The tax treatment of debt waivers in restructuring plans

Jente Dengler provides a Belgian perspective on Europe's blind spot

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> *Strikingly absent from the Commission's agenda is the tax treatment of debt waivers in the context of corporate restructuring plans*

While recent EU initiatives aim to further harmonise aspects of insolvency law, certain critical elements remain overlooked. This article highlights one such blind spot: the tax treatment of debt waivers in restructuring plans. Drawing on Belgium's framework and contrasting it with other European jurisdictions, it offers comparative insights and illustrates how tax disparities can materially influence the outcome and success of corporate debt restructurings.

In recent years, the European Commission has launched a number of initiatives aimed at the harmonisation of insolvency law across EU Member States.[1] The underlying rationale is clear: diverging national insolvency frameworks create legal uncertainty and increase transaction costs.

It leads to unfair competition between businesses established in jurisdictions with more or less efficient restructuring tools, undermining the ambition of a true capital markets union.[2]

Strikingly absent from the Commission's agenda is the tax treatment of debt waivers in the context of corporate restructuring plans. Yet, tax consequences of a restructuring plan can make or break a business' reorganisation. Consider, for instance, a debtor negotiating a plan with its creditors including debt waivers totalling EUR 100 million. If national tax legislation treats these waivers as 'taxable gain' – assuming an average corporate income tax rate of 25% applies[3] – the business will soon be hit by a EUR 25 million tax bill. This fiscal burden could jeopardize the very survival the restructuring plan aimed to ensure.

Belgium: From a definitive exemption to deferred taxation

Until recently, Belgian tax law offered a favourable treatment for corporate debt restructurings. Under former Article 48/1 of the Belgian Income Tax Code, debt waivers granted through formal restructuring proceedings, whether by way of at a collective agreement or an amicable settlement, were exempt from corporate income tax.[4] The rationale behind this exemption was evident: protecting the debtor's restored liquidity by avoiding the adverse tax consequences typically triggered by such waivers. Given that collective restructuring plans have historically included debt write-offs of up to 80%, the tax burden would otherwise be fatal for a business recovering from financial distress.[5]

However, when revisiting the scope of this exemption in 2023 following the implementation of the EU Restructuring Directive, the Belgian legislator also fundamentally changed its nature by limiting its effect in time. Since then, the exemption has been reduced to a *temporary* relief, subject to deferred phased taxation. Concretely, the amount of debt waived will be gradually

reintegrated into the taxable base of the debtor over the third to the sixth year following the year in which its restructuring plan has been fully executed.[6]

The question arises whether this taxation will unduly strain the debtor's liquidity and ultimately undermine the very purpose for which this exceptional regime was originally introduced.

Given that the earliest the debtor will face this (partial) tax bill is four years[7] after implementing its restructuring plan – which itself can span up to five years[8] – the impact should not be overstated. By then, the business can reasonably be expected to have returned to profitability and should be able to bear the deferred tax burden. Moreover, this taxable income may be offset against current year losses or tax losses carried forward.[9] That said, particularly for restructuring plans with a shorter timeframe, it is essential to plan ahead and factor this into the business plan and cash flow forecasts for the upcoming years.

Lastly, though it offers little consolation, the prospect of future tax revenue could inadvertently encourage tax authorities to adopt a more favourable stance towards restructuring plans. While this shift in voting behaviour remains to be seen, debtors have already relied on it to argue that the tax administration would be "*no worse off*" under a plan than in the alternative of a bankruptcy.

Comparative insights: A glance at the neighbours

Under **German** income tax legislation, any increase in business income resulting from a debt waiver for the purpose of corporate restructuring is fully exempt.[10] In **France**, on the other hand, debt waivers are treated as taxable gain and directly included in the debtor's net taxable profit. However, when granted in formal insolvency proceedings, the statutory threshold for offsetting tax losses carried forward is increased with the waived debt amount.[11] Additionally, a specific exemption may apply where financial debt is waived by the debtor's parent company, provided that it subscribes to a share capital increase in the debtor within two years following the waiver.[12]

In the **Netherlands**, the situation is a bit more nuanced: while debt waivers are generally considered taxable income, a so-called 'debt waiver exemption' may apply where the debt is demonstrably irrecoverable and expressly waived. This exemption is limited to the portion of income exceeding current-year losses and available tax losses carried forward.[13]

