



EUROPEAN COMMISSION

Brussels,  
C (2011)

**Subject: State Aid/Germany (Bavaria)  
Aid No SA 31144/N/10 (N 274/A/2010)  
Disaster Aid Scheme "Bayerischer Härtefonds Finanzhilfen"  
(beneficiaries in the agriculture and forestry sector)**

Sir,

The European Commission ("the Commission") wishes to inform Germany that, having examined the information supplied by your authorities on the State aid measure referred to above, it has decided not to raise any objections to the relevant measure as it is compatible with the Treaty on the Functioning of the European Union ("TFEU").

In taking this decision the Commission has relied on the following considerations:

**PROCEDURE**

- (1) By letter of 23 June 2010, registered by the Commission on the same day, Germany notified, according to Article 108(3) of the TFEU, the above mentioned aid scheme.
- (2) The Commission services have divided the measure into part A (beneficiaries in the agriculture and forestry sector) and part B (beneficiaries in trade and industry). The present Decision solely concerns part A of the measure; part B is subject to Commission Decision SA 31151 (N 274b/2010) of 10 May 2011.
- (3) By letters of 11 August 2010, 11 November 2010 and 24 February 2011, the Commission services asked for supplementary information.
- (4) The German authorities provided such information by letters of 6 October 2010, 27 December 2010 and 18 March 2011. By the latest letter, the German authorities also requested to suspend the on-going proceeding for a period of three months. The Commission services agreed to this request by letter of 29 March 2011, thus extending the period within which the Commission is required to adopt a decision until 29 June 2011. The German authorities provided additional information by letter of 25 May 2011.

H.E. Dr Guido Westerwelle  
Federal Minister for Foreign Affairs  
Werderscher Markt 1  
D - 10117 BERLIN

## **DESCRIPTION**

### **Title**

- (5) Bayerischer Härtefonds Finanzhilfen – Emergency Scheme aiming at giving relief from natural disaster damages (hereinafter: "the Scheme")

### **Objective**

- (6) The objective of the Scheme is to grant support in exceptional emergency situations to compensate for uninsurable damage caused by natural disasters. The scope of the Scheme shall only cover the following categories of future natural disasters: earthquakes, landslides, floods and avalanches.

### **Beneficiaries**

- (7) Undertakings regardless of their size are entitled to apply for aid under the Scheme. Since a framework scheme has been notified, the number of beneficiaries cannot be specified. Eligible undertakings must be based or must have a permanent establishment in the *Land Bayern*.

### **Legal Basis**

- (8) The notification refers to an existing aid scheme, which introduced emergency relief of damages from natural disaster and which was approved by Commission Decision E 12/94 (SG (94) D/12332) dated 24 August 1994. The present notification has the purpose of introducing some amendments to the existing scheme.
- (9) The legal basis of the scheme is the Budget Act of Bavaria ("*Bayerische Haushaltsordnung*"), in particular Article 23 and 44 of the Budget Act, and the Act on State guarantees ("*Gesetz über die Übernahme von Staatsbürgschaften und Garantien des Freistaates Bayern*").

The measure is implemented on the basis of the two following administrative regulations:

- Administrative Regulation on granting of State aid for damage due to natural disasters ("*Härtefonds für Notstände durch Elementarereignisse*");
- Administrative Regulation on granting State guarantees for damage due to natural disasters ("*Richtlinien für die Übernahme von Staatsbürgschaften bei Notständen durch Elementarereignisse*").

### **Description of the scheme**

#### *Determination of a natural disaster*

- (10) The final power to decide about the existence of a natural disaster and the start of measures under the Scheme is assigned to the Bavarian Ministry of Finance. The applicable procedure functions as follows: after the occurrence of the natural disaster the county authority concerned informs the government of the province, if possible the following day. The government of the province examines on its own on the basis

of first estimations whether measures on the basis of the notified scheme are possible and necessary. If appropriate, the government of the province estimates the geographic scope and the timeframe of the measures. On the basis of the government's (of the province) proposal the Ministry of Finance informs the Ministry of Internal Affairs and the Ministry of Economy and the Ministry of Agriculture, and takes in agreement with these the final decision about the existence of a natural disaster, the start of the aid measures and their geographic scope and timeframe. In order to determine the existence of a natural disaster, the Ministry of Finance relies not only on the reports of the local authorities but also on special status reports provided by the disaster control and civil protection services and the expertises (in particular regarding the water level, precipitation amount and snow depths) provided by the Ministry of Environment.

