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COMMISSION DECISION

of 5.09.2014

ON THE AID SCHEME

**No SA.26212 (2011/C) (ex 2011/NN — ex CP 176/A/08) and SA.26217
(2011/C) (ex 2011/NN — ex CP 176/B/08)**

Implemented by the Republic of Bulgaria

in the context of swaps of forest land

(Only the Bulgarian version is authentic)

(Text with EEA relevance)

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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 regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having regard to the Commission decision C (2011) 4444 of 29.6.2011¹,

Having called on interested parties to submit their comments pursuant to the provision(s) cited above and having regard to their comments,

Whereas:

1. PROCEDURE

- (1) On 17 July 2008, the Commission received a letter from a complainant wishing to remain anonymous (“the first complainant”) alleging that the Republic of Bulgaria had granted aid in the context of the swap of ownership of privately-owned forest land for government-owned public forest land often

¹ OJ C 273 of 16.9.2011, p. 13.

followed by a change in the designated use of the swapped land from forest land to land available for construction. The first complainant submitted additional information by letters of 28 August 2008, 3 September 2008, 1 October 2008, 5 December 2008, 18 February 2010, 12 October 2010 and 26 January 2011.

- (2) On 27 January 2009, additional information on the contested swap transactions was received by the Commission from a third party. On 14 May 2009, a second complaint was submitted on those swaps, with additional information submitted by that complainant on 2 June 2009 and 8 June 2009. On 23 March 2010, another third party submitted information on those swaps to the Commission.
- (3) The Bulgarian authorities provided the Commission with information on the contested swap transactions by letters dated 2 September 2008, 28 October 2008, 4 January 2010, 23 March 2010, 27 March 2010, 30 August 2010 and 14 February 2011. During meetings held between the Commission's services and the Bulgarian authorities on 22 February 2010, 12 October 2010 and 3 February 2011, the latter provided additional information on those swaps.
- (4) By letter of 29 June 2011, the Commission informed the Republic of Bulgaria that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty in respect of the contested swap transactions. The Commission decision to initiate the formal investigation procedure ("the opening decision") was published in the *Official Journal of the European Union*². The Commission invited interested parties to submit their comments on the measure.
- (5) By letter received on 29 September 2011, the Bulgarian authorities provided their comments on the opening decision.
- (6) The Commission received comments on the opening decision from the following interested parties: *Ecobalkani-Bulgaria EOOD*³, *Vihren OOD*⁴, *Aqua Estate OOD*⁵, *Elkabel AD*⁶, *Jivka Blagoeva*⁷, *V-N-G Confort OOD*⁸, *Yavor Haytov*⁹, *Simeon Stoev Mirov*¹⁰, *LM Impex EOOD*¹¹, *All Seas Property 2 OOD*¹², *Litex Commerce AD*¹³, *Foros Development EAD*¹⁴, *Izgreve 5 EOOD*¹⁵, *BOIL OOD*¹⁶, *BG Land Co OOD*¹⁷, *Mirta Engineering EOOD*¹⁸, *Beta Forest*

² OJ C 273 of 16.9.2011, p. 13.

³ Letter dated 26 July 2011.

⁴ Letter dated 27 July 2011.

⁵ Letters dated 28 July and 14 October 2011.

⁶ Letter dated 29 July 2011.

⁷ Letter dated 29 July 2011.

⁸ Letter dated 29 July 2011.

⁹ Letters dated 30 July 2011, 15 and 22 October 2011.

¹⁰ Letter dated 31 July 2011.

¹¹ Letter dated 1 August 2011.

¹² Letter dated 1 August 2011.

¹³ Letter dated 5 August 2011.

¹⁴ Letter dated 12 August 2011.

¹⁵ Letter dated 22 August 2011.

¹⁶ Letter dated 12 October 2011.

¹⁷ Letters dated 14 and 23 October 2011.

*EOOD*¹⁹, *Kosta Gerov*²⁰, *Marieta Babeva*²¹, *Dimitar Terziev*²², *Svetoslav Mihailov* and *Elizabet Mihailova*²³, and from a complainant, who requested that his/her identity is not disclosed²⁴.

- (7) By letters dated 1 September 2011, 5 October 2011, 25 November 2011, 14 December 2011 and 3 April 2012, the Commission forwarded those comments to the Bulgarian authorities, which were given the opportunity to react. The comments of the Republic of Bulgaria on the interested parties' comments were received by letters dated 4 November 2011, 15 December 2011, 12 January 2012 and 25 April 2012, respectively.
- (8) The Bulgarian authorities provided additional information on the contested swap transactions by letter of 2 December 2011 and during a meeting held with the Commission's services on 9 December 2011.
- (9) By letter of 9 February 2012, the Commission requested further clarifications from the first complainant on certain evidence it submitted.
- (10) On 3 April 2012, the Commission forwarded additional comments from a number of third parties²⁵ to the Bulgarian authorities. The Commission received the comments of the Republic of Bulgaria on these comments on 25 April 2012 and 15 May 2012.
- (11) On 26 July 2012, the Commission requested additional information from the Bulgarian authorities. On 17 August 2012, the Bulgarian authorities requested an extension of the deadline to provide that information, which was granted by the Commission on 31 August 2012. On 19 September 2012, the Bulgarian authorities provided the requested information.
- (12) On 3 October 2012, the Commission requested further clarifications from *Elkabel AD*, one of the third parties who submitted comments on the opening decision, which were provided on 31 October 2012.
- (13) By letters of 14 January 2013, 17 May 2013, 22 July 2013 and 22 October 2013, the Commission requested additional information from the Bulgarian authorities, which was provided on 4 and 5 February 2013, 25 June 2013 and 5 July 2013, 16 and 23 August 2013, and 19 November 2013 and 20 December 2013, respectively. Part of the information submitted with the

¹⁸ Letter dated 14 October 2011.

¹⁹ Letter dated 14 October 2011.

²⁰ Letters dated 16 September and 15 October 2011.

²¹ Letters dated 16 September and 15 October 2011.

²² Letters dated 16 September and 15 October 2011.

²³ Letters dated 15 October 2011 and 7 December 2011

²⁴ Letter dated 17 October 2011. In accordance with Article 6(2) of Regulation (EC) No 659/1999, this interested party has requested its identity is not disclosed to the Member State concerned on grounds of potential damage.

²⁵ Aqua Estate OOD, Beta Forest EOOD, Kosta Gerov, Dimitar Terziev, Yavor Haytov, Valentina Haytova, Georgi Aleksandrov Babev, Marieta Babeva, Elizabet Mihaylova, Svetoslav Mihaylov, BG Land Co OOD, Mirta Engineering EOOD, Miks PS-OOD, and Boil OOD.

last submission was subsequently resubmitted by the Bulgarian authorities by email of 21 January 2014.

2. DESCRIPTION OF THE MEASURE

2.1. The Land Swaps

- (14) In 1947, all forest land in Bulgaria became public property as a result of expropriation by the State. This remained the case until 2000, when the restitution of forest land to previous private owners was started.
- (15) On the basis of an amendment to the Forest Act²⁶, which came into effect on 22 February 2002, swaps of recently privatised forest land with government-owned public forest land from the State forest fund were made possible. This amendment to the Forest Act was in force until 27 January 2009 and defined the order and conditions under which those swaps were conducted.
- (16) For the purposes of the swaps, the prices of the privately-owned and publicly-owned forest land were determined on the basis of a specialized regulation, namely, the Regulation on the calculation of basic prices, prices for land in excluded areas and creating rights of use and easements in respect of forests and forest stock land²⁷ (the “Regulation on basic prices”), which entered into force on 18 November 2003. Bulgarian law did not allow expert evaluators to deviate from the prices determined for forest land by applying the Regulation on basic prices.
- (17) On the basis of that regulation, the basic price of a plot of forest land is determined as the sum of the basic value of that land and the value of the stand (plant species situated on that land).
- (18) The value of the land is determined on the basis of the average value of land according to the categories of land offering identical conditions for the growth of plants (150 site types, as per Annex 1 of the Regulation on basic prices). That value is then adjusted using an adjustment coefficient that takes account of the location of the land in relation to the local and national infrastructure. That adjustment coefficient (Km), set out in Annex 2 of the Regulation on basic prices, is determined by using the following formula:

$Km = 1 + g + m + s + p$, where:

p = coefficient of proximity to a surfaced road measured in a straight line (from 0,00 to 0,20)

s = coefficient of proximity to an urban area measured in a straight line (from 0,00 to 0,25)

m = coefficient of proximity to the sea measured in a straight line (from 0,00 to 0,20)

²⁶ Bulgarian Forest Act published in Bulgarian State Journal No 125 of 29 December 1997.

²⁷ Adopted by Decree of the Council of Ministers No 252 of 6 November 2003, published in Bulgarian State Journal No 101 of 18 November 2003 (last amended in Bulgarian State Journal No 1 of 5 January 2007).

g = coefficient of proximity to a city, expressed in figures reflecting the distance to a given city (shortest road distance between the plot in question and city). Cities are divided into 6 groups as set out in Table 1:

Table 1

Group 1: Sofia (from 0,00 to 0,70)	Group 2: Ruse, Plovdiv, Burgas, and Varna (from 0,00 to 0,50)	Group 3: Blagoevgrad, Veliko Tarnovo, Vratza, Pleven, and Stara Zagora (from 0,00 to 0,40)	Group 4: other district cities (from 0,00 to 0,35)	Group 5: other big cities (Botevgrad, Gorna Oryahovitza, Dimitrovgrad, Dupnitza, Kazanlak, Karlovo, Lom, Petrich, Samokov, Svishtov, and Cherven Bryag (from 0,00 to 0,30)	Group 6: other municipal centres (from 0,00 to 0,10)

(19) The value of the land is further adjusted by adding an increase per hectare (increment) which is set on the basis of the average price of land observed in the area where the plot is situated. Those increments are laid down in the provisions of Annex 3 to the Regulation on basic prices and are indicated in Table 2:

Table 2

	Increment (BGN/hectares)
Sofia, national resorts and adjacent residential holiday areas, land located within 10 kilometres from the sea	5000
Settlements of 1 st and 2 nd category	2000
Settlements of 3 rd and 4 th category	1000
Settlements of 5 th and 6 th category	500
Settlements of 7 th and 8 th category	0

- (20) The total value of the land determined through this mechanism is referred to as the basic value of the land.
- (21) The value of the stand (plant species situated on the land) is the value of the stand's current age and the projected value of its rotation age. The value of wood from forest stands at their current age (the age at the time of valuation) is equal to the profits from the sale of the varieties in question at average market prices where costs related to felling, primary processing and transportation to a temporary storage place are deducted. If the income does not cover the costs, the wood is not considered to have any value.
- (22) Income from sales is determined by grading the stock and the volume of wood categories. The costs (BGN/cubic metre) related to felling and primary processing of wood with an average level of difficulty of the wood-felling area are determined by the type of trees and category of wood on the land. The costs of wood transportation are determined by the type of trees, the category of the wood and the average transportation distance from the plot in question. The transport costs are multiplied to each kilometre of transport by a coefficient which takes into account the level of difficulty of the route.
- (23) The average market prices and the costs related to felling, primary processing and transportation of wood should be regularly determined and updated by the Executive Forests Agency ("EFA")²⁸, on the basis of weighted averages calculated from statistical data collected over a period of three years (the last year carries double the weight).
- (24) Thus, by adding the value of the stand, as determined by an evaluator, to the basic value of the land, the basic price of a plot of forest land is obtained.
- (25) To this basic price, an adjustment accounting for the protection of the environment-shaping nature and recreational functions of the forest land is made to land located in areas of so-called "special protection against urbanization", established in certain regions of Bulgaria by law. Pursuant to the provisions of Annex 19 to the Regulation on basic prices, the basic value of forest properties situated in such areas are multiplied by a coefficient (K) identified in Table 3²⁹, namely:

Table 3

Black Sea coast first area	K = 6;
Black Sea coast second area	K = 5;

²⁸ The Executive Forests Agency was previously called State Forest Agency, or SFA. It will be referred to as the "EFA" throughout the present decision for reasons of consistency.

²⁹ In cases in which an estate falls into more than one area, the higher coefficient is taken into account.

