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**WORKING LANGUAGE**

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**Subject: State aid NN 8/2009 - Germany  
Nature conservation areas**

Dear Sir,

The Commission wishes to inform Germany that, having examined the information supplied by your authorities on the matter referred to above, it has decided to raise no objections to the proposed aid measure.

## **1. Procedure**

- (1) The measure was notified by letter dated 7 March 2007, in accordance with Article 88(3) of the EC Treaty. Additional information was sent by letters dated 4 June 2007 and 20 July 2007. A meeting with the German authorities took place on 24 October 2007. Additional information was provided by Germany by letters of 21 November 2007, 21 January 2008, 9 May 2008 and 14 April 2009.
- (2) As one of the measures (the large-scale nature conservation projects) is already being applied, the notification has been entered in the register of non-notified measures.

## **2. Description**

### **2.1. Measures**

- (3) The programme consists of two measures:

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1. the gratuitous transfer of federally-owned natural heritage sites (hereinafter referred to as "land transfer");
  2. the funding of large-scale nature conservation projects.
- (4) The two measures may overlap, as a large-scale nature conservation project may involve the transfer of federally-owned land.

## **2.2. Budget**

- (5) The budget allocated to large-scale nature conservation projects is EUR 14 million/year. The transfer of land does not entail budgetary expenditure.

## **2.3. Duration**

- (6) The measures are not subject to precise time limits. The "land transfer" measure will come to an end when all the areas concerned have been transferred. The measure concerning large-scale conservation projects is of unlimited duration. The projects themselves have a duration of 8-10 years.

## **2.4. Legal basis**

- (7) *Haushaltsgesetz* 2006, Vermerk Nr. 60.1 zu Kap. 0807 Tit. 12101 (Budget Act); *Koalitionsvertrag zwischen CDU, CSU und SPD für die 16. Legislaturperiode vom 11. November 2005*, Pkt. 7.4; *Förderrichtlinien für Naturschutzgrossprojekte* of 28 June 1993 (Guidelines for large-scale nature conservation projects).

## **2.5. Detailed description of the measures**

### **2.5.1. Land transfer**

- (8) Valuable natural heritage sites exist on federally-owned land in Germany, notably in national parks, UNESCO-biosphere reserves, core zones (*Kernzonen*) of large-scale nature conservation projects, former military training grounds and on land reclaimed from mining.
- (9) According to a study carried out in 2005 by the Deutsche Naturschutzring (DNR)<sup>1</sup>, due to budgetary constraints the German authorities find it increasingly difficult to finance the long-term upkeep and development of these areas. In the past, valuable nature protection areas were sold, in certain cases with environmental constraints designed to guarantee the preservation of the naturalistic value of the areas. However, experience gathered has shown that, where such areas were sold to private individuals, even if they were classified as natural protection areas (for example Natura 2000), their naturalistic value was significantly degraded over the years. Besides, nature conservation organizations do not have the financial means to purchase the 125.000 ha of federally-owned land that need to be transferred to ensure their proper upkeep, and to pay for follow-on costs (*Folgekosten*). These follow-on

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<sup>1</sup> Langfristige Finanzierungsansätze zur Sicherung des nationalen Naturerbe, Berlin, March 2005.

costs, which take the form of taxes, contributions to water and land associations (*Wasser and Bodenverbände*), insurance etc, may be substantial (they have been approximately estimated at 50 € per hectare) but are still considerably lower than the administrative costs the State would incur if it continued to manage the areas concerned.

- (10) Germany has therefore decided not to sell the areas concerned, but to transfer responsibility for the conservation of these areas of outstanding naturalistic value to the *Länder* and the *Deutsche Bundesstiftung Umwelt* (DBU, German Environment Foundation). The *Länder* may further transfer these areas gratuitously to nature conservation organizations (which may be in private or mixed ownership). 125 000 ha of German federal nature conservation areas will be transferred under this measure.
- (11) The natural heritage sites to be transferred are selected according to the following nature conservation criteria:
- land in national parks,
  - land in UNESCO-biosphere reserves,
  - land in core zones of large-scale nature conservation projects in Germany,
  - former military training grounds and land reclaimed from mining as large, uninterrupted expanses,
  - land in NATURA 2000 sites,
  - nature conservation areas larger than 50 ha,
  - land in areas of importance for the biotope network and species protection.
- (12) The transfer of property rights over the land is linked to contractually defined obligations which concern nature conservation obligations the recipients are required to comply with. Such nature conservation duties are assigned either by the German Federal Government (in the case of the *Deutsche Bundesstiftung Umwelt*) or by the *Länder* governments (in the case of the other conservation organizations) by an administrative or legal act<sup>2</sup>.
- (13) Transfers to nature conservation associations and foundations take place on proposal from the *Länder*, which select the beneficiaries in an open and non-discriminatory procedure, based on the candidates' technical qualifications.
- (14) While ownership of the land is transferred to the recipients free of charge, all other costs related to the transfer (for example surveying costs and taxes) as well as maintenance costs and inherited pollution risks (*Altlasten*) are borne by the recipients of the areas. If income generated by the exploitation of the land exceeds costs, the balance must be used exclusively for the preservation and improvement of the national natural heritage or, in alternative, must be paid back to the transferring federal institution. Recipients must submit an annual report showing how revenue was used. The environmental restrictions on land use are permanent,

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<sup>2</sup> Verwaltungs- oder Rechtsakte

and the recipients may not alienate the land without authorization from the competent Ministry.

