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SENSITIVE*: LIMITED

**Subject: State aid–Germany (Brandenburg)
SA.55183 (2019/N)
Brandenburg: Measures for near-natural development of waters**

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 this scheme does not constitute State aid in the sense 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 16 August 2019, registered by the Commission on the same day, Germany notified, according to Article 108(3) TFEU, the above-mentioned scheme. The Commission sent a request for additional information to the German authorities on 10 October 2019, which the German authorities answered by letter of 12 November 2019, registered by the Commission on the same day.

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2. DESCRIPTION

2.1. Title

- (2) Brandenburg: Measures for near-natural development of waters

2.2. Objective

- (3) With the present notification the authorities of Germany wish to obtain a State aid clearance for a scheme for the near-natural development of waters in Brandenburg as referred to in sub-measure M 7.2, section 8.2.6.3.2 of the Rural Development Programme Berlin and Brandenburg 2014-2020¹ (hereinafter: RDP), further described in section 2.8 of this Decision. The conditions of the notified scheme are identical to those described in section 8.2.6.3.2 of the RDP. The measures under the notified scheme contribute to the general public interest.
- (4) With this support, a natural and environmentally sound development of water bodies is pursued, improving the water quality and the water management infrastructure, thus contributing to the sustainable development of rural areas and to the implementation of the objectives of the EU Water Framework Directive² and the EU flood risk management Directive³. The funding supports the sustainable development of waters in accordance with § 6 of the German Water Resources Act⁴ [Wasserhaushaltsgesetz (WHG)].

2.3. Legal basis

- (5) The legal basis is the „Guideline of the Ministry for Rural Development, Environment and Agriculture (MLUL) of Brandenburg with regard to the granting of financial support to near-natural development of waters and of support to measures to reinforce the management of the water regime of the Land Brandenburg (Guideline Waters development/Water regime Land Brandenburg – RL Gew/LWH)“ [*Richtlinie des Ministeriums für Ländliche Entwicklung, Umwelt und Landwirtschaft (MLUL) des Landes Brandenburg über die Gewährung von Zuwendungen zur Förderung der naturnahen Entwicklung von Gewässern und zur Förderung von Maßnahmen zur Stärkung der Regulationsfähigkeit des Landschaftswasserhaushaltes (Richtlinie Gewässerentwicklung / Landschaftswasserhaushalt - RL GewEntw/LWH)*]

2.4. Duration

- (6) From 1 January 2019 until 31 December 2020.

¹ Rural Development Programme Berlin and Brandenburg (Germany) - [Programm zur Entwicklung des ländlichen Raums von Berlin und Brandenburg (Deutschland)], CCI 2014DE06RDRP007, approved by Commission decision C(2018)8090 of 27.11.2018.

² Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy (OJ L 327, 22.12.2000, p. 1).

³ Directive 2007/60/EC of the European Parliament and of the Council of 23 October 2007 on the assessment and management of flood risks (OJ L 288, 9.11.2007, p. 27).

⁴ Gesetz zur Ordnung des Wasserhaushalts.

2.5. Budget

- (7) The overall budget is EUR 2 666 666,67 with an annual budget of EUR 1 333 333,33. The budget is co-financed by EAFRD⁵ funds of EUR 2 000 000 (75%) and funds from the Land Brandenburg of EUR 666 666, 67 (25%).

2.6. Beneficiaries

- (8) The eligible beneficiaries are non-profit entities of private law, such as nature protection associations and federations.
- (9) The number of beneficiaries is estimated at less than 10.
- (10) Excluded from the scheme are:
- 1) Undertakings in difficulty within the meaning of point 35(15) of the European Union Guidelines for State aid in the agricultural and forestry sectors and in rural areas 2014 to 2020⁶
 - 2) Undertakings subject to an outstanding recovery order following a previous Commission decision declaring an aid illegal and incompatible with the internal market.

2.7. Aid instrument

- (11) Direct grant.

2.8. Description of the aid measure

- (12) According to the German authorities, the beneficiaries are non-profit entities of private law, which do not exercise an economic activity with regard to the activities supported under the scheme at hand. The German authorities explained that the projects supported under the scheme concern water infrastructure, which is not commercially used. The activities do not generate net revenues and do not lead to an increase of the value of the infrastructure.
- (13) For the improvement of the ecologic and chemical situation or the potential of waters, there is no existing market. In this regard, the German authorities have confirmed that the beneficiaries do not offer goods and services on a market and thus do not carry out an economic activity.
- (14) The eligible costs are all costs, such as planning and investment costs, which are needed for the realisation of the following activities and projects:
- 1) conceptual preparation and research in connection with the measures mentioned in recital (14)2) below, including feasibility studies, examinations, concepts, documentation and planning according to phases 1 to 4 of the fees for architects and engineers (HOAI) [Honorarordnung

⁵ European Agricultural Fund for Rural Development [Europäischer Landwirtschaftsfonds für die Entwicklung des ländlichen Raums].

