Brussels, - 5 MAI 2011
C/2011/2934

Dear President,

I would like to thank you for forwarding the Opinion of the German Bundesrat on the Commission proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1698/2005 on support for rural development by the European Agricultural Fund for Rural Development (COM (2010) 537 final).

The opinion raises a number of points, both general and specific, on the alignment of Regulation (EC) No 1698/2005 whereby it suggests that the Commission has not correctly applied the provisions of Articles 290 and 291 TFEU. In fact, the Bundesrat considers that those cases, where the proposal provides for the adoption of delegated acts, concern uniform conditions for the application of Regulation (EC) No 1698/2005 by Member States

In the alignment exercise of Regulation (EC) No 1698/2005 the Commission has followed as closely as possible the provisions of Articles 290 and 291 TFEU. It has been guided by the statements made in its Communication on the Implementation of Article 290 TFEU. No additional empowerments to the ones already existing have been provided for, as the whole alignment exercise consisted in an examination of existing implementing provisions and their classification according to the criteria of Articles 290 and 291 TFEU as either delegated or implementing and, consequently, the provision of the relevant legal basis in Regulation (EC) No 1698/2005. In this respect, all rules that contain uniform conditions for the implementation of Regulation (EC) No 1698/2005 by the Member States have been classified as implementing and the relevant empowerment has been provided, while all provisions that consist in supplementing non-essential elements of the various provisions of Regulation 1698/2005 have been classified as delegated and the relevant delegation provided for.

It should be pointed out here that the Commission has been guided by the principle that the classification of rules as requiring for their adoption either a delegated or an implementing act needs to be done on the basis of the nature of the rule to be adopted, in accordance with the provisions of Articles 290 and 291 TFEU and not on the basis of a particular procedure for adoption being preferred for reasons that do not relate to the nature of the rule. In other words it is the nature of the rule that should determine the procedure for its adoption and not the procedure for adoption that should determine our understanding of the nature of the rule.

Furthermore, the Opinion of the Bundesrat requests the Commission to adopt the relevant provisions, in all cases in which there is a need of uniform conditions for the application of EU-legal acts, by means of implementing acts in accordance with the provisions of the Treaty of Lisbon (291 TFEU).

Ms Hannelore KRAFT
President of the German Bundesrat
Leipziger Straße 3 - 4
D-10117 Berlin

The Commission has consistently provided for the adoption of implementing acts in all cases where existing implementing rules concern the uniform application of the basic act by Member States.

As regards the similarity between the regulatory procedure with scrutiny under the comitology decision and the provisions of Article 290 TFEU on delegated acts addressed by the opinion of the Bundesrat in point 5 and 7, the Commission has examined and raised this question in point 2.1. of its Communication on the Implementation of Article 290 TFEU. This point states: "Purely in terms of the wording, the definition of delegated acts in Article 290(1) is very similar to that of acts which, under Decision 1999/468/EC3 ("the comitology Decision"), are subject to the regulatory procedure with scrutiny introduced by Decision 2006/512/EC of 17 July 2006. In both cases the acts in question are of general application and seek to amend or supplement certain non-essential elements of the legislative instrument.

However, the similarity of the criteria does not mean that they will be implemented in exactly the same way; in a new institutional context the scope of the delegated acts will not necessarily be identical to that of the regulatory procedure with scrutiny. Any automatic duplication of precedents is therefore to be avoided."

Consequently the Commission has not applied a mechanical criterion for the qualification of existing implementing rules as falling either under implementing or delegated acts but has instead sought to apply the criteria foreseen in Articles 290 and 291 of the Treaty.

Regarding national expert knowledge, the purpose of the alignment exercise has in no case been to limit the participation of the Member States but only to adapt Regulation (EC) No 1698/2005 to the requirements of the Treaty of Lisbon. In this respect it should be pointed out that the Commission has clearly stated in point 4.2 of its Communication on the Implementation of Article 290 TFEU that it "intends systematically to consult experts from the national authorities of all the Member States, which will be responsible for implementing the delegated acts once they have been adopted. This consultation will be carried out in plenty of time, to give the experts an opportunity to make a useful and effective contribution to the Commission."

The Opinion of the Bundesrat also disagrees with the new Articles that have been proposed for each Axis of EAFRD support by means of which the Commission is given the possibility to adopt, through delegated acts, specific provisions in order to ensure an efficient and targeted use of funds and a coherent approach in the treatment of beneficiaries.

However, the purpose of the new Articles is to provide the legal basis for the adoption by the Commission of rules already existing in Regulation (EC) No 1974/2006 that supplement the content of the various measures by providing for example definitions of non-essential terms used in the description of the measures, additional eligibility conditions, or provisions that affect the rights of individuals and may therefore not be provided for in an implementing act.

As regards the submission of evaluations, Articles 27 and 28 of Regulation (EC) No 1290/2005 concern suspension in cases of incomplete declarations of expenditure or other financial information and do not, in the Commission's view, provide a sufficient legal basis for suspending payments in case of non-timely submission of the mid-term and ex-post evaluation reports, which do not constitute financial information. It is therefore necessary to

provide a specific legal basis for the provision of Article 61, second paragraph, of Regulation (EC) No 1974/2006 in Regulation (EC) No 1698/2005.

