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# Loss forfeiture exemption for troubled businesses rejected

**The ECJ has upheld a Commission ruling to the effect that the exemption from the provision for loss forfeiture on change of shareholders for troubled companies being rescued constitutes unlawful state aid.**

If more than 25% of a company's share capital is acquired by a single person (together with his related parties) over a five-year period, the company's losses brought forward are no longer available for future loss relief in proportion to the equity acquired. If the acquisition is for more than 50% of the equity, the entire future relief is lost. There are three exceptions to this rule, acquisitions within a group without a change in ultimate shareholder, losses covered by potentially taxable hidden reserves (appreciation in value of assets held, off-balance sheet intangibles) and acquisitions in the course of a rescue operation to save a troubled business. This latter is subject to a number of safeguards to ensure protection of, in particular, the employees. Nonetheless, the European Commission saw it as indiscriminate state aid and ordered the German government to disapply it for the future and in retrospect. The government protested, but lost its case before the ECJ on a procedural point following a missed deadline. However, two taxpaying companies sued the Commission in their own names, having suffered the withdrawal of a binding ruling confirming their future entitlement to loss offset despite a "harmful" change of shareholders. The withdrawal followed the Commission's order to Germany.

The ECJ has now passed judgment on both cases. It confirms the Commission's view, arguing that the general rule is for the forfeiture of loss relief on change of shareholder and that the exception is applied indiscriminately without regard to the individual circumstances. It thus favours certain companies – those in financial difficulties – over their competitors in the marketplace. At one point, a plaintiff argued with government support that the loss forfeiture provision was intended to prevent the abusive practice of buying up tax loss companies. The exception was designed to exempt genuine rescue attempts. However, the argument failed because a rescue attempt was not the only non-abusive share acquisition in a loss-making company. In the other case, the same argument failed because of an inconsistency in the official explanation of the loss forfeiture rule – one official source proclaimed it as an anti-abuse measure, while another explained it as a revenue raiser to compensate for the drop in the corporation tax rate from 25% to 15%. Both taxpayers claimed that they had relied on their rulings before being thwarted by the Commission. To this the court replied, the question of reliance on a ruling was a matter for national law; a taxpayer's remedy lay in an appeal to the courts against a repayment demand for the illicit state aid now to be recovered.

The ECJ case references are T-287/11 *Heitkamp v. Commission* and T-620/11 *GFKL v. Commission* judgments of February 4, 2016.

**Schlagwörter**

change of shareholders, loss forfeiture, troubled businesses