DECISIONS

COMMISSION DECISION (EU) 2020/450

of 22 January 2020

on the aid scheme SA.29150 – 2010/C (ex 2010/NN) implemented by Germany on the fiscal carry-forward of losses in case of restructuring of companies in difficulty (*Sanierungsklausel*)

(notified under document C(2020) 254)

(Only the German text is authentic)

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to the provision cited above ([1]),

Whereas:

1. PROCEDURE

(1) By letters dated 5 August 2009 and 30 September 2009, the Commission asked Germany for information about § 8c of the corporate income tax act (*Körperschaftsteuergesetz,* 'KStG'). The German authorities replied to these requests by letters of 20 August 2009 and 5 November 2009. By decision of 24 February 2010 ('the Opening Decision'), the Commission opened the formal investigation procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union (TFEU) in respect of § 8c(1a) KStG (*Sanierungsklausel*).

(2) The Opening Decision was published in the *Official Journal of the European Union* ([2]). The Commission invited Germany and interested parties to submit comments.

(3) The German authorities submitted their comments by letter of 9 April 2010.

(4) Two meetings with the German authorities were held in Brussels on 9 April 2010 and on 3 June 2010. The German authorities submitted further information on 2 July 2010. The Commission did not receive any comments from interested parties.

(5) On 26 January 2011, the Commission adopted Decision 2011/527/EU ([3]) ('the 2011 Decision') in which it considered that § 8c(1a) KStG (*Sanierungsklausel*) constitutes State aid, which was unlawfully put into effect by Germany in breach of Article 108(3) TFEU. The Commission also concluded that the aid granted under § 8c(1a) KStG was incompatible with the internal market, in particular to the extent that it could not be found compatible based on point (b) of Article 107(3) TFEU, as interpreted by the Temporary Framework ([4]) ([5]), and ordered recovery of the incompatible aid.

([1]) OJ C 90, 8.4.2010, p. 8.

([2]) OJ C 90, 8.4.2010, p. 8.

([3]) Commission Decision 2011/527/EU of 26 January 2011 on State aid C 7/10 (ex CP 250/09 and NN 5/10) implemented by Germany — Scheme for the carry-forward of tax losses in the case of restructuring of companies in difficulty (*Sanierungsklausel*) (OJ L 235, 10.9.2011, p. 26).

([4]) Communication from the Commission — Temporary Community framework for State aid measures to support access to finance in the current financial and economic crisis (OJ C 83, 7.4.2009, p. 1).

([5]) Under the Temporary Framework, aid is deemed compatible provided that its amount does not exceed EUR 500 000, the beneficiary has not been an undertaking in difficulty on 1 July 2008 and all the other conditions set out in point 4.2.2 of the Temporary Framework are met.

(6) After the adoption of the 2011 Decision, Germany and third parties lodged actions for annulment of the 2011 Decision ([6]). On 4 February 2016, the General Court dismissed the arguments of the applicants and confirmed the 2011 Decision ([7]).

(7) Germany and two potential beneficiaries (Heitkamp BauHolding GmbH and GFKL Financial Services AG) appealed the judgments of the General Court. On 28 June 2018, the Court of Justice annulled the judgments of the General Court and the 2011 Decision ([8]). The Court of Justice found that the Commission erred in the selectivity analysis by considering only the rule prohibiting the carry-forward of losses in case of change in the company's shareholding structure (§ 8c(1) KStG) to be the reference framework and excluding from it the general rule of loss carry-forward.

2. DETAILED DESCRIPTION OF THE MEASURE/AID

2.1. Background

(8) Corporate taxation in Germany is based mainly on the income tax act (*Einkommensteuergesetz*, ('EStG')) and the KStG. § 10d(2) EStG foresees the possibility to carry forward losses incurred in a tax year, meaning that, in line with the ability-to-pay principle, taxable income in future tax years may be reduced by setting off past losses up to an upper limit of EUR 1 million per year. According to § 8(1) KStG, this possibility to carry forward losses also applies to entities subject to corporate income tax.

(9) According to the German authorities, providing such carry-forward of losses also triggered trade in empty-shell companies, which had long ceased any economic activity, but which still retained losses that had been carried forward.