- (15) For land transfer, the German authorities could not provide examples of contracts or cadastral records (*Grundbucheintragung*), since the measure has not yet been implemented. However, the authorities have explained that the environmental restrictions on land use will follow the same lines as those applied to the large-scale conservation projects (see points (20) to (22) *infra*).

## **2.6. Large-scale nature conservation projects**

- (16) The federal programme for the "establishment and protection of valuable natural areas and landscapes of national importance", set out in the *Förderrichtlinien für Naturschutzgrossojekte* (Guidelines for large-scale nature conservation projects) of 28 June 1993, aims to finance projects for the conservation of landscapes and natural heritage sites. The programme has been going on since 1979. Until now, in the vast majority of cases the beneficiaries have been public entities, and only exceptionally private nature conservation organizations.
- (17) The programme aims to ensure the sustainable maintenance of natural landscapes and "cultural landscapes" with particularly valuable habitats for protected animal and plant species. The aim of the measures is in particular the maintenance of biodiversity (diversity of species, diversity of ecosystems and genetic diversity within species). The programme thus contributes to the attainment of supranational nature conservation objectives such as those set in the Convention on Biodiversity, the related EU-target to stop biodiversity loss by 2010, as well as the long-term preservation of Natura 2000 areas.
- (18) The projects to be financed are selected on the basis of nature conservation criteria such as representativeness, scale, closeness to natural state, exemplary character and endangerment. Any interested organization may, in cooperation with the competent *Land*, submit proposals for a conservation project.
- (19) Project managers (*Projektträger*) must be State institutions (district authorities, municipalities, communal associations) or nature conservation associations, foundations or groupings thereof. EUR 14 million of government funding are provided each year for implementation of the programme. Project managers are proposed by the *Länder*, which make their selection on the basis of the candidates' technical qualifications.
- (20) The obligations for recipients are project-specific and are set out in administrative or legal acts issued by the authorities. The parameters for calculation of the grants are indicated in the *Förderrichtlinien*. The grant amount for each project is then stipulated contractually in the grant act (*Zuwendungsbescheid*<sup>3</sup>). This act specifies the type and duration of the obligations, the geographic coverage, the scope, type, duration and method of calculation of the financial grants, and includes provisions on monitoring and modification of the grant amounts. It is complemented by a care and management plan.

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<sup>3</sup> *Zuwendungsbescheid*, §44 Bundeshaushaltsordnung, BGBl I 1969, 1248

- (21) The care and management plan provides a detailed description of the nature conservation tasks involved in each project. The plan, which is drawn up under the control of a Committee, must be in line with a set of guidelines, which typically include criteria such as those outlined below.
- a) The standards for future development of the core areas must be those of an environment with unspoiled natural flora and fauna, taking account of the general socio-economic conditions. The habitats of the animal and plant species which occur in such areas, in particular endangered and typical species as well as target and dominant species in the core areas, must be safeguarded and developed;
  - b) integrated, site-specific protection and management concepts must be developed taking particular care to preserve, optimise and develop valuable habitats;
  - c) conservation-oriented visitor management must be introduced to ensure the environmentally-friendly use of the project's core areas for the purpose of leisure and recreation;
  - d) Evaluation tools must be developed to assess the long-term success of the project;
  - e) Use for hunting and recreational purposes must not be in conflict with the nature conservation objectives and the need for protection and tranquillity in the areas.
- (22) The conservation tasks may thus take different forms, which are defined specifically for each area. For example, the organizations may be required to create or expand natural ecosystems such as wetlands, restore the original water regimes, encourage the development of self-regulating flora and fauna, reduce the quantities of nutrients or create total reserves.
- (23) The Federal Government covers a maximum of 75% of eligible project expenditure. The remaining expenditure must be financed by the competent *Land* and by the project manager. In particular, there is a requirement that at least 10% of the costs incurred during the project, (net of income), as well as the totality of follow-on costs (the long-term costs to be sustained after completion of the projects) must be borne by project managers.
- (24) The German authorities have provided assurances that the public funding provided cannot exceed the costs incurred by the project managers to fulfil the obligations, net of any income generated by the projects. The projects are of limited duration (10 years on average).
- (25) Typically, in the case of private conservation entities, the own-contribution is raised through donations. However, it is possible for the conservation entities to draw revenue from the land they manage. Such sources of revenue are, however, limited by the restrictions on land use imposed by the German government. Revenue may be obtained, in particular but not exclusively, through hunting leases, fishing leases, sales of wood obtained from forestry upkeep activities and tourism. This revenue is offset against the costs of the projects. The German authorities point out that, if the conservation organizations were precluded from exercising any revenue-generating activities, the cost of conservation projects would be higher, and this would infringe the principle, enshrined in the budgetary law, that support measures should be implemented at the least cost for the State<sup>4</sup>.

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<sup>4</sup> Sparsamkeitsgebot, §7 Bundeshaushaltsordnung (BHO) of 16.5.2001.

