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Denmark

RESTRUCTURING & INSOLVENCY

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This country-specific Q&A provides an overview of restructuring & insolvency laws and regulations applicable in Denmark.

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DENMARK
RESTRUCTURING & INSOLVENCY

1. What forms of security can be granted over immovable and movable property? What formalities are required and what is the impact if such formalities are not complied with?

Danish law allows for a variety of securities that can be granted over both immovable and movable assets.

The formalities required for perfection of such security rights differ. However, the general rule is that charges relating to tangible and intangible assets must be registered with the Land Registration Court.

Non-compliance leads to other creditors not having to abide by the security.

Further, if the security right is not granted no later than simultaneously with the debt creation, the security right can be deemed void in subsequent insolvency proceedings of the debtor, subject to certain time-bar deadlines.

Immovable property / real estate

Danish law allows for three kinds of mortgages of real estate: a (regular) mortgage, an indemnity bond and an owner's mortgage. All three kinds are subject to registration with the Land Registration Court.

A mortgage is issued as a fixed amount corresponding to the actual debt. The debtor will usually service the loan.

The indemnity bond provides security for a specific creditor within a certain maximum and does not entail a requirement for the debt to be fixed.

The owner's mortgage is a reservation made by the owner. The owner can transfer this reservation to a creditor as security for an obligation. The reservation is for a fixed amount but does not entail a requirement for the debt to be fixed.

Movable assets

Charges relating to movable assets must be registered with the Land Registration Court, excluding aircrafts, ships, and assets taken in possession by the creditor as other rules apply in respect of such assets.

Danish law does not allow for charges relating to unspecified assets except through a floating company charge ("virksomhedspant"), a pledge of receivables ("fordringspant") or of a business' movable property, but not stock, if the business is operated from leased premises. All these security rights must be registered with the Land Registration Court.

Through a "virksomhedspant" a business can pledge its trade receivables, inventory, operating equipment, livestock, intellectual property, and some vehicles. The floating charge crystalizes if insolvency proceedings commence against the debtor. This means that at the time of the court's decision to initiate insolvency proceedings against the debtor, no new asset can be subject to the charge.

Other kinds of charges relating to movable assets may be issued regarding only specific and identifiable assets.

Pledges of unlisted shares must be notified to the company. A pledge of a receivable must be notified to the debtor of the said receivable. Pledges of listed shares must be registered with the financial institution holding the shareholder register.

2. What practical issues do secured creditors face in enforcing their security package (e.g. timing issues, requirement for court involvement) in out-of-court and/or insolvency proceedings?

Danish law distinguishes between pledges and mortgages in relation to enforcement.

Enforcing mortgages requires the creditor to execute and enforce the security with the Enforcement Court.

As for pledges of a specific right/receivable, and charges where the creditor is in possession of the asset, the creditor can generally claim the pledged right(s) without the involvement of the Enforcement Court.

Out-of-court restructurings does not grant any moratorium and thus does not bar a charge holder from enforcing a claim.

In case of bankruptcy proceedings, the court appointed trustee/administrator is mandated with liquidating the assets – also assets charged as security for certain creditors. However, the creditor can require a forced auction of the asset six months after the commencement of the proceedings. Charged receivables are exempt from these rules i.e., the creditor can usually claim such receivables paid directly to the creditor in case of bankruptcy proceedings.

Enforcing a security package can be a slow process, especially in out-of-court proceedings. Enforcing the security package and turn it into cash or other movable property can be time consuming, and there is a risk of the value dropping in the meantime, meaning that the creditor may risk not getting full satisfaction.

If a debtor has several secured creditors, the order of priority can cause for problems. Typically, the order of priority follows the agreement and the rules of law. But if there are several secured creditors with different securities, it may be necessary to determine which creditor has priority.

3. What restructuring and rescue procedures are available in the jurisdiction, what are the entry requirements and how is a restructuring plan approved and implemented? Does management continue to operate the business and / or is the debtor subject to supervision? What roles do the court and other stakeholders play?

Danish law includes rules on in-court preventive and "ordinary" restructuring, but not informal, out-of-court restructurings. The rules are included in the Danish Bankruptcy Act and were amended in March 2021 and July 2022.