(10) As a reaction to the trade in empty-shell companies, the German Parliament restricted in 1997 the possibility to carry forward losses, by introducing in § 8(4) KStG the so-called '*Mantelkaufregelung*' ('coat-buying rule', the coat being the empty-shell company). This rule restricted the carrying forward of losses to those corporate entities that were legally and economically identical with the entity that incurred the losses. The rule did not contain a definition of 'economically identical', but relied on one negative and two positive elements:

— there is no economic identity if more than half of the shares of the corporate entity are transferred and the entity then continues its economic activity or starts it anew, with predominantly new assets,

— there is, on the contrary, economic identity if the injection of new assets solely has the purpose of restructuring the loss-making entity and if the activity which had caused the unrelieved loss carry-forward, continues in a comparable manner for the following 5 years,

— there is also economic identity if, rather than injecting new assets, the acquiring entity covers the losses that have accrued at the loss-making entity.

(11) The last two examples were commonly referred to as '*Sanierungsklausel*' (clause allowing for restructuring of companies in difficulty).

(12) § 8(4) KStG was repealed as of 1 January 2008 by the 2008 act to reform company taxation (*Unternehmensteuerreformgesetz 2008*) ([9]).

([6]) 16 actions for annulment were lodged, one by Germany (T-205/11) and 15 by potential beneficiaries. With the exception of T-287/11 and T-620/11, all actions were stayed.

([7]) Judgment of the General Court of 4 February 2016, *Heitkamp BauHolding* v *Commission*, T-287/11, ECLI:EU:T:2016:60; Judgment of the General Court of 4 February 2016, *GFKL Financial Services* v *Commission*, T-620/11, ECLI:EU:T:2016:59.

([8]) Judgment of the Court (Second Chamber) of 28 June 2018, *Andres (faillite Heitkamp BauHolding)* v *Commission*, C-203/16 P, ECLI:EU:C:2018:505; judgment of the Court (Second Chamber) of 28 June 2018, *Germany* v *Commission*, C-208/16 P, ECLI:EU:C:2018:506; judgment of the Court (Second Chamber) of 28 June 2018, *Germany* v *Commission*, C-209/16 P, ECLI:EU:C:2018:507; judgment of the Court (Second Chamber) of 28 June 2018, *Lowell Financial Services* v *Commission*, C-219/16 P, ECLI:EU:C:2018:508.

([9]) *Unternehmensteuerreformgesetz 2008*, 14 August 2007, Federal Law Gazette (*Bundesgesetzblatt* ('BGBl.')) 2007, Part I, No 40, p. 1912.

(13) The same act introduced the new § 8c(1) KStG, which limited the possibility to carry forward losses in case of changes in the shareholding of a corporate entity more than § 8(4) KStG had done previously. Under the new rule:

— unused losses are forfeited in total if more than 50 % of the share capital, membership rights, ownership rights or voting rights are transferred to an acquirer,

— unused losses are forfeited pro rata if within a period of five years more than 25 % and up to 50 % of the share capital, membership rights, ownership rights or voting rights are transferred.

(14) The new rule initially did not provide any exception for the companies being simultaneously subject to a significant change in ownership and in the process of restructuring.

(15) According to the explanatory memorandum adopted by the German Parliament together with the *Unternehmens-steuerreformgesetz 2008*, the purpose of replacing § 8(4) KStG by the new § 8c(1) KStG was to simplify the rules (it transpires from the explanatory memorandum that the practical application of § 8(4) KStG had led to many difficult legal questions) and to better target the anti-abuse measure ([10]). The German Parliament was aware of the fact that as a result of the reform in case of a restructuring of an undertaking in difficulties, which implied a change in ownership, the carry-forward of losses would no longer be possible. It considered that this was acceptable, as the tax authorities could waive tax debts in such a situation based on considerations of equity also without an explicit provision in the KStG ([11]).

2.2. **The measure**

(16) In June 2009, § 8c KStG was amended by inserting a new provision (§ 8c(1a) KStG) concerning the preservation of loss carry-forward in case of acquisition of companies in difficulty in view of their restructuring. This amendment formed part of the Citizens' Relief – Health Insurance – Act (*Bürgerentlastungsgesetz Krankenversicherung*) ([12]). The new provision generally is again referred to as *Sanierungsklausel* (or new (*neue*) *Sanierungsklausel* in order to distinguish it from its predecessor in § 8(4) KStG).

