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EUROPEAN COMMISSION

SECRETARIAT GENERAL

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PERMANENT REPRESENTATION OF
GERMANY TO THE
EUROPEAN UNION
Rue J. de Lalaing, 8-14

1040 – BRUSSELS

[Official stamp of the Permanent Representation]

Reference: State Aid No. NN 8/2009 – Germany

The Secretariat General is pleased to inform you of the Commission's decision on the above matter and trusts that this will be conveyed to the Federal German Foreign Minister.

On behalf of the Secretary General

[signature]
Karl VON KEMPIS

Enc.: C(2009) 5080 final

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EUROPEAN COMMISSION

SECRETARIAT GENERAL

Brussels, 02.07.2009
C(2009) 5080 final

**Reference: State Aid NN 8/2009 – Germany
Nature Conservation Areas**

Dear Federal Minister,

After examining Germany's submissions on the matter mentioned above, the Commission has decided to raise no objections to the planned state aid scheme.

1. Procedure

- (1) The Commission was notified of the measure according to Article 88 (3) EC Treaty by letter of 7 March 2007. Additional information was supplied by letters of 4 June 2007 and 20 July 2007. On 24 October 2007 a meeting took place with the German authorities. Germany supplied additional information by letters of 21 November 2007, 21 January 2008, 9 May 2008 and 14 April 2009.
- (2) Since one of the measures ('large-scale nature conservation projects') is already in progress, the notification was entered in the register of non-notified measures (NN).

2. Description

2.1 Measures

- (3) The scheme comprises two measures:
 1. The free-of-charge transfer of nature conservation areas owned by the German state and designated as national natural heritage sites (hereafter called 'transfer of lands')
 2. Support for large-scale nature conservation projects.
- (4) These two measures may overlap since transfers of lands may take place in the course of a large-scale nature conservation project.

His Excellency Mr Frank-Walter STEINMEIER
Federal Foreign Minister
Werderscher Markt 1
D – 101117 Berlin, Germany

2.2 Allocation of resources

- (5) EUR 14 million per year are earmarked for large-scale nature conservation projects. No budgetary expenditure is occasioned by transfer of lands.

2.3 Duration

- (6) The measures are indefinite in term, or no specific end-date is stipulated. The ‘transfer of lands’ measure will be concluded when all the affected sites have been transferred. The ‘large-scale nature conservation projects’ measure is indefinite in term. The projects themselves will run for a term of eight to ten years.

2.4 Legal basis

- (7) *Haushaltsgesetz 2006, Vermerk Nr. 60.1 zu Kap. 0807 Tit.12101* [Budget Act 2006, note 60.1 to chapter 0807 title. 12101]; *Koalitionsvertrag zwischen CDU, CSU und SPD für die 16. Legislaturperiode vom 11. November 2005, Pkt. 7.4* [Coalition Agreement between the CDU, CSU and SPD for the 16th legislative period, dated 11 November 2005, item 7.4]; *Förderrichtlinien für Naturschutzgroßprojekte vom 28. Juni 1993* [Funding guidelines for large-scale nature conservation projects of 28 June 1993].

2.5. Detailed description of measures

2.5.1. Transfer of lands

- (8) Valuable national natural heritage exists on state-owned lands in Germany, especially in national parks, UNESCO biosphere reserves, core areas of the Federal Government’s large-scale nature conservation projects, former military training sites and post-mining landscapes.
- (9) According to a 2005 study¹ by the German League for Nature and Environment (Deutscher Naturschutzring, DNR), tight budgetary resources make it increasingly difficult for Germany to finance the long-term management and development of these areas. In the past, valuable nature reserves were sold off, in many cases with environmental conditions attached to the sale to ensure that the sites’ nature conservation value would be maintained. Nevertheless, experience showed that once such sites had been sold to private buyers their conservation value clearly declined over the years, even when they were classified as statutory nature reserves (e.g. Natura 2000 areas). Furthermore, nature conservation organisations lack the necessary financial resources to purchase the complete suite of state-owned sites (125,000 ha) that need to be transferred to guarantee their proper management as well as to cover the consequential costs. These consequential costs in the form of taxes, charges to water and soil management associations, insurance costs etc. can be substantial (having been estimated at around EUR 50 per ha). Nevertheless they are significantly lower than the management costs the state would incur if it were to continue to manage the nature conservation areas itself.
- (10) Germany therefore decided not to sell the sites concerned but to transfer responsibility for the upkeep of sites of special nature conservation value to the German regional states (Länder) and to the German Federal Foundation for the Environment (Deutsche Bundesstiftung Umwelt, DBU). The Länder may, in turn, transfer these sites free of charge to nature conservation organisations (in private, public or mixed ownership). Within the scope of this measure, 125,000 ha of state-owned sites of conservation merit have already

¹ *Langfristige Finanzierungsansätze zur Sicherung des nationalen Naturerbe* [Long-term financing approaches to safeguard national natural heritage], Berlin, March 2005.

been transferred.

(11) The national natural heritage sites to be transferred are selected according to the following conservation principles:

- Sites in national parks,
- Areas within UNESCO biosphere reserves,
- Core areas of the Federal Government's large-scale nature conservation projects,
- Large, unfragmented spaces such as former military training sites and post-mining landscapes,
- Sites within NATURA 2000 areas,
- Statutory nature reserves larger than 50 ha,
- Sites in areas of importance for habitat connectivity and species protection.