Preventive Restructuring:

Only the debtor can initiate preventive restructuring. The rules differ depend on whether a stay of enforcement has been requested. If not, the proceedings are not automatically published, the proceedings will not bar enforcement actions, an administrator does not have to be appointed, the proceedings do not follow the timelines and information requirements of the ordinary proceedings, and the debtor does not have to disclose a restructuring plan/proposal and thus the creditors are not necessarily requested to vote on the plan/proposal at meeting in the bankruptcy court. Even if an enforcement stay is granted, the proceedings does not automatically block a bankruptcy petition from a creditor, though the bankruptcy court can choose to reject the petition due to the ongoing proceedings.

If an enforcement stay has been requested, the proceedings will follow many of the rules of the "ordinary" restructuring proceedings including the deadlines and obligatory court meeting. However, the creditors cannot vote on the restructuring plan but only the final restructuring proposal.

Unlike the ordinary restructuring proceedings and bankruptcy/liquidation proceedings, preventive restructuring can be initiated if it is likely that the debtor will become solvent.

Further, a floating charge will not crystalize due to the preventive proceedings.

Ordinary restructuring

Both the debtor and creditors can file for "ordinary" restructuring when the debtor is insolvent. The management remains in control of the day-to-day operations, but an administrator – appointed by the Bankruptcy Court – must accept all major transactions.

The creditors will vote on a restructuring plan and a final proposal.

Restructuring proceedings follow strict timelines and cannot extend beyond 11-12 months. The timeframe is as follows:

- One week after proceedings commenced:

1. the administrator must send out a notice to all known creditors.

- Four weeks (but can be extended up to eight weeks):

1. an in-court creditors' meeting on approval of the restructuring plan must have taken place (though in preventive restructuring proceedings the creditors cannot vote on the plan); and
2. one week prior to the meeting, the administrator must send the proposed restructuring plan, outlining the general terms of the plan, to all creditors and the court.

- Three months:

1. the administrator must send a report on all material information and accounts of the business during the proceedings.

- Six months after the first meeting (but this can be extended up to a total of four months)

1. an in-court creditor meeting on approval of the restructuring proposal must take place; and
2. the administrator must send the restructuring proposal to all known creditors two weeks before this meeting.

The Bankruptcy Court will have to approve the restructuring proposal after the voting.

With the amendment of the Bankruptcy Act in July 2022, voting classes were introduced for large enterprises, but small and midsize enterprises can opt in on the new voting rules as well. Consequently, a restructuring proposal is approved by the creditors if the majority of voting classes votes in favor. The creditors must be put into classes with other creditors of sufficient equal and common interest. Secured creditors must be put into one separate voting class.

A fast-track business sale scheme is possible, i.e., a transfer can be executed without voting, and this cannot be deemed void later unless a creditor objects within five days of receiving notice on the transfer.

The bankruptcy court plays a passive role compared to DIP-proceedings in other jurisdiction, and the court mainly oversees that the formal rules on voting and deadlines for submitting information to creditors etc., is complied with. In the general the process is primarily managed by the restructuring administrator and the creditors. However, the bankruptcy court must deny ratification of the restructuring proposal if the proposal is otherwise contrary to rules of law.

4. Can a debtor in restructuring proceedings obtain new financing and are any special priorities afforded to such financing (if available)?

During restructuring proceedings, the debtor may obtain new financing from existing or new lenders. It is the duty of the restructuring administrator to ensure that any new incursions of debt be responsible in relation to the debtor's financial position.

New financing is not afforded any super-priorities under Danish insolvency law. However, debt incurred by the debtor during the restructuring proceedings with the consent of the restructuring administrator appointed by the bankruptcy court is afforded a pre-preferential priority in the order of dividend distribution.

Such debt is ranked amongst other reasonable cost incidental to restructuring attempts.

5. Can a restructuring proceeding release claims against non-debtor parties (e.g. guarantees granted by parent entities, claims against directors of the debtor), and, if so, in what circumstances?

Restructuring proceedings will not automatically release claims against non-debtor parties. The restructuring administrator is appointed on the mandate of the creditors and is obliged to care for the interests of the creditors. Any release of claims against non-debtor parties must therefore be in the interest of the creditors.

6. How do creditors organize themselves in these proceedings? Are advisory fees covered by the debtor and to what extent?