(17) Under § 8c(1a) KStG, a corporate entity is allowed to carry forward losses despite changes in its shareholding that fulfil the conditions of § 8c(1) KStG, if the following requirements are met:

— the acquisition serves the purpose of restructuring ('*Sanierung*') of the corporate entity ([13]),

— the company is illiquid or over-indebted or risks being illiquid or over-indebted at the time of acquisition ([14]),

— the essential business structures of the company are preserved by way of:

  — the corporate entity honours an agreement between management and work council ('*Betriebsvereinbarung*') on the preservation of jobs, or

  — preservation of 80 % of the jobs (in terms of overall remuneration) for five years following the acquisition, or

  — injections of significant business assets ('*wesentliches Betriebsvermögen*') or write-off of debts which still have an economic value within 12 months; business assets are material if they amount to at least 25 % of the assets of the previous financial year; any transfer back to the acquiring entity within the first three years are deducted,

([10]) German Parliament's printed papers series (*Bundestagsdrucksache*) 16/4841, p. 74.

([11]) *Bundestagsdrucksache* 16/4841, p. 76, referring to a circular of the Federal Ministry of Finance dated 27 March 2003 (Federal Tax Gazette (*Bundessteuerblatt*) ('BStBl.') 2003, Part I, p. 240).

([12]) *Gesetz zur verbesserten steuerlichen Berücksichtigung von Vorsorgeaufwendungen* (*Bürgerentlastungsgesetz Krankenversicherung*), 16. June 2009, BGBl. 2009, Part I, No 43, p. 1959.

([13]) *Sanierung* has the purpose of reorganising a company. Reorganisation is a measure that intends to avoid or overcome illiquidity (*Zahlungsunfähigkeit*) or over-indebtedness (*Überschuldung*). Accordingly, only companies that are or are to be illiquid or over-indebted at the time when the change in the shareholding takes place, are eligible.

([14]) The terms 'illiquidity', 'risk of illiquidity' and 'over-indebtedness' are defined in German insolvency legislation (*Insolvenzordnung* ('InsO'), 5 October 1994, BGBl. 1994, Part I, No 70, p. 2866): 'Illiquidity' (§ 17 InsO): if the debtor is not able to meet due payment obligations and has ceased payments. 'Risk of illiquidity' (§ 18 InsO): If the debtor is likely not to be able to meet future payment obligations at their due date. 'Over-indebtedness' (§ 19 InsO): If the debtor company's assets do not cover its existing liabilities; 'over-indebtedness' is however excluded if the debtor company has a positive prognosis for it to continue to exist.

— the company does not change sector of activity for five years following the acquisition,

— the company had not ceased operation at the time of the acquisition.

(18) § 8c(1a) KStG entered into force on 10 July 2009 and was applicable retroactively as of 1 January 2008.

(19) Initially, § 8c(1a) KStG was introduced as a temporal measure applicable until 31 December 2009. However, on 22 December 2009, the German Parliament adopted, as part of the act on the acceleration of growth of 22 December 2009 (*Wachstumsbeschleunigungsgesetz*) a provision that deleted the corresponding sunset clause from the KStG ([15]).

(20) It is to be noted that the losses that are carried forward can only be offset against benefits of the company that is being restructured. The acquiring company cannot offset these losses against its own benefits. This holds true even if the acquiring company consolidates its tax liabilities at the level of the group, as point (1) of the first sentence of § 15 KStG prohibits loss carry-forward if an entity (*Organgesellschaft*) forms part of a consolidated entity (*Organschaft*) ([16]). However, German corporate tax law provides that such losses are not lost; they are merely 'frozen' at the level of the *Organgesellschaft* and may be used once the company is not anymore consolidated. There is no time limit for the carry-forward of these 'frozen' losses.

(21) The acquiring company benefits indirectly from § 8c(1a) KStG, as, once the restructuring process is successfully completed, the provision reduces the tax burden of the restructured entity. Furthermore, the acquiring company can merge part or the entirety of its activities into the acquired company and use in this manner the losses that have been carried forward.

