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COUNCIL

THE HAGUE PROGRAMME: STRENGTHENING FREEDOM, SECURITY AND JUSTICE IN THE EUROPEAN UNION

(2005/C 53/01)

I. INTRODUCTION

The European Council reaffirms the priority it attaches to the development of an area of freedom, security and justice, responding to a central concern of the peoples of the States brought together in the Union.

Over the past years the European Union has increased its role in securing police, customs and judicial cooperation and in developing a coordinated policy with regard to asylum, immigration and external border controls. This development will continue with the firmer establishment of a common area of freedom, security and justice by the Treaty establishing a Constitution for Europe, signed in Rome on 29 October 2004. This Treaty and the preceding Treaties of Maastricht, Amsterdam and Nice have progressively brought about a common legal framework in the field of justice and home affairs, and the integration of this policy area with other policy areas of the Union.

Since the Tampere European Council in 1999, the Union's policy in the area of justice and home affairs has been developed in the framework of a general programme. Even if not all the original aims were achieved, comprehensive and coordinated progress has been made. The European Council welcomes the results that have been achieved in the first five-year period: the foundations for a common asylum and immigration policy have been laid, the harmonisation of border controls has been prepared, police cooperation has been improved, and the groundwork for judicial cooperation on the basis of the principle of mutual recognition of judicial decisions and judgments has been well advanced.

The security of the European Union and its Member States has acquired a new urgency, especially in the light of the terrorist attacks in the United States on 11 September 2001 and in Madrid on 11 March 2004. The citizens of Europe rightly expect the European Union, while guaranteeing respect for fundamental freedoms and rights, to take a more effective, joint approach to cross-border problems such as illegal migration, trafficking in and smuggling of human beings, terrorism and organised crime, as well as the prevention thereof. Notably in the field of security, the coordination and coherence between the internal and the external dimension has been growing in importance and needs to continue to be vigorously pursued.

Five years after the European Council's meeting in Tampere, it is time for a new agenda to enable the Union to build on the achievements and to meet effectively the new challenges it will face. To this end, the European Council has adopted this new multi-annual programme to be known as the Hague Programme. It reflects the ambitions as expressed in the Treaty establishing a Constitution for Europe and contributes to preparing the Union for its entry into force. It takes account of the evaluation by the Commission [1] as welcomed by the European Council in June 2004 as well as the Recommendation adopted by the European Parliament on 14 October 2004 [2], in particular in respect of the passage to qualified majority voting and co-decision as foreseen by Article 67(2) TEC.

The objective of the Hague programme is to improve the common capability of the Union and its Member States to guarantee fundamental rights, minimum procedural safeguards and access to justice, to provide protection in accordance with the Geneva Convention on Refugees and other international treaties to persons in need, to regulate migration flows and to control the external borders of the Union, to fight organised cross-border crime and repress the threat of terrorism, to realise the potential of Europol and Eurojust, to carry further the mutual recognition of judicial decisions and certificates both in civil and in criminal matters, and to eliminate legal and judicial obstacles in litigation in civil and family matters with cross-border implications. This is an objective that has to be achieved in the interests of our citizens by the development of a Common Asylum System and by improving access to the courts, practical police and judicial cooperation, the approximation of laws and the development of common policies.

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[1] COM (2004) 401 final.

[2] P6_TA-PROV (2004) 0022 A6-0010/2004.

A key element in the near future will be the prevention and suppression of terrorism. A common approach in this area should be based on the principle that when preserving national security, the Member States should take full account of the security of the Union as a whole. In addition, the European Council will be asked to endorse in December 2004 the new European Strategy on Drugs 2005-2012 that will be added to this programme.

The European Council considers that the common project of strengthening the area of freedom, security and justice is vital to securing safe communities, mutual trust and the rule of law throughout the Union. Freedom, justice, control at the external borders, internal security and the prevention of terrorism should henceforth be considered indivisible within the Union as a whole. An optimal level of protection of the area of freedom, security and justice requires multi-disciplinary and concerted action both at EU level and at national level between the competent law enforcement authorities, especially police, customs and border guards.

In the light of this Programme, the European Council invites the Commission to present to the Council an Action Plan in 2005 in which the aims and priorities of this programme will be translated into concrete actions. The plan shall contain a timetable for the adoption and implementation of all the actions. The European Council calls on the Council to ensure that the timetable for each of the various measures is observed. The Commission is invited to present to the Council a yearly report on the implementation of the Hague programme ('score-board').

II. GENERAL ORIENTATIONS

1. General principles

The programme set out below seeks to respond to the challenge and the expectations of our citizens. It is based on a pragmatic approach and builds on ongoing work arising from the Tampere programme, current action plans and an evaluation of first generation measures. It is also grounded in the general principles of subsidiarity, proportionality, solidarity and respect for the different legal systems and traditions of the Member States.

The Treaty establishing a Constitution of Europe (hereinafter 'the Constitutional Treaty') served as a guideline for the level of ambition, but the existing Treaties provide the legal basis for Council action until such time as the Constitutional Treaty takes effect. Accordingly, the various policy areas have been examined to determine whether preparatory work or studies could already commence, so that measures provided for in the Constitutional Treaty can be taken as soon as it enters into force.

Fundamental rights, as guaranteed by the European Convention on Human Rights and the Charter of Fundamental Rights in Part II of the Constitutional Treaty, including the explanatory notes, as well as the Geneva Convention on Refugees, must be fully respected. At the same time, the programme aims at real and substantial progress towards enhancing mutual confidence and promoting common policies to the benefit of all our citizens.

2. Protection of fundamental rights

Incorporating the Charter into the Constitutional Treaty and accession to the European Convention for the protection of human rights and fundamental freedoms will place the Union, including its institutions, under a legal obligation to ensure that in all its areas of activity, fundamental rights are not only respected but also actively promoted.

In this context, the European Council, recalling its firm commitment to oppose any form of racism, antisemitism and xenophobia as expressed in December 2003, welcomes the Commission's communication on the extension of the mandate of the European Monitoring Centre on Racism and Xenophobia towards a Human Rights Agency.

3. Implementation and evaluation

The evaluation by the Commission of the Tampere programme [1] showed a clear need for adequate and timely implementation and evaluation of all types of measures in the area of freedom, security and justice.

It is vital for the Council to develop in 2005 practical methods to facilitate timely implementation in all policy areas: measures requiring national authorities' resources should be accompanied by proper plans to ensure more effective implementation, and the length of the implementation period should be more closely related to the complexity of the measure concerned. Regular progress reports by the Commission to the Council during the implementation period should provide an incentive for action in Member States.

Evaluation of the implementation as well as of the effects of all measures is, in the European Council's opinion, essential to the effectiveness of Union action. The evaluations undertaken as from 1 July 2005 must be systematic, objective, impartial and efficient, while avoiding too heavy an administrative burden on national authorities and the Commission. Their goal should be to address the functioning of the measure and to suggest solutions for problems encountered in its implementation and/or application. The Commission should prepare a yearly evaluation report of measures to be submitted to the Council and to inform the European Parliament and the national parliaments.

[1] COM(2004) 401 final.

The European Commission is invited to prepare proposals, to be tabled as soon as the Constitutional Treaty has entered into force, relating to the role of the European Parliament and national parliaments in the evaluation of Eurojust's activities and the scrutiny of Europol's activities.

4. **Review**

Since the programme will run for a period during which the Constitutional Treaty will enter into force, a review of its implementation is considered to be useful. To that end, the Commission is invited to report by the entry into force of the Constitutional Treaty (1 November 2006) to the European Council on the progress made and to propose the necessary additions to the programme, taking into account the changing legal basis as a consequence of its entry into force.

III. **SPECIFIC ORIENTATIONS**

1. **Strengthening freedom**

1.1. *Citizenship of the Union*

The right of all EU citizens to move and reside freely in the territory of the Member States is the central right of citizenship of the Union. Practical significance of citizenship of the Union will be enhanced by full implementation of Directive 2004/38 [1], which codifies Community law in this field and brings clarity and simplicity. The Commission is asked to submit in 2008 a report to the Council and the European Parliament, accompanied by proposals, if appropriate, for allowing EU citizens to move within the European Union on similar terms to nationals of a Member State moving around or changing their place of residence in their own country, in conformity with established principles of Community law.

The European Council encourages the Union's institutions, within the framework of their competences, to maintain an open, transparent and regular dialogue with representative associations and civil society and to promote and facilitate citizens' participation in public life. In particular, the European Council invites the Council and the Commission to give special attention to the fight against anti-semitism, racism and xenophobia.

[1] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ L 158 of 30.4.2004, p. 77).

1.2. *Asylum, migration and border policy*

International migration will continue. A comprehensive approach, involving all stages of migration, with respect to the root causes of migration, entry and admission policies and integration and return policies is needed.

To ensure such an approach, the European Council urges the Council, the Member States and the Commission to pursue coordinated, strong and effective working relations between those responsible for migration and asylum policies and those responsible for other policy fields relevant to these areas.

The ongoing development of European asylum and migration policy should be based on a common analysis of migratory phenomena in all their aspects. Reinforcing the collection, provision, exchange and efficient use of up-to-date information and data on all relevant migratory developments is of key importance.

The second phase of development of a common policy in the field of asylum, migration and borders started on 1 May 2004. It should be based on solidarity and fair sharing of responsibility including its financial implications and closer practical cooperation between Member States: technical assistance, training, and exchange of information, monitoring of the adequate and timely implementation and application of instruments as well as further harmonisation of legislation.

The European Council, taking into account the assessment by the Commission and the strong views expressed by the European Parliament in its Recommendation [2], asks the Council to adopt a decision based on Article 67(2) TEC immediately after formal consultation of the European Parliament and no later than 1 April 2005 to apply the procedure provided for in Article 251 TEC to all Title IV measures to strengthen freedom, subject to the Nice Treaty, except for legal migration.

1.3. *A Common European Asylum System*

The aims of the Common European Asylum System in its second phase will be the establishment of a common asylum procedure and a uniform status for those who are granted asylum or subsidiary protection. It will be based on the full and inclusive application of the Geneva Convention on Refugees and other relevant Treaties, and be built on a thorough and complete evaluation of the legal instruments that have been adopted in the first phase.

[2] P6_TA-PROV (2004) 0022 A6-0010/2004.

The European Council urges the Member States to implement fully the first phase without delay. In this regard the Council should adopt unanimously, in conformity with article 67(5) TEC, the Asylum Procedures Directive as soon as possible. The Commission is invited to conclude the evaluation of first-phase legal instruments in 2007 and to submit the second-phase instruments and measures to the Council and the European Parliament with a view to their adoption before the end of 2010. In this framework, the European Council invites the Commission to present a study on the appropriateness, the possibilities and the difficulties, as well as the legal and practical implications of joint processing of asylum applications within the Union. Furthermore a separate study, to be conducted in close consultation with the UNHCR, should look into the merits, appropriateness and feasibility of joint processing of asylum applications outside EU territory, in complementarity with the Common European Asylum System and in compliance with the relevant international standards.

The European Council invites the Council and the Commission to establish in 2005 appropriate structures involving the national asylum services of the Member States with a view to facilitating practical and collaborative cooperation. Thus Member States will be assisted, *inter alia*, in achieving a single procedure for the assessment of applications for international protection, and in jointly compiling, assessing and applying information on countries of origin, as well as in addressing particular pressures on the asylum systems and reception capacities resulting, *inter alia*, from their geographical location. After a common asylum procedure has been established, these structures should be transformed, on the basis of an evaluation, into a European support office for all forms of cooperation between Member States relating to the Common European Asylum System.

The European Council welcomes the establishment of the new European Refugee Fund for the period 2005-2010 and stresses the urgent need for Member States to maintain adequate asylum systems and reception facilities in the run-up to the establishment of a common asylum procedure. It invites the Commission to earmark existing Community funds to assist Member States in the processing of asylum applications and in the reception of categories of third-country nationals. It invites the Council to designate these categories on the basis of a proposal to be submitted by the Commission in 2005.