(12) The transfer of ownership rights in the sites concerned is linked to contractually defined nature conservation obligations which the recipients must discharge. The nature conservation task is officially conferred by an administrative or legal instrument of the German Federal Government (in the case of the DBU) or of the governments of the German Länder (in the case of other nature conservation organisations).

(13) Transfers to nature conservation associations and foundations take place at the suggestion of the Länder, which select the beneficiaries in an open and non-discriminatory process on the basis of the qualifications and expertise demonstrable by the applicants.

(14) While the recipients pay nothing for the transfer of ownership rights, they are responsible for all other costs associated with the transfer (e.g. survey costs and taxes) as well as the costs of upkeep and of managing site contamination risks. If revenues from the use of the sites exceed costs, the difference must be used entirely for protecting and fostering national natural heritage or else paid over to the transferring Federal Government institution. The recipients must present an annual report which clearly states how the revenues have been used. The environmental conditions governing use of the sites remain in force indefinitely and recipients may not transfer the sites to other owners without approval from the responsible ministry.

(15) Germany could not submit examples of contracts or land register entries in connection with transfers of nature conservation areas because the measure is not yet being implemented. Germany has explained, however, that the environmental conditions governing site use are oriented to the principles applicable to large-scale nature conservation projects (see recitals (20) to (22)).

2.6 Large-scale nature conservation projects

(16) Under the Federal Government programme to establish and protect valuable natural areas and landscapes of national importance ('Funding guidelines for large-scale nature conservation projects', 28 June 1993), Germany supports projects to protect landscapes of national importance and national natural heritage. The programme has been running since 1979. To date, the vast majority of beneficiaries have been state institutions whereas private nature conservation organisations have only benefited in exceptional cases.

(17) The programme aims to contribute to the long-term safeguarding of natural and cultural landscapes containing outstanding habitats of animal and plant species requiring protection. Measures are aimed particularly at conserving biological diversity (diversity of species, diversity of ecosystems, genetic diversity within species). Hence the programme contributes

towards fulfilling supranational conservation objectives, such as those defined in the Convention on Biological Diversity, and towards realising the EU objective of halting any further loss of biodiversity by 2010 at the latest. In addition, it contributes to the long-term protection of Natura 2000 areas.

- (18) The projects to be supported are selected on the basis of conservation criteria such as national representativeness, extent of spatial coverage, degree of human-induced landscape modification, model character and level of threat. Any interested organisation can submit proposals for a nature conservation project in cooperation with the responsible German Land.
- (19) Only state institutions (e.g. district authorities, municipal authorities, local authority special-purpose associations) or nature conservation associations or foundations, or alliances of the above are considered as project-executing agencies. Federal Government funding amounting to EUR 14 million per year is made available for the implementation of the programme. Project-executing agencies are proposed by the Länder, who then make their selection, giving due regard to the requisite expertise and qualifications.
- (20) The obligations of the recipients are defined individually in relation to the project, and set out by the responsible authorities in an administrative or legal instrument. The parameters for the calculation of grants are set out in the funding guidelines. The amount of grant per project is fixed in law by the grant determination.² It also specifies the nature of the conditions imposed and the length of time they will remain in force, the applicable territories, and the scope, term and method for calculating the grant; furthermore the grant determination contains provisions for controls and any revision of grant amounts. It is accompanied by a management plan.
- (21) The management plan specifies the nature conservation tasks for each project in detail. The plan, which is drafted under the supervision of a committee, must meet a series of requirements including criteria such as the following:
 - a) Primary orientation of future development of core areas to the requirements of the natural resources of fauna and flora typically found in the ecological region, also taking account of the prevailing socioeconomic conditions. Habitats of the animal and plant species that occur, especially threatened and characteristic species as well as target and indicator species in the core areas, are to be safeguarded and developed concurrently;
 - b) Development of integrated, site-appropriate conservation and management concepts, with special attention to the safeguarding, optimisation and development of habitats meriting protection.
 - c) Development of nature conservation oriented visitor-management measures to ensure that leisure and recreational use are compatible with the natural environment in the project core areas;
 - d) Development of a long-term evaluation concept for project success;
 - e) Hunting and leisure use must not conflict with the nature conservation objectives nor be detrimental to areas where protection and tranquillity are the overriding needs.
- (22) Consequently the nature conservation tasks may take a variety of forms and are defined individually for each area. For example, organisations can be required to create or extend natural ecosystems like wetlands, restore the original ecological equilibrium of water resources, promote the self-regulation capacity of flora and fauna, reduce nutrient

² The mandatory contents of a grant determination (*Zuwendungsbescheid*) are set out in paragraph 44 BHO (*Bundshaushaltsordnung* – Federal Budget Code); BGBl. (*Bundesgesetzblatt* – Federal Law Gazette) I 1969, 1248

discharges or create strict nature reserves.

