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**Subject: State Aid SA.64494 (2021/N) – Germany  
COVID-19: Federal umbrella scheme for damage compensation of  
fairs and congresses 2021 (follow-up scheme to SA.59173 (2020/N))**

Excellency,

**1. PROCEDURE**

- (1) By electronic notification of 17 August 2021, Germany notified the above-mentioned scheme (“the measure”), in compliance with Article 108(3) of the Treaty on the Functioning of the European Union (“TFEU”). On 22 September, 4 and 26 October and 8 November 2021, Germany has submitted additional information.
- (2) A predecessor scheme, approved by Commission decision SA.59173 of January 2021 based on Article 107(2)(b) TFEU<sup>1</sup>, allowed beneficiaries to apply for compensation of losses of profit, if those losses had been incurred in the period from 1 March 2020 until 31 December 2020. The predecessor scheme ceased to be in force on 30 June 2021. With the measure, beneficiaries will be allowed to apply for aid for compensation of losses of profit, if those losses have been incurred in the period from 1 January 2021 until 31 December 2021.

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<sup>1</sup> Commission decision C(2021) 477 final of 21 January 2021 SA.59173 (2020/N) – Germany. COVID-19: Federal umbrella scheme for damage compensation of fairs and congresses, OJ C 50, 12.2.21, p. 1.

Seiner Exzellenz Herrn Heiko Maas  
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- (3) Germany exceptionally agrees to waive its rights deriving from Article 342 TFEU, in conjunction with Article 3 of Regulation 1/1958,<sup>2</sup> and to have this Decision adopted and notified in English.

## **2. DETAILED DESCRIPTION OF THE MEASURE**

### **2.1. Context**

- (4) Germany explains that the trade fair sector, together with all related services, has been particularly affected by the pandemic. In comparison with other sectors, which were in part already in a position to resume normal operations and generate revenue, normal operations are still a long way off for the trade fair sector. The adverse effects of the pandemic are therefore expected to last significantly longer in that sector.
- (5) All businesses with trade fair and congress infrastructure in Germany, together with their related activities and services, have been affected in the course of the worldwide COVID-19 pandemic, through the cancellation and postponement of trade fairs and congresses. The grounds for the cancellations and postponements are the prohibitions on or strict requirements for the execution of events that have been imposed by public authorities, as a result of which events may only be carried out in a very limited manner or not at all. As a result, the trade fair and congress sector lost the basis for its business. In addition to significant loss of turnover, those businesses will need in 2021 to absorb considerable costs for events that were prepared but that never took place.
- (6) According to calculations carried out by the Institute of German Trade Fairs (Institut der deutschen Messewirtschaft - AUMA) on 12 July 2021, 70% of all international and national trade fairs planned for 2021 in Germany had already been cancelled or postponed (year 2020: 75%). Even for regional trade fairs, the cancellation rate stood at 58% (year 2020: 62%).
- (7) Furthermore, the trade fair sector cannot hope to benefit from major “catch-up effects”. First, trade fairs, by their very nature, take place at regular intervals. There are extremely limited opportunities for trade fairs that take place annually or biennially to “catch up”; in general, they will only take place again next year or the year after (if at all). The trade fairs that had been planned for 2021 will therefore be cancelled entirely for the organisers. Second, many events – fairs and conferences – will not be able to take place, even if they were, in principle, again permitted on the scale that had been planned, since they simply can no longer be organised in the short time available. A preparation period of up to two years is standard for such events.
- (8) Finally, Germany argues, the international aspects of the trade fair industry should be taken into account. This means on the one hand that the success of the trade fair industry is also dependent on international visitors and exhibitors. As a result of the travel limitations necessitated by the COVID-19 pandemic (whether as a result of bans on departure from and entry into particular countries and travel warnings or through quarantine requirements, which effectively create an

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<sup>2</sup> Regulation No 1 determining the languages to be used by the European Economic Community, OJ 17, 6.10.1958, p. 385.

impediment to travel), international guests, particularly from outside Europe, are generally not in a position to take part in trade fairs in Germany. The relevant level of risk in other countries, moreover, still makes planning exceedingly difficult.