1.4. *Legal migration and the fight against illegal employment*

Legal migration will play an important role in enhancing the knowledge-based economy in Europe, in advancing economic development, and thus contributing to the implementation of the Lisbon strategy. It could also play a role in partnerships with third countries.

The European Council emphasizes that the determination of volumes of admission of labour migrants is a competence of the Member States. The European Council, taking into account the outcome of discussions on the Green Paper on labour migration, best practices in Member States and its relevance for implementation of the Lisbon strategy, invites the Commission to present a policy plan on legal migration including admission procedures capable of responding promptly to fluctuating demands for migrant labour in the labour market before the end of 2005.

As the informal economy and illegal employment can act as a pull factor for illegal immigration and can lead to exploitation, the European Council calls on Member States to reach the targets for reducing the informal economy set out in the European employment strategy.

1.5. *Integration of third-country nationals*

Stability and cohesion within our societies benefit from the successful integration of legally resident third-country nationals and their descendants. To achieve this objective, it is essential to develop effective policies, and to prevent the isolation of certain groups. A comprehensive approach involving stakeholders at the local, regional, national, and EU level is therefore essential.

While recognising the progress that has already been made in respect of the fair treatment of legally resident third-country nationals in the EU, the European Council calls for the creation of equal opportunities to participate fully in society. Obstacles to integration need to be actively eliminated.

The European Council underlines the need for greater coordination of national integration policies and EU initiatives in this field. In this respect, the common basic principles underlying a coherent European framework on integration should be established.

These principles, connecting all policy areas related to integration, should include at least the following aspects.

Integration:

— is a continuous, two-way process involving both legally resident third-country nationals and the host society,

— includes, but goes beyond, anti-discrimination policy,

— implies respect for the basic values of the European Union and fundamental human rights,

— requires basic skills for participation in society,

— relies on frequent interaction and intercultural dialogue between all members of society within common forums and activities in order to improve mutual understanding,

— extends to a variety of policy areas, including employment and education.

A framework, based on these common basic principles, will form the foundation for future initiatives in the EU, relying on clear goals and means of evaluation. The European Council invites Member States, the Council and the Commission to promote the structural exchange of experience and information on integration, supported by the development of a widely accessible website on the Internet.

1.6. *The external dimension of asylum and migration*

1.6.1. Partnership with third countries

Asylum and migration are by their very nature international issues. EU policy should aim at assisting third countries, in full partnership, using existing Community funds where appropriate, in their efforts to improve their capacity for migration management and refugee protection, prevent and combat illegal immigration, inform on legal channels for migration, resolve refugee situations by providing better access to durable solutions, build border-control capacity, enhance document security and tackle the problem of return.

The European Council recognises that insufficiently managed migration flows can result in humanitarian disasters. It wishes to express its utmost concern about the human tragedies that take place in the Mediterranean as a result of attempts to enter the EU illegally. It calls upon all States to intensify their cooperation in preventing further loss of life.

The European Council calls upon the Council and the Commission to continue the process of fully integrating migration into the EU's existing and future relations with third countries. It invites the Commission to complete the integration of migration into the Country and Regional Strategy Papers for all relevant third countries by the spring of 2005.

The European Council acknowledges the need for the EU to contribute in a spirit of shared responsibility to a more accessible, equitable and effective international protection system in partnership with third countries, and to provide access to protection and durable solutions at the earliest possible stage. Countries in regions of origin and transit will be encouraged in their efforts to strengthen the capacity for the protection of refugees. In this regard the European Council calls upon all third countries to accede and adhere to the Geneva Convention on Refugees.

1.6.2. Partnership with countries and regions of origin

The European Council welcomes the Commission Communication on improving access to durable solutions [1] and invites the Commission to develop EU-Regional Protection Programmes in partnership with the third countries concerned and in close consultation and cooperation with UNHCR. These programmes will build on experience gained in pilot protection programmes to be launched before the end of 2005. These programmes will incorporate a variety of relevant instruments, primarily focused on capacity building, and include a joint resettlement programme for Member States willing to participate in such a programme.

Policies which link migration, development cooperation and humanitarian assistance should be coherent and be developed in partnership and dialogue with countries and regions of origin. The European Council welcomes the progress already made, invites the Council to develop these policies, with particular emphasis on root causes, push factors and poverty alleviation, and urges the Commission to present concrete and carefully worked out proposals by the spring of 2005.

1.6.3. Partnership with countries and regions of transit

As regards countries of transit, the European Council emphasises the need for intensified cooperation and capacity building, both on the southern and the eastern borders of the EU, to enable these countries better to manage migration and to provide adequate protection for refugees. Support for capacity-building in national asylum systems, border control and wider cooperation on migration issues will be provided to those countries that demonstrate a genuine commitment to fulfil their obligations under the Geneva Convention on Refugees.

The proposal for a Regulation establishing a European Neighbourhood and Partnership Instrument [2] provides the strategic framework for intensifying cooperation and dialogue on asylum and migration with neighbouring countries amongst others around the Mediterranean basin, and for initiating new measures. In this connection, the European Council requests a report on progress and achievements before the end of 2005.

[1] COM (2004) 410 final.
[2] COM (2004) 628 final.

1.6.4. Return and re-admission policy

Migrants who do not or no longer have the right to stay legally in the EU must return on a voluntary or, if necessary, compulsory basis. The European Council calls for the establishment of an effective removal and repatriation policy based on common standards for persons to be returned in a humane manner and with full respect for their human rights and dignity.

The European Council considers it essential that the Council begins discussions in early 2005 on minimum standards for return procedures including minimum standards to support effective national removal efforts. The proposal should also take into account special concerns with regard to safeguarding public order and security. A coherent approach between return policy and all other aspects of the external relations of the Community with third countries is necessary as is special emphasis on the problem of nationals of such third countries who are not in the possession of passports or other identity documents.

The European Council calls for:

— closer cooperation and mutual technical assistance,

— launching of the preparatory phase of a European return fund,

— common integrated country and region specific return programmes,

— the establishment of a European Return Fund by 2007 taking into account the evaluation of the preparatory phase,

— the timely conclusion of Community readmission agreements,

— the prompt appointment by the Commission of a Special Representative for a common readmission policy.

1.7. *Management of migration flows*

1.7.1. Border checks and the fight against illegal immigration

The European Council stresses the importance of swift abolition of internal border controls, the further gradual establishment of the integrated management system for external borders and the strengthening of controls at and surveillance of the external borders of the Union. In this respect the need for solidarity and fair sharing of responsibility including its financial implications between the Member States is underlined.

The European Council urges the Council, the Commission and Member States to take all necessary measures to allow the abolition of controls at internal borders as soon as possible, provided all requirements to apply the Schengen acquis have been fulfilled and after the Schengen Information System (SIS II) has become operational in 2007. In order to reach this goal, the evaluation of the implementation of the non SIS II related acquis should start in the first half of 2006.

The European Council welcomes the establishment of the European Agency for the Management of Operational Cooperation at the External Borders, on 1 May 2005. It requests the Commission to submit an evaluation of the Agency to the Council before the end of 2007. The evaluation should contain a review of the tasks of the Agency and an assessment of whether the Agency should concern itself with other aspects of border management, including enhanced cooperation with customs services and other competent authorities for goods-related security matters.

The control and surveillance of external borders fall within the sphere of national border authorities. However, in order to support Member States with specific requirements for control and surveillance of long or difficult stretches of external borders, and where Member States are confronted with special and unforeseen circumstances due to exceptional migratory pressures on these borders, the European Council:

— invites the Council to establish teams of national experts that can provide rapid technical and operational assistance to Member States requesting it, following proper risk analysis by the Border Management Agency and acting within its framework, on the basis of a proposal by the Commission on the appropriate powers and funding for such teams, to be submitted in 2005,

— invites the Council and the Commission to establish a Community border management fund by the end of 2006 at the latest,

— invites the Commission to submit, as soon as the abolition of controls at internal borders has been completed, a proposal to supplement the existing Schengen evaluation mechanism with a supervisory mechanism, ensuring full involvement of Member States experts, and including unannounced inspections.

The review of the tasks of the Agency envisaged above and in particular the evaluation of the functioning of the teams of national experts should include the feasibility of the creation of a European system of border guards.

The European Council invites Member States to improve their joint analyses of migratory routes and smuggling and trafficking practices and of criminal networks active in this area, *inter alia* within the framework of the Border Management Agency and in close cooperation with Europol and Eurojust. It also calls on the Council and the Commission to ensure the firm establishment of immigration liaison networks in relevant third countries. In this connection, the European Council welcomes initiatives by Member States for cooperation at sea, on a voluntary basis, notably for rescue operations, in accordance with national and international law, possibly including future cooperation with third countries.

With a view to the development of common standards, best practices and mechanisms to prevent and combat trafficking in human beings, the European Council invites the Council and the Commission to develop a plan in 2005.

1.7.2. Biometrics and information systems

The management of migration flows, including the fight against illegal immigration should be strengthened by establishing a continuum of security measures that effectively links visa application procedures and entry and exit procedures at external border crossings. Such measures are also of importance for the prevention and control of crime, in particular terrorism. In order to achieve this, a coherent approach and harmonised solutions in the EU on biometric identifiers and data are necessary.

The European Council requests the Council to examine how to maximise the effectiveness and interoperability of EU information systems in tackling illegal immigration and improving border controls as well as the management of these systems on the basis of a communication by the Commission on the interoperability between the Schengen Information System (SIS II), the Visa Information System (VIS) and EURODAC to be released in 2005, taking into account the need to strike the right balance between law enforcement purposes and safeguarding the fundamental rights of individuals.

The European Council invites the Council, the Commission and Member States to continue their efforts to integrate biometric identifiers in travel documents, visa, residence permits, EU citizens' passports and information systems without delay and to prepare for the development of minimum standards for national identity cards, taking into account ICAO standards.

1.7.3. Visa policy

The European Council underlines the need for further development of the common visa policy as part of a multi-layered system aimed at facilitating legitimate travel and tackling illegal immigration through further harmonisation of national legislation and handling practices at local consular missions. Common visa offices should be established in the long term, taking into account discussions on the establishment of an European External Action Service. The European Council welcomes initiatives by individual Member States which, on a voluntary basis, cooperate at pooling of staff and means for visa issuance.

The European Council:

— invites the Commission, as a first step, to propose the necessary amendments to further enhance visa policies and to submit in 2005 a proposal on the establishment of common application centres focusing *inter alia* on possible synergies linked with the development of the VIS, to review the Common Consular Instructions and table the appropriate proposal by early 2006 at the latest,

— stresses the importance of swift implementation of the VIS starting with the incorporation of among others alphanumeric data and photographs by the end of 2006 and biometrics by the end of 2007 at the latest,

— invites the Commission to submit without delay the necessary proposal in order to comply with the agreed time frame for implementation of the VIS,

— calls on the Commission to continue its efforts to ensure that the citizens of all Member States can travel without a short-stay visa to all third countries whose nationals can travel to the EU without a visa as soon as possible,

— invites the Council and the Commission to examine, with a view to developing a common approach, whether in the context of the EC readmission policy it would be opportune to facilitate, on a case by case basis, the issuance of short-stay visas to third-country nationals, where possible and on a basis of reciprocity, as part of a real partnership in external relations, including migration-related issues.

2. **Strengthening security**

2.1. *Improving the exchange of information*

The European Council is convinced that strengthening freedom, security and justice requires an innovative approach to the cross-border exchange of law-enforcement information. The mere fact that information crosses borders should no longer be relevant.

With effect from 1 January 2008 the exchange of such information should be governed by conditions set out below with regard to the principle of availability, which means that, throughout the Union, a law enforcement officer in one Member State who needs information in order to perform his duties can obtain this from another Member State and that the law enforcement agency in the other Member State which holds this information will make it available for the stated purpose, taking into account the requirement of ongoing investigations in that State.

