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Subject: SA.26212 and SA.26217 (2011/C; ex-2011/NN, ex-CP176a/2008 and CP176b/2008) – Bulgaria

Alleged aid in the form of swap of ownership of privately owned forest estates for the governmental ones

Sir, /Madam***

The Commission wishes to inform Bulgaria that, having examined the information supplied by your authorities on the measure referred to above, it has decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union ("TFEU").

1. PROCEDURE

- (1) On 17 July 2008 a complaint from a complainant wishing to remain anonymous has been received and was granted the number CP 176/2008 (A/14905). On 11 August 2008 the non-confidential version of this complaint was forwarded to the Bulgarian authorities for their comments (D/53153). On 28 August 2008 further information was received from the complainant (A/17566). On 2 September 2009, a first reply was received from the Bulgarian authorities (A/17907).
- (2) The complainant submitted additional information on the case on 3 September 2008 (A/17987) and 1 October 2008 (A/20168) respectively. This information was sent to the Bulgarian authorities on 7 October 2008 (D/53840). The reply from the Bulgarian authorities was received on 28 October 2008 (A/22818). On 5 December 2008 the complainant submitted some further information (A/26375).

- (3) On 27 January 2009 information on the case was received from a third party (A/2063).
- (4) On 14 May 2009 (A/14172), 2 June 2009 (A/13121) and 8 June 2009 (A/13953) respectively, a complaint on the same subject was received from a second complainant. The non-confidential version of this second complaint was forwarded to the Bulgarian authorities for their comments on 8 December 2009 (D/55202).
- (5) On 4 December 2009 the case was split administratively. The part of the complaint related to correspondence with the first complainant was re-named SA.26212 (CP 176a/2008). The part of the complaint related to the correspondence with the second complainant was re-named SA.26217 (CP176b/2008).
- (6) In the case CP176b/2008, a reply from the Bulgarian authorities on the request for information of 8 December 2009 was received on 4 January 2010 (A/123).
- (7) On 23 March 2010 information on the case from a third party was received (A/5244) and was registered in the case CP176b/2008.
- (8) In the case CP176a/2008, the non-confidential version of certain documents was requested from the complainant (D/55201). This was received on 6 January 2010 (A/328) and was sent to the Bulgarian authorities for their comments on 26 January 2010 (D/5308).
- (9) On 2 February 2010 the Bulgarian authorities requested the translation into Bulgarian of certain documents that were sent to them in the correspondence with the number D/5308. Furthermore, on 10 February 2010 they have requested the extension of the deadline to provide information (A/2443), which was agreed to by the Commission by letter of 16 February 2010 (D/5635).
- (10) On 18 February 2010 additional information was received from the complainant (A/3075), mentioning not only forest swaps, but also swaps of farmland.
- (11) On 22 February 2010 a technical meeting was held with the Bulgarian authorities in order to discuss the issues raised by the complainants. Certain questions raised during that meeting were sent in writing to the Bulgarian authorities by electronic mail on 24 February 2010 (D/5783).
- (12) On 24 February 2010 the Bulgarian translation of the correspondence of 26 January 2010 (D/5308) was sent to the Bulgarian authorities (D/5777).
- (13) On 17 March 2010 the latest submission from the complainant of 18 February 2010 (A/3075) was transmitted to the Bulgarian authorities and their comments only in relation to the swaps of forests were requested (D/6272).

- (14) On 23 March 2010 the reply from the Bulgarian authorities on the request for information of 26 January 2010 (D/5308; translations sent with the number D/5777) was received (A/5048).
- (15) On 27 March 2010 the reply from the Bulgarian authorities on the questions sent on 24 February 2010 (D/5783) was received (A/5403).
- (16) On 25 March 2010 the Bulgarian authorities requested an extension of the deadline for their reply (A/5194) and the translation into Bulgarian of certain documents transmitted on 18 February 2010 (D/6272). This extension was granted by the Commission on 8 April 2010 (A/6593). On 19 April 2010 the English version of the documents transmitted on 18 February 2010 (D/6272) was sent to the Bulgarian authorities (D/6737).
- (17) On 10 August 2010 (D/8649) and 11 August 2010 (D/8687) respectively the English and Bulgarian versions of a request for information were sent to the Bulgarian authorities. The Bulgarian authorities submitted the information requested on 30 August 2010 (A/12003).
- (18) On 12 October 2010 a further submission on the case (CP 176a/08) was received from the complainant (A/13173). On that same day a meeting was held with the Bulgarian authorities to clarify certain issues. During that meeting the Bulgarian authorities provided the Commission with certain information in the form of a presentation, which was registered on 19 November 2010.
- (19) In view of a further meeting on the swap cases being planned, the Commission informally requested the Bulgarian authorities for some information on 26 January 2011. Additionally, on that same day, a new submission was received from the complainant on the case CP 176a/08.
- (20) On 3 February 2011 a meeting was held with the representatives of the Bulgarian authorities. As a follow-up to this meeting, the Bulgarian authorities sent certain clarifications to the Commission on 14 February 2011.