- (9) On the other hand, as Germany points out, international business depends on opportunities to organise trade fairs in other countries. Many fair infrastructure operators organise also events outside their own infrastructure. For those activities they use third party venues in other towns in Germany or outside Germany. Such external activities (inside or outside Germany) contribute to covering the high costs associated with large infrastructure and permanent staff. Those external activities are also affected directly by the COVID-19 pandemic and, thereby, severely reduce the potential income of fair infrastructure operators. For example, according to the foreign trade fair programme of the Federal Ministry for Economic Affairs in cooperation with AUMA, of the 375 foreign trade fairs planned for 2021, 90 (24%) have already been cancelled or postponed (year 2020 at 2 November 2020: 57%). The trade fairs of German organisers abroad (GTQ – German Trade Fair Quality Abroad) also confirm the difficulties experienced by the international trade fair sector: of the 355 GTQ trade fairs planned prior to the COVID-19 pandemic for the year 2021, 130 (37%) were completely cancelled (year 2020 at 2 November 2020: 39%).
- (10) Germany argues the current economic situation of the conference sector is comparable to the situation of the trade fair sector, and the same difficulties and uncertainties exist in the conference sector.
- (11) According to calculations by AUMA, the overall economic consequences of trade fair cancellations amount to EUR 20.6 billion in 2021 (year 2020: EUR 21.4 billion), only a small amount of which will be covered by the notified measure. 165 000 jobs are endangered (year 2020: 180 000 jobs) and EUR 3.3 billion less tax revenue in 2021 (as of 12 July 2021) is likely to be collected (year 2020: EUR 3.4 billion less).

## **2.2. Legal basis**

- (12) The legal basis for the measure is the “Regelung 2021 zur vorübergehenden Gewährung von Beihilfen zugunsten von Messe- und Kongressinfrastruktur im Geltungsbereich der Bundesrepublik Deutschland im Zusammenhang mit dem Ausbruch von COVID-19 („Bundesrahmenregelung Beihilfen für Messen 2021“)<sup>3</sup> which will be implemented based on the respective Budget Laws of the *Länder*.

## **2.3. Objective of the measure**

- (13) The objective of the measure is to compensate companies that own and/or operate and rent out trade fair and/or congress infrastructure and deliver related services for their losses of profit due to measures taken by public authorities to mitigate

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<sup>3</sup> “Regulation on the temporary provision of aid for the benefit of trade fair and conference infrastructure as applicable within the Federal Republic of Germany in connection with the outbreak of Covid-19” (“Federal Framework Scheme 2021 on Subsidies for Trade Fairs”).

the effects of the COVID-19 pandemic. The losses deprived the companies temporarily of liquidity resulting in difficulties to cover their fixed costs.

#### **2.4. Budget and duration of the measure**

- (14) The German authorities roughly estimate the measure's budget at approximately EUR 208 million (compared to EUR 642 million for the predecessor scheme) and highlight that that amount is only provisional and subject to final decisions in that regard. It will be borne by the *Länder* and/or the municipalities as well as the Federal government.
- (15) The measure enters into force on the day of the notification of its approval by the Commission and no aid can be granted before that date under the measure. It ceases to be in force on 30 June 2022. Beneficiaries can apply for compensation under the measure until 31 May 2022. Beneficiaries can apply for compensation for losses of profit incurred in the period from 1 January 2021 until 31 December 2021, assuming that prohibition measures applicable to trade fairs and congresses are still in force.

#### **2.5. Geographical scope**

- (16) Beneficiaries need to be owners or operators of fair and/ or congress infrastructure in Germany (see also recital (21)).
- (17) Eligible prohibition measures are measures taken in Germany or in other EEA Member States (for events in the relevant country).
- (18) Damage can be compensated for events organised:
- in the owner's/ operator's own infrastructure in Germany;
  - outside the owner's/ operator's own infrastructure (possibly also outside Germany but within the EEA).

#### **2.6. Form of aid**

- (19) The aid will take the form of direct grants.

#### **2.7. Administration of the measure**

- (20) The measure will be managed by granting authorities at different administrative levels (federal, *Länder* or municipal level), depending on the respective rules of each of the *Länder*. They will be in charge of the measure's implementation, including the payment of the aid and its control.

#### **2.8. Beneficiaries**

- (21) Beneficiaries of the measure are:

- (a) Private and public undertakings owning and operating trade fair and/or congress infrastructure in Germany and that provide services in connection with the trade fair and congress business<sup>4</sup>;
  - (b) Owners of trade fair and/or congress infrastructure in Germany leasing it to an operator, based on a profit-related lease;
  - (c) Operators leasing the trade fair and/or congress infrastructure in Germany from the owner, based on a profit-related lease and that provide services in connection with the trade fair and congress business<sup>5</sup>;
  - (d) Intermediary entities that lease the trade fair and/or congress infrastructure in Germany from the owner and lease it to a third party/operator as well as those operators.
- (22) According to Germany, all those companies bear the specific burden of high infrastructure costs and suffer damage, as trade fairs and congresses, or at least large trade fairs or congresses, were impossible due to the measures adopted by public authorities governments due to the COVID-19 pandemic.
- (23) Based on preliminary estimations by Germany, at least 36 trade fair and/or congress infrastructure operators of all sizes (both SMEs and large undertakings) are potential beneficiaries.
- (24) Undertakings which are part of a multinational group of undertakings for the purposes of § 90 (3) sentence 4 *Abgabenordnung* (Fiscal Code) must disclose information on the actual ownership structure of all parts of the group to the granting authority. If they are obliged to prepare a country-by-country report according to § 138a (1) *Abgabenordnung*, they will submit that report to the granting authority. Undertakings that are part of a multinational group of undertakings for the purposes of § 90 (3) sentence 4 *Abgabenordnung*, are also obliged to confirm that the aid granted by the granting authority does not go to non-cooperative jurisdictions within the meaning of the Union list of non-cooperative jurisdictions for tax purposes<sup>6</sup>. Undertakings domiciled in non-cooperative jurisdictions cannot be recipients of aid under the measure.

