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***SENSITIVE\*: LIMITED***

**Subject: State aid / Germany (Bavaria)  
SA.54436 (2019/N)  
Investment measures for irrigation infrastructure**

Sir,

The European Commission ("the Commission") wishes to inform Germany that, having examined the information supplied by your authorities on the scheme referred to above, it has decided that it does not constitute State aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union ("TFEU").

The Commission has based its decision on the following considerations:

**1. PROCEDURE**

- (1) By letter of 20 May 2019, registered by the Commission on the same day, Germany notified, according to Article 108(3) TFEU, the above mentioned aid scheme. The Commission sent a request for additional information to the German authorities on 17 July 2019, which the German authorities answered by letter of 8 August 2019, registered by the Commission on the same day. On 9 October 2019 the Commission requested an extension of the delay to assess the present measure until 8 November 2019, which the German authorities accepted by letter of 22 October 2019.

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## **2. DESCRIPTION**

### **2.1. Title**

- (2) Investment measures for irrigation infrastructure.

### **2.2. Objective**

- (3) According to the German authorities, the objective of the scheme is a sustainable and environmentally friendly irrigation infrastructure. Against the backdrop of climate change, the project is intended to test whether State support for investment measures for irrigation infrastructure for special agricultural crops, horticulture and viticulture is effective in achieving irrigation that is gentle on water and groundwater.

### **2.3. Legal basis**

- (4) Guidelines on aid for water management projects (*Richtlinien für Zuwendungen zu wasserwirtschaftlichen Vorhaben (RZWas 2018)*) of 8 October 2018.
- (5) The German authorities committed in their notification that no aid will be granted prior to the Commission decision.

### **2.4. Duration**

- (6) Until 31 December 2021.

### **2.5. Budget**

- (7) The German authorities estimate the overall budget of the scheme at EUR 40 million.

### **2.6. Beneficiaries**

- (8) According to the German authorities, the recipients of the aid will be local authorities as well as water and soil associations who will receive aid for the establishment of an irrigation infrastructure (direct beneficiaries).
- (9) This irrigation infrastructure will be mainly used by agricultural undertakings (indirect beneficiaries).
- (10) No aid will be granted for investments at the level of the end users.

### **2.7. Description of the aid schem**

- (11) The granting authority is the Bavarian State Ministry for Environment and Consumer Protection (*Bayerisches Staatsministerium für Umwelt und Verbraucherschutz*).
- (12) Aid will be granted for the establishment of a comprehensive irrigation infrastructure aiming at a sustainable and environmentally friendly use and at a fair distribution of irrigation water resources.
- (13) The infrastructure will cover a certain connected area under agricultural, horticultural or viticulture use and will provide, free of charge, water to all

agricultural users within this area who need it for irrigation purposes. Insofar as the quality and quantity of the water allows, it can also be used for other agricultural water utilisation or by other users outside agriculture.

- (14) Local authorities (cities, communes) as well as water and soil associations can apply for aid. They have to commit to keep separate accounts for economic activities (if any) and non-economic activities in order to avoid cross-subsidisation.
- (15) In order to be eligible the following conditions have to be fulfilled:
  - ex ante legally binding commitments (over at least 20 years) of all agricultural users of the area concerned to exclusively use the irrigation infrastructure (obligation to connect and to use) obtained; likewise, a commitment to abandon and dismantle the existing water abstraction facilities, unless they become part of the new irrigation infrastructure;
  - presentation of an elaborated concept of a sustainable and environmentally sound irrigation including decision on a preferred option;
  - construction of the irrigation infrastructure in areas with appropriate water management and agricultural conditions (e.g. hydrogeological units);
  - establishment or maintenance of biotope structures and/or extensive agricultural use in certain parts of the area concerned;
  - the planned irrigation infrastructure must allow for a sustainable use of the landscape water regime.
- (16) Aid will be granted at 50% of eligible costs with a maximum amount per grant of EUR 10 million.
- (17) The following costs are eligible:
  - water intakes and other facilities for the abstraction of water;
  - collecting works from larger water bodies;
  - reservoirs for rain and surface water as well as river filtrate;
  - reservoirs to avoid abstraction tips of groundwater including filter system;
  - supply lines and pumps;
  - water counter;
  - stage installations and/or measuring devices;
  - control elements for the infrastructure;
  - planning works up to 15%;
  - studies on the flow of substances and relevant biological quality components in water bodies.

