



Brussels, 27.03.2014
C(2014) 1811 final

PUBLIC VERSION

This document is made available for
information purposes only.

Subject: SA.36346 (2013/N) – Germany – GRW land development scheme for industrial and commercial use

Sir,

1. PROCEDURE

- (1) By letter of 15 March 2013, the German authorities notified, in accordance with Article 108(3) of the Treaty on the Functioning of the European Union ("TFEU"), a joint programme scheme for the improvement of regional economic structure¹ ("GRW Coordination Framework") comprising eight different measures².
- (2) This decision addresses only the measure concerning public funding for the development of land by, in principle, public authorities, and its subsequent sale to interested third parties, as described in section 3.2.1 of Part II B of the GRW Coordination Framework (in the following referred to as "the measure").
- (3) By letter of 2 April 2013, the German authorities provided additional information on the measure. The Commission requested further information by letter dated 7 May 2013, to which the German authorities replied on 26 June 2013.

¹ *Gemeinschaftsaufgabe "Verbesserung der regionalen Wirtschaftsstruktur" (GRW) – kommunale wirtschaftsnahe Infrastruktur.*

² Registered individually under SA.36346, SA.36347, SA.36348, SA.36349, SA.36351, SA.36352 and SA.36353, SA.37555.

Seiner Exzellenz Herrn Frank-Walter STEINMEIER
Bundesminister des Auswärtigen
Werderscher Markt 1
D - 10117 Berlin

- (4) By letter of 4 July 2013, the German authorities requested the suspension of the procedure until 2 September 2013, to which the Commission services agreed by letter of 15 July 2013.
- (5) On 19 September 2013, a meeting took place between the German authorities and the Commission services. Following that meeting, the procedure was suspended on request by Germany until 19 November 2013, when further information was submitted.
- (6) On 15 January 2014, a second meeting took place between the German authorities and the Commission services. This was followed by a request for information sent on 16 January 2014, to which the German authorities replied on 28 February 2014.
- (7) Germany takes the view that the measure does not constitute State aid pursuant to Article 107(1) TFEU and notified the scheme for reasons of legal certainty only.

2. DESCRIPTION OF THE MEASURE

2.1. Background

- (8) The German authorities previously notified the measure in 2002 for application during the period 2004-2006. In its decision of 9 July 2003³, the Commission concluded that the scheme did not constitute State aid within the meaning of the Treaty. The Commission considered that the development and revitalisation of land did not constitute an economic activity and public funding of local public authorities for such an activity was therefore an intrastate financial transfer without any state aid aspects. At the level of developers the presence of aid was excluded, since they were selected through public tender procedures. At the level of the final purchaser of the land, no aid was considered to be present, since the sale took place on market terms in line with the principles of the Commission's land sale communication⁴. Bespoke development was not eligible for funding under the previously notified measure.
- (9) Although the essence of the measure has not changed since the Commission's 2003 decision, the German authorities decided to re-notify the measure in light of the *Leipzig/Halle*⁵ judgment of the General Court for reasons of legal certainty. The German authorities maintain the view that the measure does not involve State aid at any of the three levels identified above.

³ Commission decision of 9 July 2003, case N 644/A/B/2002.

⁴ Commission Communication on State aid elements in sales of land and buildings to public authorities, OJ C 209, 10.7.1997, p. 3.

⁵ Joined Cases T-443/08 and T-455/08 *Freistaat Sachsen, Flughafen Leipzig/Halle et al v Commission* [2011] ECR II-1311, in particular paragraphs 93 and 94, upheld on appeal, see Case C-288/11 P, *Mitteldeutsche Flughafen AG and Flughafen Leipzig-Halle GmbH v Commission* [2012] ECR I-0000.

2.2. Aim of the measure and legal basis

- (10) As stated above, the measure belongs to a scheme for the improvement of regional economic structures, the aim of which is to support regional development and social and territorial cohesion.⁶
- (11) The measure is described in section 3.2.1 of Part II B of the GRW Coordination framework, which was based on the GRWG Act of 6 October 1969, amended on 7 September 2007.⁷ The general provisions of section 3.1 of Part II B of the GRW Coordination Framework also apply to the measure.

