

INSOL Europe/LexisPSL joint project on the implementation analysis of the Directive (EU) 2019/1023 in the EU Member States

Denmark

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Restructuring & Insolvency analysis: This article looks at how Denmark has implemented Directive (EU) 2019/1023 as part of the Joint Project between INSOL Europe and LexisPSL to track implementation.

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INSOL Europe/LexisNexis research on implementation of the EU Directive

LexisPSL are working with INSOL Europe on a joint project to obtain articles from the INSOL Europe membership and Country Coordinators showing how EU Member States have implemented [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](#) (the EU Directive).

A consolidated table appears at Practice Note: [INSOL Europe/LexisPSL Joint Project on EU Harmonisation Directive 2019/1023: consolidated table](#).

As always, you should contact local lawyers in the relevant jurisdiction to check the current measures in force and the impact of any particular circumstances or nuances of your case.

Question 1: When did/will the new restructuring law come into force? What is/are the name of the new proceedings which comply with the EU Directive?

The EU Directive on restructuring and insolvency will be implemented into Danish law on 17 July 2022. As provisions on restructuring, discharge on debt and disqualification are already part of Danish law, the implementation has the effect of adjusting the Danish judicial restructuring framework rather than introducing a wholly new regime.

The new proceeding is called the preventive restructuring procedure (in Danish: *forebyggende rekonstruktion*). The provisions are added as a new chapter of the existing Bankruptcy Act.

Question 2: Is court approval automatically required? Is court involvement possible during the course of the proceedings? (for e.g. to rule on short notice on conflicts regarding classes of creditors with voting rights, etc...)

Court approval is required to initiate the preventive restructuring procedure. During the procedure, the court rules on class formation, if applicable, see Question 7; granting of a stay; appointment of an administrator, if applicable, see Question 5; and the restructuring plan (under the Bankruptcy Act the restructuring plan is called a restructuring proposal).

Question 3: What are the entry criteria (ie must insolvency be proved)? Could you please define the entry criteria under your national legislation?

The preventive restructuring procedure only applies to debtors carrying on business activities. The entry criteria stipulates that the debtor must be either insolvent or likely to become insolvent; the likelihood of be-

coming insolvent is a stage prior to insolvency (defined as being unable to fulfil one's obligations as they fall due, and such a situation is not just temporary).

Question 4: Can foreign companies use the process?

Only debtors with legal venue in Denmark can use the preventive restructuring procedure in Denmark.

Question 5: Does the debtor (ie company's management) remain in possession or is an insolvency practitioner (or any other professional, in that case could you please specify) automatically appointed?

The appointment of an insolvency practitioner is only mandatory if a stay is granted by the court, meaning the management remains in possession, but the administrator (the insolvency practitioner), if appointed, shall approve of any significant actions to be taken by the debtor.

Question 6: Is there any moratorium on claims to protect the debtor during the process? What is the minimum and maximum length of the stay?

A stay can be granted by the court on request from the debtor. The stay cannot be withdrawn once granted. The maximum length of a preventive restructuring with a stay is one year. A preventive restructuring procedure period combined with a restructuring procedure cannot extend beyond one year.

Question 7: Are creditors placed into classes for voting purposes? How are 'affected creditors' defined under your legislation?

Creditors are placed into classes for voting purposes. For small and medium-sized enterprises (SMEs) class formation is voluntary and, if applicable, class formation must be based on a sufficient commonality of interest between the creditors. 'Affected creditors' are defined as creditors holding claims that are affected by the restructuring plan, except related parties that do not hold voting power.

Question 8: What is the voting threshold to approve the restructuring?

The majority (simple) of the classes must vote in favour of the restructuring proposal. Likewise, the majority (simple) of creditors in each class must vote in favour in order for the class in its entirety to be in favour.

Question 9: Can shareholders be bound?

The new provisions introduce a new regime that can bind shareholders to the extent that the share capital can be reduced to zero, and new share capital can be subscribed (by new shareholders).

Question 10: How are secured creditors treated?

All secured creditors are placed in a separate class for themselves. If a secured claim is partly out of the money (meaning that the debt exceeds the value of the security) then the unsecured part is placed in a different class (with other unsecured claims).

Question 11: How are employees treated?

A stay does not apply to employees' salary claims, to the extent these are preferential (certain time limits apply). If employees are affected by the restructuring plan, the employees hold a voting right.

Question 12: Can certain (holdout) creditors be crammed down? Is the absolute priority rule applied?

The absolute priority rule is understood as the principle in accordance with which the claims of a dissenting class of creditors is required to be paid in full before any class of creditors junior to such dissenting class may receive or retain any property in satisfaction of their claims.

According to the Danish implementation of the EU Directive, dissenting creditors may be crammed down (forced to accept the restructuring plan approved by the court) if the majority of classes vote in favour of the restructuring plan. However, dissenting creditors cannot be forced to be treated worse than other similar ranked creditors.

Question 13: Can onerous contracts be disclaimed? Are there any restrictions on ipso facto clauses?

Even prior to the implementation of the EU Directive, the Danish Bankruptcy Act allows for a preceptive right for the debtor—under a bankruptcy or restructuring procedure—to choose to continue mutual contracts and with respect to contracts for ongoing deliveries to pay only (as a preferential claim) for deliveries relating to the period following the opening of such proceedings. This also applies despite agreed ipso facto-clauses. It is important to note that in a restructuring scenario the creditor cannot terminate such contracts despite payment default by the debtor regarding the period prior to the opening.

In respect of the preventive restructuring procedure, mutual contracts may be continued but default may cause termination, unless a stay is granted and the administrator consents.

Question 14: Will the new procedure be listed in Annex A of the EU Recast Regulation on Insolvency 2015/848? If not, how will it be recognised in other countries?

The EU Recast Regulation on Insolvency 2015/848 is not applicable in Denmark due to Denmark's legal reservations.

Question 15: Are new money or other arrangements granted any protection/priority (eg DIP finance)?

Rules on priority of loans etc granted and approved by an administrator are in force under the exiting Danish Bankruptcy Act and will remain in force. Post implementation an administrator shall approve such loans in order for the loan to become prioritized.

Question 16: How long should the process take (roughly)?

The preventive restructuring process should take no longer than one year.

Question 17: How much is the process likely to cost (roughly)?

The cost of the process depends on the size of the debtor's company and the co-operation of creditors.