

Abstract

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The fact that, sometimes, shareholders finance their company using debt instead of equity is well known among academics and practitioners. In order to deal with this issue, several jurisdictions foresee an automatic subordination of these types of loans. This is the case, inter alia, of Portugal and Germany, and, to some extent, of Italy. The rules regarding said subordination tend, however, to vary among Member-States (“MS”), even among the ones who foresee said subordination. In fact, not only do the criteria to subordinate a loan vary from MS to MS but, in addition, different MS also have different exceptions to said subordination. In the first part of our presentation, we will provide a brief comparative analysis regarding the rules that deal with the subordination of shareholders’ loans in Portugal, Germany and Italy.

On the second part, however, we will shift our focus into the treatment of shareholders’ loans in the context of restructuring procedures. In fact, if it may seem logical to subordinate shareholders’ loans in the context of insolvency, it is also true that, in the context of a restructuring procedure, shareholders’ (either the current or new ones) money may be of the essence to ensure the required new money in order to give the company a second chance. This being the case, the jurisdictions that subordinate shareholders’ loans face, in these cases, the dilemma between subordinating the loans or, in the opposite direction, granting them some sort of privilege in the event of a future insolvency. Starting with my own jurisdiction, but extending said analysis to Germany and Italy, I will conduct a comparative analysis on the treatment of shareholders’ loans in the context of new money financing, having always in mind the EU Directive 2019/1023, 20th of June, 2019.

To conclude, I will make some remarks about my own view on these two topics: the subordination of shareholders’ loans and the treatment of said loans in a restructuring proceeding.