II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 23 November 2005

on the aid scheme 'Real Estate Transfer Tax Exemption for Housing Companies in the *Neue Länder*' with regard to the labour market region Berlin

(notified under document number C(2005) 4434)

(Only the German text is authentic)

(Text with EEA relevance)

(2006/566/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(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 provisions cited above [1] and having regard to their comments,

Whereas:

1. PROCEDURE

(1) By letter dated 16 January 2004, registered as received by the Commission on 19 January 2004, Germany notified the Commission of the aid scheme entitled 'Real Estate Transfer Tax Exemption for Mergers between Housing Companies and Housing Associations in the *Neue Länder*'.

(2) By letter dated 17 February 2004, the Commission requested additional information. By letter dated 17 March 2004, registered as received by the Commission on 19 March 2004, additional information was submitted by Germany.

(3) By letter dated 26 April 2004 and further to a meeting held on 10 April 2004, in which Germany announced that it would provide supplementary information on the scheme, Germany requested an extension of the deadline. This extension was granted by letter dated 10 May 2004.

(4) By letter dated 14 May 2004, registered as received by the Commission on the same day, Germany submitted further information. By letters dated 30 June 2004 and 14 September 2004, the Commission requested additional information concerning the scheme. This information was submitted by Germany by letters dated 29 July 2004 and 6 October 2004, registered as received by the Commission on 29 July 2004 and on 15 October 2004.

(5) By letter dated 1 December 2004, the Commission informed Germany that it had decided to raise no objections to those parts of the scheme that were restricted to the new German *Länder* which are assisted areas under Article 87(3)(a) [2]. In the same letter the Commission informed Germany that it had decided to initiate the formal investigation procedure laid down in Article 88(2) of the EC Treaty as regards Berlin and those parts of Brandenburg that belong to the labour market region of Berlin and are assisted areas under Article 87(3)(c) of the EC Treaty [3].

[1] OJ C 53, 3.3.2005, p. 18.

[2] Brandenburg (except areas belonging to the labour market region of Berlin), Mecklenburg-Western Pomerania, Saxony, Saxony-Anhalt, Thuringia.

[3] See list of German assisted areas, State aid N 195/99, C 47/99, and N 641/02.

(6) The decision was published in the *Official Journal of the European Union* on 3 March 2005. The Commission invited interested parties to submit their comments on the aid scheme ([4]), but received none.

(7) Germany submitted its comments by letter dated 14 February 2005.

2. DETAILED DESCRIPTION OF THE AID SCHEME

2.1. Background

(8) The aid scheme temporarily exempts housing companies and housing associations from the real estate transfer tax in cases of mergers and acquisitions involving real estate located in the labour market region of Berlin.

(9) In the former GDR apartments were built for many decades on the basis of a centralised planning system. At the same time old buildings were neglected to such an extent that in 1990 many apartments were no longer habitable. German reunification resulted in strong demand for newly built apartments or private homes, which led to a shortage on the housing market in the new *Länder* and in the labour market region of Berlin. Experts and politicians expected the housing shortage to last and reacted by providing tax subsidies and accelerated depreciations for new buildings and refurbishments in the new *Länder* and in the labour market region of Berlin in the period 1990 to 1998. These incentives led to a housing surplus, in particular as in the meantime it had become clear that demand for apartments did not grow as predicted, but decreased. At present, the surplus amounts to some 1 million units.

(10) Germany and the new *Länder* therefore decided to demolish vacant apartments in a programme called 'urban rebuilding East' (*Stadtumbau Ost*). According to the information provided by Germany, a substantial part of the demolition costs will have to be borne by the housing companies and housing associations themselves.

(11) Germany argues that the undercapitalisation of many housing companies and associations in the new *Länder* and in the labour market region of Berlin — caused by lost revenues due to high vacancy rates and the relative fragmentation of the market — is threatening to jeopardise the demolition programme deemed necessary by the Federal Government and the *Länder* as they will not be able to bear their share of the demolition costs.