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<sup>4</sup> According to Germany, the restrictions and prohibitions due to the COVID-19 pandemic have a particularly strong effect on the services provided by the trade fair/congress infrastructure operators, which are a major means of financing the infrastructure. Therefore, all services related to the operation of such infrastructure have to be covered. That concerns the entire value chain involved in the operation of trade fairs, e.g. catering, trade fair construction and technical services, as trade fair infrastructure operators generate a large part of their revenue by those means. Germany explained that the measure does however not cover undertakings that provide services related to trade fairs/congresses but do not own or lease the infrastructure.

<sup>5</sup> See footnote 4.

<sup>6</sup> Council conclusions on the revised EU list of non-cooperative jurisdictions for tax purposes, OJ C 64, 27.2.2020, p. 8.

## 2.9. Basic elements of the measure

- (25) According to the measure, the authorities can compensate losses of profits caused by the COVID-19 pandemic. In order to calculate the losses of profit caused by the COVID-19 pandemic that will be eligible for aid, costs not incurred will be deducted. Therefore, the aid covers only the damage caused by the COVID-19 pandemic.
- (26) Aid as damage compensation can be granted to undertakings if they fall in one of the categories of beneficiaries mentioned in recital (21), and, as a result of the government measures to mitigate the effects of the COVID-19 pandemic:
- (a) Have been prohibited from using their infrastructure for the organisation of trade fairs or congresses or have been prohibited from using their infrastructure for large trade fairs or congresses; and
  - (b) have incurred a loss of profit in the EEA<sup>7</sup>.
- (27) Losses of profits may only be compensated, in the trade fair and congress business, including leasing and the organisation of events, together with any additional services that would normally be delivered, provided that the holding of such planned trade fair or congress event was impossible due to the COVID-19 pandemic, since (i.) a complete ban on events is in place or (ii.) events with the intended number of attendees are prohibited due to a limit regarding the maximum permissible number of persons or the maximum number of persons per square meters.
- (28) Compensation can be granted for losses of profit, if the beneficiaries have incurred them in the period between 1 January 2021 and 31 December 2021, when restrictive measures were in place. In principle, those losses of profit actually incurred are to be calculated ex post. In exceptional cases, where the documentation required for the calculation of the actual loss is not available at the time of the aid application, the calculation of the whole of the loss may be carried out on the basis of a projection. In that case, the aid applicant must set out in its application why an ex post evaluation of the losses cannot be made. In the case of the (partial) submission of a projection, the calculation of the actual losses must be handed in by 30 June 2022.
- (29) The aid may cover up to 100% of the eligible costs.
- (30) The scheme provides two methods for calculating the lost profits:
- “Reference period” method: The difference between the profits from operation of trade fair or congress infrastructure on the basis of the average of profits in the reference period in the years 2018 and 2019<sup>8</sup> (but not exceeding the profits in the reference period in 2018) and the actual

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<sup>7</sup> For the calculation of the loss of profit of a company that falls under one of the categories of eligible beneficiaries in recital (21) a decline in revenue due to a ban of an event organised by that company within the EEA, can be taken into account.

<sup>8</sup> To reflect the high number of trade fairs that take place every second year, the relevant reference period covers 2018 and 2019.

profits in the same period in 2021, taking into account the deductible items (see recital (32)).

- “Contribution margin” (Deckungsbeitrag I) method: As an alternative to the use of a reference period, the loss for which compensation may be granted can also be calculated on the basis of the last regular (i.e., not affected by the COVID pandemic) contribution margins of the trade fair/events that were cancelled or did not take place in full extent. The notion of “contribution margin” (Deckungsbeitrag I) refers to the difference between revenues and variable costs. The contribution margin is the amount per event available to cover the fixed costs. According to Germany, as most of the trade fairs are organised on an annual or biennial basis and remain stable (or grow moderately) as regards size, participants, revenues, etc., it is possible to take previous events as a point of reference for the calculation of the loss of profits. However, a fair can only be considered as a relevant past event if it took place at the same location. From the point of view of an independent observer the two events would have to be “two in the same series”.