Resort areas, resorts, and settlements of national significance	K = 4;
Forest and land located in areas stretching from the edge of national and municipal roads to the restrictive lines for construction	K = 3
Resort areas, resorts, and settlements of local significance	K = 4;

- (26) Finally, a so-called “market regulator coefficient” is applied to the basic price of the land according to Annex 20 to the Regulation on basic prices. That coefficient is expressed in BGN/m² and ranges from 10 for land adjacent to the seaside, big mountain resorts and Sofia, to 1 for the least attractively situated land.
- (27) Notwithstanding the foregoing, if the private party received forest land under the swap transaction of a higher total administrative price than the land it relinquished, it had to pay compensation to the State for that difference in price. According to the Bulgarian authorities, as a general rule, the State only accepted swaps as a result of which the State received land of a higher administrative value. This rule, however, relates only to the total administrative price of the privately-owned plot being higher than the administrative price of the publicly-owned plot for which it was swapped, not its price per square metre.
- (28) On 27 January 2009, a ban on swaps of forest land came into force. The period under review of the contested swap transactions is thus from 1 January 2007, the date of the accession of the Republic of Bulgaria to the Union, to 27 January 2009, the date of the swaps moratorium (“the period under review”).

2.2. The Change in the Designated Use of the Land

- (29) The complainants further allege that the swap transactions were often followed by a change in the designated use of the land from forest land to land available for construction and that that change further increased the disparity between the market value of the government-owned public forest land swapped with the privately-owned plot.
- (30) The Bulgarian authorities explained that the procedure for the change in the designated use of the land is not governed by the provisions of the Forest Act (like the swap transactions) but by a separate set of legislation, among others, the Spatial Planning Act (ZUT)³⁰. According to that legislation, any owner of forest land may request a change in the designated use of their forest land into land available for construction by sending an application to the Executive

³⁰ Published in the Bulgarian State Journal No 1 of 2 January 2001

Director of the EFA, which was part of the Ministry of Agriculture and Food³¹. A commission of (internal and potentially external) experts then examines that request and provides an opinion to the Executive Director, who adopts a preliminary decision on the application. If that decision is positive and confirms the grounds for and the legality of the application, it will be forwarded to all services responsible for the change of designation (the provincial governor, the mayor of the municipality and the director of the regional directorate responsible for forests).

- (31) On the basis of a positive preliminary decision, the owner will submit an application to the municipality concerned for the commissioning, drafting and approval of a detailed master plan. Such a plan requires the consultation of all (local) stakeholders. If that plan is approved by the responsible authorities and once it comes into force, the owner of the land will submit an application to the Minister of Agriculture and Food for the exclusion of that forest land from the protected forest stock. If that application is accepted, a stamp duty, determined by an independent evaluator in line with the provisions of the Regulation on basic prices, is due.
- (32) After the payment of the stamp duty by the owner of the forest land to the responsible authorities, the procedure for the issuance of an administrative decision on the change of the designated use of the land will be launched. Depending on the size of the property, this decision is granted by either the Minister of Agriculture and Food (if it concerns a property of less than 10 hectares) or by the Council of Ministers.
- (33) On 3 September 2009, a moratorium on the subsequent change of the designated use of swapped land was introduced.

2.3. Legal basis for the measures

- (34) The swaps, the calculation of prices for use in the swap transactions and the procedure for the change in the designated use of the swapped forest land are governed by the following legal texts:
 - Bulgarian Forest Act
 - Regulation on the calculation of basic prices, prices for land in excluded areas and creating rights of use and easements in respect of forests and forest stock land
 - State Property Act³²
 - Obligations and Contracts Act³³

³¹ During the period 1999 to 2007, this Ministry was known as the Ministry of Agriculture and Forests. It was renamed the Ministry of Agriculture and Food at the beginning of 2008. The Ministry is referred to by its current name throughout this decision for reasons of consistency. The Executive Forests Agency (EFA) was once part of this Ministry.

³² Published in Bulgarian State Journal No 44 of 21 May 1996 (last amended in Bulgarian State Journal No 41 of 02 June 2009)

- Spatial Planning Act.

2.4. Beneficiaries

- (35) Potential beneficiaries of the swap transactions are natural persons, private companies and municipalities, often active in real estate development and/or tourism activities, who exchanged their forest land for publicly-owned forest land.

3. GROUNDS FOR INITIATING THE PROCEDURE

- (36) In the opening decision, the Commission expressed doubts as to whether the swap transactions and/or the subsequent change in the designated use of the land contained elements of State aid within the meaning of Article 107(1) of the Treaty and whether such aid could be found compatible with the internal market.

3.1. Intrinsic Link between the Swaps and the Change in the Designated Use of the Land

- (37) A first doubt raised by the Commission related to the allegation made by the complainants that in several cases the swaps were followed by a change in the designated use of the land swapped, i.e. from forest land to land available for construction.
- (38) In light of the numerical evidence provided by the Bulgarian authorities, the Commission noted in the opening decision that out of the 147 swaps carried out during the period under review (2006-2009), 15 were followed by a change in designated use (10%). Moreover, the Commission observed that different legal provisions apply to the swap transaction and to potential requests for a change in the designated use and that separate administrative procedures are in place for both procedures. These elements appeared, at first sight, to confirm the thesis of the Bulgarian authorities that – as a general principle – the two steps are not intrinsically linked³⁴.
- (39) However, the Bulgarian authorities indicated that the formulas for setting the administrative prices of forest land and the stamp duty payable for the change in the designated use of the land were set at a level to ensure that the full swap price of forest land plus the change in the designed use of the land would, to a large extent, equal the market price of similar land available for construction. This could imply that the authorities assumed that many investors would try to couple both steps into one transaction.
- (40) Consequently, the Commission raised doubts whether the potential change of the designated use of forest land concerned should be taken into account when determining the price of the plot for the purpose of the swap transactions, i.e.

³³ Published in Bulgarian State Journal No 275 of 22 November 1950 (last amended in Bulgarian State Journal No 50 of 30 May 2008)

³⁴ An unknown number of intended changes of use may be blocked by the moratorium imposed in 2009.

whether the swap and the subsequent change of the designated use of the swapped land should be considered intrinsically linked.

3.2. Potential State aid in the Change of the Designated Use of the Land

- (41) A second doubt raised by the Commission was whether the change in the designated use of the land swapped could result in the grant of State aid, as it further increased the value of the land swapped.
- (42) The Commission noted in the opening decision that the change in the designated use of the land does not *prima facie* seem to have involved any transfer of State resources. The stamp duty due on such transactions was calculated according to the legal provisions and – to the Commission’s knowledge – paid in all cases concerned. Therefore, although undertakings concerned by the change in the designated use of the land may have benefitted from that change, the administrative decisions effectuating the change would not result in State aid within the meaning of Article 107(1) of the Treaty. The Commission did not take a definite position on this issue and invited interested parties to comment on whether State aid was involved in the operation.

3.3. Potential State aid in the Swap of Forest Land

- (43) The Commission noted in the opening decision that the prices of the forest land for the purposes of the swaps were determined by experts using solely the formulas set out in the Regulation on basic prices. The Commission, therefore, raised doubts as to whether the application of those formulas led to an administrative price which was similar to the prices obtained in arm’s length transactions between two private parties. The Commission therefore invited the Republic of Bulgaria and third parties to provide information on market prices obtained in fully private sales (or swap transactions) of forest land that took place in Bulgaria during the period under review. The Commission further invited the Republic of Bulgaria and third parties to provide information on the differences between those prices and the administrative prices used for the contested swap transactions and, hence, the potential amount of State aid involved in those transactions. In addition, the Commission invited the Republic of Bulgaria and third parties to provide information on the rules applied as far as the compensation paid in swap transactions in case of difference in prices for the two swapped plots of land is concerned. Finally, the Commission invited the Republic of Bulgaria to provide further information to substantiate its claim that the contested swaps do not affect intra-Union trade.
- (44) The Commission also set out its preliminary view in the opening decision on how the advantage arising from the contested swap transactions should be quantified, should those swaps be found to give rise to State aid:
 - (i) the difference between the real market price of privately-owned forest plot 1 and the administrative price for plot 1, determined in line with the prescriptions of the Regulation on basic prices,
 - (ii) the difference between the real market price of publicly-owned forest plot

2 and the administrative price for plot 2, determined in line with the prescriptions of the Regulation on basic prices.

The State aid amount involved in the swap transactions would then be equal to the value of (ii) less the value of (i).

Any monetary compensation resulting from the difference in the administrative prices of two plots being the object of the swap transaction paid by one party to another shall also be taken into account while calculating the potential State aid element involved in the transaction.

3.4. Compatibility of Potential State Aid

- (45) Should State aid be found to be present either as a result of the change in the designated use of the land and/or as a result of the swap transactions, the Commission then raised doubts in the opening decision as to whether such aid could be considered compatible with internal market and, more specifically, with Article 107(3)(a) of the Treaty and the provisions of the Guidelines for national Regional Aid 2007-2013³⁵ and/or 107(3)(c) of the Treaty and the provisions of the Community Guidelines for State aid in the agriculture and forestry sector 2007 to 2013 (“Forestry Guidelines”)³⁶.
- (46) The Commission therefore requested the Republic of Bulgaria and interested parties to provide observations on the compatibility of the contested measures.

4. COMMENTS FROM INTERESTED PARTIES

4.1. Comments from the First Complainant in relation to the Doubts raised by the Commission in the Opening Decision

- (47) The first complainant argues that the contested swaps constitute State aid within the meaning of Article 107(1) of the Treaty, which is incompatible with the internal market
- (48) As regards the first doubt expressed by the Commission, the first complainant argues that the change in the designated use of the land and the swap transactions should be regarded as intrinsically linked. Firstly, the complainant claims that many of the beneficiaries of the swaps are active in the construction and tourism sectors, not in forest activities. Secondly, according to the first complainant, since the moratorium came into effect in 2009, swapped forest land is virtually not exploited commercially. Thirdly, at the time that the swap transactions were carried out many of the beneficiaries allegedly announced and advertised their development projects for the swapped forest land as ski or seaside resorts and had even initiated discussions with the relevant local authorities to ensure a change in the designated use of the land would come about. Fourthly, the complainant contends that the same State agency (the EFA) was often responsible for the conclusion of the swap

³⁵ OJ C 54, 04.03.2006, p. 13

³⁶ OJ C 319, 27.12.2006, p. 1

and for the exclusion of the swapped land from the forest fund (EFA and the competent regulator)³⁷, thus clearing the way for its commercial development.

- (49) Accordingly, the first complainant considers that a potential reclassification of the designated use of the land and the corresponding price increase should be taken into account when quantifying the total amount of State aid involved in the swap transactions. Therefore, in the complainant's view, comparisons with plots of constructible land should be made in the quantification of the aid to properly reflect the market price of the swapped land.
- (50) The complainant also mentions that in view of the attractiveness of the regions where the government forest plots were located, it would have been more prudent for the authorities first to act to increase the plots' value (i.e. change their designated use to make them available for construction) and only afterwards dispose of the plots. According to the complainant, in none of the cases where a request for a swap was made, did the EFA proceed to change the designated use of that land prior to that swap. This is, according to the complainant, a clear indication that there was intent to bring benefit to the acquirer of the government-owned forest land. This practice was also criticised by the World Bank in a Report on Bulgarian Forest of 2009, which noted that the State was incurring losses in this particular way³⁸.
- (51) As regards the second doubt expressed by the Commission, on whether State aid was granted as a result of the change in the designated use of the swapped land, the first complainant argues that while the acquirer of the land subsequently paid a stamp duty upon the decision to convert the designated use of the land and that this amount should be deducted from the quantification of any aid received as a result of the swap, that duty does not reflect the actual increase in the value of the plot as a result of that change. The complainant further claims that in those instances where the swap was conducted before Bulgaria's accession to the Union but the change in the designated use of the land took place after accession, the illegal State aid granted to the acquirer of the land should be the difference between the market value of the respective plot at the time of the swap (prior to accession) and the market value of the plot after the change in the land designation (after accession).
- (52) As regards the third doubt expressed by the Commission concerning the presence of State aid as a result of the swaps, the complainant argues that the formulas prescribed by the Regulation on basic prices do not reflect the market value of the swapped land. The complainant also contests the independence of

³⁷ According to the complainant, the exclusion of forest from the State forest fund prejudices the subsequent decision of the local authorities regarding its subsequent use, as they have no better option but to adopt a Detailed Spatial Plan for the plot, which has ceased to be forest land and protected as such.