Concerning the involvement of the monitoring committee, the new subparagraph of Article 78 integrates in Regulation (EC) No 1698/2005 the existing provision of Article 59a of Regulation (EC) No 1974/2006. It does not bring any substantial changes. The "four cases" to which the Bundesrat refers are not additional duties, as they were already included in Article 59a under the formulation "changes referred to in Article 9(1) of the Regulation".

In reply to the request related to the support of areas, which connect Natura 2000 areas, it has to be underlined that the proposal provides for the eligibility of delimited nature protection areas with environmental restrictions, which contribute to the implementation of Article 10 of Directive 92/43/EEC in addition to the eligible Natura 2000 agricultural and forestry areas designated under the Habitats Directives. In order to ensure that payments continue to be primarily used for the designated Natura 2000 sites, it is appropriate to limit the size of the agricultural connecting areas eligible for payments to 5% of the total (agricultural and forestry land) designated Natura 2000 areas as well as to limit the eligible area of forestry land serving to connect Natura 2000 areas to 5% of the total designated Natura 2000 area. This provision shall ensure for both the administration and future beneficiaries a transparent and correct identification of the areas subject to Natura 2000 payments.

In April 2009 several Member States presented 39 simplification proposals to the Council. 15 of these simplification proposals concerned cross compliance. Eleven out of the 15 cross compliance related proposals have been accepted, sometimes partly adapted in order to ensure that the cross compliance control system is not jeopardized. Most of the accepted proposals have been implemented by now, amongst others by amending Commission Regulation (EC) No 1122/2009. Two proposals, namely with regard to follow-up checks of minor infringements or non-compliances determined at farms where the reduction fixed amounts less than 100 EURO (de-minimis rule), could not yet be implemented as they require an amendment of Council Regulation (EC) No 73/2009. This is now proposed in the framework of the amendment of Council Regulation (EC) No 73/2009.

Out of the nine proposals linked to rural development this proposal covers four: reducing the number of strategic monitoring reports, simplification of the follow-up of the minor and de minimis infringements and facilitating more tailor-made use of the advisory services. In addition, the recast of rural development control regulation, Regulation (EC) No 1975/2006 (new Regulation (EC) No 65/2011), addressed two of the proposals which are linked to controls.

Concerning the three remaining requests, the Commission is currently working on a definition of the tolerable rate of error for rural development. In addition, a specific task force has been established to work with the Member States to correct inaccuracies concerning the reporting of error rates.

Two other proposals related to the state aid approval as part of the programme approval procedure and to the reduction of the scope of the Common Monitoring and Evaluation Framework can not be applied in the middle of the programming process.

First, an approval of the non agricultural state aids under rural development programmes is not possible as they fall outside the scope of Article 42 of the Treaty. The Commission can favour a practical solution, whereby a parallel assessment is carried out to ensure that the non agricultural state aid schemes are approved prior to the approval of the amendments to the rural development plan. Also, in most cases the Member States may make use of the de minimis Regulation or the Block Exemption Regulation.

Secondly, the Common system for the monitoring and evaluation of Rural Development Programmes has been established through a cooperative process with the Member States. In addition, the Commission established a European Evaluation Network in view of facilitating the implementation of this system. The objective of using indicators is to allow for a quantification of the impact of Rural Development policy. Such information contributes to an increase in the credibility and accountability of the policy. Changing the system would weaken the position of Rural Development and render Member States' efforts and the results obtained so far, of limited value.

Further discussion on simplification takes place in the specific Expert Group on Simplification which meets regularly. The Commission has also launched a study on the administrative burden of some selected rural development measures.

As regards the need for shorter agri-environmental and animal welfare contracts, the Commission considers that for many commitments longer periods are necessary to obtain the envisaged environmental benefits from agri-environmental measures on farm level.

Concerning the eligibility of VAT, Article 71(3) of Regulation (EC) No 1698/2005 stipulates that EAFRD can only finance non-recoverable VAT when it is genuinely and definitively borne by beneficiaries other than non-taxable persons referred to in Article 13 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax. This rule excludes State or regional/local government authority or another body governed by public law in terms of VAT eligibility.

By specifying the nature of the eligible beneficiaries, the rule adopted by Regulation (EC) No 1698/2005 responds to the Court of Auditors' Special Report No 7/2003 on the implementation of assistance programming for the period 2000-2006 within the framework of the Structural Funds, published July 23, 2003. This report required that the eligibility rules for VAT should be further clarified in the light of the complexity of the VAT-system. The established rule takes also into account the existence of different compensation systems in Member States with regard to public bodies subject to VAT, which make it difficult to establish the evidence of non-recoverable character of VAT.

I hope that these clarifications address the questions and comments raised in the Bundesrat's Opinion and look forward to continuing our political dialogue in future on this and other subjects.

Yours sincerely,