



EUROPEAN COMMISSION

CONCILIATION BODY
Audit of Agricultural expenditure
Secretariat

Brussels, 19 June 2015.

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Subject: Clearance of accounts
Conciliation request n° 15/BG/671 submitted by the Bulgarian authorities
Sector: RURAL DEVELOPMENT, INVESTMENT
**** Enquiry: RD1/2012/806/BG**

In accordance with the provisions of Article 16 §4 of Regulation (EC) n° 885/2006 , please find enclosed a copy of the report, which have been adopted by the Conciliation Body for the case 15/BG/671.

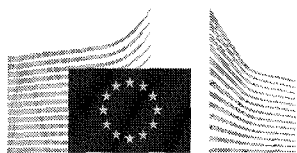
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1 Enclosure

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EUROPEAN COMMISSION

CONCILIATION BODY
Audit of agricultural expenditure

Case 15/BG/671

RURAL DEVELOPMENT; INVESTMENT

REPORT

1. By letter of 10 December 2014 the Commission's services (the services) notified the Bulgarian authorities (the authorities) of their proposal to exclude from EU financing an amount of 28 831 832.78 € as the implementation in Bulgaria of investment measures 311 (M311) and 312 (M312) under the 2007-2013 rural development programme (RDP) was not in conformity with EU legislation in financial years 2009 - 2014¹.

On 3 February 2015 the authorities referred the proposed correction to the Conciliation Body (the Body).

A. REASONS FOR THE CORRECTION

2. The services are of the opinion that the authorities have not respected the rules concerning aid ceilings when granting support for the installation of solar (photovoltaic) panels (panels)².

Under the RDP the aid intensity for M311 and M312 is 70% of total eligible expenditure; the maximum total eligible expenditure per project is 400 000 € and in case of investments in renewable energy production 1 000 000 €; the maximum grant aid per project is 200 000 €; the aid intensity can be increased by 10% points to 80% for investment in buildings and equipment for production and sale of energy from renewable energy sources.

The services claim that the authorities' support for small plants under the RDP consists of financial support of maximum 200 000 € per project³ and of a guaranteed preferential price⁴. Electricity producers are obliged to buy in electricity produced by the panels at the guaranteed price, which is higher than the normal price; the preferential price is guaranteed for the duration of 20-25 years and is fixed by a regulatory body.

The services assume that solar panel plants with co-financed investments, low operational costs and preferential sales price, "without any doubt" make profit. They consider the preferential treatment for the small panels to produce extra-income for the beneficiaries that should have been taken into consideration by the paying agency (PA) when checking the respect of the co-

¹ Audit RD1/2012/806/BG.

² In the COL under point 1.2 the services refer to a separate issue concerning measure 511 but as no correction is proposed in relation to the issue it will not be dealt with in this report.

³ According to the services the vast majority of panels received an aid very close to the maximum.

⁴ The services refer to a judgment of the Court of Justice (C-379/89) stating that preferential prices made compulsory by a public body are an economic advantage of public nature.

financing ceilings⁵. This should be done on the basis of the business plans submitted with the application for aid.

The financial advantage of the preferential price is estimated by the services on the basis of certain parameters such as prices, access to the grid, levies and inflation rates; they estimate the discounted average financial advantage to be 418 859 € for a panel producing from 2011 and of 243 178 € and 128 938 € for panels producing from 2012 and 2013 respectively. The services underline that the estimate is based on assumptions but conclude that the total advantage received by the beneficiaries is 28 831 832.78 €.

B. THE CONCILIATION PROCEDURE

3. In their request for conciliation, the authorities claim that the proposed correction should be withdrawn in full since the preferential price system is fully in accordance with Community rules.

The authorities' reasoning is largely based on State aid rules, other EU and national rules and Court case C-379/98. In their view, the Court's conclusions requires that the underlying reasons for the national energy policy must be considered before concluding that an unlawful economic advantage has been conferred on certain undertakings.

On the basis of Directive 2009/28/EC national targets and national action plans determining the share of energy from renewable sources have been adopted. The setting of preferential purchase prices for electricity is based on these policy instruments, and the prices are determined by taking into account a number of economic parameters.

As of 1 December 2011 the preferential price takes into account the share of EAFRD-funding in the total investment cost of the construction of the panels concerned. As a result of this, the preferential prices have been differentiated.

The authorities argue that no unlawful accumulation of State aid has occurred. They also argue that Article 26(6) of Regulation (EC) No 1975/2006 (prohibition of double financing) has not been infringed⁶. Indirect effects of policies cannot amount to double financing in the sense of that Article; the investment aid and the preferential price system do not target the same costs. The preferential prices are intended as compensation for the high costs of compliance with public environmental protection obligations and not for investment costs. Long-term assets financed by the aid are excluded from the base of the calculation of the preferential price.

In addition, and on the basis of Regulation (EC) No 1998/2006, the authorities claim that the total deductible amount of the advantage would have to be calculated for a period not exceeding 3 years from the moment the aid was granted. In this context they refer to the "de minimis" principle laid down in Article 2(2) of the said Regulation.