#### *Procedure, type and level of support*

- (11) Enterprises located in the eligible areas have to apply for the aid by written procedure. The beneficiaries have to indicate every single damaged asset and have to prove that they could not repair or replace the damaged asset by their own means. In addition, the beneficiaries have to prove that the asset was not insurable.
- (12) After the assessment of the application the competent authority takes a granting decision. This decision states - depending on the individual situation as regards the extent of the loss, the financial situation of the beneficiary and the emergency of the case - whether the aid is either granted in the form of direct grants, interest subsidies or guarantees.<sup>1</sup>
- (13) As a general rule, it is stated that for damages up to an amount of EUR 10.000 only 35 % of the necessary costs for restoration or replacement shall be awarded.
- (14) Furthermore, in general a reduction of 10 % of the proved costs will be applied in cases of replacement in order to take account of the increase of value linked to the acquisition of a new object.
- (15) Interest subsidies for loans of the beneficiary can only be granted if the bank and the beneficiary can agree on a loan at market conditions. As far as guarantees are concerned, it is stipulated that a maximum of 90 % of the underlying loan can be guaranteed.
- (16) The competent authority controls the appropriate application of the aid and the beneficiaries have to fulfil corresponding reporting obligations. If necessary, the granting decision will be revoked.

#### *Duration*

- (17) Compensation for damage can be awarded as from the approval of the measure by the European Commission. The Scheme will expire after a period of six years starting from the date of approval of State Aid Decision SA 31151 (N 274b/2010) of 10 May 2011 (see paragraph (9) of that Decision), i.e. on 10 May 2017.

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<sup>1</sup> The German authorities confirmed that the provisions of the Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees (OJ C 155, 20.06.2008, p. 10.) and the Communication on the revision of the method for setting the reference and discount rates (OJ C 14, 19.01.2008, p. 6.) will be respected.

### *Budget and intensity*

- (18) - Annual budget: 1 500 000 € (estimated).
- Aid intensity: up to 100%

### *Cumulation*

- (19) The level of damages is determined for each individual case. The aid amount cannot exceed the amount necessary for the restoration or replacement of the damaged asset. Aid granted pursuant to other measures regarding the damage will be deducted from this maximum amount.

### *Eligible costs*

- (20) Aid under the notified scheme shall only be granted if the occurred damage has been uninsurable for the beneficiary.
- (21) The concept of damage as applied by the German authorities is based on the principle that only the costs necessary to restore or replace the damaged asset to its former condition are eligible. Only the assets necessary for business continuity are eligible.
- (22) This concept includes in particular refinancing costs of capital goods partially or wholly destroyed due to the natural disaster as well as costs to replace partially or wholly lost stocks of raw materials and intermediary goods.
- (23) Incurred losses and foregone profits associated with temporary interruptions of the production process, the loss of orders, customers or markets as well as other damages are excluded from compensation.
- (24) The aid can be granted only if despite preventive measures the beneficiary is in an exceptional state of distress not attributable to anyone's negligence. An exceptional state of distress is assumed, if the damage is so severe that it cannot be remedied by the party having suffered the damage out of his own financial resources.
- (25) As a general rule, it is stated that for damages up to an amount of EUR 10.000 only 35 % of the necessary costs for restoration or replacement shall be awarded.
- (26) Furthermore, in general a reduction of 10 % of the proved costs will be applied in cases of replacement in order to take account of the increase of value linked to the acquisition of a new object.
- (27) Interest subsidies for loans of the beneficiary can only be granted if the bank and the beneficiary can agree on a loan at market conditions. As far as guarantees are concerned, it is stipulated that a maximum of 90 % of the underlying loan can be guaranteed.

### *Information and reporting obligations*

- (28) The German authorities committed to abide by the following information and reporting obligations:
- (29) Within a delay of fifteen days beginning with the start of measures on the basis of the notified scheme, the German authorities inform the Commission services about the concrete case of application. In this context, information has to be submitted on the basis of which the presence of a natural disaster within the meaning of Article 107(2)(b) of the TFEU can be proven. Also, the already implemented or planned measures and the estimated volumes of damage and aid have to be indicated.
- (30) In the aftermath of the implementation of the scheme in a concrete situation, at the latest within three months after the last individual aid regarding a certain natural disaster has been granted, the German authorities transmit the respective final report. In so far conclusive information on the basis of which the presence of a natural disaster within the meaning of Article 107(2)(b) of the TFEU can be proven that information will be submitted to the Commission services. In addition, information on all individual implementation measures and the concrete number of beneficiaries, as well as the overall aid amount will be submitted.

