DECISIONS

COMMISSION DECISION

of 15 December 2009

on State aid granted by Germany in respect of certain activities of the Bavarian Animal Health Service (C 24/06 (ex NN 75/2000))

(notified under document C(2009) 9954)

(Only the German text is authentic)

(2010/178/EU)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union and in particular the first subparagraph of Article 108(2) thereof,

Having given interested parties notice to submit their comments pursuant to that Article, and having regard to those comments,

Whereas:

I. PROCEDURE

(1) By letter of 21 February 2000 a complaint was lodged with the Commission regarding measures taken by the Bavarian Animal Health Service (TGD). The same complainant subsequently sent further letters regarding the same complaint. The State aid case was registered under number NN 75/00.

(2) The Commission wrote a number of letters to Germany in connection with the complaint. In reply to these letters, Germany submitted information in letters dated 4 July 2000, 22 December 2000, 22 November 2002, 10 April 2003, 1 December 2003 and 27 June 2005. A meeting with German officials took place on 17 July 2003.

(3) The measure had been in operation since 1974. Despite enquiries, it was not possible to find proof of the measure having been notified. The aid was therefore entered in the register of non-notified aid measures.

(4) By letter dated 7 July 2006, the Commission informed Germany that it had decided to initiate the procedure laid down in Article 108(2) TFEU [1] in respect of the aid.

(5) The Commission decision to initiate the procedure was published in the *Official Journal of the European Union* [2]. The Commission called on interested parties to submit their comments.

(6) The Commission received written comments from interested parties by letters dated 30 October 2006, 2 November 2006 and 7 November 2006.

(7) Germany sent its comments to the Commission by letters dated 6 November 2006, 22 January 2007, 25 July 2008 and 9 February 2009.

II. DESCRIPTION

(8) The measure is taken pursuant to Article 14(1) of the Law on support for Bavarian agriculture (*Gesetz zur Förderung der bayerischen Landwirtschaft* — LwFöG).

(9) The objective of the measure is to safeguard and improve the hygiene of foodstuffs of animal origin.

(10) The beneficiaries are farmers and fishermen (hereinafter referred to collectively as farmers).

(11) A further beneficiary is the Bavarian Animal Health Service (TGD).

(12) The measure is financed from the resources of the Land of Bavaria and the Bavarian Animal Disease Fund (hereinafter: BTSK).

(13) Although described as 'general measures' (*Globalmaßnahmen*), the measures in question benefit only farmers in Bavaria. Moreover, according to the information provided by Germany, they are very specific and of a purely preventive nature relating to the production of milk and meat and to the rearing of pigs, poultry,

[1] On 1 December 2009, Articles 87 and 88 of the EC Treaty were replaced by Articles 107 and 108 of the Treaty on the Functioning of the European Union (TFEU). The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 107 and 108 TFEU should be understood as references to Articles 87 and 88, respectively, of the EC Treaty where appropriate.

[2] OJ C 244, 11.10.2006, p. 15.

sheep and fish. Stocks (*Tierbestände*) are examined according to an established programme that takes account of specific animal disease risks or criteria for the prevention and eradication of animal diseases. Germany has also specified that the support is granted only for general measures in the public interest that go beyond the legal requirements for the individual farmer (letter of 6 November 2006, p. 4).

(14) The following types of measure are taken on agricultural holdings: continuous monitoring by means of tests and/or precautionary examinations, sampling and (laboratory/serial) analyses, veterinary advice, drawing up prevention and eradication plans and developing vaccination programmes.

(15) Germany has indicated that the measures listed above in recital 14 constitute a basis for specific advice to farmers for appropriate preventive or curative action. According to Germany, however, services normally provided by practising veterinary surgeons (e.g. treatment with medicinal products or preventive vaccination) are not part of these 'general measures'.

(16) These 'general measures' are free of charge for farmers. However, farmers cannot request the measures; the TGD — which has been entrusted with taking them — undertakes them on its own initiative.

(17) The Land of Bavaria reimburses the cost of the measures to the TGD. Pursuant to the second sentence of Article 14(1) of the LwFöG, State payments are granted for 50 % of essential expenditure.

(18) A further percentage of the TGD's personnel and non-personnel costs is reimbursed from other State resources, namely the BTSK (see State aid case numbers NN 23/07, N 426/03 and N 81/04). Together, this amounts to reimbursement of up to 100 % of the costs.

(19) The benefits to the TGD are set out below.

(20) Under the wording of the LwFöG, the TGD is reimbursed only half of the essential expenditure from State resources. According to the information provided by Germany, however, up to 100 % reimbursement can be obtained.

(21) The aid has been paid to the TGD since 1974. Under Article 15(1) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty [1], the powers of the Commission to recover aid are subject to a limitation period of ten years. The Commission investigation started in 2000. The ten-year period laid down in Article 15(2) of Regulation (EC) No 659/1999 therefore goes back to 1990. Therefore, aid paid before this period will not be investigated further.