Without prejudice to work in progress [1] the Commission is invited to submit proposals by the end of 2005 at the latest for implementation of the principle of availability, in which the following key conditions should be strictly observed:

— the exchange may only take place in order that legal tasks may be performed,

— the integrity of the data to be exchanged must be guaranteed,

— the need to protect sources of information and to secure the confidentiality of the data at all stages of the exchange, and subsequently,

— common standards for access to the data and common technical standards must be applied,

— supervision of respect for data protection, and appropriate control prior to and after the exchange must be ensured,

— individuals must be protected from abuse of data and have the right to seek correction of incorrect data.

The methods of exchange of information should make full use of new technology and must be adapted to each type of information, where appropriate, through reciprocal access to or interoperability of national databases, or direct (on-line) access, including for Europol, to existing central EU databases such as the SIS. New centralised European databases should only be created on the basis of studies that have shown their added value.

— in cases where persons or goods are under surveillance by security services in connection with terrorist threats, ensure that no gaps occur in their surveillance as a result of their crossing a border,

In the short term all the elements of the European Council's declaration of 25 March 2004 and the EU action plan on combating terrorism must continue to be implemented in full, notably that enhanced use of Europol and Eurojust should be made and the EU Counter Terrorism Coordinator is encouraged to promote progress.

In this context the European Council recalls its invitation to the Commission to bring forward a proposal for a common EU approach to the use of passengers data for border and aviation security and other law enforcement purposes [2].

The high level of exchange of information between security services shall be maintained. Nevertheless it should be improved, taking into account the overall principle of availability as described above in paragraph 2.1 and giving particular consideration to the special circumstances that apply to the working methods of security services, e.g. the need to secure the methods of collecting information, the sources of information and the continued confidentiality of the data after the exchange.

2.2. *Terrorism*

With effect from 1 January 2005, SitCen will provide the Council with strategic analysis of the terrorist threat based on intelligence from Member States' intelligence and security services and, where appropriate, on information provided by Europol.

The European Council underlines that effective prevention and combating of terrorism in full compliance with fundamental rights requires Member States not to confine their activities to maintaining their own security, but to focus also on the security of the Union as a whole.

As a goal this means that Member States:

— use the powers of their intelligence and security services not only to counter threats to their own security, but also, as the case may be, to protect the internal security of the other Member States,

— bring immediately to the attention of the competent authorities of other Member States any information available to their services which concerns threats to the internal security of these other Member States,

The European Council stresses the importance of measures to combat financing of terrorism. It looks forward to examining the coherent overall approach that will be submitted to it by the Secretary General/High Representative and the Commission at its meeting in December 2004. This strategy should suggest ways to improve the efficiency of existing instruments such as the monitoring of suspicious financial flows and the freezing of assets and propose new tools in respect of cash transactions and the institutions involved in them

The Commission is invited to make proposals aimed at improving the security of the storage and transport of explosives as well as at ensuring traceability of industrial and chemical precursors.

[1] The Draft framework decision on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union, inparticular as regards serious offences including terrorist acts, doc. COM(2004) 221 final.

[2] Declaration on Combating terrorism adopted on 25 March 2004, doc. 7906/04, point 6.

The European Council also stresses the need to ensure adequate protection and assistance to victims of terrorism.

The Council should, by the end of 2005, develop a long-term strategy to address the factors which contribute to radicalisation and recruitment for terrorist activities.

All the instruments available to the European Union should be used in a consistent manner so that the key concern — the fight against terrorism — is fully addressed. To that end the JHA Ministers within the Council should have the leading role, taking into account the task of the General Affairs and External Relations Council. The Commission should review Community legislation in sufficient time to be able to adapt it in parallel with measures to be adopted in order to combat terrorism.

The European Union will further strengthen its efforts being directed, in the external dimension of the area of freedom, security and justice, towards the fight against terrorism. In this context, the Council is invited to set up in conjunction with Europol and the European Border Agency a network of national experts on preventing and combating terrorism and on border control, who will be available to respond to requests from third countries for technical assistance in the training and instruction of their authorities.

The European Council urges the Commission to increase the funding for counter-terrorism related capacity-building projects in third countries and to ensure it has the necessary expertise to implement such projects effectively. The Council also calls on the Commission to ensure that, in the proposed revision of the existing instruments governing external assistance, appropriate provisions are made to enable rapid, flexible and targeted counter-terrorist assistance.

2.3. *Police cooperation*

The effective combating of cross-border organised and other serious crime and terrorism requires intensified practical cooperation between police and customs authorities of Member States and with Europol and better use of existing instruments in this field.

The European Council urges the Member States to enable Europol in cooperation with Eurojust to play a key role in the fight against serious cross-border (organised) crime and terrorism by:

— ratifying and effectively implementing the necessary legal instruments by the end of 2004 ([1]),

— providing all necessary high quality information to Europol in good time,

— encouraging good cooperation between their competent national authorities and Europol.

With effect from 1 January 2006, Europol must have replaced its 'crime situation reports' by yearly 'threat assessments' on serious forms of organised crime, based on information provided by the Member States and input from Eurojust and the Police Chiefs Task Force. The Council should use these analyses to establish yearly strategic priorities, which will serve as guidelines for further action. This should be the next step towards the goal of setting up and implementing a methodology for intelligence-led law enforcement at EU level.

Europol should be designated by Member States as central office of the Union for euro counterfeits within the meaning of the Geneva Convention of 1929.

The Council should adopt the European law on Europol, provided for in Article III-276 of the Constitutional Treaty, as soon as possible after the entry into force of the Constitutional Treaty and no later than 1 January 2008, taking account of all tasks conferred upon to Europol.

Until that time, Europol must improve its functioning by making full use of the cooperation agreement with Eurojust. Europol and Eurojust should report annually to the Council on their common experiences and about specific results. Furthermore Europol and Eurojust should encourage the use of and their participation in Member States' joint investigation teams.

Experience in the Member States with the use of joint investigation teams is limited. With a view to encouraging the use of such teams and exchanging experiences on best practice, each Member State should designate a national expert.

([1]) Europol Protocols: the Protocol amending Article 2 and the Annex to the Europol Convention of 30 November 2000, OJ C 358 13.12.2000, p. 1, the Protocol on the privileges and immunities of Europol, the members of its organs, its Deputy Directors and its members of 28 November 2002 OJ C 312, 16.12.2002, p. 1 and the Protocol amending the Europol Convention of 27 November 2003, OJ C 2, 6.1.2004, p. 3. The Convention of 29 May 2000 on mutual assistance in criminal matters between the Member States, OJ C 197, 12.7.2000, p. 1 and its accompanying Protocol of 16 October 2001 OJ C 326, 21.11.2001, p. 2 and Framework Decision 2002/465/JHA of 13 June 2002 on Joint Investigation Teams, OJ L 162, 20.6.2002, p. 1.

The Council should develop cross-border police and customs cooperation on the basis of common principles. It invites the Commission to bring forward proposals to further develop the Schengen-acquis in respect of cross border operational police cooperation.

Member States should engage in improving the quality of their law enforcement data with the assistance of Europol. Furthermore, Europol should advise the Council on ways to improve the data. The Europol information system should be up and running without delay.

The Council is invited to encourage the exchange of best practice on investigative techniques as a first step to the development of common investigative techniques, envisaged in Article III-257 of the Constitutional Treaty, in particular in the areas of forensic investigations and information technology security.

Police cooperation between Member States is made more efficient and effective in a number of cases by facilitating cooperation on specified themes between the Member States concerned, where appropriate by establishing joint investigation teams and, where necessary, supported by Europol and Eurojust. In specific border areas, closer cooperation and better coordination is the only way to deal with crime and threats to public security and national safety.

Strengthening police cooperation requires focused attention on mutual trust and confidence-building. In an enlarged European Union, an explicit effort should be made to improve the understanding of the working of Member States' legal systems and organisations. The Council and the Member States should develop by the end of 2005 in cooperation with CEPOL standards and modules for training courses for national police officers with regard to practical aspects of EU law enforcement cooperation.

The Commission is invited to develop, in close cooperation with CEPOL and by the end of 2005, systematic exchange programmes for police authorities aimed at achieving better understanding of the working of Member States' legal systems and organisations.

Finally experience with external police operations should also be taken into account with a view to improving internal security of the European Union.

2.4. *Management of crises within the European Union with cross-border effects*

On 12 December 2003 the European Council adopted the European security strategy, which outlines global challenges, key threats, strategic objectives and policy implications for a secure Europe in a better world. An essential complement thereof is providing internal security within the European Union, with particular reference to possible major internal crises with cross-border effects affecting our citizens, vital infrastructure and public order and security. Only then can optimum protection be provided to European citizens and vital infrastructure for instance in the event of a CBRN accident.

Effective management of cross-border crises within the EU requires not only strengthening of current actions on civil protection and vital infrastructure but also addressing effectively the public order and security aspects of such crises and coordination between these areas.

Therefore the European Council calls for the Council and the Commission to set up within their existing structures, while fully respecting national competences, integrated and coordinated EU crisis-management arrangements for crises with cross-border effects within the EU, to be implemented at the latest by 1 July 2006. These arrangements should at least address the following issues: further assessment of Member States' capabilities, stockpiling, training, joint exercises and operational plans for civilian crisis management

2.5. *Operational cooperation*

Coordination of operational activities by law enforcement agencies and other agencies in all parts of the area of freedom, security and justice, and monitoring of the strategic priorities set by the Council, must be ensured.

To that end, the Council is invited to prepare for the setting up of the Committee on Internal Security, envisaged in Article III-261 of the Constitutional Treaty, in particular by determining its field of activity, tasks, competences and composition, with a view to its establishment as soon as possible after the Constitutional Treaty has entered into force.

To gain practical experience with coordination in the meantime, the Council is invited to organise a joint meeting every six months between the chairpersons of the Strategic Committee on Immigration, Frontiers and Asylum (SCIFA) and the Article 36 Committee (CATS) and representatives of the Commission, Europol, Eurojust, the EBA, the Police Chiefs' Task Force, and the SitCEN.

2.6. *Crime prevention*

Crime prevention is an indispensable part of the work to create an area of freedom, security and justice. The Union therefore needs an effective tool to support the efforts of Member States in preventing crime. To that end, the European Crime Prevention Network should be professionalised and strengthened. Since the scope of prevention is very wide, it is essential to focus on measures and priorities that are most beneficial to Member States. The European Crime Prevention Network should provide expertise and knowledge to the Council and the Commission in developing effective crime prevention policies.

In this respect the European Council welcomes the initiative of the Commission to establish European instruments for collecting, analysing and comparing information on crime and victimisation and their respective trends in Member States, using national statistics and other sources of information as agreed indicators. Eurostat should be tasked with the definition of such data and its collection from the Member States.

It is important to protect public organisations and private companies from organised crime through administrative and other measures. Particular attention should be given to systematic investigations of property holdings as a tool in the fight against organised crime. Private/public partnership is an essential tool. The Commission is invited to present proposals to this effect in 2006.

2.7. *Organised crime and corruption*

The European Council welcomes the development of a strategic concept with regard to tackling cross-border organised crime at EU-level and asks the Council and the Commission to develop this concept further and make it operational, in conjunction with other partners such as Europol, Eurojust, the Police Chiefs Task Force, EUCPN and CEPOL. In this connection, issues relating to corruption and its links with organised crime should be examined.

2.8. *European strategy on drugs*

The European Council underlines the importance of addressing the drugs problem in a comprehensive, balanced and multidisciplinary approach between the policy of prevention, assistance and rehabilitation of drug dependence, the policy of combating illegal drug trafficking and precursors and money laundering, and the strengthening of international cooperation.

The European Strategy on Drugs 2005-2012 will be added to the programme after its adoption by the European Council in December 2004.