- (26) The following description of the activities that may be carried out in the framework of large-scale conservation projects is based on the information provided by the German authorities and on a sample contract<sup>5</sup>, and is therefore not exhaustive.
- (27) The sample contract sets out environmental constraints which are modulated according to the area concerned (core zones are subject to more stringent constraints than other zones). For example, in the core zones it is forbidden to build, carry out mining activities, create tourism infrastructure or construct new roads. Generally speaking, activities should not perturb the quiet of the protected areas. Limited tourist activities such as visitors' management (*Besucherlenkung*) are possible provided they comply with the environmental criteria set out in the care and management plan. In the example provided, fishing activities are possible subject to conditions (the long-term objective being the development of autochthonous fish populations). Hunting is also possible, with limitations concerning fixed hunting facilities and baiting/feeding. According to the German authorities, hunting may be necessary to protect forests and should therefore be viewed as a conservation task. As regards forestry, the German authorities have indicated that some particularly valuable forests must be left to natural dynamics (no exploitation), whereas others may be exploited, provided this is done in a non-intensive, environmentally friendly way. Sales of wood are possible. If land is purchased in the framework of a project, existing leases may continue until their expiry but cannot be renewed. New leases of land for extensive exploitation (outside the core areas) are possible.
- (28) As shown by the above example, the sources of revenue at the organizations' disposal are limited by the restrictions on land use imposed by the authorities, but are not defined in an exhaustive way, and the revenue-generating potential of the areas may differ widely. Therefore, the exact financial amount required to cover the recipients' costs cannot be established on an *ex ante* basis, since it has to take into account all revenue accruing to the recipients. In any event, if revenue exceeds costs, the balance must be paid back to the federal institution which awarded the grant, so as to ensure that the conservation entities do not receive more than is strictly necessary to carry out the project.
- (29) The two measures (land transfer and conservation projects) are independent from one another. However, there may be a degree of overlap, as federally-owned land in core areas of large-scale conservation projects may be transferred free of charge to the conservation entities. Besides, project costs may include the purchase of privately-owned land, if this is indispensable to discharge the conservation tasks. The ownership of such land is also transferred to the conservation entities.

*Further transfer or resale of the land*

- (30) Land which is either transferred free-of-charge or purchased with federal funds cannot, in principle, be alienated. However, alienation of land may, under certain circumstances, be authorized by the competent authorities<sup>6</sup>. The German authorities have provided assurances that a resale of the land would be authorized only for land consolidation purposes (*Arrondierung*). The proceeds of the sale would have to be reinvested fully in the care and

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<sup>5</sup> In particular, the description of the project "Pfrunger-Burgweiler Ried" of Land Baden-Württemberg.

<sup>6</sup> Zuwendungsbescheid, § 44 Bundeshaushaltsordnung, BGBI I 1969, 1248.

development of the nature protection areas or used for the acquisition of land with the same or higher naturalistic value. Otherwise, the proceeds would have to be paid back to the State. For both measures (land transfer and conservation projects), the permanent nature of the environmental constraints and the obligation to either reinvest the proceeds of a sale in nature conservation or return them to the State are laid down in the cadastral records of the land parcels concerned.

- (31) Further transfer of the land to a different recipient organization is also possible, in principle. In this case, the land will retain all its existing environmental constraints, and will be transferred to the new owner in such a manner that neither the original recipient, nor the new recipient, can draw any economic benefit from the transfer while the new owner will maintain the nature conservation responsibilities.

### **3. Assessment**

#### **3.1. Presence of aid pursuant to Article 87(1) of the EC Treaty**

##### **3.1.1. Transfer of competences and assets from the Federal Government to the Länder**

- (32) In some cases the transfer of nature conservation areas consists in the mere transfer of ownership from the German Federal Government to the *Länder*. The Commission considers that this transaction constitutes a shift of property rights and responsibility for nature conservation *within* the State structure and does not involve a transfer of State resources to undertakings. Therefore, insofar as the *Länder* are concerned, the notified measure is not caught by Article 87(1) of the EC Treaty.

- (33) The German authorities have indicated that the *Deutsche Bundesstiftung Umwelt* (DBU) should be considered part of the State structure. However, according to available information, the DBU has created a subsidiary foundation (*DBU Naturerbe GmbH*) which will carry out directly some major nature conservation projects. The Commission takes the view that this subsidiary cannot be considered part of the State structure, but should be viewed as a publicly owned conservation entity. The analysis developed in points (34) to (41) therefore also applies to all entities entrusted with the tasks under scrutiny, whether public or private. This includes DBU Naturerbe GmbH and, potentially, DBU, if they carry out the same tasks

##### **3.1.2. Nature conservation entities are undertakings**

- (34) The Länder may delegate the discharge of the conservation tasks attributed to them and, in particular, transfer land ownership to nature conservation foundations, associations or societies, which may be in private, public or mixed ownership.
- (35) The prohibition of State aid enshrined in Article 87(1) of the EC Treaty applies only insofar as the beneficiaries are undertakings. The German authorities consider that the nature conservation organizations concerned by the scheme cannot be classified as undertakings since they are non profit-making and carry out activities which are not economic in nature and have

been defined as services of general interest<sup>7</sup>. According to Germany, this conclusion would be corroborated by the fact that, under German law, such entities are exempt from company tax. In its letter of 9 May 2008, the German authorities also refer to Commission Decision NN 41/2005 (*Green Funds*, Netherlands)<sup>8</sup> where the Commission came to the conclusion that the Dutch nature protection organizations concerned did not exercise economic activities and underline that the same conclusion should apply to the German entities.