(31) Germany explained that the reference period method is particularly suitable for loss calculation in the trade fair business, which is very stable (less volatile) compared to other sectors, since the organisation of a trade fair takes a very long time and therefore has to be planned well ahead. Germany further explains that, generally, trade fairs take place at the same date every year or every second year and at the same place to make planning for all participants (trade fair exhibitors, visitors, etc.) easier. Many trade fairs are established events, often with a long-standing tradition. As the trade fairs are planned and booked well in advance, companies would usually not make decisions about their participation at short notice. Furthermore, the risk of an economic slowdown is spread over many different sectors as the portfolio of trade fairs is very diverse (such as automotive, books, cosmetics, sports, art, etc.). Therefore, economic slowdown or negative developments in one business sector would not normally affect the trade fair business as there would still be other sectors left. In addition, trade fair exhibitors as well as their (potential) clients are often from different sectors and branches. Moreover, exhibitors usually would still participate in trade fairs despite less favourable economic conditions as doing so is an important way to increase demand/orders for their products and services.

(32) To limit the aid to the minimum necessary, the beneficiaries have an obligation to take all reasonable measures to minimise the losses that they incur. Any expenses that have been avoided or savings that have been made or any benefits received on any other basis (in particular payments from insurance companies) are deducted. Expenses that have been avoided or savings that have been made include, but are not limited to:

- saved personnel expenses (e.g. by means of short-time allowances);
- saved repair and maintenance costs;
- saved marketing costs;
- costs not incurred (e.g. for IT or infrastructure).

- (33) Only the damage that directly results from loss of profits incurred between 1 January 2021 and 31 December 2021 due to prohibition measures will be compensated. For measures that prohibit all large events (defined by reference to a cap on attendance), Germany explained that the attendance for every event concerned will be compared to the attendance of the same event the last time it took place (which may have been in 2019 or 2018 or earlier, depending on the interval), based on the sold tickets. The incremental revenue per attendee will then be identified, multiplied by the difference between maximum allowed attendees and actual attendees whenever the latter is lower than the former, and the resulting incremental revenue subtracted from the lost profit of the event. This ensures that the compensation is only for that loss of attendees attributable to the measure<sup>9</sup>. Conversely, a loss of profits is not eligible for aid if it is not caused by the prohibitions and restrictions related to the COVID-19 pandemic, in particular because the actual number of visitors is below the maximum permissible number of persons.
- (34) As regards required documentation and control, Germany explained that, as the implementation of the scheme is governed by the rules of each of the *Länder*, the details of the granting and recovery procedures may differ but highlighted the following common requirements.
- (35) In their aid application, the beneficiaries have to explain that they are eligible for aid in accordance with the scheme. This implies that they:
- show that their activities are covered by the scheme (see recital (21));
  - state the precise activities that were excluded due to bans in the EEA (to that end they have to identify the bans or restrictions which are relevant and the exact activities that were affected);
  - show the damages directly caused by the applicable prohibition.
- (36) Together with their aid application, beneficiaries have to provide all documents relevant for the calculation/control of the damages, including the audited accounts for 2018/2019 (where the method based on reference periods is used), and/or a confirmation of an independent expert (tax consultant or external auditor). The ex post control of overcompensation will be based, inter alia, on the audited accounts of the beneficiaries.
- (37) Some *Länder* may request the auditors to confirm, in the context of the annual audit, the damage calculation. Thus, in Germany's view, regardless of the procedural provisions applicable in each Land, there are effective legal means to recover any excess payments.
- (38) According to Germany, the beneficiaries will be required to provide all underlying documents for the damage calculations. If the actual losses exceed the projected losses, then the granting authority may make an adjustment, provided

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<sup>9</sup> An example made by Germany: The last time a trade fair took place, 10 000 people have attended. If events beyond 1 000 persons are prohibited, the loss would be calculated only on the basis of 9 000 lost attendance, even if fewer than 1 000 persons have actually attended during the COVID-19 pandemic.



the aid never exceeds the actual net loss of profit eligible to compensation. If the actual net loss of profit is below the projected losses, the granting authority must reclaim any overpaid aid from the recipient of aid.

