

Proposal of the European Commission for a directive on preventive restructuring frameworks

RESOR

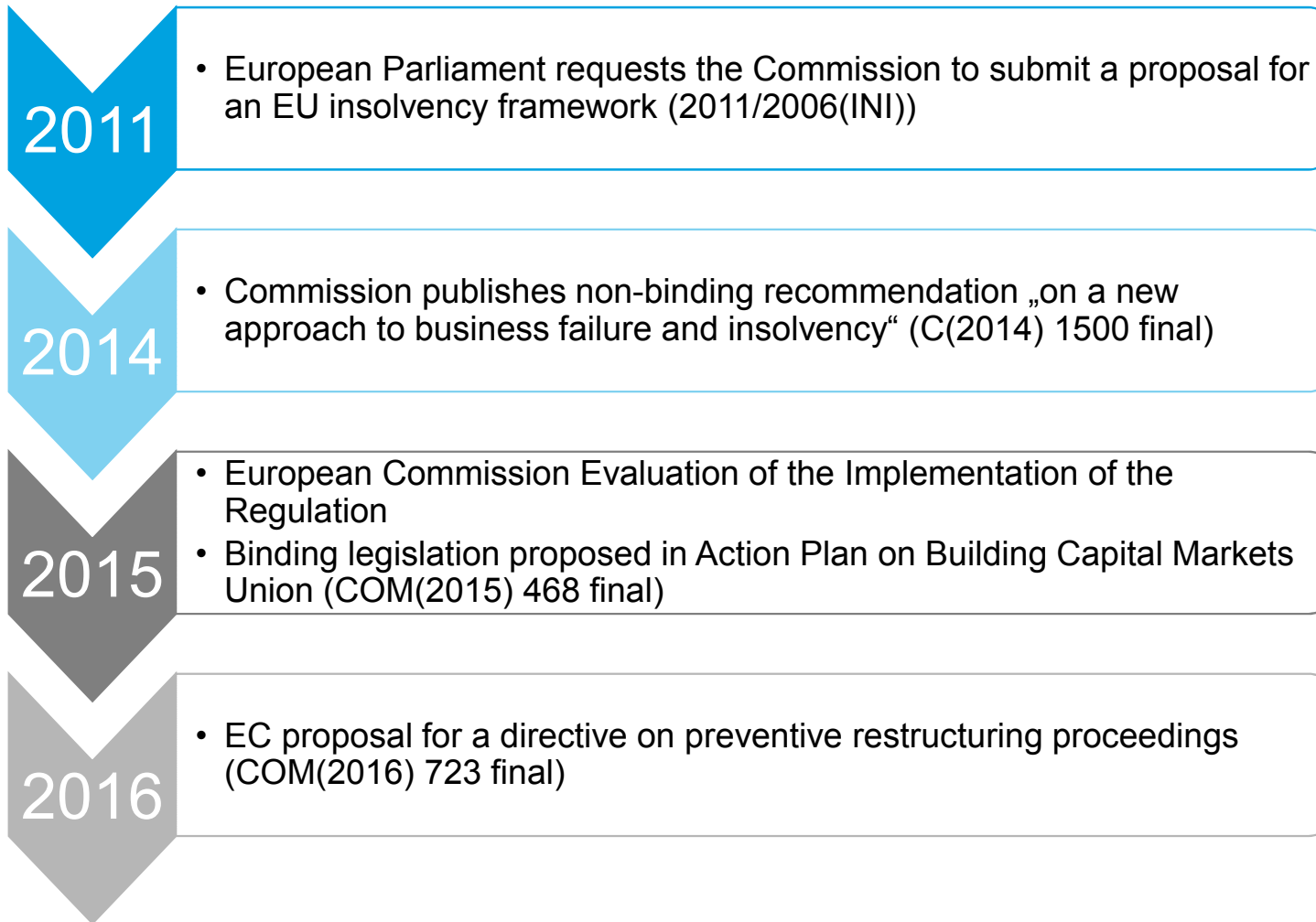
2 June 2017, Hamburg, Arco Bobeldijk (Loyens & Loeff) and Nico Tollenaar (RESOR)