³⁸ "Bulgaria: Forest Policy Note", March 10, 2009, p. 11, paragraph 51, <http://siteresources.worldbank.org/BULGARIAEXTN/Resources/305438-1224088560466/BulgariaForestPolicyNote03102009GOB.pdf>

the evaluators, as, in its view, the acquirer of the land is free to choose a friendly evaluator, leading towards a significant underestimate of prices.

- (53) The complainant also provided additional information on the market prices of the swapped forest land or very similar forest land allegedly showing considerable discrepancies with the administrative prices for the plots. Due to time constraints the complainant only researched the prices of nine of the swapped plots. For this exercise, bank evaluations of land were used, as well as information from the public real estate registry in Bulgaria showing actual prices at which real estate deals were concluded for similar plots. The price discrepancies encountered ranged from an undervaluation (by using the administrative price) of 50-65% to cases where forest land was allegedly acquired at 1 to 2% of its market value.
- (54) Finally, the complainant claims that the fact that criminal proceedings were initiated against the former head of the EFA on charges of concluding swaps to the detriment of the State is an indication that the Bulgarian authorities themselves consider that forest land was delivered to certain private parties at a price far below market value.
- (55) As regards the question whether the swaps distort competition and affect trade between Member States, the complainant claims that to its knowledge none of the beneficiaries of the swaps engage in forest activities as their main commercial activity. Rather, almost all beneficiaries allegedly have a history of or future business plans for economic activities or investments in one of the following sectors: real estate speculation, construction and/or tourism. According to the complainant, tourism by definition concerns the whole of the internal market so that even a few cases of selective aid are bound to distort it. The complainant further adds that, in light of the number and the scale of the swaps, foreign competitors are effectively deterred from entering the Bulgarian market. While several major Union investors (e.g. Lindner, ECE) have been active in urban construction projects in Bulgaria (business centres and large department stores), virtually all large-scale investments in sea, ski or golf resorts have allegedly been made by Bulgarian-controlled companies.

4.2. Comments from the Beneficiaries of the Swap Transactions and other Third Parties

- (56) The Commission received comments from numerous third parties, most of which were private parties to the swap transactions (“the beneficiaries”). The Commission notes that a number of beneficiaries³⁹ merely issued a brief statement that no State aid was involved in the swap deals they were a party to. Other beneficiaries provided more detailed observations on the doubts expressed by the Commission in the opening decision, which will be examined in the following sections.

³⁹ Ecobalkani-Bulgaria EOOD, Vihren OOD and Elkabel AD

4.2.1. Intrinsic Link between the Swap and the Change in the Designated Use of the Land

- (57) As regards the first doubt expressed by the Commission on the existence of an intrinsic link between the swaps and the change in the designated use of the land, the majority of beneficiaries⁴⁰ who responded to the opening decision argue that no such link exists. The swap and the subsequent change of the designated use of the swapped land would be governed by two separate procedures, which are each within the competence of two different State bodies that operate independently from one another. The swaps fall within the competence of the Minister of Agriculture and Food or the Council of Ministers, depending on the size of the plot to be swapped, and the EFA, while the change in the designated use of the land falls within the competence of the local authorities – mayors of municipalities or the municipal council; the Minister of Regional Development and Public Works; or the regional governor for sites located within their region – and requires the approval of a detailed or general spatial development plan.
- (58) One beneficiary⁴¹ further adds that there is no automatic link between changing the designated use of the land and an increase in its value. The decision to change the designated use of the land would be based on the appraisal of its necessity, which has a wider scope and often overrides the private interests of owners, and is therefore not based on the commercial interests of the parties to the swap transaction. Another beneficiary⁴² notes that the statistical information provided by the Bulgarian authorities confirms the lack of an intrinsic link. Finally, other beneficiaries⁴³ deem the question of whether a link exists to be irrelevant, since in their specific cases the swapped land they acquired was not excluded from forest protection for development purposes nor has any procedure been initiated to change the designated use of the land.
- (59) As regards the question of whether the potential change in the designated use of the swapped land should be taken into account for determining the price of that land, the majority of beneficiaries argue that it should not, for various reasons. A number of beneficiaries⁴⁴ argue that it would be unjustified to take the hypothetical possibility of changing the designated use of swapped land into account, since such a change may never be requested or may be rejected due to a failure to comply with the respective administrative requirements. The strategic location of swapped forest land, which allegedly increases its value, should be irrelevant if the designated use of land has not been changed and the acquired land can only be used for the purpose stipulated by law. Thus, one beneficiary⁴⁵ argues that regard should be had to the specific agreement reached between the parties to the swap at the date of valuation. An objective

⁴⁰ This opinion was supported by Foros, Mirta Engineering, Beta Forest, LM Impex, Mr Gerov, Mr Babev and Mrs Babeva, Mr Terziev, Mr Mihailov and Mrs Mihailova

⁴¹ All Seas

⁴² LM Impex

⁴³ This opinion was supported by Izgrev, Litex, MIKS, BOIL, and Mrs Blagoeva.

⁴⁴ This opinion was supported by Mr. Gerov and Terziev and by Mr Babev and Mrs Babeva.

⁴⁵ All Seas

and fair calculation of market value should also take into account the spatial development master plans (allowing or not construction) in force at the date of valuation of the swapped forest land. Consequently, a set of uniform criteria should be specified that allows for a distinction between a hypothetical possibility and the actual intention of the parties to the swap to subsequently undertake a change in the use of the land.

- (60) Moreover, many beneficiaries note that for the exclusion of land from forest protection the payment of a fee for the change of its designated use is required, which is equal to the price per square metre of constructible land in the area in question. Hence, those beneficiaries claim that they do not accrue an economic benefit from the change, because if the acquired land is sold, used as collateral or developed, its value would be the same as the value of land available for construction. A similar argument was made by Mirta Engineering and Beta Forest, who note that the change of the designated use of land involves additional expenses, notably stamp duty and local tax as well as design costs, which further increase property value. Indeed, Mr Mihailov and Mrs Mihailova claim that in their case the change of the designated use of the land was conditional upon payment of the State fees defined in Article 17 of the Forest Act and the Implementing Regulation on the Forest Act.
- (61) Finally, certain beneficiaries⁴⁶ deem the question irrelevant, since in their specific cases the swapped land they acquired was not excluded from the forest protection for development purposes nor has any procedure been initiated to change the designated use of the land. MIKS noted in its submission that in its swaps contract the Bulgarian State stipulated that no change of the designated use of the land was permitted.

4.2.2. State Aid in the Swap of Forest Land

- (62) As regards the doubts raised by the Commission of whether the administrative prices for the swap transactions led to a market price, the beneficiaries⁴⁷ provided several similar arguments, in relation to their own swap transactions, why that should be the case.
- (63) First, one beneficiary⁴⁸ argues that, in determining administrative prices, the Regulation on basic prices takes account of objective criteria, such as the location of the land, the importance of the districts and the type and importance of the plant varieties on the land, while two other beneficiaries⁴⁹ argue that the administrative swap price is based on criteria that are identical to those used in swaps of private forest land undertaken by private investors, which involve land situated in proximity to local or national infrastructure that is similar to the contested swap transactions in terms of plant species, location in areas placed under special protection from urbanisation, etc. Similarly, other

⁴⁶ Foros Development, Izgrev, Liteks Komers and Jivka Blagoeva

⁴⁷ This opinion was supported by Mr Mihailov and Mrs Mihailova, Mirta Engineering, Beta Forest, Elkabel and Mrs Blagoeva.

⁴⁸ Mrs Blagoeva

⁴⁹ Izgrev and Litex Komers

beneficiaries⁵⁰ argue that the valuations resulting from the Regulation on basic prices lead to administrative prices which are similar to, or in many cases higher than, market prices for forest land in Bulgaria due to the lack of a domestic market for this type of land and the fact that the few private transactions were undertaken at low prices. Hence, the swaps were conducted under the prevailing economic conditions on the market.

- (64) Second, a number of beneficiaries⁵¹ argue that they carried out valuations of the swapped parcels that lead to administrative prices which are similar to⁵², or in many cases even higher than⁵³, market prices for forest land in Bulgaria.
- (65) Third, several beneficiaries⁵⁴ point to the absence of fully private swaps or sale transactions in the areas where the swaps of those beneficiaries took place as a reason why administrative prices should be considered to approximate market prices.
- (66) Finally, several beneficiaries⁵⁵ argue that since the Minister of Agriculture and Food, in the exercise of his discretionary power, is entitled to refuse to carry out the swap if the State has no interest in acquiring the private forest land and the conditions of the swap agreement have to be approved by both parties (public and private), the swap transactions should be considered as commercial transactions in which context the State behaves as a market economy operator ("MEO").
- (67) As regards the potential amount of State aid involved in the transactions (i.e. the difference between the administrative and market prices for the forest land), the majority of beneficiaries⁵⁶ replied that where the privately held land is more valuable than the publicly-owned land, the Bulgarian authorities did not cover the difference in prices. Another beneficiary⁵⁷ claimed that the difference in the market prices of swapped private and public forests situated

⁵⁰ Mr Gerov, Mr Babev and Mrs Babeva, and Mr Terziev (and their lawyer Mrs Shankova on their behalf).

⁵¹ LM Impex, Mr. Mihailov and Mrs. Mihailova, Mirta Engineering, Beta Forest, Foros Development.

⁵² Elkabel. In response to doubts expressed by the Commission, Elkabel ordered a new expertise from an independent expert which showed that even though for some of the plots concerned the market prices would be higher than the administrative prices calculated in line with the Regulation on basic prices, the total administrative price of all plots exchanged by Elkabel was higher than their market value. It was further explained that the total administrative price of the publicly-owned plots that were exchanged was also higher than their market value. The evaluator hence concluded that the use of administrative prices did not lead to the granting of an unwarranted advantage to Elkabel

⁵³ Izgrev, Litex Komers, Mr Gerov, Mr Terziev, Mr Babev and Mrs Babeva, MIKS and BOIL. In the case of Mr. Mihailov and Mrs. Mihailova, the value of the swapped privately owned land was allegedly higher (BGN 83 322,66) than that of the publicly-owned land (BGN 67 125,00).

⁵⁴ Mr. Mihailov and Mrs. Mihailova, Mirta Engineering and Beta Forest (in relation to the Novo Oriahovo Region), Foros Development (in relation to the Burgas Municipality), and MIKS and BOIL (in relation to the Nessebar Region).

⁵⁵ MIKS, BOIL, Foros Development, Mirta Engineering and Beta Forest

⁵⁶ Izgrev, Mrs Blagoeva, MIKSD, BOIL, Mirta Engineering, Beta Forest, Mr Mihailov and Mrs Mihailova

⁵⁷ Litex Komers.

in the same or adjacent areas favours the government as the administrative prices are higher than the market prices freely negotiated between private forest owners in the areas concerned.