- (39) The granting authority will recover any overcompensation. Where the aid amount can be calculated *ex post*, it will only be necessary to recover overcompensation where the beneficiary later received compensation by other means (such as insurance), which were not known at the time of calculating the damage. Where the aid is calculated on the basis of loss projections<sup>10</sup>, the calculation will be checked *ex post*.
- (40) There is a “claw-back mechanism”, which aims at the recovery of payments in excess of the actual damage. To the extent that the amount of aid is defined on the basis of an estimation/forecast of the damage<sup>11</sup>, the authority managing the administration of the measure will carry out an *ex post* assessment and evaluate the exact damage suffered. Beneficiaries who have used an estimation method must submit the exact damage suffered during the duration of the measure together with its calculation by 30 June 2022. The calculation can be based on the reference period or on the contribution margin method (see recital (30)). The authority managing the administration of the measure will then evaluate whether the estimated damage was higher than the one actually incurred and recover accordingly, if need be.
- (41) In addition, the German authorities confirmed that:
- Payment made to beneficiaries will be net of any amount obtained from insurance, litigation, arbitration or any other source for the same damage. If the aid is paid out before the insurance, the authorities will recover the amount from the beneficiary;
  - The benefit of the aid is excluded for any applicant who is responsible for the damage suffered and/or did not conduct its activities with due diligence or in compliance with applicable legislation or did not take any measure within its responsibility to mitigate its damage.
  - The damage calculation for the period between 1 January 2021 and 31 December 2021 will take into account the economic effects of declines in demand due to lower aggregate demand, or to greater customer reluctance, or the generally applicable restrictions on capacity and social distancing measures, all of which cannot be taken into account in the calculation of the eligible damage. Germany commits to apply price adjusted gross domestic product (GDP) year-to-year decline, which is 5% according to calculations of the Federal Statistical Office (Destatis)<sup>12</sup>, to determine the counterfactual profits for the periods between 1 January 2021 and 31 December 2021, which accordingly reduces the potential damage. In order

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<sup>10</sup> Only in exceptional cases, see recital (28).

<sup>11</sup> Only in exceptional cases, see recital (28).

<sup>12</sup> According to the Federal Statistical Office (Destatis) report dated 30 April 2021.

to adjust for sector specificities of the measure, the haircut that is applied to counterfactual profits may need to be increased, if appropriate.

- If the monthly damage compensation per beneficiary exceeds, on average over the eligible compensation period, EUR 4 million<sup>13</sup>, the counterfactual profits must be determined on a case-by-case basis. In that analysis for each beneficiary concerned, the individual counterfactual profits have to be adjusted for the economic effects of declines in demand due to lower aggregate demand, or to greater customer reluctance, or the generally applicable restrictions on capacity and social distancing measures. In particular, the actual impact of the restrictions will be established by comparison with periods in 2020 and 2021 where such eligible restrictions were not enforced. If it is demonstrated that an individual adjustment is not possible in certain cases, a haircut of 10% on the entire corresponding profits of 2019 will be applied.
- This calculation of the haircut also applies in cases where the applicant applies for aid due to the loss of profit in other EEA countries, if the damage, which occurred due to a ban outside Germany, does not exceed 5% of the total damage of that beneficiary. In case this threshold is exceeded, the haircut will be calculated for each relevant damage occurred outside Germany based on the price-adjusted decline in GDP in the respective EEA State as from 2020. If the monthly damage compensation per beneficiary exceeds EUR 4 million, the individual haircut in the respective EEA State needs to be determined on a case-by-case basis. If it is demonstrated that an individual adjustment is not possible in certain cases, a haircut of twice the price-adjusted decline in GDP in the respective EEA State as from 2020 will be applied.

## 2.10. Cumulation

- (42) According to Germany, aid granted under this measure may be combined with other aid in the EEA for the compensation of losses, and with aid under the Temporary Framework, up to a limit of 100% of the actual loss calculated in accordance with this measure.<sup>14</sup>
- (43) In case of a cumulation with aid under section 3.12 of the Temporary Framework, the beneficiary must repay aid received under section 3.12 before applying for aid under the measure.

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<sup>13</sup> In order to determine whether the ceiling of EUR 4 million is exceeded Germany should calculate the damage compensation without applying the deduction of the 5% GDP decline to the counterfactual profit.

<sup>14</sup> This also includes aid already approved by the Commission on the basis of the Temporary Framework under the “Third Amended Federal Scheme on Small Grants 2020”, the “Federal Scheme on subsidised Loans 2020”, the “Federal Scheme on Guarantees 2020”, the “Federal Scheme on Uncovered Fixed Costs 2020”, the “Federal Scheme on recapitalisation measures and subordinated loans 2020” and aid approved on the basis of Article 107 (2)(b) TFEU under the “Federal scheme for damage compensation for the November and December 2020 lockdown” as in force at the time of this decision.

- (44) The granting authority must impose an obligation on the beneficiaries of any aid to provide details of all aid applied for or received in connection with the COVID-19 pandemic in the EEA. It must advise the beneficiary that this information constitutes “facts relevant to subsidies” as set out at § 264 of the Criminal Code (*Strafgesetzbuch*) and that subsidy fraud is punishable under that provision.

### **2.11. Monitoring and reporting**

- (45) The German authorities committed to provide a report no later than one year after the date of the Commission decision, a list of all individual aid measures based on the scheme no later than one year after the Commission decision. That list will include the amount of compensation and recoverable advances granted as well as recoveries.

## **3. ASSESSMENT OF THE MEASURE**

### **3.1. Lawfulness of the measure**

- (46) The German authorities have fulfilled their obligation according to Article 108(3) TFEU by notifying the aid measure before putting it into effect. The Commission takes note of the fact that the scheme will enter into force only after the notification of the approval by the Commission.