3. **THE OPENING DECISION**

(22) By letter dated 24 February 2010, the Commission informed the German authorities that it had decided to initiate the procedure laid down in Article 108(2) TFEU in respect of the above described measure granted under § 8c(1a) KStG.

(23) In its Opening Decision, the Commission considered that § 8c(1a) KStG differentiated between financially sound companies that are loss-making and companies that are (potentially) illiquid or over-indebted, in benefitting the latter. The Commission regarded the measure in its preliminary view to be selective and to entail State aid, as also the other conditions of Article 107(1) TFEU appeared to be fulfilled. Finally, the Commission expressed its doubts about the compatibility of the measure with point (b) of Article 107(3) TFEU, as interpreted by the Temporary Framework, and with point (c) of Article 107(3) TFEU, as interpreted by the (then applicable) Rescue and Restructuring Guidelines ([17]) and the (then applicable) Regional Aid Guidelines ([18]).

(24) After the opening of the formal investigation procedure, the German Federal Ministry of Finance instructed the tax authorities in charge of tax collection to cease applying § 8c(1a) KStG until the Commission had adopted a final decision in the case and to inform the entities concerned that in case of a negative final decision of the Commission, State aid would have to be recovered ([19]).

4. **COMMENTS FROM THE GERMAN AUTHORITIES**

(25) The German authorities consider that § 8c(1a) KStG does not constitute State aid, for three reasons:

— it complies with the private creditor principle (see Section 4.1),

— it is not selective (see Section 4.2),

— it is justified by the nature and the logic of the German tax system (see Section 4.3).

([15]) *Gesetz zur Beschleunigung des Wirtschaftswachstums* (*Wachstumsbeschleunigungsgesetz*), 22 December 2009, BGBl. 2009, Part I, No 81, p. 3950, point (3)(b) of Article 2.

([16]) So called '*vororganschaftliche Verluste*'.

([17]) Communication from the Commission — Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ C 244, 1.10.2004, p. 2).

([18]) Guidelines on national regional aid for 2007-2013 (OJ C 54, 4.3.2006, p. 13).

([19]) Circular from the Federal Ministry of Finance dated 30 April 2010 addressed to the tax authorities of the Länder in charge of tax collection (*BMF v 30.4.2010 IV C 2 -S 2745-a/08/10005:002*), BStBl. 2010, Part I, p. 488.

(26) The German authorities further argue that the new *Sanierungsklausel* in § 8c(1a) KStG corresponds in essence to the old *Sanierungsklausel* in § 8(4) KStG, which had never been criticised by the Commission (see Section 4.4) and that a number of other Member States have similar tax rules in place (see Section 4.5).

4.1. **Compliance with the private creditor principle**

(27) In their letter of 2 July 2010, the German authorities claim that the private creditor principle may be invoked with respect to fiscal or para-fiscal claims ([20]). They furthermore consider that the relationship of the German State towards its taxpayers is comparable to the relationship between a private creditor and a debtor, which are linked by a long-term contract (*Dauerschuldverhältnis*), such as a rent contract or an employment contract. In the view of the German authorities, a private creditor engaged in such a long-term contract would forego part of its future claims, if that enabled the acquisition of its debtor by another undertaking, which in turn would ensure the continuation of the long-term contract.

4.2. **Absence of selectivity**

(28) The German authorities consider that § 8c(1a) KStG is a general measure, since it is not limited to any sector, any size of undertakings or any region. They point out that any undertaking could potentially find itself, without being responsible for it, in financial difficulties and be eligible for the application of the rule.

(29) The German authorities note that the Commission itself had taken the view, in its 1998 notice on direct business taxation, that, 'provided that they apply without distinction to all firms and to the production of all goods', tax measures of a purely technical nature, such as rules on loss carry-overs, were not selective, and that 'the fact that some firms or some sectors benefit more than others from some of these tax measures does not necessarily mean that they are caught by the competition rules governing State aid' ([21]).