### **ASSESSMENT**

#### **Application of Article 107(1) of the TFEU**

- (31) Pursuant to Article 107(1) of the TFEU, aid granted by a Member State or through state resources in any form whatsoever that distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is prohibited, insofar as it affects trade between Member States.
- (32) It is clear that the measure in question confers an advantage on its recipients. This advantage is granted through State resources and it favours recipients located in the *Land Bayern*.
- (33) According to the case law of the Court of Justice, the mere fact that the competitive position of an undertaking is strengthened compared to other competing undertakings, by giving it an economic benefit which it would not otherwise have received in the normal course of its business, points to a possible distortion of competition.<sup>2</sup>
- (34) Aid to an undertaking appears to affect trade between Member States where that undertaking operates in a market open to intra-Union trade.<sup>3</sup> The notified disaster aid can be granted to practically all undertakings in the agricultural sector in the *Land Bayern*. Most undertakings in the agricultural sector will very likely be engaged in trade with other Member States. Therefore, the present measure is liable to affect intra-Union trade.

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<sup>2</sup> Judgment of the Court of 17 September 1980 in Case 730/79 *Philip Morris Holland BV v Commission of the European Communities* [1980] ECR 2671.

<sup>3</sup> See in particular the judgment of the Court of 13 July 1988 in Case 102/87 *French Republic v Commission of the European Communities* [1988] ECR 4067.

- (35) In light of the above, the conditions of Article 107(1) of the TFEU are fulfilled. It can therefore be concluded that the proposed measure constitutes State aid within the meaning of that Article. The aid may only be considered compatible with the internal market if it can benefit from one of the derogations provided for in the TFEU.

#### **Application of Article 107(2)(b) of the TFEU**

- (36) The Commission examined the notified scheme pursuant to Article 107(2)(b) of the TFEU.
- (37) Article 107(2)(b) of the TFEU states that aid to make good the damage caused by natural disasters or exceptional occurrences shall be compatible with the internal market.

#### **Application of the Guidelines**

- (38) The Commission assesses aid to make good the damage caused by natural disasters or exceptional occurrences on the basis of Chapter V.B.2 of the Community guidelines for state aid in the agriculture and forestry sector 2007 to 2013 (hereinafter: "the Guidelines").<sup>4</sup>

#### *The existence of a natural disaster*

- (39) As laid out in point 121 of the Guidelines, the Commission has consistently held that the notions of 'natural disaster' and 'exceptional occurrence' contained in Article 107(2)(b) of the TFEU must be interpreted restrictively. This has been confirmed by the Court of Justice of the European Union<sup>5</sup>. Hitherto the Commission has accepted that earthquakes, avalanches, landslides and floods may constitute natural disasters provided that a sufficiently precise description can be established.
- (40) Without prejudice to the evaluation of future cases to be reported under the reporting obligation mechanism described in paragraphs (28) to (30), the Commission notes that the disaster types covered by the notified Scheme appear to match exactly the disaster types mentioned in point 121 of the Guidelines (see paragraph (6)).
- (41) In addition, the German authorities confirmed that damage caused directly by climatic events such as rain or hail is excluded. As regards floods, this also excludes cases where in rivers the water level rises but not yet causes water to overflow the river banks. In this context, the German authorities have also confirmed that the Scheme is not applicable to damages caused by dammed up moisture.
- (42) The risk that aid on the basis of the Scheme will be paid out in situations not constituting natural disasters in the meaning of point 121 of the Guidelines can be excluded. In this respect, it should be taken into account that the power to decide about the application of the scheme is not attributed to the local authorities or the provinces themselves, but to the level of the *Land*. When deciding about the existence of a natural disaster several institutions are involved and the competent Ministry of Finance relies not only on the reports of the local authorities, but also on

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<sup>4</sup> OJ C 319/1 of 27.12.2006

<sup>5</sup> See judgment of 11 November 2004 in Case C-73/03 Spain v. Commission, paragraph 37; Judgment of 23 February 2006 in Case C-346/03 and C-529/03 Giuseppe Atzeni and others, paragraph 79.

special status reports provided by the disaster control and civil protection services and the expertises (in particular regarding the water level, precipitation amount and snow depths) provided by the Ministry of Environment.

