



## EUROPEAN COMMISSION

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**PUBLIC VERSION**

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Subject: **State aid SA.33206 (2015/NN) – Alleged unlawful State aid to German Youth Hostel Association ("Deutsches Jugendherbergswerk") – Tax measures**

Sir,

### **1. PROCEDURE**

- (1) By letter dated 17 May 2011, A & O Hotels and Hostels Holding AG ("the complainant") submitted a complaint regarding alleged unlawful aid to German Youth Hostel Association – Deutsches Jugendherbergswerk (hereinafter: "DJH") granted by the German authorities. The complaint was registered under reference number 2011/055791. By letter of 26 July 2011 (reference number 2011/081167) the complainant amended its complaint and submitted additional information.
- (2) The Commission invited the German authorities by letters of 23 August 2011 and 10 April 2012 registered under reference number 2011/089075 and 2012/036996 respectively to comment on the allegations formulated in the complaint. Germany reacted by submission of information dated 20 October 2011 (reference number 2011/113014) and 8 May 2012 (reference number 2012/048396). Additional information was submitted by Germany with letters dated 30 January 2013 (reference number 2013/009915), 31 January 2013 (reference number 2013/010304), 25 June 2014 (reference number 2014/066751), 12 August 2014 (reference number 2014/084056), 10 September 2014 (reference number 2014/091161), and 23 January 2015 (reference number 2015/007199). A trilateral meeting with the German authorities and the complainant was held on 20 October 2014. By letter of 18 December 2014 (reference number 2014/129135) the

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Commission services sent a preliminary assessment letter rejecting the part of the complaint with respect to fiscal measures. The complainant responded by letters dated 18 January 2015 (reference number 2015/004116) and 14 March 2015 (reference number 2015/026832). Germany submitted additional information on 15 April 2015 (reference number 2015/035496).

- (3) The present decision deals exclusively with the alleged State aid elements in the form of tax exemptions from which DJH is benefiting.

## **2. DETAILED DESCRIPTION OF THE ALLEGED MEASURE**

### **2.1. Complainant and complaint**

- (4) The complainant A & O Hotels and Hostels Holding AG is a low budget private hotel and hostel operator. Founded in 2000, A&O Hotels and Hostels is operating in Berlin, Dortmund, Dresden, Dusseldorf, Frankfurt, Graz, Hamburg, Karlsruhe, Cologne, Leipzig, Nuremberg, Prague, Vienna and Munich. The offered combination of hotel and hostel under one roof targets many different customer groups, such as backpackers, solo travellers, families, school classes or associations.
- (5) The complainant alleges that DJH receives public funding from Germany at national, regional and local level for investing into hotel-type operations. The complainant submitted a non-exhaustive list of cases spread all over Germany where investments in the construction and renovation of youth hostels were supported. This part of the complaint is now registered as SA.43068 (2015/CP) and is not covered by the present decision. Furthermore, the complainant addresses various tax exemptions of which DJH would benefit (e.g. from corporate income tax, value added tax, etc.) for its operations. This part of the complaint is registered as SA.33206 (2015/NN) and is assessed in the present decision.
- (6) In the view of the complainant, which is operating private youth hostels, the measures in favour of DJH create an uneven playing field and distort competition on the market for youth hostels.

### **2.2. DESCRIPTION OF THE MEASURE**

- (7) The German Youth Hostel Association is a public-benefit association. The DJH is divided into 14 regional (*Länder*) associations. Each regional association is legally and organizationally independent and an independent member of the DJH.
- (8) The DJH itself as well as its legally independent subdivisions qualify as tax-privileged corporations within the meaning of §§ 51 and 52 para. 2 Nr. 4 ("advancement of assistance to young people") of the German General Fiscal Code ("Abgabenordnung" or "AO" adopted in 1977).
- (9) The German General Fiscal Code regulates in §§ 51 – 68 the concept of "tax privileged corporation". DJH is mentioned in § 68 of the German General Fiscal Code, which entrusts the youth hostels with the social objective of performing a tax-exempted specific dedicated activity ("*Zweckbetrieb*") whereby the application of the tax exemption excludes the activity related to accommodation of persons above the age of 27 years and is linked to the condition that the accommodation of

persons aged above 27 years does not exceed the 10% of the total number of accommodations.<sup>1</sup>