(22) Accordingly, the budgetary data provided by Germany and presented in the Annex concern the payments to the TGD for the costs incurred in discharging public service obligations during the period from 1990 to 2008.

Reasons for initiating the formal investigation procedure and the scope thereof

(23) It was not clear, after initial examination, whether the budget payments and the payments from the BTSK favoured the TGD or not.

(24) Furthermore, the complainant alleged that the veterinary surgeons employed by the TGD provide certain clinical/diagnostic and therapeutic services (care services) at up to 90 % below cost price. This was the sphere in which the TGD became a commercial operator.

(25) According to the complainant, this is possible only because the TGD receives financial assistance for the 'general measures', which enables it to offer clinical/diagnostic and therapeutic services considerably cheaper than veterinary surgeons in independent practice, since the latter have to manage without financial assistance and are not on site, whereas the TGD veterinarians are already on site, thus saving transport costs and giving them the opportunity to acquire business.

(26) In line with its notice on the determination of the rules applicable for the assessment of unlawful State aid [2], the Commission always assesses the compatibility of unlawful State aid with the internal market in accordance with the substantive criteria set out in any instrument in force at the time when the aid was granted. The Commission did not have, at the time it initiated the procedure, sufficient information to be sure that the aid for farmers complied with the relevant Community provisions, i.e. the Guidelines for State aid in the agricultural sector and the Guidelines for examining State aid to fisheries and aquaculture. The Commission therefore requested the relevant information from Germany.

(27) By letter of 12 December 2008, the Commission services asked Germany to confirm whether the aid under investigation continued being granted after 1 January 2008 and, if so, to provide the information necessary to assess the compatibility of the aid with the Community Guidelines for State aid in the agriculture and forestry

[1] OJ L 83, 27.3.1999, p. 1.

[2] OJ C 119, 22.5.2002, p. 22.

sector 2007 to 2013 ([1]) (hereinafter 'Guidelines'), which replaced the Community Guidelines for State aid in the agriculture sector ([2]) (hereinafter 'Community Guidelines') as of 1 January 2007, and the Guidelines for the examination of State aid to fisheries and aquaculture ([3]) (hereinafter 'the 2008 Guidelines'). By letter of 9 February 2009, Germany declared that the aid would continue to be granted in the agriculture sector after 2008 and provided the requested information.

III. GERMANY'S COMMENTS

(28) Germany argued that the payments granted by the Land of Bavaria and the BSTK for the general measures are to be considered as compensation for providing official services in the public interest, and referred to the jurisprudence under which State compensatory payments for services provided in order to discharge public service obligations, do not, under certain conditions, fall under the heading of State aid. Therefore the measures are not, in Germany's view, to be considered as State aid within the meaning of Article 107(1) TFEU.

(29) Germany was of the opinion that the general measures serve the health and welfare of animals, consumer protection and the protection of animals. Thus, the general measures are primarily in the interest of the general public.

(30) In Germany's view, extensive knowledge is gained from the implementation of these general measures which is then made available nationally and internationally through specialist publications and scientific lectures. Thus, a substantial part of the results obtained from the general measures is accessible to experts in the EU.

(31) Germany also stated that care services, i.e. services normally provided by practising veterinary surgeons (e.g. treatment with medical products or preventive vaccinations), were not provided under the programme of general measures. Outside this subsidised programme the TGD pursues some profit-oriented activities (the care services), which constitute less than 5 % of all veterinary activities. The profit-oriented activities accounted for 2,6–2,85 % of the TGD's total annual turnover.

(32) Cross-subsidising can be excluded by a clear and understandable separation between 'general measures' and 'profit-oriented activities'. Strict separation is guaranteed by very detailed accounting as well as extensive controls.

([1]) OJ C 319, 27.12.2006, p. 1.
([2]) OJ C 28, 1.2.2000, p. 2.
([3]) OJ C 84, 3.4.2008, p. 10.

IV. THIRD-PARTY OBSERVATIONS

(33) The third parties reiterated that, through the veterinary surgeons it engages, the TGD not only provides preventive treatment but also care services.

(34) The third parties did not allege that direct financial support was granted for these care services, but insisted that the TGD was able to offer comparable services under more favourable conditions than independent veterinarians.

(35) The claim that the aid for farmers was not in accordance with the Community guidelines on State aid in the agriculture sector or the applicable legislative provisions was not maintained, nor did anybody object to the financing of the aid.

V. ASSESSMENT OF THE MEASURE

Presence of aid for farmers

(36) As laid down in Article 107(1) TFEU, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.

(37) The Court of Justice has ruled that, when considering whether a State measure constitutes aid within the meaning of Article 107 TFEU, it is to be determined whether the recipient undertaking has received an economic advantage which it would not have received under normal market conditions ([4]) or has been spared costs which it would normally have had to bear from its own resources ([5]).

(38) Prima facie, these conditions would seem to be met.