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Agenda

1. Introduction
2. Overview potential tax aspects
3. Discussion tax aspects



Key objectives

- Enhance rescue culture
- Prevent insolvency (“likelihood of insolvency”)
- Remove obstacles to the freedom of capital and establishment

Key features

- Plan procedure – mix between UK scheme and Chapter 11
- Outside formal “traditional” insolvency proceedings
- Limited court involvement but not entirely “out of court”
- Can bind all types of capital providers
- Majority in a class binds a minority + cross-class cram down
- Debtor-In-Possession, no general stay or publicity

Main steps

1. Debtor proposes plan (no court test or approval of disclosure statement required)
2. Vote (no formal meetings required)
3. Confirmation (decision within 30 days after vote)
4. Possibility for expedited appeal; no suspensive effect

Voting and acceptance

- Voting in classes
- No need for meetings (voting through e.g. electronic means)
- Adopted if requisite majority in each class votes in favour
- Required majority no higher than 75% in amount, no head count

Confirmation and cram down

- Adopted by each class (consensual plan)
 - best interest test (at least liquidation value)
 - feasibility test (reasonable prospect of viability)

- Cram down of dissenting classes
 - at least one affected class has voted in favour
 - absolute priority rule (at least reorganisation value)

- Lacking:
 - unfair discrimination test (as in Chapter 11)
 - no protection of security interests (as in Chapter 11)

Ancillary measures

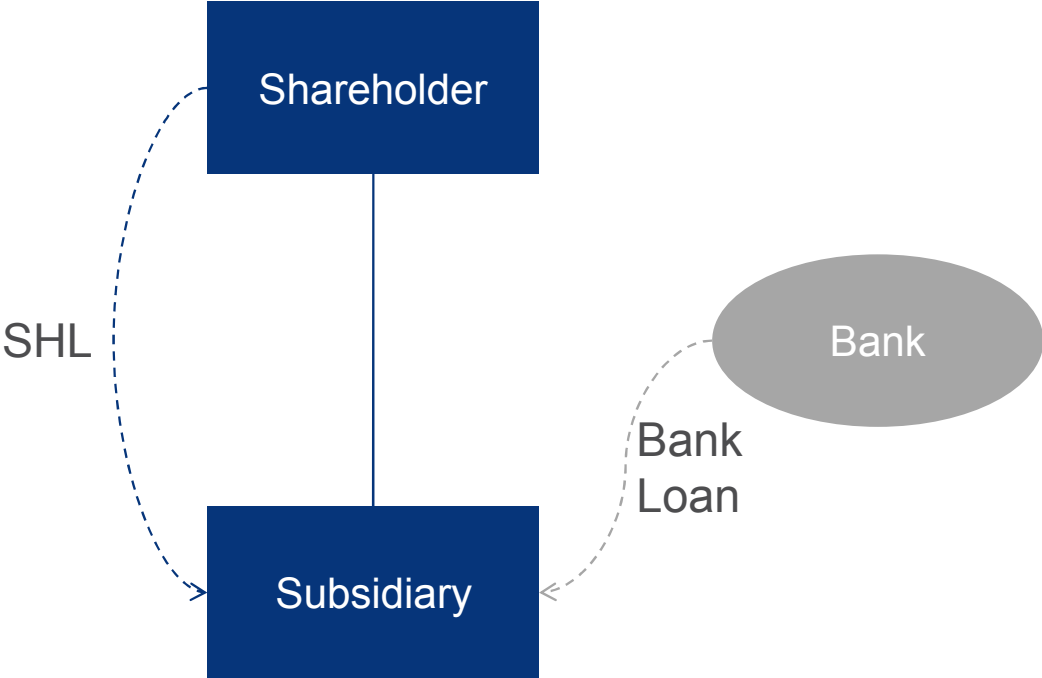
- Stay of individual enforcement actions
- Ability to require continued performance of executory contracts
- No ability to reorganise workforce