- (18) Components used at the level of individual undertakings as well as replacement investments are not eligible.
- (19) The contracts for the construction of the irrigation infrastructure will be awarded based on a tendering procedure.
- (20) The German authorities explained that the infrastructure will be comprehensive in the project areas concerned and will therefore constitute a natural monopoly.
- (21) They underlined that no aid will be granted for the creation of additional reservoirs and supply lines at the level of individual agricultural undertakings, which could aim at increasing the available water volume and the productivity of the undertakings concerned. Rather will aid be granted for the construction of irrigation infrastructure outside of individual undertakings, the use of which will be conditioned on the renouncement of existing abstraction rights and the acceptance of an external water management.
- (22) The German authorities explained that there will be no economic advantage for participating agricultural undertakings.
- (23) Currently, those undertakings can obtain their irrigation water independently, mainly from ground water and partly from surface waters, free of charge.
- (24) Under the envisaged project, agricultural undertakings will renounce their existing permits and commit to connect exclusively to the aided irrigation infrastructure. In case of drought, water will be divided fairly, which could also result in a limitation of water volumes for certain undertakings.
- (25) The German authorities underlined that the envisaged scheme will only have positive environmental effects as it aims at preserving ground water and water bodies in the areas concerned.

### **3. ASSESSMENT**

#### **3.1. Existence of aid - Application of Article 107(1) TFEU**

- (26) According to Article 107(1) TFEU, "[s]ave as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market".
- (27) The State aid rules only apply where the beneficiary of a measure is an 'undertaking'. The Court of Justice has consistently defined undertakings as entities engaged in an economic activity, regardless of their legal status and the way in which they are financed.<sup>1</sup> The classification of a particular entity as an undertaking thus depends entirely on the nature of its activities.

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<sup>1</sup> Judgment of the Court of Justice of 12 September 2000, Pavlov and Others, Joined Cases C-180/98 to C-184/98, ECLI:EU:C:2000:428, paragraph 74; Judgment of the Court of Justice of 10 January 2006, Cassa di Risparmio di Firenze SpA and Others, C-222/04, ECLI:EU: C:2006:8, paragraph 107.

- (28) The qualification of a measure as aid within the meaning of Article 107(1) TFEU (cf. recital (26)) therefore requires the following cumulative conditions to be met: (i) the measure must be imputable to the State and financed through State resources; (ii) it must confer an advantage on its recipient; (iii) that advantage must be selective; and (iv) the measure must distort or threaten to distort competition and affect trade between Member States.
- (29) In the case at hand aid will be granted by the Bavarian State Ministry for Environment and Consumer Protection (cf. recital (11)). The scheme in question is therefore imputable to the State and financed through State resources.
- (30) It has therefore to be examined whether the aid scheme at hand also fulfils the three other conditions of Article 107 (1) TFEU (cf. recital (28)) and thus constitutes State aid.
- (31) This assessment will be done at two levels:
- 1) At the level of the direct beneficiaries*
- (32) Under the notified scheme, aid will be granted to local authorities and water and soil associations (cf. recital (8)), which are public bodies as well.
- (33) They receive aid for the establishment of a comprehensive irrigation infrastructure (cf. recital (12)). It has therefore to be examined whether such activity can be considered an economic activity (cf. recital (27)).
- (34) To clarify the distinction between economic and non-economic activities, the Court of Justice has consistently held that any activity consisting in offering goods and services on a market is an economic activity.<sup>2</sup>
- (35) In the case at hand the infrastructure will be comprehensive in the project areas concerned and will therefore constitute a natural monopoly (cf. recital (20)). No entity other than the direct beneficiaries can provide similar services on the same territory, which aim at benefiting society as whole, by means of a better use and distribution of water resources (cf. recitals (12) and (25)). As regards the infrastructure, there is, therefore, no market and hence direct beneficiaries are not engaged in an economic activity. Moreover, direct beneficiaries have to commit to keep separate accounts for economic activities (if any) and non-economic activities in order to avoid cross-subsidisation (cf. recital (14)).
- (36) It can therefore be concluded that the second condition for the existence of an aid is not fulfilled. Consequently, based on the information provided by the German authorities, the notified scheme does not constitute State aid, in the sense of Article 107(1), TFEU, at the level of the direct beneficiaries.<sup>3</sup>

