

SHARE DEALS - New legal provision adopted

ON 21 APRIL 2021, THE BUNDESTAG APPROVED A REAL ESTATE TRANSFER TAX REFORM - THE NEW PROVISIONS FOCUS ON SHARE DEALS - ARRANGEMENTS FOR AVOIDING RETT ARE STILL POSSIBLE - UNIT DEALS ARE NOW MORE ATTRACTIVE IN SOME CASES

Executive Summary

- The “*acquisition threshold*” for share deals which trigger the real estate transfer tax (RETT) has been lowered from 95% to 90%. That means a RETT blocker will need to hold at least 10.1% in the future.
- For some kinds of restructuring, the holding pre-period and post-period pertinent for RETT will generally be 10 years (and even 15 years in some cases) instead of the 5 years currently specified.
- A new element regarding share transfers is being introduced for corporations (such as the legal forms of GmbH and S.à r.l.) which own real estate.
- It will be more difficult - albeit not impossible (and doing so can still be attractive for larger volumes) - for real estate legal partnerships to carry out “*stretched share deals*” and for real estate corporations to carry out “*club deals*”.
- “*Unit deals*” (transfers of unit certificates in open-ended funds which commercially hold real estate) are coming more into focus.
- The new rules will generally enter into force as per 1 July 2021. Yet it is also possible that some transactions which pre-date the new rules will still be affected, especially with respect to the holding pre-period and post-period.
- Approval from the Bundesrat, Germany’s second legislative chamber, remains pending.

The rules up to now

The RETT rate varies depending on the German state it is being levied in, ranging from 3.5% to 6.5%. It normally applies when a property is sold or in some other manner transferred from one legal entity to another legal entity (“*asset deal*”).

However, RETT can also be triggered when shares in a company are transferred from one legal entity to another legal entity and that company owns real estate (“*share deal*”).

In the case of share deals, German law has defined three general situations that will trigger RETT: (1.) When at least 95% of the shares (“*acquisition threshold*”) in a legal partnership under German law, such as a GmbH & Co. KG, owning real estate are transferred from old shareholders to new shareholders within a period of 5 years. (2.) At least 95% of the shares in a company owning real estate are unified at the level of a party, as defined under law. (3.) At least 95% of the financial interest in a company owning real estate is ultimately held by a single party.

For certain kinds of restructuring which result in the property or shares in the property-holding company being transferred to another legal entity, there are specific conditions under which the transactions will be exempted. This especially applies for real estate transfers between “transparent” legal partnerships and their respective partners. It is possible this exemption will only be granted if there are no changes in the ownership structure in the preceding five years (“*holding pre-period*”) and the subsequent five years (“*holding post-period*”).



Share deal involving a RETT blocker

Under the legal provisions applicable up to now, the real estate transfer tax can be avoided entirely or almost entirely in a share deal which transfers “only” 94.9% of the shares in the property-holding company. The remaining 5.1% of the shares either stay with the old shareholder, or, in the case of a legal partnership, are transferred from the old shareholder to the new shareholder after a period of slightly more than 5 years (“**stretched share deal**”); or, in the case of a corporation, the minority stake (“**RETT blocker**”) is transferred (potentially even simultaneously) to another new shareholder (“**club deal**”).

The new rules

The **first component** to the new legal provisions is the **lowering of the acquisition threshold from 95% to 90%**. Conversely, this means a RETT blocker will need to hold at least 10.1% of the shares in the future. This circumstance is likely to render many arrangements less financially attractive. Recent rulings have increasingly stipulated that a RETT blocker’s share must not be financially eroded. Accordingly, the significant rights pertaining to a RETT blocker’s share must remain intact, especially with a view to the participation in the hidden reserves, voting rights, and ongoing profit participation rights. When it comes to call options (and/or put options) regarding a RETT blocker’s share, too, the RETT blocker’s participation in value growth must remain intact. If these requirements are not met, then there is a risk that the RETT blocker’s share will be attributed to the other shareholder and that real estate transfer tax will be levied. However, using a share deal for RETT avoidance can still be attractive, especially in situations involving larger volumes.

The **second component** consists in **extending the holding pre-period and post-period to 10 years (and even 15 years in some cases)**. Moreover, the 10-year period also applies for RETT eligibility with respect to share transfers to new shareholders which cumulatively equate to 90% of the shares in a legal partnership.

¹ In the EU/EEA zone or recognised equivalent trading venues

The **third component** lies in the introduction of a **new element with respect to corporations**. As laid out above with respect to legal partnerships, it likewise applies for corporations that a (cumulative) transfer of at least 90% of shares within 10 years from one (or multiple) old shareholder(s) to one or multiple new shareholders will trigger RETT. That means the club deal arrangement, which has been popular up to now and involves a transfer of 100% to multiple new shareholders, will also become more difficult. A club deal of this nature will no longer be possible in a single phase, but will at least still be possible by stretching it over time.

One **exemption to the above rule regarding corporations** is the new “**stock exchange rule**”. Corporations whose shares are admitted for trading on an organised market¹ will not be included if the majority of the company’s capital is represented there.

Entry into force and transition period

These **new rules will, as a rule, enter force as per 1 July 2021**. That means swift execution of a transaction can still be worthwhile in many cases.

The increase in the acquisition thresholds means certain kinds of restructuring carried out before entry into force will indirectly fall under the **10-year (or even 15-year) holding post-period** if the restructuring has not been finalised yet. That means **certain transactions which pre-date the new rules will still be affected, i.e. certain arrangements from 2016 onwards**. Yet there is generally an exemption for corporation club deals executed prior to 1 July 2021 (“*signing*” and “*closing*”). Special transitional rules apply for stretched share deals involving legal partnerships.

Summary

This reform makes it necessary to carefully consider on a case-by-case basis whether certain arrangements for RETT avoidance will still be financially beneficial.



While a first glance may make hasty real estate transactions feel necessary, it is imperative that decisions be reviewed diligently in order to avoid unintended detriments. In particular, it is possible that old exposures from 2016 onwards may be encompassed by the extension to the holding periods. It is important to avoid surprises here. Even finalised share deals will need to be reviewed if they feature options which pertain to a RETT blocker and have not been exercised yet.

An assessment of constitutionality also remains pending. The stock exchange clause is particularly met with heavy criticism in the literature. In some individual cases, it may make sense to file an objection against an RETT assessment notification. That will be the only way to avoid an unfounded RETT burden should parts of these news legal provisions be found to be unconstitutional.

It is likely that a “unit deal” will be the more financially attractive option for some transactions in the future, where a fund commercially holds (with its financial management company doing the holding under civil law) the real estate and/or shares in the property-holding company and there is a transaction to transfer fund unit certificates. Further arrangement alternatives can be taken into consideration based on the individual case, such as (atypical) silent partnerships or foundation models.

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