

Directors' liabilities - Denmark

In Denmark directors' liabilities in limited companies (A/S and ApS) are defined in the 'A/S Act' section 54 subsection 2 (daily management) and 3 (supervisory board) and the 'ApS Act' section 19.

The liabilities are in practice identical, but whereas an 'A/S' according to the 'A/S Act' has a supervisory board (normally (a majority of) non-executive board members – and with special regulation regarding publicly listed companies) and a daily management, an 'ApS' is only required by the 'ApS Act' to have 'a management' having the combined responsibilities and liabilities as the supervisory board and the daily management in an 'A/S' unless otherwise decided in the individual bi laws.

In the following reference is made to the rules set out in the 'A/S Act'.

1. Obligation to file?

In Denmark there is no explicit legal/mandatory obligation for a director or the supervisory board to file for suspension of payment (a 'chapter 11 like institute ') or bankruptcy.

Such situation is handled in accordance with Corporate Governance and best practise recommendations in the legal gap between regulation in the 'A/S Act' and the bankruptcy Act as regulation is not given directly or defined explicitly in the 'A/S Act'.

However, according to the 'A/S Act' section 54 subsection 3 the supervisory board is obliged to secure that the company's capital readiness at any time is sufficient with regard to the ongoing business and known debt.

If the capital readiness is not sufficient the supervisory board shall establish such by the use of any relevant measures, i.e. new agreements of terms of payment with known creditors, raise of new equity capital, loans etc.

This obligation is parallel to the board's obligation to arrange a shareholders' meeting no later than 6 months after deciding that the company has lost 50% of its registered equity capital.

Should these measures be insufficient or even rejected by creditors or investors the supervisory board should voluntarily file for suspension of payment or bankruptcy.

If the supervisory board doesn't file and continues business regardless of the known financial situation the responsible supervisory board puts it self at risk for being rightfully charged with damages suffered by the creditors provided that the board has not acted responsibly/negligently according to the law after being aware of the financial situation. Danish legal counsel is recommended in such situations.

2. Who can be held liable?

Chapter 16 of the Danish 'A/S Act' (section 140 – 145) describes 'lex specialis' rules for liability for founders, board members and directors, shareholders, auditors and other organs instituted by the 'A/S Act' regarding damages caused by the said persons/organs through negligence and suffered by the company or a third party.

Chapter 16 also contains rules of procedure regarding the company's decision – mandatory decision taking on a shareholders meeting (Section 144) - to claim liability towards a liable director and a time limit of 6 months to be counted from the date of decision on a shareholders' meeting to file in court (Section 145).

3. Sanctions?

Sanctions according to Chapter 16 of the 'A/S Act' are purely financial, i.e. payment of damages.

The 'A/S Act' section 160 and 161 contain rules to punish violation of a number of sections of the 'A/S Act' with a fine provided that more severe punishment should not be suffered in accordance with the Danish criminal code.

In practise fines are never or only very seldom given with reference to the 'A/S Act' section 160 – 161.

In neither case sanctions are imposed automatically – the company, a creditor or the Danish Authorities must file individually to the Police Authority.

4. Proceedings against the directors?

If a Danish company is solvent or in solvent liquidation an external legal or physical person can bring proceedings against directors or an appointed liquidator.

If a Danish company is solvent or in solvent liquidation the company itself can only bring procedures against directors if a general shareholders' meeting decides to do so, re. the 'A/S Act' Section 144 above.

If bankruptcy procedures are brought to the estate of a Danish company the appointed receiver of the estate has the sole and full authority to bring proceedings against any creditor including claims against directors.

However, should the receiver decide to give up a claim, the receiver is obliged to inform the creditors of the estate of such decision.

The Probate Court can then decide a time limit for the creditors to decide to conduct the case on behalf of the estate and pay all related costs. If the trial is won damages and legal costs should be paid to the estate and the creditor who has conducted the case on behalf of the estate will on demand be reimbursed reasonable costs – and not necessarily all costs – incurred during the trial.

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