(39) The measure is financed from State resources. It benefits certain undertakings, namely Bavarian farmers, as they receive the subsidised services for free. As these undertakings are active in a highly competitive international market, the measure distorts or threatens to distort competition ([6]) and also affects trade between Member States ([7]).

([4]) Judgment in Case C-39/94 *SFEI* [1996] ECR I-3547, paragraph 60.
([5]) Judgment in Case C-301/87 *France* v *Commission* [1990] ECR I-307, paragraph 41.
([6]) According to European Court of Justice case-law, the strengthening of an undertaking's position vis-à-vis its competitors as a result of financial aid granted by a Member State is an indication of a distortion of competition (Judgment in Case C-730/79 *Philip Morris* v *Commission* [1980] ECR 2671, paragraphs 11 and 12).
([7]) In 2007, the value of German intra-EU trade in agricultural products was EUR 45 327 million (imports) and EUR 37 514 million (exports) (*Source:* Eurostat).

(40) Therefore, the measure constitutes aid and Article 107(1) TFEU applies. It must consequently be examined whether derogation might be granted from the general principle of the incompatibility of State aid under Article 107(1) TFEU.

Legality of the aid

(41) The 'general measures' for farmers (as from 1990) and the compensation granted to the TGD for undertaking the 'general measures' during the period from 1990 to 2004 were granted without having been notified to the Commission. They are unlawful because they were granted in breach of Article 108(3) TFEU.

Compatibility of aid to farmers in the agriculture and fisheries sector

Aid for combating animal diseases

(42) The ban on granting State aid under Article 107(1) TFEU does not apply without exception, however. The Commission has examined whether any of the exceptions to the ban in principle on aid under Article 107(1) TFEU apply.

(43) The exceptions provided for in Article 107(2) TFEU, which concern aid of a social character granted to individual consumers, aid to make good the damage caused by natural disasters or exceptional occurrences and aid granted to the economy of certain areas of the Federal Republic of Germany, are irrelevant in the present context.

(44) The Commission considers that the exceptions provided for in Article 107(3)(a) TFEU concerning the development of certain areas are not applicable to the scheme at issue because the measure does not comprise aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment.

(45) As for the exception provided for in Article 107(3)(b) TFEU, it is sufficient to note that the aid scheme at issue is not an important project of common European interest and does not seek to remedy a serious disturbance in the German economy. Neither is the objective to promote culture and heritage conservation within the meaning of the exception provided for in Article 107(3)(d) TFEU.

(46) Neither Germany nor any interested parties invoked the above-mentioned exceptions in the course of the investigation procedure.

(47) The only exception that could be considered is therefore that contained in Article 107(3)(c) TFEU, under which aid may be declared compatible if 'it facilitates the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest'.

(48) Given that the measure involves aid to farmers, the Community guidelines for State aid in the agriculture and forestry sector and the Guidelines for the examination of State aid to fisheries and aquaculture are applicable here. As mentioned in recital 26 above, given that these measures constitute unlawful State aid, the Commission assesses their compatibility with the internal market in accordance with the conditions of the provisions in force at the time when the aid was granted.

Aid granted in the agriculture sector until 2007

(49) According to the Commission's notice on the determination of the rules applicable for the assessment of unlawful State aid, the Community Guidelines apply to the measures at issue here, whereas the aid granted before the entry into force of the Community Guidelines (i.e. before 1 January 2000) are to be assessed in light of the Commission working document of 10 November 1986 [1].

(50) The Community Guidelines state in point 11.4.1 that 'where a farmer loses livestock as a result of animal disease, or where his crops are affected by plant disease, this does not normally constitute a natural disaster or an exceptional occurrence within the meaning of the Treaty'.

(51) In such cases, aids to provide compensation for the losses incurred and aids to prevent future losses may be permitted by the Commission only on the basis of Article 107(3)(c) TFEU, which provides that aid to facilitate the development of certain activities may be considered compatible with the internal market provided that it does not affect trading conditions to an extent contrary to the common interest.

(52) Point 11 of the Community Guidelines applies to the aid for farmers considered here as the measures serve to prevent and combat animal diseases. The Commission bases its examination of aid to prevent and combat animal diseases on point 11.4 of the Community Guidelines. Such aid is regarded as compatible with Articles 107 and 108 TFEU if the following conditions are met.

[1] Commission working document No VI/5934/86 of 10 November 1986.

(53) The measure should form part of a programme at EU, national or regional level for the prevention, control or eradication of the disease concerned (point 11.4.2 of the Community Guidelines). Under point 11.4.2 of the Community Guidelines, an alert system is to be set up in combination with aid to encourage the individuals in question to take part in preventive measures on a voluntary basis, where appropriate. Accordingly, only diseases which are a matter of concern for the public authorities, and not measures for which farmers must reasonably take responsibility themselves, may be the subject of aid measures.

(54) The aid measures should be preventive or compensatory, or a combination of the two (point 11.4.3 of the Community Guidelines).