- (36) The Commission does not share this view. The Court of Justice has consistently ruled that the notion of undertaking encompasses all entities exercising an economic activity, irrespective of their legal form and of how they are financed.<sup>9</sup> Therefore, the conclusion as to whether the conservation entities carry out economic activities cannot be based on their general aim, profit-making orientation or fiscal treatment under national law, but must be grounded on an analysis of the activities such entities are liable to carry out under the notified measure<sup>10</sup>. Therefore, the position taken by the Commission in Case NN 41/2005 cannot be generalized and construed as a precedent, since it simply reflects the Commission's conclusion that, based on the information provided by the Netherlands, the Dutch organizations did not carry out any economic activities under that specific scheme.
- (37) It is also common ground that, where economic activities are involved, no distinction should be made between those nature conservation entities which are publicly owned and those which are privately owned or in mixed ownership<sup>11</sup>.
- (38) The German authorities point out that the revenue-generating activities may be the inevitable result of the conservation tasks. For example, trees may need to be felled for environmental reasons (e.g. in order to remove foreign tree species), and certain animal populations may need to be reduced by hunting in order to protect forest ecosystems. Likewise, tourism and recreational activities will not be primarily oriented towards business exploitation and will be restricted by the need to avoid disturbing the local fauna. Tourism may be carried out by specialized undertakings.
- (39) The Commission notes that nature conservation entities may carry out a variety of tasks, which are not defined exhaustively *ex ante*, either in the legal basis (the *Förderrichtlinien*) or in the notification itself<sup>12</sup>. While it cannot be excluded that some of the conservation tasks globally defined by Germany as Services of General Interest will be purely non-economic in nature, in other cases the conservation objective will be achieved through the imposition of environmental constraints on activities such as forest and pasture management, leases of land and tourism. Even though these activities may be limited in scope and not particularly

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<sup>7</sup> Aufgaben der Daseinsvorsorge.

<sup>8</sup> Commission Decision of 25 August 2006, C(2006) 3886.

<sup>9</sup> Judgments of the Court of Justice: C-41/90, *Höfner und Elser*, [1991] ECR 1979, paragraph 21, C-244/94, *Fédération française des sociétés d'assurance and Others*, [1995] ECR I-4013, paragraph 14, and C-55/96, *Job Centre*, [1997] ECR I-7119, paragraph 21.

<sup>10</sup> For non-profit making organizations, see for example Joined cases 209/78 to 215/78 and 218/79 *Van Landewyck* [1980] ECR 03125 and Case C-244/94, *FFSA and others* [1995] ECR I-4013.

<sup>11</sup> The EC Treaty (Article 295) is neutral as regards private v. public ownership of undertakings.

<sup>12</sup> Point 6.1 of the Förderungsrichtlinien merely states: "*exploitation, hunting, fishing and recreational activities are authorized insofar as they are not contrary to the nature protection objectives of the project*".



profitable due to the environmental constraints, profitability is not a relevant criterion for the classification of an activity as economic in nature.

- (40) Such classification cannot be based, either, on the teleological argument put forward by the German authorities according to which the "focus" of the activities would be environmental protection rather than the generation of revenue. The Commission notes that, regardless of the environmental objectives pursued, the conservation organizations have an interest in generating sufficient revenue to cover the costs related to land ownership and/or those related to project implementation (10% of project costs must be borne by the organizations themselves). Therefore, the environmental objective will always coexist with the economic objective.
- (41) According to settled case-law, any activity consisting in supplying goods or services on a given market is an economic activity<sup>13</sup>. The Commission considers that, in the case at hand, activities like sales of wood, leases of land and tourism must be classified as economic in nature. The German nature conservation entities concerned by the notified measures should therefore be considered as undertakings within the meaning of Article 87(1) of the EC Treaty insofar as they exercise these activities (and as such, they should be subject to State aid control).
- (42) This finding is in line with previous Commission decisions approving under the State aid rules very similar German measures involving the gratuitous transfer of forestry land to the *Länder* and nature conservation organizations (C 17/1998, N 506/1999 and N 277/2003), where the revenue-producing activities carried out were equally considered economic in nature, and the entities were qualified as undertakings.

### **3.1.3. Criteria to identify the presence of State aid**

- (43) Under Article 87(1) of the EC Treaty, a measure constitutes State aid if the four following conditions are cumulatively met. First, it must be a State measure or involve State resources. Second, the measure must confer an advantage on its recipients. Third, it must be granted selectively by favouring only certain undertakings. Fourth, it must affect trade between Member States and distort or threaten to distort competition.

#### **3.1.3.1. Transfer of State resources**

- (44) Under the land transfer measure, the German State transfers the ownership of the selected natural sites free-of-charge. The long-term restrictions on land use linked to nature conservation objectives reduce its sales value, but do not bring it down to zero. The potential sales value of the land is difficult to quantify as it depends on factors such as the suitability of the area for income-generating activities or the extent of follow-on costs (which include land tax, water and land fees, insurance and other administrative costs). A study carried out in 2005 by the *DNR-Strategiegruppe Naturschutzflächen* and submitted by the German authorities underlines the difficulties of valuating the land, but makes no suggestion that the market value of the land would be zero. On the contrary, the study puts forward tentative cost

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<sup>13</sup> Judgment of the Court of 10 January 2006 in Case C-222/04 *Cassa di Risparmio di Firenze et al.* [2006] ECR I-289.

figures for certain types of areas. Moreover, in the past this type of land was sold to nature conservation entities and private individuals for consideration.