### **3.2. Existence of State aid**

- (47) Article 107(1) TFEU defines State aid as “*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*”.
- (48) The qualification of a measure as aid within the meaning of that provision therefore requires that the following cumulative conditions 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.
- (49) The measure is imputable to the State as it is based on the acts mentioned in recital (12) and it is taken by the State authorities. The compensation envisaged by Germany will be paid from the State budget (recital (14)) and is therefore provided through State resources within the meaning of Article 107(1) TFEU.
- (50) The measure confers an advantage on its beneficiaries in the form of direct grants (recital (17)). The measure thus relieves those beneficiaries of damage that they would have to bear under normal market conditions. The advantage corresponds to the amount of compensation paid under the scheme.
- (51) The advantage granted by the measure is selective, since it is awarded only to certain undertakings (see recitals (21) to (24)).
- (52) The measure is liable to distort competition, since it strengthens the competitive position of its beneficiaries. As the scheme covers sectors and undertakings

involved in trade between Member States (see recitals (8) and (9)), there is a risk that the aid could distort or threaten to distort competition and affect such trade.

- (53) The proposed measure therefore constitutes State aid within the meaning of Article 107(1) TFEU.

### **3.3. Compatibility**

- (54) The Commission has examined the notified scheme pursuant to Article 107(2)(b) TFEU.

#### **The notion of exceptional occurrences with the meaning of Article 107(2)(b) TFEU**

- (55) Article 107(2)(b) TFEU provides that aid to make good damage caused by natural disasters or exceptional occurrences shall be compatible with the internal market. Neither the TFEU nor other Union legislation contains a precise definition of the notion of exceptional occurrence. As they constitute exceptions to the general prohibition of State aid within the internal market laid down in Article 107(1) TFEU, the Commission, in line with the consolidated Union case law<sup>15</sup> has consistently held that the notions of ‘natural disaster’ and ‘exceptional occurrence’ referred to in Article 107(2)(b) TFEU must be interpreted restrictively.
- (56) The characterisation of an event as being an exceptional occurrence is made by the Commission on a case-by-case basis, having regard to its previous practice in the field<sup>16</sup>.
- (57) In that regard, the following indicators relating to the event concerned must be cumulatively met: (i) unforeseeable or difficult to foresee<sup>17</sup>; (ii) significant scale/economic impact<sup>18</sup>, and (iii) extraordinary<sup>19</sup>.

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<sup>15</sup> Judgment of the Court of Justice of 11 November 2004, *Spain v Commission*, C-73/03, EU:C:2004:711, paragraph 37 and judgment of the Court of Justice of 23 February 2006, *Atzeni and others*, in Joined Cases C-346/03 and C-529/03, EU:C:2006:130 paragraph 79.

<sup>16</sup> Exceptional occurrences which have been accepted in the past by the Commission include war, internal disturbances and strikes, and, with certain reservations and depending on their extent, major industrial accidents which result in widespread economic loss, see *Guidelines for State aid in the agricultural and forestry sectors and in rural areas 2014 to 2020*, paragraph 330 (OJ C 204, 1.07.2014, p. 53).

<sup>17</sup> Commission Decision of 1 August 2008, case SA.32163, *Remediation of damage to airlines and airports caused by seismic activity in Iceland and the volcanic ash in April 2010, Slovenia*, recital 31.

<sup>18</sup> Elements taken into account by the Commission to consider that the occurrence reached a significant scale: negative consequences cannot be contained (Commission Decision of 4 October 2000 on case NN 62/2000, *Régime temporaire d'aides aux entreprises victimes des intempéries et de la marée noire – France*), or because of the number of dead or injured people (Commission Decision of 11 April 2012 on case SA.33487, *Agricultural and fisheries aid to compensate for damage due to exceptional occurrence (red mud "Aluminium accident")*, Hungary, recital 35; Commission Decision of 2 May 2002 on case N241/2002, *Régime en faveur des entreprises victimes de la catastrophe industrielle de Toulouse, France*, recital 19), the immense ecological and economic damage (Commission Decision of 11 April 2012 on case SA.33487, recital 36), the amount of material damage despite the local character of the industrial accident (Commission Decision of 2 May 2002 on case N 241/2002, recital 19).