When commencing restructuring proceedings, the bankruptcy court will schedule a meeting with the creditors. Further the restructuring administrator must send the proposed restructuring plan to all known creditors and the bankruptcy court. The restructuring administrator must give notice of the restructuring proceedings to all known creditors and other parties, except for the debtor's employees, affected by the restructuring proceedings and to the bankruptcy court. This notice must be accompanied about information regarding the time of the meeting scheduled with the creditors.

There is no access to the establishment of a creditor's committee compared to e.g. Chapter 11 proceedings. Usually, many creditors will mandate the same insolvency attorney, often chosen by the majority creditor, to vote on their behalf at the creditor meetings. The restructuring administrator will often receive several such power of attorneys from creditors prior to the creditor's meetings, making such meeting a formality.

In some cases, rules on voting classes applies, in which case the voting happens in these classes. Creditors are put into classes with other creditors will similar or comparable interest.

Creditors advisory fees are not covered by the debtor.

7. What is the test for insolvency? Is there any obligation on directors or officers of the debtor to open insolvency proceedings upon the debtor becoming distressed or insolvent? Are there any consequences for failure to do so?

The insolvency test is a liquidity test: can the debtor fulfill its obligations as these falls due and is this not merely a temporary inability. An underbalance is therefore not necessarily evidence of insolvency, but it can be a firm indicator.

Management of the debtor is obligated to ensure sufficient capital reserves to fulfill current and future obligations. The Danish Companies Act contains rules on how the management should act towards the shareholders if the company's equity falls below half of the share capital value.

Management is obligated to cease operations and file for insolvency proceedings if continued operation will cause (additional) loss for the creditors or others, and there is no realistic prospects of turning around the business (the "point of hopelessness"). If management does not comply, each member of the management might incur personal liability of losses suffered by creditors and the debtor.

The trustee is obligated to assess whether management should be held liable and/or should be disqualified for bankruptcy reasons. Disqualification is decided upon by the Bankruptcy Court after legal proceedings initiated by the trustee, and the court can disqualify management members of the business from taking part of the management in a limited liability company for up to three years.

8. What insolvency proceedings are available in the jurisdiction? Does management continue to operate the business and / or is the debtor subject to supervision? What roles do the court and other stakeholders play? How long does the process usually take to complete?

Currently, three Danish formal insolvency procedures exist: Preventive Restructuring, "Ordinary" restructuring and bankruptcy (liquidation).

Preventive Restructuring

Preventive restructuring can only be initiated by the debtor and the debtor stays in possession. The rules governing the proceedings differs dependent on whether a stay on enforcement actions has been requested by the debtor (e.g. only if a stay is granted an administrator need to be appointed) If an enforcement stay is granted, the rules are in most ways similar to the rules governing "ordinary" restructuring. Please see answers to question 3 for further details on preventive restructuring proceedings.

Restructuring

The purpose of restructuring is to improve insolvent debtors' possibilities to continue their activities through either a business sale or a compulsory composition. Please see answers to question 3 for further details on restructuring proceedings.

Bankruptcy (liquidation)

In bankruptcy, the trustee appointed by the court is mandated to liquidate the debtor's assets and wind up the business. The management is stripped off all mandates.

The court supervises the trustee's administration of the estate. The court must approve the financial statements for the proceedings to be concluded.

The management is obligated to answer the trustee's question(s) to assist the trustee in assessing the debtor.

There is no set timeframe for the bankruptcy process, and the time the process takes to complete depends on the size and complexity of the estate.

9. What form of stay or moratorium applies in insolvency proceedings against the continuation of legal proceedings or the enforcement of creditors' claims? Does that stay or moratorium have extraterritorial effect? In what circumstances may creditors benefit from any exceptions to such stay or moratorium?

The following only applies in preventive restructuring if a stay on enforcement actions have been requested by the debtor.

Insolvency proceedings put a stay against all other insolvency proceedings and enforcement of creditor's claims. Further, a creditor cannot file a lawsuit against the debtor.

If the debtor is a natural person, the stay only has

temporary effect until the proceedings have been concluded. If the debtor is not a natural person, the entity will dissolve after the proceedings have been concluded, leaving uncovered creditors with no debtor to their claims.