- (45) According to the Commission Communication concerning State aid elements in sales of land and buildings by public authorities<sup>14</sup>, State aid can only be excluded if a sale is concluded at market value. Since the land is transferred free-of-charge despite the fact that it has a positive market value, the German State is transferring State resources to the recipients in the form of foregone revenue.
- (46) As regards the large-scale conservation projects, the State intervenes by providing 90% of project costs (thorough federal and *Länder* resources). Therefore, this measure also involves a transfer of State resources.

#### **3.1.3.2. *Economic advantage***

- (47) Both measures confer an economic advantage on the recipients, since the land is put free-of-charge at the disposal of the beneficiaries, who may exploit it commercially and obtain revenue, even though such revenue may be limited by environmental constraints. Besides, when ownership is transferred free-of-charge or at a reduced cost for the recipient (e.g. in the framework of a conservation project), there is arguably a further element of potential advantage consisting in the value of the land. The relevance of this advantage for the assessment of the measures at issue will be examined in greater detail in points (79) to (81) below.

#### **3.1.3.3. *Selectivity***

- (48) The beneficiaries are selected nature conservation organizations. Therefore, the measures are selective in scope.

#### **3.1.3.4. *Impact on trade and distortion of competition***

- (49) The beneficiaries of the measures exercise activities in sectors such as forestry, tourism and hunting/fishing. These sectors are open to competition and there is intra-community trade in all of them. Admittedly, these activities are likely to be limited in scope, both geographically and in terms of value.
- (50) As regards value, modest amounts of aid complying with the conditions set out in Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis aid*<sup>15</sup> fall outside the scope of Article 87(1) of the Treaty. In the case at hand, however, no limit is set to the value of the aid which may be granted to the recipients.
- (51) As regards the geographical scope of the activities, the Commission has accepted that state support did not affect trade only in a very limited number of cases involving purely local services, unlikely to attract custom from other Member States, such as a German swimming

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<sup>14</sup> OJ C 209, 10.7.1997, p. 3.

<sup>15</sup> OJ L 379, 28.12.2006, p. 5.

pool<sup>16</sup>. The Community courts have likewise interpreted the notion of impact on trade in a strict way.

(52) In the case at hand, at least one of the activities (wood sales) does not concern the provision of a service, but the sale of goods (forestry products), which are clearly capable of being exported within the EU. As regards the other activities, also given the geographical location of the areas, which are scattered on the whole German territory, it cannot be ruled out that the transferred land would be suitable for international tourism, or that the hunting leases would attract interest internationally. Besides, the German scheme does not define exhaustively the activities which may be carried out on the land. Therefore, despite the fact that the impact of the measures is likely to be limited, the Commission considers that intra-community trade should be considered affected.

#### **3.1.4. Conservation tasks as Services of General (Economic) Interest**

(53) The German authorities take the view that the nature conservation tasks carried out under the notified measures should be viewed as non-economic Services of General Interest ("SGI").

(54) However, as explained in points (36) to (42) *supra*, the Commission considers that at least some of the activities carried out by the conservation entities and defined as services of general interest are indeed economic in nature. Therefore, the Commission has assessed whether the tasks at issue can be viewed as Services of General *Economic* Interest ("SGEI") instead.

(55) As the ECJ repeatedly confirmed, also in the recent *BUPA*<sup>17</sup> judgment, Member States have wide discretion in defining a SGEI mission and the conditions of its implementation. The Commission can question the Member States' definition only in case of manifest error. Member States must, however, indicate the reasons why they consider that the service in question, because of its specific nature, deserves to be characterized as a SGEI<sup>18</sup>.

(56) Environmental protection tasks of the type proposed by Germany have never so far been defined as a SGEI by a Member State. SGEI missions have typically concerned network industries such as telecommunications, water and electricity distribution, postal services, transport services as well as certain airport or port services. On the other hand, the notion of SGEI cannot be a static one, since the perception of what services should be guaranteed through the intervention of the State is liable to develop over time. In its 2004 White Paper on Services of General Interest<sup>19</sup> the Commission already recognized that "*services of general interest and the context in which they are provided, including the European Union itself, are constantly evolving and will continue to evolve*".

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<sup>16</sup> Commission decision N 258/2000 of 21.12.2000, Germany – leisure pool Dorsten, OJ C 172, 16.6.2001, p. 16.

<sup>17</sup> See judgment of the CFI of 12 February 2008 in Case T-289/03 *BUPA*, paragraphs 166 to 169, not yet published.

<sup>18</sup> *BUPA* case-law, *ibidem*, paragraph 172.