- (23) The German Federal Government contributes a maximum 75 % share of the project costs eligible for support. The remaining costs are borne by the responsible German Land and the project-executing agency. In particular, by mandatory stipulation at least 10% of the net costs (after deduction of revenues) incurred during the project as well as all consequential costs (long-term post-project costs) must be borne by the project-executing agency.
- (24) Germany has given an assurance that, as a matter of principle, state grants cannot exceed the costs incurred by the project-executing agency in discharging its obligations (after deduction of all project revenues). Projects are limited to a finite term (of 10 years on average).
- (25) In the case of private nature conservation organisations, the self-funded element is generally financed from donations. Nevertheless, nature conservation organisations can also generate revenue from the land under their management. These sources of income are restricted, however, by the conditions on use imposed by the German Federal Government. Revenues may be generated mainly, but not necessarily only, from hunting and fishery leases, timber sales as part of forest management, and tourism activities. These revenues are offset against project costs. Germany states that nature conservation projects would be more expensive if nature conservation organisations were completely prohibited from generating revenue, which would also contravene the thrift requirement³ laid down in the Federal Budget Code, according to which state support measures must adhere to the principles of thrift and economic efficiency.
- (26) The list of activities permitted within the scope of nature conservation projects, below, is based on the information supplied by Germany along with a model agreement,⁴ and is not therefore exhaustive.
- (27) The model agreement contains specific environmental conditions for each sub-area (core areas being subject to more stringent conditions than other areas). For example, mining is prohibited in core areas and no tourism infrastructure or new roads may be built. As a matter of principle, the activities undertaken should not disturb the tranquillity of the protected areas. Limited tourism-related activities such as visitor management are possible provided that they are compatible with the environmental criteria defined in the management plan. In the example case cited here, fishery is permitted under certain conditions (the long-term goal being the support of native fish populations). Hunting is also possible but with restrictions on constructing permanent hunting facilities and on game feeding. According to information submitted by Germany, hunting activities can be a necessary component of forest protection and should therefore be viewed as a conservation measure. With regard to the forest, Germany contends that in some especially valuable forest areas, free rein must be given to natural dynamic processes (without any management) whereas other areas can certainly be managed provided that non-intensive, environmentally sustainable practices are adopted. Timber sales are permitted. If land is acquired under the auspices of a project, existing leases can continue to be honoured until they expire but may not be renewed. It is possible to agree new leases for comprehensive management (of land outside core areas).
- (28) As the above example shows, the revenue sources of the nature conservation organisation are limited by conditions on use but are not exhaustively defined, and the revenue potential can vary greatly from area to area. It is not therefore possible to predict with accuracy what amount is required in order to cover the recipient's costs, since all the revenues accruing to the recipient also need to be taken into consideration. As a matter of principle, however, if revenues exceed costs, the difference must be paid over to the Federal Government institution that provided the grant. This ensures that nature conservation organisations do

³ The thrift requirement (*Sparsamkeitsgebot*) is specified in paragraph 7 BHO of 16 May 2001.

⁴ Principally, a description of the 'Pfungser-Burgweiler Ried' project, Baden-Württemberg.

not receive more resources than are absolutely necessary for project implementation.

- (29) The two measures ('transfers of nature conservation areas' and 'large-scale nature conservation projects') are independent from one another. Nevertheless, some areas of overlap can arise, since Federal Government owned sites in core areas of large-scale nature conservation projects can be transferred free of charge to nature conservation alliances. Furthermore, project costs may also include the purchase of lands in private ownership if this is necessary in order to accomplish the nature conservation tasks. Ownership of these sites is likewise transferred to the nature conservation organisations.

Subsequent transfer to other parties free of charge or in return for payment

- (30) As a matter of principle, sites which are either transferred free of charge or purchased with federal funding may not subsequently be transferred to other parties. Under certain circumstances, however, the responsible authorities may approve a further transfer.⁵ Germany has given an assurance that subsequent transfer of such sites will only be approved for boundary rationalisation purposes. The proceeds of the sale must be used in their entirety for the management and development of nature reserves or for the acquisition of sites of equal or higher conservation value. Otherwise revenues must be paid over to the state. For both measures (transfer of lands and nature conservation projects) the land register entries for the sites concerned specify that the environmental conditions will remain in force indefinitely, and that sale proceeds must either be used for nature conservation or else paid over to the state.
- (31) Subsequent transfer of sites to another recipient organisation is equally possible in principle. In this case, all the existing environmental conditions remain in force for the site in question, and it is transferred to the new owner in such a way that neither the original nor the new recipient obtains any economic advantage from the transfer, while the nature conservation obligations pass to the new owner.

3. Review under EU state aid law

3.1. Existence of state aid within the meaning of Article 87 (1) of the EC Treaty

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

In some cases the transfer of lands consists solely of the transfer of ownership from the Federal Government to the Länder. In the Commission's view, this procedure constitutes a transfer of ownership rights and nature conservation obligations between levels *within* the public sector and not the transfer of state resources to undertakings. Hence, where the notified measure concerns the Länder, it does not fall within Article 87 (1) EC Treaty.

- (33) Germany has stated that the German Federal Foundation for the Environment (DBU) is to be regarded as part of the federal administration. According to the information provided, the DBU has founded a subsidiary foundation DBU Naturerbe GmbH, which will execute a number of large-scale nature conservation projects directly. In the view of the Commission, this subsidiary foundation is not part of the federal administration but a state-owned nature conservation organisation. Hence the analysis in recitals (34) to (41) also relates to all public and private organisations entrusted with the tasks that are the object of this assessment. This includes DBU Naturerbe GmbH and possibly also the DBU if it is executing the same tasks.

⁵ The mandatory contents of a grant determination (*Zuwendungsbescheid*) are set out in paragraph 44 BHO, BGBl. I 1969, 1248.

