



ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



## Our grateful thanks go to our 2019 Annual Congress Sponsors

### CONGRESS MAIN SPONSOR



### CONGRESS GENERAL SPONSORS



www.gorrissenfederspiel.com



www.pluta.net



www.proskauer.com



www.resor.nl

### EVENT SPONSORS



www.nautadutilh.com



www.edwincoe.com



www.dlapiper.com



www.dentons.com



www.alixpartners.com



www.hww.eu



www.hoche-avocats.com



www.mcstayluby.ie



www.moonbeever.com



www.profpannen.de



www.anchor.eu



www.citr.ro



www.schubra.de



www.schiebe.de



www.horten.dk



www.kellerhals-carrards.ch



www.troostwijkauctions.com



www.op-zaman.si



www.grant-thornton.co.uk



www.cpo.nl



www.bnt.eu



www.cnajmj.fr

With thanks to our Congress Supporter:



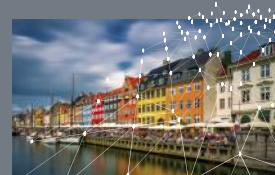
INTERNATIONAL ASSOCIATION OF JUDICIAL LAWYERS  
www.aija.org



ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



**Download the App:**

Search 'INSOL Europe' in your app store



*App Kindly Sponsored by:*



[www.citr.ro](http://www.citr.ro)



[www.schubra.de](http://www.schubra.de)

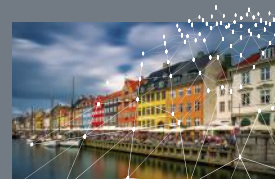




ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



## Morning Technical Session

Kindly Sponsored By

# AlixPartners

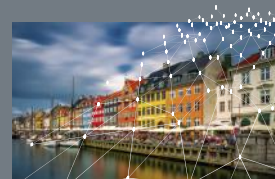
[www.alixpartners.com](http://www.alixpartners.com)



ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



## Opening remarks

### **Congress Facilitator**

Chris Laughton, Mercer & Hole, UK

### **Co-Chairs**

Michala Roepstorff, Plesner, Denmark

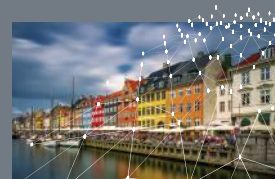
Florian Bruder, DLA Piper, Germany



ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



## **Keynote Speaker:** **Prof. Henning Jørgensen**

- Professor at the Department of the Political Science of the Aalborg University, Denmark
- Former Director of the European Trade Union Research Institute (ETUI)
- Former Director of the Center for Labour Market Research (CARMA) at the Aalborg University, Denmark



ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



## **Litigation Funding: Money for nothing and claims for free**

Carmel King, Grant Thornton, UK

Matthias Hofmann, Pohlmann Hofmann, Germany

Henrik Rothe, Copenhagen Business School (CBS) /  
Copenhagen Economics / Justitia, Denmark

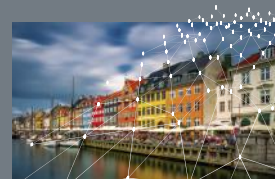
Thomas Kohlmeier, Nivalion, Switzerland



ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



## **Litigation Funding**

A third party provides finance to enable costly litigation to proceed, in return for an agreed share of the proceeds of the claim, if successful.

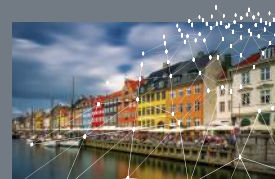
The funder has no direct interest in the proceedings.



ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



## Litigation Funding: Observations on Current International Trends

**Thomas Kohlmeier**

Nivalion AG





ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



1. About Nivalion AG
2. Market Development Litigation Funding (I): Capital Inflow and Market Participants
3. Market Development Litigation Funding (II): Service Offering in Core Markets (UK / DACH / Nordics)



ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



## About Nivalion AG

Swiss company with offices in Zug, Munich and Vienna (planned for 4Q19)

Focus on complex litigation and arbitration proceedings

Scope of Business: All Continental European markets, Direct and Secondary Funding

Combination of > 40 years of funding experience, comprehensive litigation practice in high-end law firms and the financial strength of professional Swiss core investors

Member of the Association of Litigation Funders of England and Wales and observance of ICCA Principles/Best Practices

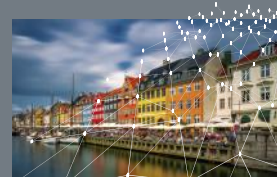




ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



## Capital Inflow and Market Participants:

- Uninhibited Capital Inflow: currently available capital for LF-based risk transfers estimated at USD 50 billion
- Key message: "more than enough money available for good risks" - scarcity tends to be on the risk side rather than on the capital side
- Rising number of market participants: currently estimated approx. 90 serious market participants\* (Law Firms / LegalTech / Collection Concepts etc. not considered)

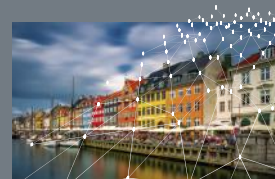
\*Source: Interview with portfolio manager of LF umbrella fund



ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



## Service Offering in Core Markets:

Litigation Funding morphs into Legal Finance: Litigation / Arbitration Funding, Monetization, Portfolio Funding, Defence Funding, Bridge Loans, etc.

Litigation Funding, ATE Insurance, in individual cases Litigation Buyout Concepts: from a claimant's point of view, ever more concepts of risk transfer emerge (oftentimes in combination)

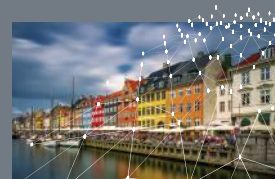
(US), UK and Germany mature markets with very differentiated offerings and specialized players (for instance Asset Tracing etc. ) Switzerland / Austria in close step with Germany; Nordics: emerging market for Funders



ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



## Litigation Funding: Practitioner's View

**Dr. Matthias Hofmann**  
Attorney, Insolvency Practitioner



ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



- Role of litigation funding from the view of a German Insolvency Administrator: important instrument to reach best results in restructuring and insolvency cases
- different reasons for implementing litigation funding
  - impecunious estates and lack of other funding, esp. lack of financing by main creditors or by legal aid, if applicable
  - protection of funds/assets against cost risks in high risk lawsuits



ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



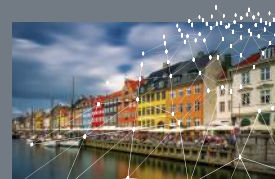
- Experience/Practice in national (German) cases:
  - clear market of litigation funding with quite comparable standards and conditions (available in cases of claims beginning from EUR 100k, partially from EUR 50k)
  - almost “daily business” for insolvency administrators
  - larger differences in conditions of litigation funding in unconventional cases, e.g. antitrust/cartel cases



ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



- Experience/Practice in cross border cases:
  - due to higher litigation costs litigation funding available only in case of higher dispute values
  - market for cross border litigation funding not yet totally developed
  - however funding opportunities even in special cases, e.g. cross border asset tracing outside the EU





ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



## Litigation Funding: Considerations

**Judge Henrik Rothe**

Adjunct Professor at Law and Senior Associate,  
Copenhagen Economics



ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



## Case Study I:

Insolvency Practitioner vs. D&O Insurer / Germany:

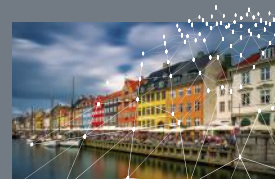
“Insurance claim as only valuable part of the insolvency estate?”



ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



## Case Study II:

Asset Tracing for Insolvency Practitioner (Germany):

“Locating embezzled assets all over the world”



ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



## Thank You – Questions?

Carmel King  
Grant Thornton UK LLP  
carmel.king@uk.gt.com  
+44(0)20 7865 2359

Dr Matthias Hofmann  
Pohlmann Hofmann  
m.hofmann@pohlmannhofmann.de  
+49(0)89 548033-0

Judge Henrik Rothe  
Adjunct Professor at Law and Senior  
Associate, Copenhagen Economics  
hr.law@cbs.dk  
+45(0) 24810071

Thomas Kohlmeier  
Nivalion AG  
Thomas.Kohlmeier@nivalion.ch  
+41(0)41 748 43 00



ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



## INSOL International

Julie Hertzberg  
President of INSOL International  
Alvarez and Marsal, USA



ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



## Delegate Coffee Break

Kindly Sponsored By



**Kellerhals  
Carrard**

[www.kellerhals-carrard.ch](http://www.kellerhals-carrard.ch)



ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



## **SoMe - Accounts and insolvency**

Piya Mukherjee, Horten Law Firm, Denmark

Anton Molchanov, Arzinger, Ukraine

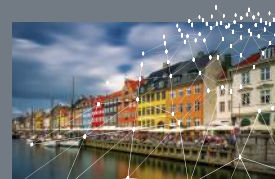
Frank Heemann, bnt attorneys in CEE, Lithuania



ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



1. Types of Social Media Accounts
2. Creating an account
3. Are accounts assets in a bankruptcy ?
4. Transferability of accounts
5. GDPR issues
6. Valuation of accounts

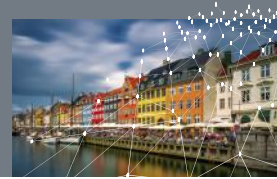




ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



Products

Pricing

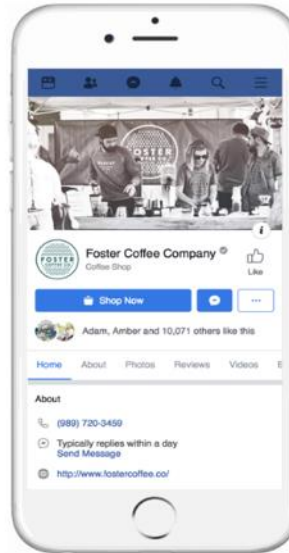
About

Webinars

[Start Your Free Trial](#)

[Log in](#)

## 1. Facebook – 2.23 billion MAUs



Facebook is the biggest social media site around, with more than two billion people using it every month. That's almost a third of the world's population! There are [more than 65 million businesses using Facebook Pages](#) and [more than six million advertisers](#) actively promoting



ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



**Instagram** – 1 billion MAUs



**YouTube** – 1.9 billion MAUs



**Snapchat** – 255 million MAUs



**Tumblr** – 642 million MUVs



**Pinterest** – 250 million MAUs



**LinkedIn** – 294 million MAUs



**Twitter** – 335 million MAUs



ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



 Help Center

 Search

[Log In](#)

[Create Account](#)

[Home](#)

[Using Facebook](#)

[Managing Your Account](#)

[Privacy and Safety](#)

[Policies and Reporting](#)

[Creating an Account](#)

[Friending](#)

[Your Home Page](#)

[Messaging](#)

[Stories](#)

[Your Photos and Videos](#)

[Videos on Watch](#)

[Pages](#)

[Groups](#)

[Events](#)

[Fundraisers and Donations](#)

[Payments](#)

[Marketplace](#)

[Apps](#)

[Facebook Mobile and Desktop](#)

[Apps](#)

[Accessibility](#)

## Create an Account

### Before You Create an Account

[Does it cost money to use Facebook? Is it true that Facebook is going to charge to use the site?](#) 

[Can I create a joint Facebook account or share a Facebook account with someone else?](#) 

[Can I create multiple Facebook accounts?](#) 

[Why am I getting a Facebook invite email from a friend?](#) 

### Creating Your New Account

[How do I create a Facebook account?](#) 

Note: you must be at least 13 years old to create a Facebook account.

