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Client Alert

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Germany: ECJ Judgment May Limit German RETT

New opportunities for tax-efficient reorganisations involving German real estate-holding companies.

In brief

The European Court of Justice's (ECJ) Nova Iberomoldes judgment may become a turning point for German real estate transfer tax (RETT) on capital contributions and corporate restructurings involving real estate-owning entities. If applied to the German RETT regime, the decision could materially change the taxation of such transactions by opening an EU law-based route to RETT neutrality beyond the restrictive exemption under Section 6a of the German Real Estate Transfer Tax Act ("**German RETT Act**"). At the same time, the practical impact will depend heavily on the pending German Federal Fiscal Court (BFH) proceedings, in particular whether the BFH follows the ECJ's reasoning, refers the matter to the ECJ, or seeks to distinguish the German rules. For both defense advice in pending or past RETT cases and the structuring of future reorganizations, Nova Iberomoldes should therefore be considered carefully – but not yet treated as settled law.

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In more detail

Background

RETT has become a material cost factor not only in real estate transactions, but also in corporate restructurings and intra-group reorganizations. Its scope extends well beyond the direct transfer of German real estate. Under Sections 1 (2a), (2b), (3) and (3a) German RETT Act, RETT may be triggered by direct or indirect changes at shareholder level where real estate-owning entities are involved. In particular, the transfer of at least 90% of the shares or interests in such entities may be sufficient to trigger RETT, even though legal ownership of the real estate itself remains unchanged.

For intra-group reorganizations, Section 6a German RETT Act provides relief in certain cases. However, its practical relevance is limited by strict requirements. These include a 95% shareholding threshold, five-year pre- and post-transaction holding periods and a narrowly defined catalogue of qualifying transactions. In practice, these conditions are often difficult to satisfy, particularly because the German tax authorities and courts have traditionally applied the exemption restrictively.

Against this background, the compatibility of German RETT rules with EU law has long been debated. In addition to the EU fundamental freedoms, Council Directive 2008/7/EC concerning indirect taxes on the raising of capital ("**Directive**") is particularly relevant. The recent judgment of the European Court of Justice (ECJ) in Nova Iberomoldes has brought this debate back into focus. Although the case concerned Portuguese law, its reasoning may have significant implications for the German RETT regime.

The Directive: protection for contributions of capital and restructuring operations

The Directive is intended to protect the free movement of capital and the functioning of the internal market by prohibiting Member States from levying indirect taxes on certain corporate transactions. Within its scope, the Directive provides full harmonization which means that Member States may not introduce or maintain deviating national rules unless expressly permitted by the Directive.

The Directive applies to "capital companies" within the meaning of Article 2 Directive. This includes companies listed in Annex I of the Directive, such as typical EU corporations as well as, based on a broader functional definition, among others, any other company, firm, association or legal person operating for profit.

Two categories of protected transactions are particularly relevant:

- Contributions of capital within the meaning of Article 3 Directive, including the formation of a capital company, capital increases and contributions of assets of any kind, and

- Restructuring operations within the meaning of Article 4 Directive, including transfers of all assets and liabilities between capital companies and certain acquisitions of majority voting rights.

By contrast, ordinary sales and purchases of shares – standard share deals – are not covered by the Directive.

For transactions falling within Articles 3 or 4, Article 5 (1) Directive establishes a broad prohibition on indirect taxation. However, Member States may levy taxes where one of the limited exceptions in Article 6 (1) Directive applies. The most relevant exceptions are taxes on the transfer of securities, property transfer taxes and value added tax. Accordingly, RETT can be charged if, for instance, a capital company contributes a business including German real estate to another capital company.

The ECJ's Nova Iberomoldes judgment

The Nova Iberomoldes case concerned Portuguese municipal real estate transfer tax (IMT). In 2019, Nova Iberomoldes – SGPS, S.A. was incorporated as a joint-stock company. Its share capital was funded entirely by contributions in kind consisting of shares in several subsidiaries, one of which held real estate in Portugal.