3.1.2 Nature conservation organisations are undertakings

- (34) The Länder can surrender their responsibility for performing their nature conservation tasks and, in particular, transfer Land-owned property to nature conservation foundations, alliances or associations which may be in public, private or mixed ownership.
- (35) The prohibition of state aid under Article 87 (1) of the EC Treaty is only applicable where the beneficiaries are deemed to be undertakings. In Germany's view, the nature conservation organisations to which the scheme is addressed are not considered to be undertakings, since they are not profit-oriented and carry out non-economic activities which can be classified as public service tasks. In Germany's view, this is further supported by the fact that such organisations are exempt from corporation tax under German law. In its letter of 9 May 2008, Germany further referred to Decision No. NN 41/2005 (Green Investment Funds – Netherlands)⁶ of the Commission, in which it concluded that the Dutch nature conservation organisations concerned were not engaging in economic activity. Germany contends that the same must apply to the German nature conservation organisations.
- (36) The Commission does not share this view. According to settled case law at the Court of Justice, the term undertaking covers any entity engaging in economic activity, irrespective of its legal form and the nature of its financing.⁷ The question as to whether nature conservation organisations engage in economic activities cannot therefore be answered with reference to their general purpose, the profit motive or their tax treatment under individual Member State law, but rather from an analysis of the activities likely to be carried out by the organisation in the course of the notified measure.⁸ Consequently the decision in case NN 41/2005 is not universally applicable and cannot be cited as a precedent, since all that can be inferred from it is that, based on the information provided by the Netherlands, the Commission found the Dutch organisations not to be engaging in economic activity within the scope of the scheme concerned.
- (37) Furthermore, it is indisputable that where economic activity is found to exist, no distinction may be made between state-owned nature conservation institutions on the one hand and private or mixed organisations on the other.⁹
- (38) Germany contends that revenue-generating activities could unavoidably arise out of nature conservation tasks. For example, in order to conserve the natural environment, trees must sometimes be felled (for example, to remove tree species not native to the habitat), and in order to protect forest ecosystems, certain animal populations must be limited by hunting. Tourism and leisure activities are not primarily geared towards economic use and are limited by the requirement to avoid disturbances to local fauna. Tourism activities can also be carried out by specialised undertakings.
- (39) The Commission holds that nature conservation organisations can undertake very varied activities which are not defined exhaustively in advance, either in the legal basis (funding guidelines) or in the notification itself.¹⁰ Although some of the nature conservation tasks presented by Germany as services in the public interest may possibly be completely non-economic in nature, in other cases the nature conservation objective is achieved through the imposition of environmental conditions to govern forest and pasture management, site leasing and tourism. While these activities may be small-scale and, as a consequence of the environmental conditions, not particularly profitable, profitability is not relevant to the

⁶ Commission Decision of 25 August 2006, C(2006)3886.

⁷ See following judgments of the Court of Justice: Case C-41/90, Höfner and Elser [1991], I-1979, paragraph 21, C-244/94, Fédération française des sociétés d'assurance et al. [1995], I-4013, paragraph 14, and C-55/96, Job Centre [1997], I-71 19 paragraph 21

⁸ Regarding non-profit organisations see, for example, the linked Cases 209/78 to 215/78 and 218/79, Van Landewyck [1980], 3125, and Case C-244/94, FFSA et al. [1995], I-4013

⁹ Article 295 of the EC Treaty is neutral as regards private or public ownership.

¹⁰ Section 6.1 of the funding guidelines simply states: 'Use, hunting, fishery and recreational activities are only permitted in so far as they do not conflict with the project's nature conservation objectives.'

question of whether an activity is economic in nature.

- (40) Also irrelevant is the teleological argument offered by Germany that activities are geared towards nature conservation and not revenue generation. The Commission notes that regardless of environmental protection objectives, the nature conservation organisations have an interest in generating sufficient revenues to cover the costs associated with the land ownership and/or project implementation (the organisations must fund 10% of the project costs themselves). Thus, in parallel to the environmental protection objective, an economic objective always exists.
- (41) According to settled case law, every activity that consists of offering goods or services in a certain market constitutes an economic activity.¹¹ The Commission considers that in the present case, activities such as the sale of timber, the leasing of sites, or tourism should be classified as economic activities. It follows that, in so far as they engage in these activities, the German nature conservation organisations to which the notified measure applies should be viewed as undertakings within the meaning of Article 87 (1) EC Treaty (and should be subject to state aid control accordingly).
- (42) This finding is in line with past decisions by the Commission which invoked the state aid regulations to approve very similar German measures, which provided for the free-of-charge transfer of forest sites to Länder and nature conservation organisations (C 17/1998, N 506/1999 and N 277/2003), and which likewise classified the revenue-generating activities as economic activities and the organisations as undertakings.

3.1.3. Criteria for determining the existence of state aid

- (43) According to Article 87 (1) EC Treaty, a measure should be viewed as state aid if it meets the following four criteria. First, the measure must be financed by the state or from state resources. Second, the measure must confer an advantage on the beneficiaries. Third, it must be selective, which is the case if it only favours certain undertakings. And fourth, it must adversely affect trade between Member States and distort or threaten to distort competition.