(12) Germany emphasises that the re-balancing of demand and supply cannot be achieved by simply eliminating oversupply, but also necessitates supplying the quality of living space actually demanded. In order to achieve this, housing companies and associations in the new *Länder* and in the labour market region of Berlin need to invest massively to adapt their current stock of apartments. In order to put the companies in the new *Länder* and in the labour market region of Berlin in a position to invest, Germany concludes they should have the opportunity to merge, thereby benefiting from the resulting synergy effects.

(13) According to Germany, the real estate transfer tax has proved to be a barrier to mergers and acquisitions between such companies and associations. By suspending the real estate transfer tax temporarily, market participants will have the opportunity to merge. The broadened capital base of merged housing companies and associations will put them in a better position to bear the costs of necessary demolition while simultaneously undertaking the investments necessary to offer modern housing.

(14) A real estate transfer tax is a tax levied on real estate transactions resulting in a change in the ownership of the relevant property. Tax liability arises when real estate is transferred through sale or other legal transaction. The real estate transfer tax (*Grunderwerbsteuer*) in Germany is calculated on the basis of the standardised value (*Einheitswert*) of the property and is levied at a rate of 3,5 %.

2.2. Scope of this Decision

(15) In its letter dated 1 December 2004 the Commission decided to raise no objections to those parts of the aid measure 'Real Estate Transfer Tax Exemption for Housing Companies in the New *Länder*' which relate to assisted areas covered by Article 87(3)(a) of the EC Treaty. This Decision accordingly concerns only those parts of the scheme which relate to the labour market region of Berlin, which is an assisted area covered by Article 87(3)(c) of the EC Treaty.

2.3. Objective of the aid scheme

(16) The objective of the scheme is to redevelop the housing market in the labour market region of Berlin by eliminating oversupply and by helping housing companies and housing association to provide the quality of housing which is actually demanded. By enabling such companies to demolish unoccupied apartment blocks, Germany intends to improve the physical appearance and infrastructure of certain areas in the labour market region of Berlin which are otherwise characterised by a poor physical environment. […] (*).

([4]) See footnote 1.

(*) Business secret.

2.4. **Beneficiaries**

(17) The potential beneficiaries of the scheme are housing companies and housing associations (*Wohnungsunternehmen* and *Wohnungsgenossenschaften*) acquiring real estate in the labour market region of Berlin by means of mergers and acquisitions. For the purpose of this Decision, housing companies and housing associations will be defined as companies and associations whose main business is the administration, construction, sale and renting of apartments. Enterprises in difficulty are excluded from the scheme.

(18) For the time being, three mergers between housing companies are anticipated in the labour market region of Berlin. In the case of mergers that took place in Berlin between 1995 and 1998, the following real estate transfer tax amounts were registered: EUR 3,1 million for a merger involving 19 plots of land; EUR 1,4 million for a merger involving 39 plots of land; and EUR 6,7 million for a merger involving 491 plots of land.

2.5. **Duration of the scheme**

(19) The scheme is limited to all merger and acquisition activities between housing companies and associations taking place between 31 December 2003 and 31 December 2006.

3. **DECISION TO INITIATE THE PROCEDURE**

(20) In its letter of 1 December 2004, the Commission considered the following and concluded that the notified scheme constituted State aid within the meaning of Article 87(1) of the EC Treaty:

— the involvement of State resources is demonstrated by the fact that by allowing exemption from the real estate transfer tax, Germany forgoes tax revenues that would otherwise have accrued to it;

— the measure is selective as it is targeted upon particular geographical areas in the new *Länder* and the labour market region of Berlin by favouring certain undertakings, namely housing companies and associations, and is limited to mergers and acquisitions between such companies and associations involving real estate property in the new *Länder* and the labour market region of Berlin;

— the scheme constitutes an advantage for the housing companies and associations involved in mergers and acquisitions, as they are exempted from the payment of the real estate transfer tax they would otherwise have had to bear in the absence of the scheme;

— finally, as the transfer of real estate is an activity in which there is trade between Member States, it cannot be excluded that the scheme affects trade between Member States.