3. **Strengthening justice**

The European Council underlines the need further to enhance work on the creation of a Europe for citizens and the essential role that the setting up of a European Area for Justice will play in this respect. A number of measures have already been carried out. Further efforts should be made to facilitate access to justice and judicial cooperation as well as the full employment of mutual recognition. It is of particular importance that borders between countries in Europe no longer constitute an obstacle to the settlement of civil law matters or to the bringing of court proceedings and the enforcement of decisions in civil matters.

3.1. *European Court of Justice*

The European Council underlines the importance of the European Court of Justice in the relatively new area of freedom, security and justice and is satisfied that the Constitutional Treaty greatly increases the powers of the European Court of Justice in that area.

To ensure, both for European citizens and for the functioning of the area of freedom, security and justice, that questions on points of law brought before the Court are answered quickly, it is necessary to enable the Court to respond quickly as required by Article III-369 of the Constitutional Treaty.

In this context and with the Constitutional Treaty in prospect, thought should be given to creating a solution for the speedy and appropriate handling of requests for preliminary rulings concerning the area of freedom, security and justice, where appropriate, by amending the Statutes of the Court. The Commission is invited to bring forward — after consultation of the Court of Justice — a proposal to that effect.

3.2. *Confidence-building and mutual trust*

Judicial cooperation both in criminal and civil matters could be further enhanced by strengthening mutual trust and by progressive development of a European judicial culture based on diversity of the legal systems of the Member States and unity through European law. In an enlarged European Union, mutual confidence shall be based on the certainty that all European citizens have access to a judicial system meeting high standards of quality. In order to facilitate full implementation of the principle of mutual recognition, a system providing for objective and impartial evaluation of the implementation of EU policies in the field of justice, while fully respecting the independence of the judiciary and consistent with all the existing European mechanisms, must be established.

Strengthening mutual confidence requires an explicit effort to improve mutual understanding among judicial authorities and different legal systems. In this regard, networks of judicial organisations and institutions, such as the network of the Councils for the Judiciary, the European Network of Supreme Courts and the European Judicial Training Network, should be supported by the Union.

Exchange programmes for judicial authorities will facilitate cooperation and help develop mutual trust. An EU component should be systematically included in the training of judicial authorities. The Commission is invited to prepare as soon as possible a proposal aimed at creating, from the existing structures, an effective European training network for judicial authorities for both civil and criminal matters, as envisaged by Articles III-269 and III-270 of the Constitutional Treaty.

3.3. *Judicial cooperation in criminal matters*

Improvement should be sought through reducing existing legal obstacles and strengthening the coordination of investigations. With a view to increasing the efficiency of prosecutions, while guaranteeing the proper administration of justice, particular attention should be given to possibilities of concentrating the prosecution in cross-border multilateral cases in one Member State. Further development of judicial cooperation in criminal matters is essential to provide for an adequate follow up to investigations of law enforcement authorities of the Member States and Europol.

The European Council recalls in this context the need to ratify and implement effectively — without delay — the legal instruments to improve judicial cooperation in criminal matters, as referred to already in the paragraph on police cooperation.

3.3.1. Mutual recognition

The comprehensive programme of measures to implement the principle of mutual recognition of judicial decisions in criminal matters, which encompasses judicial decisions in all phases of criminal procedures or otherwise relevant to such procedures, such as the gathering and admissibility of evidence, conflicts of jurisdiction and the ne bis in idem principle and the execution of final sentences of imprisonment or other (alternative) sanctions [1], should be completed and further attention should be given to additional proposals in that context.

The further realisation of mutual recognition as the cornerstone of judicial cooperation implies the development of equivalent standards for procedural rights in criminal proceedings, based on studies of the existing level of safeguards in Member States and with due respect for their legal traditions. In this context, the draft Framework Decision on certain procedural rights in criminal proceedings throughout the European Union should be adopted by the end of 2005.

The Council should adopt by the end of 2005 the Framework Decision on the European Evidence Warrant [2]. The Commission is invited to present its proposals on enhancing the exchange of information from national records of convictions and disqualifications, in particular of sex offenders, by December 2004 with a view to their adoption by the Council by the end of 2005. This should be followed in March 2005 by a further proposal on a computerised system of exchange of information.

3.3.2. Approximation of law

The European Council recalls that the establishment of minimum rules concerning aspects of procedural law is envisaged by the treaties in order to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension. The approximation of substantive criminal law serves the same purposes and concerns areas of particular serious crime with cross border dimensions. Priority should be given to areas of crime that are specifically mentioned in the treaties.

To ensure more effective implementation within national systems, JHA Ministers should be responsible within the Council for defining criminal offences and determining penalties in general.

3.3.3. Eurojust

Effective combating of cross-border organised and other serious crime and terrorism requires the cooperation and coordination of investigations and, where possible, concentrated prosecutions by Eurojust, in cooperation with Europol.

The European Council urges the Member States to enable Eurojust to perform its tasks by:

— effectively implementing the Council Decision on Eurojust by the end of 2004 [3] with special attention to the judicial powers to be conferred upon their national members, and

— ensuring full cooperation between their competent national authorities and Eurojust.

The Council should adopt on the basis of a proposal of the Commission the European law on Eurojust, provided for in Article III-273 of the Constitutional Treaty, after the entry into force of the Constitutional Treaty but no later than 1 January 2008, taking account of all tasks referred to Eurojust.

[1] OJ C 12, 15.1.2001, pages 10-22.

[2] COM(2003) 688.

[3] OJ L 63, 6.3.2002, pages 1-3.

Until that time, Eurojust will improve its functioning by focusing on coordination of multilateral, serious and complex cases. Eurojust should include in its annual report to the Council the results and the quality of its cooperation with the Member States. Eurojust should make maximum use of the cooperation agreement with Europol and should continue cooperation with the European Judicial Network and other relevant partners.

The European Council invites the Council to consider the further development of Eurojust, on the basis of a proposal from the Commission.

3.4. *Judicial cooperation in civil matters*

3.4.1. Facilitating civil law procedure across borders

Civil law, including family law, concerns citizens in their everyday lives. The European Council therefore attaches great importance to the continued development of judicial cooperation in civil matters and full completion of the programme of mutual recognition adopted in 2000. The main policy objective in this area is that borders between countries in Europe should no longer constitute an obstacle to the settlement of civil law matters or to the bringing of court proceedings and the enforcement of decisions in civil matters.

3.4.2. Mutual recognition of decisions

Mutual recognition of decisions is an effective means of protecting citizens' rights and securing the enforcement of such rights across European borders.

Continued implementation of the programme of measures on mutual recognition ([1]) must therefore be a main priority in the coming years to ensure its completion by 2011. Work concerning the following projects should be actively pursued: the conflict of laws regarding non-contractual obligations ('Rome II') and contractual obligations ('Rome I'), a European Payment Order and instruments concerning alternative dispute resolution and concerning small claims. In timing the completion of these projects, due regard should be given to current work in related areas.

The effectiveness of existing instruments on mutual recognition should be increased by standardising procedures and documents and developing minimum standards for aspects of procedural law, such as the service of judicial and extra-judicial documents, the commencement of proceedings, enforcement of judgments and transparency of costs.

Regarding family and succession law, the Commission is invited to submit the following proposals:

— a draft instrument on the recognition and enforcement of decisions on maintenance, including precautionary measures and provisional enforcement in 2005,

— a green paper on the conflict of laws in matters of succession, including the question of jurisdiction, mutual recognition and enforcement of decisions in this area, a European certificate of inheritance and a mechanism allowing precise knowledge of the existence of last wills and testaments of residents of European Union in 2005, and

— a green paper on the conflict of laws in matters concerning matrimonial property regimes, including the question of jurisdiction and mutual recognition in 2006,

— a green paper on the conflict of laws in matters relating to divorce (Rome III) in 2005.

Instruments in these areas should be completed by 2011. Such instruments should cover matters of private international law and should not be based on harmonised concepts of 'family', 'marriage', or other. Rules of uniform substantive law should only be introduced as an accompanying measure, whenever necessary to effect mutual recognition of decisions or to improve judicial cooperation in civil matters.

Implementation of the programme of mutual recognition should be accompanied by a careful review of the operation of instruments that have recently been adopted. The outcome of such reviews should provide the necessary input for the preparation of new measures.

3.4.3. Enhancing cooperation

With a view to achieving smooth operation of instruments involving cooperation of judicial or other bodies, Member States should be required to designate liaison judges or other competent authorities based in their own country. Where appropriate they could use their national contact point within the European Judicial Network in civil matters. The Commission is invited to organise EU workshops on the application of EU law and promote cooperation between members of the legal professions (such as bailiffs and notaries public) with a view to establishing best practice.

([1]) OJ C 12, 15.1.2001, pages 1-9.

3.4.4. Ensuring coherence and upgrading the quality of EU legislation

In matters of contract law, the quality of existing and future Community law should be improved by measures of consolidation, codification and rationalisation of legal instruments in force and by developing a common frame of reference. A framework should be set up to explore the possibilities to develop EU-wide standard terms and conditions of contract law which could be used by companies and trade associations in the Union.

Measures should be taken to enable the Council to effect a more systematic scrutiny of the quality and coherence of all Community law instruments relating to cooperation on civil law matters.

3.4.5. International legal order

The Commission and the Council are urged to ensure coherence between the EU and the international legal order and continue to engage in closer relations and cooperation with international organisations such as The Hague Conference on Private International Law and the Council of Europe, particularly in order to coordinate initiatives and to maximise synergies between these organisations' activities and instruments and the EU instruments. Accession of the Community to the Hague Conference should be concluded as soon as possible.

4. **External relations**

The European Council considers the development of a coherent external dimension of the Union policy of freedom, security and justice as a growing priority.

In addition to the aspects already addressed in the previous chapters, the European Council calls on the Commission and the Secretary-General / High Representative to present, by the end of 2005, a strategy covering all external aspects of the Union policy on freedom, security and justice, based on the measures developed in this programme to the Council. The strategy should reflect the Union's special relations with third countries, groups of countries and regions, and focus on the specific needs for JHA cooperation with them.

All powers available to the Union, including external relations, should be used in an integrated and consistent way to establish the area of freedom, security and justice. The following guidelines [1] should be taken into account: the existence of internal policies as the major parameter justifying external action; need for value added in relation to projects carried out by the Member States; contribution to the general political objectives of the foreign policies of the Union; possibility of achieving the goals during a period of reasonable time; the possibility of long-term action.

[1] Established at the European Council meeting in Feira in 2000.

COUNCIL DECISION

of 17 February 2005

renewing the term of office of the President of the Office for Harmonisation in the Internal Market (trade marks and designs)

(2005/C 53/02)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark [1], and in particular Article 120(1) and (2) thereof,

Having regard to the Council Decision of 2 May 2000 appointing the President of the Office for Harmonisation in the Internal Market (trade marks and designs) [2],

Having regard to the proposal by the Administrative Board of the Office for Harmonisation in the Internal Market (trade marks and designs) of 23 November 2004 concerning the renewal of the term of office of the President of the Office,

HAS DECIDED AS FOLLOWS:

Sole Article

The term of office of Mr Wubbo de BOER, born on 27 May 1948, as President of the Office for Harmonisation in the Internal Market (trade marks and designs) is hereby renewed for the period from 1 October 2005 to 30 September 2010.

Done at Brussels, 17 February 2005.

For the Council
The President
J.-C. JUNCKER

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[1] OJ L 11, 14.1.1994, p. 1. Regulation as last amended by Regulation (EC) No 422/2004 (OJ L 70, 9.3.2004, p. 1).
[2] OJ C 139, 18.5.2000, p. 1.