- (10) The tax privileged corporation is in principle exempted from corporate and local business tax as laid down in § 5 I Nr. 9 of the German Corporate Income Tax Act ("Körperschaftsteuergesetz") and § 3 Nr. 6 of the Local Business Tax Code ("Gewerbesteuer-gesetz").
- (11) It is also exempt from the tax on real property, as laid down in § 3 I Nr. 3 b of the German Real Property Tax Act ("Grundsteuergesetz" from 10 August 1951). According to the German Property Tax Act, the premises of the youth hostels have been exempted from the tax on real property. Furthermore, according to the Implementing Regulation on Property tax ("Grundsteuerrichtlinie") dated 10 April 1954, Nr. 27, the activity of the DJH is of public-benefit nature for an unlimited time period.

### **3. COMMENTS AND INFORMATION FROM GERMANY**

- (12) The German authorities put forward the argument that the DJH benefited from the status as tax-privileged corporation and therefore from exemptions from corporate tax, local business tax and tax on real property since before 1950. They submit that the supporting measures even date back to legislation from 1922 Youth Welfare Law ("Reichsjugendwohlfahrtsgesetz").
- (13) Germany provided comprehensive evidence to prove that the German General Fiscal Code adopted in 1977 codifies pre-existing rules dating from before the creation of the European Economic Community, without changing these rules materially.

### **4. ASSESSMENT OF THE ALLEGED AID MEASURE**

#### **4.1. Exemption from corporate, local business and real property tax**

- (14) The German Youth Hostel Association and its legally independent subdivisions qualify as tax-privileged corporations within the meaning of §§ 51 and 52 para. 2 Nr. 4 ("advancement of assistance to young people") of the German Fiscal Code. As such they are tax privileged corporations and are exempt from corporate tax (§ 5 I Nr. 9 of the German Corporate Income Tax Act), local business tax (§ 3 Nr. 6 of the Local Business Tax Code) and tax on real property (§ 3 I Nr. 3 b of the German Real Property Tax Code).
- (15) The current concept was already present in the 1953 Regulation on public-benefit organizations ("Gemeinnützigkeitsverordnung 1953", BGBl. I 1953, p. 1592), which implements §§ 17 to 19 of Law on the modification of certain tax rules from 1934 ("Steueranpassungsgesetz of 16 October 1934", Reichsgesetzbl. I S. 925). Before, the same concept was present in the 1941 Regulation on charitable organizations ("Gemeinnützigkeitsverordnung from 16 December 1941, in the following GemVO 1941", Reichsministerialbl. S. 299), which was also based on §§ 17 to 19 of the 1934 Law on the modification of certain tax rules.

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<sup>1</sup> Verfügung der OFD Frankfurt S 0187 A – 20 St 53 of 29 March 2012.