(21) In its Decision 2002/581/EC ([5]) on the tax measures for banks and banking foundations implemented by Italy, the Commission considered that tax exemptions aimed at restructuring sectors in difficulty by specifically favouring mergers and acquisitions should be regarded as aid aimed at reducing firms' current expenses and thus constituting operating aid. However, in its decision to initiate the present formal investigation procedure this matter was left undecided as the Commission took into consideration the arguments put forward by Germany in order to demonstrate that the present aid measure could be finally assessed in a different way.

(22) The Commission had serious doubts whether the scheme proposed by Germany for the Article 87(3)(c) labour market region of Berlin is proportionate to the objective and does not distort competition to an extent contrary to the common interest, for the following reasons:

— the vacancy rate in Berlin, at 5,3 % for privately owned apartments and 8,77 % for communal apartments, is significantly lower than in the new *Länder*, where the overall vacancy rate is 14,2 %. Almost all vacant apartments are located in the eastern districts of Berlin;

— no data had been provided by Germany to demonstrate that the labour market region of Berlin was suffering from depopulation in a way that is comparable with the Article 87(3)(a) assisted areas covered by the scheme;

— whereas the typical amounts of real estate transfer tax involved in mergers and acquisitions between housing companies and associations are in the range of EUR 150 000 and EUR 1,5 million for the Article 87(3)(a) areas, the corresponding amounts for the city of Berlin — based on past experience — lie between EUR 1,4 million and EUR 6,7 million.

([5]) OJ L 184, 13.7.2002, p. 27.

— No data had been provided by Germany that would demonstrate that the temporary tax exemption was likely to contribute to activating the real estate market in the labour market region of Berlin as well as having positive spill-over effects and that it is extremely unlikely that private sector involvement in remediation can be expected without any state intervention.

4. COMMENTS FROM GERMANY

(23) Germany argues that aid granted under the present aid scheme cannot be considered to be operating aid under the Community guidelines on national regional aid ([6]). The particularity of the scheme is to exempt transactions regarding real estate situated in the labour market region of Berlin from real estate transfer tax. Beneficiaries are housing companies and associations where the transaction is the result of a merger or acquisition between such entities. Only in such cases will the companies which are involved in the transaction be exempted temporarily from the real estate transfer tax. As a merger or acquisition between two housing companies (or housing associations) takes place in principle only once, Germany does not regard the aid as compensating for current expenses.

(24) Furthermore, the housing companies and associations will in principle continue to pay the real estate transfer tax when buying property. As the regular business activity of housing companies and associations in general is the purchase and sale and/or rent of property, the payment of the real estate transfer tax would constitute regular current expenses of the companies concerned. However, the scheme does not affect these regular current expenses as it does not apply in cases where housing companies and associations simply acquire or sell a piece of property.

(25) With regard to the alleged lower vacancy rates in Berlin, Germany argues that such a contention is unfounded as the Commission's argument is based on average data, whereas certain districts in Berlin have vacancy rates which are comparable to those in the new *Länder*. According to the data provided by Germany, the districts with similar low vacancy rates (around 14 %) are mostly located in the eastern districts of Berlin, e.g. *Hohenschönhausen*, *Marzahn-Hellersdorf* and *Lichtenberg*.

(26) As regards depopulation, Germany argues that the labour market region of Berlin suffered from a decline of population in recent years, resulting in a decline in demand for housing. However, the statistical data provided by Germany show that, having become the capital for the Federal Republic of Germany, Berlin is not suffering from a decline of population, but has a stable population trend. Nevertheless, the data do confirm that the eastern districts of Berlin have suffered from out-migration in comparable proportions to the new *Länder*.

(27) Germany confirmed that aid amounts involved in mergers between housing companies and housing associations in the labour market region of Berlin are substantially higher than in the Article 87(3)(a) assisted areas, which is due to the size and higher value of real estate in the labour market region of Berlin ([7]).

(28) Germany claims that mergers and acquisitions in the housing sector will have a positive spill-over effect on the housing market as the newly created undertakings have the capacity to start the overdue restructuring processes, e.g. by putting vacant real estate on the market and/or by demolishing run-down apartments. As the real estate transfer tax puts a serious strain on the overall liquidity of the companies involved, levying it delays the necessary investments.