(30) The German authorities take the view that these considerations are of particular importance for favourable tax treatment of research and development, but also of environmental protection, training and employment. In the view of the German authorities, fiscal rules benefitting undertakings making particular efforts in these areas are not selective, as they are open to all undertakings, even if *de facto* they will benefit more undertakings active in certain sectors than others. In their view, the same reasoning should also apply to fiscal rules benefitting undertakings in difficulty which are acquired in order to be restructured.

(31) The German authorities claim that the Court of Justice and the General Court had accepted that a measure benefitting exclusively undertakings in difficulty may, in principle, constitute a general measure, which is not selective. They quote in this respect first the judgment in the *DM Transport* case ([22]), where the Court of Justice held the following with regard to a Belgian payment facility for undertakings in difficulties:

> 'The French Government argues that payment facilities in relation to social security contributions do not constitute State aid if they are granted in identical circumstances to any undertaking experiencing financial difficulties. That would seem to be the case under the regime established by the Belgian legislation. The Commission, however, claims that the ONSS has a discretionary power in regard to the grant of payment facilities.
>
> It follows from the wording of Article 92(1) of the Treaty that general measures which do not favour only certain undertakings or the production of only certain goods do not fall within that provision. By contrast, where the body granting financial assistance enjoys a degree of latitude which enables it to choose the beneficiaries or the conditions under which the financial assistance is provided, that assistance cannot be considered to be general in nature (see, to that effect, Case C-241/94 *France v Commission* [1996] ECR I-4551, paragraphs 23 and 24).
>
> It is for the national court in the main proceedings to determine whether the ONSS's power to grant payment facilities is discretionary or not and, if it is not, to establish whether the payment facilities granted by the ONSS are general in nature or whether they favour certain undertakings.'

([20]) Germany cites the judgment of the Court (Second Chamber) of 14 September 2004, *Spain* v *Commission*, C-276/02, ECLI:EU:C:2004:521, paragraphs 15 and 26, as well as the judgment of the Court (Sixth Chamber) of 29 June 1999, *DM Transport*, C-256/97, ECLI:EU:C:1999:332, paragraphs 22 and 25.

([21]) Commission notice on the application of the State aid rules to measures relating to direct business taxation (OJ C 384, 10.12.1998, p. 3), points 13 and 14.

([22]) Judgment of the Court (Sixth Chamber) of 29 June 1999, *DM Transport*, C-256/97, ECLI:EU:C:1999:332, paragraphs 26 to 28.

(32) Furthermore, the German authorities quote the judgment in the *HAMSA* case ([23]), where the Spanish authorities had argued that a measure is not selective, because it applied to all undertakings in difficulty. The Court of First Instance held on that point:

> 'In the present case, the argument relied on by the applicant and the Kingdom of Spain to the effect that the Spanish law of 26 July 1922 concerning suspension of payments institutes a general procedure, applicable to all companies in difficulty, cannot be accepted. Whilst it is true that the law does not have authority to apply selectively in favour of certain categories of undertakings or sectors of activity, it must be remembered that the debt remissions criticised by the Commission do not flow automatically from the application of the law, but from the discretionary decisions made by the public bodies in question. It is, moreover, settled case-law that where the body granting financial assistance enjoys a degree of latitude which enables it to choose the beneficiaries or the conditions under which the financial assistance is provided, that assistance cannot be considered to be general in nature (Case C-256/97 *DM Transport* [1999] ECR I-3913, paragraph 27).'

(33) The German authorities argue that, contrary to the measures at stake in *DM Transport* and *HAMSA*, § 8c(1a) KStG does not provide for discretionary decisions of public bodies, but that its application flows automatically from the law. Therefore, applying an argument *a contrario*, § 8c(1a) KStG would not be selective.

(34) The German authorities also take the view that § 8c(1a) KStG forms part of the body of rules that form the German insolvency law. In particular, the eligibility of an undertaking is based on the notions of illiquidity, risk of illiquidity and over-indebtedness, which are defined in the *Insolvenzordnung* and which render an undertaking eligible for the opening of insolvency procedures.

(35) The German authorities conclude on the question of selectivity that the Commission's view had as a result that any tax reduction constituted State aid, even if it was generally applicable, and that such a position violated the TFEU.