- (16) Nr. 27 of the Implementing Regulation on Property tax of 10<sup>th</sup> of April 1954 *expressis verbis* states, that the activity of the German Youth Hostel Association and its members on the *Länder* level is clearly non-profit oriented with regards to § 17 of the the Law on the Modification of certain tax rules of 16 October 1934.
- (17) As of 1953, the Regulation on charitable organizations implemented §§ 17 to 19 of the Law on the Modification of certain tax rules which regulate the “*Gemeinnützigkeit*” and hence the tax exemption of the DJH. The confirmation of the “*Gemeinnützigkeit*” was in the competence of the tax authorities of the *Länder* as provided by Article 108 of the German constitution (“Grundgesetz”).
- (18) In 1977, § 11 of the Implementing Regulation on corporate tax (“*Körperschaftsteuerdurchführungsverordnung*” - KStDV 1926) was codified and was transformed into §§ 51 to 68 of the General Fiscal Code. § 68 1. b) AO explicitly mentions youth hostels. The examples of “*Zweckbetriebe*” in § 68 AO do not contain any differences in substance compared to § 9 of the 1953 Regulation on charitable organizations. The substance of the concept remained unchanged by incorporating it into the General Fiscal Code and with following subsequent legislative amendments. The administrative order to the General Fiscal Code (“*Einführungserlass zur Abgabenordnung*”) also clarifies that the provision covers entities that already benefitted from the status of tax-privileged corporation before.<sup>2</sup> According to the Property Tax Act from 10 August 1951 (BStBl. I. 466) the shared accommodation facilities (“*gemeinschaftliche Wohnräume*”) of the youth hostels have been explicitly exempted from the property tax pursuant to the § 5 Number 2 Lit. 4. The latter provision is still applicable today.
- (19) According to § 17 (3) Nr. 1 of the *Steueranpassungsgesetz* in the version from 16 October 1948, the promotion of youth care (“*Jugendpflege and Jugendfürsorge*”) has been defined as having a non-profit (“*gemeinnützig*”) purpose. In the meantime the original term youth care (“*Jugendfürsorge*”) has been replaced by the term youth support (“*Jugendhilfe*”) which was introduced in § 52 line 2 Number 4 of the General Fiscal Code. The definition of “youth support” covers, among others, the realization of the rights of children and youth by fostering their development and their upbringing as self-responsible and community oriented persons.
- (20) The conceptual continuity of the relevant fiscal provisions is revealed by comparing the provisions of the 1953 Regulation on charitable organizations with the current provisions regarding public-benefit organizations in §§ 51 et seq. of the General Fiscal Code. § 6 of the Regulation on charitable organizations contained a principle - currently regulated by § 64 AO - that the legal entity entitled to fiscal advantages is obliged to pay taxes as long as it conducts economic activity. § 7 of the Regulation on public-benefit organizations contained an exception, when legal entities entitled to fiscal advantages and conducting economic activity were not obliged to pay taxes, namely when “*the overall design of the economic activity is directed towards achieving the tax-privileged purposes of the corporation as set out in the statutes, such purposes can be achieved only by way of such activities, and the economic activity does not enter into competition with non-privileged activities of the same or similar type to a greater extent than necessary for achieving the tax-privileged purposes (“fiscally innocuous economic activity”)*”.

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<sup>2</sup> Einführungserlass zur Abgabenordnung, § 68, paragraph 4.

This provision reflects current definition of dedicated activity in § 65 AO; only the wording has been linguistically "modernized".

- (21) §§ 8 to 10 of the Regulation on public-benefit organizations contained examples of legal entities which met the requirements or met the requirements under certain conditions (i.e. welfare institutions, asylums for aged and handicapped people, orphanages, youth and dormitories, kindergartens, people's kitchens ("*Volksküchen*"), farms and nurseries as well as other self-sufficiency facilities, facilities for work therapeutic purposes, institutions for the blind, institutions for care education, institutions to remedy the young people unemployment, cultural institutions and events, sporting events, hospitals). This exemplary catalog in terms of content can be found today in the §§ 66 to 68 of the General Fiscal Code.
- (22) Such unlimited tax exemption has been acknowledged by the tax authorities of the *Länder* based on the GemVO 1941. The tax authorities at the *Länder* level which are responsible for the application of fiscal regulations, have applied the tax exemptions for youth hostels via their relevant individual tax decisions ("*Steuerbescheide*").
- (23) In view of the above, the conclusion can be drawn that DJH has been completely tax exempted from corporate, local business and real property tax and that no taxes have been imposed at least since 1951 (regarding real property tax) and at least since 1953 (regarding corporate and local business tax). Therefore, those measures have been in place before the entry into force of the Treaty of Rome on 1 January 1958.
- (24) Pursuant to Article 1 (b) (i) of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (hereinafter: "Procedural Regulation")<sup>3</sup>, "*all aid which existed prior to the entry into force of the Treaty in the respective Member States, that is to say, aid schemes and individual aid which were put into effect before, and are still applicable after, the entry into force of the Treaty*" is deemed to be existing aid. Moreover, according to Article 4 (1) of Commission Regulation 794/2004 for the implementation of the Procedural Regulation,<sup>4</sup> "[f]or the purposes of Article 1(c) of [the Procedural Regulation], an alteration to existing aid shall mean any change, other than modifications of a purely formal or administrative nature which cannot affect the evaluation of the compatibility of the aid measure with the common market".<sup>5</sup>
- (25) In light of the above and following the assessment of the relevant national provisions, it arises that the tax exemptions from corporate, local business and real property tax for youth hostels predate the creation of the European Economic