(55) They should be compatible with the specific provisions laid down in Community veterinary and phyto-sanitary legislation (point 11.4.4 of the Community Guidelines).

(56) The aid may be granted for up to 100 % of costs incurred (point 11.4.5 of the Community Guidelines). No aid may be granted where Community legislation stipulates that the costs in question are to be borne by farmers themselves.

(57) These conditions are met as follows.

(58) The measures form part of a programme at regional level (Bavaria). Their purpose is the prevention and control of animal diseases, as proven by the explicit objective of the LwFöG (to safeguard and improve the hygiene of foodstuffs of animal origin) and the 'general measures' applied. The measures under scrutiny serve the purpose of fighting infectious animal diseases, including factorial diseases and zoonoses. They are also intended to optimise and reduce the use of pharmaceuticals. The main diseases for particular groups of animals are: for bovines and sheep — zoonoses, Q-fever, paratuberculosis, transmissible spongiform encephalopathy and mastitis; for pigs and poultry — zoonoses, salmonella, escherichia coli and enteritis. In addition, methods and procedures for the detection and diagnosis of viral diseases are developed and evaluated.

(59) The general measures contribute to the EU's objective of ensuring a high level of animal health. In addition, the Commission has no evidence that they could contravene relevant EU veterinary legislation.

(60) The scheme provides for a maximum aid intensity of 100 %. It does not provide any support where Community legislation states that the farmers have to bear the costs themselves.

(61) 50 % of the costs incurred for the general measures concerning the agriculture and fisheries sector are borne by the Land of Bavaria. Germany informed the Commission in its comments following the opening of the procedure that another part of the costs is financed by the BTSK. The BTSK is a public body financed by parafiscal levies. The combined financing of the aid through the resources of the Land of Bavaria and of the BSTK is limited to 100 % and is in practice even less. In the past, the Commission has upon several occasions approved financing through the parafiscal levies by the BTSK ([1]). The Commission has therefore no reason to re-examine these parafiscal levies in depth. Neither the plaintiff nor the third parties objected to the mode of financing of the BTSK (i.e. that part of the financing of the aid at issue).

(62) The Community Guidelines are based on the same principles as the Commission working document of 10 November 1986. Therefore, the same assessment also applies to the aid given to farmers from 1990 to 1999, which also has to be considered in line with these principles. The State aid can therefore be regarded as compatible with the internal market.

Aid granted in the agriculture sector from 2007

(63) As for the situation after 2007, point 133 of the Guidelines states that the Commission will declare State aid for combating animal and plant diseases compatible with Article 107(3)(c) TFEU if it fulfils the conditions of Article 10 of Commission Regulation (EC) No 1857/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to State aid to small and medium-sized enterprises active in the production of agricultural products and amending Regulation (EC) No 70/2001 ([2]). In this context only disease prevention measures need to be considered, as no aid is given to curative measures or to compensate losses.

(64) Were the aid to farmers to cover consultancy costs, this would constitute technical support within the meaning of point 103 of the Guidelines. In line with this point, the Commission will declare State aid for technical support compatible with Article 107(3)(c) TFEU if it fulfils the conditions of Article 15 of Regulation (EC) No 1857/2006.

(65) Article 10 of Regulation (EC) No 1857/2006 allows aid for the following.

([1]) State aids NN 23/97, N 426/03 and N 81/04 (still in force).
([2]) OJ L 358, 16.12.2006, p. 3.

(66) Aid to compensate farmers for the costs of prevention and eradication of animal or plant diseases or pest infestations incurred for the costs of health checks, tests and other screening measures, purchase and administration of vaccines, medicines and plant protection products, slaughter and destruction costs of animals and costs of destruction of crops is compatible with the internal market. Aid must be granted in the form of services subsidised by up to 100 % and must not involve direct payments of money to the producers (Article 10(1) of Regulation (EC) No 1857/2006).

(67) Any amount received under insurance schemes and costs not incurred because of the disease must be deducted from the eligible cost and losses (Article 10(3) of Regulation (EC) No 1857/2006).

(68) Payments must be made in relation to diseases or pests for which EU or national legislative or administrative provisions exist. Payments must thus be made as part of a public programme at EU, national or regional level for the prevention, control or eradication of the disease or pest concerned. The diseases or pest infestation must be clearly identified in the programme, which must also contain a description of the measures concerned (Article 10(4) of Regulation (EC) No 1857/2006).

(69) The aid must not relate to disease in respect of which EU legislation provides for specific charges for control measures or that the cost of such measures is to be borne by the agricultural holding, unless the cost of such measures is entirely offset by compulsory charges on producers (Article 10(5) and (6) of Regulation (EC) No 1857/2006).

(70) As regards animal diseases, the aid must be granted in respect of diseases mentioned in the list of animal diseases established by the World Organisation for Animal Health and/or in the Annex to Council Decision 90/424/EEC of 26 June 1990 on expenditure in the veterinary field [1] (Article 10(7) of Regulation (EC) No 1857/2006).