- (43) Finally, the German authorities are obliged to inform the Commission services about every concrete case of application of the notified scheme within a delay of fifteen days beginning with the start of measures. In particular, the German authorities have to submit information on the basis of which the presence of a natural disaster in the meaning of point 121 of the Guidelines can be proven. Should the situation arise that the given event does not constitute a natural disaster, this information mechanism would still provide the opportunity for the Commission to take appropriate actions.
- (44) The conditions of point 121 of the Guidelines are therefore deemed to be met.

#### *Compensation*

- (45) According to point 123 of the Guidelines, once the existence of a natural disaster or an exceptional occurrence has been demonstrated, the Commission will permit aid of up to 100 % to compensate for material damage. Compensation should normally be calculated at the level of the individual beneficiary, and in order to avoid over-compensation, any payments due, for example under insurance policies, should be deducted from the amount of aid. The Commission will also accept aid to compensate farmers for loss of income resulting from the destruction of the means of agricultural production, provided that there is no over-compensation. In all cases, the case law of the Court of Justice requires the Member State to demonstrate a direct link between the damage caused by the exceptional occurrence and the State aid and as precise an assessment as possible to be made of the damage suffered by the producers concerned.
- (46) Germany has assured to demonstrate the existence of each single disaster under the information and reporting obligation mechanism described in paragraphs (28) to (30). Under the Scheme, compensation is assessed separately for each individual beneficiary (see paragraph (19)). Only where damages could not be insured, compensation will be granted (see paragraphs (11) and (20)). This implies that payments under insurance policies will be deducted from the amount of aid. In addition, different measures will be taken to exclude overcompensation (see paragraphs (13) to (15)). Losses of income and foregone profits are, as a rule, excluded from compensation (see paragraph (23)). Under the information and reporting obligation mechanism described in paragraphs (28) to (30), Germany will be required to demonstrate a direct link between the damage caused and the State aid and as precise an assessment as possible to be made of the damage suffered.
- (47) The conditions of point 123 of the Guidelines are therefore deemed to be met.
- (48) Based on the above considerations, the notified Scheme meets the requirements as provided under Chapter V.B.2 of the Guidelines.

#### *Duration of the scheme*

- (49) According to point 189 of the Guidelines, schemes covering State aid measures that can also benefit from co-financing under Regulation (EC) No 1698/2005 should be

limited to the duration of the programming period 2007-2013. Other aid schemes should not apply for more than seven years.

- (50) The Scheme would apply until 10 May 2017 (see paragraph (17)). As it cannot benefit from co-financing under Regulation (EC) No 1698/2005, the duration of the Scheme is in line with the conditions laid down in point 189.
- (51) Finally, the German authorities committed to suspend any payment of aid under the notified Scheme if the beneficiary still has at its disposal an earlier unlawful aid that was declared incompatible by a Commission Decision (either concerning an individual aid or an aid scheme), until that beneficiary has reimbursed or paid into a blocked account the total amount of unlawful and incompatible aid and the corresponding recovery interest.<sup>6</sup>
- (52) In light of all the above, the aid scheme in question is considered to be compatible with the internal market under Article 107(2)(b) of the TFEU.

#### 4. CONCLUSION

On the basis of the above considerations, the Commission has accordingly decided to consider the aid to be compatible with Article 107 (2)(b) of the TFEU.

If this letter contains confidential information, which should not be published, please inform the Commission within fifteen working days from the receipt of the present letter. If the Commission does not receive a reasoned request by this deadline, you will be deemed to have agreed to the publication of the full text of this letter in the authentic language on the following webpage:

[http://ec.europa.eu/eu\\_law/state\\_aids/state\\_aids\\_texts\\_de.htm](http://ec.europa.eu/eu_law/state_aids/state_aids_texts_de.htm)

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

European Commission  
Directorate-General for Agriculture and Rural Development  
Directorate Agricultural Legislation  
Office: Loi 130 5/98A  
B-1049 Brussels  
Fax No: 0032 2 2967672

Yours faithfully,

For the Commission

Dacian CIOLOȘ

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<sup>6</sup> See judgment of 15 May 1997 in Case C-355/95 P *Textilwerke Deggendorf GmbH v. Commission*, paragraph 25



Member of the Commission