2. DESCRIPTION OF THE ALLEGED AID

- (21) After their expropriation in 1947, all forests in Bulgaria became public property, and remained so until 2000, when the restitution of forests to previous private owners was started. Certain forest areas then became private property.
- (22) The Bulgarian authorities indicated that on the basis of an amendment to the Forest Act¹, which came into effect 22 February 2002, swaps of forest and land plots from the forestry fund (owned by the State) with privately owned forests were made possible. This amendment to the Forest Act, in force till 27 January 2009, defined the order and conditions for the swaps. According to the

¹ Bulgarian Forests Act promulgated in SG No 125 of 29 December 1997

Bulgarian authorities, the swaps aimed towards a more efficient ownership structure and consolidation of publicly owned forests.

- (23) According to the Bulgarian authorities, if the private party was receiving a land of higher value through the swap, it had to pay compensation to the State for the difference in price. The Bulgarian authorities have indicated that as a general rule, the State only accepted swaps through which the State received land of a higher value.
- (24) The complainants consider that State aid was granted in the context of swap transactions undertaken by the Bulgarian authorities. Allegedly, where public forest estates were exchanged for private ones, the Bulgarian State realised a price which is alleged to be lower than the market value. In several cases the swaps were followed by a change in the use of the land swapped (i.e. from forest to construction land), whereby the value of the plot obtained in this way would be even further increased.
- (25) Both the swap and the change of use of the land are based on Bulgarian legislation that came into force (before the Bulgarian Accession to the European Union). In particular, 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 land² ("Regulation on basic prices") which defined the methodology for evaluation for prices of forest estates entered into force on 18 November 2003.
- (26) On 27 January 2009 a ban on forest swaps came into force; on 3 September 2009, a moratorium on the subsequent change of the use of the land was introduced. Therefore, forest swaps with private parties and subsequent changes to the use of the land, have no longer been possible since 2009. The complainants (request that the alleged aid resulting from the swaps and changes of the status of the land is declared unlawful and incompatible, and is recovered by the Bulgarian authorities.

2.1. The beneficiaries

- (27) According to the complainants, potential beneficiaries of the aid are natural persons, private companies or municipalities, often active in real estate development and/or tourism activities, who exchanged their forest estates for publicly owned forest plots.

2.2. The aid amount

- (28) At this stage, and based on the information available to the Commission, it is impossible to assess the exact amount of aid potentially granted in the context of the swaps of forest estates. On the basis of the information provided by the

² Adopted by Decree of the Council of Ministers No 252 of 6 November 2003, promulgated in Bulgarian State Journal No 101 of 18 November 2003 (last amended in SG No 1 of 5 January 2007).

complainants³ it seems that – at least in certain cases – the aid amount involved exceeds the *de minimis* threshold.

2.3. Granting of the aid according to the complainants

- (29) According to the complainants State aid would be granted in the context of forest swaps in a two-stage process. At first stage, state-owned forests would be swapped for privately-owned ones upon inequitable terms, primarily because of the strategic location of such public forests. Secondly, an approval would be granted by the competent authority for the alteration of the designated status of the former state-owned forest and its inclusion in the urbanised area, which allow development to be undertaken. This scheme would consequently, by cumulation of both steps, allow undertakings to obtain an economic benefit, as the prices for the public land charged in the swap and/or the subsequent change of the use of land would be lower than the market price for comparable land sold on the market. The Bulgarian legislation in place would hence create a State aid scheme.
- (30) The prices of forest estates swapped by the state as an owner are determined on the basis of a specialized Bulgarian 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 land (the "Regulation on basic prices").
- (31) According to the complainants, the price as determined in application of the Regulation on basic prices is lower than the market price. The Regulation on basic prices would not sufficiently reflect the value of the estates as objects of construction planning. For example, the ordinance does not require that the evaluation has to take into account the zoning status of the respective property, i.e. whether the respective forest estates are designated for construction in spatial development plans. This, according to the complainants, can result in price differences of tens or hundreds times between the market price and the preliminary state-conducted assessment. Moreover, the coefficients for determining the administrative prices have not been (sufficiently) updated between 2004 and 2010. Therefore, according to the complainants, in the swap transactions, the real market price of the government forests is never used.
- (32) Finally, the complainants argue that the market price of the swapped forest estate becomes many times higher than the price determined in application of

³ The complainants estimate that already the amount of aid involved in 15 transactions chosen out of the 147 swaps, would be between EUR 55 million (if only the swap is considered) and EUR 126 million (if the change in the use of the land is taken into account). According to the information they provide, the aid amounts in each of these 15 transactions (not taking into account the potential change in the use of the land) would range from EUR 340 360 to EUR 27.9 million. Even though this estimation only relates to the difference between the administrative and the market price of the publicly owned forest plot (i.e. advantage to the private party), considering that the privately-owned plots were in general located in less attractive areas, the difference between their administrative and market price (i.e. advantage to the public party) appears to be less profound. Therefore, the complainants argue that the actual State aid amount granted to the private party, i.e. the difference between the advantages to the private and to the public parties, could still be substantial.

the Regulation on basic prices, when the new owner of the property amends the purpose of the swapped land to constructible land, which is regularly done.

