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German Tax and Legal News

Governing grand coalition reaches agreement on draft law to amend RETT rules on share deals

Legislative process to amend RETT rules is expected to be completed by June 2021 and amended rules likely will be effective as from 1 July 2021.

The legislative process to introduce amended real estate transfer tax (RETT) rules with broader applicability, which had long been stalled, has gained new momentum after Germany's governing grand coalition of Christian Democrats and Social Democrats reportedly reached an agreement in the beginning of April 2021 regarding the content of the amendments. Based on several press releases, the pending legislative process is expected to be finalized no later than June 2021, and the amended rules would enter into force as from 1 July 2021. The draft law proposal to amend the RETT rules is based on a 8 May 2019 proposal published by the Ministry of Finance (see GTLN dated 06/26/2018 and GTLN dated 05/09/2019), with some amendments. The original proposal was approved by the government on 31 July 2019, but stalled after its introduction into the legislative process (see GTLN dated 09/23/2019).

As provided in the original proposal, the updated draft law includes a considerable broadening of the applicability of the RETT rules; the originally proposed measures are still included, with certain amendments. In particular, the reduction of the current 95% threshold to 90% for a RETT-triggering event remains unchanged, and the potential reduction to 75% (or an even lower threshold) that had been discussed seems to have been abandoned.

Under the current rules, RETT is triggered on direct transfers of real estate, as well as where 95% or more of the shares in a German real estate-owning company are directly or indirectly transferred to a new owner, or where 95% or more of such shares are directly or indirectly combined for the first time in the hands of a new shareholder (or where there is a 95% or greater change, directly or indirectly, of the partners in a German real estate-owning partnership). As mentioned above, under the draft law, the 95% threshold would be reduced to 90%. In addition, a new rule would be introduced for corporations, under which a transfer of 90% or more of the shares to multiple new shareholders within a 10-year period would trigger RETT. A similar rule already applies to real estate-owning partnerships with a 95% threshold and a five-year monitoring period, which would be amended to align with the 90% threshold and 10-year monitoring period for corporations. It is worth noting that the rules for both partnerships and corporations also would apply to indirect changes in the shareholder structure. Thus, if 90% or more of the shares of any corporate entity are transferred to new shareholders, the entity would be treated as a deemed new shareholder for purposes of all of its own shareholdings. Under the updated version of the draft law, an exception from this rule would be introduced for certain listed companies, so that routine shareholder changes would not be counted toward the 90% threshold. However, the exception for listed companies would be narrow and, due to the way the law currently is drafted, would be available only for certain qualifying listings within the EU/European Economic Area (EEA) or within Australia, Hong Kong, or the US. As the law is drafted currently, it seems that, e.g., a listing on a stock exchange in the UK or Switzerland would not qualify for the exception (see also GTLN dated 10/09/2019).

In addition to these changes, the minimum holding periods in the RETT code for certain structures to qualify for favorable tax treatment would be extended from five years to 10 or 15 years.

Notably, the intragroup exemption for certain reorganizations within a 95%-controlled group would not be aligned with the new 90% threshold used elsewhere in the amendments to the RETT act, creating an inconsistency within the draft rules. This inconsistency could trigger new discussions on the compatibility of the intragroup restructuring exemption with EU state aid rules, in light of the grounds upon which the Court of Justice of the European Union concluded that the exemption was justifiable in a 2018 decision (case C-374/17).

Once enacted, the new rules generally would apply to transactions carried out after 30 June 2021. Complex rules are included in the draft law to manage the transition from the existing 95% threshold to the new 90% threshold.
The expansion of the rules, if enacted as currently drafted, would require taxpayers to exercise additional care in their due diligence when reorganizing shareholdings above any entity owning German real estate. The expansion of rules currently applicable to partnerships to apply to corporations and the introduction of a 10-year or 15-year monitoring period also would add significant complexity to the RETT rules. In addition, it appears that the application of the intragroup restructuring exemption would (again) become questionable in light of EU law principles.