The trustee will have to decide on behalf of the estate whether the estate will continue as a party to a litigation initiated prior to the proceedings. An estate's choice of utilization of powers or not can either be a downside or a benefit for a creditor. This will depend on the specific circumstances and therefore requires the careful consideration of the bankruptcy estate.

Where legal proceedings are commenced against the debtor prior to the date of the bankruptcy order, the trustee decides whether the estate should continue the case by utilizing its litigation powers or forfeit it. Usually, the bankruptcy estate will be given a deadline within which it has to give notice of its possible utilization of powers.

If the estate utilizes its litigation powers, the bankruptcy estate may incur legal costs that are given a special priority in the bankruptcy order.

Commencement of insolvency proceedings does – from a Danish law perspective – have extraterritorial effect and thus bars enforcement actions and legal proceedings in foreign jurisdictions, however such jurisdictions can of course have their own limitation on recognizing court orders of Danish (bankruptcy) courts.

10. How do the creditors, and more generally any affected parties, proceed in such proceedings? What are the requirements and forms governing the adoption of any reorgnisation plan (if any)?

As stated above (question 6), the bankruptcy court will schedule a meeting with the creditors, when commencing restructuring proceedings. Further the restructuring administrator must send his proposal for a restructuring plan to all known creditors and the bankruptcy court. The restructuring administrator must give notice of the restructuring proceedings to all known creditors and other parties, 'affected by the restructuring proceedings and to the bankruptcy court. This notice must be accompanied with information regarding the time of the meeting scheduled with the creditors.

Restructuring proceedings must conclude with at least one of the following elements:

- A compulsory composition order that may provide for a percentage reduction or cancellation of the claims against the debtor. A compulsory composition order may also provide for an extension of payments.
- A business transfer that consists in the transfer in ownership of the debtor's ongoing business, or a part thereof,
- Or other measures which, individually or collectively with the other parts of the restructuring proceedings, result in the debtor no longer being insolvent.A restructuring proposal is adopted if a majority of the creditors represented at the meeting vote in favour of it. The adopted restructuring proposal is valid when it is ratified by the bankruptcy court and has universal binding effect at that point, also for dissenting creditors.

11. How do creditors and other stakeholders rank on an insolvency of a debtor? Do any stakeholders enjoy particular priority (e.g. employees, pension liabilities, DIP financing)? Could the claims of any class of creditor be subordinated (e.g. recognition of subordination agreement)?

The order of the priority of the unsecured creditors is stated in the Danish Bankruptcy Act's rules on dividend distribution, and this also applies in relation to in-court restructurings. As for the distribution is a "waterfall" (priority) scheme:

1. Costs of the bankruptcy proceedings and the costs of the administration of the estate are covered.
2. Reasonable costs of attempted restructuring,
3. Employees' salary claims,
4. Supplier's claims for some specific duties,
5. Ordinary claims. These include all unsecured creditors who do not have a claim covered by the categories listed above or below e.g., trade creditors, unsecured loans, damages, etc. This is the main category and the starting point for all creditors' claims.
6. Interest accrued after the bankruptcy order, gifts and fines are the last items to be covered.

Only if a creditor has accepted a subordination prior or during the proceedings will the claim (including shareholder loans) become subordinated.

12. Can a debtor's pre-insolvency transactions be challenged? If so, by whom, when and on what grounds? What is the effect of a successful challenge and how are the rights of third parties impacted?

The Danish Bankruptcy Act contains rules on avoidance / claw back of pre-proceeding transaction.

The trustee is obliged to investigate the debtor's transactions and assess whether any transactions are avoidable, and, in the affirmative, the estate will initiate proceedings against the receiver/beneficiary. Legal proceedings must in general be initiated no later than one year from the date of the bankruptcy order.

Avoidable transactions include gifts, improper payments of debt, transactions that evade the estate's rightful assets and transactions with which the debtor's debt increases.

Depending on the type of the transaction, the beneficiary of a voidable transaction will have to either return the benefit of the transaction or compensate the loss suffered by the estate by the transaction.

13. How existing contracts are treated in restructuring and insolvency processes? Are the parties obliged to continue to perform their obligations? Will termination, retention of title and set-off provisions in these contracts remain enforceable? Is there any ability for either party to disclaim the contract?

