

CJEU holds German RETT exemption for group restructurings not to be State aid in upstream merger case

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In Brief

On 19 December 2018, the Court of Justice of the European Union (CJEU) issued its judgment in the case of *A-Brauerei* (C-374/17).

Background

In December 2009, Germany introduced an exemption from Real Estate Transfer Tax (RETT) for group restructurings in section 6a of the RETT Act. At that time, lawmakers intended to facilitate reorganisations of company groups that had become necessary because of the financial crisis. The new law took effect from 1 January 2010.

A-Brauerei was a German stock corporation, which acquired all assets and liabilities of its 100% subsidiary by an upstream merger carried out on 1 August 2012. As the merged subsidiary owned German real estate, RETT would have been triggered if the tax exemption under section 6a RETT Act had not come into play. The provision applies to:

- (i) A restructuring that is regulated by the German Restructuring Law or any equivalent (company) law of a Member State of the EU or the European Economic Area (i.e. any type of reorganisation of a group that is governed by other laws is not covered by section 6a, e.g. the mere sale of assets);
- (ii) Entities involved in the restructuring that form part of the same group (i.e. there must be a common parent, which - directly or indirectly - holds at least 95% of the shares in all entities involved; the parent itself may also be part of the restructuring);

- (iii) Restructurings where the participation(s) of at least 95% exist during the five years before and after the transaction.

All requirements must be met cumulatively. *A-Brauerei* and the German tax authorities had a dispute, which ended up in litigation on whether the RETT exemption was applicable. Finally, the Federal Fiscal Court decided that the benefits of the RETT exemption had to be granted to *A-Brauerei* unless the rule constituted illegal State aid. On 30 May 2017, the Federal Fiscal Court referred the case to the CJEU expressing doubts in respect of section 6a RETT and its compatibility with EU State aid rules.

CJEU decision

When the CJEU examined the selectivity of section 6a of the RETT Act, the Court held that the general rule (reference framework) in this case was that, in principle, all transfers of ownership in German real estate triggered RETT.

The CJEU concluded that the provision is a derogation from the reference framework as it exempts group restructurings from the RETT levy even if another entity acquires the property. Entities that are involved in group restructurings covered by section 6a RETT and entities that perform other types of ownership transfers or do not form part of a group are, furthermore, in a comparable situation in the light of the objective of the general rule. The provision was, therefore,

found to be a *priori* selective (i.e. in this respect, the CJEU did not agree with the Advocate General who had opined on 19 September 2018 that there was no derogation from a reference framework as the RETT exemption was generally available to all undertakings irrespective of their size, activity, location etc.).

However, the CJEU found that the derogation can be justified by the nature or general scheme of the German tax system and the intention of the German provision to prevent double taxation. The CJEU held that in an upstream merger case like the one at hand it can be assumed that the taxpayer (parent) already paid RETT when it integrated the subsidiary with the property into the group because the parent owns more than 95% of the shares in the subsidiary (i.e. the acquisition of such amount of shares in a property owning company is an event triggering German RETT). Exempting such a parent from the second RETT levy is therefore justified by the objective to prevent double taxation. As regards requirement (iii) relating to the duration of the holding, the Court found it to be justified by the objective to prevent abuse. The CJEU did not comment on requirement (i).

Our view

The RETT exemption granted in the case at hand for an upstream merger did not infringe the State aid rules. Therefore, it can be expected that the German Federal Court of Finance which had requested the CJEU to give a ruling on the question regarding the illegal State aid will itself decide in favour of *A-Brauerei* in the underlying case. Besides, the Federal Court of Finance will most likely proceed with several other pending proceedings which concern further conditions of section 6a of the RETT Act.

Furthermore, it remains to be observed whether the German legislator will consider changes in section 6a of the RETT Act due to the decision of the CJEU.

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