3.1.3.1. Transfer of state resources

- (44) The 'transfer of lands' measure provides for Germany to transfer the ownership of certain natural sites free of charge. Although the sale value of the sites is lowered by the long-term restrictions on their use as a result of the nature conservation objectives, it is still higher than zero. The potential sale value of the sites is difficult to quantify, because it depends on factors like their suitability for revenue-generating activities and the scale of the consequential costs (which include property tax, charges to water and soil management associations, insurance and other administrative costs). A study carried out in 2005 by the DNR strategy group on nature conservation sites, which Germany has submitted, confirms that the value of the sites is difficult to determine but contains no indication that their market value is zero. Rather, the study contains price estimates for particular types of site. Furthermore, in the past such sites have been transferred to nature conservation organisations and private individuals in return for payment.
- (45) According to the Commission Communication on State aid elements in sales of land and buildings by public authorities¹² the existence of state aid can only be precluded if the sale is transacted at market value. Since in the present case sites are transferred free of charge, despite having a positive market value, Germany is transferring state resources to the

¹¹ Judgment of the Court of Justice of 10 January 2006 in Case C-222/04, Cassa di Risparmio di Firenze et al. [2006], I-289.

¹² Official Journal of the European Union (OJ) C 209 of 10 January 1997, p. 3

recipients in the form of a sacrifice of revenue.

- (46) The state bears 90% of project costs for large-scale nature conservation projects (out of Federal Government and Länder resources). Hence this measure, too, involves the transfer of state resources.

3.1.3.2. Economic advantage

- (47) Both measures confer an economic advantage on the beneficiaries because the beneficiaries receive the sites free of charge and may use them economically and generate revenue, even though revenues are lowered by the environmental conditions. In view of the value of the sites, a potential advantage is also associated with the transfer of ownership free of charge or at reduced cost (e.g. within the course of a nature conservation project). The relevance of this advantage to the assessment of the present measure is examined more closely in recitals (79) to (81).

3.1.3.3. Selectivity

- (48) The beneficiaries are selected nature conservation organisations. Hence the measures are selective.

3.1.3.4. Adverse effect on trade and distortion of competition

- (49) The beneficiaries of the measures engage in activities in the economic branches of forestry, tourism and hunting/fishery. These are branches in which free competition and trade prevails between Member States. However, the activities may well be on a small-scale in terms of both territorial extent and economic value.
- (50) In terms of economic value, small sums of aid below the criteria listed in Commission Regulation (EC) No. 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to de minimis aid¹³ do not fall within the scope of Article 87 (2) of the EC Treaty. In the present case, the amount of aid that may be granted to the beneficiaries is not limited in value terms.
- (51) In terms of the territorial extent of the activities, the Commission has noted that there are very few cases in which state subsidies do not adversely affect trade; namely, where services are provided only at a local level and where they do not service demand from other Member States, as for instance in the case of a swimming pool in Germany.¹⁴ The Community courts take a similarly narrow interpretation of impairment of trade.
- (52) In the present case, at least one of the activities (sale of timber) is deemed not to be a service but the sale of goods (forest products) which can clearly be exported to other Member States. As regards the other activities – and especially given the locations of the transferred sites, which are distributed across the entire territory of Germany – it is impossible to preclude that these might be suitable for international tourism or that the lease of hunting rights might attract interest from abroad. Furthermore the activities that may be carried out on these sites have not been exhaustively defined in the German regulation. Therefore the Commission is of the opinion that despite the probable minor impacts of the measures, trade within the Community should be seen as adversely affected.

¹³ OJ L 379 of 28 December 2006, p. 5.

¹⁴ Commission Decision N 258/2000 of 21 December 2000, Germany – Freizeitbad Dorsten (OJ C 172 of 16 June 2001, p. 16)

3.1.4. Nature conservation tasks as services of general (economic) interest

- (53) In Germany's view, the nature conservation tasks to be carried out in the course of the notified measure should be seen as non-economic 'services of general interest' (SGIs).
- (54) As set out in recitals (36) to (42) the Commission, however, takes the view that while the activities to be carried out by the nature conservation organisations are designated as services of general interest, in certain respects at least they are economic in nature. Therefore the Commission has examined whether the activities concerned can be viewed instead as 'services of general *economic* interest' (hereafter called SGEIs for brevity).
- (55) As the Court of Justice repeatedly finds, and the court of first instance recently confirmed in its BUPA judgment,¹⁵ Member States have broad discretion in defining the nature and scope of a SGEI and in specifying the conditions of implementation. The Commission can only take issue with Member States' definitions in the event of a manifest error. The Member States must, however, justify why they believe that the specific characteristics of the service in question are such that it should be viewed as a service of general economic interest.¹⁶
- (56) Environmental protection tasks as provided for in the German measure have never previously been designated as services of general economic interest by any Member State. SGEI contracts are generally awarded in network industries such as telecommunications services, water and electricity supply, postal services, transport services and certain airport and port services. The concept of services of general economic interest is nevertheless subject to modification, because opinions as to which services the state should guarantee through intervention might be expected to change over time. Previously, in its 2004 White Paper on services of general interest,¹⁷ the Commission acknowledged the following: *'Services of general interest and the context in which they are provided, including the European Union itself, are constantly evolving and will continue to evolve.'*
- (57) Although the White Paper focuses mainly on classic public services, environmental protection is also mentioned as a potential remit area for services of general interest. To quote from Section 3.4 of the White Paper: *'In line with the Union's policy on sustainable development, due consideration has to be taken also of the role of services of general interest for the protection of the environment and of the specific characteristics of services of general interest directly related to the environmental field, such as the water and waste sectors.'*
- (58) In the Commission's view, however, a measure can only be classified as a service of general interest if it actually serves the interests of citizens. The nature conservation tasks that Germany is entrusting to the nature conservation organisations serve objectives that are in the interests of society as a whole, namely the protection of intact natural habitats, which are of great value for future generations. These tasks can be conceived of as services for all citizens and clearly fall within the responsibility of the state, which takes appropriate action through its public authorities but which considers it expedient, e.g. for financial reasons, to entrust other organisations with these responsibilities. Consequently the scheme differs from classic environmental protection measures in that under the latter, only the undertakings can voluntarily implement actions for the benefit of the environment, and not the state itself. Therefore the Commission acknowledges that, in the present case, nature conservation tasks can constitute a service of general interest.
- (59) If, however, Member States define services of general economic interest for sectors of the economy which have been the object of harmonisation measures at EU level, then these

¹⁵ See judgment of the court of first instance of 12 February 2008 in Case T-289/03, BUPA, paragraphs 166 to 169 (not yet published in the compilation).