### To create a Facebook account:

- 1 Go to [www.facebook.com/r.php](http://www.facebook.com/r.php).
- 2 Enter your name, email or mobile phone number, password, date of birth and gender.
- 3 Click **Sign Up**.
- 4 To finish creating your account, you need to [confirm your email or mobile phone number](#).



ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



Help Center

Help topics

Guides

Contact us



Sign in

Using Twitter ▾

Managing your account ▾

Safety and security ▾

Rules and policies ▾

Help Center > Signing up with Twitter

## Signing up with Twitter

### How to create a Twitter account on the web

1. Go to <http://twitter.com> and find the sign up box, or go directly to <https://twitter.com/signup>.
2. You will be guided through our sign up experience and prompted to enter information such as your name and email address.
3. If you choose to sign up with an email address, we will require you to verify your email address by sending you an email with instructions.
4. If you choose to sign up with a phone number, we will require you to verify by sending you an SMS text message with a code. You may also request a voice call to verify your phone number. Enter the verification code in the box provided. Learn more about having a [phone number associated with your account](#).
5. Once you sign up for an account, you can select a username (usernames are unique identifiers on Twitter). We'll tell you if the username you want is available.
6. Learn how to [customize settings](#) for your new account.



ANNUAL CONGRESS 2019

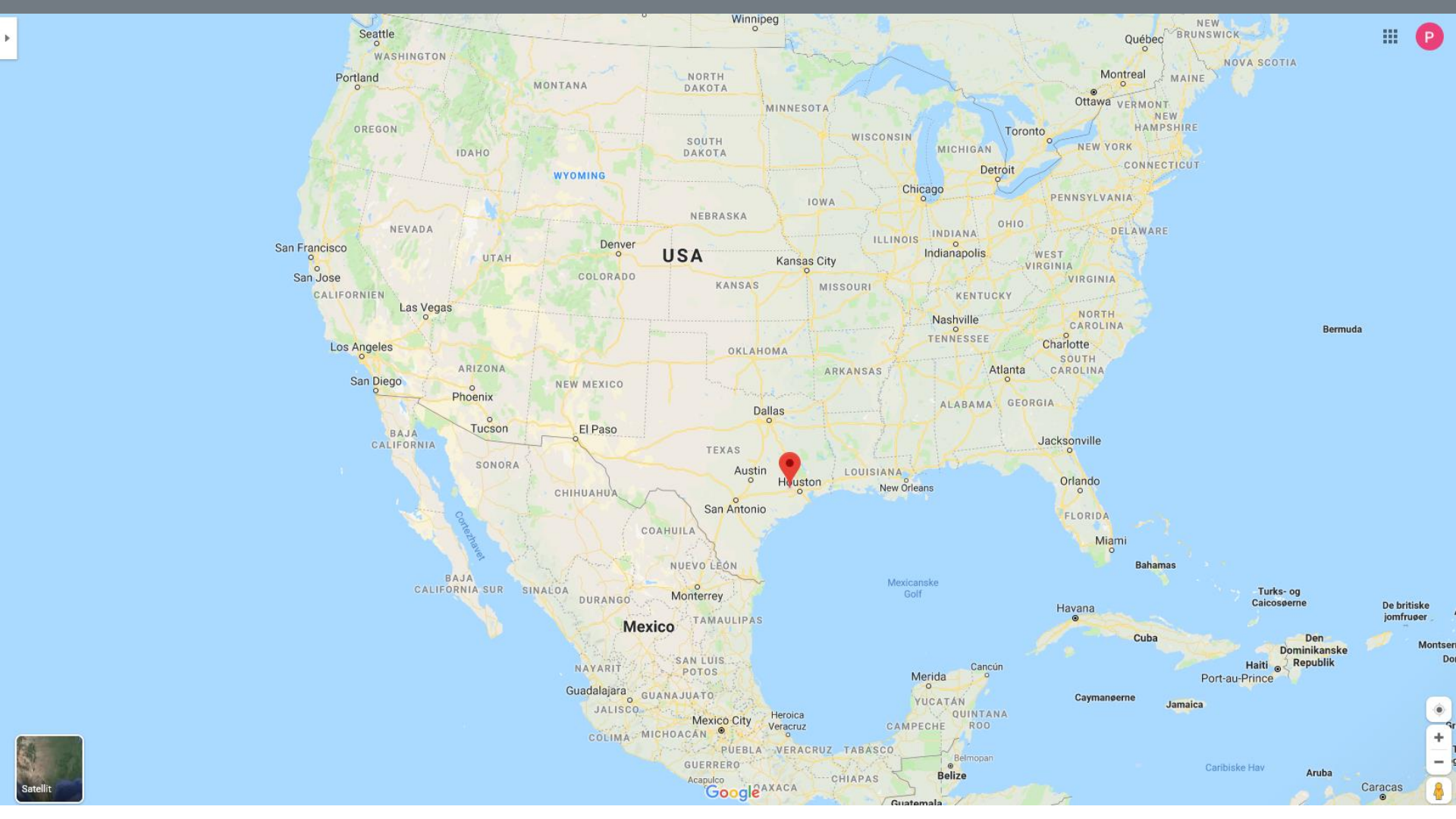
# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



Creating an account requires:

- Natural person – and date of birth
- Email
- Telephonenumber



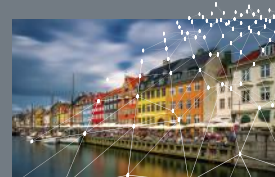




ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?

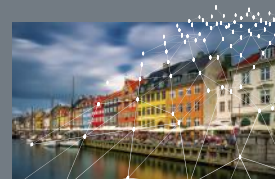




ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



## Terms & Conditions

Prohibition clauses concerning the transfer of (basic) accounts

Facebook	Instagram	YouTube (Google)*
<p>When people stand behind their opinions and actions, our community is safer and more accountable. For this reason, you must:</p> <ul style="list-style-type: none"><li>• Use the same name that you use in everyday life.</li><li>• Provide accurate information about yourself.</li><li>• Create only one account (your own) and use your timeline for personal purposes.</li><li>• Not share your password, give access to your Facebook account to others, or transfer your account to anyone else (without our permission).</li></ul>	<p>You can't attempt to buy, sell, or transfer any aspect of your account (including your username) or solicit, collect, or use login credentials or badges of other users.</p>	<p>You are not allowed to:</p> <p>access, reproduce, download, distribute, transmit, broadcast, display, sell, license, alter, modify or otherwise use any part of the Service or any Content except:</p> <ul style="list-style-type: none"><li>(a) as specifically permitted by the Service;</li><li>(b) with prior written permission from YouTube and, if applicable, the respective rights holders; or</li><li>(c) as permitted by applicable law</li></ul>
<p><a href="https://www.facebook.com/terms.php">https://www.facebook.com/terms.php</a></p>	<p><a href="https://help.instagram.com/581066165581870">https://help.instagram.com/581066165581870</a></p>	<p><a href="https://www.youtube.com/static?hl=de&amp;template=terms">https://www.youtube.com/static?hl=de&amp;template=terms</a></p>

\*Not clear in the case of YouTube (Google), since it is not mentioned in the Terms of Service. But "your Google Account may be assigned to you by an administrator, such as your employer or educational institution" (Google Terms of Service). Therefore, it might be possible (implied consent).





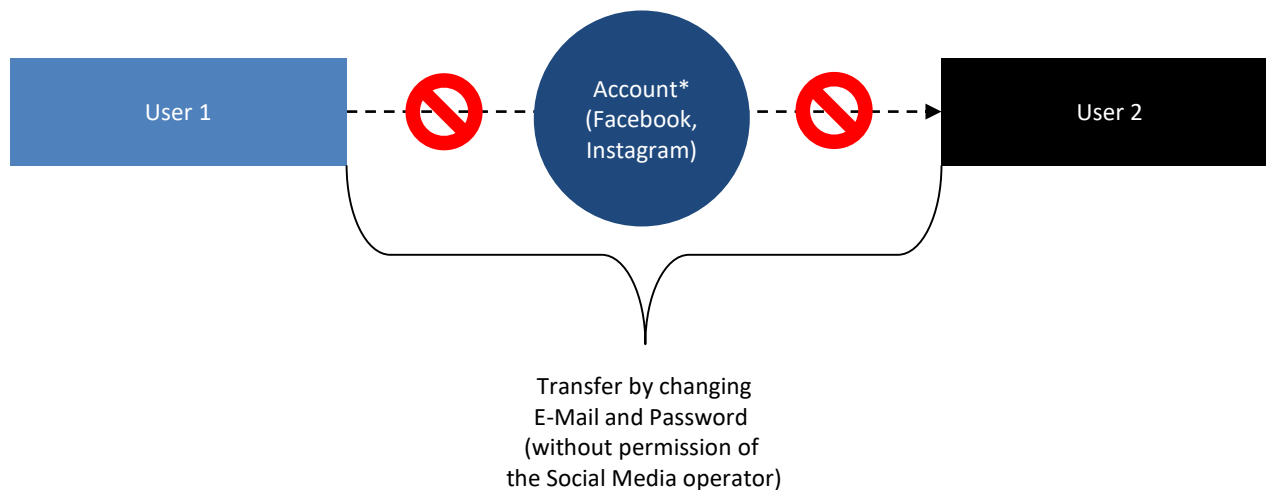
ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



## Prohibited: Transfer of (basic) accounts



\*Not clear in the case of YouTube (Google), since it is not mentioned in the Terms of Service. But "your Google Account may be assigned to you by an administrator, such as your employer or educational institution" (Google Terms of Service). Therefore, it might be possible (implied consent).



