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Update: German Real Estate Transfer Tax— Intended Cutback of Share Deal Privilege

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I. Status of the Legislation Process

In June 2018, the finance ministers of the German federal states made proposals on how to tighten the German Real Estate Transfer Tax ("RETT") Act, which include:

- the extension of the Change of Ownership Rules to companies;
- the extension of the Cooling Period from 5 to 10, possibly even to 15 years; and
- the reduction of the Equalization Threshold from 95% to 90%.

(For more information [see Stay Current – June 2018](#)). The German legislature seems willing to implement these proposals very soon in the "New RETT Act".

Rumor has it that the Federal Ministry of Finance has already prepared a first draft bill which was sent to the finance ministers of the federal states. It is likely that the finance ministers will discuss the draft at their next conference, scheduled for 8 November 2018. We assume that the Federal Ministry of Finance intends to incorporate the feedback from the conference into the draft bill and will introduce the draft bill into the German Parliament very soon after the conference.

The introduction of the draft bill may determine when the New RETT Act would become applicable ("Cut-off Date"). We, therefore, currently assume that the Cut-off Date could be on or around 8 November 2018. (However, the German legislature might prefer to introduce the draft bill even earlier without feedback from the state finance ministers to shorten any potential retro-active effect, in which case the Cut-off Date would be earlier).

II. Grandfathering Provisions

It is still unclear how the New RETT Act will deal with transactions for which a share purchase agreement ("SPA") has been signed prior to the Cut-off Date but which will be completed only thereafter, if the completion of the transaction would be free of RETT under the currently existing RETT regime, but subject to RETT under the New RETT Act.

From our view, the New RETT Act ought to provide for grandfathering provisions under which these transactions will remain exempt from RETT if completion occurs within a certain (short) period after the Cut-off Date (6-9 months) and if the parties to the SPA are irrevocably bound as to each other by such SPA. In this case the parties to the SPA should be entitled to rely on the existing RETT regime (*see, inter alia*, Federal Constitutional Court NJW 2018, 1379, 1384 marginal 139 *et seq.*; NJW 2013, 145, 146 marginal 60 *et seq.*).



However, according to sources close to the process, the legislature is still considering not including such a grandfathering provision in order to avoid a "last run" for share deals under the old regime. If the legislature does not include such a provision, we would in that respect consider such New RETT Act as unconstitutional. However, the legislature may consciously accept the risks of a possible partial unconstitutionality of the New RETT Act or may add a grandfathering provision only at a very late stage in the legislative process in order to discourage taxpayers from implementing share deals due to uncertainty on how these transactions will be taxed under the New RETT Act. If the legislature did not include a grandfathering provision and a concerned taxpayer intended to invoke the unconstitutionality of the New RETT Act, the taxpayer would need a lot of patience and liquidity as such a proceeding takes in the aggregate easily six years or more and taxpayers must pay RETT generally within 4 weeks after the relevant tax order has been issued.

III. Outlook

Until the new draft of the New RETT Act is published, investors should consider both options—asset and share deals. If possible, share deals should be completed immediately after exchange of contracts. If an interim period between signing and completion cannot be avoided, we recommend including a right to withdraw from the contract if the New RETT Act is introduced into the German Parliament and does not include a grandfathering provision.



If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings Frankfurt lawyers:

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