<sup>19</sup> Communication of the Commission of 12.5.2004 COM(2004)374 final, available at [http://eurlex.europa.eu/LexUriServ/site/en/com/2004/com2004\\_0374en01.pdf](http://eurlex.europa.eu/LexUriServ/site/en/com/2004/com2004_0374en01.pdf)

- (57) The Commission White Paper, while focusing on the more typical public service missions, also considered the environment to be an area where services of general interest might be established: in section 3.4 of the Paper, it is stated that, "*in line with the Union's policy on sustainable development, due consideration has to be taken also of the role of services of general interest for the protection of the environment and of the specific characteristics of services of general interest directly related to the environmental field, such as the water and waste sectors*".
- (58) The Commission considers, however, that a necessary precondition for qualifying a measure as a SGEI is that it genuinely serves the interest of citizens. The conservation tasks entrusted by Germany to the nature conservation entities pursue objectives which are in the interest of society as a whole, namely the preservation of intact habitats of outstanding naturalistic value for future generations. These tasks, which can be construed as services rendered to all citizens, clearly fall within the remit of the State acting as public authority, which however may find it appropriate to entrust them to other entities, for example for budgetary reasons. In that sense, the scheme differs from a classical environmental aid measure: in the latter case the activities which are beneficial for the environment cannot be carried out by the State, but can only be carried out by undertakings on a voluntary basis. Therefore, the Commission accepts that the conservation tasks at issue may constitute a service of general interest.
- (59) However, it should be noted that SGEIs established by the Member States in sectors of the economy which have been the object of harmonization at the EU level must be examined with particular care in order to avoid contradictions. In particular, the forestry sector is harmonized, and State aid for forestry is covered by the Community Guidelines for State aid in the Agriculture and Forestry Sector 2007-2013<sup>20</sup> ("the 2007 Agriculture Guidelines"). Therefore, the Commission has examined whether agricultural rules should be applied to the case at hand. The 2007 Agriculture Guidelines (notably point 175, letters (a) to (g)) would allow aid aimed to promote the ecological, protective and recreational function of forests, as well as aid in the form of transfer of forestry land for permanent protection purposes.
- (60) However, in the case at hand, forestry land constitutes only a fraction of the natural protection areas at issue (and only 0.8% of all exploited forested land in Germany). Besides, the organizations concerned will also carry out other activities to be assessed as compensation for an SGEI, and a global analysis of the absence of overcompensation would necessarily need to include revenue from forestry activities.
- (61) In the light of the above, the Commission considers that it would not be appropriate to carve out forestry and carry out a separate analysis on the basis of the sectoral rules, and that an analysis based on compensation for an SGEI is the most correct approach for the measures put in place by Germany, which must be assessed globally.

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<sup>20</sup> OJ C 319 of 27.12.2006, p. 1.

### 3.1.5. The Altmark criteria are not cumulatively fulfilled

- (62) The German authorities have provided information aiming to demonstrate that the measures do not constitute aid on the basis of the *Altmark*<sup>21</sup> case-law. The Commission has examined and dismissed this argument.
- (63) In its judgment in the *Altmark* case, the Court of Justice held that, public service compensation (that is, compensation for an SGEI) does not constitute State aid within the meaning of Article 87 of the Treaty provided four conditions are cumulatively met.
- (64) In particular, the fourth *Altmark* condition is that, in order not to constitute State aid, the amount of compensation must be defined either through an open, transparent and non discriminatory public tender procedure (the "tender method") *which would allow for the selection of the tenderer capable of providing those services at the least cost to the community*<sup>22</sup>, or the public authorities have to define the amount of compensation on the basis of an analysis of the costs of a typical undertaking, well run and adequately equipped (the "benchmarking method").
- (65) Under the notified measures, the conservation organisations are selected in an open and transparent public procedure. However, the bidding process is not based on the lowest price of the services, or on the most economically advantageous offer<sup>23</sup>, but rather on the qualifications of the organizations and –only for the nature conservation projects - on the environmental merits of the projects. The amount of compensation is therefore not fixed as a result of a bidding process, contrary to what the *Altmark* case-law requires, and the system does not ensure that the services will be provided at the least cost for the State. Even though the German authorities have assured that, in the event of two organizations presenting offers for the same project, the more economic of the two offers would be selected, this possibility seems purely theoretical (since projects will typically be different) and would in any event only cover a fraction of projects. The amount of compensation is not fixed through benchmarking, either. Therefore, the conclusion must be drawn that the fourth *Altmark* condition is not fulfilled, and therefore the *Altmark* case-law cannot be relied upon to classify the measures as non-aid.
- (66) Since all the criteria of Article 87(1) are met, the measure constitutes State aid.
- (67) Even though the criteria applied here are different, the State aid finding is consistent, in substance, with the Commission's previous decision-making practice: a number of German schemes involving the gratuitous transfer of federally-owned forestry land to the *Länder* and to nature conservation organizations (notified to and authorized by the Commission in cases C 17/1998, N 506/1999 and N 277/2003) were also found to constitute State aid<sup>24</sup>.

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<sup>21</sup> Judgment of the Court of 24 July 2003 in Case C 280/00 *Altmark Trans and Regierungspräsidium Magdeburg*, [2003] ECR I-7747.

<sup>22</sup> *Ibidem*, point 93.

<sup>23</sup> This notion is wider than that of the lowest price and also takes into account qualitative factors

<sup>24</sup> In its decision approving case N 277/2003 (Decision of 26 April 2006 COM (2006) 1579 fin) the Commission stated that it was unable carry out an analysis based on the notion of compensation for services of general interest because the German authorities had not provided sufficient information to substantiate the claim.