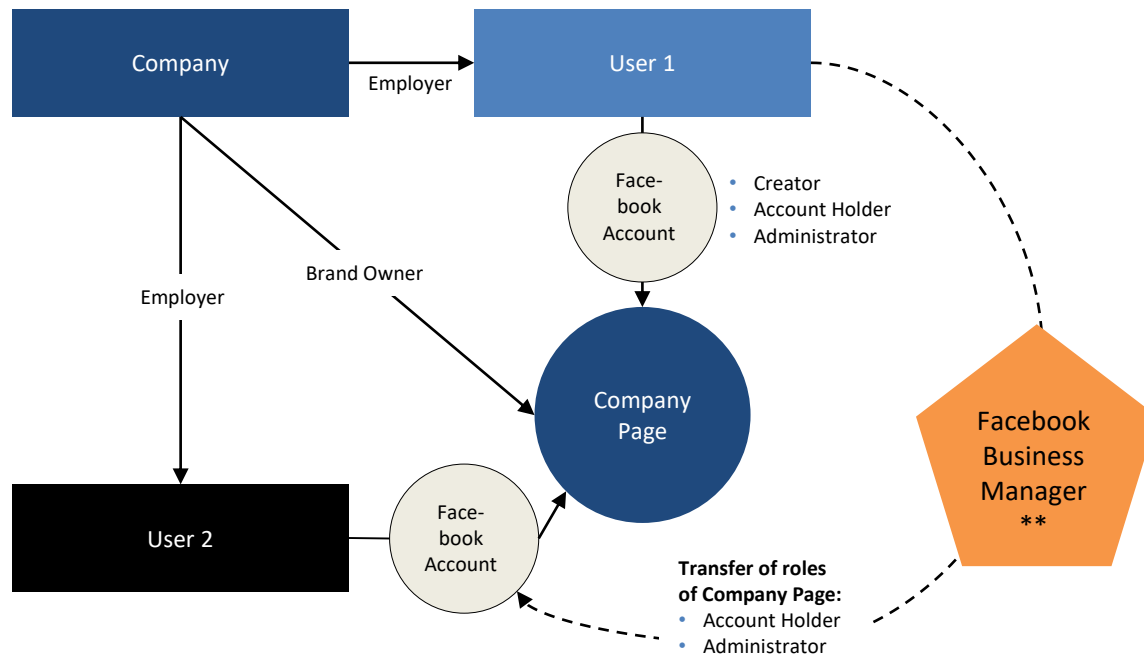
ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



## Facebook: Company Page and its transfer \*



Transfer of account  
is still strictly  
forbidden!

\*Does not apply to  
accounts and advertising  
accounts.

\*\*External tool provided by  
Facebook in order to  
transfer ownership of  
company pages



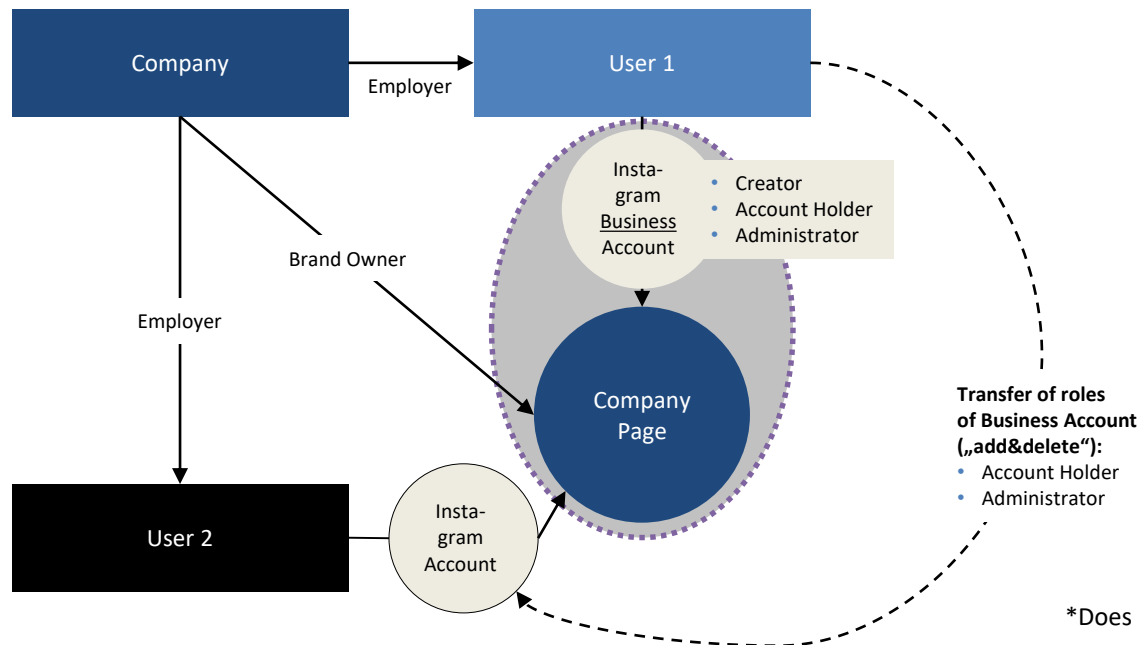
ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?

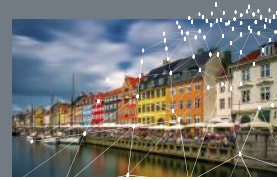


## Instagram: Business Account and its transfer\*

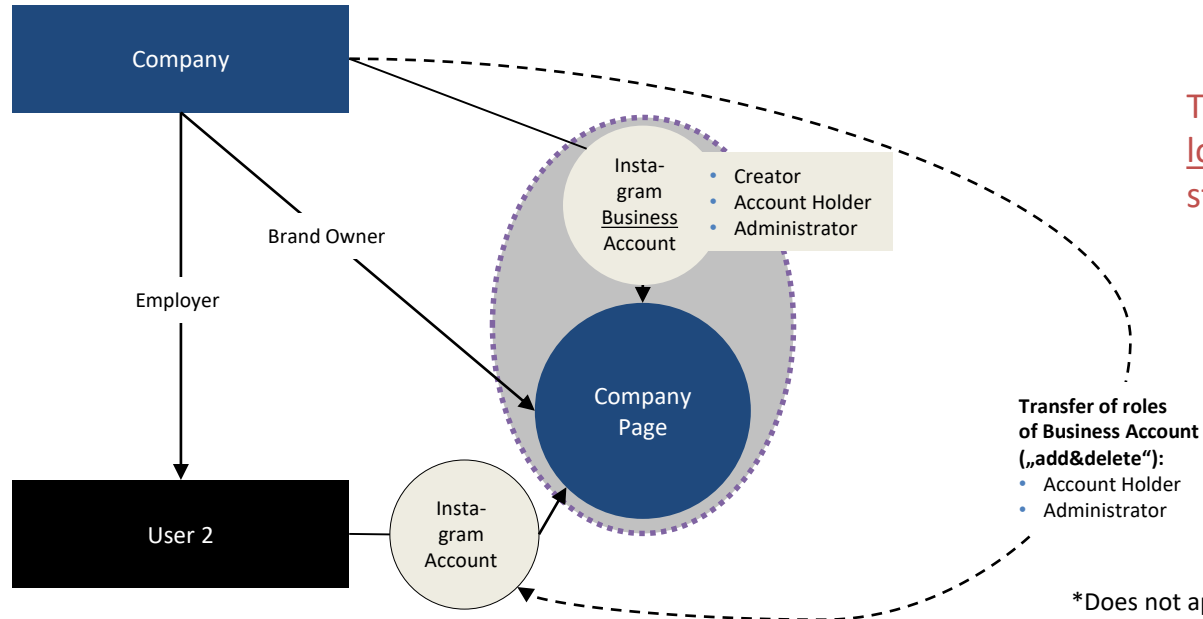


Transfer via sharing login data is still strictly forbidden!

\*Does not apply to advertising accounts.



## Instagram: Business Account and its transfer\*



Transfer via sharing  
login data is still  
strictly forbidden!

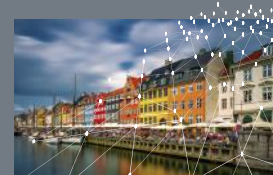
\*Does not apply to advertising accounts.



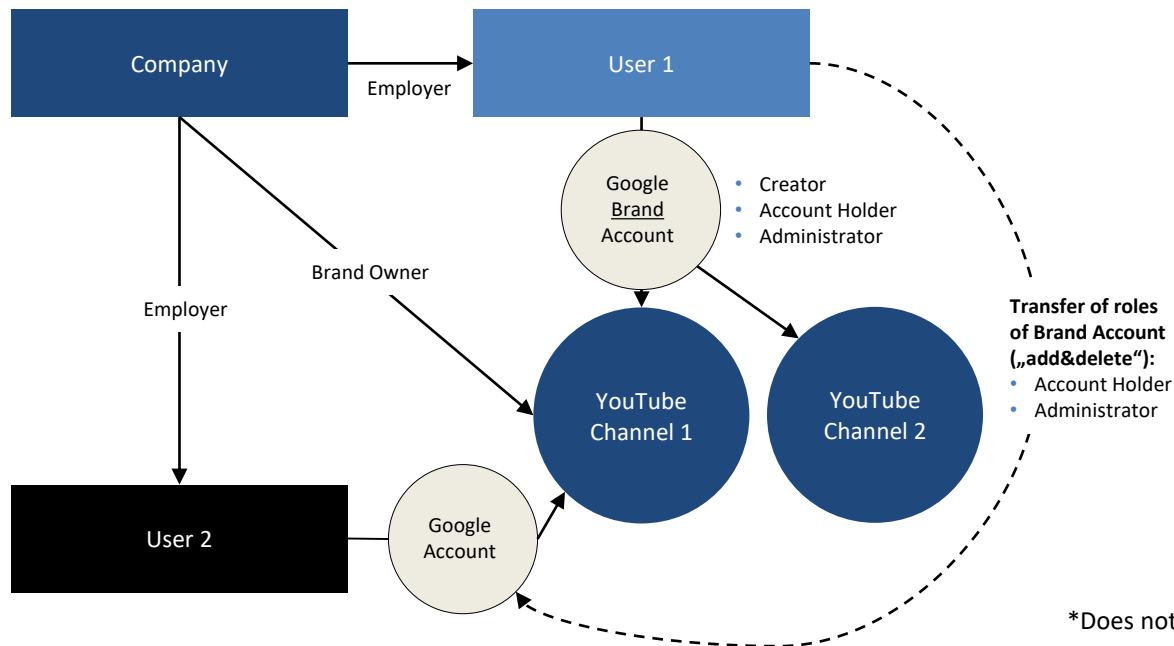
ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