2.4. Preliminary position of the Bulgarian authorities

- (33) Bulgarian authorities argue that no State aid in the sense of Article 107(1) of the Treaty on the Functioning of the European Union ("TFEU") is involved in swaps of forest estates. As one of the reasons they quote that the complainants have not demonstrated how the potential aid would be affecting trade between Member States, and that no wood from the swapped forest land would be exported⁴. The authorities also indicated that should the Commission find that State aid is involved, they would be prepared to notify an aid scheme in line with the Guidelines on national regional aid ("the RAG").
- (34) Next to that, they point to the fact that the price of the publicly-owned forest land is always determined in line with the Commission Communication on State aid elements in sales of land and buildings by public authorities⁵ (the "Communication on sales of land"). The evaluation is done by an independent evaluator before the transaction takes place. When determining the price of the plot, the evaluator follows the prescriptions for setting prices of the Regulation on basic prices. These take into account certain objective criteria, like the location of the plot, the significance of the area for the protection of forest against urbanisation and the value of the plant species present on the plot. Before the swap transaction is closed, both parties to the deal (private and public) have to agree that they indeed want to exchange the land at the price determined by the evaluator.
- (35) The Bulgarian authorities state that in order to verify if the price required for the publicly-owned forest plot in a swap transaction is market conform, it should be compared to the price of other forest plots, and not, as suggested by the complainants, to the prices achieved for the sales of land for construction,. Their main argument is that the law offered only the possibility to request such a change of designation, but not a legal right to such a change. Supporting evidence shows that only a small part of swaps was followed up by a change in the designated use of the land:

Year when swap was conducted	Number of swaps	Cases of changed status of land
2006	15	3
2007	23	8
2008	62	4

⁴ Based on the information provided by the authorities, this appears to cover only 3 municipalities. For the rest of the country they did not provide any information.

⁵ OJ C 209 of 10.07.1997, p. 3-5

2009	47	0
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- (36) The procedure for the change of the designation of the land is set out in detail in the Implementing Regulation to the Forests Act. First the (new) owner of the forest plot has to submit an application to the Executive Director of the Executive Agency for Forests, which is part of the Ministry of Agriculture and Forests. A positive opinion of the local authorities (state forestry and game protection services in the areas where the plot is located) is required. A commission of (internal and potentially external) experts examines the application and submits an opinion to the Executive Director who adopts on its basis a preliminary decision. If the decision is positive and confirms the grounds for and the legality of the application, it is forwarded to all services concerned being responsible for the change of designation (the provincial governor, the mayor of the municipality, and the director of the regional directorate responsible for forests). The subsequent stages of the administrative procedure are handled by bodies independent from the Minister of Agriculture and/or the Executive Director. On the basis of the positive preliminary decision, the owner has to submit an application to the municipality concerned for a detailed master plan to be commissioned, drafted and approved. Such a plan requires the consultation of all (local) stakeholders. If such a plan is approved and after it has come into force the owner submits an application to the Minister of Agriculture and Food for the exclusion of the forest plot concerned from the forestry stock. For such exclusion a stamp duty, determined by an independent evaluator in line with the provisions of the Regulation on basic prices, is due. After the payment of the stamp duty a procedure for the issuance of an administrative decision on the alteration of the designated status of the plot of land is launched. Depending on the size of the property this is handled either by the Minister of Agriculture and Food (if concerns less than 10 ha of land) or by the Council of Ministers.
- (37) Additionally, the Bulgarian authorities have informed the Commission that a ban on forest swaps has been introduced into legislation on 23 January 2009 and came into force on 27 January 2009. Furthermore, on 5 August 2009 the Bulgarian government issued an order suspending the examination of applications for the change of the status of the forest land acquired by private natural or legal persons by means of swap. This moratorium was confirmed by a Resolution of the Bulgarian National Assembly of 3 September 2009. In view of the foregoing, forest swaps with private parties and subsequent changes to the designated use of the land, are no longer possible in Bulgaria.
- (38) The Bulgarian authorities have also informed the Commission that in certain cases corruptive practices may have taken place, leading to situations where for the determination of the prices of swapped land the Regulation on basic prices may not have been respected (or not correctly followed). These cases were transmitted to the Bulgarian Prosecutor's Office, and criminal investigations against high-ranking officials, including two former ministers of Agriculture and a former Head of the Bulgarian Forestry Agency, were opened on the grounds that the relevant Bulgarian legislation was incorrectly applied.

It is important to highlight that these criminal investigations do not concern the same issues as the present State aid investigation: the criminal investigations address the incorrect application of the Bulgarian law, while the State aid investigation covers the effects of the correct application of the abovementioned legal provisions.

2.5. State aid notification

- (39) The Bulgarian authorities consider that the forest swaps and subsequent changes in the use of the land do not involve State aid. They indicated their willingness to notify an aid scheme, if the Commission should find that (unlawful) State aid was present.

2.6. Legal basis

- (40) The national legal basis for the forest swaps, the change in the designation of the forest land and the calculation of prices for use in the swap transactions is:
- a. Bulgarian Forests Act
 - b. 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
 - c. State Property Act⁶
 - d. Obligations and Contracts Act⁷.

3. ASSESSMENT OF THE POTENTIAL AID AND ITS COMPATIBILITY

3.1. Existence of State aid

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

3.1.1 Intrinsic link between the swap and change in the use of the land

- (42) The first issue at stake is whether the two steps of the transaction, i.e. the swap and the subsequent change of use of the land (from forest into land available for construction), are intrinsically linked. Looking at the numerical evidence provided by the Bulgarian authorities, the Commission notes that out of the 147 swaps (2006-2009) 15 were followed by a change in status (10%). These data, as well as the different legal and administrative procedures in place,

⁶ Promulgated in SG No 44 of 21 May 1996 (last amended in Bulgarian State Journal No 41 of 02 June 2009)

⁷ Promulgated in SG No 275 of 22 November 1950 (last amended in Bulgarian State Journal No 50 of 30 May 2008)

seem to confirm the thesis of the Bulgarian authorities that – as a general principle – the two steps are not intrinsically linked.⁸

