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Commission objects to enhanced loss relief for troubled companies

The European Commission has concluded that the rule exempting troubled companies from the loss relief forfeiture on change of shareholders is unauthorized state aid.

Generally, companies forfeit remaining loss carry forwards if more than 50% of their share capital changes hands over a five year period. If the change is between 50% and 25%, the loss is forfeit in proportion to the change. This rule applies to direct and indirect changes in ownership. Its purpose is to curb dealings in tax loss companies. In 2009 in a reaction to the economic crisis, the government introduced a temporary exemption for share acquisitions to enable corporate recovery. This exemption applied retroactively to all acquisitions from January 1, 2008 and was later made permanent. Its stated objective is to facilitate the preservation of the business in a substantially unchanged form of a company in difficulties. Companies taking advantage of it must still be in business on the date of the share transfer and not change the nature of their business activity for the next five years. They and their shareholders must also demonstrate commitment in one of three ways – a formal shop agreement with the employees on job preservation, maintaining the average wages bill for the next five years at no less than 80% of the average for the previous five, or with a capital injection of not less than 25% of existing net assets.

The European Commission has now decided that this exemption from the normal loss forfeiture rule is unlawful state aid. Its main objection is that the inducement is available to all companies in trouble, and not merely to those who actually need it. Its press announcement implies that it might have accepted a system of individual exemptions subject to its individual approval on the bases of minimising competition distortion and medium turn viability of the business. It has ordered Germany to recover any aid already paid out (reduced tax from offset of an otherwise forfeit loss) and has asked for a list of amounts and beneficiaries. In April 2010, the finance ministry warned beneficiaries of a possible repayment obligation and suspended the exemption pending the Commission's decision. It is now open to Germany – though not to individual taxpayers – to contest the Commission's decision before the ECJ.

Schlagwörter

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