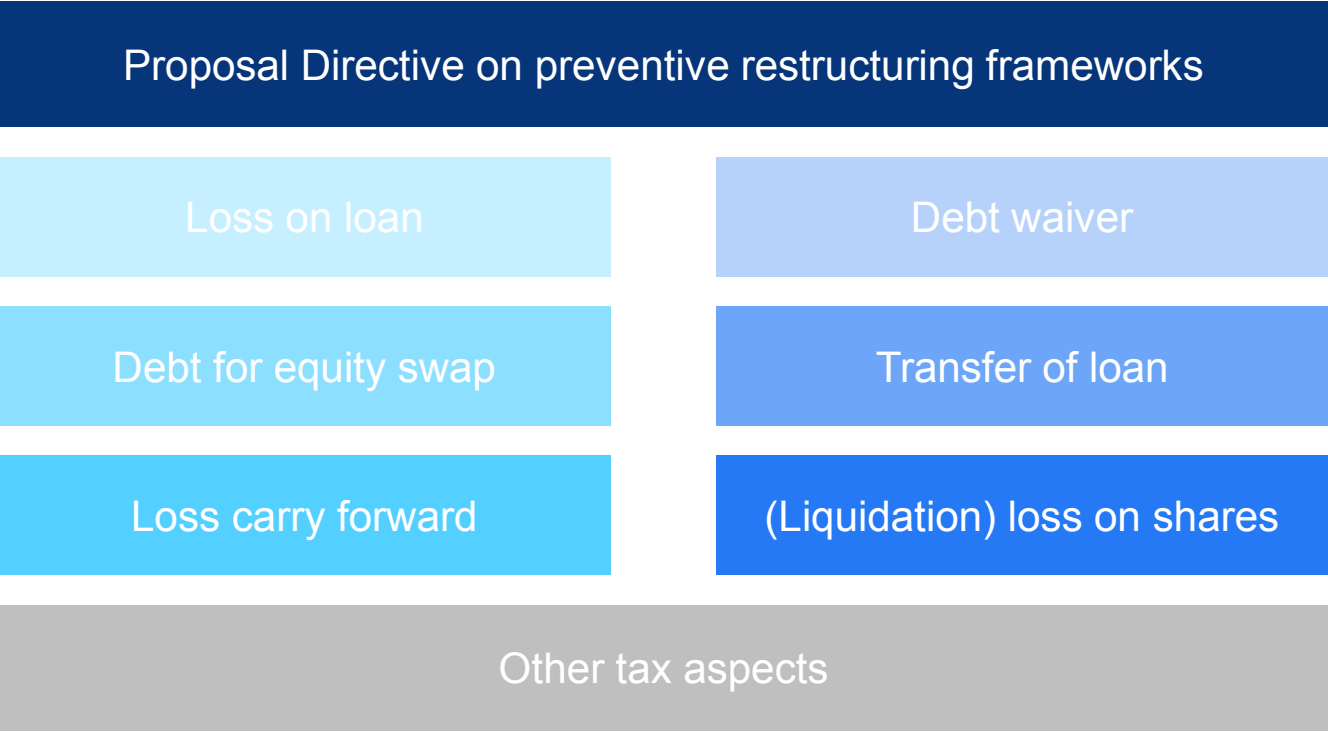


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CORPORATE TAX
SERVICES

Dutch tax aspects of preventive restructuring





Loss on loan

Creditor: non-shareholder

- Loss on loan tax deductible

Creditor: shareholder

- Loss on receivable deductible (except in case of a non- businesslike loan)

Debt waiver

- Taxable profit up to amount of tax losses
- profit in excess of tax losses is exempt – no cash out
- Point of attention: if debtor forms part of a fiscal unity, or has formed part of a fiscal unity in the last 6 years; stand alone approach

Debt for equity swap

Creditor

- Participation exemption (shareholdings $\geq 5\%$)
- Clawback reserve

Debtor

- No tax consequences

Transfer loan

- Loss on loan tax deductible for creditor
- No impact on tax losses at level of debtor
- No clawback in case of debt to equity swap by new investor

Loss compensation

Transfer assets to new entity

- No transfer of tax losses possible

Restructuring within existing entity

- No impact on tax losses
- 'Streaming' in case of $\geq 30\%$ change of ownership and decrease of $\geq 70\%$ of the activities

(Liquidation) loss on shares

- Liquidation loss tax deductible
- Elimination of shares in case of restructuring? No liquidation loss

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