# EU Direct Tax Newsalert

## German Federal Fiscal Court refers § 6a RETT Act to CJEU as potential State aid

### Introduction

The German Federal Fiscal Court has expressed its doubts as to the compatibility of the German real estate transfer tax (RETT) exemption pursuant to § 6a German RETT Act with the State aid provisions. Therefore, the German Federal Fiscal Court referred preliminary questions to the Court of Justice of the European Union (CJEU) (decision of 30 May 2017, II R 62/14).

### Background

Pursuant to § 6a German RETT Act, RETT will not be levied for certain taxable acquisitions which take place due to a restructuring within a group of companies (e.g. a merger). § 6a German RETT Act is applicable if the following three conditions are cumulatively met:

1. The restructuring is governed by provisions of the German Restructuring Act or a comparable law of an EU or an EEA Member State; and
2. A controlling company as well as a dependent company are involved in the restructuring process; and
3. The shareholding of the controlling company in the dependent company makes up at least 95% of the latter's capital in the five years before and the five years after the restructuring.

### Facts and preliminary observations

In the underlying case, the plaintiff was the sole shareholder of a property holding subsidiary company for more than five years. In 2012, the subsidiary was merged into the plaintiff. The German tax authorities considered this as a taxable acquisition for which a tax exemption pursuant to § 6a German RETT Act could not be granted. On the basis of domestic law, the German Federal Fiscal Court is inclined to decide the case in favour of the plaintiff (as did the fiscal court of Nuremberg in the first instance). The German Federal Fiscal Court takes the view that:

- § 6a German RETT Act applies to the merger of the subsidiary to the plaintiff. The fact that following the merger, the plaintiff could no longer hold shares in the subsidiary, is not relevant.
- § 6a RETT Act needs to be interpreted broadly in the sense that it covers the case at hand.
- It is questionable whether the tax exemption under § 6a RETT Act is State aid pursuant to Article 107 (1) of the Treaty on the Functioning of the European Union (TFEU).
- It is necessary to clarify whether § 6a German RETT Act provides a selective advantage to certain undertakings because it requires (i) a restructuring in the sense of the German Restructuring Act, (ii) a 95% shareholding between a controlling and a dependent company and (iii) a minimum holding period of five years before and five years after the restructuring.
- It is furthermore essential to decide whether § 6a RETT Act is justified by the nature or the general scheme of the tax system as the rule simply carves out the general definition of taxable events in § 1 RETT Act, which appears too broad with regard to reorganisations.

### Takeaway

Restructurings of German and international groups in which German RETT was avoided by the application of § 6a RETT Act are exposed to a recovery risk if the law is found to constitute State aid, which is incompatible with the internal market. It remains to be seen what the CJEU will decide.

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