(71) Aid schemes must be introduced within three years following the occurrence of the expense or loss. The aid must be paid out within four years following the occurrence (Article 10(8) of Regulation (EC) No 1857/2006).

(72) These conditions are met as follows:

(73) As described above in recital 14, the aid relates to a variety of measures (continuous monitoring, sampling and (laboratory/serial) analyses, veterinary advice, drawing up prevention and eradication plans and developing vaccination programmes), whose direct purpose is the prevention of diseases. Germany confirmed by letter of 9 February 2009 that the aid is given in the form of subsidised services. Therefore aid for such costs can be authorised under Article 10(1) of Regulation (EC) No 1857/2006.

(74) Germany confirmed by letter of 9 February 2009 that where the projects concern animal diseases, these diseases are contained in the list established by the World Organisation for Animal Health and/or in the Annex to Council Decision 90/424/EEC.

(75) Article 10(3) of Regulation (EC) No 1857/2006 is not relevant as aid is granted for preventive measures only.

(76) Where specific ailments are concerned, the aid is given under a regional programme in which the diseases and/or illnesses and corresponding measures are clearly identified. Article 10(4) of Regulation (EC) No 1857/2006 is therefore satisfied.

(77) Costs that the producers have to pay themselves under EU legislation are not eligible. Article 10(5) of Regulation (EC) No 1857/2006 is therefore satisfied.

(78) Expenses incurred before the services are given are not eligible. Article 10(8) of Regulation (EC) No 1857/2006 is therefore satisfied.

(79) Germany has not excluded that the measures referred to in recital 14 may relate to other animal health aspects than specific and identified diseases, illnesses or pests, for instance to production hygiene. Hence measures would constitute aid for consultancy where the advice and plans are adapted to the situation of certain farmers or groups of farmers.

(80) Article 15(2)(c) of Regulation (EC) No 1857/2006 allows aid to cover the fees for consultancy services, provided by third parties, which do not constitute a continuous or periodic activity nor relate to the enterprise's usual operating expenditure, such as routine tax consultancy

[1] OJ L 224, 18.8.1990, p. 19.

services, regular legal services, or advertising. Article 15(3) of Regulation (EC) No 1857/2006 provides that the aid may cover up to 100 % of the eligible costs and must be given in the form of subsidised services.

(81) These conditions are met as follows:

(82) It appears from the documentation submitted by Germany (see recital 14) that the subsidised consultancy services are in the form of projects that relate to specific one-off animal health issues of public interest. Although certain measures may require continuous monitoring or testing, these appear to be linked to the particular project and not to represent routine ongoing veterinary or quality controls of the stock. Neither can the cost of such measures be considered as usual operating expenditure within the meaning of Article 15(2)(c) of Regulation (EC) No 1857/2006, as costs of routine visits for prevention and treatment by a veterinary specialist are not eligible for aid. All aid is given in the form of subsidised services and limited to 100 % of the eligible costs. The State aid can therefore be regarded as compatible with the internal market.

Aid granted in the fish farming sector

(83) The measures have also been carried out in the fish farming sector. The Guidelines for the examination of State aid to fisheries and aquaculture from 1988, 1992, 1994, 1997 and 2001, which correspond to the Guidelines for agriculture, establish the following conditions for deeming State aids in the veterinary and health fields compatible with the internal market [1]: A public authority must combat a disease so as to ensure that action is taken in the common interest and not only in a particular interest. The objectives of the aid measures must be either preventive or compensatory or both. The TGD was put in charge of the measures by the Land Bavaria and executes them on its own initiative, as stated in another context in recital 16. The measures serve preventive objectives. The State aid can therefore be regarded as compatible with the internal market.

(84) The State aids granted between 1 November 2004 and 31 March 2008 are assessed case-by-case in accordance with point 3.10 of the Guidelines for the examination of State aid to fisheries and aquaculture [2] (hereinafter 2004 Guidelines), which refers to Article 4 of Commission Regulation (EC) No 1595/2004 [3], which in turn refers to Article 15(3) of Council Regulation (EC) No 2792/1999 of 17 December 1999 laying down the detailed rules and arrangements regarding Community structural assistance in the fisheries sector [4]. Under point 3.1(2) of the 2004 Guidelines, these State aids are compatible with the internal market and in accordance with the objectives of the Common Competition and the Common Fisheries Policy as set out in Regulations (EC) No 2371/2002 [5] and (EC) No 2792/1999. Under Article 15(2) of Regulation (EC) No 2792/1999, operations of collective interest with a broader scope than usually undertaken by private business may be encouraged. Examples of such operations are listed in Article 15(3)(e) and (l). The Commission notes firstly that the purpose of the 'general measures' meets with the aims of those examples. Secondly, the TGD carries out those activities on its own initiative and not at the farmers' request. Moreover (see point 3.4 of the 2004 Guidelines), the farmers would not necessarily have taken the measures under pure market conditions. Finally, the measures also lea d to lasting improvements in the sector within the meaning of point 3.5 of the 2004 Guidelines.