Contracts and obligations are only binding upon the debtor after the restructuring proceedings or bankruptcy proceedings if the administrator decides to let the contract(s) continue. The contracting party cannot in general legally prevent the administrator from adopting the contract(s). If continued, the company/estate becomes obligated by the terms and the creditor's claim obtains pre-preferential priority.

Ipso-Facto-Clauses are not respected. Set-off provisions generally remain unaltered by the proceedings.

The rules on restructuring allow for forced transfer of continued contracts in case of a business transfer.

14. What conditions apply to the sale of assets / the entire business in a restructuring or insolvency process? Does the purchaser acquire the assets "free and clear" of claims and liabilities? Can security be released without creditor consent? Is credit bidding permitted? Are pre-packaged sales possible?

The trustee is responsible for liquidating the assets during bankruptcy proceedings. Typically, a sale will happen with the consent of the secured creditor and on a "free and clear" basis. If a secured creditor refuses to consent, the trustee can make a request for a compulsory sale. However, for floating company charges special rules apply according to which the trustee can buy out the chargeholder in accordance with a binding assessment.

A bid from the pledgee within the security is effectively set off against the secured part of the debt.

Restructuring proceedings do not clear pledges.

The trustee, the administrator, and the restructuring accountant (and those affiliated with them) may not acquire the assets.

As for both restructuring and bankruptcy, a sale of the entire business on an asset sale basis can happen.

15. What duties and liabilities should directors and officers be mindful of when managing a distressed debtor? What are the consequences of breach of duty? Is there any scope for other parties (e.g. director, partner, shareholder, lender) to incur liability for the debts of an insolvent debtor and if so can they be covered by insurances?

As stated above in the answer to question 7, management is obligated to cease operations and file for insolvency proceedings if continued operation will cause (additional) loss for the creditors or others. If management does not comply, each member of the management might incur personal liability of losses suffered by creditors and the debtor.

The trustee is obligated to assess whether management should be held liable and/or should be disqualified for bankruptcy reasons. Disqualification is decided upon by the Bankruptcy Court after legal proceedings initiated by the trustee, and the court can disqualify management members of the business from taking part of the

management in a limited liability company for up to three years.

In most larger businesses, there will be one or more D&O insurance policies in place. Most policies contain exceptions in relation to grossly negligent and intentional acts.

16. Do restructuring or insolvency proceedings have the effect of releasing directors and other stakeholders from liability for previous actions and decisions? In which context could the liability of the directors be sought?

Restructuring or insolvency proceedings does not release directors or other stakeholders from liability.

Management in general, in the performance of their duties, are liable to pay damages, when they have intentionally or negligently caused damage to the limited liability company. The same applies where the damage has been caused to the shareholders or any third party.

The management must on an ongoing basis assess if it is sensible to carry on the operation of the company. If business is conducted past “the point of hopelessness”, management can be made liable for losses suffered after this point. Claims for such losses are usually brought by the estate of the bankrupt company, but can under certain circumstances also be brought by individual creditors

17. Will a local court recognise foreign restructuring or insolvency proceedings over a local debtor? What is the process and test for achieving such recognition? Does recognition depend on the COMI of the debtor and/or the governing law of the debt to be compromised? Has the UNCITRAL Model Law on Cross Border Insolvency or the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments been adopted or is it under consideration in your country?

As the general starting point, foreign restructuring and insolvency proceedings are not recognized under Danish law. Further, Denmark has a reservation in respect of/opted-out from the judicial area and co-operation in the EU. As a result, there is no statutory framework in place in relation to overall recognition of foreign restructuring or insolvency proceedings regarding local debtors. A Danish bankruptcy order or restructuring decision is consequently as the overall starting point necessary.

Danish courts might on a case-by-case basis liaise with foreign courts, however it is the general rules that this is not possible.

Denmark has acceded to the Nordic Bankruptcy Convention, and this recognizes insolvency proceedings from the Nordic countries.

18. For EU countries only: Have there been any challenges to the recognition of English proceedings in your jurisdiction following the Brexit implementation date? If yes, please provide details.

No. Due to Denmark’s reservation on the judicial area, the recognition of English proceedings remains unaffected by Brexit.

