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# ***RETT exposure: Constitutional Court dismisses low RETT values for share deals (and reorg.'s) since 2009***

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## **In brief**

On 23 June 2015, the German Federal Constitutional Court (“BVerfG”) decided that the current real estate transfer tax (“RETT”) base for reorganisations and share deals is unconstitutional from 1 January 2009.

The Court granted a grace period until 30 June 2016 for the German legislator to pass new rules. It is expected that the new rules will lead to higher RETT burdens on reorganisations and share deals. The impact on past assessments is currently unclear.

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## **Background**

In 2011, the German Federal Fiscal Court referred a case regarding the correct determination of the RETT base to the German Federal Constitutional Court. On 23 June 2015 the Court decided that the current law is unconstitutional.

## **Current Law**

Under the current law, RETT is levied in case of a direct transfer of German real estate (asset deal) on the purchase price paid, which usually corresponds to the fair market value (“FMV”) of the real estate.

RETT is also levied on share deals e.g. if more than 95% of the shares in an entity owning German real estate are directly or indirectly unified in one hand. In such case RETT is however principally based on a special RETT base. This calculation can lead to a tax base that is significantly lower than the actual FMV of the real estate.

## **Federal Constitutional Court decision**

Generally, the direct transfer of real estate (asset deal) leads to a RETT base close to the current FMV.

The indirect transfer of real estate (share deal) leads to a special RETT base which can be significantly lower.

Against this background, the Court decided different tax treatments of the same underlying transaction to be unconstitutional as the same economic transaction is taxed differently without a reasonable justification.

The special RETT base for share deals has been declared unconstitutional retroactively for transfers from 1 January 2009.

## **New Regime**

The Court granted a grace period until 30 June 2016 for the German legislator to pass new rules regarding the calculation of the RETT base.

## **Consequences**

The new rules are expected to lead to a RETT base for share deals closer to the FMV of the real estate. The impact on past assessments is currently unclear.

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