5. ASSESSMENT OF THE AID

5.1. Existence of State aid

(29) For the reasons given in its letter of 1 December 2004 (recitals 20, 21 and 22), which have not been contested by Germany, the Commission considers that the present aid scheme 'Real Estate Transfer Tax Exemption for Housing Companies in the New *Länder*' involves State aid pursuant to Article 87(1) of the EC Treaty.

5.2. Legality of the measure

(30) By notifying the aid scheme as a draft, Germany met its obligation under Article 88(3) of the EC Treaty.

5.3. Compatibility of the measure

(31) Article 87(2) of the EC Treaty provides that certain types of aid are compatible with the common market. In view of the purpose of the aid, which is to redevelop the housing market through the demolition of empty apartment spaces, the Commission considers that Article 87(2)(a) and (b) of the EC Treaty are not applicable to the aid scheme, nor has Germany argued that this may be the case.

([6]) OJ C 74, 10.3.1998, p. 9; point 4.15 of the guidelines states that regional aid aimed at reducing a firm's current expenses (so-called operating aid) is normally prohibited.

([7]) Based on information provided in a letter dated 21 June 2004, the assets of certain housing companies in Berlin amount to between EUR 552,4 million and EUR 1 202 million.

(32) Nor is Article 87(2)(c) of the EC Treaty applicable, as the oversupply of housing was not caused by the division of Germany and Berlin, but rather by tax measures to promote new buildings and refurbishments in the new *Länder* and Berlin during the years 1990 to 1998.

(33) Article 87(3) of the EC Treaty specifies other forms of aid which may be regarded as compatible with the common market. In view of the nature and purpose of the scheme and its geographical scope, the Commission considers that Article 87(3)(b) and (d) of the EC Treaty are not applicable. Article 87(3)(a) of the EC Treaty allows aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment. However, as the labour market region of Berlin is an assisted area under Article 87(3)(c) of the EC Treaty, Article 87(3)(a) is not applicable.

(34) In assessing whether the exemptions provided for in Article 87(3) (c) of the EC Treaty can apply, the Court of Justice of the European Communities held in Case C-169/95 *Kingdom of Spain* v *Commission* ([8]) that Article 87(3) 'gives the Commission a discretion the exercise of which involves economic and social assessments that must be made in a Community context'. For certain types of aid, the Commission has defined how it will exercise these discretionary powers, be it in the form of block exemptions or of Community frameworks, guidelines or notices. Where such secondary texts exist, the Commission must follow them in its assessment of cases of aid.

(35) In this respect, the Commission notes that the scheme is not limited to measures that are in line with Commission Regulation (EC) No 70/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to state aid to small and medium-sized enterprises ([9]), or to measures covered by the Community guidelines on state aid for rescuing and restructuring firms in difficulty ([10]), or to any of the following instruments: the Community framework for State aid for research and development ([11]), Commission Regulation (EC) No 68/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to training aid ([12]) or Commission Regulation (EC) No 2204/2002 of 12 December 2002 on the application of Articles 87 and 88 of the EC Treaty to State aid for employment ([13]). Therefore, none of these guidelines, frameworks or regulations are applicable to the present case. The Community guidelines on state aid for environmental protection ([14]) are not applicable either because the scheme is not intended for environmental protection.

(36) For assisted areas covered by Article 87(3)(c) of the EC Treaty such as the labour market region of Berlin, the guidelines on national regional aid (hereinafter referred to as the regional aid guidelines) apply. The regional aid guidelines support investment and job creation by promoting the expansion, modernisation and diversification of the establishments located in such less favoured regions. However, the regional aid guidelines also state that aid confined to one area of activity may have a major impact on competition in the relevant market, and its effects on regional development are likely to be limited.

(37) In any case, the regional aid guidelines only apply to certain categories of aid which include aid for initial investment, aid for job creation and, exceptionally, operating aid. According to point 4.15 of the regional aid guidelines, such operating aid may only be granted in regions eligible under the derogation in Article 87(3)(a) of the EC Treaty provided that it is justified in terms of its contribution to regional development and its nature and that its level is proportional to the handicaps it seeks to alleviate.