Portuguese IMT applied to certain acquisitions of shares in real estate-owning companies where the acquirer obtained at least 75% of the share capital. The Portuguese tax authorities therefore subjected the transaction to IMT.

The ECJ held that the transaction qualified as a restructuring operation under Article 4 (1) (b) Directive. The newly incorporated company acquired majority shareholdings in other capital companies, while the contributing shareholder received shares in the newly formed company. As a result, the court held that Article 5 (1) (e) Directive prohibited the imposition of an indirect tax on that restructuring.

The court's reasoning is particularly important because it focuses on the actual taxable event. The fact that Portuguese IMT was calculated by reference to the value of the underlying real estate did not change its character. Nor was it relevant how the tax was classified under national law. What mattered was that the tax was triggered by the transfer of shares in real estate-owning companies and thereby burdened a transaction protected by the Directive.

The ECJ rejected the argument advanced by the Portuguese government and supported by the German government, which had intervened in the proceedings, that the tax should be viewed economically as a tax on the transfer of real estate rather than on the transfer of shares. The court held that the underlying real estate remained legally owned by the subsidiaries. A mere change in the indirect shareholder structure could not be equated with a transfer of ownership in the real estate.

The court also refused to apply the exception for property transfer taxes under Article 6 (1) (b) Directive. As an exception to the Directive's general prohibition, that provision must be interpreted strictly. It covers taxes linked to an actual transfer of immovable property to a capital company. It does not permit Member States to tax a share-level restructuring with RETT merely because the companies whose shares are transferred own real estate.

Finally, the ECJ rejected a general anti-avoidance justification. A rule that automatically taxes qualifying transfers of shares in real estate-owning companies, without requiring concrete indications of abuse, goes beyond what is necessary to prevent tax avoidance.

Potential impact on German RETT

The Nova Iberomoldes judgment is directly relevant to the German debate. German RETT provisions in Sections 1 (2a), (2b), (3) and (3a) German RETT Act likewise tax changes at shareholder level where the relevant entity directly or indirectly owns German real estate. Legal ownership of the real estate itself, however, does not change. Structurally, these rules resemble the Portuguese IMT regime examined by the ECJ: the taxable event is a share transfer or consolidation, while the tax base is determined by reference to the underlying real estate.

This is significant because the BFH has previously taken a different view – earlier in case II R 65/06 concerning a prior version of the Directive, and more recently in case II R 36/21. In this recent decision the court assessed a transaction that, according to its own judgment, fell within the scope of Articles 3 and 4 Directive. Nevertheless, it held that German RETT does not generally constitute an indirect tax within the meaning of Article 5 Directive. In addition, the BFH considered RETT on share transfers to fall within the exception for property transfer taxes under Article 6 (1) (b) Directive, and therefore to be permissible. Surprisingly, the court did not consider referring the case to the ECJ for an EU law conformity analysis.

Until recently, the proceedings in II R 36/21 had been pending before the German Federal Constitutional Court following a constitutional complaint in which the taxpayer asserted, inter alia, a violation of its constitutional right to a lawful judge. In its decision of 25 June 2026 (1 BvR 574/25), the German Federal Constitutional Court dismissed the complaint, concluding that the

BFH's decision not to make a preliminary reference to the ECJ could not be regarded as arbitrary when assessed on the basis of the legal position prevailing at the time of its judgment of 25 September 2024. The court further clarified that the subsequent judgment of the ECJ in Nova Iberomoldes may justify a different assessment today, but does not retrospectively render the BFH's approach arbitrary.

The new ECJ decision is now of renewed relevance because another case, II R 8/23, is pending before the BFH. That case concerns the compatibility of Section 1 (3) no. 4 German RETT Act with the indirect tax verdict of Article 5 (1) (e) Directive. It involves a downstream merger under Austrian law resulting in an indirect transfer of shares in German real estate-owning companies. The prior instance, the Munich Fiscal Court, denied the RETT exemption at first instance.