COMMISSION

Euro exchange rates [1]

2 March 2005

(2005/C 53/03)

1 euro =

	Currency	Exchange rate		Currency	Exchange rate
USD	US dollar	1,3101	LVL	Latvian lats	0,6961
JPY	Japanese yen	137,43	MTL	Maltese lira	0,4307
DKK	Danish krone	7,4433	PLN	Polish zloty	3,9098
GBP	Pound sterling	0,6859	ROL	Romanian leu	36 443
SEK	Swedish krona	9,0627	SIT	Slovenian tolar	239,73
CHF	Swiss franc	1,5413	SKK	Slovak koruna	37,858
ISK	Iceland króna	79,88	TRY	Turkish lira	1,6841
NOK	Norwegian krone	8,2060	AUD	Australian dollar	1,6792
BGN	Bulgarian lev	1,9559	CAD	Canadian dollar	1,6286
CYP	Cyprus pound	0,5830	HKD	Hong Kong dollar	10,2185
CZK	Czech koruna	29,647	NZD	New Zealand dollar	1,8077
EEK	Estonian kroon	15,6466	SGD	Singapore dollar	2,1346
HUF	Hungarian forint	242,21	KRW	South Korean won	1 319,79
LTL	Lithuanian litas	3,4528	ZAR	South African rand	7,7544

[1] *Source:* reference exchange rate published by the ECB.

Non-opposition to a notified concentration

(Case COMP/M.3702 — CVC/CSM)

(2005/C 53/04)

(Text with EEA relevance)

On 18 February 2005, the Commission decided not to oppose the above notified concentration and to declare it compatible with the common market. This decision is based on Article 6(1)(b) of Council Regulation (EC) No 139/2004. The full text of the decision is available only in English and will be made public after it is cleared of any business secrets it may contain. It will be available:

— from the Europa competition web site (http://europa.eu.int/comm/competition/mergers/cases/). This web site provides various facilities to help locate individual merger decisions, including company, case number, date and sectoral indexes,

— in electronic form on the EUR-Lex website under document number 32005M3702. EUR-Lex is the on-line access to European law. (http://europa.eu.int/eur-lex/lex)

STATE AID — GERMANY

State aid No C 40/2004 (ex N 42/2004) — 'Real Estate Transfer Tax Exemption for Housing Companies in the *Neue Länder*'.

Invitation to submit comments pursuant to Article 88(2) of the EC Treaty

(2005/C 53/05)

(Text with EEA relevance)

By means of the letter dated 1 December 2004 reproduced in the authentic language on the pages following this summary, the Commission notified Germany of its decision to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of part of the abovementioned measure.

The Commission decided not to raise any objections to certain other parts of the measure that are described in the letter below.

Interested parties may submit their comments on the measure in respect of which the Commission is initiating the procedure within one month of the date of publication of this summary and the following letter, to:

European Commission
Directorate-General for Competition
State Aid Greffe
B–1049 Brussels
Fax (32-2) 296 12 42

These comments will be communicated to Germany. Confidential treatment of the identity of the interested party submitting the comments may be requested in writing, stating the reasons for the request.

TEXT OF SUMMARY

By letter dated 16 January 2004, registered at the Commission on 19 January 2004, Germany notified the abovementioned measure to the Commission.

1. **Objective of the scheme**

Germany proposes to temporarily exempt housing companies from the real estate transfer tax in case of mergers and acquisitions involving land in the *Neue Länder*. The measure is intended to put housing companies in a better position to undertake the necessary investments to meet current market requirements.

2. **Beneficiaries of the scheme**

Potential beneficiaries of the measure are housing companies and housing associations (*Wohnungsunternehmen und Wohnungsgenossenschaften*) acquiring land in the *Neue Länder* (Brandenburg, Mecklenburg-Vorpommern, Sachsen, Sachsen-Anhalt, Thüringen, and Berlin) by means of mergers and acquisitions. For the purpose of this measure, housing companies and housing associations will be defined as companies and associations with the administration of apartments (construction, rental, and sale) as their main business domain. Enterprises in difficulty will be excluded.

3. **Funding of the scheme**

The German authorities have stated that the overall budget of the scheme as well as the potential aid amounts involved in the individual transactions are hard to predict. According to surveys undertaken by Germany, the average amount of real estate transfer tax associated with mergers between housing companies and housing associations will therefore — with the exception of Berlin — be between EUR 150 000 and EUR 1,5 million. In Berlin, aid amounts based on historical data are estimated at between EUR 1,4 million and EUR 6,7 million.

4. **Duration of the scheme**

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

5. **The investment instrument**

The measure is a temporary exemption from the real estate transfer tax.

6. **Assessment of the scheme**

6.1. *Existence of State aid*

The Commission considers that the measure involves State aid within the meaning of Article 87(1) of the EC Treaty.

6.2. *Preliminary assessment of compatibility of the measure*

In view of the expected positive effects of the measure on the housing market (reduction of oversupply) and the general socio-economic development (reduced migration) in the *Neue Länder* and the typically small amounts of aid involved as well as their limitation in time until the end of 2006, the Commission considers that for those parts of the measure that are restricted to assisted areas pursuant to Article 87(3)(a) of the EC Treaty, the aid is proportionate to the objective and does not distort competition to an extent contrary to the common interest. Therefore, it is not necessary to come to a final view on the qualification of the aid as operating aid.

For those parts of the measure proposed by Germany which are aimed at assisted areas pursuant to Article 87(3)(c) ECT, i.e. the labour market region of Berlin, the Commission has come to the following preliminary conclusions:

(a) The vacancy rate in Berlin is significantly lower than the average vacancy rate of the *Neue Länder*. Whereas the overall vacancy rate for the *Neue Länder* is 14,2 %, the corresponding rate for Berlin is 5,32 % for privately owned apartments and 8,77 % for communal apartments, respectively. Almost all vacant apartments are located in Ostberlin.

(b) No data has been provided by Germany that would demonstrate that Berlin is suffering from comparable depopulation as the Article 87(3)(a) regions covered by the measure.

(c) 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 Berlin — based on experiences in the past — lie between EUR 1,4 million and EUR 6,7 million.

(d) No data has been provided by Germany that would demonstrate that the temporary tax exemption is likely to contribute to activating the real estate market in 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.

The Commission, after a first preliminary assessment of the measure, therefore has doubts whether the measure proposed by Germany for the Article 87(3)(c) region of Berlin (labour market region Berlin) is proportionate to the objective — in particular by providing for a sufficient link between the tax breaks and the costs to be borne by the beneficiaries — and does not distort competition to an extent contrary to the common interest. The Commission is of the opinion that a more thorough analysis of this complex question is necessary. The Commission wishes to collect information from other interested parties, notably from housing companies and associations interested in investing in the *Neue Länder*. To do so, the Commission must, for legal reasons, open the procedure provided for in Article 88(2) ECT. It is only with the help of such observations that the Commission can decide whether such aid is necessary and does not adversely affect trading conditions to an extent contrary to the common interest.

TEXT OF LETTER

'Die Kommission teilt der Bundesrepublik Deutschland mit, dass sie nach Prüfung der von den deutschen Behörden zur vorerwähnten Maßnahme übermittelten Angaben beschlossen hat, wegen eines Teils der Maßnahme das Verfahren nach Artikel 88 Absatz 2 EG-Vertrag einzuleiten.

Die Kommission hat beschlossen, keine Einwände gegen bestimmte andere Teile der im nachstehenden Schreiben beschriebenen Maßnahme zu erheben.

1. **VERFAHREN**

Mit Schreiben vom 16. Januar 2004, das am 19. Januar 2004 bei der Kommission einging, hat Deutschland die vorgenannte Maßnahme notifiziert.

Mit Schreiben D/51125 vom 17. Februar 2004 forderte die Kommission ergänzende Informationen an. Diese wurden von Deutschland mit Schreiben vom 17. März 2004 übermittelt, das bei der Kommission am 19. März 2004 einging.

Mit Schreiben vom 26. April 2004 und im Anschluss an eine Besprechung am 16. April 2004, auf der Deutschland ankündigte, es werde weitere Angaben zu der Maßnahme bereitstellen, beantragte Deutschland eine Verlängerung der Frist. Die Fristverlängerung wurde mit Schreiben D/53302 vom 10. Mai 2004 gewährt.

Mit Schreiben vom 14. Mai 2004, das bei der Kommission am selben Tag registriert wurde, übermittelte Deutschland ergänzende Angaben. Mit Schreiben D/54751 vom 30. Juni 2004 und Schreiben D/56567 vom 14. September 2004 forderte die Kommission weitere Informationen zu der Maßnahme an. Diese wurden von Deutschland mit Schreiben vom 29. Juli 2004 und 5. Oktober 2004 übermittelt, die bei der Kommission am 29. Juli 2004 bzw. 6. Oktober 2004 eingingen.

2. **AUSFÜHRLICHE BESCHREIBUNG DER MASSNAHME**

2.1. **Ziel der Maßnahme**

Ein wesentliches Merkmal des Wohnungsmarktes in den neuen Bundesländern ist die hohe Leerstandsquote, verursacht durch die tief greifenden gesellschaftlichen und wirtschaftlichen Veränderungen im Zuge der Wiedervereinigung. Im Rahmen einer integrierten Strategie zur Wiederbelebung des Wohnungsmarktes in den neuen Ländern schlägt Deutschland vor, den Erwerb von Grundstücken in den neuen Ländern durch Verschmelzung oder Spaltung von Wohnungsunternehmen und Wohnungsgenossenschaften für einen befristeten Zeitraum von der Grunderwerbsteuer zu befreien. Mit der Maßnahme sollen Wohnungsunternehmen/-genossenschaften in die Lage versetzt werden, die nötigen Investitionen zu tätigen, um den aktuellen Markterfordernissen zu entsprechen.

2.2. **Begünstigte der Maßnahme**

Potenziell Begünstigte der Maßnahme sind *Wohnungsunternehmen und Wohnungsgenossenschaften,* die in den Bundesländern Brandenburg, Mecklenburg-Vorpommern, Sachsen, Sachsen-Anhalt, Thüringen und Berlin belegene Grundstücke durch Verschmelzung oder Spaltung erwerben. Für die Zwecke der Maßnahme werden Wohnungsunternehmen und Wohnungsgenossenschaften definiert als Unternehmen und Genossenschaften, deren Kerngeschäft in der Verwaltung von Wohnungen (Bau, Vermietung und Verkauf) besteht. Unternehmen in Schwierigkeiten kommen nicht in Betracht.

Nach der deutschen Fördergebietskarte ([1]) gelten Brandenburg, Mecklenburg-Vorpommern, Sachsen, Sachsen-Anhalt und Thüringen als Fördergebiete im Sinne von Artikel 87 Absatz 3 Buchstabe a) EG-Vertrag. Die Arbeitsmarktregion Berlin ist als Fördergebiet gemäß Artikel 87 Absatz 3 Buchstabe c) EG-Vertrag eingestuft.

2.3. **Laufzeit der Maßnahme**

Die Maßnahme ist auf Verschmelzungs- oder Spaltungsvorgänge zwischen Wohnungsunternehmen/-genossenschaften beschränkt, die zwischen dem 31. Dezember 2003 und dem 31. Dezember 2006 erfolgen.

2.4. **Hintergrund der Maßnahme**

2.4.1. *Grunderwerbsteuer*

Die Grunderwerbsteuer wird bei Grundstücksübertragungen erhoben, die zu einem Eigentümerwechsel führen. Die Steuer entsteht, wenn Grundstücke durch Verkauf oder sonstige Rechtsgeschäfte übereignet werden. In Deutschland wird die Grunderwerbsteuer anhand des Bedarfswerts des Grundstücks berechnet und der Steuersatz beträgt 3,5 %.