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<sup>3</sup> Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, OJ L 248, 24.9.2015, p. 9–29.

<sup>4</sup> Commission Regulation (EC) 794/2004 of 21 April 2004 implementing Council Regulation (EC) 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 140, 30.04.2004, p. 1-134. It is noted that, pursuant to Article 35 of the Procedural Regulation, references to the repealed Regulation 659/1999 shall be construed as references to the Procedural Regulation.

<sup>5</sup> Article 1 (c) of the Procedural Regulation defines new aid as "*all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid*".

Community, and thus constitute "existing" measures in the above meaning.<sup>6</sup> In 1977, the AO involved only changes of purely formal and administrative nature, which thus do not affect the qualification of those measures as "existing". Due to their "existing" nature, those measures do not represent new nor unlawful aid.

- (26) The Commission has therefore reached the conclusion that the measures in question do not constitute new State aid, as defined pursuant to Article 1 (c) of the Procedural Regulation and hence cannot be unlawful aid pursuant Article 1 (f) of the Procedural Regulation.

#### **4.2. Exemption from Value Added Tax**

- (27) National VAT exemptions may only be granted within the framework of the VAT Directive<sup>7</sup>. Pursuant to Article 132 (1) (h) of the VAT Directive "*Member States shall exempt the following transactions: (...) the supply of services and goods closely linked to the protection of children and young persons by bodies governed by public law or by other organisations recognised by the Member State concerned as being devoted to social well-being*".

- (28) Germany transposed this provision in the national VAT code. Pursuant to § 4 No. 24 of the German VAT Code, services provided by German youth hostels are exempted from VAT.

- (29) Considering the fact that Article 132 (1) (h) of the VAT Directive imposes on Member states a clear and precise obligation to exempt the supply of services and goods closely linked to the protection of children and young persons by bodies governed by public law or by other organisations recognised by the Member State concerned as being devoted to social well-being, in transposing the exemption into national law Germany is only implementing Union provisions in accordance with its obligations stemming from the Treaty. The Commission considers, in line with the jurisprudence of the Court of Justice<sup>8</sup>, that the degree of latitude that the Member States have to ensure the implementation of the VAT Directive does not affect the unconditional nature of the obligation imposed by that provision to grant exemption as laid down in Article 132 (1) (h) of the VAT Directive. Therefore the exemption of DJH from VAT under German law is not imputable to Germany and therefore does not constitute State aid in the meaning of Art. 107(1) TFEU.

### **5. CONCLUSION**

- (30) In light of the foregoing assessment, the Commission decides that the measure described

- is "existing", and thus does not constitute new nor unlawful aid with regard to the exemptions from corporate, local business and real property tax; and
- does not constitute aid with regard to the exemption from the value added tax,

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<sup>6</sup> In that regard, see also Case C-322/09 P *NDSHT v Commission* EU:C:2010:701, paras 44-60 (and in particular para. 54).

<sup>7</sup> Council Directive 2006/112/EC of 28 November 2006.

<sup>8</sup> Case T-351/02 *Deutsche Bahn AG v Commission* EU:T:2006:104, paras 102-106.

and rejects the complaint insofar as it refers to tax measures and is covered by the present decision.

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Yours faithfully  
For the Commission

Margrethe VESTAGER  
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