¹⁶ Judgment in the BUPA case, paragraph 172.

¹⁷ Communication from the Commission of 12 May 2004, COM(2004)374 final, downloadable from http://eur-lex.europa.eu/LexUriServ/site/en/com/2004/com2004_0374en01.pdf

services must be reviewed with special care in order to avoid inconsistencies. For example, the forest sector is harmonised and state aid for forestry is subject to the ‘Community guidelines for state aid in the agriculture and forestry sector 2007 to 2013’¹⁸ (hereafter called ‘Agriculture Guidelines 2007’). The Commission therefore examined whether the agriculture guidelines are applicable to the present case. Under the Agriculture Guidelines 2007 (particularly at paragraph 175, letters a to g), state aid is permitted to support the ecological, protective and recreational functions of forests, as is state aid in the form of a transfer of forest areas for permanent nature conservation purposes.

- (60) In the present case, the forest areas represent only part of the nature reserves in question (and account for only 0.8% of Germany’s entire utilised forestry area). Furthermore, the organisations in question will also engage in other activities, which should be reviewed as compensation for the provision of SGEIs. During the global review to determine whether any overcompensation has occurred, revenues from forestry activities must also be taken into account.
- (61) In light of the above considerations, it seems to the Commission inappropriate to isolate forestry and submit it to separate analysis on the basis of the sectoral rules; it deems analysis based on public service compensation for SGEIs to be the most appropriate approach for analysing the German measures, which should be subjected to a global review.

3.1.5 Not all of the Altmark criteria are fulfilled

- (62) Germany has submitted information to prove that the measures do not constitute state aid under the terms of the Altmark judgment.¹⁹ The Commission has examined this claim and rejects it as inaccurate.
- (63) In its judgment on the Altmark case, the Court of Justice found that compensation for discharging public service obligations (i.e. for providing services of general economic interest) does not constitute state aid within the meaning of Article 87 of the EC Treaty as long as four conditions are met.
- (64) The fourth Altmark condition states that the only circumstances in which compensation should not be qualified as state aid are when the level of compensation is determined either by an open, transparent and non-discriminatory procedure for the award of public contracts (tender procedure) *which enables the selection of the applicant who can provide this service for the public at the lowest costs*,²⁰ or based on an analysis of the costs of an average, well-run and adequately equipped undertaking (comparison method).
- (65) The notified measures provide for selection of the nature conservation organisations by means of an open and transparent public procedure. The bidding process is not, however, geared towards the lowest price for the provision of the services or the most economically favourable offer,²¹ but towards the aptitude profile of the organisations and – in the case of nature conservation projects – the environmental benefit of the projects. Thus in contravention of the Altmark condition, the amount of compensation is not determined on the basis of a tender procedure and thus there is no assurance that the services are being provided on behalf of the state at the lowest cost. Although Germany has stated that if two organisations submit an offer for one and the same project, the more economically favourable offer will be selected, in practice this is barely likely to occur, because the submission of dissimilar projects would normally be permitted, and this would only affect a portion of the projects in any case. The amount of compensation is not defined using the

¹⁸ OJ C 319 of 27 December 2006, p. 1

¹⁹ Judgment of the Court of Justice of 24 July 2003 in Case C-280/00, Altmark Trans and Regierungspräsidium Magdeburg [2003], I-7747.

²⁰ Ibid., paragraph 93.

²¹ This concept is broader than that of the lowest price in that it also takes qualitative factors into account.

comparison method. It must therefore be concluded that the fourth Altmark criterion is not fulfilled, with the result that the measures cannot be classified as devoid of state aid on the basis of the Altmark judgment.

- (66) Conversely, since all the criteria of Article 87 (1) of the EC Treaty are fulfilled, the measures constitute state aid.
- (67) Even though other criteria are being applied in this case, the finding that state aid is occurring fundamentally coincides with the Commission's past decision-making practice, for a series of German schemes providing for the transfer of Federal Government owned forest areas, free of charge, to the German Länder and to nature conservation organisations (the notified and Commission-authorized state aid cases C 17/1998, N 506/1999 and N 277/2003) were likewise deemed to constitute state aid.²²

3.2. Legality of state aid

- (68) In the letter dated 11 April 2008 Germany confirmed that the 'large-scale nature conservation projects' measure has been running since 1979. The 'transfer of lands' measure is not yet being implemented. Consequently the aid granted within the scope of the 'large-scale nature conservation projects' measure contravenes EU law.

3.3. Assessment of the compatibility of the state aid with the provisions on services of general economic interest passed after the Altmark judgment (the Monti-Kroes Package / 'SGEI Package').