In 2022, controversy emerged when new tax legislation restricted the use of tax losses carried forward, just as the Dutch Scheme (WHOA) was gaining traction.[14] The interplay between this new limitation and the existing debt waiver exemption was ambiguous, sparking serious concern and, in some cases, even producing the opposite effect – notably, triggering taxation rather than relief.[15] Several WHOA restructurings failed due to unexpected tax burdens, underscoring the critical role of tax treatment in the effectiveness of restructuring regimes.[16]

Conclusion: A call for harmonisation

The tax treatment of debt waivers is not a peripheral issue. It affects the liquidity, chances of survival and investment appeal of companies undergoing restructuring. The divergence in tax regimes across EU Member States leads to materially different outcomes for identical restructuring plans, solely based on the debtor's tax residence. This disparity undeniably undermines the very objective of the EU's harmonisation efforts.

If the European legislator genuinely aims to promote efficient, predictable and investor-friendly restructuring frameworks and intends to create a true Capital Markets Union, tax considerations must be part of the discussion. Harmonisation should go beyond mere procedural convergence and give proper weight to the financial reality of corporate debt restructuring. This calls for a thorough debate on how debt waivers in restructuring processes should be fiscally treated, hereby carefully weighing the interests of national treasuries and Member States' fiscal sovereignty against the need to safeguard the debtor's liquidity and foster harmonisation within the internal market. ■

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Footnotes:

1 For instance, Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, *OJ L* 172, 26.6.2019, 18–55 ('EU Restructuring Directive').

2 See preamble of the Proposal for a Directive of the European Parliament and of the Council harmonising certain aspects of insolvency law, COM/2022/702 final, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52022PC0702>.

3 The standard corporate income tax rate in Belgium is 25% according to Article 215, BITC (*Wetboek Inkomstenbelastingen*).

4 Conversely, the creditor also benefits from a temporary exemption for impairments and provisions on its (partially) waived claim, despite their non-definitive nature (Article 48, BITC).

5 Article XX.75/1 (formerly Article XX.73), Belgian Code of Economic Law (Wetboek Economisch Recht). In amicable settlements, creditors may even consensually grant greater debt reductions.

6 Article 49, Belgian Act of 28 December 2023 containing various tax provisions (*Belgian Official Gazette* 29.12.2023).

7 The debtor will only receive the first tax assessment in the assessment year following the year in which this tax liability is first included in its taxable base, albeit partially considering the phased taxation (at a rate of 1/4th per year).

8 Article XX.76, Belgian Code of Economic Law.

9 Note that the application of tax losses carried forward is limited to EUR 1 million + 70% of the remaining taxable basis.

10 Article 3a (1) (*Sanierungserträge*), German Income Tax Act (*Einkommensteuergesetz*).

11 Article 209, I, paragraph 4, French General Tax Code (*Code général des impôts*).

12 Ibid., Article 216 A.

13 Article 8, Dutch Corporate Tax Act (*Wet op de vennootschapsbelasting 1969*).

14 Ibid., Article 20, as amended by Article XXVI of the 2021 Tax Plan.

15 E.g. the failed WHOA and subsequent bankruptcy of shipyard GS Yard BV available at <https://www.rtvnoord.nl/economie/1153793/sas-uit-foxhol-wordt-nieuwe-eigenaar-gs-yard-na-onnodig-faillissement>. See also T. Tekstra, 'De fiscus en de WHOA, een paar apart', HERO 2024, W-013, available at <https://www.online-hero.nl/art/5023/de-fiscus-en-de-whoa-een-paar-apart#_edn20>. This coordination issue was ultimately resolved through the new provision in Article 8(4), Dutch Corporate Tax Act, as included in the 2025 Tax Plan.

16 T. Tekstra, 'De fiscus en de WHOA, een paar apart', *HERO* 2024, W-013, available at: <https://www.online-hero.nl/art/5023/de-fiscus-en-de-whoa-een-paar-apart#_edn20>. This coordination issue was ultimately resolved through the new provision in Article 8(4), Dutch Corporate Tax Act, as included in the 2025 Tax Plan.