



Restructuring Clause – Judgement of European Court of Justice overturns prior decision of European General Court

In its decision as of June 28, 2018 the European Court of Justice annulled the former judgement of the European General Court and the decision of the European Commission (2011/527/EU), which defined the German “restructuring clause” as a unlawful state aid.

In the course of financial and economic crises, the German government introduced the so-called “restructuring clause” in 2009. The restructuring clause enabled corporations, in case of restructuring due to financial difficulties, to carry forward their tax losses despite any harmful share acquisition and forfeiture of losses accordingly.

Thereupon, the European Commission initiated a formal examination of the restructuring clause and deemed in its decision as of January 26, 2011 (2011/527/EU) the clause as a unlawful state aid. The Commission founded the rule sets up an exemption to the forfeiture of losses rule, which limits respectively and completely excludes the carry-forward of losses in case of a share acquisition of more than 25% and more than 50% respectively. Furthermore, the European Commission stated in the decision that the clause offers a non-justifiable selective advantage on corporations which met the criteria, which is not consistent with the European law. The German government was forced to suspend the restructuring clause, recover the aid granted from the beneficiaries and provide a summary accordingly.

Two companies which were listed as beneficiaries of the restructuring clause applied at the European General Court. The Federal Republic of Germany applied as intervener to support both companies. However, the European General Court followed the previous decision and opinion of the European Commission and dismissed the applications as unfounded.

In response to the judgement of the General Court, the companies and the Federal Republic of Germany lodged cross-appeal at the European Court of Justice. On June 28, 2018, the European Court of Justice overturned the decision of the General Court and annulled the commission’s decision on state aid.

The European Court of Justice found that the European Commission did not use the appropriate “reference framework” in order to examine the conditions relating to the selectivity of the state aid. In the case of the restructuring clause, the correct reference framework is the possibility of unlimited utilization of tax losses in future years. Thus, the forfeiture of loss is not the general rule to be applied with regards to the loss carried forward, but is rather the exception. The restructuring clause is once more a reverse exception of the exception.

Due to the falsely determined reference framework, the decisions relating to the selectivity were incorrect. The EU Commission and the General Court should have applied a broader framework. However, the European Court of Justice has only declared that the decision of the Commission and the General Court were wrong, due to the false reference system and did not state if the restructuring clause itself constitutes a unlawful state aid or not.

Therefore, there is currently no certainty concerning the restructuring clause. However, explanations indicate that the rules may not be classified as unlawful.

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