- (68) As regards the other conditions for a finding of State aid, several beneficiaries⁵⁸ contested that they had been met. Thus, certain beneficiaries⁵⁹ argue that they are natural persons, to which the Bulgarian State Aid Act and Article 107 of the Treaty do not apply. In relation to State resources, those beneficiaries note that the government acquired the land through unlawful expropriation without adequate compensation so that the State cannot be considered to dispose of those resources. In relation to selectivity, those beneficiaries argue that the Forest Act applies *erga omnes* and thus does not discriminate.
- (69) Another beneficiary⁶⁰ also considers that the conditions of Article 107 of the Treaty have not been fulfilled as regards the swap transactions, but for slightly different reasons. First, there would be no transfer of State resources since the swap is a “double sale transaction” that was undertaken after a valuation was conducted by an independent property assessor on the basis of the objective criteria for price calculation stipulated by law. No advantage has been granted, nor have the counter-parties to the swap been placed in a more favourable position than that of its competitors since every forest land owner could have requested a swap of its private land for publicly-owned forest land. A similar argument is made by another beneficiary⁶¹ which considers the swaps scheme to be a general measure available to all forest land owners.
- (70) In relation to the existence of an economic advantage, the majority of beneficiaries⁶² contested that they received such an advantage from the transactions since, according to them, the administrative price for the swapped land was equivalent to or higher than its market price.
- (71) Finally, as regards the question of whether the swap transactions distort competition and affect trade between Member States, the large majority of beneficiaries⁶³ answered that they do not operate in the real estate development or tourism sectors and/or have not taken any steps to obtain a license as a tour operator. Furthermore, they confirmed to neither have used the land acquired through the swap for timber production following its acquisition, nor to have sold any timber in Bulgaria or in other Member States. Therefore, they claim that no actual or potential impact on intra-Community trade may be alleged. Another beneficiary⁶⁴ added that the swaps do not lead to a boost in domestic output thereby limiting the possibilities available to

⁵⁸ BOIL, Mr Mihailov and Mrs Mihailova

⁵⁹ Mr Gerov, Mr Terziev, and Mr Babev and Mrs Babeva

⁶⁰ LM Impex

⁶¹ All Seas

⁶² Izgrev, Mrs Blagoeva, Litex Komers, MIKS, Foros Development, Mirta Engineering and Beta Forest

⁶³ Izgrev, Litex Komers, MIKS, BOIL, Mirta Engineering, Beta Forest, Mr Mihailov and Mrs Mihailova, LM Impex

⁶⁴ LM Impex

undertakings from other Member States to import products into the local market.

- (72) Other beneficiaries⁶⁵ claimed that since the swaps do not entail a transfer of State resources and do not confer an economic advantage upon them, they cannot be considered to affect the market balance and economic conditions in which enterprises operate, i.e. initial investment for the acquisition of tangible assets is required. Thus, undertakings from other Member States can enter and operate on the same market upon equitable conditions, so that trade between Member States cannot be said to have been affected by the contested swaps.
- (73) Finally, one beneficiary⁶⁶ explained that the forest land he acquired from the State is not suitable for afforestation. He further considers his property superior to the one he received from the State and that the transaction does not entail State aid. Finally, he mentioned that the land acquired is used for mobile beekeeping by making use of the land for pasture during the summer.

4.2.3. Compatibility of Potential Aid

- (74) While the Commission requested interested parties to provide any available evidence which would allow it to examine the compatibility of the contested swap transactions with the internal market, none of the beneficiaries did so.

5. COMMENTS FROM THE REPUBLIC OF BULGARIA

5.1. Bulgaria's Comments on the Opening Decision

- (75) The Bulgarian authorities maintain that the contested swap transactions do not constitute State aid within the meaning of Article 107(1) of the Treaty.
- (76) In relation to the alleged intrinsic link between the swap transactions and the change in the designated use of the swapped forest land, the Bulgarian authorities noted that Article 15(b) of the Forest Act allows for the possibility to apply for a change in the designated use of forest land irrespective of the way in which the land was acquired, whether through a swap, sales transaction or by other means. However, such a theoretical possibility should not be understood as a firm, prior agreement between the authorities and the private party to the swap to subsequently change the designated use of the land.
- (77) The Bulgarian authorities provided evidence that, in relation to the 132 swaps that took place during the period 2007 to 2009, there were 24 requests made to change the designated use of the swapped forest land, of which in only 15 cases (i.e. 11,4% of all swaps) a positive administrative decision was adopted allowing for the requested change.
- (78) The Bulgarian authorities also note the different goals pursued by the swap transactions and the change in the designated use of the land. While the swaps seek to achieve the consolidation and conservation of Bulgarian forests so as

⁶⁵ Mr Gerov, Mr Babev and Mrs Babeva and Mr Terziev

⁶⁶ Mr Stoev.

to ensure their sustainable development and reproduction for the benefit of society as a whole, the change in the designated use of the land aims at achieving the goals laid down in the Spatial Planning Act, which provides the rules for the incorporation of land into the boundaries of agglomerations where construction is allowed in line with public needs and interests relating to sustainable development and building appropriate living, working and recreational conditions for citizens. In addition, while the swap transactions depend on decisions taken by the Minister of Agriculture and Food changes to the designated use of land depend on the approval of a spatial development plan by different competent bodies, namely the Minister of Regional Development and Public Works, the Regional Governor or municipal councils. Finally, considering that the right to request a change in the designated use of land does not arise directly from the Forest Act but requires satisfying conditions stipulated in other laws, the Bulgarian authorities consider that the hypothetical possibility to change the designated use of the land does not mean that such a change is intrinsically linked to the swap transactions.

- (79) As regards the question of whether the potential change in the designated use of the swapped land should be taken into account for determining the price of that land,, the Bulgarian authorities reiterated their position that there is no direct link between the price at which the swap is valued and the subsequent change in the use of the land. The authorities provided an extensive description of the procedure to be followed to determine the prices for the swap (ex Articles 20(5) and 21 of the Regulation on basic prices) and the fees due for the change in the designated use of the land, respectively. Those authorities also note that private owners may request a change in the designated use of forest land regardless of how they obtained the land, so that any investor would enjoy the same advantages, regardless of whether they have acquired the forest from the government or under an arm's length transaction concluded with a private party, so that the fees payable to bring about a change in the designated use of the land should be considered non-selective vis-à-vis beneficiaries.
- (80) As regards the Commission's doubts whether the methodology for calculating administrative prices correctly reflects market prices, the Bulgarian authorities note, first, that the administrative prices are set following the provisions of the Regulation on basic prices and that that Regulation was designed taking as an example practices for administrative price-setting for forest land in other Member States, most notably Germany. Moreover, the valuations of private and public forests were conducted by independent experts following a single set of criteria.
- (81) Second, the Bulgarian authorities provided data on all transactions⁶⁷ involving the sale and purchase of privately-owned forests carried out in the period 2007-2009⁶⁸. The information provided in respect of the average prices of

⁶⁷ The authorities indicated that in the period under review 567 private forest sales transactions took place.

⁶⁸ Subsequently, in January 2009 the swap of government land under the old rules and procedure were prohibited by law and the practice was discontinued.

privately-owned properties (i.e. “market prices”) comprises a summary of credible market evidence in line with the requirement stipulated in point 34 of the Supplementary provisions of the Regulation on basic prices. Where no information is available about transactions concluded in the same areas, details of ones that took place in areas situated in proximity and involved forests that are similar in terms of location and plant species have been provided. According to the Bulgarian authorities, on the basis of these data it can be demonstrated that in the majority of cases the administrative price used for the contested swap transactions was in general higher than the market prices obtained in arm’s length transactions⁶⁹. In this regard, the Bulgarian authorities call into question the evidence provided by the complainant. On the one hand, the prices quoted by the complainants would namely be prices for which the land was offered for sale and not necessarily prices effectively obtained or prices of plots of land that had already had their designated use changed and where the stamp duty was paid. On the other hand, the market price quoted by the complainant is not always reliable as in many cases it was obtained only as a result of a single private transaction.

- (82) Third, the Bulgarian authorities reiterated that the government did not cover any shortfall between the higher administrative total value of the private forest land it acquired and that the swap transactions were only carried out if the privately-owned plot of forest land received was higher or equal in value to the government-owned plot for which it was swapped. Additionally, the private party had to pay overheads in the amount of 2% of the property’s value.
- (83) Finally, the Bulgarian authorities point out that, since its original enactment, the Regulation on basic prices has been amended on three occasions – in 2004, 2005 and 2007, respectively. The amendment of the regulation in 2005 would be particularly noteworthy in light of the advanced stage in the restitution of expropriated forests and forest land as it meant that private forests were already both available and in demand on the market. This amendment essentially aimed to alter the land valuation methodology. In addition, the coefficients relating to areas protected from urbanisation were also increased and several new categories setting out the increments to land prices depending on the category of the settlement were introduced.
- (84) Moreover, following Bulgaria’s accession to the Union on 1 January 2007, the coefficients in the regulation were fully updated, including those relating to the areas protected from urbanisation and the so-called “market regulator” coefficients, which depend on the category of land. Additionally, Article 20(5) of the Regulation on basic prices was amended by increasing the swap price of government land by 50% of the value of the “market regulator” coefficient. Moreover, an increment to be added to land value according to the different categories of settlements was introduced.

⁶⁹ The Bulgarian authorities point to evidence showing that in 105 swap transactions the administrative swap price was higher than the market price obtained by private parties in arm’s length transactions, while it was lower only in 13 cases.

- (85) According to the Bulgarian authorities, those amendments to the Regulation on basic prices demonstrate that despite there being no well-developed domestic market for forest land and in light of the impending accession of Bulgaria to the Union, the authorities attempted to update the valuation mechanism set out in the regulation by ensuring it was based on credible market evidence. Consequently, at the date of Bulgaria's accession to the Union the calculated administrative prices calculated on the basis of the Regulation on basic prices would not have been lower than the market prices for those plots.
- (86) In relation to the Commission's doubt on swap transactions potential to distort competition and affect trade between Member States, the Bulgarian authorities point out, first, that of the private parties that took part in the contested swap transactions, 81 of these constitute undertakings within the meaning of Article 107(1) of the Treaty. The remaining 51 private parties were natural persons not engaged in trading goods or services. Bulgaria underlines in this context that neither the State Forest Agency nor its successor the Executive Forests Agency has received any applications for timber felling or export from the natural persons who conducted swaps in the period under review.
- (87) Second, the Bulgarian authorities claim that the swap transactions cannot affect intra-Union trade since the aided firms are engaged in activities that do not involve the import or export of products or services. The Bulgarian authorities supplemented the information already provided on volumes of timber produced and exported to the Union during the period under review and provided a document showing that none of the private parties that acquired government forest land under the contested swap transactions produced, sold in the national market or exported timber from the Republic of Bulgaria.
- (88) Third, the Bulgarian authorities argue that the tourism sector (e.g. as operating a tour operator, travel agency, hotel proprietor and provider of ancillary tourist services) is governed by the rules set out in the Bulgarian Tourism Act. That Act requires an administrative registration of operators in a public registry kept by the Ministry of Economy, Energy and Tourism. Persons engaged in hotel management are also subject to a requirement for registration into a dedicated registry pursuant to Article 58 of the Tourism Act. For this reason, only those companies entered into the respective public registers kept by the Ministry of Economy Energy and Tourism may be regarded as undertakings operating in the tourism sector. A check of the relevant registries showed that only one of the companies that acquired government-owned forest land as a result of the contested swap transactions – Kapsi Tours OOD – is registered as a tour operator within the meaning of the Tourism Act.
- (89) Fourth, the Bulgarian authorities explained that conducting business as a real estate development company in Bulgaria is also subject to a requirement for registration in the Central Occupational Register of Builders kept by the Bulgarian Construction Chamber in accordance with a dedicated law, notably the Construction Chamber Act⁷⁰. The Bulgarian authorities point out that only

⁷⁰ SG No 108/2006

three of the undertakings that conducted swaps with the government were registered as construction companies and may have been in some way engaged in building work under the law.

- (90) Consequently, the Bulgarian authorities argued that most of the undertakings that potentially benefitted from the contested swap transactions were not operating in the construction and tourism sectors. Consequently, in their view, competition on the relevant markets, other than the forest sector, cannot be said to have been distorted by those transactions.

5.2. Bulgaria's Comments on the Observations of the Complainant

- (91) The Bulgarian authorities concur with the complainant that no State aid is present in swaps of forest land between the State and municipalities. By contrast, they argue that the complainant's allegation that most beneficiaries are active in construction or tourism sector is incorrect, for the same reasons explained in the previous section.

- (92) The Bulgarian authorities also disagree with the way in which the complainant determined the forest land's market prices by comparing the prices of forest land in different years (e.g. a few years before the forests were swapped) and contest the complainant's claim that in certain cases the owners of the swapped forest land provided that land as collateral to obtain loans as this would not comply with the provisions of Bulgarian law and the State Property Act cited by the complainant. The data provided by the complainant would contain significant errors and not correlate with available property registers and documentation of the swaps. The data provided by the complainant would also be incorrect with regard to the State-owned forest land that was acquired through swaps and subsequently provided as collateral for loans. In any event, the Bulgarian authorities explain that banks in Bulgaria require other liquid assets as collateral, in addition to real estate, to ensure that the debt will be repaid. According to those authorities it would, therefore, be incorrect to divide the amount of the loan granted by the surface in m² of the land serving as collateral for the mortgage to determine the price per square metre. The authorities also provide an opinion of the First Investment Bank on the mechanisms for granting loans and the methods of evaluating forests and forest estates proposed by the borrowers as collaterals.