4.3. **Justification by the nature or general scheme of the tax system**

(36) The German authorities consider that the exemption created by § 8c(1a) KStG is justified based on the nature and general scheme of the German system for taxing corporate entities. They claim that there is an objective difference between undertakings in difficulty which are in need of restructuring and other undertakings, and that this objective difference justifies a different treatment of undertakings in difficulty which are acquired in view of a restructuring. The German authorities base their argument on three considerations.

(37) Firstly, they argue that whereas financially sound undertakings have a choice between financing themselves on capital markets and looking for another undertaking that may want to acquire them, undertakings in difficulty only have the latter option, i.e. to look for an acquirer, as they will not be able to raise debt on capital markets or obtain a bank loan. As a result, undertakings in difficulty will systematically loose the possibility to carry forward their losses, whereas healthy undertakings always have the choice between debt financing and the search for a buyer.

(38) Secondly, they argue that the *ratio legis* of § 8c(1) KStG, that is to avoid trade in empty-shell companies with accumulated losses, does not require the exclusion of loss carry-forward in situations where the acquisition has the purpose of a restructuring, and not of pure fiscal optimisation. Without the limitation of § 8c(1a) KStG to acquisitions of undertakings in financial difficulty in view of restructuring, i.e. by including also other acquisitions, the *ratio legis* could no longer be realized.

(39) Thirdly, they argue that the purpose of § 8c(1) KStG is to ensure that the sales price for participations in undertakings is based solely on the economic value of the undertaking, excluding the value of the accumulated losses for fiscal optimisation. In case of the acquisition of an undertaking in difficulty in view of restructuring, however, the possible value of accumulated losses plays, in the view of the German authorities, no particular role. To demonstrate this, they note that accountants do not give any value, in the books of a tax-consolidated entity, to possibly carried-forward losses of an ailing undertaking.

(40) For these three cumulative reasons, the German authorities consider that, even if § 8c(1a) KStG were *prima facie* selective, it is in any event justified by the nature and general scheme of taxation of corporate entities in Germany.

([23]) Judgment of the Court of First Instance (Fifth Chamber, extended composition) of 11 July 2002, *HAMSA* v *Commission*, T-152/99, ECLI:EU:T:2002:188, paragraph 157.

4.4. **Link between new and old *Sanierungsklausel***

(41) The German authorities observe that § 8c KStG has replaced, as of 1 January 2008, a similar rule, namely § 8(4) KStG. They note that both rules pursue the same objective, namely to exclude trade in empty-shell companies with accumulated losses.

(42) The German authorities note that the Commission had never indicated any possible problems with regard to § 8(4) KStG, and that it therefore would appear that this rule did not constitute State aid.

(43) Therefore, they consider that the position of the Commission in this regard is incoherent.

4.5. **Similar rules in other tax systems**

(44) The German authorities have indicated that many other Member States have rules in place which are comparable to § 8c(1a) KStG. They cite in this respect Austria, Belgium, Finland, Italy, Luxembourg and the Netherlands. They note that the Commission has not taken any action under its State aid competences with regard to these Member States, despite the very strong similarities of the systems.

(45) The German authorities, in reaction to recital 34 of the Opening Decision, which explains the action the Commission has taken with respect to the French system, underline also that the German system is different from the French system that had been limited to certain sectors of the economy and contained a complete exemption from corporate income tax.

5. **DEVELOPMENTS AFTER THE ADOPTION OF THE 2011 DECISION AND AFTER ITS ANNULMENT**

(46) After the adoption of the 2011 Decision, Germany suspended the application of the measure until a final judgment by the General Court or the Court of Justice ([24]).

(47) On 29 March 2017, the German Federal Constitutional Court (*Bundesverfassungsgericht*) considered the *pro rata* forfeiture of losses in case of a transfer of 25 %–50 % share capital, membership rights, ownership rights or voting rights under § 8c(1) KStG unconstitutional, and required the German Parliament to amend the provision by 31 December 2018 ([25]). The German Parliament subsequently removed (with retroactive effect from 21 December 2007) the *pro rata* forfeiture of losses in case of a transfer of 25 %–50 % share capital, membership rights, ownership rights or voting rights, and retained only the full forfeiture of losses if more than 50 % of such capital or rights were transferred to another entity ([26]).