2.3. Content of the measure

- (12) The notified measure concerns public funding for the development and revitalisation of land by, in principle, local authorities for the subsequent construction of industrial and commercial infrastructure. It can be divided in two steps: 1) the renovation/development of land which is eligible for funding under the GRW Coordination Framework; and 2) the subsequent sale of the remedied/developed land to any interested third party.
- (13) The support consists of direct grants. The joint task co-financing rate is in principle 60% of the costs for activities eligible for funding.⁸ When the measure is implemented through inter-municipal cooperation, when it ties in with a regional development strategy, or when derelict sites (brownfield sites on land formerly used for industry, commerce, and transport infrastructure or subject to a change of land use) are being regenerated with due respect to the polluter pays principle, the joint task co-financing rate can be up to 90%.⁹
- (14) Eligible costs¹⁰ under the measure are the development, expansion and revitalisation of industrial and commercial areas. Included in the eligible costs are, in particular,:
- groundwork for making land ready to build;
 - construction costs for streets, street lighting, anti-noise barriers, landscaping;
 - connection costs to the mainframe for water, electricity, gas and sewage;
 - environmental protection measures and decontamination, provided that the polluter pays principle is respected, that there is a direct technical link to the measure in question, and that they are essential for its implementation as well as economically justifiable;
 - removal of constructions that exist on industrial and commercial sites (old factories, military buildings or supply facilities).
- (15) The funding is limited to eligible regions selected on the basis of a number of indicators, including notably unemployment rate, gross annual salary of workers,

⁶ Point 1.1 of Part II B of the Coordination Framework.

⁷ Gemeinschaftsaufgabe "Verbesserung der regionalen Wirtschaftsstruktur - Law on the joint Federal Government/Länder scheme for improving regional economic structures (GRWG).

⁸ Point 3.1.1 first indent of part B II of the Coordination Framework.

⁹ Point 3.1.1 second indent of part B II of the Coordination Framework.

¹⁰ Point 3.2.1 of part B II of the Coordination Framework.

work force prognosis and infrastructure indicator, as defined in Part I of the GRW Coordination Framework.¹¹

- (16) Projects are selected on the basis of eligibility criteria¹² laid down in rules defined in advance by the Law on the joint Federal Government/Länder scheme for improving regional economic structures (GRWG)¹³ and by the Coordination Committee of the GRW Framework.¹⁴ The federal states may define additional restrictive eligibility conditions in their aid scheme guidelines.
- (17) These criteria most notably include:
- contribution to the improvement of infrastructure in the areas in question;
 - strengthening of the regional economic potential;
 - increasing the productivity and competitiveness of undertakings.
- (18) Customised development of land for ex ante identified undertakings and tailored to their needs (bespoke development) is excluded from the scheme.¹⁵ The same holds for land redevelopment for large retail stores¹⁶.
- (19) A recovery clause is provided for situations in which the eligibility conditions for funding are no longer met by the selected projects.¹⁷

2.4. Bodies responsible for implementing the projects

- (20) The direct recipients of the funds under the measure are the bodies responsible for implementing the projects which are selected for funding. Eligible bodies are in principle local authorities or associations of local authorities, which are granted preference.¹⁸ In some cases, responsible bodies can also be non-profit organisations or joint ventures between municipalities or non-profit entities on one hand, and commercial enterprises on the other, where a majority share is held by the local authorities or the non-profit participants.¹⁹
- (21) In most cases, the body responsible for implementing the project is the owner of the land. Where the responsible body does not own the land which is selected for funding under the measure, it must conclude an agreement with the owner of the land conferring the right of use and ultimately sell that land to the responsible body. The possible profit from such a sale must be for the responsible body's account.²⁰

¹¹ Section 1.1.1 of Part II B of the Coordination Framework.

¹² Point 1.4 of Part II B of the Coordination Framework.

¹³ Article 4(3) of the GRWG, and section 1.4 of Part II B of the Coordination Framework.

¹⁴ Composed of the Federal Government and the governments of the federal states.

¹⁵ Point 3.2.1 second indent of Part II B of the GRW Coordination Framework.

¹⁶ Point 3.1.9 of Part II B of the GRW Coordination Framework.