- (43) On the other hand, the Bulgarian authorities indicated that the formulas for setting the prices of forest estates and the stamp duty fee payable for the change in the use of the land, were set so as to achieve that the full – swap – price of a forest estate plus change in the use of the land would to a large extent equal the market price of similar estate available for construction. This implies that the authorities may have been assuming that many investors might try to couple both steps into one transaction.
- (44) Having regard to the above considerations, the Commission at this stage deems that, as a general principle, the two steps, i.e. the swap and the change in the use of the land, are not intrinsically linked and should be analysed separately. However, it cannot be excluded that in certain cases it was the intention of the authorities and the private party to the swap, from the outset, that the swap would be followed by a reclassification of the swapped land. In such cases the two stages would in fact be intrinsically linked.
- (45) Therefore, the Commission invites all interested parties to provide comments on the proposed approach, i.e. considering that there is no intrinsic link between the two steps of the transaction.

3.1.2 Potential State aid in the change of the use of the land

- (46) The process of changing the use of a certain (forest) estate into constructible land is documented in the Bulgarian legislation. The complainants claim that the fact that the owners of forest land could (until the moratorium was proclaimed) change the use of that land largely increased its value, and hence State aid was granted.
- (47) The Commission notes that prima facie the change in the status of the land does not seem to have involved any transfer of public resources. The stamp duty due on such transactions was calculated according to legal provisions and – to the Commission's knowledge – paid in all cases concerned. Therefore, it would seem that even though a certain economic advantage may have been granted to the private undertaking concerned as a result of the administrative decisions approving the change in the status of the land, these administrative decisions would not result in the granting of State aid in the meaning of Article 107(1) TFEU. However, the Commission does not take a definite position on this issue and invites interested parties to comment on the question of whether in the light of the generally acknowledged definition of state aid that requires the involvement of state resources, the administrative change of the status of the land constitutes state aid in the meaning of Article 107(1) TFEU.

⁸ An unknown number of intended changes of use may be blocked by the moratorium imposed in 2009.

3.1.3 Potential State aid in the swap of forest land

3.1.3.1 Swaps as a general measure

- (48) When analysing whether the forest swap transactions involve State aid, the first issue to consider is whether such a scheme could be considered a general measure. Should that be the case, then no State aid in the sense of Article 107(1) TFEU would be granted. In line with the principles elaborated in the Commission notice on the application of the State aid rules to measures relating to direct business taxation⁹ measures that are open to all economic agents within a Member State or pursue general economic policy objectives do not constitute State aid in the meaning of Article 107(1) TFEU. They must, however, be effectively open to all firms on an equal access basis and may not de facto be reduced in scope through, e.g. the discretionary power of the State to grant them.
- (49) In relation to the above, the Bulgarian authorities effectively argued that any owner of forest property could, under the applicable legislation, request to swap the privately owned forest for a publicly owned forest. However, when deciding on such swap the Standing Executive Committee in the Forestry Agency used criteria determined by the director of the Agency. Moreover, the Minister of Agriculture had the discretion to veto a swap.
- (50) In view of the foregoing, the Bulgarian public authorities did have considerable discretion in deciding on the individual swap transactions. Consequently, the Commission considers that the scheme of swaps of private forest land for public forest land cannot be considered to constitute a general measure.

3.1.3.2 State aid in swap transactions

- (51) In order to establish whether the swap transactions grant an economic advantage to private undertakings involved, the Commission has to determine whether the price which was established by the evaluators on the basis of provisions laid down in the Bulgarian legislation, fully reflected the market value of the forest land concerned on the date of valuation.

General

- (52) In line with the Market Economy Investor Principle ("MEIP"), in order not to be granting any State aid public authorities have to behave for the purposes of the transactions in the same way as private market investors would do. This implies that also when entering into swap transactions they should charge a market conform price for the land in their possession.

⁹ OJ C 384 of 10.12.1998, p. 3-9

- (53) The Commission considers that the presence of an economic advantage in the swap of publicly owned forest land for privately owned forest plots must be assessed with reference to the Communication on sales of land¹⁰.
- (54) The Communication on sales of land lays down two possibilities for automatically excluding the presence of State aid in sales of land and buildings by public authorities: when the sale is carried out through an unconditional bidding procedure, accepting the best bid or, in the absence of such procedure, when the sale price is at least equal to the value established by an independent expert evaluation.
- (55) In the present case of land swaps, there was no formal bidding procedure for any of the publicly owned forest plots. The potential beneficiaries of aid already held forest land positions that they wished to exchange for other plots owned by the State. It were hence usually the private parties applying to the Bulgarian authorities for the exchange of forest plots to take place, and not the authorities initiating the swap. Therefore the Commission has to establish whether the prices used for carrying out the land swaps were established in line with the principles set out in Commission communication on sales of land in respect of independent expert evaluation.
- (56) Point 2 (a) of the Commission communication on sales of land, under the heading "Sale without an unconditional bidding procedure", reads as follows:

(a) Independent expert evaluation

If public authorities intend not to use the procedure described under 1, an independent evaluation should be carried out by one or more independent asset valuers prior to the sale negotiations in order to establish the market value on the basis of generally accepted market indicators and valuation standards. The market price thus established is the minimum purchase price that can be agreed without granting State aid.