In light of Nova Iberomoldes, the BFH will now have to reassess whether its previous approach can be maintained. Three outcomes appear possible: (i) the BFH may hold that German RETT may not be assessed on transactions protected by the Directive following the ECJ decision, (ii) the BFH may seek clarification on whether and to what extent German RETT on share-level restructurings is compatible with the Directive and refer the case to the ECJ or (iii) the BFH may attempt to differentiate the Portuguese regime from the German rules and uphold its previous position.

Given the clarity of the ECJ's reasoning, a referral or a shift in national case law appears more likely than a simple continuation of the status quo.

EU Law as a potential second route to RETT neutrality

If the reasoning in Nova Iberomoldes is applied to German RETT, the consequences could be substantial. Where a transaction qualifies as a contribution of capital or restructuring operation under Articles 3 or 4 Directive, RETT under Sections 1 (2a), (2b), (3) or (3a) German RETT Act may be incompatible with EU law.

This would be particularly relevant where Section 6a German RETT Act is not available. In such cases, the Directive could provide an independent EU law-based route to RETT neutrality. This may affect, in particular, mergers, demergers, contributions in kind and intra-group reorganizations involving real estate-owning entities.

For many corporate groups, this would be highly relevant in practice. Transactions that previously failed to qualify for Section 6a German RETT Act relief because of the 95% threshold, holding period requirements or limitations in the statutory catalogue of eligible transactions may nevertheless fall within the protective scope of the Directive and could be executed without triggering RETT.

However, the Directive does not apply to every share transfer. Standard share deals that do not include shares as consideration for the transfer remain outside its scope. The decisive question is whether the transaction qualifies as a contribution of capital or restructuring operation within the meaning of Articles 3 or 4 Directive. This requires a careful case-by-case assessment.

Implications for partnerships and third-country entities

The precise scope of the Directive remains subject to uncertainty. In Nova Iberomoldes, the relevant entities were Portuguese capital companies and therefore clearly within the Directive. More difficult questions arise for partnerships and third-country entities being involved in transactions.

Article 2 of the Directive contains a broad functional definition of a capital company. It is not limited to the entities listed in Annex I of the Directive. In particular, Article 2 (2) Directive extends the concept to any other company, firm, association or legal person operating for profit. This may support the view that certain partnerships are protected by the Directive, depending on their legal characteristics.

Similar questions arise for third-country entities, such as companies domiciled in the United States, Switzerland or the United Kingdom. The broader wording of Article 2 Directive and the connection to the free movement of capital under Article 63 TFEU may support an inclusive interpretation. However, it should be expected that the German tax authorities may advocate a narrower approach, limited only to eligible EU entities.

Accordingly, transactions involving partnerships or third-country entities offer potential arguments under EU law, but also carry a higher degree of legal uncertainty.

What to do

Following the ECJ decision, taxpayers should now review RETT-relevant reorganizations and pending cases in light of Nova Iberomoldes.

First, existing RETT assessments relating to capital contributions or reorganizations under Sections 1 (2a), (2b), (3) or (3a) German RETT Act should be reviewed promptly. Where procedurally possible, objections should be filed or maintained, expressly referring to Nova Iberomoldes. Applications for suspension of enforcement should also be considered.

Second, past transactions should be reviewed to determine whether proceedings can be reopened. In many cases, this will be possible only within narrow procedural limits, but the potential amounts involved may justify an analysis.

Third, for ongoing and future transactions, companies should still seek to satisfy the requirements of Section 6a German RETT Act wherever possible. Until the BFH or the ECJ provides further clarification, Section 6a German RETT Act remains the current established domestic exemption. However, the protection under the Directive should now be considered as an additional structuring argument, especially where Section 6a German RETT Act is unavailable.

Last, more complex structures involving partnerships, non-EU entities or mixed entity chains require particular attention. While there may be arguments for applying the Directive, the risk profile is higher and should be reflected in transaction planning, tax filings and disclosure strategy.

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