3.3.1. Applicability of the SGEI judgment

- (69) If undertakings with low turnover which provide services of general economic interest are granted compensation on a small scale, then according to the 'Commission Decision of 28 November 2005 on the application of Article 86 (2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest', this can be granted as compensation²³ ('SGEI Decision') and viewed as aid compatible with the common market (and exempt from obligatory notification). The SGEI Decision is applicable to compensation payments and undertakings with an average annual pre-tax turnover from all activities in the two accounting years preceding the assumption of a service of general economic interest amounting to less than EUR 100 million in total, and receiving an annual compensation payment for provision of the service amounting to less than EUR 30 million.
- (70) Germany has submitted that according to the available information (which relates to possible future recipients of Federal Government owned sites and the current recipients of resources within the framework of nature conservation projects), the turnover of the beneficiary organisations remains below the EUR 100 million threshold set out in the SGEI Decision. As regards the amount of compensation, in the case of the 'transfer of lands' measure, it is unlikely that the revenues generated from the sites will exceed the threshold of EUR 30 million (although precise figures will only be available after the transfer of the sites). In the case of the nature conservation projects, there is no prospect whatsoever of exceeding the SGEI Decision thresholds because the total budget for the measure is the lower amount of EUR 14 million, and furthermore it has to be divided up among 20-30 recipients.

- (71) The Commission therefore concludes that all aid granted in the past for nature conservation

²² In the aid authorisation decision N 277/2003 of 26 April 2006 (COM(2006) 1579 final) the Commission found that it was not in a position to carry out a review in terms of compensation for services of general interest because the German authorities had not submitted sufficient information.

²³ OJ L 312 of 29 November 2005, p. 67

projects falls within the scope of the SGEI Decision.

- (72) Future aid in the course of both measures (transfer of lands and nature conservation projects) is likewise expected to fall within the scope of the SGEI Decision in the overwhelming majority of cases. However, because the scheme is not explicitly restricted to measures that fulfil the conditions of the SGEI Decision, in certain cases the thresholds could be exceeded nevertheless. Therefore a review must also be conducted of whether the scheme is compatible with the SGEI Framework. However, since the rules of the SGEI Decision and the SGEI Framework are the same in content (except that the Decision is merely narrower in its scope of application), no separate review is necessary.

3.3.2. Assessment of the compatibility of the aid with the SGEI Framework

- (73) Compensation payments which cannot be classified as devoid of state aid under the Altmark criteria can nevertheless be deemed compatible with the common market if the conditions of the Community framework for state aid in the form of public service compensation²⁴ ('SGEI Framework') are met.

3.3.2.1. Genuine services of general economic interest

- (74) In of the analysis in recitals (55) to (58), the Commission acknowledges that it is in the public interest to ensure that valuable national natural heritage is protected and fostered, and that this public interest justifies the creation of public interest obligations.

3.3.2.2. Conferment of responsibility

- (75) Where compensation is granted for the discharge of public interest obligations, these must be clearly defined. According to paragraph 12 of the SGEI Framework, this means that the public contract for provision of the service of general interest should be awarded 'by way of one or more official acts', which must specify the following particulars:

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

- (76) As regards the transfer of lands, the undertakings are entrusted with the nature conservation tasks by means of the donation contract (*Schenkungsvertrag*) in conjunction with a corresponding entry in the land register. Exclusive or special rights are not granted. The donation contract contains a precise description of the nature conservation tasks that the recipient of the sites must fulfil. The obligations are also reflected in the land register entry, which provides for restrictions upon use and resale of the sites in question. The parameters of the transfer are defined in advance and there are mechanisms for the prevention of overcompensation. Therefore it can be noted that in the case of the 'transfer of lands' measure, Germany is following the proper procedure for conferring responsibility for the nature conservation tasks upon the recipient organisation.

- (77) As regards the financing of large-scale nature conservation projects, the conferment of

²⁴ OJ C 297 of 29 November 2005, p. 4.

responsibility takes place by means of the legally binding grant determination notice issued by the Länder, in conjunction with the management plan for the given project. The grant determination notice specifies that the public resources made available for the given project may only be used to fulfil tasks in the public interest.²⁵ The tasks are then set out in detail in the management plan for the project. Exclusive or special rights are not granted. The temporal, territorial and financial parameters of the projects are defined and there are measures for the prevention of overcompensation. Once again, it can be ascertained that in the case of the large-scale nature conservation projects, the responsibilities for nature conservation tasks are being properly conferred.

3.3.2.3. Amount of compensation

(78) The amount of compensation may not exceed what is necessary to cover all or some of the costs incurred in discharging the public service obligations, taking into account the revenues and a reasonable profit margin (paragraph 14 of the SGEI Framework). The compensation may only be used for the operation of the services of general economic interest (paragraph 15 of the SGEI Framework).

(a) Transfer of lands

(79) The potential economic advantage that accrues to nature conservation organisations can be defined as the sum of revenues from commercial use of the sites, and their market value. Any advantage associated with the market value of the sites only accrues de facto in the event of sale. As a matter of principle, the nature conservation organisations may not subsequently transfer the sites to third parties at will. And even if a subsequent transfer is approved, the organisation may not retain the proceeds of the sale but must either use them for environmental protection measures or pay them to the state. The environmental protection obligations cannot be surrendered and in the event that the obligations are not discharged, the transferred sites revert back to state ownership.

(80) In view of this fact, the only advantage accruing to the nature conservation organisations is comprised of the revenue from engaging in economic activities on the sites. In order to determine whether overcompensation within the meaning of the SGEI Framework has occurred, the Commission bases its assessment not on the potential market value of the sites but on the revenue achievable from their use.