## YouTube: Brand Account and its transfer \*

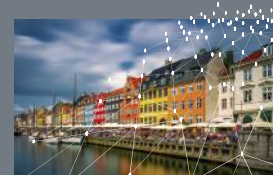




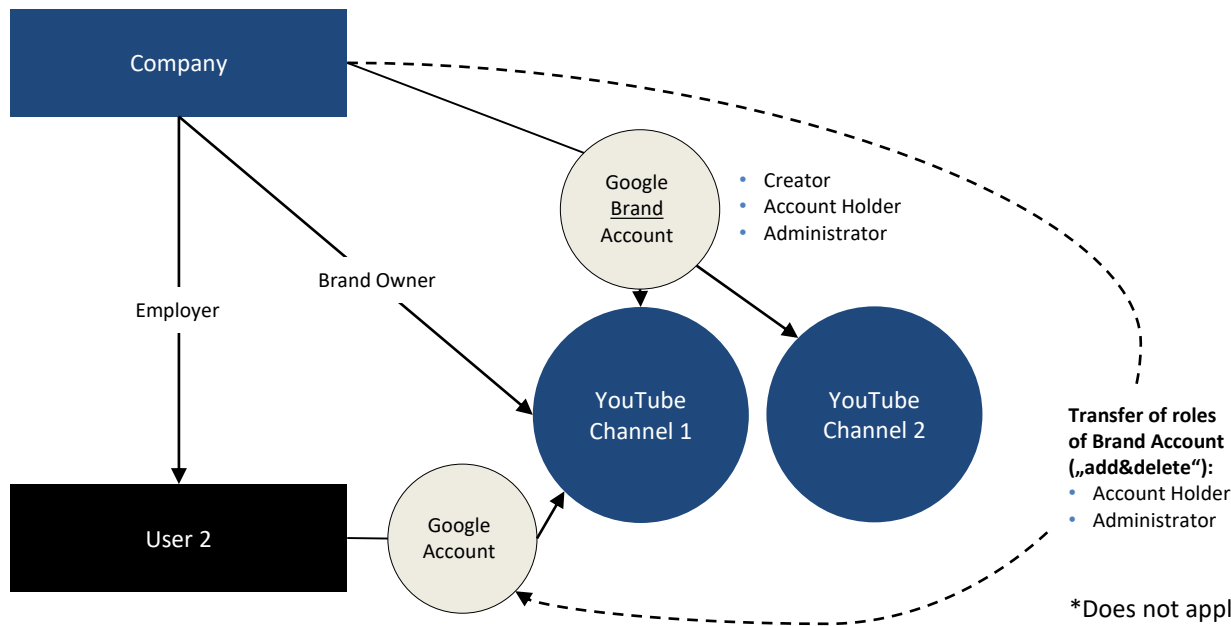
ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



## YouTube: Brand Account and its transfer \*





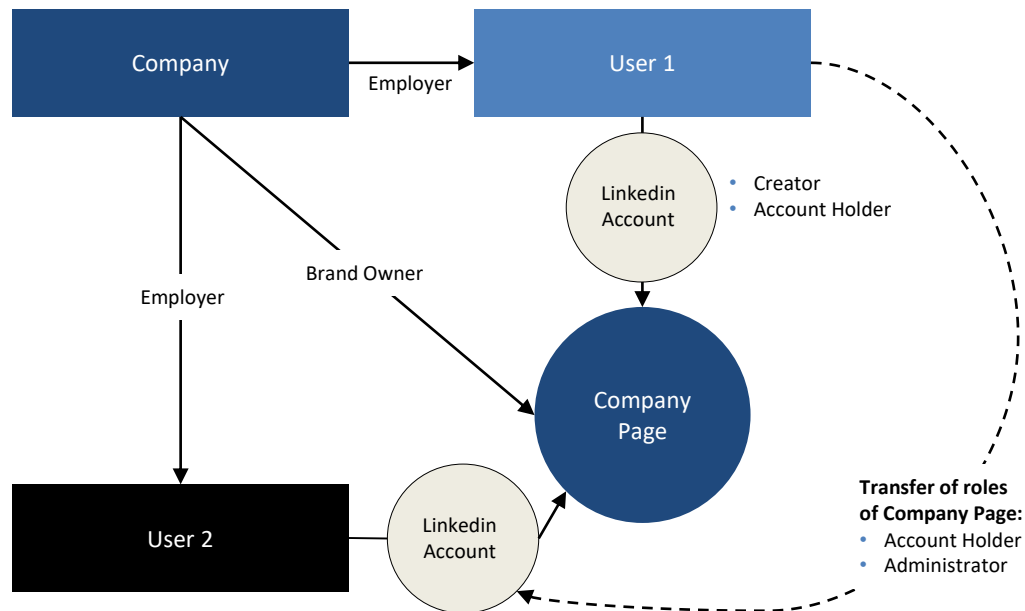
ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



## Linkedin: Account and its transfer \*





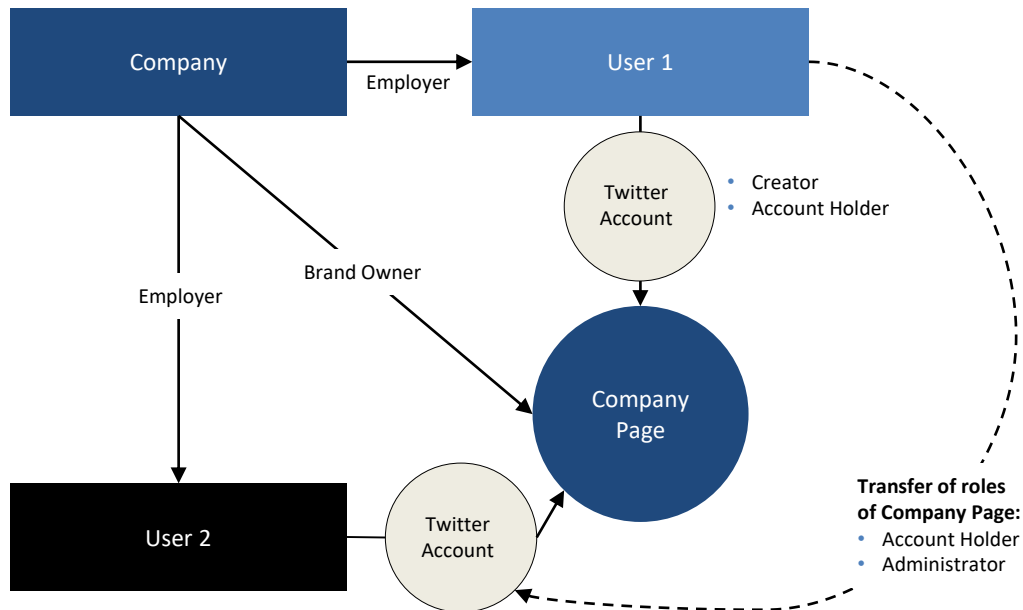
ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



## Twitter: Account and its transfer \*







ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



## SoMe insolvency transfers and GDPR

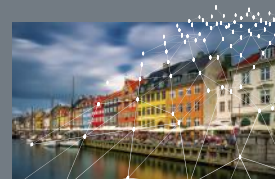
- *A trustee should ensure that:*
  - all personal data (PD) being a content of the SoMe are still used solely for informing the SoMe account subscribers on the acquired company, and
  - the acquired company has only legitimate interests over collection and storage of PD.
- *This means that:*
  - after the SoMe has been sold the PD usage conditions should not be changed (subscribers of SoMe remaining subscribers, not targets for the aggressive marketing, social researchers etc.),
  - PD's terms of processing should not be changed and be kept within legitimate interest (no harm to a PD owner),
  - duly PD protection (technical side of the safeguard),
  - all rights and freedoms of PD owners related to their data processing by the acquired company are to be reserved (including a right to opt-out from the SoMe subscription).



ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



## Valuation of the SoMe accounts

*What is the price of a SoMeAc assets consists of?*

- Number of followers
- Number of following
- Ratio followers/following
- Number of lists the SoMeAc is in
- If the account is verified or not (true Donald Duck issue)
- Average impressions per a publication (number of likes and\or given by the SoMe, specialized blogs and experts)
- The economic market value of an impact on the Some (based on pay-per-tweet online platforms and CPMs by ads)



ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



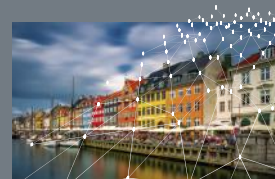
# Questions?



ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



## **Directors, duties and early warning tools: Who will warn the creditors?**

Rita Gismondi, Gianni Origoni Grippo Cappelli & Partners, Italy

Patrizia Riva, University of Piemonte Orientale /  
Studio Associato, Italy

Nicolaes W.A. Tollenaar, RESOR, The Netherlands

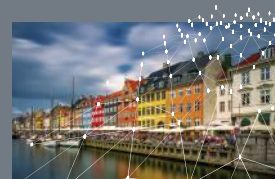
Morten Møller, Erhvervshus Midtjylland /  
Central Denmark Business Hub, Denmark



ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



## **Preventive Restructuring Frameworks (“PRF”) under the Directive**

- Article 1, para. 1 – PRF and likelihood of insolvency (preventing insolvency and ensuring viability of the debtor)
- Article 3, para. 1 and 2 – Early Warning Tools
- Article 4 – Availability of PRF



ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



## **Preventive Restructuring Frameworks (“PRF”) under the Directive – cont.**

Preventive remedies should, among other things:

- (i) enable the enterprises to restructure at an early stage and to avoid their insolvency;
- (ii) maximise the total value to creditors, owners and the economy as a whole;
- (iii) prevent unnecessary job losses, as well as losses of knowledge and skills; and
- (iv) prevent the build-up of non-performing loans.



ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



## **Preventive Restructuring Frameworks (“PRF”) under the Directive – cont.**

The Restructuring Frameworks Directive also provides that:

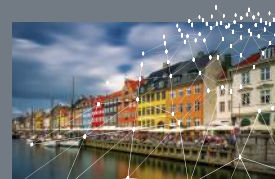
- clear information on the available preventive restructuring procedures, as well as early warning tools, should be put in place in order to push debtors to take early action at the onset of economic and financial problems
- possible early warning mechanisms should include accounting and monitoring duties for the debtor, or the debtor's management, as well as reporting duties under loan agreements
- third parties with relevant information such as accountants, tax and social security authorities could be incentivised (or obliged) under national law to flag a negative development
- the involvement of judicial or administrative authorities should be limited to where it is necessary and proportionate in order to safeguard the interests of creditors and other interested parties likely to be affected



ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



## **PRF and Early Warning in Domestic Legislations**

- Some domestic legislative insolvency reform are already taking into account (and adopting) the changes required by the Directive
- 2-year term for implementation and compliance
- Main highlights of the domestic legislation in Denmark, The Netherlands, Italy





ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



## Main Highlights of Domestic Legislation: Denmark

### *Early Warning and Preventive Restructuring*

- Danish interpretation of Article 3 of the Directive: early warning means early assistance, not just information
- An effective early warning mechanism helps to give an expert analysis of the problems and turn around companies in distress / assist them to smooth closures
- Major bonus: the early warning mechanism addresses Article 4 of the Directive
- Article 4(5) of the Directive: preventive restructuring frameworks may take place out of court – this is what we do, limiting bureaucracy and costs for the company, its creditors and other entities involved (courts, tax authorities etc.)



ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



## **Main Highlights of Domestic Legislation: The Netherlands**

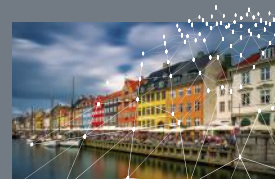
- Act on the Confirmation of Private Plans (July 2019)
- Dutch scheme: combining elements of the UK scheme (implementation of a plan outside formal insolvency proceedings) with elements of Chapter 11 (cram down), and innovating on both
- Fast and flexible pre-insolvency procedure compliant with the Directive
- Both debtor, and creditor friendly procedure



ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



## Main Highlights of Domestic Legislation: Italy

- New Italian Code of Corporate Crisis and Insolvency (the “**Code**”) enacted in 2019 on the basis of both international and European insolvency law inputs
- The Code is aimed at ensuring an earlier emersion of the distress situation of the company, through certain preventive restructuring remedies and early warning tools



ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



## **Main Highlights of Domestic Legislation: Italy – cont.**

- “Internal” tools: organizational models and best practices adopted by companies and corporate bodies
- “External” tools: alert obligations upon certain entities, aimed at:
  - a prompt detection of crisis indicators; and
  - a quick adoption of the more appropriate measures
- Crisis indicators



ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



## Main Highlights of Domestic Legislation: Italy – cont.

- Alert obligations upon:
  - control bodies (internal auditors or external auditors, where provided) through an internal notice sent to the management of the company, with a short term (30 days) for the adoption of the required remedies; lacking any reply of action, the control bodies shall inform OCRI (i.e., “*organismo di composizione della crisi d’impresa*”), an independent body related to the Companies’ Register and entitled to deal with crisis situations;
  - qualified public creditors (i.e., Tax Agency, Social Securities Contribution Authority and Tax Collection Authority) through a notice sent to the debtor, in the event of indebtedness exceeding certain thresholds; if the indebtedness is not cured, or actions are not taken by the debtor within a certain timeframe (90 days), such creditors shall inform OCRI.



ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



## **Main Highlights of Domestic Legislation: Italy – cont.**

Sensitive and debatable issues arising from early warning tools:

- Very strict and low thresholds (especially for SMEs)
- Short timeline for the rescue vs risks of a quick worsening of the distress situation
- Confidentiality issues and liability issues



ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



## **Main Issues related to Early Warning: Who Will Warn Creditors?**

- Lack of recognition of the existence of financial problems
- Lack of ability to deal with such problems and handle the situation
- Cause for delay of early warning
- Internal vs external control
- Duties of directors and related liability issues
- Strong incentive in taking care of governance matters



ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



## **Main Issues related to Early Warning: Who Will Warn Creditors? – cont.**

### Skills gap:

- Lack of overview, capacity within accountancy / budgeting / planning

### Psychology:

- Denial, blame, stress

### Society:

- Cultural perceptions, legislation, possibilities for debt discharge





ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



## The Role of Corporate Supervisory Bodies

A. First Stage of the Crisis: The **board of statutory auditors** check the conduct of the board of directors ensuring that an adequate administrative and organisational system is implemented with particular reference to the **presence, structure and functioning, of (i) an adequate accounting framework, (ii) an internal control system** that monitors the accounting data, and (iii) an adequate management system aimed at providing **reliable and effective indicators to monitor, amongst other things, the parameters identified in the Code.**

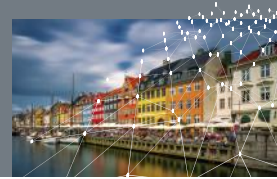
**INFORMAL INTERNAL ALERT**: When “**grounded evidence**” of the crisis is recognised the corporate supervisory board must “**immediately inform**” the board of directors for appropriate provisions to be taken.



ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



## The Role of Corporate Supervisory Bodies – cont.

B. Second Stage of the Crisis: The corporate control bodies shall evaluate whether to put a **FORMAL “INTERNAL ALERT”** system into place. The directors shall be aware of the existence of a more identified and significant criticality as compared to the previous phase and of the need to enter into a well identified **path to avoid consolidation of a crisis situation**.

Once the situation is classified as significant and, naturally, **in the event of inertia of the directors** or rather only in the case where they have not put in place adequate provisions, the corporate control bodies can indeed decide to **implement a specific “notification procedure”**.

For this purpose the board of statutory auditors and the independent auditors must send an **official written notice to the directors**, motivating their decision, and providing a suitable, but short term (no **more than thirty days**) by which the board of directors **must refer regarding the solutions identified** and the actions undertaken.



ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



## The Role of Corporate Supervisory Bodies – cont.

**C. Third Stage of the Crisis:** more significant **financial imbalances** that, if not actively managed, can seriously **undermine the going concern** (“inadequacy of the prospective cash flows to regularly meet planned obligations”).

It may be necessary to start a process of “**INTERNAL ALERT TO THE OUTSIDE**”: The corporate supervisory board must inform **OCRI**.

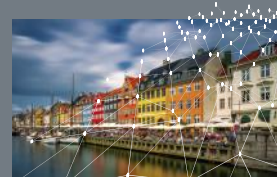
The **timely notification** implies an exemption from liability for the **corporate supervisory bodies**



ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



## Early Warning Europe

- A three-year pilot project to spread best practice in early warning to several European countries. Derived from the experiences from Early Warning Denmark since 2007.
- Total budget 4.8 million €. Funded by Cosme up to 3.6 million €.
- 15 European partners in 7 countries.
- Responds to EASME's ambition of building knowledge and good practice in early warning, restructuring and second chance.



ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



## Early Warning Europe – cont.

### What Early Warning Europe Does

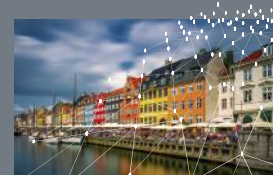
- Provides impartial and confidential help to:
- ensure that necessary changes are made for companies to survive
- ensure quick and honest closures, when this is the right way out
- bring companies on to a new course towards growth
- attempts to change the general perception of closures and second starts (from incompetence to experience)
- part of an integral approach to growth policy – supporting SMEs in their entire life cycle



ANNUAL CONGRESS 2019

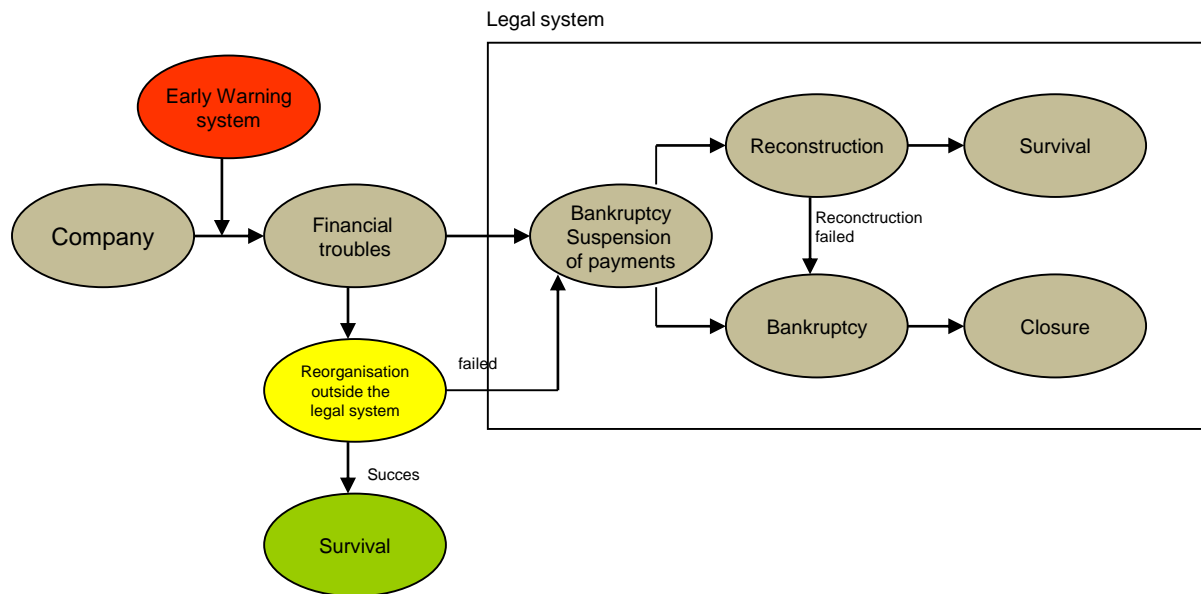
# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



## Early Warning Europe – cont.

Helping the enterprise **before** it ends up in the legal system





ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



## Early Warning Europe – cont.

### Facts

- About half of the assisted companies survive
- 30 % go bankrupt – of which 1/6 carry on in a new legal construction
- 20 % close while solvent or reduce operation to less than 13.000 € per year
- 20 % saving for public treasury from closed companies
- Companies that survive do it with a 6 % lower loss of turnover and an 11 % higher first-year growth
- Companies that carry on entirely or partially preserve 50 % of the original jobs



ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



## Early Warning Europe – cont.

### Example of Good Practice

- Owner-led shop selling coats and jackets for ladies, 2<sup>nd</sup> generation owner, 5 physical shops & webshop, 22 employees, operation in 3 countries
- Severely hit by the financial crisis, decline in sales, sharp rise in bank loan, no useful guidance from owner's bank, accountant or lawyer
- EW intervention:
  - Diagnosis with EW consultant, full overview, decision on allocating a volunteer mentor (from same business sector) and on reconstructing the company
  - Sorting out legal issues, capitalising stocks, renegotiating all contracts: shop rental, supplies, bank, staff etc., closing 2 unprofitable shops, setting very tight new budget
  - Now: budget is kept, business is profitable, debt paid off, owner's personal property intact





ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



## **Duties of Directors and Liability Issues**

Article 19 of the Directive: Where there is a likelihood of insolvency, directors have due regard, as a minimum, to the following:

- (a) the interests of creditors, equity holders and other stakeholders;
- (b) the need to take steps to avoid insolvency; and
- (c) the need to avoid deliberate or grossly negligent conduct that threatens the viability of the business



ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



## **Duties of Directors and Liability Issues – cont.**

Reasonable business judgment or reasonable commercial risks, particularly where it would improve the chances of a restructuring of potentially viable businesses.