(38) The present tax exemption for housing companies active in the labour market region of Berlin does not appear to be specifically linked to an initial investment or the extension of an existing establishment as provided in point 4.4 of the regional aid guidelines. Nor does it concern any job creation linked to the carrying out of an initial investment project as provided for in point 4.11 of the regional aid guidelines.

(39) Consequently, the scheme does not fall within the scope of any existing guidelines, frameworks or regulations adopted on the basis of Article 87(3)(c) of the EC Treaty. The Commission will thus assess the scheme directly upon the basis of Article 87(3)(c) of the EC Treaty.

([8]) [1997] ECR I-135. See also judgement dated 17 September 1980 in case 730/79 *Philip Morris* v *Commission* [1980] ECR I-2671.
([9]) OJ L 10, 13.1.2001, p. 33. Regulation as last amended by Regulation (EC) No 1040/2006 (OJ L 187, 8.7.2006, p. 8).
([10]) OJ C 244, 1.10.2004, p. 2.
([11]) OJ C 45, 17.2.1996, p. 5.
([12]) OJ L 10, 13.1.2001, p. 20. Regulation as last amended by Regulation (EC) No 1040/2006.
([13]) OJ L 337, 13.12.2002, p. 3. Regulation as last amended by Regulation (EC) No 1040/2006.
([14]) OJ C 37, 3.2.2001, p. 3.

5.3.1. *Compatibility with Article 87(3)(c) of the EC Treaty*

(40) Article 87(3)(c) of the EC Treaty allows State aid measures intended to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest. When examining whether aid is compatible under Article 87(3)(c) of the EC Treaty, the Commission takes into account the Community's objectives and determines whether the State aid is an appropriate instrument for dealing with the problem as opposed to other policy instruments and whether the aid is proportionate to the objective pursued.

(41) The objective of the present aid scheme is to redevelop the housing market in the labour market region of Berlin by eliminating oversupply and by helping housing companies and housing associations to provide the quality of housing which is actually demanded. By enabling companies to demolish unoccupied apartment blocks, Germany intends to improve the physical appearance and infrastructure of certain areas in the labour market region of Berlin […].

(42) Tackling physical deprivation and regenerating […] urban areas are an increasing political priority in the Community. The Commission has accordingly approved aid schemes directly under Article 87(3)(c) of the EC Treaty in the field of urban regeneration, for example in Commission Decision 2003/433/EC of 21 January 2003 on the aid scheme 'Stamp duty exemption for non-residential properties in disadvantaged areas' notified by the United Kingdom ([15]) or in State aid N 211/03 '*Nouvelles Zones Franches Urbaines*' ([16]). In these decisions the Commission acknowledged that many cities in the Community, including the most prosperous ones, contain 'pockets of deprivation', i.e. areas that are characterised by a lack of social inclusion and a poor physical environment in terms of infrastructure, housing and local amenities. The Commission recognised the need for public financial aid in order to support the urban regeneration process and found that the schemes were compatible under the Community objectives of economic and social cohesion, which implies the reduction of disparities between levels of development of different areas.

(43) Germany acknowledged that the city of Berlin — now that it had become the capital of the Federal Republic of Germany — was not suffering from a decline in population. A study provided by Germany indicates that the number of inhabitants will remain stable. However, what is also clear from the data is that the districts *Marzahn-Hellersdorf*, *Lichtenberg* and *Hohenschönhausen* have indeed suffered from out-migration in comparable proportions to that in the new *Länder*. As a result the vacancy rate in *Marzahn-Hellersdorf* is as high as 14,1 %.

