The Adoption of Restructuring Plans

As was articulated previously, the Danish insolvency restructuring framework has many of the key features of the preventive restructuring frameworks seen in other jurisdictions and, indeed, the PRD.[8] In insolvency, Danish law affords affected parties – creditors, which will not be paid be in full or at all – the right to vote on a restructuring plan.[9] Secured creditors are excluded from voting except for the amount of their claim that is unsecured.[10] Related parties are also excluded from voting on the restructuring plan.[11] Creditors with contested claims may be considered ineligible to vote by the Bankruptcy Court if the contested claim is decisive for the adoption of the plan.[12] If the plan consists of a compulsory composition, all creditors whose claims are written down are considered affected; however, a compulsory composition cannot include either secured or preferential creditors.[13]

As restructuring plans in Denmark cannot entail a compulsory composition of secured creditor claims that are higher ranked than ordinary unsecured creditors, the compulsory composition will only affect the ordinary unsecured creditors, which then vote in one pool. Since the voting does not take place in classes – there is only one class *per se* – there is no need to separate creditors into classes for the purpose of voting. It is the role of the Danish Bankruptcy Court to examine and confirm the creditors that are eligible to vote, a decision which cannot be appealed.[14]

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[3] Cf. The Danish Bankruptcy Act, Consolidated Act No. 11 of 6 January 2014, as amended by Act No. 84 of 28 January 2014, Act No. 737 of 25 June 2014m Act No. 573 of 4 May 2015, Act No 550 of 30 May 2017, Act no. 1555 of 19 December 2017 and Act No. 58 of 30 January 2018 *(DBA*) section 17 (2).
[4] Up to 11 months.
[5] DBA section 12 c.
[6] DBA section12 c(4).
[7] Danish BA, s 12(c)(5). If Denmark maps across this framework to preventive restructuring, it may need to consider this aspect in light of the PRD.
[8] In some instances, the only difference between Danish restructuring and preventive restructuring in other jurisdictions is the end purpose; the purpose of the Danish framework is to enable the debtor to exit insolvency, whereas preventive restructuring is to enable the debtor to avoid becoming insolvent in the first place. As such, in order to access restructuring in Denmark, the debtor must be insolvent, making it different to the PRD.
[9] Danish BA, ss 13 d (1) & 120 (1).
[10] Danish BA, s 120(2). This rule is not uncommon in that other jurisdictions have a similar situation, for example, Italy.
[11] Danish BA, s 13 d (3).
[12] Danish BA, s 13 d (2).
[13] Danish BA, s 13 d (4) and section 10 a (2). A compulsory composition (*tvangsakkord*) is a legally regulated restructuring procedure, in which the amount that the debtor has to pay to the creditors is reduced.
[14] The voting rules are slightly different when the plan consists of the transfer of a business but the voting rights are still only conferred on one class of creditors.

For the purpose of the plan becoming binding on all affected creditors once it is confirmed by the court, Danish law mandates that a restructuring plan is adopted if the majority does not oppose it.[15] Voting is formal, and confirmation is always mandatory.[16]

The Confirmation of Restructuring Plans

The Danish regulations require that all restructuring plans containing an element of business transfer or compulsory composition are confirmed by the relevant court.[17] The degree to which the court examines the proposal depends on the factual circumstances of each case. The parties affected by the plan can object to its confirmation. This then requires a court examination of the basis for the objection.[18]

Denmark has three mandatory grounds, which if present, result in the rejection of a restructuring plan:

(i) First, the court examines if there have been procedural violations or if the debtor and insolvency practitioner have given incomplete information. If there are errors, they must have had the potential to impact on the voting to result in the Court rejecting the plan.[19]

(ii) Second, the court examines the restructuring proposal to determine if it contains provisions that are contrary to the rule of law or statutory provisions in the Bankruptcy Act.[20]

(iii) Third, the court must reject the plan if a creditor has been granted an advantage outside of the restructuring plan in order to exert influence over the vote on the plan.

It appears that the court has limited discretion to reject a plan outside of these three grounds. This limitation on the court's discretion has been explained by the legislator in the following terms: the rejection of a restructuring plan, which has been approved by the required majority of creditors, should be exceptional. This is because the (majority of the) creditors should have the final say on the adoption of a restructuring plan.