An 'asset valuer' is a person of good repute who:

- has obtained an appropriate degree at a recognized centre of learning or an equivalent academic qualification,
- has suitable experience and is competent in valuing land and buildings in the location and of the category of the asset.

If in any Member State there are not appropriate established academic qualifications, the asset valuer should be a member of a recognized professional body concerned with the valuation of land and buildings and either:

- be appointed by the courts or an authority of equivalent status,
- have as a minimum a recognized certificate of secondary education and sufficient level of training with at least three years post-qualification practical

¹⁰ Commission communication on State aid elements in sales of land and buildings by public authorities, O.J. C 209 of 10.07.1997, p.3-5

experience in, and with knowledge of, valuing land and buildings in that particular locality.

The valuer should be independent in the carrying out of his tasks, i.e. public authorities should not be entitled to issue orders as regards the result of the valuation. State valuation offices and public officers or employees are to be regarded as independent provided that undue influence on their findings is effectively excluded.

'Market value' means the price at which land and buildings could be sold under private contract between a willing seller and an arm's length buyer on the date of valuation, it being assumed that the property is publicly exposed to the market, that market conditions permit orderly disposal and that a normal period, having regard to the nature of the property, is available for the negotiation of the sale.

Evaluation prior to transaction

- (57) The Commission notes that for the purpose of the swap transactions the price of both, public and private, plots of forest land is determined in the course of an independent expert valuation. The Bulgarian authorities confirmed that all valuations were established before the swap transaction took place. Moreover, before the swap transaction became effective, both parties to the deal (private and public) had to confirm that they indeed wanted to exchange the land at the price determined by the evaluator.

Independence of evaluators

- (58) All valuers preparing and defending valuations of state forest estates have to meet the provisions of the Bulgarian Ordinance No 17 on issuing licences to natural persons and legal entities to pursue private forestry. The valuers are part of the expert teams working with the courts of the Republic of Bulgaria. They do not have any employment or official legal relationship with the Ministry of Agriculture and Food or with the State Forestry Agency. According to the Regulation on basic prices, the selection of evaluators for the purpose of evaluating the forest land plots to be swapped is conducted by the "owner" or "a party concerned".
- (59) At this stage of the procedure, the Commission considers that the evaluators used for the purposes of valuing the forest land parcels in the swap transactions are independent evaluators in the meaning of the Communication on sales of land.

Market price determined on basis of accepted market indicators and evaluation standards

- (60) The Commission has to verify whether the price of the forest land concerned established by the valuers for the purpose of the swap transaction reflects the market value of the asset and was established on the basis of generally accepted market indicators and evaluation standards.

- (61) The prices were determined by experts using solely the formulas set in the Regulation on basic prices. The Bulgarian law does not allow the experts to deviate from the price determined in this way.
- (62) The basic price of a forest land estate (set for the purpose of the swap) is the sum of the basic price of land and the price of the stand (plant species situated on the estate).
- (63) The value of land is determined in relation to the average values of land according to categories of land offering identical conditions for the growth of plants (150 site types, as per Annex 1 of the Regulation on basic prices). The such determined value of land is further adjusted using an adjustment coefficient that takes account of location of the estate in relation to the local and national infrastructure. This adjustment coefficient is set out in Annex 2 of the Regulation on basic prices.
- (64) The adjustment coefficient K_m is set by the following formula:

$$K_m = 1 + g + m + s + p, \text{ where:}$$

s – coefficient of proximity to an urban area measured by air (from 0.00 to 0.25)

m - coefficient of proximity to the sea measured by air (from 0.00 to 0.20)

p – coefficient of proximity to a surfaced road measured by air. (from 0.00 to 0.2)

g = coefficient of proximity to a city, expressed in figures reflecting the distance to a given city (shortest road distance between estate and city). Cities are divided into 6 groups:

Group 1: Sofia (from 0.00 to 0.7)	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, Dupnitsa, 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)

- (65) The land value is furthermore adjusted by adding an increase per hectare which is set on the basis of the average price of land observed in the area where the estate is situated. These price increases are laid down in the provisions of Annex 3 to the Regulation on basic prices, and are indicated in the table below:

	Increment (BGN/hectares)
Sofia, national resorts and adjacent residential holiday areas, land located within 10 km 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

- (66) The total value of land determined in that way is the so-called basic value of land.
- (67) The price of the stand (plant species situated on the estate) present on the land is the value of their current age and the projected value of their rotation age. The value of wood from forest stands at their current age (the age at the time of valuation) equals to the profit from sales of the varieties at average market prices where costs related to felling, primary processing, and transportation to a temporary storage place are deducted. In case the income does not cover the costs, the wood does not have any value.
- (68) Income from sales is determined by grading the stock and the volume of wood categories. The costs (BGN/cubic meter) 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. The costs of wood transportation are determined by the type of trees, category of wood, and the average transportation distance. An addition is made to each kilometre of transportation as follows: the cost of transportation is multiplied by a coefficient which takes into account the level of difficulty of the route.
- (69) 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 Forestry Agency, on the basis of weighted averages calculated from statistical data collected over a period of 3 years (the last year has a double weight).