⁶ OJ C 204, 1.7.2014, p. 1. Amended by the Notices published in OJ C 390, 24.11.2015, p. 4, OJ C 139, 20.4.2018, p. 3, OJ C 403, 9.11.2018, p. 10 and by the Corrigendum published in OJ C 265, 21.7.2016, p. 5.

für Architekten und Ingenieure], pursuant to number 2.1 of the legal basis mentioned in recital (5);

- 2) measures regarding the near-natural development of waters to improve the ecological and chemical status, as well as the potential of surface waters, pursuant to number 2.2 of the legal basis mentioned in recital (5), by:
- a the creation of water development areas through the establishment and design of water buffer strips including site-appropriate plantings;
 - b improving the hydromorphological conditions by water development corridors, creating natural water body structures or by initiating an intrinsically dynamic development, for example by:
 - change of the water dynamics or the waters morphology,
 - extension of the course of straightened waters,
 - elimination of water constructions,
 - connection of old streams,
 - revitalization of floodplains;
 - c improving the hydromorphological conditions by means of change of the quantity, structure and composition of the substrate in the watercourse bed and the water bottom;
 - d enhancing / restoring of the biological continuity of the waters, in particular by establishing appropriate fish passes, dismantling or structural adaptation of transverse structures;
 - e improvement of the ecological and chemical status by reducing emissions into water bodies from diffuse or specific sources and reducing the effects of such material inputs, for example by:
 - installing retention soil filters;
 - investment-related measures to comply with requirements regarding material reduction that go beyond minimum requirements;
 - oxygen enrichment (deep water aeration);
 - chemical and physical open water and sediment treatment (phosphate precipitation, destratification, deep water drainage);
 - sediment removal;
 - biological methods (biomass extraction / biomanipulation).

(15) VAT is an eligible cost only where the beneficiary cannot deduct input VAT.

(16) Costs for the following activities are not eligible for aid:

- 1) the construction of office buildings;
- 2) the procurement of vehicles and equipment;
- 3) the maintenance of water bodies and water management facilities;

- 4) permanent hydrographic tasks;
 - 5) institutional funding;
 - 6) cash payments instead of compensatory measures;
 - 7) legal costs in actions brought by the applicant against the Land Brandenburg.
- (17) The intensity of the State support is 100% of the eligible costs of the activities and projects mentioned in recital (14), which are co-financed within the RDP with funds from the EAFRD and the Land Brandenburg (recital (7)).
- (18) The impact on the environment has already been analysed in the approved RDP. The objective of the scheme is the near-nature development of waters (see recitals (3) and (4)) and thus is expected to have positive effects on the environment.
- (19) The German authorities explained that it is not excluded that applicants carry out both activities of economic and of non-economic character. The supported activities notified under the present scheme are non-economic activities. In order to exclude possible cross-subsidisation from the non-economic into the economic sphere, the aided projects under the notified scheme are obligatory subject to a separate accounting. In this regard, a verification is made at the stage when the proof of the correct use of the eligible expenses has to be presented by the beneficiaries (recital (21)).
- (20) The objectives and the supported activities are detailed in the aid application submitted to the granting authority, which is the “Investitionsbank des Landes Brandenburg” (ILB).
- (21) Payments of the support are made by way of reimbursement, i.e. prior to the disbursement of funding all original invoices and payments are checked. The beneficiary must pay the eligible costs in advance. An inspection takes place in order to check whether the submitted invoices relate to the supported project, with the aim to ensure that the support cannot be used for any other projects.
- (22) The support under the scheme cannot be cumulated with support from other measures for the same eligible costs.

3. ASSESSMENT

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

- (23) 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”.
- (24) The qualification of a measure as aid within the meaning of Article 107(1) TFEU (cf. recital (23)) 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.

- (25) 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 financed⁷. The classification of a particular entity as an undertaking thus depends entirely on the nature of its activities.
- (26) 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 activity⁸.
- (27) In the case at hand, aid will be granted from State and Union funds (recital (7)). The scheme in question is therefore imputable to the State and financed through State resources.
- (28) However, in the present case, the beneficiaries of the aid are non-profit entities under private law, such as nature protection associations that safeguard the interests of near-nature development of waters.
- (29) Furthermore, the objective of the scheme is to support near-nature development and management of waters (recital (4)). The activities and investments under the present scheme (recital (14)) contribute to the achievement of this objective. The activities under the scheme are to the benefit of the general public and do not serve commercial exploitation.
- (30) It follows from recitals (12) and (13) that the beneficiaries of the aid do not exercise an economic activity with regard to the supported activities under the notified scheme. There is no market existing for these activities carried out by the beneficiaries. They do not offer goods and services on a market and thus do not carry out any economic activity (recital (26)).
- (31) Therefore, given the nature of the scheme and its focus on the natural development of waters, the Commission considers that the scheme is non-economic in nature as regards its beneficiaries.
- (32) Nevertheless, it follows from recital (19) that, outside the scope of the projects supported under the notified scheme, it cannot be excluded that beneficiaries carry out economic activities. However, in this respect, first, public funding they receive will only cover the costs linked to the nature-protection activities supported under the notified scheme (recitals (14) and (19)).
- (33) Second, there must be a clear division between economic and non-economic activities, so that cross-subsidisation is excluded. Third, it follows from recitals

⁷ 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.

⁸ 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.

(19), (20) and (21) that beneficiaries use separate accounts for supported and non-supported activities, thus ensuring that costs are allocated, declared, verified and reimbursed in an appropriate way in order to exclude that public funding benefits any economic activities in which beneficiaries may engage outside of the supported projects.

- (34) Based on the above, it can be concluded that the present scheme does not constitute State aid in the sense of Article 107(1) of the TFEU.

4. CONCLUSION

The Commission has accordingly decided that the scheme 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 decisions⁹ 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.

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 794/2004¹⁰, to the following address: agri-state-aids-notifications@ec.europa.eu.

For the Commission

Margrethe VESTAGER
Executive Vice-President

⁹ Commission communication C(2003) 4582 of 1 December 2003 on professional secrecy in State aid decisions, OJ C 297, 9.12.2003, p. 6.

¹⁰ Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 140, 30.4.2004, p. 1).