Where the company experiences financial difficulties, directors should take steps to minimise losses and to avoid insolvency, such as:

- seeking professional advice, including on restructuring and insolvency, e.g. by making use of early warning tools
- protecting the assets of the company so as to maximise value and avoid loss of key assets
- considering the structure and functions of the business to examine viability and reduce expenditure
- refraining from committing the company to the types of transaction that might be subject to avoidance unless there is an appropriate business justification
- continuing to trade in circumstances where it is appropriate to do so in order to maximise going-concern value
- holding negotiations with creditors and entering preventive restructuring procedures



ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



**Thank you for your attention**

Rita Gismondi

[rgismondi@gop.it](mailto:rgismondi@gop.it)

Patrizia Riva

[patrizia.riva@studio-riva.com](mailto:patrizia.riva@studio-riva.com)

Nicolaes W.A. Tollenaar

[Nico.Tollenaar@resor.nl](mailto:Nico.Tollenaar@resor.nl)

Morten Møller

[mmo@earlywarningeurope.eu](mailto:mmo@earlywarningeurope.eu)



ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



## **Employees prepacked**

Sophie Jacmain, NautaDutilh, Belgium

Nicolas Partouche, Dethomas Peltier Juvigny & Associés, France

David Rubin, David Rubin & Partners, UK

Karol Tatara, Tatara & Partners, Poland

Evert Verwey, Clifford Chance, The Netherlands



ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



## Introduction

- Brief overview of the two main recent decisions of the Court of Justice
  - The Smallsteps case of 22 June 2017 in the Netherlands (Evert Verwey)
  - The Plessers case of 16 May 2019 in Belgium (Sophie Jacmain)
- Impact (case study) of these two main recent decisions of the Court of Justice
  - in France ( Nicolas Partouche)
  - in Poland ( Karol Tatara)
  - in the UK ( David Rubin)



ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



## THE NETHERLANDS

### From a walk in the park to a minefield

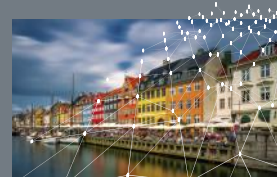
- From 2011 onwards, most of the Dutch courts developed a pre-pack practice;
- With the introduction of the Continuity of Enterprises Act I in 2015, the Dutch legislator aimed for a statutory basis for this newly developed practice;
- The Continuity of Enterprises Act I was adopted by the Dutch House of Representatives in 2016, but the vote by the Dutch Senate was postponed due to (the outcome of) the *Smallsteps case*.



ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



## THE NETHERLANDS

### The Smallsteps case: background (I)

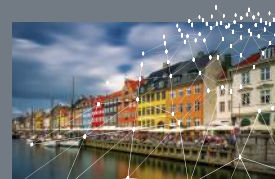
- Dutch childcare provider group Estro was declared bankrupt on July 5, 2014;
- On the same day as the bankruptcy order, a pre-packaged deal was concluded between Estro's bankruptcy trustee and Smallsteps for the acquisition of 250 (out of 380) childcare providers. Consequently, about 1.000 employees were fired;
- The Dutch Trade Union Federation and four former employees argued that the deal concluded between the bankruptcy trustee and Smallsteps should be qualified as a regular transfer of undertaking and not as a 'special' transfer of undertaking within the meaning of article 5(1) of EU Directive 2001/23/EC (hereafter: EU Directive);



ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



## THE NETHERLANDS

### The Smallsteps case: background (II)

- Article 5 of the EU Directive, which has been implemented by the Dutch legislator in article 7:666 of the Dutch Civil Code, declares various employee protection provisions inapplicable to the transfer of a bankrupt undertaking that meets certain conditions;
- Eventually, it was up to the Court of Justice of the European Union (hereafter: the CJEU) to rule on whether the pre-packaged deal constituted a regular transfer of undertaking or a special transfer of undertaking within the meaning of article 5(1) of the EU Directive.





ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



## THE NETHERLANDS



### The Smallsteps case: ruling

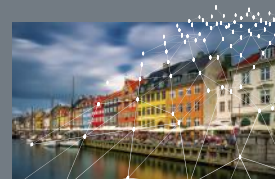
- The Court ruled that the pre-packaged deal did not satisfy all the conditions laid down in article 5(1) of the EU Directive:
  1. The transferor is the subject of bankruptcy proceedings or any analogous insolvency proceedings;
  2. Those proceedings must have been instituted with a view to the liquidation of the assets of the transferor;
  3. And be under the supervision of a competent public authority.
- Consequently, the employee protection provisions apply to a pre-pack; thus making it an unattractive restructuring model.



ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



## THE NETHERLANDS

### Recent developments

- No pre-pack practice
- Currently, a draft act is being developed and consulted upon, concerning the protection of employees during the transition of an enterprise into bankruptcy. This would be an adjustment to the Continuity of Enterprises Act I.



ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



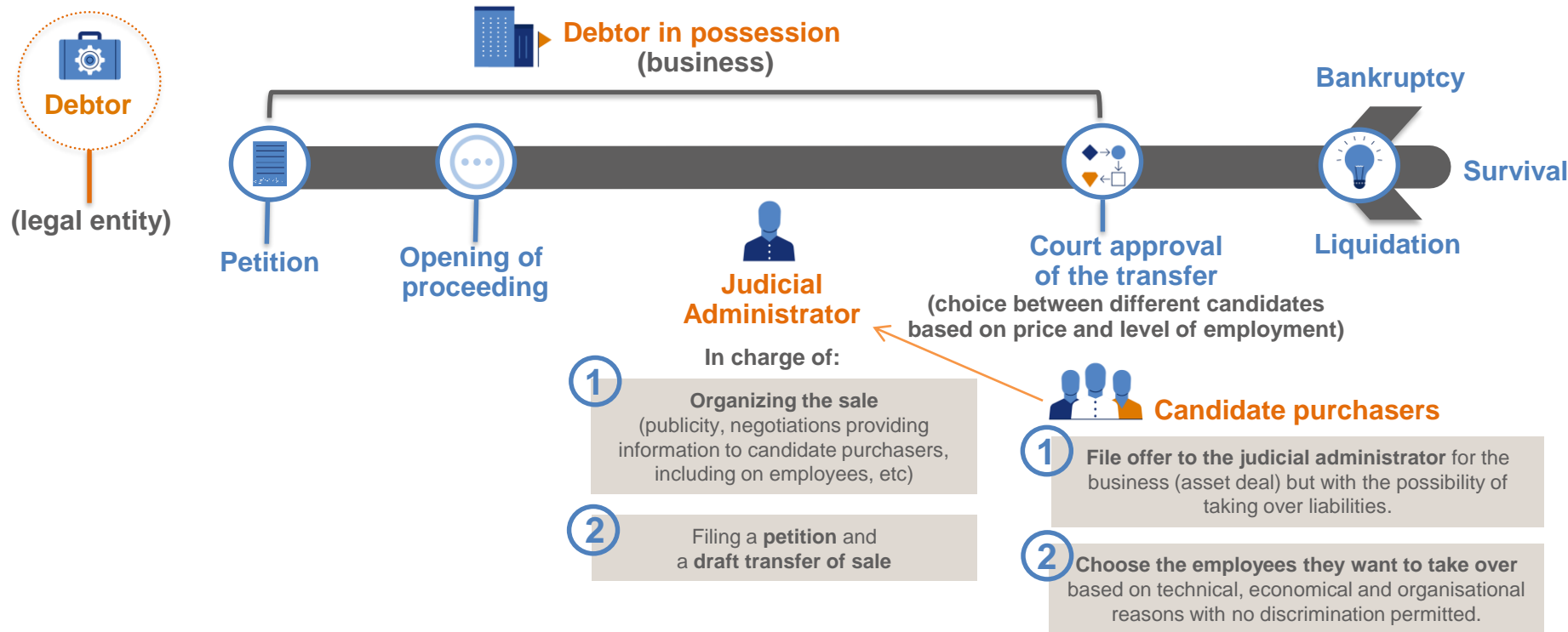
## BELGIUM : PLESSERS

- Brief overview of the Belgium legal framework of the reorganisation proceedings by transfer of a business



# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?





ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



- The Plessers case of 16 May 2019 : position of the Court: analysis of art. 5 Directive Transfer of Undertakings
  1. bankruptcy proceedings or any analogous insolvency proceedings: NO
  2. **which have been instituted with a view to the liquidation of the assets of the transferor: NO**
  3. under the supervision of a competent public authority: NO



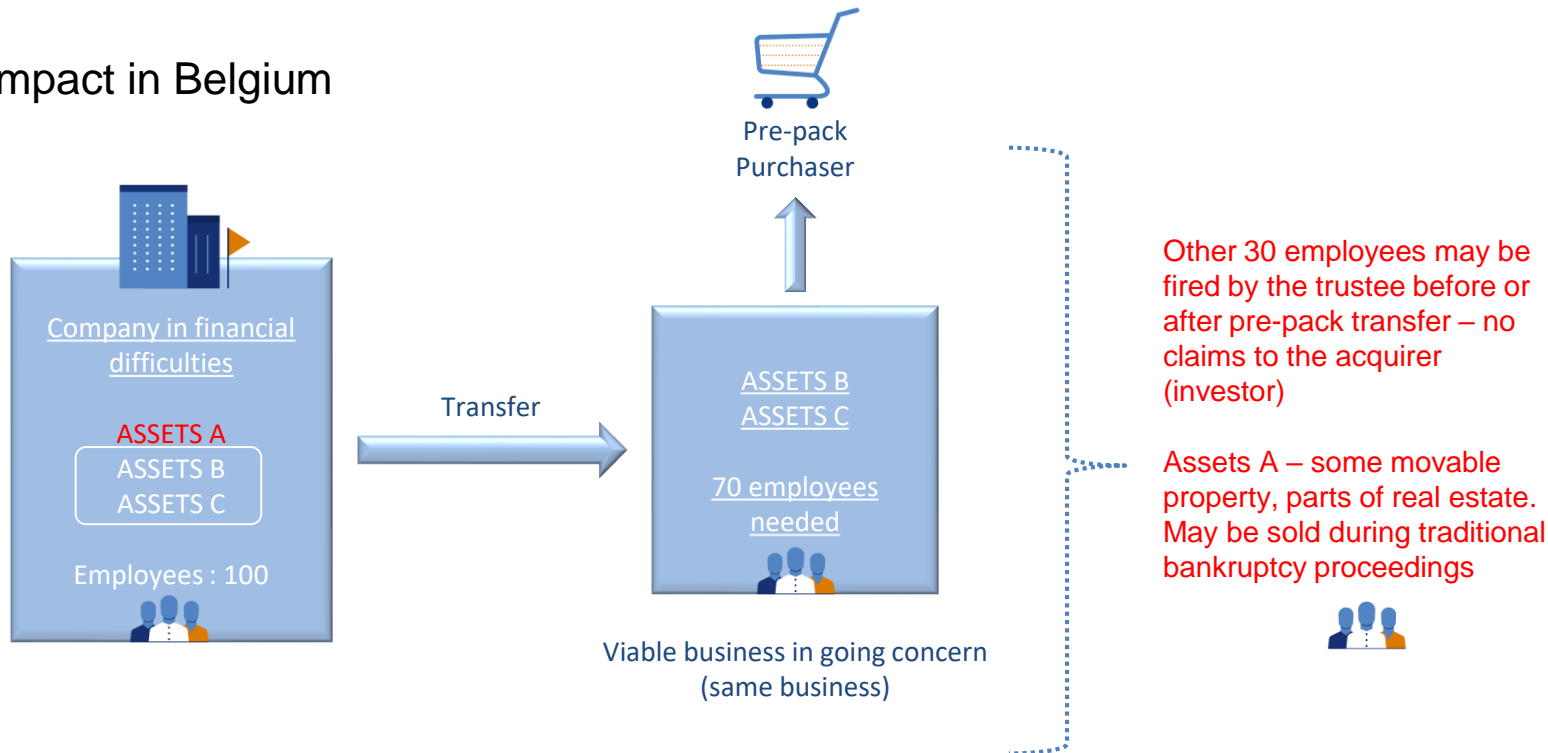
ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



- Impact in Belgium

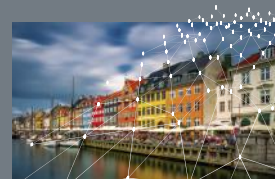




ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



## BELGIUM

- No formal procedure of prepack under Belgian insolvency law
- Judicial reorganization: transfer of undertaking post Plessers
  - *Post Plessers*: great uncertainty
  - *Quid* enhanced motivation of economic, technical or organisational reasons?
- Bankruptcy
  - Transfer of undertaking after “real” bankruptcy ? What is the difference ?



ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



Thank you for your attention!



Sophie Jacmain, Lawyer Brussels

E: [Sophie.Jacmain@nautadutilh.com](mailto:Sophie.Jacmain@nautadutilh.com)

● **NautaDutilh** | International Law Firm



Brussels  
office

NautaDutilh BVBA/SPRL  
Chaussée de La Hulpe 120 | B-1000 Brussels  
Belgium  
☎ +32 2 566 80 00





ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



## FRANCE – Prepack

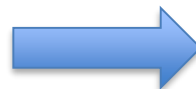
- French law provides for a prepack procedure (= faster schedule):

### CONFIDENTIAL

1

#### Preventive restructuring procedure:

- ✓ Debtor in possession, assisted by an insolvency practitioner (IP), appointed by the Court
- ✓ Research of buyers of business led by the IP
- ✓ As soon as a serious bid(s) is received = opening of a public procedure



### PUBLIC

2

#### Judicial reorganization:

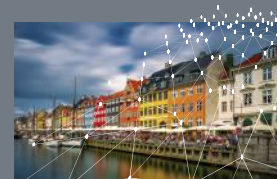
- ✓ Transfer of business (assets + people), without liabilities
- ✓ Can be completed in a week
- ✓ Non-transferred employees shall be dismissed

- More generally, transfer of business (so called sale's plan) possible within:

Safeguard  
proceeding

Judicial  
reorganization

Judicial  
liquidation



## FRANCE – Sale's plan (prepack or not)

1

### CALL FOR TENDERS

- **Research** of investors (advertisement)
- Disclosure by the IP of a **jobs' list** = list of positions existing in the company, filtered by professional categories (e.g.: sale's man, manual worker, CFO etc)
- **Anonymous** = no name, gender, personal details...

2

### TAKEOVER OFFERS

- **Cherry picking of assets**
- **Cherry picking of jobs:**
  - ⇒ number of positions to be transferred to the bidder, filtered by professional categories
  - ⇒ General explanations for positions to be transferred = consistency with the business plan
  - ⇒ no explanation needed for non-transferred jobs

3

### JUDGEMENT

- Court-ordered transfer of **employment contracts**
- **Authorization of termination of non-transferred contracts:** mention of number of employees concerned with professional categories

4

### DISMISSAL

- **Dismissal** of non-transferred employees by the receiver or the liquidator
- **Application of priority criteria** to choose the employees to be dismissed



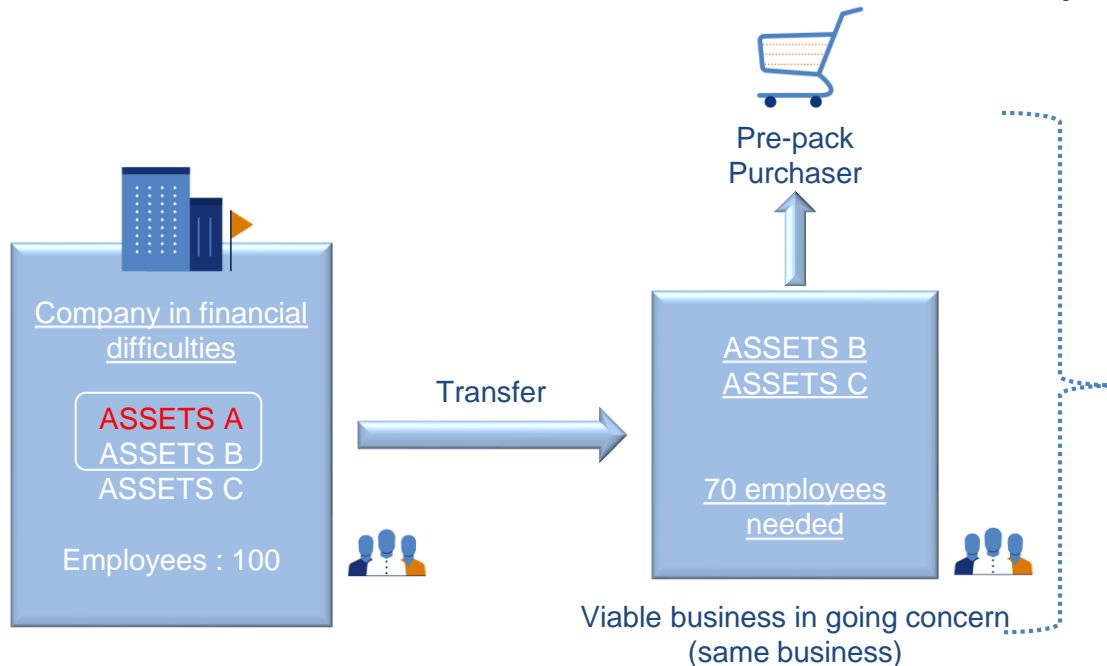
ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



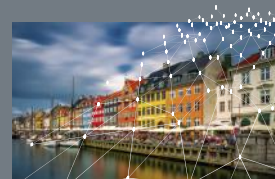
## FRANCE – Case study



Other 30 employees may be fired by the IP after the pre-pack transfer – no claims to the purchaser



Assets A – some movable property, parts of real estate. May be sold during traditional bankruptcy proceedings



## FRANCE – Case study

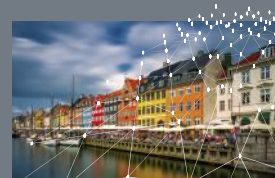
- **Application test of art. 5 § 1 of TUPE Directive on French sale's plan:**
  1. ***“Bankruptcy proceedings or any analogous insolvency proceedings”:***
    - ✓ Judicial reorganization: **NO** / Judicial liquidation: **NO**  
≠ the continuation of operation which is the goal of a sale's plan
  2. ***“which have been instituted with a view to the liquidation of the assets of the transferor”:***
    - ✓ Judicial reorganization: **NO** → this proceeding is clearly intended to allow the continuation of the business
    - ✓ Judicial liquidation: **? ?**
      - ✓ the goal of the liquidation is to close the business of the debtor or to sale (individually or globally) the assets of the debtor
      - ✓ the transfer of business is provided by French law to maintain activities and enable the payment of the debts
  3. ***“under the supervision of a competent public authority”:*** **YES**
- **Conclusion:** no application of art. 5 § 1 of TUPE Directive on French sale's plan



ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



## FRANCE – Case study

- **Compliance with art. 3 and 4 of TUPE Directive?**

- ✓ **NO:** the bid of the purchaser only explains why the jobs to be transferred are kept
- ✓ **NO:** the dismissal letter only refers to the authorization for termination of employment contracts given by the Court

- **Suggestions for practical and/or legal amendments:**

- ✓ The purchaser should justify, in his bid, the **operational, organizational, economic or technical reasons** for transferring some jobs and not the others
- ✓ The Court should **authorize dismissal of jobs non-transferred by taking into account the purchaser's explanations**
- ✓ The letter of dismissal send to each non-transferred employees should **justify the dismissal by the reasons included in the judgment**



ANNUAL CONGRESS 2019

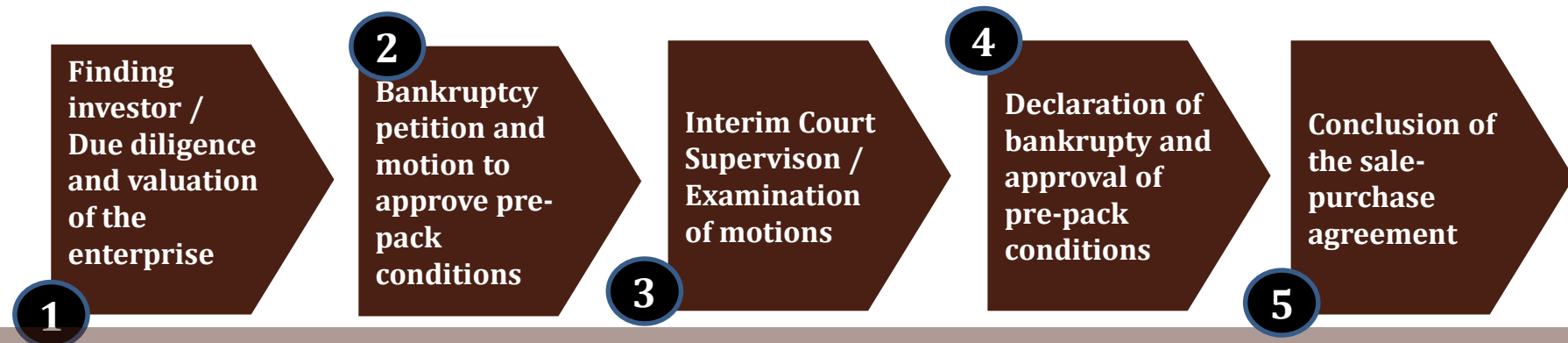
# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



