

INSOLVENCY & RESTRUCTURING

Bankruptcy

How to file for bankruptcy?

A petition for bankruptcy may be filed by a creditor or by the debtor itself to the Bankruptcy Court. If the Bankruptcy Court finds that the debtor is insolvent and that the insolvency is not considered to be of temporary nature, the Bankruptcy Court will decide to commence bankruptcy proceedings against the debtor.

If a creditor is to file for bankruptcy against a company, the proceedings are conditional upon said creditor's payment of an administration bond (DKK 30,000) to the Bankruptcy Court. Under certain circumstances, the Bankruptcy Court may disregard the condition of an administration bond, but this is a rare exception.

If the petition is filed by the company, security is also a prerequisite for the Bankruptcy Court to initiate the proceedings. However, the claim for security is more often disregarded by the Bankruptcy Court.

What happens when a bankruptcy order is issued?

When a bankruptcy order is issued by the Bankruptcy Court, the debtor loses its right to dispose of the assets. Thus, an estate will be established and a trustee appointed. The trustee will act as the management and is granted full right of disposal of the debtor.

Will the bankruptcy be made public?

The Bankruptcy Court announces the bankruptcy order in the Danish Official Gazette (in Danish: "Statstidende"), and a notice of the bankruptcy is submitted to the Danish Commerce and Companies Agency and other public authorities, if applicable. The debtor is required to add "under konkurs" (in English: "in bankruptcy") to its name.

The objective of the bankruptcy proceedings

The main objective of the trustee is to wind up the business in favour of the creditors. The Trustee has to monetise the assets of the estate. The Trustee is obligated to review the company's records and accounts for the purpose of clarifying whether the creditors have been pursued for any unlawful conduct or any unusual business transactions.

After the records and accounts have been reviewed by the trustee and all assets have been monetised, the trustee has to distribute any profit left in the estate after payment of the estate's administrative costs.

What information will the creditors receive?

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Immediately after issuance of the bankruptcy order, the trustee will send a letter to all known creditors of the debtor. In this letter, the trustee will inform the creditors of the situation of the debtor. After three weeks, the trustee will send a preliminary statement on the assets and liabilities of the estate to the creditors.

No later than four months after the issuance of the bankruptcy order, the trustee will send a statement describing the reason for the company's bankruptcy. This statement will also include a balance sheet and information regarding the latest annual account and the accounting figures.

Subsequently, the trustee will send semi-annual statements describing the situation of the estate and the work undertaken by the trustee in the period following the last statement.

What happens to the employees?

Within 14 days after issuance of the bankruptcy order, the trustee has to decide whether or not the estate wants to affirm any existing employment contracts. If the trustee decides to affirm an employment contract, the estate will be bound by the terms and conditions of the contract. An employee will be entitled to terminate the employment if the trustee decides not to affirm the employment contract.

What happens to agreements concluded by the company?

The trustee decides whether or not to affirm the company's executive agreements. If the trustee decides to affirm an agreement, the estate will be bound by the terms and conditions herein, and the other party's claims in that respect will be ranked as pre-preferential claims, cf. below.

If an agreement is rejected by the estate, the other party may cancel the agreement and file a claim for consideration or damages. The claim will be ranked as an ordinary claim and the creditor may therefore expect to receive less dividend of the claim, cf. below.

How to file a claim?

The creditors are encouraged to file their documented claim with the estate within four weeks following issuance of the bankruptcy order. However, it is possible for a creditor to file a claim against the estate after expiry of the four-week period. When filing the claim, the creditor must provide documentation substantiating the claim and a legal advisor's assistance may be needed.

How are the claims ranked?

The Bankruptcy Act sets up a ranking of the claims that may be filed against the estate. Claims arisen in connection with the administration of the bankruptcy estate will be met before all other claims (the pre-preferential claims, Section 93-claims).

Second priority will be given to the secondary pre-preferential claims which concern costs incurred whilst attempting to restructure the company including obligations undertaken with the approval of the administrator during reconstruction (Section 94-claims).

Third priority is given to claims from the employees (Section 95-claims). After the employees' claims have been met, certain suppliers' excise duty claims will be met (Section 96-claims).

The remaining claims will be met on equal terms and covered by the remaining dividend, if any (Section 97-claims). Usually, the company's suppliers will file their claims as Section 97 claims. Last priority will be given to deferred claims such as interest and promised gifts; a claim which will rarely be met (Section 98-claim).

Creditor claims secured by mortgage or other types of securities will be fully covered subject to sufficient security.

What happens at the end of the bankruptcy proceedings?

Normally, the trustee will conclude the bankruptcy proceedings with a statement of affairs and accounts for the estate, including a proposal for distribution to the creditors. If the statement is approved by the Bankruptcy Court, the creditors will receive dividends of their claims, provided that the estate pays dividend to the specific type of claim.

Restructuring

According to Danish law, restructuring is the main possibility for a company to survive in case of insolvency.