### **3.2. Legality of the aid**

(68) In its letter of 11 April 2008, the German authorities confirmed that the large-scale conservation project measure has been ongoing since 1979. The land transfer measure has not been implemented. Therefore, the aid is unlawful insofar as the conservation projects measure is concerned.

### **3.3. Compatibility of the aid on the basis of the post-Altmark package**

#### **3.3.1. Applicability of the SGEI Decision**

(69) Small amounts of compensation granted to undertakings providing services of general economic interest whose turnover is limited may be considered compatible aid (and exempted from the notification requirement) pursuant to Commission Decision of 28 November 2005 on the application of Article 86(2) of the Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest<sup>25</sup> (the "*SGEI Decision*"). In particular, the SGEI Decision applies to compensation granted to undertakings with an average annual turnover before tax, all activities included, of less than EUR 100 million during the two financial years preceding that in which the service of general economic interest was assigned, which receive annual compensation for the service in question of less than EUR 30 million.

(70) The German authorities have clarified that, according to the information at their disposal (which relates to possible future recipients of federal land and current recipients of funds in the framework of nature conservation projects), the turnover of the recipient organizations does not exceed the threshold of EUR 100 million laid down in the SGEI Decision. As regards the amounts of compensation involved, for the land transfer measure it is expected that the revenue drawn from the land will not exceed the EUR 30 million threshold (but exact figures will only be available after the land has been transferred). As regards the conservation projects, the grants cannot exceed the threshold of the SGEI Decision, considering that the total budget allocated to the measure (EUR 14 million) is shared between 20-30 recipients.

(71) On the basis of this information, the Commission concludes that all aid granted in the past for conservation projects falls within the scope of the SGEI Decision.

(72) As regards the future, it is likely that, in the vast majority of cases, aid granted towards both measures (land transfer and conservation projects) will fall within the scope of the SGEI Decision. However, in the absence of an explicit limitation of the scheme to measures fulfilling the conditions of the SGEI Decision, there may be situations in which the thresholds are exceeded. It is therefore appropriate also to check compliance of the scheme with the SGEI Framework. Since the rules of the SGEI Decision and Framework are, in substance, the same (the Decision is just narrower in its scope of application) there is no need for a separate assessment.

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<sup>25</sup> OJ L 312 of 29.11.2005, p. 67.

### **3.3.2. Compatibility on the basis of the SGEI Framework**

(73) Public service compensation which cannot be qualified as non-aid on the basis of the Altmark criteria may, however, be found compatible if it complies with the conditions laid down in the Community Framework for State aid in the form of public service compensation<sup>26</sup> ("*the SGEI Framework*").

#### **3.3.2.1. Genuine SGEI**

(74) In the light of the analysis developed in points (55) to (58), the Commission is satisfied that it is in the public interest to ensure that valuable natural heritage sites are protected and enhanced, and that such public interest justifies the establishment of public service obligations.

#### **3.3.2.2. Entrustment**

(75) Public service obligations for which compensation is granted must be clearly defined. According to point 12 of the SGEI Framework, this means that responsibility for operation of the SGEI must be entrusted to the undertaking concerned by way of one or more official acts, which must specify:

- a) the precise nature and duration of the public service obligations;
- b) the undertakings and the territory concerned;
- c) the nature of any exclusive or special rights assigned to the undertaking;
- d) the parameters for calculating, controlling and reviewing the compensation;
- e) the arrangements for avoiding and repaying any overcompensation.

(76) As regards the transfer of land, the entrustment to undertakings of the conservation tasks takes place through the donation contract (*Schenkungsvertrag*), in conjunction with the modification of the relevant cadastral data (*Grundbucheintragung*). No special or exclusive rights are granted. The donation contract describes the exact environmental obligations recipients of the land must comply with. These constraints are reflected in the cadastral data, which establish land use and resale restrictions for the concerned areas. The parameters of the transaction are established beforehand and mechanisms are put in place to ensure the avoidance of overcompensation. Therefore, for the land transfer measure, it can be considered that the environmental tasks have been duly entrusted by Germany to the recipient organizations.

(77) As regards the financing of large nature conservation projects, the entrustment is enshrined in the legally binding *Zuwendungsbescheid* issued by the Länder, in conjunction with the management and development plan of each project. The *Zuwendungsbescheid* prescribes that the public resources made available for the project must be used exclusively to discharge tasks of general interest<sup>27</sup>. These tasks are then specified in detail in the project-specific

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<sup>26</sup> OJ C 297 of 29.11.2005, p. 4.

<sup>27</sup> defined by reference to the *Förderrichtlinien*.

management and development plan. No special or exclusive rights are granted. The temporal, geographic and financial parameters of the transaction are specified and mechanisms are put in place to avoid overcompensation. Therefore, it can be considered that the environmental tasks related to this measure have also been duly entrusted.

### 3.3.2.3 *Amount of compensation*

(78) The amount of compensation cannot exceed what is necessary to cover all or part of the costs incurred in discharging the public service obligations, taking into account the relevant receipts and a reasonable margin of profit (point 14 of the SGEI Framework). Compensation must actually be used for the operation of the SGEI (point 15 of the SGEI Framework).