(44) The Commission notes, however, that under the present aid scheme not only housing companies and housing associations owning real estate in certain districts in the labour market region of Berlin (e.g. *Marzahn-Hellersdorf*, *Lichtenberg*, *Hohenschönhausen*, *Neukölln*) can benefit from real estate transfer tax exemptions, but that the scheme applies to all such undertakings in the whole of the labour market region of Berlin. While the Commission recognises that the regeneration process in Berlin might suffer from several handicaps resulting from its unique past and that the above mentioned districts might be considered 'pockets of deprivation', it is of the opinion that the labour market region of Berlin as a whole is not in need of aid to support urban regeneration.

(45) Germany did not provide data for the labour market region of Berlin to demonstrate that State aid to support mergers and acquisitions among housing companies (housing associations) is in fact the appropriate instrument for tackling efficiently the oversupply of apartments in certain districts. Whether or not the scheme will result in the undertakings actually demolishing empty housing space in districts like *Marzahn-Hellersdorf*, *Lichtenberg*, *Hohenschönhausen* and *Neukölln* remains unknown.

5.3.2. *Effect on trade to an extent contrary to the common interest*

(46) Having established that urban regeneration falls within the Community's objectives, the Commission will now assess whether trading conditions are adversely effected to an extent contrary to the common interest.

(47) Germany acknowledged that the aid amounts involved in mergers and acquisitions between housing companies (housing associations) in the labour market region of Berlin are substantially higher than in Article 87(3)(a) assisted areas, which is due to the size and the higher value of real estate in the labour market region of Berlin ([17]). Germany has confirmed that aid for housing companies in Berlin under the present scheme can amount up to EUR 6,7 million. The Commission considers that aid of this magnitude distorts competition and affects trade within the Community. In addition, the present scheme does not prevent housing companies (housing associations) from merging more than once, and no mechanism is put into place to monitor the cumulation of aid.

([15]) OJ L 149, 17.6.2003, p. 18.

([16]) See website: http://europa.eu.int/comm/secretariat_general/sgb/state_aids/industrie_2003.htm

([17]) According to the information provided in a letter sent on 21 June 2004, the assets of certain housing companies in Berlin amount to between EUR 542,4 million and EUR 1 202 million.

(48) In view of the fact that the scheme potentially benefits all housing companies and housing associations owning real estate in the labour market region of Berlin whereas only certain districts are in fact in need of regeneration, the Commission concludes the scheme proposed by Germany for the labour market region of Berlin, which is an assisted area covered by Article 87(3)(c) of the EC Treaty, is not proportionate to the objective pursued. The Commission considers that promoting real estate transfer in the whole of the labour market region of Berlin will prove to be ineffective and that the aid adversely affects trade and competition contrary to the common interest.

6. **CONCLUSIONS**

(49) The regional aid guidelines are not applicable in this specific case. The scheme does not support initial investment or job creation.

(50) The Commission has considered it appropriate to examine the aid measure directly on the basis of Article 87(3)(c) of the EC Treaty as no Community framework, guidelines or regulations are applicable to it. Though urban regeneration falls within the Community objectives of economic cohesion and sustainable development, the present measure is not well targeted.

(51) The measure is aimed at the labour market region of Berlin as a whole, whereas only certain districts suffer from deprivation. The Commission therefore concludes that the scheme is disproportionately wide. Germany did not provide any information on how the aid measure will specifically address the districts which are in need of regeneration and finally lead to the demolition of empty housing. Germany acknowledged that all housing companies and associations active in the labour market region of Berlin are eligible for the tax exemption under the measure and even if they do not own any real estate in the deprived districts.

(52) The aid amounts involved in the measure are significant, especially in cases where a housing company or housing association merges several times or receives cumulated aid. The Commission concludes that the aid scheme adversely affects trading conditions to an extent contrary to the common interest,

HAS ADOPTED THIS DECISION:

Article 1

The State aid scheme '*Real Estate Transfer Tax Exemption for Housing Companies in the Neue Länder*' is incompatible with the common market as far as the labour market region Berlin is concerned.

The aid may accordingly not be implemented.

Article 2

Germany shall inform the Commission, within two months of notification of this decision, of the measures taken to comply with it.

Article 3

This decision is addressed to the Federal Republic of Germany.

Done at Brussels, 23 November 2005.

For the Commission

Neelie KROES

Member of the Commission