- (93) The Bulgarian authorities also disagree with the complainant's allegation that the municipal authorities had no choice but to adopt detailed spatial development plans for the land whose designated use had been changed. According to those authorities any change in the designated use of the land is based on legally enforced, detailed spatial development plans that have been publicly discussed, and have amended existing general spatial development plans for populated areas. These administrative procedures are not in the discretion of the Minister of Agriculture and Food, who issues individual administrative notices for changing the zoning of land to the parties requesting such a change only after the relevant detailed spatial development plan enters into force.

- (94) The authorities further refute that many parties involved in swaps intended to change the designated use of the forest plot obtained. Pursuant to the Bulgarian Forest Act such realised changes may only be carried out by filing an application under the procedure referred to in Article 14[©] of the Forest Act (repealed). Any other intention expressed in a mass media publication or in a way other than the procedure provided by law would be irrelevant and arbitrary.
- (95) The authorities also disagree with the complainant's statement that the administrative way of determining the prices of forest land would not reflect the dynamic development of the economy. The authorities believe that the way to determine prices by using the Regulation on basic prices is adequate. It is also not true that the Regulation has not been updated, as new coefficients were introduced in 2007, so that no economic advantage was granted to economic operators through swaps already carried out.
- (96) The authorities counter the argument of the complainant that the evaluators would be partial. According to those authorities those evaluators are court experts, whose integrity cannot be called into question. Furthermore, in case they would value the forest land favourably for the private party and not in line with the provision of the Regulation on basic prices, such a valuation would not be accepted by the authorities for the purpose of the swap.
- (97) In relation to the complainant's allegation that the official statistical, data on values/prices of transactions provided by the authorities is not correct, the authorities state that tax evasion by hiding the actual price of a transaction constitutes a crime under the Bulgarian Penal Code.
- (98) Finally, the Bulgarian authorities refute the complainant's statement that the indictment of the former head of the EFA would be proof of existence of a State aid relating to the swaps. According to those authorities the proceedings against officials who participated in the procedures for swaps of State-owned forest land are irrelevant to assess the presence of aid in the contested transactions.

5.3. Bulgaria's Comments on the Observations submitted by Other Third Parties

5.3.1. Bulgaria's Comments of 29 September 2011

- (99) By letter of 29 September 2011 the Bulgarian authorities responded to the comments submitted by All Seas on the opening decision.
- (100) All Seas has swapped a total of 157,4 ha of privately-owned forest plots in the municipalities of Teteven and Gaborovo in return for government-owned forest plots totalling approximately 57,9 ha in the municipality of Balchik⁷¹. In this context All Seas also paid the Bulgarian State BGN 138 781 in overhead expenses.

⁷¹ Order No RD 49-269/17.07.2007

- (101) The government-owned forest plots were valued at an administrative price of BGN 11,99/m². According to the information available to the Bulgarian authorities, during the period under review the average market price (being the price agreed between private parties buying and selling forest plots on a commercial basis in the same or nearby region within the same municipality) was BGN 4,16/m². Consequently, the swap between All Seas and the Republic of Bulgaria was conducted against payment and did not result in an economic advantage within the meaning of Article 107 of the Treaty.
- (102) The Bulgarian authorities further note that All Seas applied for a change in the designated use of the forest plot in accordance with Article 14 of the Forest Act and that the Bulgarian Council of Ministers granted the application in accordance with Article 14d(2) of the Forest Act⁷². To the knowledge of the Bulgarian authorities, this decision has not entered into force. The Bulgarian authorities agree with All Seas that the State had no direct influence over the changes in the designated use of the land in question (for which no land use map existed), and therefore that change of ownership resulting from the swap cannot be expression of any common intention on the part of the parties to the swap to effect a change in its designated use. According to the Bulgarian authorities, the determining factor in the evaluation of the swaps must be whether the balance-sheet value of the assets being exchanged is equivalent. This is precisely the basis on which the Bulgarian government has conducted these transactions. Another reason that no State aid is involved in changing the use of the land after the swap is the fact that the administrative fees are the same for all applicants.
- (103) The Bulgarian authorities further note that All Seas has neither harvested timber on the plots it received as a result of the swap, nor has it engaged in intra-Union trade in timber from those plots. Furthermore, All Seas does not offer tourist services as specified in the Tourism Act, nor is it a construction company within the meaning of the Chamber of Builders Act.

5.3.2. Bulgaria's Comments of 4 November 2011

- (104) By letter of 4 November 2011, the Bulgarian authorities responded to the comments of the following third parties: Elkabel AD, LM Impex EOOD, Foros Development EAD and Simeon Stoev Mirov.
- (105) As regards the swap transactions executed with Elkabel, LM Impex and Foros Development, the Bulgarian authorities stated that they did not cover any shortfall in prices and, in the cases concerned, received additional payment of overheads from the private parties. In addition, all local taxes were paid by those parties. Finally, none of the three companies requested the change in the use of the acquired forest land.
- (106) The Bulgarian authorities further note that in some of the municipalities where the exchanged plots were located, no fully private transactions had taken

⁷² Decision No. 602/16.09.2008

place, so that it was not possible to determine the market price of the plots exchanged or whether an economic advantage had been granted.

- (107) The Bulgarian authorities further note that neither Elkabel, nor LM Impex is a timber exporter, nor is either registered as a construction or tourism company under Bulgarian law.
- (108) As regards Simeon Stoev Mirov, a natural person, who swapped 5,6 decares of private forest land in Rakitovo, valued at BGN 3436, in return for 5 decares of publicly-owned forest land in Burgas (village of Kraymorie), valued at BGN 1308, the Bulgarian authorities consider that this swap should fall under the de minimis regulation.
- (109) For those reasons, the Bulgarian authorities argue that swaps with in their view the above-mentioned private parties do not constitute State aid.

5.3.3. Bulgaria's Comments of 16 December 2011

- (110) By letter of 16 December 2011, the Bulgarian authorities responded to the comments of the following third parties: V-G-N Confort OOD, Izgrev 5 EOOD, Ecobalkani-Bulgaria EOOD, Vihren EEOD, Liteks Komers AD and Jivka Blagoeva.
- (111) As regards the swap transactions with V-G-N Confort, Izgrev 5, Ecobalkani, Vihren and Liteks Komers, the Bulgarian authorities explained that they did not cover any shortfall in prices and, in the cases concerned, received additional payment of overheads from the private parties. Moreover, all local taxes were paid by the those parties. Finally, V-G-N Confort, Ecobalkani and Liteks Komers did not request a change to the designated use of the government-owned forest land acquired by them.
- (112) The Bulgarian authorities further note that in some of the municipalities where the exchanged plots were located, no fully private transactions took place, so that it is not possible to determine the market price of the plots concerned and it cannot be conclusively ascertained whether an economic advantage was granted to above-mentioned private parties. In the case of Izgrev 5, the administrative price of the swapped publicly-owned forest land was slightly higher than the market price obtained in similar private transactions, so that according to the Bulgarian authorities no advantage was granted. The same reasoning would apply to the transaction with Liteks Komers, where – according to the Bulgarian authorities – administrative prices would have been four times higher than the market prices for the publicly-owned forest land.
- (113) Finally, the Bulgarian authorities note that none of the above-mentioned private parties is a timber exporter or is registered as a construction or tourism company under Bulgarian law, so that the swap transactions concluded with them do not affect trade between Member States.
- (114) As regards the swap transaction with Jivka Blagoeva, a natural person, it resulted in the swap of 1,9036 ha of privately-owned forest land in Teteven Municipality, valued at BGN 16 091, in return for 0,3001 ha publicly-owned

forest land in the Predela area, Razlog Municipality, valued at BGN 24 216. The Bulgarian State did not cover the shortfall in price, all overheads and local taxes were paid by Jivka Blagoeva and the new owner has not requested a change in the designated use of the swapped land. According to the Bulgarian authorities this swap should fall under the De minimis Regulation.

- (115) Accordingly, the Bulgarian authorities consider that no State aid is present in the swap transactions concluded with the private parties mentioned above.

5.3.4. Bulgaria's Comments of 25 April 2012

- (116) By letter of 25 April 2012, the Bulgarian authorities responded to the comments of the following third parties: Aqua Estate, Beta Forest, Kosta Gerov, Dimitar Ivanov Terziev, Yavor Iliev Haytov, Valentina Angelova Haytova, Georgi Aleksandrov Babev, Marieta Tihomirova Damyanova, Elizabet Petkova Mihaylova, Svetoslav Petkov Mihaylov, BG Land Co, Mirta Engineering, Miks PS-OOD, and BOIL OOD.
- (117) The Bulgarian authorities support the comments submitted by these natural persons and companies which were parties to swap transactions concluded during the period under review, namely that the swaps do not involve State aid but instead constitute transactions carried out under favourable conditions for the State and at prices that are not lower than market prices for similar real estates. Moreover, the Bulgarian authorities support the view of the above mentioned private parties that the swap transactions were carried out in compliance with Bulgarian national law in force: the regulation on basic prices and the Forest Act. Finally, some of these transactions should be considered to fall under the De minimis Regulation.

5.4. Bulgaria's Replies to the Commission's Requests for Information sent during the Formal Investigation Procedure

- (118) In subsequent submissions, in response to requests for information, the Bulgarian authorities provided market prices – both for the privately-owned and publicly-owned forest land – for all the swap transactions carried out during the period under review⁷³.
- (119) In their submission of 19 November 2013⁷⁴, however, the Bulgarian authorities indicated that there were some problems regarding the reliability of data they provided. In particular, for the purposes of the formula provided in recital (44), the Bulgarian authorities provided fair market prices for 82 (60 publicly-owned and 22 privately-owned plots) plots concerned by the contested swap transactions. For the remaining plots, they provided the market values on a best-effort basis, indicating that they might not necessarily represent fair market values. For the remaining publicly-owned plots concerned, the Bulgarian authorities explained that the prices they quoted as market prices were actually the mean of prices for various types of forest transactions. Hence

⁷³ This information was (re)submitted by Bulgaria in spreadsheet sent to the Commission by email of 21 January 2014 (2014/032997).

⁷⁴ Submission reference 2013/115208

they do not necessarily represent a fair market value, because they are not equal to average prices of fully analogous transactions.

- (120) Similarly, for the remaining privately-owned plots that were not yet the subject of an evaluation by an independent expert, the Bulgarian authorities indicated that in certain cases the prices quoted in sales certificates, which were used by the authorities as a proxy for the provided market values of these plots, were close or equal to the so-called tax values. The tax value of a plot is not its market value, but the minimum price that has to be paid in real estate transactions, i.e. the market value of the plot concerned would in principle be higher.
- (121) Notwithstanding the foregoing, the Bulgarian authorities stressed that the data they provided on market prices are the best estimates they can obtain, as: (i) there are no specific rules in Bulgaria for determining market prices for forest plots through valuation, (ii) it would take a lot of time to carry out a valuation, by an independent expert valuator, about what the market prices of the plots concerned would have been at the time of the swap and (iii) such an evaluation would be a very costly process. Additionally, the Bulgarian authorities stated that the prices provided are anyway closer to fair market prices than they would be to the administrative prices.
- (122) Finally, the Bulgarian authorities provided information on a sample of 25 swap transactions on the administrative prices actually used and the hypothetical administrative prices that would result from the use of coefficients present in the 2010 update of the Regulation on basic prices. The sample provided covered 25 transactions that took mainly place in 2009 or 2008 (only 6 transactions in 2007). This information was requested by the Commission in order to verify that the system of administrative prices – if they were updated properly – would be appropriate to reflect market prices for forest land on the basis and would lead in all cases to a price as close as possible to the market value, as required by the case-law.

6. ASSESSMENT OF THE MEASURE

6.1. Existence of Aid

- (123) According to Article 107(1) of the Treaty, 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 provision of certain goods shall be incompatible with the common market, in so far as it affects trade between Member States.
- (124) The qualification of a measure as aid within the meaning of Article 107(1) therefore requires the following cumulative conditions to be met: (i) the measure must be imputable to the State and financed through State resources; (ii) it must confer an advantage on its recipient; (iii) that advantage must be selective; and (iv) the measure must distort or threaten to distort competition and have the potential to affect trade between Member States.