¹⁷ Point 2 of part II B of the GRW Coordination Framework.

¹⁸ Point 3.1.3, first sentence of Part II B of the GRW Coordination Framework, and Article 2 (2) of the Law on the joint Federal Government/Länder scheme for improving regional economic structures (GRWG).

¹⁹ Point 3.1.3 second indent of Part II B of the GRW Coordination Framework.

²⁰ Point 3.2.1 of Part II B of the GRW Coordination Framework.

- (22) Claw-back clauses are included to recover any profit from the body responsible for implementing the project resulting from the sale of the redeveloped land, taking into account the costs incurred.²¹

2.5. Developers

- (23) Bodies responsible for implementing the projects can entrust the implementation to developers through an open, transparent and non-discriminatory tender procedure. In such cases, the developer's commercial activity must be restricted to carrying out the relevant works or marketing of the land; they may not use the land itself.²²
- (24) In particular, the following conditions must be fulfilled:
- developers are selected in compliance with rules on public procurement and State aid,
 - the development or marketing company must receive a normal market payment determined through the bidding procedure for its services,
 - proceeds obtained from the marketing are to be paid to the body responsible for implementing the project,
 - the body responsible for implementing the project has sufficient influence over the design of the project to ensure that its interests are served,
 - the developer's commercial activity must be restricted to the operation or marketing of the land, and
 - the developer may not use the land itself.

2.6. Final purchasers of the developed land

- (25) After the development of the land, any interested third party may buy the remedied land, which must be sold in accordance with the guidance provided in the Commission's land sale communication, i.e. at a market price.

2.7. Duration and budget

- (26) The GRW Framework will enter into force on 1 July 2014 and last until 31 December 2020. According to the German authorities, the envisaged budget planned under the GRW Framework can be only estimated at this stage, and the annual overall amount projected is EUR 200 million.

3. POSITION OF THE GERMAN AUTHORITIES

- (27) The German authorities consider the measure not to constitute State aid within the meaning of Article 107(1) TFEU. As regards local authorities as bodies responsible for implementing the projects, the German authorities consider that the measure finances non-economic activities and constitutes a pure intra-State financial transfer without State aid aspects. More generally, the German authorities claim that the measure does not involve any economic advantage to any body responsible

²¹ Point 3.1.5 and 3.2.1 of Part II B of the Coordination Framework.

²² Point 3.1.4 of Part II B of the GRW Coordination Framework.

for implementing the projects because of claw back mechanisms provided thereunder.

- (28) If any land work is to be carried out by private companies or legally independent municipal companies, these will be selected through an open, non-discriminatory procurement procedure and those companies may not use the land itself. The measure therefore confers no advantage upon them.
- (29) Finally, as regards the purchasers of the developed land, the German authorities consider that there is no State aid since the land is sold at a market price in accordance with the Commission's land sale communication.

4. ASSESSMENT OF THE MEASURE

4.1. Presence of State aid within the meaning of Article 107(1) TFEU

- (30) According to Article 107(1) of the TFEU, *"save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market"*.
- (31) The qualification of a measure as aid within the meaning of this provision therefore requires the following cumulative conditions to be met: (i) the measure must be imputable to the State and financed through State resources; (ii) it must confer an advantage on its recipient; (iii) that advantage must be selective; and (iv) the measure must distort or threaten to distort competition and have the potential to affect trade between Member States.
- (32) In the present case, the presence of State aid should be examined at three possible levels: at the level of the bodies responsible for implementing the projects, developers, and final purchasers of the developed land. The first are the direct recipients of the grants to carry out the land development/remediation projects, whereas the latter two are indirectly concerned by the measure.

4.2. Assessment at the level of the bodies responsible for implementing the projects

4.2.1. Land development by local authorities

- (33) The measure concerns a scheme which provides funding for the development and revitalisation of land by, in principle, local authorities, for subsequent construction of industrial and commercial infrastructure. It entails the decontamination and revitalization of land located in the eligible areas for GRW funding, while respecting the "polluter pays" principle. The measure does not concern funding the construction of buildings or other structures, nor the management or administering the operation of land and/or buildings, but only making the terrain ready to build upon and ensuring that it is connected to utilities (water, gas, sewage and electricity) and transport networks (rail and roads).