(85) By letter of 9 February 2009, Germany confirmed that the aid is still paid in the agriculture sector and gave examples of typical projects. These do not include projects in the fisheries sector. As it cannot be ruled out that aid may be granted for the aquaculture sector after 1 April 2008, it must be examined whether such aid would be compatible with the provisions applicable to the agriculture and fisheries sector after that date. In connection with aid falling within the scope of other provisions, point 4.2 of the 2008 Guidelines refers to the respective conditions under those provisions, in this case under Commission Regulation (EC) No 736/2008 of 22 July 2008 on the application of Articles 87 and 88 of the Treaty to State aid to small and medium-sized enterprises active in the production, processing and marketing of fisheries products [6]. The relevant provision for aid for veterinary measures is Article 14 of Regulation (EC) No 736/2008. This provides that aid for veterinary measures is compatible with the internal market provided it meets the conditions under Articles 28 and 32 of Council

[1] See letter E of the Guidelines for the examination of State aid to fisheries and aquaculture from 1988 (OJ C 313, 8.12.1988, p. 21); point 2.5 of those from 1992 (OJ C 152, 17.6.1992, p. 2); point 2.9 of those from 1994 (OJ C 260, 17.9.1994, p. 3); point 2.9 of those from 1997 (OJ C 100, 27.3.1997, p. 12); point 2.8 of those from 2001 (OJ C 19, 20.1.2001, p. 7).

[2] OJ C 229, 14.9.2004, p. 5.
[3] OJ L 291, 14.9.2004, p. 3.
[4] OJ L 337, 30.12.1999, p. 10.
[5] OJ L 358, 31.12.2002, p. 59.
[6] OJ L 201, 30.7.2008, p. 16.

Regulation (EC) No 1198/2006 [1] and Article 12 of Commission Regulation (EC) No 498/2007 [2]. In respect of the aid in question, the conditions under these Regulations and the general principles under point 3 of the 2008 Guidelines have remained the same in terms of substance as the provisions that applied to the aid granted before 1 April 2008. Therefore the assessment carried out for that aid can also be applied to the aid granted after 1 April 2008. As the aid granted before 1 April 2008 is compatible with the applicable provisions and as the aid and the way in which it was granted remained unchanged after 1 April 2008, the Commission concludes that the aid meets the conditions under the provisions applying in the fisheries and aquaculture sector.

(86) It follows from the above that the State aid granted to farmers under the measure under investigation meets the conditions set out in the relevant EU rules in the agriculture and fisheries sector. The Commission notes in this respect that neither the plaintiffs nor the other parties concerned have substantiated any infringement of the relevant EU provisions. The State aid can therefore be regarded as compatible with the internal market.

Presence of aid to the TGD

(87) To constitute a State aid, a measure must confer on recipients an advantage.

(88) It is apparent from the case-law of the European Court of Justice that public service compensation does not constitute State aid within the meaning of Article 107(1) TFEU if it fulfils certain conditions [3]. However, if these conditions are not fulfilled but the general criteria for the applicability of Article 107(1) TFEU are nevertheless satisfied, such compensation constitutes State aid.

(89) In the Altmark judgment, the Court laid down the conditions under which public service compensation does not constitute State aid as follows (principle 3):

'(a) First, the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined.

(b) Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner […].

(c) Third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations.

(d) Fourth, where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means […] so as to be able to meet the necessary public service requirements, would have incurred in discharging these obligations, taking into account the relevant receipts and a reasonable profit from discharging the obligations.'

(90) Where these four criteria are met, public service compensation does not constitute State aid and Articles 107(1) and 108 TFEU do not apply. If the Member States do not respect these conditions and if the general criteria for the applicability of Article 107(1) TFEU are met, the public service compensation constitutes State aid, which must be notified to the Commission pursuant to Article 108(3) TFEU.

(91) When the procedure was opened, there was some doubt as to whether conditions (c) and (d), in particular, were met.

(92) Regarding condition (a), the Commission recalls that Article 14(1) LwFöG provides for a public service obligation in that it specifies a clear objective (healthy nutrition) and the means to reach it (high quality of foodstuffs) via a number of measures (see recital 14). Under its statutes, the TGD promotes animal welfare for the safe production of animal-based food products and for the protection of both consumers and animals. To fulfil its aims, it uses its own staff and its own facilities. The measures it takes are laid down in agreement No R1-4010/1393 of 1974 and framework agreement No T-7482-100 of 13 July 1993 between the Land of Bavaria and the TGD. The details are established every year in yearly agreements and administrative decisions.