- (125) As a preliminary matter, however, it is also necessary to consider in the present case whether the potential beneficiaries of the swap transactions are undertakings within the meaning of Article 107(1) of the Treaty. That is because, according to the wording of that provision, the State aid rules only apply where the recipient of an aid is an undertaking.
- (126) The Court of Justice of the European Union (“CJEU”) defines the notion of “undertaking” for the purposes of Article 107(1) of the Treaty as any entity engaged in an economic activity, regardless of its legal status or the way in which it is financed⁷⁵. According to the CJEU, any activity consisting in offering goods and services on a market constitutes an economic activity⁷⁶. The classification of an entity as an undertaking is thus always relative to a specific activity. An entity that carries out both economic and non-economic activities is to be regarded as an undertaking only with regard to the former. An undertaking does not need to be a legal person; natural persons can also be considered undertakings under the State aid provided they carry out an economic activity.
- (127) With this in mind, it should be noted that certain beneficiaries of the contested swap transactions did not carry out economic activities with the swapped forest land during the period under review, nor do they carry out such activities at present. As a result, those beneficiaries cannot be considered undertakings within the meaning of Article 107(1) of the Treaty so that no State aid is considered to be present in the swap transactions they concluded with the Bulgarian State.
- (128) Consequently, the remainder of this decision concerns only those beneficiaries of the contested swap transactions that constitute undertakings within the meaning of Article 107(1) of the Treaty.

6.1.1. Intrinsic Link between the Swap and the Change of the Designated Use of the Land

- (129) The first doubt raised by the Commission in its opening decision was whether an intrinsic link existed between the swap transactions and the change of the designated use of the swapped land received by the beneficiaries. This is important because, if such a link is found to exist, it will impact the Commission’s assessment of whether the swap transactions give rise to an economic advantage and how that advantage should be quantified. An intrinsic link means that it was the intention of the parties to the swap transaction, before that transaction was completed, to change the designated use of the publicly-owned land from forest land to land available for construction subsequent to the swap. Thus, while the administrative prices calculated for the swap transaction on the basis of the Regulation on basic prices would be based on the swap of two plots of forest land, the subsequent change in the designated use of publicly-owned plot, if intended from the outset, could result

⁷⁵ Joined Cases C-180/98 to C-184/98 *Pavlov and Others* [2000] ECR I-6451, paragraph 74.

⁷⁶ Case 118/85 *Commission v Italy* [1987] ECR 2599, paragraph 7; Case C-35/96 *Commission v Italy* [1998] ECR I-3851, paragraph 36; Joined Cases C-180/98 to C-184/98 *Pavlov and Others* [2000] ECR I-6451, paragraph 75.

in an undervaluation of the plot received considering its intended future use as construction land.

- (130) According to the Commission, the fact that the contested swap transactions were always – or at least in a large majority of cases – followed by a (approved) request to change the designated use of the swapped forest land received by the beneficiary to land available for construction would be an objective indication that the parties to those swap transactions intended from the outset to change the designated use of the publicly-owned land subsequent to the swap.
- (131) The statistical data provided by the Bulgarian authorities in response to the opening decision, reaffirming the data reflected in recital (38), demonstrates that in relation to the 132 swap transactions that took place during the period under review, 24 requests for a change in the designed use of the land into land available for construction were submitted (representing 18,2% of the total swaps) of which in 15 cases approval was given for the requested change (representing 11,4% of the total swaps). On the basis of that data, the Commission concludes that in the majority of cases the swaps were not followed by a request to change the designated use of the land.
- (132) In any event, the Commission observes that Bulgarian legislation provides for two separate procedures for swaps and for the change in the designated use of land, respectively, and two separate State bodies are competent for each operation and operate independently from one another. This provides a further indication that an intrinsic link between the swap transactions and the change in the designated use of the land is missing in the present case.
- (133) Since no intrinsic link has been shown to exist between the swap transactions and the change in the designated use of the swapped land received by the beneficiary, the Commission shall examine each of those operations separately for the existence of State aid within the meaning of Article 107(1) of the Treaty.

6.1.2. Existence of Aid in the Change of the Designated Use of the Land

- (134) Land use designation is the legal control by public authorities on the use and intensity of development of a plot of land. Where a public authority approves a change in the designated use of a plot of land it performs a regulatory activity and is not acting as an economic agent.
- (135) Only advantages granted directly or indirectly through State resources are to be considered aid within the meaning of Article 107 of the Treaty. According to the case-law of the CJEU⁷⁷, the distinction made in that provision between “aid granted by a Member State” and aid granted “through State resources” does not signify that all advantages granted by a State, whether financed through State resources or not, constitute aid. Rather, the distinction is intended merely to bring within that definition both advantages which are

⁷⁷ Case C-379/98 *Preussen Elektra* [2001] ECR I-2099.

granted directly by the State and those granted by a public or private body designated or established by the State.

- (136) While the approval by a public authority to change the designated use of a particular plot of land from forest land to land available for construction may result in an increase in the market value of that land, that approval does not entail a transfer of State resources within the meaning of Article 107(1) of the Treaty: the exercise of that regulatory task does not result in a positive transfer of funds to the recipient of that approval, nor does it entail a forgoing of State resources, since the State is not obliged in exercising that regulatory task to charge successful applicants a fee that captures the full economic value they extract from obtaining that approval⁷⁸.
- (137) Accordingly, the decision by a public authority to change the designated use of a particular plot of land does not constitute State aid within the meaning of Article 107(1) of the Treaty.

6.1.3. Existence of Aid in the Swap Transaction

- (138) According to settled case law⁷⁹, the sale by public authorities of land or buildings to an undertaking or to an individual involved in an economic activity may give rise to an economic advantage and thus constitute State aid within the meaning of Article 107(1) of the Treaty, in particular where it is not made at market value, that is to say, where it is not sold at the price which a private investor, operating in normal competitive conditions, would be likely to have fixed. The same is true of a swap transaction where the value of the publicly-owned land received from the State is superior to the value of the privately-owned land relinquished to the State.
- (139) However, prior to examining whether the swap transactions give rise to an economic advantage, the Commission shall examine whether the remaining conditions listed in recital (126) are present for a finding of State aid within the meaning of Article 107(1) of the Treaty.
- (140) First, as regards the imputability of the measure, the swap transactions fall within the competence of the Minister of Agriculture and Food or the Council of Ministers (depending on the size of the plot to be swapped) and the EFA, all of which are State bodies. To the extent the swap transaction results in a transfer of publicly-owned forest land of superior value to the privately-owned forest land relinquished, it gives rise to a transfer of State resources insofar as the Bulgarian State forgoes certain revenues it would have been able to attain if it had operated in accordance with market conditions when carrying out that transaction.

⁷⁸ See, by way of analogy, Case T 475/04 *Bouygues SA v Commission* [2007] ECR II 2097, paragraphs 108 to 111 and 123 upheld in Case C 431/07 P *Bouygues and Bouygues Telecom v Commission* [2009] ECR I 2665, paragraphs 94 to 98 and 125.

⁷⁹ Case C-239/09 *Seydaland Vereinigte Agrarbetriebe GmbH & Co. KG v BVVG Bodenverwertungs- und -verwaltungs GmbH* [2010] ECR I-13083, paragraph 34 and Case C-290/07 P *Commission v Scott* [2010] ECR I-7763, paragraph 68; Case T-244/08 *Konsum Nord ekonomisk förening v Commission* [2011] ECR II-00444, paragraph 61.

- (141) Second, the swap transactions are selective insofar as they only benefit those land owners which swapped their privately-owned forest land with publicly-owned forest land.
- (142) Third, the swap transactions distort competition and affect trade between Member States. To the extent the beneficiaries of the swaps are undertakings that offer goods and services on a particular market, any financial benefit resulting from the swaps strengthens their position as compared with other undertakings competing in intra-Union trade for the same goods and services⁸⁰. Indeed, a number of beneficiaries⁸¹ of the swap transactions have, *amongst others*, real estate, tourism, restaurant activities and afforestation listed as the economic sectors in which they operate in the Bulgarian Commercial Registry. Those sectors are open to competition at Union level. This is demonstrated by information in that same registry in which several beneficiaries⁸² of the swap transactions have trade or (international) commercial activities listed as the economic sector in which they operate. As regards the argument put forward by the Bulgarian authorities that for companies to be active in the tourism or construction sectors their inscription in dedicated registers is necessary and that that would not be the case for most of the companies participating in the swap transactions, the Commission observes that the notion of “undertaking” in Article 107(1) of the Treaty is an objective concept, so that the question of whether undertakings offer goods and services on a particular market, and thus compete with other undertakings and engage in intra-Union trade, is to be determined in light of the activities actually carried out by those undertakings and not whether they have complied with certain national legal formalities.
- (143) Finally, as regards the presence of an economic advantage, the swap transactions concern the exchange of (at least) two plots of forest land between the Bulgarian State and private parties. To determine whether an economic advantage was derived by the private parties as a result of the swap transaction, the market value of the plots swapped needs to be assessed and compared to one another. If the swap transaction results in a transfer of publicly-owned forest land which is of superior value to the forest land relinquished by the private party, an economic advantage will be conferred upon that private party.
- (144) As explained in recital (16), for the swaps in question administrative prices were calculated on the basis of the Regulation on basic prices. The CJEU has recognised that, where national law establishes administrative rules for calculating the market value of land for their sale by public authorities, the application of those rules must, in order to comply with Article 107 of the Treaty, lead in all cases to an administrative price as close as possible to the

⁸⁰ Case T-288/97 *Friuli-Venezia Giulia* [2001] ECR II-1619, paragraph 41.

⁸¹ This is, amongst others, the case for : All Seas Property 2, Aqua Estate, Beta Forest, BG Land Co, Ecobalkani, MIKS and BOIL.

⁸² This is the case, e.g. for Izgrev, Liteks Comers, LM Impex and VNG Confort.

market value of the land⁸³. As that market value is theoretical, a margin for variation on the price obtained as compared with the theoretical price will be tolerated⁸⁴.

- (145) The Bulgarian authorities were requested to provide information on the administrative prices used for the 132 swap transactions that took place during the period under review, as well as on market prices for those same transactions. The Commission requested the Bulgarian authorities to also consider any prior or subsequent transactions with the same forest plots when determining their market value. Consequently, even though the Commission considers that for the assessment of potential State aid elements in the swap transactions the provenance of the swapped forest plots is irrelevant, price information – where available – was taken into account.
- (146) The Bulgarian authorities indicated some problems with the reliability of the data they could provide on market prices⁸⁵. At the same time, however, they indicated that the information provided contains best estimates of market prices⁸⁶. The Commission considers those data to be sufficiently reliable estimates of the real (i.e. “fair”) market value of the plots concerned.
- (147) The analysis of the data showed that for privately-owned plots the use of administrative prices resulted in a systematic overvaluation of the forest land concerned as compared to market prices⁸⁷, whereas for the publicly-owned forest land the situation was more nuanced, since both cases of over- and undervaluation were encountered. Accordingly, in the determination of whether an advantage was conferred on the beneficiaries as a result of the swap transactions, a simple comparison of the market price of the publicly-owned plot at the time of the swap with the market price of the privately-owned plot for which it was swapped would insufficiently take account of the systematic overvaluation of the latter. Therefore, the Commission devised a formula that took account of the administrative prices used in the initial transaction for properly assessing the advantage resulting from the swap. That formula, which was already set out in the opening decision, requires the calculation of the following amounts:
- (i) the difference between the real market price of the privately-owned plot of forest land and the administrative price for that plot, determined in line with the prescriptions of the Regulation on basic prices; and
 - (ii) the difference between the real market price of the publicly-owned plot of forest land and the administrative price for that plot, determined in

⁸³ Case C-239/09 *Seydaland*, cited above, paragraph 35. See, also, Commission Decision of 19 December 2012 in Case SA.33167 on proposed alternative method for the valuation of agriculture and forest land in Germany sold by the public agency BVVG, OJ C43 of 15.02.2013, p. 7.

⁸⁴ See, by way of analogy, Title II, point 2(b), of the Commission Communication on State aid elements in sales of land and buildings by public authorities (OJ 1997 C 209, p. 3).