#### a) *Land transfer*

(79) The potential economic advantage accruing to the conservation organizations can be defined as the revenue streams obtained through the commercial exploitation of the land, plus the sales value of the land. However, the element of advantage incorporated in the sales value of the land will, *de facto*, materialize only in the event of a sale. It should be noted that, in principle, the land transferred to the conservation entities cannot be freely alienated by the recipients. Even where alienation is authorized, the proceeds of the sale cannot be retained by the recipient, but must be either reinvested in environmental conservation, or paid back to the State. The environmental obligations cannot be reverted, and in case of non-compliance with such obligations, the transferred land is to be returned to the State.

(80) In this situation, the only advantage accruing to the recipients consists in the revenue streams obtained through the exercise of the economic activities which may be carried out on the land. Therefore, for the purpose of analysing the absence of overcompensation in the light of the Framework, the Commission considers it appropriate to base its assessment not on the potential sales value of the land, but on the revenue that can be drawn from it.

(81) According to the information provided by the German authorities, the proceeds from the economic activities at issue will typically not exceed the costs arising from the environmental tasks imposed on the recipients and the costs related to the ownership of the land (e.g. taxes, remediation of inherited pollution (*Altlasten*) and other contributions). Since each area has a different potential for generating income, it is impossible to provide *ex ante* figures. However, the German authorities have provided a description of the general accounting principles to be used. Should revenues exceed costs, the balance must be either reinvested in the protection of the natural heritage, or be transferred back to the State. Therefore, it is considered that the compensation (the revenue which can be obtained from the land) will be used entirely to discharge the SGEI obligations, as foreseen by the SGEI Framework.

(82) Overcompensation can also be ruled out, since the revenue must be entirely allocated to the conservation tasks or paid back. It is worth noting that this method excludes the possibility for the recipients to retain any margin of profit from their activities, even though a reasonable margin of profit would be allowed by the SGEI Framework (cfr. point 18).

(83) The SGEI Framework also sets out requirements aiming to ensure the absence of cross-subsidization in cases where the undertakings also carry out activities falling outside the scope of the service of general economic interest, for example by means of cost/revenue



allocation mechanism or the keeping of separate accounts for SGEI and non-SGEI activities. In the case at hand, both the conservation activities and the revenue-generating activities can be considered to fall within the scope of the SGEI. For these activities, there is a financial settlement whereby the costs of the conservation measures are set against the costs and revenues from the economic activities. However, the conservation entities may carry out other activities, unrelated to the measure at issue. In this case it is necessary to ensure that the costs arising from such activities cannot be imputed to the SGEI and taken into account in the financial settlement.

- (84) The German authorities have confirmed that the accounting principles applicable to the measure<sup>28</sup> guarantee transparency and a clear segregation between costs and revenues related to the various activities carried out by the conservation entities.
- (85) It should also be noted that the absence of cross-subsidization is the natural corollary of the mechanism chosen by Germany. Cross-subsidization can be defined as the ability of an undertaking to use the subsidy obtained for the operation of the SGEI in order to offer artificially low prices in its other commercial activities. In this case the proceeds of the commercial activities are the only instrument for the conservation organizations to cover the costs arising from the environmental obligations (again, the activities cannot benefit from a subsidy, but the possibility to exercise them for free constitutes the subsidy). No incentive exists, *de facto*, for the organizations to price their commercial services at a level which would undercut competitors.
- (86) Besides, it is noted that this mechanism reflects point 17 of the SGEI Framework, stating that "*the Member State may also decide that the profits accruing from other activities outside the scope of the service of general economic interest must be allocated in whole or in part to the financing of the service of general economic interest*".

b) *Major nature conservation projects*

- (87) The project funding agreement is also based on the principle that any revenue drawn by the conservation organizations from the economic exploitation of the land must be used to finance the project and any excess revenue should be either reinvested in nature protection or handed back. The considerations developed *supra* in points (82) to (85) on the absence of overcompensation and cross-subsidization equally apply to this measure.
- (88) As regards the potential advantage incorporated in the value of the land transferred free-of-charge to the project managers (in case of overlap with the land transfer measure) and in the value of the land purchased as part of project costs (for which recipients will pay only 10% of the purchase price), the considerations developed in points (79) and (80) equally apply to this measure.
- (89) It can therefore be concluded that the compensation provided under both notified measures does not exceed what is necessary to discharge the public service obligations entrusted to the beneficiaries.

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<sup>28</sup> See para. 6.2.2 ANBestP in VV zu § 44 BHO.

#### **3.3.2.4 Reporting**

(90) The German authorities have agreed to provide a report on the implementation of the scheme every three years. The report will take the form of a table showing, for each measure, the revenue drawn from the land, the expenditure incurred and the use to which any excess revenue was put. Germany will also indicate cases in which the alienation of land was authorized by the competent authorities.

#### **3.3.2.5 Conclusion**

(91) In the light of the above analysis, the Commission concludes that the relevant rules of the post-Altmark package are complied with. Since, as explained *supra* in point (71), the substantive rules of the SGEI Decision and the SGEI Framework do not differ, individual instances of aid which, in view of their characteristics, fall within the scope of the SGEI Decision are considered to comply with the Decision on the basis of the analysis developed above.

### **4. DECISION**

(92) In the light of the above, the Commission considers that the measure is compatible with the common market pursuant to Article 86(2) of the EC Treaty.

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Yours faithfully,

For the Commission

Neelie KROES  
Member of the Commission