(48) After the annulment of the 2011 Decision by the Court of Justice, Germany also reintroduced the *Sanierungsklausel* (§ 8c(1a)) in the KStG on 11 December 2018 (with retroactive effect from 2008) ([27]).

6. **ASSESSMENT OF THE MEASURE**

(49) According to Article 107(1) TFEU, 'any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market'.

(50) The qualification of a measure as aid within the meaning of this provision therefore requires the following conditions to be met: (i) the measure must be imputable to the State and financed through State resources; (ii) it must confer an advantage to an undertaking; (iii) that advantage must be selective; and (iv) the measure must distort or threaten to distort competition and affect trade between Member States.

(51) The characterisation of a measure as State aid, within the meaning of Article 107(1) TFEU requires all four conditions to be met, those conditions being cumulative. The Commission will examine first the condition relating to the granting of a selective advantage.

([24]) Point (2)(a) of Article 4 (amendment to § 34(7c) KStG) of the act to transpose the Directive concerning the recovery of claims relating to taxes, duties and other measures and to amend laws on taxation (*Gesetz zur Umsetzung der Beitreibungsrichtlinie sowie zur Änderung steuerlicher Vorschriften*), 7 December 2011, BGBl. 2011, Part I, No 64, p. 2592.

([25]) Judgment of the *Bundesverfassungsgericht* of 29 March 2017, 2 BvL 6/11 https://www.bundesverfassungsgericht.de/e/ls20170329_2bvl000611.html

([26]) Point (2) of Article 6 (amendment to § 8c(1) KStG) of the act to prevent shortfalls of turnover taxes due on product sales over the internet and to amend further laws on taxation (*Gesetz zur Vermeidung von Umsatzsteuerausfällen beim Handel mit Waren im Internet und zur Änderung weiterer steuerlicher Vorschriften*), 11 December 2018, BGBl. 2018, Part I, No 45, p. 2338.

([27]) Point (6)(b) of Article 6 (amendment to § 34(6) KStG) of the *Gesetz zur Vermeidung von Umsatzsteuerausfällen beim Handel mit Waren im Internet und zur Änderung weiterer steuerlicher Vorschriften*.

(52) As a matter of principle, to assess the existence of an advantage the financial situation of the undertaking following the measure should be compared with its financial situation if the measure had not been taken ([28]).

(53) In particular, in relation to tax measures, in order to evidence a possible tax advantage, it is necessary to assess whether the tax treatment granted to an entity provides it with an advantage in comparison to the ordinary or 'normal' tax regime ([29]). The assessment of the advantage is thus closely linked with the assessment of the selectivity criterion (where the existence of a derogatory tax treatment is also assessed in comparison to the general tax rules).

(54) According to established case law ([30]), the assessment of the material selectivity of a fiscal measure takes place in three steps. First, it is necessary to identify and examine the common or 'normal' regime ('system of reference') applicable in the Member State concerned. Second, it is in relation to this common or 'normal' tax regime that it is necessary to assess and determine if any advantage granted by the tax measure at issue may be selective. This has to be done by demonstrating that the measure derogates from that common regime inasmuch as it differentiates between economic operators that, in the light of the objective pursued by that regime, are in a comparable factual and legal situation. Third, if such derogation exists, it is necessary to examine whether it results from the nature or general scheme of the taxation system of which it forms part and could hence be justified by the nature or logic of the system. In this context, it is for the Member State to show that the differentiated tax treatment derives directly from the basic or guiding principles of that system.

(55) In this case, it results from the judgments of the Court of Justice ([31]) that the corporate tax rules applicable in Germany generally to all undertakings are the system of reference and that these include the general loss carry-forward rule under §8(1) KStG. The objective of these rules is the taxation of corporate profits to generate revenue for the budget, in accordance with the ability-to-pay principle.

(56) §8(1) KStG establishes (by reference to § 10d EStG) that entities subject to corporate income tax can, for tax purposes, carry-forward losses incurred in a tax year to future tax years (up to an upper limit of EUR 1 million per year).