⁸⁵ Letter of 19 November 2013; submission reference 2013/115208.

⁸⁶ This issue, together with the Bulgarian arguments, is described in detail in section 5.4.

⁸⁷ Under- or overvaluation in comparison to the market price provided by the Bulgarian authorities for the plot concerned.

line with the prescriptions of the Regulation on basic prices.

An advantage would be considered to be present if the value of (ii) less the value of (i) was positive.

However, any monetary compensation paid by one party to the other to cover the difference in the administrative prices of two plots being the object of the swap transaction shall also be taken into consideration for determining whether the swap transaction gave rise to an advantage.

- (148) Applying that formula to the data provided by the Bulgarian authorities on the fair market values and administrative prices of the swapped forest land, the Commission concludes that an advantage was conferred on the beneficiaries of the land swaps in almost 80% of the swap transactions carried out during the period under review, as reflected in Table 4.

Table 4: Comparison administrative prices used in swaps and market prices provided by the Bulgarian authorities

Swap transactions	2007	2008	2009	Total
Advantage granted (no. of cases)	18	48	38	104
<i>As percentage of all swaps</i>	<i>78%</i>	<i>77%</i>	<i>81%</i>	<i>79%</i>
Number of swaps executed	23	62	47	132

- (149) The above data show that the administrative prices, set for the purpose of the swap transactions in accordance with the Regulation on basic prices, did not sufficiently reflect the real market value of the forest plots concerned.

- (150) That discrepancy between the administrative prices used for the contested swap transactions and the market prices of the plots in question results, on the one hand, from the fact that the underlying methodology used in the Regulation on basic prices does not sufficiently reflect the criteria that a market operator would consider important to value the swapped plots of forest land, nor does it accord them their appropriate weight. First, the average values of land listed in Annex 1 of the Regulation on basic prices according to the categories of land offering identical conditions for the growth of plants, which are used as a basis for determining the basic value of the land (see recital (18)), were supposed to be set on the basis of market prices or the accounts kept of state-owned forests, but in reality were determined by experts on the basis of a small number of market sources.

- (151) Second, the coefficients and increments used to account for certain attributes of the forest land in the calculation of the basic value of that land, described in recitals (18) to (26), reflect a means of administrative simplification rather than an attempt to accurately measure the economic value that a similarly situated hypothetical market operator would award to those attributes. Indeed, the Bulgarian authorities have provided no economic data to support the levels at which those coefficients and increments were set in the regulation.

(152) On the other hand, even if the methodology laid down by the Regulation on basic prices initially resulted in market prices for the swapped forest land, *quod non*, the average prices, the coefficients and the increments were never updated during the period under review to adequately reflect the fluctuations in market prices that subsequently occurred. According to the case-law⁸⁸, where prices for land are rising sharply, administrative methods for calculating the price of land sold by public authorities must provide for the continuous updating of those prices, so that the price actually paid by the purchaser reflects, in so far as is possible, the market value of that land. During the preliminary examination phase, the Bulgarian authorities explained that pursuant to Articles 7.1 and 32 of the Regulation on basic prices, the coefficients contained in that regulation for the calculation of administrative prices should have been updated on a yearly basis. Moreover, according to information provided by the Bulgarian authorities, during the period under review the market prices for forest land were increasing sharply. Nevertheless, the update foreseen in that regulation was never carried out during that period. The Bulgarian authorities only updated the average prices, the coefficients and the increments used for setting administrative prices in 2010 on the basis of recent market developments.

(153) Accordingly, the Commission concludes that the swap transactions conferred an economic advantage on the beneficiaries of the land swaps in those cases where the administrative prices used did not adequately reflect the market price for the land swapped.

6.1.4. De minimis aid

(154) As a final matter, it should be observed that in cases where the individual beneficiary of the swap transaction received an advantage not exceeding the thresholds specified in Commission Regulation (EC) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid⁸⁹, that advantage will not be considered State aid and thus not fall within the prohibition of Article 107(1) of the Treaty, provided all the other conditions laid down by that regulation are fulfilled.

(155) On the basis of the quantitative data provided by the Bulgarian authorities, it would appear that in many cases⁹⁰ the amount of aid received by the

⁸⁸ Case C-239/09 *Seydaland*, cited above, paragraph 54.

⁸⁹ O J L 352, 24.12.2013. The *de minimis* Regulation was adopted by the Commission pursuant to Article 2 of Council Regulation (EC) No 994/98, as amended by the Council Regulation No 733/2013 of 22 July 2013, OJ L204, 31.07.2013, p. 11.

⁹⁰ On the basis of the preliminary calculations performed by the Commission on the quantitative data provided by the Bulgarian authorities, it would seem that in only 45 out of 104 cases where an advantage was granted to a private party as a result of a swap, that advantage exceeded the *de minimis* threshold. However, these calculations neither exclude those cases in which the beneficiary of the swap was not an undertaking (which would reduce the number of swaps constituting aid) nor [do they account for those cases in which the same beneficiary benefitted from multiple swap transactions, the advantage of which exceed EUR 200 000 in total (increasing the number of swaps constituting aid). More precise calculations should be carried out by the Bulgarian authorities in the context of recovery.

beneficiaries of the swap transaction is below the *de minimis* threshold of EUR 200 000.

6.1.5. Conclusion on the existence of aid

- (156) In light of the foregoing, the Commission concludes that the swap transactions carried out by the Republic of Bulgaria during the period under review constitute State aid within the meaning of Article 107(1) of the Treaty in those cases in which the counter-party to that transaction is an undertaking within the meaning of that provision, the administrative prices used for that transaction did not reflect market prices and the conditions for *de minimis* aid laid down in Commission Regulation (EC) No 1407/2013 are not fulfilled.

6.2. Legality of the measure

- (157) By failing to notify those swap transactions before their implementation, the Republic of Bulgaria did not fulfil its obligation under Article 108(3) of the Treaty. Those swap transactions thus constitute unlawfully implemented State aid.

6.3. Compatibility of the aid

- (158) Although the Bulgarian authorities were asked to provide information on the possible compatibility of those swap transactions with the internal market, they maintained their line of argumentation that those transaction had no effect on intra-Union trade and, hence, did not constitute State aid within the meaning of Article 107(1) of the Treaty.
- (159) In this regard, the Commission notes that the burden of proof of the compatibility of aid with the internal market, by way of derogation from Article 107(1) of the Treaty, is borne principally by the Member State concerned, which must show that the conditions for that derogation are satisfied⁹¹.
- (160) In any event, the Commission notes that there do not appear to be any *prima facie* grounds to deem the swap transactions compatible with the internal market, either on the basis of Article 107(3)(a) and (c) of the Treaty directly or on the basis of Guidelines based on those provisions.
- (161) Thus, the Community Guidelines for State aid in the agricultural and forestry sector (“Forestry Guidelines”) cannot be used as a compatibility basis for the scheme of swaps, because they only apply to living trees and their natural environment in forests and other wooded land, including measures to maintain and enhance the ecological and protective functions of forests and measures to promote the recreational use and social and cultural dimensions of forests. Additionally, the costs covered by the aid granted in the context of the swaps do not comply with the definition of the eligible costs of the Forestry

⁹¹ Case T-68/03 *Olympiaki Aeroporia Ypiresies/Commission* [2007] ECR II-2911, paragraph 34.

Guidelines⁹², as no statutory or contractual obligation was imposed on the private parties to use the land obtained through swaps as nature protection areas. On the contrary, all parties had the right to ask for the change of the use of the forest land into constructible land, and some of them indeed did.

- (162) Nor do the Guidelines for national Regional Aid 2007-2013, provide a compatibility basis. The Commission notes in this respect that the swaps were not undertaken by the Bulgarian authorities specifically to contribute to regional development. Furthermore, the eligible costs were not defined, nor was it determined how the incentive effect of the aid would be controlled and how the respect of the applicable regional aid ceilings would be ensured.
- (163) Finally, in discussions prior to the adoption of the opening decision the Bulgarian authorities claimed that the swaps pursued a public policy objective of consolidating the ownership of forest land. Even if the consolidation of forest land could be found to constitute a common interest objective, *quod non*, the Bulgarian authorities did not demonstrate that the aid granted was necessary to achieve that objective nor that the means chosen were the most appropriate.
- (164) They also failed to demonstrate that means chosen ensured that the aid granted was limited to the minimum necessary to incentivise private parties to undertake the swap transactions. This is, amongst others, evident from the strong fluctuations of the administrative prices obtained by using the prescribed methodology. When compared to the market prices that were provided by the Bulgarian authorities, these administrative prices do not appear systematically to be for a similar percentage higher or lower than market prices. If the transactions of 2007 are taken as an example, the difference between the market prices and administrative prices for privately-owned plots ranged from -503,97% to +89,91%.⁹³
- (165) Finally, the Bulgarian authorities failed to demonstrate that the swaps transactions did not distort competition to an extent contrary to the common interest. Accordingly, the swap transactions cannot be deemed compatible with the internal market on the basis of Article 107(3)(c) of the Treaty directly.
- (166) Consequently, the Commission concludes that the aid granted in the context of the swap transactions cannot be considered compatible with the internal market.

⁹² Paragraph 175 g) of the Forest Guidelines defines eligible costs as: “the costs of purchase of forest land used or to be used as nature protection areas. The forest land in question must be entirely and permanently secured for nature protection purposes by the means of a statutory or contractual obligation.” The remaining categories of eligible costs defined in paragraph 175 of the Forest Guidelines are not appropriate in the case at hand.

⁹³ For publicly-owned forest land the difference between the market price and the administrative price ranges from -6130,00% to +74,98%. It should be noted, however, that the administrative price for such plots was higher than their market price only in 2 out of 23 cases.

7. RECOVERY

- (167) Pursuant to Article 14(1) of Regulation (EC) No 659/1999⁹⁴, where unlawfully granted State aid is found to be incompatible with the internal market, that aid should be recovered from the recipients, unless this would be contrary to a general principle of law. Article 14(2) of that regulation establishes that the aid is to be recovered, including interest, from the date on which the unlawful aid was at the disposal of the beneficiary until the date of its effective recovery. Finally, Article 14(3) of that regulation provides that recovery shall be effectuated without delay and in accordance with the procedures under the national law of the Member State concerned, provided that they allow for the immediate and effective execution of the Commission decision.
- (168) The purpose of recovery is achieved once the unlawful aid in question, together with appropriate default interest, has been repaid by the undertakings which benefited from it. By repaying the aid, the recipient forfeits the advantage which it had enjoyed over its competitors on the market, and the situation prior to the grant of the aid is restored⁹⁵. While the Member State may choose the means to fulfil its obligation to recover illegal aid, the measures chosen may not adversely affect the scope and effectiveness of Union law. A Member State can fulfil a recovery obligation only if the means chosen are suitable to re-establish the normal conditions of competition which were distorted by the grant of the illegal aid and are consistent with the relevant provisions of Union law⁹⁶.
- (169) Thus, given that the Republic of Bulgaria has been found to have unlawfully implemented State aid through the swap transactions, it should be required to recover that aid from the beneficiaries of those transactions.

7.1. Identification of the Beneficiaries from which to Recover

- (170) The unlawful and incompatible aid must be recovered from the undertakings that actually benefited from it⁹⁷. However, where the Commission is not in a position to identify, in the decision itself, all the undertakings that have received unlawful and incompatible aid, this will have to be done at the start of the implementation process by the Member State concerned, who will have to look at the individual situation of each undertaking concerned⁹⁸.
- (171) In the present case, the potential beneficiaries of the incompatible State aid are those natural and legal persons who participated in the 132 swap transactions with the Bulgarian authorities during the period under review. From this group, the Bulgarian authorities should subtract those natural and legal persons that do not qualify as “undertakings” within the meaning of Article 107(1) of

⁹⁴ Council Regulation (EC) No 659/1999, laying down detailed rules for the application of Article 93 of the EC Treaty, OJ L 83 of 27.3.1999, p. 1.

⁹⁵ Case C-277/00 *Germany v Commission* [2002] ECR I-11695, paragraphs 74-76

⁹⁶ Case C-209/00 *Germany v. Commission*, cited above, paragraph 57-58.

⁹⁷ Case C-303/88 *Italy v Commission* [1991] ECR I-1433, paragraph 57; Case C-277/00 *Germany v Commission* (“SMI”), [2004] ECR I-3925, paragraph 75.