2.4.2. *Grunderwerbsteuer als Hindernis für die nötige Umstrukturierung*

Auf dem Wohnungsmarkt der *neuen Länder* wird die Grunderwerbsteuer als entscheidendes Hindernis für die notwendige Umstrukturierung wahrgenommen. Bei Fusionen und Übernahmen zwischen Wohnungsunternehmen und –genossenschaften mit Grundstücken in den *neuen Ländern* kann der Gesamtbetrag der Grunderwerbsteuer beträchtlich sein, da das Vermögen der beteiligten Unternehmen fast ausschließlich aus Grundstücken besteht. Die Grunderwerbsteuer wird nach Abschluss eines Vertrags zwischen Käufer und Veräußerer erhoben und kann so zu einer gravierenden Liquiditätsanspannung für die betroffenen Unternehmen führen. Dies ist besonders abschreckend für Wohnungsunternehmen und Wohnungsgenossenschaften in den *neuen Ländern*, die aufgrund bestehender Altschulden und der jüngsten sozio-ökonomischen Entwicklung mit ungünstigen Marktbedingungen konfrontiert sind. Die negative Auswirkung der Grunderwerbsteuer auf die notwendige Umstrukturierung des Wohnungsmarktes in den *neuen Ländern* zeigt sich außerdem darin, dass im Zeitraum 2000-2003 nur neun Fusionen zwischen Wohnungsunternehmen/-genossenschaften stattgefunden haben, bei denen es sich ausschließlich um kleine Unternehmen handelte.

2.4.3. *Grundstücksmarkt in den neuen Ländern*

Der Grundstücksmarkt in den neuen Ländern wird geprägt durch mehrere spezifische Merkmale:

— *Bevölkerungsentwicklung*: Schwache Geburtenraten in den *neuen Ländern* haben gekoppelt mit einer massiven Abwanderung in die alten Bundesländer im Zeitraum 1997-2001 zu einem Bevölkerungsverlust von 3,05 % in Sachsen-Anhalt, 5,3 % in Sachsen und 3,15 % in Mecklenburg-Vorpommern geführt. Dieser Negativtrend dürfte sich bis 2020 noch verstärken.

— *Hohe Leerstandquote*: Im Jahr 1998 verfügten die *neuen Länder* über einen Bestand von 7,3 Mio. Wohnungen. Die Leerstandsquote betrug 13 %. Nach den jüngsten Daten für 2002 stieg die Leerstandsquote auf 14,2 %. Im Vergleich dazu liegt die Leerstandsquote in den *alten Bundesländern* bei 3,1 %.

— *Leerstandsbedingte Mietausfälle*: Die hohe Leerstandsquote in den *neuen Ländern* führt zu erheblichen Mietausfällen (920 Mio. EUR jährlich bzw. 1 550 EUR pro Wohneinheit und Jahr).

— *Unsicherheit wegen offener Restitutionsverfahren:* Im Jahr 1990 fielen 700 000 Wohnungen in den neuen Ländern unter diese Regelung. Bis zum 31. Dezember 2001 konnte für 590 000 Wohnungen das Verfahren abgeschlossen werden. Für die verbleibenden 110 000 Wohnungen kann die Klärung der noch offenen Restitutionsverfahren bis zu zehn Jahren dauern. Am 31. Dezember 2001 standen von diesen 110 000 Wohnungen 35 000 (32 %) leer.

— *Programm der Bundesregierung "Stadtumbau-Ost"*: Angesichts des anhaltenden Überangebots an Mietraum in den neuen Ländern legte die Bundesregierung ein umfassendes Programm mit dem Titel "*Stadtumbau-Ost*" auf, das den Abriss von bis zu 380 000 Wohnungen bis 2009 vorsieht. Ein erheblicher Teil der Abrisskosten werden die Wohnungsunternehmen und Wohnungsgenossenschaften in den *neuen Ländern* zu tragen haben.

2.4.4. *Umfang der Maßnahme*

Die deutschen Behörden bringen vor, dass es generell schwierig sein dürfte, im Einzelnen abzuschätzen, wie viele Unternehmen die Möglichkeit der Grunderwerbsteuerbefreiung im Wege einer Fusion in Anspruch nehmen werden. Nach den Statistiken des Bundesverbands Deutscher Wohnungsunternehmen könnten 1 317 Wohnungsunternehmen und Wohnungsgenossenschaften in den neuen Ländern von der Maßnahme betroffen sein (834 Wohnungsunternehmen und 483 überwiegend kommunale Wohnungsgenossenschaften). Nach einer Umfrage des GDW würden jedoch nur rund 10 % dieser Unternehmen von der Steuerbefreiung tatsächlich Gebrauch machen.

([1]) Siehe Beihilfesachen N 195/1999, C 47/1999 und N 641/2002.

2.4.5. *Beihilfebeträge und Budget der Maßnahme*

Wie unter 2.4.4 ausgeführt, ist es nach Angaben der deutschen Behörden schwierig, das Gesamtbudget der Maßnahme und die potenziellen Beihilfebeträge, die mit den einzelnen Transaktionen verbunden sind, vorherzusagen. Die meisten Wohnungsunternehmen und Wohnungsgenossenschaften wollen derzeit keine festen Zusagen geben sondern das Inkrafttreten der Maßnahme abwarten. Deshalb handelt es sich bei den nachstehenden Ausführungen lediglich um Beispiele, um abgeleitet aus der Vergangenheit und in einigen Fällen im Vorgriff auf die Zukunft typische Fusionsfälle und damit verbundene Grunderwerbsteuerbeträge aufzuzeigen:

— *Thüringen*: Derzeit wird in Thüringen mit fünf Fusionen gerechnet. In zwei Fällen dürfte eine Grunderwerbsteuer in Höhe von 363 321 EUR bzw. 1,46 Mio. EUR anfallen. Bei zwei Fusionen im Jahr 2001 belief sich die Grunderwerbsteuer auf 180 000 EUR für ca. 200 Wohnungen.

— *Sachsen-Anhalt*: In Sachsen-Anhalt werden mindestens drei Fusionen von Wohnungsunternehmen erwartet, wobei eine Grunderwerbsteuer zwischen 250 000 EUR und 500 000 EUR anfallen dürfte. Im Falle fünf weiterer Fusionen wird mit einem Grunderwerbsteuerbetrag bis zu 300 000 EUR gerechnet.

— *Berlin*: In Berlin sind derzeit drei Fusionen zwischen Wohnungsunternehmen vorgesehen. Bei den Fusionen, die zwischen 1995 und 1998 in Berlin erfolgten, wurden folgende Grunderwerbsteuerbeträge verzeichnet: 1,3 Mio. EUR bei einer Fusion, von der 19 Grundstücke betroffen waren; 1,4 Mio. EUR bei einer Fusion, von der 39 Grundstücke betroffen waren bzw. 6,7 Mio. EUR bei einer Fusion, von der 491 Grundstücke betroffen waren.

Nach den von Deutschland durchgeführten Erhebungen wird der durchschnittliche Betrag der bei Fusionen von Wohnungsunternehmen und Wohnungsgesellschaften anfallenden Grunderwerbsteuer daher — mit Ausnahme von Berlin — zwischen 150 000 EUR und 1,5 Mio. EUR liegen.

3. **WÜRDIGUNG DER MASSNAHME**

Gemäß Artikel 6 Absatz 1 der Verordnung (EG) Nr. 659/1999 des Rates vom 22. März 1999 enthält die Entscheidung über die Eröffnung des förmlichen Prüfverfahrens eine Zusammenfassung der wesentlichen Sach- und Rechtsfragen, eine vorläufige Würdigung des Beihilfecharakters der geplanten Maßnahme durch die Kommission und Ausführungen über ihre Bedenken hinsichtlich der Vereinbarkeit mit dem Gemeinsamen Markt.

3.1. **Rechtmäßigkeit der Maßnahme**

Deutschland hat die Regelung im Entwurfstadium notifiziert und ist somit seiner Verpflichtung aus Artikel 88 Absatz 3 EG-Vertrag nachgekommen.

3.2. **Vorliegen einer Beihilfe und Vereinbarkeit mit dem EG-Vertrag**

Die Kommission hat das Vorliegen einer Beihilfe gemäß Artikel 87 Absatz 1 EG-Vertrag geprüft. Die Ergebnisse dieser Prüfung können wie folgt zusammengefasst werden.

— Die Beteiligung *staatlicher Mittel* ist dadurch gegeben, dass Deutschland bei der Befreiung von der Grunderwerbsteuer auf Steuereinnahmen verzichtet, die andernfalls erwirtschaftet worden wären;

— die Maßnahme ist *selektiv*, da sie auf Gebiete in den neuen Ländern ausgerichtet ist und bestimmte Unternehmen nämlich Wohnungsunternehmen und –genossenschaften, begünstigt und sich auf Fusionen solcher Unternehmen und Genossenschaften mit Grundstücken in den *neuen Ländern* beschränkt;

— die Maßnahme *begünstigt* an Fusionen beteiligte Wohnungsunternehmen und Wohnungsgenossenschaften, da sie von der Grunderwerbsteuer befreit werden, die sie andernfalls zu zahlen hätten;

— schließlich stellen Grundstücksübertragungen einen Tätigkeitsbereich dar, in dem Handel zwischen Mitgliedstaaten besteht, so dass eine *Beeinträchtigung des Handels zwischen Mitgliedstaaten* nicht ausgeschlossen werden kann.

Daher ist die Kommission der Auffassung, dass die Maßnahme eine staatliche Beihilfe im Sinne von Artikel 87 Absatz 1 EG-Vertrag darstellt.

3.3. **Vereinbarkeit der Maßnahme**

In Artikel 87 Absatz 2 EG-Vertrag ist geregelt, dass bestimmte Arten von Beihilfen mit dem Gemeinsamen Markt vereinbar sind. Im Hinblick auf Art und Zweck der Beihilfe sowie den geografischen Geltungsbereich finden nach Auffassung der Kommission die Buchstaben a), b) und c) auf die fragliche Regelung keine Anwendung.

In Artikel 87 Absatz 3 sind weitere Beihilfeformen genannt, die als mit dem Gemeinsamen Markt vereinbar angesehen werden können. Im Hinblick auf Art und Zweck der Maßnahme sowie den geografischen Geltungsbereich könnten nach Auffassung der Kommission die Buchstaben a) und c) im vorliegenden Fall Anwendung finden.

Bei der Beurteilung der Frage, ob die in Artikel 87 Absatz 3 Buchstaben a) und c) vorgesehenen Ausnahmen zur Anwendung gelangen können, räumt Artikel 87 Absatz 3 nach ständiger Rechtsprechung des Gerichtshofs "der Kommission ein Ermessen ein, das sie nach Maßgabe wirtschaftlicher und sozialer Wertungen ausübt, die auf die Gemeinschaft als Ganzes zu beziehen sind" ([2]). Bei bestimmten Arten von Beihilfen hat die Kommission festgelegt, wie sie diesen Ermessensspielraum ausüben wird, sei es in Form von Gruppenfreistellungen oder durch Gemeinschaftsrahmen, Leitlinien oder Bekanntmachungen. Ist derartiges Sekundärrecht vorhanden, hat sich die Kommission bei der Beurteilung von Beihilfesachen daran zu halten.

([2]) Rs. C-169/95 *Königreich Spanien / Europäische Kommission* [1997] Slg. I-00135. Siehe auch Rs. C-730/79 *Philip Morris / Kommission* [1980] Slg. I-2671.

Daher muss die Kommission zunächst feststellen, ob die in der Regelung "Grunderwerbsteuerbefreiung bei Fusionen von Wohnungsunternehmen und Wohnungsgenossenschaften in den neuen Ländern" vorgesehene Beihilfe unter eine dieser sekundärrechtlichen Vorschriften fällt.

Die Maßnahme ist weder auf KMU ([3]) oder Unternehmen in Schwierigkeiten ([4]) noch auf einen der folgenden Bereiche beschränkt: Forschung und Entwicklung ([5]), Ausbildung ([6]) oder Beschäftigung ([7]). Somit ist keine dieser Leitlinien, Gemeinschaftsrahmen oder Verordnungen auf den vorliegenden Fall anwendbar. Auch der Gemeinschaftsrahmen für staatliche Umweltschutzbeihilfen ([8]) gelangt nicht zur Anwendung, da die Regelung als solche nicht auf den Umweltschutz ausgelegt ist.