*2) At the level of the indirect beneficiaries*

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<sup>2</sup> See Judgment of the Court of Justice of 16 June 1987, *Commission v Italy*, 118/85, ECLI:EU:C:1987:283, paragraph 7; Judgment of the Court of Justice of 18 June 1998, *Commission v Italy*, C-35/96, ECLI:EU:C:1998:303, paragraph 36; Judgment of the Court of Justice of 12 September 2000, *Pavlov and Others*, Joined Cases C-180/98 to C-184/98, ECLI:EU:C:2000:428, paragraph 75.

<sup>3</sup> Construction of the irrigation infrastructure will be awarded based on a tendering procedure, which should exclude an advantage also at the level of the contractor (cf. recital (19)).

- (37) The planned irrigation infrastructure will be mainly used by agricultural undertakings (cf. recital (13)), who are therefore the indirect beneficiaries of the notified scheme.
- (38) Currently, those undertakings can obtain their irrigation water independently, mainly from ground water and partly from surface waters, free of charge (cf. recital (23)).
- (39) With the planned irrigation infrastructure, the abovementioned agricultural undertakings will continue to obtain water for irrigation purposes free of charge (cf. recitals (13) and (24)).
- (40) Moreover, the German authorities confirmed that components used at the level of individual undertakings as well as replacement investments are not eligible (cf. recital (18)).
- (41) They furthermore underlined that no aid will be granted for the creation of additional reservoirs and supply lines at the level of individual agricultural undertakings, which could aim at increasing the available water volume and the productivity of the undertakings concerned (cf. recital (21)).
- (42) The indirect beneficiaries will therefore not obtain any economic advantage from the planned irrigation infrastructure.
- (43) It can therefore be concluded that the second condition for the existence of an aid is not fulfilled. Consequently, based on the information provided by the German authorities, the notified scheme does not constitute State aid, in the sense of Article 107(1), TFEU, at the level of the indirect beneficiaries.
- (44) Since there is no economic activity involved at the level of the direct beneficiaries and the envisaged measure does not confer any economic advantage on indirect beneficiaries, there is no need to assess its effects on competition and on trade between Member States.
- (45) The four cumulative conditions of Article 107 (1) TFEU are not fulfilled in the case at hand. The notified scheme therefore does not constitute State aid.

#### **4. CONCLUSION**

The Commission has accordingly decided:

- that the measure does not constitute State aid.

If any parts of this letter are covered by the obligation of professional secrecy according to the Commission communication on professional secrecy in State aid decisions<sup>4</sup> and should not be published, please inform the Commission within fifteen working days of notification of this letter. If the Commission does not receive a reasoned request by that deadline Germany will be deemed to agree to the publication of the full text of this letter. If Germany wishes certain information to be covered by the obligation of professional secrecy please indicate the parts and provide a justification in respect of each part for which non-disclosure is requested.

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<sup>4</sup> Commission communication C(2003) 4582 of 1 December 2003 on professional secrecy in State aid decisions, OJ C 297, 9.12.2003, p. 6.

Your request should be sent electronically via the secured e-mail system Public Key Infrastructure (PKI) in accordance with Article 3(3) of Commission Regulation (EC) No 794/2004<sup>5</sup>, to the following address: [agri-state-aids-notifications@ec.europa.eu](mailto:agri-state-aids-notifications@ec.europa.eu).

For the Commission

Phil HOGAN  
Member of the Commission

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<sup>5</sup> Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EU) 2015/1589 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 140, 30.4.2004, p. 1).