## **COVID-19 outbreak as an exceptional occurrence**

- (58) Following the first reports of cases of acute respiratory syndrome (COVID-19) in the Chinese Wuhan municipality at the end of December 2019, the Chinese authorities identified a novel coronavirus (SARS-CoV-2) as the main causative agent, which had not been previously identified in humans. The outbreak has rapidly evolved, affecting not only other parts of China but has also spread to the majority of countries worldwide, including all Member States. Outbreaks of novel virus infections among people are always of public health concern and can have a significant economic impact. Specific sectors and areas are particularly affected by the outbreak and governmental restrictions and recommendations, be it directly or indirectly.
- (59) The declaration of the World Health Organization of a pandemic associated with the public health risk deriving from the absence of therapeutics or vaccines for COVID-19, determine the exceptional nature of the circumstances. The rapidity of the spread can cause enormous consequences both in terms of fatal outcomes in high-risk groups and in terms of economic and societal disruption. The necessity to adopt and encourage the respect of measures aimed at interrupting transmission chains stems from that acknowledgement. Such measures can result in far-reaching disruption of various economic sectors, which is clearly outside the normal functioning of the market.
- (60) In view of the above, this event qualifies as an exceptional occurrence because: (i) it was not foreseeable; (ii) it is clearly distinguishable from ordinary events by its character and effects on both the undertakings directly affected and the economy as a whole; and (iii) it lies outside of the normal functioning of the market.
- (61) In that context, the COVID-19 pandemic can be considered as an exceptional occurrence within the meaning of Article 107(2)(b) TFEU.

## **Causal link between the COVID-19 pandemic and damage compensated by the measure**

- (62) As an immediate consequence of the COVID-19 pandemic, public authorities within the EEA adopted several measures that prohibit trade fairs and congresses.
- (63) The prohibitions differ from one region to the other regarding their scope (prohibition of all trade fairs and congresses or prohibition of large trade fairs and congresses, defined by reference to the number of visitors/attendees) and their period of application. The present scheme applies to the extent that the applicant can prove a direct causal link between the damage it suffered and a measure applicable in the period between 1 January 2021 and 31 December 2021, prohibiting all fairs and congresses or all large fairs and congresses applicable during that period. Therefore, a beneficiary cannot claim compensation in relation to periods when in the region concerned there were no such applicable prohibitions.

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<sup>19</sup> In its Decision of 19 May 2004 in case C-59/2001 (OJ L 62, 2007, p. 14), the Commission considered that the (alleged) fall in sales of poultry meat in a Member State not directly affected by the dioxin contamination, did not constitute in itself an exceptional occurrence. It was yet an unforeseeable event, but formed part of the normal commercial risks to which an undertaking is exposed.

- (64) The Commission notes that, as a result of the measures adopted by public authorities, trade fairs and congresses, or at least large trade fairs and congresses, have been prohibited, and only smaller events could take place within the limits of capped attendance. Only losses of profits directly linked to such a ban are eligible for compensation (see recital (33)).
- (65) Those prohibition measures have an immediate impact on the profits of the undertakings that can benefit from the notified measure, because the compliance with such measures results in a revenue decline for the operators, as well as for those who lease them the infrastructure (based on a profit-related lease)<sup>20</sup>.
- (66) The actual damage suffered by those undertakings and deriving from the exceptional occurrence is the difference between the profit/loss incurred in the relevant period of the COVID-19 outbreak and related governmental measures and the profit incurred in the reference period (net losses).
- (67) The only beneficiaries entitled to compensation will be those for which it is possible to establish a direct link between the damage suffered and the COVID-19 pandemic and the prohibitions of organising trade fairs and congresses, or large trade fairs and congresses, imposed by public authorities to mitigate and combat COVID-19. As mentioned in recital (35), undertakings must solemnly declare and show in their application a direct link between their loss of profit on the one hand and the COVID-19 pandemic and the subsequent prohibitions of trade fairs and congresses. The aid application must clearly refer to the measures directly affecting the beneficiary. As a result, individual aid under the measure can be granted only to the extent that the applicant can prove a direct causal link between the damage it suffered and the restrictive measure precluding it from operating its economic activity in the period concerned. The Commission considers that such direct causal link exists to the extent that the activity of the beneficiary has been precluded by restrictive measures but only to the extent limited to the period covered by such restrictive measures.

### **Type of damages compensated and calculation methodology**

- (68) The aid granted under the measure can cover up to 100% of the eligible damage, the loss of profit, which the Commission considers as a type of damage that can be compensated under Article 107(2)(b) TFEU. The two calculation methods presented by Germany (“reference period” and “contribution margin”, see recital (30)) precisely establish the actual damages incurred.

### **Proportionality of the aid measure**

- (69) In order to be compatible with Article 107(2)(b) TFEU, the aid must be proportional to the damage caused by the exceptional occurrence. Aid must not result in overcompensation of damage; it should only make good the damage caused by the exceptional occurrence.
- (70) Germany put in place an objective, evidence-based, system as to the damage calculation. Beneficiaries will be required to provide all necessary documentation in that regard and evidence of the costs actually incurred must be submitted to the

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<sup>20</sup> See recital (21).

granting authority in writing. The competent authorities will check in each case that those elements correctly reflect the direct consequences of the COVID-19 pandemic and the related measures by public authorities.