Die Leitlinien für staatliche Beihilfen mit regionaler Zielsetzung (nachstehend "Leitlinien für Regionalbeihilfen") wurden für strukturschwache Regionen wie die neuen Länder konzipiert. Diese Leitlinien zielen auf die Förderung von Investitionen und die Schaffung von Arbeitsplätzen im Rahmen einer nachhaltigen Entwicklung ab, indem die Erweiterung, Modernisierung und Diversifizierung der Tätigkeiten der in diesen Gebieten befindlichen Betriebsstätten sowie die Ansiedlung neuer Unternehmen unterstützt werden.

Die Leitlinien für Regionalbeihilfen finden nur auf bestimmte Beihilfeformen Anwendung wie Beihilfen für Erstinvestitionen, Beihilfen für die Schaffung von Arbeitsplätzen und ausnahmsweise Betriebsbeihilfen.

Die Befreiung von der Grunderwerbsteuer ist offensichtlich nicht speziell an eine Erstinvestition oder die Erweiterung einer bestehenden Betriebsstätte im Sinne von Ziff. 4.4 der Leitlinien gebunden. Auch betrifft sie nicht die Schaffung von Arbeitsplätzen in Verbindung mit einer Erstinvestition im Sinne von Ziff. 4.11 der Leitlinien.

Außerdem haben die deutschen Behörden vorgebracht, die geplante Steuerbefreiung ziele nicht darauf ab, die laufenden Kosten der an Fusionen beteiligten Wohnungsunternehmen und -genossenschaften zu senken. In Ziff. 4.15 der Leitlinien ([9]) heißt es, dass Regionalbeihilfen, mit denen die laufenden Ausgaben eines Unternehmens gesenkt werden sollen, grundsätzlich verboten sind. In Fußnote 16 der Leitlinien wird erläutert, dass solche Beihilfen in der Regel in Form von Steuerermäßigungen oder Senkungen der Soziallasten gewährt werden. Obwohl die notifizierte Maßnahme als Befreiung von der Grunderwerbsteuer bezeichnet wird, hat Deutschland unterstrichen, dass die fragliche Maßnahme aus folgenden Gründen nicht als Beihilfe zur Senkung der laufenden Ausgaben der begünstigten Unternehmen betrachtet werden kann:

— Wohnungsunternehmen und -genossenschaften werden beim Erwerb von Liegenschaften weiterhin die Grunderwerbsteuer zahlen. Da die Geschäftstätigkeit von Wohnungsunternehmen und -genossenschaften generell darin besteht, Liegenschaften zu erwerben und zu verkaufen bzw. zu vermieten, fällt die Grunderwerbsteuer unter die laufenden Ausgaben. Die von Deutschland notifizierte Maßnahme betrifft jedoch nicht die regulären laufenden Ausgaben, da sie nicht zur Anwendung gelangt, wenn Wohnungsunternehmen und -genossenschaften einfach nur eine Immobilie erwerben oder verkaufen.

— Nach deutschen Angaben besteht die Besonderheit der notifizierten Maßnahme darin, dass nur Fusionsvorgänge zwischen Wohnungsunternehmen/-genossenschaften mit Grundbesitz in den neuen Ländern von der Grunderwerbsteuer befreit werden. Die potenziell Begünstigten werden nur unter diesen eingeschränkten Bedingungen für einen befristeten Zeitraum von der Grunderwerbsteuer frei gestellt. In Anbetracht der Tatsache, dass derzeit keine solchen Fusionen stattfinden, betrachtet Deutschland die Beihilfe nicht als Kompensation für die laufenden Ausgaben fusionsbeteiligter Wohnungsunternehmen, da die Steuer gegenwärtig nicht erhoben wird.

— Laut Auskunft der deutschen Behörden besteht die Gegenleistung der Begünstigten darin, dass sie fusionieren. Angesichts der besonderen Umstände in den neuen Ländern, die geprägt sind durch einen starken Bevölkerungsrückgang, der sich bis 2020 noch verschärfen dürfte, eine Leerstandsquote von insgesamt 14,2 % (2002) und den damit verbundenen Mietausfällen (920 Mio. EUR jährlich) sowie die Unsicherheit aufgrund laufender Restitutionsverfahren, werden Fusionen von Wohnungsunternehmen und -genossenschaften für notwendig erachtet, damit diese Unternehmen besser in der Lage sind, den oben beschriebenen Herausforderungen zu begegnen. Die Grunderwerbsteuer hat sich als Hindernis für die Konsolidierung des Wohnungsmarktes in den neuen Ländern erwiesen, was dadurch verdeutlicht wird, dass zurzeit keine Fusionen stattfinden.

— Wie Deutschland weiter vorbringt, wird das von der Bundesregierung und den Ländern aufgelegte Programm "*Stadtumbau Ost*" zum Abriss von 380 000 Wohnungen bis 2009 führen. Einen erheblichen Teil der Abrisskosten würden die Wohnungsunternehmen und -genossenschaften in den neuen Ländern zu tragen haben.

Die Kommission ist bisher davon ausgegangen, dass Steuerbefreiungen zur Umstrukturierung von Wirtschaftszweigen in Schwierigkeiten, mit denen gezielt Zusammenschlüsse gefördert werden sollen, als Beihilfe zur Senkung der laufenden Ausgaben der Unternehmen (Betriebsbeihilfe) ([10]) zu betrachten sind. Die Kommission nimmt die Argumente der deutschen Behörden zur Kenntnis, die im Hinblick auf eine anderweitige Beurteilung der anstehenden Maßnahmen vorgebracht wurden.

([3]) Verordnung (EG) Nr. 70/2001 der Kommission *über die Anwendung der Artikel 87 und 88 EG-Vertrag auf staatliche Beihilfen an kleine und mittlere Unternehmen*, ABl. L 10 vom 13.1.2001.

([4]) *Leitlinien für staatliche Beihilfen zur Rettung und Umstrukturierung von Unternehmen in Schwierigkeiten*, ABl. C 244 vom 1.10.2004.

([5]) *Gemeinschaftsrahmen für staatliche Forschungs- und Entwicklungsbeihilfen*, ABl. C 45 vom 17.2.1996.

([6]) *Verordnung (EG) Nr. 68/2001 der Kommission über die Anwendung der Artikel 87 und 88 EG-Vertrag auf Ausbildungsbeihilfen*, ABl. L 10 vom 13.1.2001.

([7]) *Leitlinien für Beschäftigungsbeihilfen*, ABl. C 334 vom 12.12.1995.

([8]) *Gemeinschaftsrahmen für staatliche Umweltschutzbeihilfen*, ABl. C 37 vom 3.2.2001.

([9]) *Leitlinien für staatliche Beihilfen mit regionaler Zielsetzung*, ABl. C 74 vom 10.3.1998.

([10]) Entscheidung der Kommission Nr. 2002/581/EG über die staatliche Beihilferegelung, die Italien zugunsten der Banken durchgeführt hat (ABl. L 184 vom 13.7.2002, S. 27).

Gemäß Ziff. 4.15 der Leitlinien in der geänderten Fassung von 2000 ([11]) können "derartige Beihilfen (Betriebsbeihilfen) in Gebieten, die in den Anwendungsbereich des Artikels 87 Absatz 3 Buchstabe a) fallen, gewährt werden, wenn sie aufgrund ihres Beitrags zur Regionalentwicklung und ihrer Art nach gerechtfertigt sind und ihre Höhe den auszugleichenden Nachteilen angemessen ist. Es obliegt den Mitgliedstaaten, die Existenz und den Umfang solcher Nachteile nachzuweisen. Diese Betriebsbeihilfen müssen zeitlich begrenzt und degressiv sein."

Für jene Teile der von Deutschland notifizierten Maßnahme, die sich auf Fördergebiete gemäß Artikel 87 Absatz 3 Buchstabe a) EGV beschränken ([12]), geht die Kommission davon aus, dass eine abschließende Bewertung der Frage, ob die Grunderwerbsteuerbefreiung eine Betriebsbeihilfe darstellt, nicht notwendig ist, da sie angesichts der besonderen Nachteile, der begrenzten Wettbewerbsverzerrung, der befristeten Geltungsdauer und der erwarteten positiven Wirkungen auf den Wohnungsmarkt sowie der sozioökonomischen Entwicklung auf jeden Fall genehmigungsfähig ist, wie aus der nachstehenden Erläuterung hervorgeht.

3.3.1. *Bestehende Nachteile in den neuen Ländern*

Deutschland hat nachgewiesen, dass der Grundstücksmarkt in den *neuen Ländern* durch mehrere Nachteile geprägt ist. Die Leerstandsquoten in den *neuen Ländern* sind deutlich höher als in anderen Regionen Deutschlands (14,2 % in den *neuen Ländern* gegenüber 3,1 % in den alten Ländern).

Die Gründe für diese signifikante Differenz stehen in unmittelbarem Zusammenhang mit dem politischen Erbe der Vergangenheit und der sozioökonomischen Entwicklung nach der Wiedervereinigung.

Die hohen Leerstandsquoten in den *neuen Ländern* führen zu erheblichen Mietausfällen (920 Mio. EUR pro Jahr).

Die ungünstige demographische Entwicklung, ausgelöst durch niedrige Geburtenquoten und eine massive Abwanderung, hat zu einem Nachfragerückgang nach Wohnraum in den *neuen Ländern* geführt.

Außerdem hat sich die Nachfrage nach Wohnraum nicht nur quantitativ, sondern auch qualitativ verändert.

Folglich besteht ein erhebliches Überangebot an Wohnraum in den *neuen Ländern*.

Daher haben die Bundesregierung und die *Länder* den Abriss von bis zu 380 000 Wohnungen in den *neuen Ländern* bis 2009 beschlossen (Programm "Stadtumbau-Ost").

Festzustellen ist, dass nach deutschen Angaben ein wesentlicher Teil der Abrisskosten von den betroffenen Wohnungsunternehmen und Wohnungsgenossenschaften zu tragen ist.

Des Weiteren hat Deutschland ausgeführt, dass die Unterkapitalisierung zahlreicher Wohnungsunternehmen und Wohnungsgenossenschaften in den *neuen Ländern* — verursacht durch Mietausfälle wegen hoher Leerstandsquoten und die relative Zersplitterung des Marktes — den von Bund und Ländern geplanten Abriss gefährden könnte, da sie nicht in der Lage sind, ihren Anteil an den Abrisskosten zu tragen.

Darüber hinaus hat Deutschland unterstrichen, dass der Ausgleich von Angebot und Nachfrage nicht nur das Überangebot beseitigen soll, sondern auch notwendig ist, um Wohnraum bereitzustellen, der den heutigen Qualitätsanforderungen entspricht.

Um dies zu erreichen, müssen Wohnungsunternehmen und Wohnungsgenossenschaften in den *neuen Ländern* massiv in die Modernisierung ihres derzeitigen Wohnungsbestands investieren.

Damit die Unternehmen in den neuen Ländern dazu in der Lage sind, müsse ihnen die Möglichkeit gegeben werden zu fusionieren und die damit verbundenen Größenvorteile zu nutzen.

Den Ausführungen der deutschen Behörden zufolge hat sich die Grunderwerbsteuer als Hindernis für Fusionen und Übernahmen zwischen solchen Unternehmen und Genossenschaften erwiesen. Dies wird dadurch unterstrichen, dass im Zeitraum 2000-2003 in den neuen Ländern nur neun Fusionen von Wohnungsunternehmen und Wohnungsgenossenschaften erfolgten.

Eine zeitlich befristete Aussetzung der Grunderwerbsteuer wird den Marktteilnehmern die Möglichkeit geben zu fusionieren. Die erweiterte Kapitalbasis fusionierter Wohnungsunternehmen und Wohnungsgenossenschaften wird sie in die Lage versetzen, die Kosten der notwendigen Abrissmaßnahmen zu tragen und gleichzeitig die erforderlichen Investitionen zu tätigen, um modernen Wohnraum zu schaffen.

