The Danish implementation of the EU Restructuring Directive

Michala Roepstorff discusses the amendments to the restructuring legislation in Denmark which were implemented to improve the framework for restructuring

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Legislation to implement the EU Directive on Restructuring and Insolvency came into force in Denmark on 17 July 2022. Prior to the implementation, in-court restructuring procedures, discharge of debt and disqualification were already part of proceedings under the Bankruptcy Act (the "Act") and an early warning system had also applied on a temporary basis for a number of years.

In 2021, certain amendments to the restructuring legislation were implemented to improve the framework for restructuring, which seems to have led to a (slight) increase in the number of filings. The implementation took place mainly by incorporating a new chapter on a preventive restructuring procedure, adjusting certain provisions and inserting a provision on the early warning system.

Preventive Restructuring Procedure ("PRP")

Prior to the implementation, in-court restructuring proceedings required that the debtor – whether a natural person or a legal entity – be insolvent. In case of insolvency, an application to open a restructuring procedure could (and still can) be filed either by the debtor or by a creditor. The implementation introduces a PRP for a debtor that, while not yet insolvent, is likely to become insolvent. The filing for such procedures is only available for the debtor, not for creditors, provided the debtor – in the case of natural persons – carries out business activities and the debtor – in the case of legal entities – is not subject to be wound up as a result of a decision by the Danish Business Authority.

Neither an automatic stay (meaning mainly that creditors are not allowed to seek satisfaction) nor a mandatory appointment of a restructuring administrator applies to the PRP – both are optional but connected. Thus, a filing for PRP may be made with or without a request for a stay. The PRP procedure PRP will to some extent differ depending on whether a stay applies.

In cases where a **stay applies**, the following is mandatory:

- A restructuring administrator is appointed (either based on the application or a subsequent request by the debtor).
- Current information on the procedure must be provided to the creditors and by public notice.
- Meetings in court must be held (see the dual-stage process described briefly below) to which the creditors must be invited to participate and receive certain information.
- The date on which the bankruptcy court decides to grant a stay is considered as the reference date (*fristdag*), which is of importance, for example, for the classification of certain claims and the time period for clawback actions.
- *Ipso facto* clauses cannot be upheld, meaning that the filing for the PRP itself cannot cause termination of a contract, nor can the counterparty demand security for claims under the contract. In fact, contracts may be continued with the consent of the restructuring administrator, regardless of default or delay in performance by the debtor prior to the PRP. Accordingly, claims under such continuing contracts will become preferential claims (for contracts with ongoing services, preferential status only applies to claims relating to the period while the stay is in effect. Discontinuation of such contracts may be effected at a month's notice and the preferential state for future claims will then cease accordingly).

In cases where a stay does not apply:

- A restructuring administrator is not appointed.
- Informing creditors on the opening of the PRP is optional (if the court is to decide on a restructuring plan, it must be presented to the creditor(s) along with certain information.
- *Ipso facto* clauses cannot be upheld (see above). However, no protection against termination or demand for security etc. applies, contrary to when a stay is granted.

The dual-phase process

Prior to the implementation, the restructuring procedure needed to have a purpose: (i) compulsory composition - write-down of the debtor's debt (a full write-off was and still is possible) and/or a moratorium and/or (ii) a business transfer in full or in part. The implementation retains both purposes and introduces a third

purpose in the form of other measures that may result in the debtor ceasing to be/become insolvent - such measures may be aimed at the capital structure of the debtor, such as a write-down of the share capital and subscription of fresh capital by cash as part of the final restructuring plan.

The restructuring procedure – prior to/post implementation - is a dual-phase process; meaning that (1) a restructuring plan addressing the overall purpose of the procedure must be presented to the creditors for a vote at a meeting to be held no later than four weeks after the opening of the restructuring procedure; and (2) a final restructuring plan must be presented to the creditors for a vote at a meeting to be held no later than six months after the opening of the restructuring procedure. An extension mechanism applies to both these phases.

When restructuring proceedings were introduced in Denmark in 2010, the terms "restructuring plan" and "restructuring proposal" were applied to phases (1) and (2) respectively. As the dual-phase process is maintained, so are the terms. Hence, the Danish term for the initial overall purpose description means a restructuring plan and the term for the final plan/scheme for the restructuring means a restructuring proposal.

Class formation

The class formation system is a significant amendment to the in-court restructuring procedures applicable prior to implementation. From the pre-legislative work, it appears that had class formation not been mandatory for non-SMEs, it might not have been introduced. The reason being that although the classes must be formed on the basis of the common interests of the creditors in each class, class formation may impair the influence of major creditors. However, the implementation states, among other things, an obligation for the bankruptcy

court to deny ratification of the final restructuring plan if it entails that the creditors will receive less dividend than they would otherwise have in case of bankruptcy - the best-interests-of-creditors test. If the debtor is a SME, the class formation system is optional (applicable both in PRP and restructuring procedures) at the sole discretion of the debtor. Moreover, class formation is only applicable to a vote on the final restructuring plan, but not to votes on, e.g., the initial restructuring plan (see above for definitions).

Related parties are excluded from voting. Prior to and post implementation, votes are cast based on each voting creditor's proportionate share of the total unsecured claim. However, if class formation applies, the result will be based on the joint votes of the creditors in each class. A restructuring plan as well as a restructuring proposal is deemed to be adopted by the creditors if a majority of the voting creditors represented vote in favour.

Prior to implementation, votes were cast to reject (a non-cast vote was considered a vote in favour) and, unless a majority voted to reject the plan/proposal, it was considered adopted. In respect of the plan, rejection by a simple majority of the votes represented required that the rejecting creditors represent at least 25% of the total claim of all creditors with voting rights. The 25% threshold for rejecting voting creditors to the initial plan still applies.

It remains to be seen to what extent the new tools will be used and especially whether they will result in an increase in the number of filings for the in-court restructuring procedure as well as in the number of ratified final restructuring plans. Moreover, of interest will be whether the preventive restructuring regime may lead distressed debtors to seek in-court measures in an attempt to avoid a worsening of their financial position. ■

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