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)

COMMISSION DECISION (EU) 2020/450

of 22 January 2020

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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.

Changes to legislation: *There are currently no known outstanding effects for the Commission Decision (EU) 2020/450. (See end of Document for details)*

(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.

(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)].

(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 *Unternehmenssteuerreformgesetz 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*

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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 ('S*anierung'*) 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,

— 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).

(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