(93) Regarding condition (b), it should be noted that each of the individual activities was established in advance and that the financial compensation was calculated using a points system based on the anticipated time and costs. This was also the case for new services added in

[1] OJ L 223, 15.8.2006, p. 1.
[2] OJ L 120, 10.5.2007, p. 1.
[3] Judgments in Case C-280/00 *Altmark* [2003] ECR I-7747 and Joined Cases C-34/01 to C-38/01 *Enirisorse* [2003] ECR I-14243.

subsequent years. It should be noted in this regard that the operations of the TGD have been audited and approved by the Bavarian High Court of Auditors (Bayerischer Oberster Rechnungshof). The accounts have been also audited and approved by independent auditing companies for the period covered by this Decision.

(94) Regarding condition (c), Germany has submitted data proving that the costs incurred in discharging the public service obligations have not been overcompensated (see annex). Indeed, the data show that the TGD did not make a profit in the years 1990 to 2004. The costs of the general measures are calculated using a point-based calculation, the points representing a certain value in euro. This calculation method is the outcome of an initiative of the Bavarian Court of Auditors. It is comparable to the method by which services in human medicine are calculated. Germany has stated that the method used since 2002 fulfils the requirements of Commission Directive 2005/52/EC [1].

(95) Regarding condition (d), Bavaria awarded the public service obligation to TGD as a result of an open public procurement procedure as of 1 January 2005. As a result of discussions with the Commission, Bavaria initiated the public procurement by launching an EU-wide tender for a service agreement entitled 'Projektierte Maßnahmen im Bereich der Tiergesundheit landwirtschaftlicher Nutztiere in Bayern' in June 2004. The overall measures were valued at EUR 8 million per year for a duration of five years. The call for tender was published in the supplement to the *Official Journal of the European Union* (S series) [2] and in the Bavarian Government Gazette. Three competitors took part in the tender. The five-year contract was awarded to TGD as it was able to provide the requested services in the most cost-effective manner. A new public procurement by tender will be launched in 2009.

(96) As regards the second alternative under condition (d), Germany claimed that for the period until 31 December 2004 it is impossible to identify a normal enterprise that is fully comparable to the TGD.

(97) Germany has therefore not demonstrated that for the period 1990 to 2004 the TGD was compensated in accordance with an analysis of the costs of a typical well-run undertaking providing such a public service. Thus, it can be concluded that, until 31 December 2004, the particular measure in question conferred an economic advantage upon the TGD within the meaning of Article 107(1) TFEU.

(98) The annual compensation granted to the TGD over the period 1990 to 2004 therefore constitutes State aid within the meaning of Article 107(1) TFEU, whereas the annual compensation granted to the TGD from 1 January 2005 following a public procurement procedure complies with all the conditions cited in the Altmark judgment and therefore does not constitute State aid to the TGD. In this context the Commission takes note of the information submitted by Germany concerning the payments to the TGD from 1 January 2005 to end 2008 which shows that these payments did not cover the total costs of the general measures.

(99) No specific complaint or third-party observation has been made regarding fulfilment of the conditions set out in the Altmark judgment.

Compatibility of the aid with Article 106(2) TFEU

(100) In order to assess the compatibility of the public service compensation granted to the TGD with the TFEU, the provisions in force at the time the aid was granted to the TGD should be taken into account.

(101) In the Commission Communication on services of general economic interest in Europe [3] (hereinafter the Communication) which is applicable under point 26(b) of the Community framework for State aid in the form of public service compensation [4] for non-notified cases, the question of State compensation should be examined in the light of three principles:

— neutrality as regards the public or private ownership of companies,

— freedom of Member States to define what they regard as public services,

— proportionality, requiring that the restriction of competition and limitation of the freedom of the single market do not exceed what is necessary to guarantee effective fulfilment of the general interest mission.

[1] OJ L 234, 10.9.2005, p. 9.
[2] 2004/p. 112-09421.
[3] OJ C 17, 19.1.2001, p. 4.
[4] OJ C 297, 29.11.2005, p. 4.

(102) The first principle, neutrality, means that the Commission does not indicate whether undertakings responsible for providing general interest services should be public or private. Compliance with this principle is not called into question in the present case.

(103) The freedom of Member States to define a service of general economic interest means that Member States are primarily responsible for defining what they regard as services of general economic interest on the basis of the specific features of activities. The Commission intervenes in respect of this definition only in the event of abuses or manifest errors. In every case, however, for the exceptions in Article 106(2) TFEU to apply, the public service mission needs to be clearly defined and explicitly entrusted through an act of a public authority (including contracts). This is necessary to ensure legal certainty and public transparency and is essential for the Commission to carry out its proportionality assessment.

(104) The general measures entrusted to the TGD qualify as a service of general economic interest and were clearly defined and entrusted to the TGD, as stated in recital 92.

(105) In view of the proportionality principle, Article 106(2) TFEU should be taken as meaning that the means used to fulfil the general interest mission must not create unnecessary distortion of trade or exceed what is necessary to guarantee actual fulfilment of the mission. In line with point 26 of the Communication and the Court's case law at the time, the compensation should not exceed the net extra costs of the particular task entrusted to the undertaking. The performance of the general interest service must be ensured and the undertaking entrusted with such a task must be able to bear the specific additional cost of the task.