## POLAND : Pre-pack

**not soft-law**



Timing: if non-appealed – from 4 to 6 months  
If appealed – from 6 – 12 months



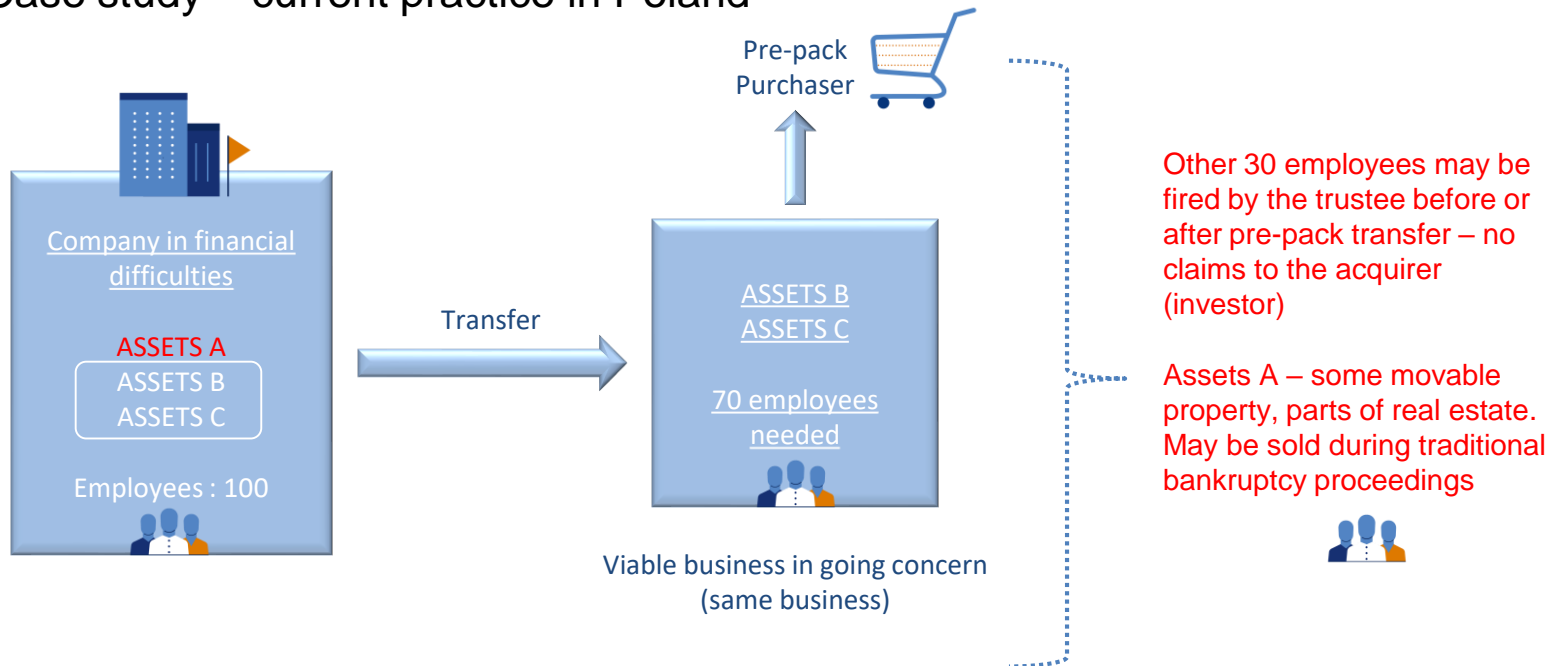
ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



- Case study – current practice in Poland

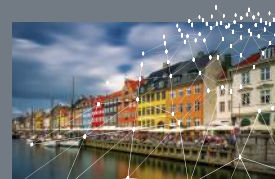




ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



## Legal risks

### Article 23[1] of Labour Code

- Joint and several liability of transferor and transferee
- For employees' receivables

### Implementation of Council Directive 2001/23/EC – employees' rights in the event of transfers

- No direct relation to insolvency





ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



Article 317 of Bankruptcy Law – no liability for old debts / execution sale effect

Dispute between some practitioners – insolvency lawyers stating that Article 317 of Bankruptcy Law is *lex specialis* to Article 23[1] of Labour Code, some labour lawyers see it differently



ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



## Estro (Smallsteps)

No Court supervision

Soft law, not clearly regulated

## Not applicable Smallsteps in Poland

Interim Court Supervisor  
appointed by the  
Bankruptcy Court

Ruling in one judgement –  
declaring bankruptcy, strict  
regulation in law



ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



## Plessers

Proceedings aiming to  
restructure business

Not enough Court supervision

## Not applicable Plessers in Poland

Word liquidation origin from  
Latin – meaning to sell,  
*liquidatio*

Court control over the proces,  
Interim Court Supervisor, ruling  
in one judgement



ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



Recent developments in Polish legislation

Scope of Article 23[1] of Labour Code used  
**accordingly** – not possible for old debts, previous  
to bankruptcy – potential dispute



ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



- Thank you for your attention!
- Karol Tatara – attorney-at-law and licensed restructuring advisor
- [k.tatara@tatara.com.pl](mailto:k.tatara@tatara.com.pl)



TATARA & PARTNERS  
RESTRUCTURING  
& INSOLVENCY  
LAW FIRM

Krakow Office:

ul. Filipa Eisenberga 11/1, 31-523 Kraków  
tel.: +48 12 634 52 92 fax: +48 12 412 23 23  
kancelaria@tatara.com.pl

Warsaw Office:

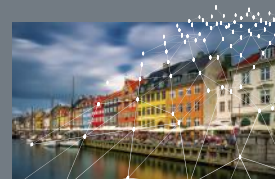
ul. Bagno 2/69, 00-112 Warszawa  
tel./fax: +48 22 654 66 32  
warszawa@tatara.com.pl



ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



## What are Pre-Packs?

- A Company arranges to sell its assets to a buyer before the formal appointment of Administrators to facilitate the sale.
- Prior to an Administrators appointment, the marketing and negotiations have taken place and a deal agreed before the appointment takes place.
- The sale contract is then rapidly executed as soon as the Administrator is appointed.
- Seamless transition to newco, immediately taking effect.
- The Golden Rules are Planning, Planning and Planning.

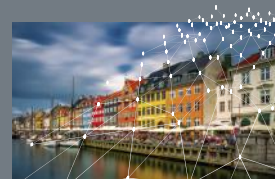




ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



## Meet the Purpose?

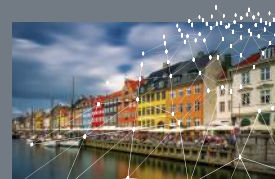
- Statutory Objective set out in Schedule B1 Para 3(1) Insolvency Act 1986:
  - a) To rescue the Company as a going concern, or
  - b) Achieving a better result for the company's creditors as a whole than would be likely if the Company were wound up, or
  - c) Realising property in order to make a distribution to one or more secured or preferential creditors.



ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



## Example: 'The REAL Chocolate Company Ltd'

- 25 shops of which 15 shops are loss making.
- Central Production Factory Facility.
- Real Chocolate (Old Co) run by 2 directors. Many reasons for failure etc.....
- Business marketed by an independent valuer including sale of assets to include Trading Name 'Real Chocolate' and the bids are all in.
- New Co set up joined by new investor, who is also a competitor. Includes Factory and just 10 shops with additional wholesale customer base and consolidated production.
- The world can continue eating wonderful chocolates.







ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



## Timeline from instruction to Appointment

**1<sup>st</sup> April**

The Co is making losses.  
Manufacturing with 25 shops,  
15 of which are lossmaking.  
Substantial debts.  
Bank has Debenture and is  
owed £250,000. Good core  
business. Objective –  
Consolidate production and  
keep 10 shops.

**10 April – 15 April**

Sale purchase  
Agreement prepared

**16<sup>th</sup> April – 21<sup>st</sup> April**

Draft and circulate the Statement of  
Insolvency Practice 16 Report providing  
further details on the sale within 7 days  
of the date of the sale.

**7<sup>th</sup> April**

Independent valuers  
prepare detailed valuation  
report and complete  
marketing on a variety of  
platforms aimed at all  
potential markets.

**16<sup>th</sup> April**

Notice of Appointment filed  
in Court. Company enters  
into Administration  
Completion of the pre-  
packaged sale of the  
business

**16<sup>th</sup> April - 11<sup>th</sup> June**

Draft and circulate the  
Administrator's Formal  
Proposals within 8 weeks of the  
start of the Administration for  
approval

**10 April**

If there is a QFC file  
Notice of Intention to  
Appoint an  
Administrator

**Interim  
Moratorium**

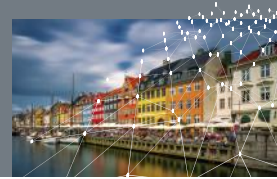
**Full Moratorium**



ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



## Benefits

- The majority of the work is completed pre-appointment thereby reducing costs and maintaining confidentiality.
- Successful bidder acquires business.
- Seamless transition – the doors do not close. Easy. Quick.
- Employee jobs saved + TUPE
- Preserves value of the business.
- Avoids Administrators trading costs.

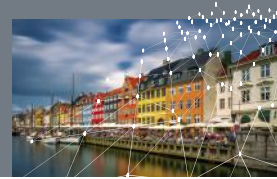




ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



## Administrators Duties (1)

Transparency in all dealings of primary importance. Creditors must be confident that the Administrator has acted professionally and with objectivity.



### Preparatory work

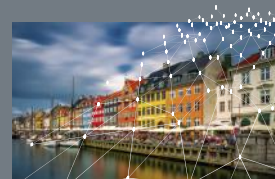
- Should bear in mind the duties and obligations which are owed to creditors in the pre-appointment period.
- Keep a detailed record of the reasoning behind both the decision to undertake a pre-packaged sale and all alternatives considered.
- Valuations obtained should be carried out by appropriate independent certificated valuers and/or advisors.



ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



## Administrators Duties (2)

### Marketing

- Marketing a business is important, ensuring that the best available consideration is obtained for creditors.
- Any deviation from the marketing essentials, the Administrator is to explain how a different strategy has delivered the best available outcome for creditors.

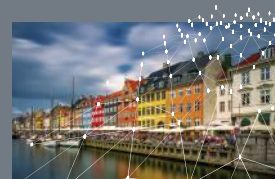




ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



## Administrators Duties (3)

### Disclosure

- Provide creditors with a detailed explanation and justification (the SIP 16 statement) of why a pre-packaged sale was undertaken and all alternatives considered.
- SIP 16 Statement should be provided within seven calendar days of the transaction.

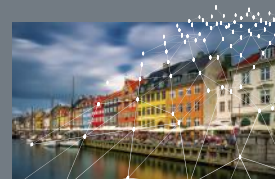




ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



## The future

- Growing demand in the UK.
- Uncertainty - Brexit





ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



David Rubin & Partners

Chartered Accountants • Licensed Insolvency Practitioners

David Rubin and Partners  
26-28 Bedford Row  
London  
WC1R 4HE

020 7400 7900

[davidr@drpartners.com](mailto:davidr@drpartners.com)



ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



## Closing of the day

Chris Laughton, Mercer & Hole, UK

Alastair Beveridge, AlixPartners, UK

Piya Mukherjee, Horten Law Firm, Denmark





ANNUAL CONGRESS 2019

# COPENHAGEN

(UN)NECESSARY PREVENTIVE RESTRUCTURING FRAMEWORKS: Where are the limits?



## Delegate & Guest Lunch

Kindly Sponsored By



Gemeinsam. Zukunft. Sichern.

[www.hww.eu](http://www.hww.eu)