- (70) Thus by adding the value of the plant species, as determined by the evaluator, to the basic price of the land, the basic price of a forest land estate is obtained.
- (71) In order to protect the environment-shaping and recreational functions of forests, areas of so-called 'special protection against urbanization' are established in certain regions of Bulgaria. Pursuant to the provisions of Annex 19 to the Regulation on basic prices, the basic prices of forest properties situated in such areas are multiplied by a coefficient K identified in the table below¹¹, namely:

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

- (72) In addition and only in case of swaps, the so called market regulator coefficient was applied, according to Annex 20 to the Regulation on basic prices. It is expressed in BGN/m², and ranges from 10 for the seaside adjacent lands, big mountain resorts and Sofia to 1 for least attractive land.
- (73) The total price of a forest estate that is the result of the expert valuation for the purposes of the swaps is the basic price of the forest state, multiplied, where relevant, by the "special protection against urbanization" coefficient and adjusted by "market regulator coefficient".
- (74) At this stage of the procedure, the Commission considers that the above method of setting administrative prices does not necessarily take into account the same criteria on the basis of which market prices would be established in private transactions. Whether this method is acceptable has to be established in the light of the jurisprudence of the European Courts.
- (75) In a recent ruling on the Seydaland case¹², the General Court analysed the interpretation of the Commission Communication on sales of land. The Court held that where the national law establishes rules for calculating the market value of land for their sale by public authorities, the application of those rules

¹¹ In cases where an estate falls into more than one area, the higher coefficient is taken into account.

¹² Case C-239/09 Seydaland Vereinigte Agrarbetriebe GmbH & Co. KG v BVVG Bodenverwertungs- und -verwaltungs GmbH, [2010] ECR I-0000, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62009J0239:EN:HTML>

must, in order to comply with Art. 107 TFEU, lead in all cases to a price as close as possible to the market value. As that market value is theoretical, except in the case of sales accepting the highest bid, a margin for variation on the price obtained as compared with the theoretical price must be tolerated. As regards the provision at issue in the Seydaland case, the Court held that the "Article 87 EC [Article 107 TFEU] must be interpreted as not precluding the provision of national law laying down calculation methods for determining the value of agricultural and forestry land, offered for sale by public authorities [...] to the extent that those methods provide for the updating of the prices, where prices for such land are rising sharply, so that the price actually paid by the purchaser reflects, in so far as is possible, the market value of that land."

Market value on the date of valuation and granting of economic advantage

- (76) Therefore, the Commission has as a last step to corroborate that the price determined by the evaluators on the basis of the method and coefficients laid down in the Bulgarian legislation were able to reflect the market value of the forest land concerned on the date of valuation.
- (77) At this stage of the procedure, the Commission is unable, on the basis of data provided by the Bulgarian authorities, to establish whether the system of administrative prices as put into place when the Regulation on basic prices was adopted in 2003, was appropriate to reflect market prices for forest land on the basis of the coefficients established at the time, at the start of the application of the method, and leads in all cases to a price as close as possible to the market value, as required by the Seydaland ruling. The Commission notes information provided by Bulgaria according to which when the Regulation on basic prices was adopted in 2003, the administrative prices (price for the swap and fee for the change of the use of the land) equalled 75%-80% of the market prices for constructible land (unofficial approximate of Bulgarian authorities). This statement does not allow concluding that the method, at the entry into force of the system, allowed leading in all cases to a price as close as possible to the market value. The Commission has doubts as to whether the Bulgarian valuation method meets this requirement, and invites all interested parties, and in particular Member States that might apply similar methods of administrative prices to establish market values for forest land, to comment on the appropriateness of the method.
- (78) In the period 2005-2008, there was a very strong increase in demand for forest estates in Bulgaria, leading to a high increase in prices of plots, especially of those located in attractive areas. During this boom, the ratio of administrative to market prices as defined in paragraph (74) fell to 15-20% on average (unofficial approximate of Bulgarian authorities). This average consideration hides exponential growth for the most attractive plots, and limited increases for less attractive parts.
- (79) The Seydaland ruling requires that the methods for setting administrative prices include a mechanism for updating those valuations which would allow the selling price of the land to reflect in so far possible, the market value of that land, especially when prices were rising sharply, since otherwise that method was not suitable for reflecting the actual market prices in question.

- (80) In the case at hand, the Bulgarian authorities indicated that pursuant to the Regulation on basic prices (Art. 7.1 and Art. 32) the coefficients contained therein should have been updated yearly. This, however, according to the Bulgarian authorities, was not done. It therefore appears that the valuation method did not take into account the market prices at the time of the transaction.
- (81) Moreover, the Bulgarian authorities indicated that in 2010 the Regulation was updated on the basis of reliable market sources and the coefficients were significantly increased. The updated coefficients lead to high increases in the value of attractive plots when compared to the previous versions of the Regulation that were in application during the period when the swap deals took place.
- (82) Therefore, the fact that most of the coefficients to set the administrative prices for forest plots have not been adapted between 2003 and 2010 in order to reflect the changes in market prices, as well as the impossibility of the experts to use market prices for forest swap transactions, imply that the Bulgarian methodology for price-setting is not in line with the Seydaland ruling, which requires such methodology to take account of (at least) sharp increases in the market price. In fact, only the coefficients referred to in Annex 20 of the Regulation on basic prices ("market regulator coefficient") were modified in 2007.
- (83) Swaps can be compared to two sales transactions taking place simultaneously. Consequently, the prices determined in application of the Regulation on basic prices would be lower than market prices both in relation to the privately and publicly owned forest. The private party, however, always had to approve the transaction and agree on the proposed prices. Considering that most private operators would normally behave as profit-maximising investors, it is unlikely that they would agree to a swap that would be to their disadvantage. Additionally, the difference between the administrative value and the market value significantly differs from one plot to the other. Swapping less attractive private land for attractive public land after the start of the price surge in 2005 and reaching its height in 2008 at the administrative prices laid down in 2004 therefore is likely to entail substantial selective economic advantages for the private party. The Commission therefore has serious doubts that the Bulgarian evaluation system as it was applied in practice led to swaps at conditions that are in conformity with the MEIP.