3.3.2. *Geringe Verzerrung des Wettbewerbs*

Die Kommission stellt fest, dass Handel und Wettbewerb nur in geringem Maße verzerrt werden. Deutschland hat nachgewiesen, dass sich für jene Teile der Maßnahme, die sich auf Fördergebiete nach Artikel 87 Absatz 3 Buchstabe a) EG-Vertrag beschränken, die üblichen Beträge der bei Fusionen und Übernahmen zwischen Wohnungsunternehmen und Wohnungsgenossenschaften anfallenden Grunderwerbsteuer zwischen 150 000 EUR und 1,5 Mio. EUR bewegen.

3.3.3. *Zeitliche Befristung der Maßnahme*

Darüber hinaus hat Deutschland mitgeteilt, dass die Anwendung der Maßnahme bis Ende 2006 befristet werden soll. Zu diesem Datum läuft auch die geltende Fördergebietskarte aus.

([11]) ABl. C 258 vom 9.9.2000, S. 5.

([12]) Siehe Rdnr. 2.2. Fördergebiete im Sinne von Artikel 87 Absatz 3 Buchstabe a) EG-Vertrag sind nach der deutschen Fördergebietskarte: Brandenburg, Mecklenburg-Vorpommern, Sachsen, Sachsen-Anhalt und Thüringen. Die Arbeitsmarktregion Berlin ist als Fördergebiet gemäß Artikel 87 Absatz 3 Buchstabe c) EG-Vertrag eingestuft.

In Anbetracht der zu erwartenden positiven Wirkungen auf den Wohnungsmarkt (Verringerung des Überangebots) und die allgemeine sozioökonomische Entwicklung (rückläufige Abwanderung) in den neuen Ländern, der generell geringen Beihilfebeträge sowie der zeitlichen Befristung der Maßnahme bis Ende 2006 ist die Kommission der Auffassung, dass für jene Teile der Maßnahme, die sich auf Fördergebiete nach Artikel 87 Absatz 3 Buchstabe a) EG-Vertrag beschränken, die Beihilfe im Verhältnis zu dem angestrebten Ziel steht und den Wettbewerb nicht in einer Weise verfälscht, die dem gemeinsamen Interesse zuwiderläuft. Deshalb ist eine abschließende Bewertung dieser Beihilfe als Betriebsbeihilfe nicht erforderlich.

3.3.4. *Bestehende Nachteile in Berlin*

Für jene Teile der von Deutschland notifizierten Maßnahme, die auf Fördergebiete nach Artikel 87 Absatz 3 Buchstabe c) EG-Vertrag ausgerichtet sind, d.h. die Arbeitsmarktregion Berlin, möchte die Kommission daran erinnern, dass in den Schlussfolgerungen des Europäischen Rates sowohl von Stockholm als auch von Barcelona eine Verringerung des Beihilfe-Gesamtumfangs und eine Neuausrichtung von Beihilfen auf Ziele von gemeinsamem Interesse, darunter Ziele des wirtschaftlichen und sozialen Zusammenhalts gefordert wird ([13]).

Die Kommission hat bereits in einer früheren Entscheidung ([14]) eingeräumt, dass Steuerbefreiungen als Sanierungsinstrument eingesetzt und zu einer Risikoverminderung für Grundstücksinvestoren beitragen können, wenn sich ein Markt als hochriskant erweist und durch renditeschwache Investitionen geprägt wird, vor allem wegen der schwachen Nachfrage und fehlenden Finanzierungsinitiativen. Als günstige Investitionsbedingungen gelten eine hohe Gesamtrendite sowie neue Geschäftschancen, transparente Ausstiegsstrategien und ein geringes Projektrisiko.

Außerdem ist in der Verordnung (EG) Nr. 1260/1999 des Rates vorgesehen, dass Gemeinschaftsinitiativen im Bereich des sozialen Zusammenhalts die "… wirtschaftliche und soziale Wiederbelebung der krisenbetroffenen Städte und Stadtviertel zur Förderung einer dauerhaften Stadtentwicklung" umfassen sollen ([15]). Die Kommissionsinitiative URBAN, die auf Grundlage dieser Verordnung entwickelt wurde, hat die Förderung der physischen und wirtschaftlichen Sanierung von Städten und Stadtvierteln mit Strukturproblemen zum Ziel. Auch wenn der Schwerpunkt dieser Initiative auf städtischen Gebieten liegt, hat die Kommission die Vorteile eines integrierten Ansatzes zur Förderung von Synergien bei der städtischen und ländlichen Entwicklung betont ([16]). Aus den vorstehenden Ausführungen ist zu entnehmen, dass sich das Gemeinschaftsziel der Stärkung des sozialen und wirtschaftlichen Zusammenhalts im Gemeinsamen Markt auch auf Initiativen zur Sanierung ländlicher und städtischer Flächen erstreckt.

Somit kommt die Kommission zu folgenden vorläufigen Schlussfolgerungen:

a. Die Leerstandsquote in Berlin liegt deutlich unter der durchschnittlichen Leerstandsquote in den neuen Ländern. Während die gesamte Leerstandsquote in den neuen Ländern 14,2 % beträgt, liegt die entsprechende Quote in Berlin bei 5,32 % für Wohnungen in Privatbesitz und bei 8,77 % für kommunale Wohnungen. Fast alle leerstehenden Wohnungen befinden sich in Ostberlin.

b. Deutschland legt keine Angaben vor, die beweisen würden, dass Berlin unter einem vergleichbaren Bevölkerungsschwund leidet, wie die von der Maßnahme erfassten Gebiete nach Artikel 87 Absatz 3 Buchstabe a).

c. Während bei Fusionen und Übernahmen zwischen Wohnungsunternehmen und Wohnungsgesellschaften in Gebieten nach Artikel 87 Absatz 3 Buchstabe a) in der Regel eine Grunderwerbsteuer zwischen 150 000 EUR und 1,5 Mio. EUR anfällt, bewegen sich die entsprechenden Beträge für Berlin erfahrungsgemäß zwischen 1,4 Mio. EUR und 6,7 Mio. EUR.

d. Deutschland hat keine Angaben vorgelegt, die beweisen würden, dass die befristete Freistellung von der Grunderwerbsteuer zur Wiederbelebung des Grundstücksmarktes in Berlin beitragen und positive Ausstrahlungseffekte haben wird und dass es sehr unwahrscheinlich ist, dass sich der Privatsektor ohne staatliches Zutun an Sanierungsmaßnahmen beteiligen wird.

Nach einer ersten vorläufigen Würdigung ergeben sich daher Zweifel, dass die von Deutschland notifizierte Maßnahme für das Gebiet nach Artikel 87 Absatz 3 Buchstabe c) (Arbeitsmarktregion Berlin) im Verhältnis zu dem angestrebten Ziel steht — vor allem was die Verbindung zwischen der Steuerbefreiung und den von den Begünstigten zu tragenden Kosten anbelangt — und den Wettbewerb nicht in einer Weise verfälscht, die dem gemeinsamen Interesse zuwiderläuft. Nach Auffassung der Kommission ist eine gründlichere Analyse dieser schwierigen Frage notwendig. Deshalb möchte die Kommission auch Stellungnahmen sonstiger Beteiligter einholen, insbesondere von Wohnungsunternehmen und Wohnungsgenossenschaften, die an Investitionen in den neuen Ländern interessiert sind. Aus rechtlichen Gründen muss die Kommission deshalb das Verfahren nach Artikel 88 Absatz 2 EG-Vertrag einleiten. Nur so wird die Kommission entscheiden können, ob die Beihilfe notwendig ist und die Handelsbedingungen nicht in einer Weise beeinträchtigt, die dem gemeinsamen Interesse zuwiderläuft.

([13]) Die Erklärungen dieser Europäischen Räte liegen in der Mitteilung der Kommission an den Rat mit dem Titel "Fortschrittsbericht über die Reduzierung und Neuausrichtung staatlicher Beihilfen", Brüssel, 16. Oktober 2002, KOM(2002) 555 endg. in gesammelter Form vor. Darüber hinaus vollzieht sich nach Auffassung der Kommission eine harmonische Entwicklung des Gemeinschaftsraums vor dem Hintergrund einer stärkeren wirtschaftlichen Integration. "Dies gilt auch für die Unterstützung aus den Strukturfonds, insbesondere wo diese die Stadtentwicklung im Rahmen eines integrierten regionalen Ansatzes sowie die ländliche Entwicklung in deren Doppelfunktion als Beitrag zum europäischen Landwirtschaftsmodell und zum wirtschaftlichen und sozialen Zusammenhalt fördern." Siehe Mitteilung der Kommission über die Strukturfonds und ihre Koordinierung mit dem Kohäsionsfonds — Leitlinien für die Programme des Zeitraums 2000-2006, ABl. C 267 vom 22.9.1999, S. 20.

([14]) Entscheidung der Kommission vom 22.1.2003 zur Beihilferegelung "Stempelsteuerbefreiung für gewerbliches Eigentum in den benachteiligten Gebieten" (ABl. L 149/2003).

([15]) ABl. L 161 vom 26.6.1999, S. 1.

([16]) Teil III: "Die Entwicklung der städtischen und ländlichen Gebiete und ihr Beitrag zu einer ausgewogenen Raumentwicklung" der Mitteilung der Kommission über die Strukturfonds und ihre Koordinierung mit dem Kohäsionsfonds, ABl. C 267 vom 22.9.1999.

4. **SCHLUSSFOLGERUNG**

Aufgrund der vorstehenden Würdigung hat die Kommission beschlossen, dass die Beihilfe im Rahmen der "Grunderwerbsteuerbefreiung bei Fusionen von Wohnungsunternehmen und Wohnungsgenossenschaften in den neuen Ländern" in jenen Teilen mit dem EG-Vertrag vereinbar ist, die sich auf Fördergebiete nach Artikel 87 Absatz 3 Buchstabe a) EG-Vertrag beschränken. Gleichzeitig hat die Kommission beschlossen, das Verfahren nach Artikel 88 Absatz 2 EG-Vertrag in Bezug auf den Teil der Maßnahme einzuleiten, der sich auf die Arbeitsmarktregion Berlin, einem Fördergebiet nach Artikel 87 Absatz 3 Buchstabe c) EG-Vertrag bezieht.

Aus diesen Gründen fordert die Kommission die Bundesrepublik Deutschland im Rahmen des Verfahrens nach Artikel 88 Absatz 2 EG-Vertrag auf, innerhalb eines Monats nach Eingang dieses Schreibens ihre Stellungnahme abzugeben und alle sachdienlichen Informationen für die Würdigung der Maßnahme in Bezug auf die Arbeitsmarktregion Berlin zu übermitteln.

Die Kommission erinnert die Bundesrepublik Deutschland an die Sperrwirkung des Artikels 88 Absatz 3 EG-Vertrag und verweist auf Artikel 14 der Verordnung (EG) Nr. 659/1999 des Rates, wonach alle rechtswidrigen Beihilfen von den Empfängern zurückgefordert werden können.

Die Kommission teilt der Bundesrepublik Deutschland mit, dass sie die Beteiligten durch die Veröffentlichung des vorliegenden Schreibens und einer aussagekräftigen Zusammenfassung dieses Schreibens im *Amtsblatt der Europäischen Union* von der Beihilfe in Kenntnis setzen wird. Außerdem wird sie die Beteiligten in den EFTA-Staaten, die das EWR-Abkommen unterzeichnet haben durch die Veröffentlichung einer Bekanntmachung in der EWR-Beilage zum Amtsblatt und die EFTA-Überwachungsbehörde durch Übermittlung einer Kopie dieses Schreibens von dem Vorgang in Kenntnis setzen. Alle vorerwähnten Beteiligten werden aufgefordert, innerhalb eines Monats nach dem Datum dieser Veröffentlichung ihre Stellungnahme abzugeben.'