(81) According to the information submitted by Germany, the revenues from the economic activities concerned do not generally exceed the costs incurred by recipients for the environmental protection tasks and land ownership with which they are entrusted (e.g. taxes, decontamination costs and other charges). Since the amount of achievable revenue differs from site to site, it is not possible to submit figures beforehand. Germany has set out the accounting principles to be used, however. Accordingly, if revenues exceed costs, the difference must be used entirely for the protection of national natural heritage or else paid over to the state. Hence the Commission finds the compensation (i.e. the revenues achievable from use of the sites) to be compatible with the SGEI Framework since it is used entirely for the discharge of SGEI obligations.

(82) Overcompensation can be precluded to the extent that revenues must either be used entirely for the environmental protection tasks or else paid over. It should be noted that the recipients are thus not permitted to retain a profit margin from the revenues generated in the course of their activities, although they would be permitted a reasonable profit margin under the SGEI Framework (cf. paragraph 18 of the SGEI Framework).

(83) For the eventuality that the undertakings concerned engage in other activities in addition to

²⁵ Defined with reference to the funding guidelines.

their SGEI contract, the SGEI Framework contains provisions to prevent cross-subsidisation; for instance, mechanisms for the allocation of costs and revenues, or separate book-keeping for SGEI activities and other activities. In the present case it can be stated that both the nature conservation activities and the revenue-generating activities are connected to the SGEI contract. With reference to these activities a breakdown of finances is prepared in which the costs of the nature conservation measures and the costs and revenues of economic activities are listed separately. However, the nature conservation organisations can also engage in activities unconnected with the measure in question. If this is the case, care must be taken not to attribute the costs incurred for these activities to the services of general economic interest, nor to include them in the financial breakdown.

- (84) Germany has confirmed that the accounting principles²⁶ applicable to the measure guarantee transparency and a clear separation between the costs and revenues attributable to the various activities of the environmental protection organisations.
- (85) Cross-subsidisation is precluded by the mechanism envisaged by Germany. Cross-subsidisation occurs when an undertaking uses subsidies obtained for the provision of services of general economic interest in order to offer its other commercial activities at artificially low prices. In the present case, revenues from commercial activities are the only possible means for the nature conservation organisations to cover the costs associated with the nature conservation obligations (the activities are not subsidised; the subsidy rather resides in the fact that the activities can be carried out free of charge). De facto there is no incentive for the organisations to offer their commercial services at below-cost prices in order to undercut their competitors' prices.
- (86) This mechanism is compatible with paragraph 17 of the SGEI Framework, which states: *'The Member State may also decide that the profits accruing from other activities outside the scope of the service of general economic interest must be allocated in whole or in part to the financing of the service of general economic interest.'*

(b) Large-scale nature conservation projects

- (87) The project support contract is based on the principle that all revenues achieved by the nature conservation organisations from the economic utilisation of the sites should be used for the financing of the project, and that any surpluses must either be used for nature conservation or else paid over. The discussions in recitals (82) to (86) on the preclusion of overcompensation and cross-subsidisation are equally valid for this measure.
- (88) As regards the potential advantage that could accrue to the project executing agencies from the value of the sites transferred free of charge (in the event of overlaps with the 'transfer of lands' measure) or from the value of the sites purchased within the scope of the project costs (for which recipients are responsible for only 10% of the purchase price), then the discussions in recitals (79) and (80) are equally applicable to this measure.
- (89) It can therefore be concluded that the compensation granted within the framework of the two notified measures does not go beyond what is necessary in order to discharge all the public interest obligations with which the beneficiaries are entrusted.

3.3.2.4. Reporting

- (90) Germany has consented to submit a report every three years on the implementation of the scheme. The report will take the form of a table which specifies, for both measures, the revenues from the use of the site, the expenses, and if relevant, the purpose for which

²⁶ See paragraph 6.2.2 of the ancillary provisions on project subsidies (*Allgemeine Nebenbestimmungen für Zuwendungen zur Projektförderung, ANBestP*) in the administrative rules (*Verwaltungsvorschriften, VV*) to § 44 BHO.

surplus revenues are used. Furthermore Germany will provide information when the responsible authorities have authorised a subsequent transfer of lands.

3.3.2.5 Conclusion

(91) In view of the above analysis, the Commission concludes that the relevant regulations under the SGEI Package passed after the Altmark judgment are being adhered to. Since the rules of the SGEI Decision and the SGEI Framework do not differ in content, as outlined in recital (72), instances of aid which fall within the scope of the SGEI Decision based on their specific characteristics are deemed to be compatible with this Decision on the basis of the above analysis.

4. DECISION

(92) In light of the above considerations, the Commission takes the view that the notified aid scheme pursuant to Article 86 (2) of the EC Treaty is compatible with the common market.

If this letter contains confidential information which should not be disclosed, please submit a reasoned request for confidential treatment within 15 working days of receipt. If no such request is received, the Commission assumes that you agree to the disclosure of the information submitted and to the publication of the full text of this letter in the authentic language on the following website:

http://ec.europa.eu/community_law/state_aids

The request should be sent by registered mail or by fax to the following address:

European Commission
Directorate General for Competition
Directorate for State Aid
State Aid Registry
1049 Brussels
BELGIUM
Fax +32 229-61242

Yours faithfully,

On behalf of the Commission

Neelie KROES
Member of the Commission

[2 official stamps]