Remaining conditions of Article 107(1) TFEU

- (84) The benefitting undertakings were either forestry undertakings or firms active in other sectors - mainly real estate development and tourism - as those were typically the private parties involved in the swap transactions. The fact that the private parties to the swaps were able to acquire forest estates for a price lower than the market price implies that they have obtained an economic advantage that can be mobilised either directly through the use of the land concerned, or indirectly as an asset that can be sold, used as a collateral for other transactions or that results in a general improvement of the balance sheet of

the beneficiary. This conclusion remains valid without prejudice to the sectors in which beneficiaries are active. It is therefore impossible to exclude that the competition was distorted in the forestry and/or in other sectors.

- (85) As mentioned above, the Bulgarian authorities have provided certain evidence that no exports of timber coming from swapped estates located in three municipalities have taken place. They have, however, not elaborated on a potential impact on trade in the forestry sector in the remaining municipalities, nor in the other sectors concerned by the swaps. The possibility of import substitution also was not dealt with. Based on the specificities of the sectors concerned, the Commission usually considers that undertakings active in real estate development and – a fortiori – in the tourism sector are operating on an EU-wide market. Consequently, the advantage granted may also have had an impact on the intra-EU trade.

3.1.4 Conclusion on the existence of State aid

- (86) In view of the foregoing considerations, the Commission, after a preliminary assessment, considers that it cannot without doubts confirm that no State aid in the sense of Article 107(1) TFEU was conferred to potential beneficiaries through the swaps of forest plots. Where the swaps were followed up by subsequent changes to the designated use of the land plots concerned, the Commission cannot exclude the possibility that the combined operation, if it is intrinsically linked, involves State aid. As to the question of whether the economic advantage that accrues to the owner of the swapped public land when the land use is changed by an administrative decision constitutes state aid, the Commission considers *prima facie* that due the absence of state resources, no state aid seems to be involved, but takes no definite position at this stage of the procedure.
- (87) Should a further investigation into the matter indeed confirm that State aid was granted, then the State aid amount involved would be calculated in the following manner:
- (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 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.

3.2. Legality of the aid

- (88) The Bulgarian authorities have not notified in line with Article 108(3) TFEU a measure relating to the granting of aid in the context of forest land swaps, before putting it into effect. Therefore, if the Commission indeed finds that State aid is present, such aid would be unlawful. Furthermore, if such aid would be found not to be compatible with the internal market, it would be subject to recovery.
- (89) Considering that Bulgaria joined the EU on 1st January 2007, it has to respect all EU State aid provisions from that moment on. The possible aid scheme resulting from the method to define administrative prices for forest land swaps and its application was not notified to the Commission as new aid, nor can it be considered to constitute existing aid on Bulgaria's accession to the EU.¹³ In addition, it has not been put into effect under a block exemption regulation. Therefore the Commission considers that the Bulgarian method, as established by the Bulgarian law and as applied, if it constitutes State aid within the meaning of Art. 107(1) TFEU, constitutes unlawful aid in the meaning of Article 1 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty¹⁴.

3.3. Compatibility of potential State aid

- (90) Since the Commission could not exclude that the method to define administrative prices for forest land swaps as it was applied creates State aid within the meaning of Article 107(1) TFEU, the Commission has to assess the compatibility of this aid with the internal market.
- (91) On the basis of Article 107(3)(a) TFEU, aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, and of the regions referred to in Article 349, in view of their structural, economic and social situation, may be considered compatible with the internal market.
- (92) As mentioned before, the whole territory of Bulgaria is an assisted area in virtue of Article 107(3)(a) TFEU with a standard regional aid ceiling for large enterprises of 50% GGE according to the Bulgarian regional aid map 2007-2013. Therefore, should the Commission indeed find that State aid is conferred to undertakings, and should such a State aid scheme comply with all the applicable provisions of the RAG, the aid granted could be compatible with the internal market.
- (93) Similarly, certain measures granted for the promotion of specific economic sectors can be found compatible under Article 107(3)(c) TFEU. Taking into

¹³ In relation thereto, the scheme of swaps was not in place before 1994, was not included as existing aid in an annex to Bulgaria's Accession Treaty, nor was it notified under the interim mechanism. It can therefore not be considered constituting existing aid in the sense of Article 1(b) of the Council Regulation (EC) No. 659/1999.

¹⁴ OJ L 83, 27.3.1999, p. 1–9

account the fact that in the case at hand any potential State aid may have been granted to undertakings active in the forestry sector, the Community Guidelines for State Aid in the Agriculture and Forestry Sector 2007-2013¹⁵ may be applicable. Consequently, if the aid potentially granted indeed complies with the provisions of these guidelines, such aid would be compatible with the internal market.