(106) It is therefore necessary in this case to quantify the net extra costs of the public service obligation (general measures) imposed on the TGD by the two agreements and then compare these costs with the State aid. If the compensation granted to the TGD is not higher than the additional costs of the public service obligation, the proportionality principle can be regarded as having been fulfilled.

(107) Over the relevant period of 1990 to 2004, the additional costs arising from the general measures exceeded the aid granted to the TGD (see Annex to this Decision).

(108) As a consequence, the payments the TGD received for the general measures that are the object of this Decision did not lead to overcompensation of the additional costs it incurred in carrying out the measures.

(109) Accordingly, the public service compensation granted to the TGD over the period 1990 to 2004 constitutes State aid under Article 107(1) TFEU which is compatible with Article 106(2) TFEU.

(110) The Commission notes in this respect, however, that it is difficult to see how the State compensation that did not even cover the total additional costs of the public service obligation could have been used to subsidise the profit-oriented activities of the TGD, as alleged by the plaintiff. In addition, the plaintiff's claim that the veterinary surgeons employed by the TGD provide certain clinical, diagnostic and therapeutic services at up to 90 % below cost price has not been proven, either by the plaintiff or by another concerned party.

(111) Because of this claim, Germany carried out a specific audit of the TGD. There was no evidence to confirm the claim. Should any concrete data confirming any such claim arise, Germany has requested to be informed so that it can investigate the case individually.

(112) The Commission also notes that the Bayerische Landestierärztekammer (Bavarian Association of Independent Veterinarians) and the Bundesverband praktizierender Tierärzte — Landesverband Bayern (Bavarian branch of the Federal Association of Veterinary Practitioners) support the activities of the TGD — including the profit-oriented elements.

VI. **CONCLUSIONS**

(113) The Commission concludes that Germany granted the aid in question in breach of Article 108(3) TFEU.

(114) On the basis of its assessment, however, it has decided that the State aid in the form of 'general measures' for farmers (as from 1990), as referred to in recitals 13 and 14, and the State compensation granted to TGD to discharge the related public service obligation entrusted to it during the period 1990 to 2004, as referred to in recital 17 and 18, are compatible with the TFEU. In fact, as explained above, part of it does not even constitute State aid. The annual compensation referred to in recitals 17 and 18, granted to the TGD from 1 January 2005 to discharge a public service obligation, complies with all the conditions of the *Altmark* judgment and therefore does not constitute State aid,

HAS ADOPTED THIS DECISION:

Article 1

The aid granted to farmers and fishermen by Germany in the form of general measures is compatible with the internal market.

The aid granted to the Animal Health Service (TGD) by Germany in the period 1990 to 2004 in the form of compensation for the TGD's discharging of the general measures is compatible with the internal market.

The compensation granted to the Animal Health Service since 1 January 2005 for discharging the general measures does not represent aid within the meaning of Article 107(1) TFEU.

Article 2

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 15 December 2009.

For the Commission
Mariann FISCHER BOEL
Member of the Commission

ANNEX

Year	Cost of the general measures	Payments from Land of Bavaria (LwFöG)	Payments from the Bavarian Animal Disease Fund	Payments from Land of Bavaria and the Bavarian Animal Disease Fund	Share of total payments in costs of general measures (%)
1990	7 676,94	3 059,57	4 588,84	7 648,42	99,63
1991	6 992,48	3 127,06	3 711,98	6 839,04	97,81
1992	8 953,42	3 203,55	4 588,84	7 792,40	87,03
1993	9 063,52	3 361,03	4 679,34	8 040,37	88,71
1994	9 547,05	3 496,01	4 588,84	8 084,85	84,68
1995	8 392,14	3 554,50	4 588,84	8 143,35	97,04
1996	8 336,35	3 599,49	4 588,84	8 188,34	98,22
1997	8 620,18	3 361,23	4 486,59	7 847,82	91,04
1998	8 613,61	3 310,10	4 397,11	7 707,21	89,48
1999	8 280,91	3 419,52	4 397,11	7 816,63	94,39
2000	9 267,13	3 419,52	4 453,35	7 872,87	84,95
2001	8 471,71	3 419,52	4 448,24	7 867,76	92,87
2002	10 002,90	3 890,00	4 453,35	8 343,35	83,41
2003	9 953,20	3 722,00	4 614,73	8 336,73	83,78
2004	8 415,84	2 807,47	4 496,00	7 303,47	86,78
2005	9 439,37	3 200,00	4 021,00	7 221,00	76,50
2006	8 608,75	2 730,00	4 021,00	6 751,00	78,42
2007	9 084,88	3 130,00	4 021,00	7 151,00	78,71
2008	9 047,96	3 080,00	4 086,00	7 166,00	79,20