19. Can debtors incorporated elsewhere enter into restructuring or insolvency proceedings in the jurisdiction? What are the eligibility requirements? Are there any restrictions? Which country does your jurisdiction have the most cross-border problems with?

Under some requirements, foreign incorporated entities can be subject to Danish insolvency proceedings. One requirement is that the debtor conducts business activities in Denmark and has its COMI in Denmark. A Danish branch of a foreign entity is thus not sufficient for the entity to enter Danish insolvency proceeding unless the branch is in fact the main office of the entity. Often, an international group will conduct its Danish activities through a Danish subsidiary, and this Danish entity can be subject to insolvency proceedings.

Since foreign restructuring and insolvency proceedings in jurisdictions not part of the Nordic Bankruptcy Convention in general are not recognized under Danish law, countries whose recognition process is based on the principle of mutual recognition/reciprocity tend cause the most cross-border problems.

20. How are groups of companies treated

on the restructuring or insolvency of one or more members of that group? Is there scope for cooperation between office holders? For EU countries only: Have there been any changes in the consideration granted to groups of companies following the transposition of Directive 2019/1023?

Companies are treated as separate legal entities unaffected by bankruptcy proceedings of other companies in their group. Danish law does not afford for consolidated / group proceedings. It is not uncommon that some of the "healthy" companies in a group continue their operation while the majority of other group companies undergo bankruptcy proceedings.

The transposition of Directive 2019/1023 has not resulted in any changes regarding this.

21. Is your country considering adoption of the UNCITRAL Model Law on Enterprise Group Insolvency?

No.

22. Are there any proposed or upcoming changes to the restructuring / insolvency regime in your country?

At the time of writing (June 2023), there are no pending bills with significant changes.

23. Is your jurisdiction debtor or creditor friendly and was it always the case?

The Danish insolvency legislation is of a creditor friendly nature, generally speaking. This has been the case for several years. Creditors can petition for both "ordinary" restructuring and liquidation/bankruptcy proceedings (though not preventive restructuring proceedings).They decide on the appointment of the trustee in case of bankruptcy and are highly involved during the restructuring proceedings through the voting system. Further, the requirements for a debtor to obtain debt rescheduling are high compared to rules in other jurisdictions.

However, since the implementation of the EU Restructuring and Insolvency Directive, a new kind of preventive and more debtor friendly restructuring procedure is now a possibility e.g., only the debtor can initiate the proceedings, the proceedings are not publicly announced unless a stay on enforcement is implemented, and there is no requirement for a court appointed administrator. That being said, the proceedings only grant very limited protection against creditors enforcing their claim unless an enforcement stay is granted. In that case, most of the procedural rules governing "ordinary" restructuring apply.

24. Do sociopolitical factors give additional influence to certain stakeholders in restructurings or insolvencies in the jurisdiction (e.g. pressure around employees or pensions)? What role does the State play in relation to a distressed business (e.g. availability of state support)?

The "waterfall" (priority) scheme of dividend distribution in the Danish Bankruptcy Act (cf. the answer to question 11 above) is a result of sociopolitical factors as due salaries to employees rank higher than all other regular creditors' claims. The Danish Employees' Guarantee Fund will cover these claims up to a certain maximum and then succeed in the claims against the estate. If an employee's claim supersedes the maximum, this part of the claim will still rank as preferential in the hierarchy of claims, but the employee will have to file the claim with the trustee of the bankruptcy estate.

Under Danish law, trade creditors do not rank differently than finance creditors, the tax authorities or claims from other public authorities.

Further, in some sector specific areas specific creditors have been given a preferential rank, e.g. in case of bankruptcy proceedings of insurance companies, policyholders and persons benefitting from insurances have priority over regular creditors' claims but still after employees' claims for salary (and some of the insured persons can further receive coverage of claims from the Danish Guarantee Fund for Non-life Insurers).

25. What are the greatest barriers to efficient and effective restructurings and insolvencies in the jurisdiction? Are there any proposals for reform to counter any such barriers?

The major issue of the Danish formal restructuring proceedings is how to fund the proceedings, as they are often costly.

The implementation of Directive 2019/1023 has, among

other things, opened the possibility of not appointing a restructuring administrator and accountant in the hope of reducing the costs of the process in some cases.

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