- (94) The Commission has doubts that the measure at hand could be found compatible with the 2007-2013 Agricultural and Forestry guidelines because the nature of the scheme, the economic activities of the potential beneficiaries, the setting of the prices of the forest estates and the stamp duty fee payable for the change of using the plot and the purposes of swapping forest land do not seem to be in line with these guidelines.
- (95) Therefore, at this stage the Commission has no information that would allow it to conclude that the possible aid contributes to any common objective of the European Union, or that it would meet the compatibility criteria laid down in any of the existing state aid instruments. The Commission therefore raises doubts as to the compatibility of the possible aid with the internal market.

3.4. Doubts and grounds for opening

- (96) For the reasons set out above, the Commission, after a preliminary assessment of the aid, has doubts as to whether the forest swap transactions and/or the subsequent change in the use of plots contain elements of State aid within the meaning of Article 107(1) TFEU, and whether such aid would be compatible with the internal market.
- (97) Consequently, the Commission is under a duty to carry out all the required consultations and, therefore, to initiate the procedure under Article 108(2). This gives the opportunity to third parties whose interests may be affected by the potential granting of the aid to comment on the measure. In the light of both the information made available by the Member State concerned and that provided by any third parties, the Commission will assess the aid character and compatibility of the measure and will take its final decision.
- (98) In this respect, the Commission recalls the doubts it has expressed in the present decision as to what extent the potential change of the designated use of land concerned should be taken into account when determining the price of the plot for the purpose of the swap. The Commission doubts whether the swap and subsequent change of the destination of the swapped forest land into constructible land should – in certain cases – be regarded as related or should in all cases be considered as not intrinsically linked.
- (99) Consequently, the Commission has doubts to what extent the potential change of the use of forest land concerned should be taken into account when determining the price of the plot for the purpose of the swap.

¹⁵ OJ C 319 of 27.12.2006, p. 1

(100) Another doubt raised by the Commission in the present decision was whether the application of the formulas prescribed by the Bulgarian legislation leads to the evaluation price being similar to the average prices obtained in arm's length transactions between two private parties, i.e. to market prices. Naturally, the transactions should relate to forest plots located in the same areas as the public and private forest plots being object of the swap deals, and having the same or sufficiently similar characteristics as far as the plant species present on the plot, the plot size, and the plot accessibility conditions are concerned. Having this in mind, the Commission invites Bulgaria and third parties to provide information on the market prices obtained in fully private sales (or swap transactions) that have taken place in Bulgaria in the period between the accession of Bulgaria to the EU and 2011. Moreover, the Commission invites Bulgaria and third parties to provide information on the differences between such market prices and the prices used for the individual swap transactions (calculated in accordance with the provisions of the Regulation on basic prices), and hence the potential amount of State aid involved. Finally, the Commission invites 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.

(101) Additionally, in view of the claim of the Bulgarian authorities that the complainants have not demonstrated that the aid would affect trade between Member States, the Commission invites Bulgaria to provide further information on if and to what extent the potential aid negatively influences Intra-Community trade.

(102) In the event that the information provided in the course of the formal investigation procedure leads the Commission to declare that State aid in the sense of Article 107(1) TFEU is present in the forest swap transactions and/or subsequent change of the use of the plots, the Commission also has to investigate whether such aid is compatible with internal market, and more specifically with Article 107(3)(a) TFEU and the provisions of the RAG and/or 107(3)(c) TFEU and the provisions of the 2007-2013 Agricultural and Forestry Guidelines. The Commission therefore requests the Member State and third parties to provide any available evidence which would allow the Commission to substantiate its assessment of the compatibility of the measure. The Commission reminds the Bulgarian authorities that the burden of proof as regards the compatibility of the aid measures is on the Member State.

4. DECISION

(103) In the light of the foregoing considerations, the Commission, acting under the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union, requests Bulgaria to submit its comments and to provide all such information as may help to assess the aid, within one month of the date of receipt of this letter. It requests your authorities to forward a copy of this letter to the potential recipients of the aid immediately.

- (104) In particular, the Bulgarian authorities are requested to supply all information necessary to establish the difference between the administrative prices charged in the context of the swaps and the market price for forest estates, located in the same area and having the same characteristics as the plots exchanged, in force at the moment of the respective transaction. In this context the Bulgarian authorities are also invited to present the outcome of their evaluations for the cases at hand where swaps took place after 31 December 2006 that would have resulted if the relevant coefficients had been correctly updated, as foreseen by the Bulgarian legislation. Finally, the Commission invites Bulgaria to provide information on the rules applicable to compensation paid in swap transactions in case of difference in prices for the two swapped plots of land.
- (105) The Commission wishes to remind Bulgaria that Article 108(3) of the Treaty on the Functioning of the European Union has suspensory effect, and would draw your attention to Article 14 of Council Regulation (EC) No 659/1999, which provides that all unlawful aid may be recovered from the recipient.
- (106) The Commission warns Bulgaria that it will inform interested parties by publishing this letter and a meaningful summary of it in the *Official Journal of the European Union*. It will also inform interested parties in the EFTA countries which are signatories to the EEA Agreement, by publication of a notice in the EEA Supplement to the *Official Journal of the European Union* and will inform the EFTA Surveillance Authority by sending a copy of this letter. All such interested parties will be invited to submit their comments within one month of the date of such publication.
- (107) If this letter 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 this letter. Your request specifying the relevant information should be sent by registered letter or fax to:

European Commission
Directorate-General for Competition
State Aid Greffe
B-1049 Brussels
Fax (32-2) 296 12 42

Yours faithfully,
For the Commission

Joaquin Almunia

Vice-President of the Commission