(57) The Court of Justice considered in paragraph 102 of the *Andres* Judgment ([32]) that the rule governing the forfeiture of losses was itself an exception to the loss carry-forward rule and that an overall examination of the content of those provisions should have made it possible to find that the restructuring clause's effect was to define a situation falling under the general loss carry-forward rule.

(58) It is therefore not necessary, in the specific circumstances of the case, to determine whether the anti-abuse rules are part of the system of reference, since, in any event, the analysis of the Court of Justice seems to exclude that the restructuring clause contradicts the objective of these rules ([33]) and derogates from them ([34]).

(59) To assess whether the *Sanierungsklausel* under §8c(1a) KStG constitutes a selective advantage, the Commission must determine whether the tax measure at issue is a derogation from that ordinary system, in so far as it differentiates between operators who, in the light of the objective pursued by the ordinary tax system, are in a comparable factual and legal situation.

([28]) See the judgment of the Court of 2 July 1974, *Italy* v *Commission*, Case 173/73, ECLI:EU:C:1974:71, paragraph 17.

([29]) See for example the judgment of the Court (Second Chamber) of 15 December 2005, *Unicredito Italiano*, C-148/04, ECLI:EU:C:2005:774, paragraphs 50 to 52; judgment of the Court (Third Chamber) of 8 December 2011, *France Télécom* v *Commission*, C-81/10 P, ECLI:EU:C:2011:811, paragraph 24.

([30]) See for example the judgment of the Court (First Chamber) of 8 September 2011, *Paint Graphos and Others*, C-78/08 to C-80/08, ECLI:EU:C:2011:550, paragraphs 49 and 71; judgment of the Court (Grand Chamber) of 21 December 2016, *Commission* v *World Duty Free Group*, and *Commission* v *Banco Santander and Santusa*, C-20/15 P and C-21/15 P, ECLI:EU:C:2016:981, paragraphs 57 and 58.

([31]) Judgment of the Court (Second Chamber) of 28 June 2018, *Andres (faillite Heitkamp BauHolding)* v *Commission*, C-203/16 P, ECLI:EU:C:2018:505; judgment of the Court (Second Chamber) of 28 June 2018, *Germany* v *Commission*, C-208/16 P, ECLI:EU:C:2018:506; judgment of the Court (Second Chamber) of 28 June 2018, *Germany* v *Commission*, C-209/16 P, ECLI:EU:C:2018:507; judgment of the Court (Second Chamber) of 28 June 2018, *Lowell Financial Services* v *Commission*, C-219/16 P, ECLI:EU:C:2018:508.

([32]) Judgment of the Court (Second Chamber) of 28 June 2018, *Andres (faillite Heitkamp BauHolding)* v *Commission*, C-203/16 P, ECLI:EU:C:2018:505

([33]) Which would consist in preventing that companies unduly reduce their tax base by the use of loss carry-forwards from empty-shell companies.

([34]) Furthermore, it could be argued that the requirement, set by the *Sanierungsklausel*, that the essential business structures and activity of the company must be preserved, excludes abuse.

(60) Given that §8c(1a) KStG allows companies, which are illiquid or over-indebted (or in risk of illiquidity or over-indebtedness) and are being restructured, to carry forward losses, the measure does not derogate from the general carry-forward rule under §8(1) KStG.

(61) On this basis, the Commission concludes that §8c(1a) KStG does not provide a selective advantage to the corporate entities to which it applies.

(62) In view of the above finding, it is not necessary to assess further arguments of the German authorities concerning the absence of a selective advantage. It is also not necessary to assess the remaining conditions for a measure to qualify as aid, since the characterisation of a measure as State aid requires all four conditions of Article 107(1) TFEU to be met, those conditions being cumulative.

7. **CONCLUSION**

(63) On the basis of the foregoing, the Commission concludes that § 8c(1a) KStG (*Sanierungsklausel*) does not constitute State aid within the meaning of Article 107(1) TFEU,

HAS ADOPTED THIS DECISION:

Article 1

The scheme on the fiscal carry-forward of losses in case of restructuring of companies in difficulty under § 8c(1a) KStG (*Sanierungsklausel*) does not constitute State aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union.

Article 2

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 22 January 2020.

For the Commission
Margrethe VESTAGER
Executive Vice-President