- (34) Activities which are part of the performance of public duties are non-economic in nature. The development and revitalization of public land by local authorities (with the use of public funds) is not an economic activity, but part of their public tasks, namely the provision and supervision of land in line with local urban and spatial development plans.
- (35) When the land is being redeveloped by local public authorities, these are the direct recipients of public funds under the measure. The transfer of resources from the Federal Republic of Germany and the federal states to the budget of the local authorities for carrying out land development projects represents an intrastate financial transfer between public authorities and therefore does not constitute State aid within the meaning of Article 107(1) TFEU.
- (36) Moreover, the claw back mechanism provides that bodies responsible for implementing the projects are under the obligation to refund any possible profits from the sale of the redeveloped site to the grant awarding body.²³ Therefore, an advantage within the meaning of Article 107(1) TFEU at the level of the responsible body can be excluded for these development projects.

4.2.2. Land development by other entities

- (37) According to the German authorities, in rare cases the bodies responsible for implementing the projects are non-profit entities or joint ventures between municipalities or non-profit organisations on the one hand, and commercial enterprises on the other. In these cases, where the bodies responsible for implementing the projects are not municipalities, the measure cannot be considered to represent a pure intrastate financial transfer. However, since the measure provides that all responsible bodies for implementing the projects are under the obligation to refund any profits from the sale of the redeveloped site to the grant awarding body²⁴, an advantage within the meaning of Article 107(1) TFEU at the level of the responsible body can be excluded for these development projects.

4.2.3. Land development in cases where the body responsible for implementing the project is not the owner of the land

- (38) The measure provides that in rare cases where the body responsible for implementing the project is not the owner of the land, the latter has to assume the contractual obligation to pass on to the responsible body all advantages from the development of the land, including any increase in value of the land. Therefore, the owner of the land does not receive an advantage and is therefore not a beneficiary of the measure within the meaning of Article 107(1) TFEU.

²³ Point 3.2.1 of Part II B of the GRW Coordination Framework.

²⁴ Point 3.1.5 second paragraph of Part II B of the GRW Coordination Framework.

4.3. Assessment at the level of developers

- (39) In so far as developers are involved, according to the provisions of the measure, they would always be selected through an open, transparent and non-discriminatory public procurement procedure²⁵ and thus provide their services against a market conform fee. Under these conditions, there is no advantage within the meaning of Article 107(1) TFEU to developers.

4.4. Assessment at the level of the purchaser of the developed land

- (40) It needs to be assessed whether the final purchaser²⁶ of the redeveloped land must be regarded as an indirect beneficiary of aid. This could be the case if the buyer receives land – as an indirect result of the measure – at a price below the market price.
- (41) The notified measure, however, provides that the land has to be sold in accordance with the guidance provided in the Commission's land sale communication. Therefore, the measure contains sufficient safeguards to ensure that the buyer pays a market price for the land, securing that the buyer is not a beneficiary of the measure within the meaning of Article 107(1) TFEU.

5. DECISION

- (42) The Commission has accordingly decided, on the basis of the foregoing assessment, that the measure does not constitute State aid pursuant to Article 107(1) of the TFEU.
- (43) If this letter contains confidential information, which should not be published, please inform the Commission services within 15 working days after receipt of this letter by providing reasons. If the Commission does not obtain a reasoned request within this delay, it will presume that you agree with the publication towards third parties and with the publication of the entire wording in the authentic language on the following internet website:

<http://ec.europa.eu/competition/elojade/isef/index.cfm>

Your request should be sent by registered letter or fax to:

European Commission
Directorate-General for Competition
State Aid Registry
Place Madou 1 / Madouplein 1
B-1049 Brussels
Belgium
Fax No: +32 2 29 61242

²⁵ Point 3.1.4 and 3.1.5 of Part II B of the GRW Coordination Framework.

²⁶ According to the German authorities, large retail stores will be explicitly excluded in public sales efforts. The corresponding bidders will not be taken into account.

Yours faithfully,
For the Commission

Joaquín ALMUNIA
Vice-president of the Commission