The court *may* reject the restructuring plan if it determines that the creditors will be better off in liquidation, in other words, the best-interests-of-creditors test.[21] The Supreme Court has held that the Bankruptcy Court should also reject the plan if its purpose is solely to discharge the debtor from personal debt - debt that continues to exist after bankruptcy proceedings have ended - as opposed to the continuation of a business, even if the plan fulfils the best-interests-of-creditors test.[22] It is worth noting that the prospect of success is not one of the mandatory factors to be assessed by the court in the confirmation process, though it is not precluded from considering it.

Cross-Class Cram-Down

The foundation for a cross-class cram-down does not yet exist in Danish law. This is because the Danish framework does not require creditor classes *per se*, as secured creditors remain outside of the restructuring process.

Protection of New and Interim Financing

Currently, there are no specific provisions that regulate new finance within restructuring in Danish law. With that said, a financier may provide new finance that can, in principle, be secured with a security right. Where new financing or a security agreement is entered into during the restructuring proceeding,

[15] Danish BA, s 14 (2).
[16] Danish BA, s 13 e.
[17] Danish BA, s 13 e. As previously noted, restructuring plans refer to insolvency restructuring and not preventive restructuring, however, the process appears to be quite similar to preventive restructuring frameworks in other jurisdictions. The point has been made that the primary difference appears to be that the Danish system attempts to support the debtor to exit from insolvency, whereas preventive restructuring frameworks seek to prevent the entry into insolvency in the first place.
[18] Per Betænkning 1512/2009 om rekonstruktion mv. P. 237 and 388, objections must be presented at the last court meeting pertaining to the creditors' adoption of the plan. The relevant creditor(s) cannot object at a later date.
19 Danish BA, s 13 e (3)(i).
[20] For example, if the plan encompasses claims that cannot be affected by a compulsory composition.
[21] *Betænkning* 1512/2009, 389.
[22] U2019.1859H and U2018.3090H.

the claim will be privileged provided that it was entered into with the consent of the restructuring administrator.[23] It is worth noting, however, that a security or financing agreement with the consent of the administrator is not automatically protected from avoidance actions.

PART III: Specific Procedural Aspects of Preventive Restructuring in Domestic Processes and in the Directive

The Threshold of Insolvency

Denmark utilises the 'cash flow test' to define insolvency. The threshold is if the debtor is unable to meet its liabilities as and when they fall due, an inability that must not be temporary.[24] The Danish insolvency threshold also includes expected (anticipated) insolvency. In other words, a debtor is considered insolvent when it is inevitable that, in the near future, it will be unable to pay its debts.[25]

Debtor in Possession

The appointment of a restructuring administrator and a restructuring accountant is mandatory for the opening of the restructuring proceedings in Denmark.[26] The debtor remains in possession during the restructuring proceedings and continues to control the day-to-day operations of the business. The debtor is not, however, entitled to enter into any transactions of material significance without the consent of the restructuring administrator.[27] The restructuring administrator may assume management duties if a majority of the creditors does not oppose such a takeover or if such action is necessary to protect the value of the business. Takeovers in both of these circumstances are examined and confirmed by the Bankruptcy Court.[28] While Denmark does have a debtor in possession style of procedure, some changes would be necessary if it were to align with the PRD. First, the current Danish frameworks requires the appointment of an insolvency practitioner, which may not be in the spirit of the case-by-case basis for appointment enshrined in the PRD. With that said, such a requirement is not unusual across the Member States surveyed as part of the JCOERE project. Second, the forced takeover option could be viewed as conflicting with the requirement in the PRD to ensure that the debtor stays in control, at least in part.

Rights *in Rem* under the EIR Recast and the PRD

As the EIR Recast does not apply to Denmark, no conflict can arise in respect of any future preventive restructuring provisions.

[23] Danish BA, s 94.
[24] Danish BA, s 17(2).
[25] Betænkning II nr 606/1971 om konkurs og tvangsakkord, 72.
[26] Danish BA, s 11(a).
[27] Danish BA, s 12.
[28] Danish BA, s12(a) & 12(b).