- (71) The aid is limited to the minimum necessary and overcompensation is avoided. As explained in recital (32), beneficiaries have an obligation to take all reasonable measures to minimise the losses that they incur and any expenses that have been avoided or savings that have been made or any benefits received on any other basis are deducted from the losses.
- (72) As described in recital (27), only damage that directly results from the prohibitions of trade fairs and congresses, or from the prohibition of large trade fairs and congresses, adopted by public authorities will be compensated. A loss of profits that is not caused by the prohibitions related to the COVID-19 pandemic, in particular because the actual number of visitors is below the maximum permissible number of persons, is not eligible for aid. This will be done by subtracting from the lost profit the incremental revenue corresponding to the difference between the maximum number of allowed attendees and the actual number of attendees. Given that the incremental revenue is larger than the incremental profit, provided that revenue per attendee is higher than variable cost per attendee, the proposed correction is conservative and ensures proportionality of the compensation.
- (73) A rigorous damage calculation of the measure is further ensured. The economic effects of declines in demand due to lower aggregate demand, or to greater customer reluctance, or the generally applicable restrictions on capacity and social distancing measures, will be taken into account by adjusting for a drop of the GDP year-to-year decline in Germany, which is 5% (see also recital (41)), when determining the counterfactual profit. In order to adjust for sector specificities of the measure, the haircut that is applied to counterfactual profits may need to be increased, if appropriate. In addition, if the monthly damage compensation per individual beneficiary exceeds, on average over the eligible period, EUR 4 million, the counterfactual profits must be determined on a case-by-case basis. In that analysis for each beneficiary concerned, the individual counterfactual profits have to be adjusted for the economic effects of declines in demand due to lower aggregate demand, or to greater customer reluctance, or the generally applicable restrictions on capacity and social distancing measures. In particular, the actual impact of the restrictions will be established by comparison with periods in 2020 and 2021 where such eligible restrictions were not enforced. If it is demonstrated that an individual adjustment is not possible in certain cases, a haircut of 10 % on the entire corresponding profits of 2019 will be applied. The haircut based on the German GDP (5% or 10%) may be applied for a certain beneficiary only if the damage claimed in EEA Member States outside Germany does not account for more than 5% of the overall damage of the beneficiary. If the damage incurred outside Germany exceeds this threshold, a country-by-country calculation of the haircut is required. This therefore ensures that, where damage suffered outside Germany is more than a marginal part of the overall damage of the company, the counterfactual is adjusted for the economic effects of general declines in demand in the Member States concerned.

- (74) *Ex post* control of overcompensation will be based, inter alia, on the audited accounts of the beneficiaries. Some *Länder* may also request the auditors to confirm, in the context of the annual audit, the damage calculation.
- (75) The granting authority has an obligation to recover any overcompensation from the aid recipient (see recitals (39) and (40)). The “claw-back mechanism”, requires the recovery of payments in excess of the actual damage. To the extent that the amount of aid is defined on the basis of an estimation/forecast of the damage<sup>21</sup>, the authority managing the administration of the measure will carry out an *ex post*-assessment and evaluate the exact damage suffered. Beneficiaries who have used an estimation method must submit calculation of the exact damage suffered during the duration of the measure together by 30 June the following year. The authority managing the administration of the measure will then evaluate whether the estimated damage was higher than the one actually incurred and recover accordingly, if need be (recital (39)).
- (76) In addition, the German authorities have put in place the following safeguards, so that the compensation under the notified measure does not exceed what is necessary to make good the damage:
- The period for damage is limited to the period for which a beneficiary can prove a direct causal link in regard to its own situation, which covers no more than the period from 1 January 2021 to 31 December 2021, assuming prohibition measures are still in place (recital (33));
  - Any payment made to beneficiaries is net of any amount recovered by insurance, litigation, arbitration or other source of compensation for the same damage (recital (41));
  - In addition, there is an exclusion of any applicant responsible for the damage suffered, or that did not conduct its activities with due diligence or in compliance with applicable legislation, or that did not take any measure to mitigate its damage (recital (41)).
- (77) The Commission, in light of those safeguards, and taking into account the limited period covered by the compensation, considers that the compensation under the measure will not exceed the damage directly suffered by each beneficiary from the COVID-19 pandemic and related measures by public authorities.
- (78) In view of the above, the Commission considers that the notified aid scheme is compatible with the internal market in accordance with Article 107(2)(b) TFEU.

#### **4. CONCLUSION**

The Commission has accordingly decided not to raise objections to the aid on the grounds that it is compatible with the internal market pursuant to Article 107(2)(b) of the Treaty on the Functioning of the European Union.

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<sup>21</sup> Only in exceptional cases, see recital (28).



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Yours faithfully,

For the Commission

Margrethe VESTAGER  
Executive Vice-President