The formal framework for restructuring a company according to the law is regulated by the Danish Bankruptcy Act.

A complete revision of the Danish restructuring rules was adopted on 1 April 2011, and previous rules on suspension of payments are no longer valid.

A company which applied for suspension of payments before the new rules entered into force will be subject to the new rules.

The objective of reconstruction

The objective of reconstruction is (i) to allow the company to continue its business by means of compulsory composition or by transferring some of the company's assets, (ii) to terminate the business of the company by transferring the business or (iii) to terminate the business through compulsory composition.

The restructuring is required to involve an element of compulsory composition or transfer of business, or a combination hereof.

How to file for reconstruction?

A company as well as the creditors may file for reconstruction. Only natural persons running a business may be reconstructed.

It is a condition for the Bankruptcy Court to initiate reconstruction proceedings that the company is insolvent and that the insolvency is not temporary.

If a creditor files for reconstruction of the company, and the company does not consent hereto, the Bankruptcy Court requires security for the costs of the reconstruction administration.

What happens when the reconstruction is initiated?

The Bankruptcy Court will immediately appoint a trustee and a nominee to administrate the company. Material transactions cannot be carried out without the prior approval of the trustee.

The nominee will assist the company in financial matters.

If the creditors so request, the Bankruptcy Court may decide that the management of the company will only be handled by the trustee during the period of restructuring.

During restructuring, the creditors are prohibited from taking certain legal actions against the company.

Will the restructuring of the company be made public?

The Bankruptcy Court announces the restructuring of the company in the Danish Official Gazette.

What information will the creditors receive?

Immediately after a restructuring order has been issued, the trustee will send a statement to all known creditors of the company. This statement must contain the latest annual report, current information on the most essential assets and obligations, infor-

mation regarding the accounting management and a statement on the objective of the restructuring.

Within four weeks after commencement of the restructuring, each creditor will receive a draft plan for the restructuring. The plan is resolved upon if a majority of the creditors does not reject the plan.

After three months, the creditors will receive a statement from the trustee containing essential information on the restructuring.

Within six months after the draft plan was presented to the creditors, the creditors will receive a final draft proposal for the restructuring of the company. The final draft proposal is resolved upon if a majority of creditors do not reject the proposal.

The proposal may be amended at the meeting on the final proposal and until affirmed by the Bankruptcy Court.

What happens to the employees?

The company continues to operate on a normal basis; however, the trustee and the management of the company must decide whether it is necessary to dismiss all or some of the company's employees as part of the restructuring or in connection with a sale of the company.

What happens with agreements entered into by the company?

Subject to approval by the trustee, mutually binding agreements between the company and the opposing party may continue to apply, provided that it is not possible for the opposing party to terminate the contract on other grounds than commencement of the restructuring. Furthermore, a terminated agreement between the company and the opposing party may continue to apply for four weeks after termination if such termination has only been effected based on the company's breach of the agreement. However, if the opposing party has acted in accordance with the termination of the agreement, it is not possible for the company to continue the agreement.

If an agreement concluded by the company continues to apply, or the company enters into a new agreement, claims related to such agreements will be classified as secondary pre-preferential claims (Section 94-claims).

The company may terminate an agreement at any time during the restructuring with 1 months' notice.

If the company chooses that an agreement must continue to apply, the opposing party cannot (i) demand that the company provides security for claims in relation to the agreement; (ii) prevent the company's performance under the contract due to the reconstruction process; (iii) demand that the company performs its obligations under the agreement before maturity of the agreement; or (iv) terminate the agreement based on the company's failure to duly meet its obligations under the agreement, unless the opposing party's claim under the agreement is contemplated by the secondary pre-preferential claims (Section 94-claims) and the company does not perform its obligations without undue delay after continuation of the agreement.

If an agreement does not continue to apply, the opposing party may terminate the agreement and demand compensation for the termination.

If the opposing party has delivered goods to the company after commencement of its restructuring and if the company does not wish to continue the agreement as described above, the goods must be returned if possible.

Should the creditors file their claims?

The trustee will encourage the creditors to file their claims in order to build a foundation for the potential restructuring of the company.

The claims will be ranked in the same way as in the case of bankruptcy.

Payment of debt will only take place if this corresponds with the order of asset distribution.

How long is a reconstruction period?

The restructuring of a company normally takes approximately seven months. The Bankruptcy Court may extend the restructuring period twice with two months to a total of 11 months. If a satisfactory solution has not been found within the 11 months, bankruptcy proceedings will be initiated against the company.

If, at any time during the restructuring, the trustee does not consider a solution within reach, he has to notify the Bankruptcy Court in order to initiate bankruptcy proceedings.

Other ways to restructure a company

Unregulated by law, it is possible to restructure a company on a more voluntary basis. This method is solely based on contract law and it is therefore up to the creditors to decide whether or not to conclude an agreement with the debtor.

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