⁹⁸ Case C-310/99 *Italy v Commission* [2002] ECR I-2289, paragraph 91.

the Treaty, as well as those persons that obtained a total advantage from swap transactions in which they took part not exceeding the thresholds laid down in the *De minimis* Regulation, so long as those transactions also comply with the other conditions laid down in that regulation. The remaining natural and legal persons who participated in swap transactions should be considered the beneficiaries of the unlawfully implemented State aid from which the Bulgarian authorities are required to recover the advantage received as a result of those transactions.

7.2. Quantification of the Aid

- (172) The Commission is not legally required to fix the exact amount to be recovered, especially where it lacks the necessary data to do so. Instead, it is sufficient for the Commission's decision to include information enabling the Member State to determine the recoverable amount without overmuch difficulty⁹⁹.
- (173) As explained at recital (147), the Commission considers that the following methodology should be used as a starting point by the Member State to determine the amount of incompatible aid to be recovered from each beneficiary:
- (i) determine the difference between the real market price of the privately-owned plot of forest land and the administrative price for that plot, determined in line with the prescriptions of the Regulation on basic prices; and
 - (ii) determine the difference between the real market price of the publicly-owned plot of forest land and the administrative price for that plot, determined in line with the prescriptions of the Regulation on basic prices.

The initial amount of State aid received as a result of the swap transaction is equal to the value of (ii) less the value of (i).

A correction to this initial amount should be made for those cases where a publicly-owned plot of land of a superior administrative value was swapped with a privately-owned plot of land of an inferior administrative value. According to the Bulgarian authorities, in those cases the beneficiary had to pay compensation to the State to cover the difference in value between the plots in those cases. Consequently, the initial amount of aid should be decreased by the amount of compensation paid by the beneficiary to the Bulgarian authorities. The resulting amount should then be recovered by the Bulgarian authorities from that beneficiary to account for the advantage obtained as a result of the swap transaction.

- (174) For the determination of the market prices of a plots concerned, the economic value of that land at the moment of the swap should be fully reflected. From

⁹⁹ Case C-480/98 *Spain v Commission* [2000] ECR I 8717, paragraph 25 and Joint Cases C-67/85, C-68/85 and C-70/85 *Kwekerij van der Kooy BV and others v Commission* [1988] ECR 219.

the information contained in the submission of the Bulgarian authorities dated 29 August 2008, it appears that in certain cases buildings and infrastructure had already been constructed on forest plots belonging to the State before the swap was carried out, even if the plot was not previously reclassified as land available for construction. In such cases, the Commission is of the opinion that the value of such buildings and/or infrastructure should also be fully reflected in the plot's market value.

- (175) The Commission notes that the information on the administrative prices used in the swap transactions as well as the market prices of all plots concerned by those transactions at the moment of the swaps are already in the possession of the Bulgarian authorities¹⁰⁰, so that the Bulgarian authorities should not encounter overmuch difficulty in determining the recoverable amounts on the basis of the methodology described in recital (171)¹⁰¹.
- (176) However, in cases where the Bulgarian authorities can raise legitimate concerns that that methodology cannot be implemented or leads to an amount that manifestly does not adequately reflect the amount of State aid received by the beneficiary, it may decide to carry out an evaluation of the market prices of the swapped plots at the time of the transaction by using an independent expert, qualified to perform such valuations, and chosen through an open public tender procedure. When establishing the procedure for choosing that expert, even in cases where the contract does not exceed the thresholds of the Union public procurement directives, the principles of transparency and equal treatment should be respected. In particular, the tender procedure should be: (i) adequately advertised; (ii) based on objective selection criteria known in advance; and (iii) include the information that, after the pre-selection stage, the final decision will be taken under the participation of representatives of the Commission's services. In those exceptional cases, the Bulgarian authorities must: (i) indicate the plot(s) concerned, (ii) indicate the justification for the need of an independent expert evaluation in that particular case; and (iii) submit to the Commission a proposal for an independent expert (selected by public tender) to be agreed on by both the Commission and the Republic of Bulgaria.
- (177) Finally, since the purpose of recovery is to restore the status quo ante as existed prior to date on which the swap transaction was carried out, the Commission considers that, in light of the exceptional nature of swap agreements in relation to forest land that has not been commercially exploited, the Republic of Bulgaria would comply with its obligation to recover the unlawfully implemented aid by undoing the contested swap transactions by swapping back the plots concerned. This would only lead to adequate recovery, however, where no material alterations have been made to both the publicly-owned and privately-owned forest land concerned since the date of

¹⁰⁰ This information was submitted by Bulgaria in spreadsheet sent to the Commission by email of 21 January 2014 (hereinafter: submission 2014/032997).

¹⁰¹ I.e. the (i) market price for forest plot concerned and (ii) administrative price for the forest plot concerned as determined in application of the Regulation on basic prices and effectively used for the purpose of the swap transaction, in the amounts stated in submission 2014/032997.

the swap transaction. In such cases, the Commission must be informed of the plots concerned within two months from the notification of this decision to the Republic of Bulgaria, the corresponding swaps should be undone and proof of that operation should be provided within four months from the date of the notification of this decision.

- (178) In all cases where recovery is required, that recovery shall be put into effect from the time when the advantage accrued to the beneficiaries, that is, from the date of the legal act granting the beneficiaries right to swap their privately-owned forest land for the publicly-owned forest land.
- (179) The sums to be recovered should bear interest from the date on which they were put at the disposal of the beneficiaries until their actual recovery. The interest should be calculated on a compound basis in accordance with Chapter V of Regulation (EC) No 794/2004 and to Regulation (EC) No 271/2008 amending Regulation (EC) No 794/2004.
- (180) The timing for the recovery of State aid amounts from individual beneficiaries should as much as possible follow those specified in the Recovery Notice¹⁰². In any event, the deadlines should not go beyond those specified in the Table 5.

Table 5: Recovery Schedule

Timing	Action
1. within two months following the notification of this decision to the Republic of Bulgaria:	<p>The Republic of Bulgaria must inform the Commission of the measures planned or taken to implement the decision, and in particular:</p> <ul style="list-style-type: none"> (i) submit to the Commission a list of all swaps concerned by the recovery, indicating the following information: <ul style="list-style-type: none"> - the administrative and market prices for the privately-owned and publicly-owned forest plots being swapped (based on the information provided by the Republic of Bulgaria in its submission 2014/032997), information on the additional compensation payments involved in each transaction, and the resulting State aid amount to be recovered; - the name of the private party involved in each transaction and an indication of reasons why this beneficiary is or is not considered to be an undertaking. (ii) identification of cases in which the recovery will be conducted based on an expert evaluation of the

¹⁰² Notice from the Commission — Towards an effective implementation of Commission decisions ordering Member States to recover unlawful and incompatible State aid, OJ C 272, 15.11.2007, p. 4-17

	<p>market prices of the forest plots at the moment the swap occurred (recital (177));</p> <p>(iii) identification of cases in which recovery will be carried out by undoing the swap transaction (recital (178)).</p>
2. within four months following the notification of this decision to the Republic of Bulgaria:	For the plots indicated under point 1(ii) above the Republic of Bulgaria should have appointed an independent expert to perform the valuation of these plots. That expert should be selected by open public tender and appointed in agreement with the Commission, upon a prior proposal from the Republic of Bulgaria.
3. within seven months following the notification of this decision to the Republic of Bulgaria:	The Republic of Bulgaria should present to the Commission the valuation report from the independent expert for the plots identified under point 1(ii) above.
4. within eight months following the notification of this decision to the Republic of Bulgaria:	The Republic of Bulgaria should have sent the recovery orders to all beneficiaries concerned specifying the exact aid amounts to be recovered.
5. within twelve months following the notification of this decision to the Republic of Bulgaria:	The Republic of Bulgaria must have implemented recovery for all swap transactions concerned.

HAS ADOPTED THIS DECISION:

Article 1

The State aid, granted to undertakings in the context of swap transactions of publicly-owned forest land in return for privately-owned forest land in the period from 1 January 2007 until 27 January 2009, unlawfully put into effect by the Republic of Bulgaria in breach of Article 108(3) of the Treaty, is incompatible with the internal market.

Article 2

Individual aid granted under the swap transactions referred to in Article 1 does not constitute aid if, at the time it is granted, it fulfils the conditions laid down by a

regulation adopted pursuant to Article 2 of Council Regulation (EC) No 994/98¹⁰³ which is applicable at the time when the aid is granted.

Article 3

Individual aid granted under the swap transactions referred to in Article 1 which, at the time it is granted, fulfils the conditions laid down by a regulation adopted pursuant to Article 1 of Council Regulation (EC) No 994/98 or by any other approved aid scheme is compatible with the internal market, up to maximum aid intensities applicable to that type of aid.

Article 4

1. The Republic of Bulgaria shall recover the incompatible aid granted under the swap transactions referred to in Article 1 from the beneficiaries.
2. By way of derogation from paragraph 1, the incompatible aid may be recovered from the beneficiaries by undoing the swap transactions, in cases where no material alterations have been made to both the publicly-owned and privately-owned forest land concerned by the transaction since the date of that transaction.
3. The sums to be recovered shall bear interest from the date on which they were put at the disposal of the beneficiaries until their actual recovery.
4. The interest shall be calculated on a compound basis in accordance with Chapter V of Regulation (EC) No 794/2004 and with Regulation (EC) No 271/2008.
5. The Republic of Bulgaria shall cancel all outstanding payments of aid under the swap transactions referred to in Article 1 with effect from the date of adoption of this decision.

Article 5

1. Recovery of the aid granted under the scheme referred to in Article 1 shall be immediate and effective.
2. The Republic of Bulgaria shall ensure that this Decision is fully implemented within twelve months following the date of notification of this Decision.

¹⁰³ As amended by the Council Regulation No 733/2013 of 22 July 2013, OJ L204, 31.07.2013, p. 11

Article 6

1. Within four months following notification of this Decision, the Republic of Bulgaria shall submit to the Commission the following information:
 - (a) a list of all swap transactions, indicating the following information:
 - the administrative and market prices for the privately-owned and publicly-owned forest plots swapped, information on the additional cash amounts involved in each transaction, and the resulting State aid amount;
 - the name of the private party, i.e. the beneficiary of the swap transaction, involved in each transaction and an indication of the reasons why that party is or is not considered to be an undertaking.
 - (b) identification of the cases in which recovery will be conducted on the basis of the market prices at the moment of the swap transactions specified in submission 2014/032997 of the Republic of Bulgaria ;
 - (c) identification of the cases in which recovery will be effectuated by undoing the swap transaction;
 - (d) identification of the cases in which recovery will be implemented on the basis of amounts determined by an independent expert evaluator and documents demonstrating that such an independent expert, selected by public tender and agreed to by the Commission, has been appointed.
2. Within eight months following notification of this Decision, the Republic of Bulgaria shall submit to the Commission the following information:
 - (a) the list of beneficiaries that have received aid under the swap transactions referred to in Article 1 and the total amount of aid received by each of them as a result of those transactions;
 - (b) the total amount (principal and recovery interests) to be recovered from each beneficiary;
 - (c) a detailed description of the measures already taken and planned to comply with this Decision;
 - (d) documents demonstrating that the beneficiaries have been ordered to repay the aid.
3. Within twelve months following notification of this Decision, the Republic of Bulgaria shall submit documents demonstrating that the aid has fully been recovered from the beneficiaries concerned.
4. The Republic of Bulgaria shall keep the Commission informed of the progress of the national measures taken to implement this Decision until the recovery of the aid granted under the swap transactions referred to in Article 1 has been

completed by submitting reports on a two-monthly basis. It shall immediately submit, on simple request by the Commission, information on the measures already taken and planned to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and recovery interest already recovered from the beneficiaries

Article 7

This Decision is addressed to the Republic of Bulgaria.

Done at Brussels,

For the Commission

Joaquín Almunia
Vice-president of the Commission

Notice

If the decision contains confidential information which should not be published, please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed to agree to publication of the full text of the decision. Your request specifying the relevant information should be sent by registered letter or fax to:

European Commission

Directorate-General for Competition

State Aid Registry

B-1049 Brussels

Belgium

Fax No: +32 2 29 61242