⁵ *'Administrative checks shall include procedures to avoid irregular double financing with other Community or national schemes and with other programming periods. Where financing from other sources exists these checks shall ensure that the total aid received does not breach the maximum permissible aid ceilings.'* (Article 26(6) of Regulation (EC) No 1975/2006 and Article 24(5) of Regulation (EC) No 65/2011).

⁶ Now Article 24(5) of Regulation (EC) No 65/2011.

Furthermore, the authorities disagree with the services' calculation method used for the proposed correction. They identify elements, which are insufficiently founded and they present an alternative simulation model.

The authorities are of the opinion that the business plans and the revenue information therein should not and could not be used to determine the aid. The business plan shall demonstrate the economic viability of the project. The estimated revenue is at that stage still hypothetical and unreliable. At the application stage, the exact price of the electricity is not known.

The authorities' system of preferential prices is under investigation by other services of the Commission⁷. The correction proposal should therefore be suspended until that investigation has been concluded.

4. At the hearing with the services, the services maintained their position; they were, however, prepared to re-analyse the financial documentation submitted by the authorities to assure that the estimate of the advantage obtained by the beneficiaries is correct. They were also prepared to consider whether factors used in their simulation model should be modified.

The Body had understood that the services' main argument was that the combination of investment aid and the capitalisation of the advantage obtained from the higher-than-normal price constituted double financing leading to a non-respect of the 200 000 € ceiling laid down in the RDP. The services confirmed this; they also admitted that guaranteed (and preferential) pricing of electricity delivered to the grid and produced by a renewable source is an energy policy instrument applied throughout the EU. However, as already confirmed, they could not accept double financing of the investment in panels under the RDP if it did not respect the ceiling of 200 000 €. As the discounted economic effect of the guaranteed price is known in advance by the applicant it must be seen as a financial component of the investment decision.

The Body wondered whether a parallel could not be drawn to the situation where under a rural development programme investment aid is granted for building a stable, the stable is then used for rearing animals and the farmer receives investment aid as well as CAP premiums (a guaranteed preferential price) for the animals. The services claimed that the 2 situations could not be compared.

The rules regarding 'de minimis' aid are State aid rules; they are of no relevance for the present case. The services did not accept that, in contrast to production from other sources of renewable energy such as from biomass, an applicant had operating costs when running the production and delivery of electricity from panels; once the investment had been completed only simple and basic maintenance would suffice. Consequently, the guaranteed price should be equalled to an investment aid. They noted that if the preferential price applied was reduced in December 2011 for panels which had received RDP support, this only confirmed the link between the 2 instruments.

⁷ State aid inquiry by DG COMP.

The services could not accept that the calculation of the financial advantage should not extend further than 3 years. The proposed correction is not based on State aid rules; the period to be considered must be the duration of the guaranteed price contract.

5. At the hearing with the authorities the Body informed them of the services' position.

The authorities claimed that they (i.e. paying agency and Ministry for agriculture and food) were not responsible for the (preferential) electricity price; this was fixed by a State Commission (regulatory authority). Contrary to the preferential price, the aid under the RDP is an investment aid. As from 1 December 2011 the investment aid is taken into consideration in the fixing of the preferential price; as a consequence there is a significant difference (relation ca. 1:1.4) between the preferential price for panels with and without investment aid.

The authorities repeated that a preferential price is not a State aid as it is not financed by the State and they referred to the judgment in Court case C-379/98. The Body said that for the services the present case is not about State aid but about double financing which is prohibited under Regulation (EC) No 1975/2006.

The authorities disagreed with the services' assumption concerning double financing. The guaranteed, preferential price was not aimed at the investment but at combatting certain costs linked to the production of electricity, such as operating costs (which for panels varied between around 10% and 46% depending on where the panels were placed), depreciation and a return on capital invested.

On the preferential price, the authorities explained that a preliminary contract was set up between the applicant and the electricity company; this contract gives the applicant the assurance that the panels will be linked to the grid. After the investment in and establishment of the panels, a second contract is signed and in this contract the preferential price is fixed, taking into account the investment aid received. According to the authorities, the applicant has no certainty as to the amount of the preferential price until that moment, and he consequently accepts to run a financial risk on this point. This is the rationale behind the investment aid; without the support, no one would engage in the installation of panels.

The authorities confirmed their position laid out in their conciliation request as to the services' simulation model and the period on which an economic advantage could be calculated

C. VIEWS OF THE CONCILIATION BODY

6. On the basis of the file at its disposal and the hearings with the parties, the Body notes that it has not been possible to conciliate the positions of the parties. The Body welcomes the services willingness to have a second look at certain technical and financial elements of their correction proposal.

The services are of the opinion that the granting of an investment aid under the Bulgarian RDP and of a guaranteed sales price for electricity under the Bulgarian energy law creates a double financing, which is not allowed under Article 26(6) of Regulation (EC) No 1975/2006 if the maximum permissible aid ceiling is not respected. While the services claim that both the

investment aid and the guaranteed price relate to the investment, the authorities argue that the 2 instruments concern different elements, i.e. the physical and financial investment and the operation of the investment. The Body also refers to the discussion about an investment in a stable, cf. point 4 above.

Both opinions could be defensible, but the Body refrains from further comments on this topic as it concerns a matter of legal interpretation. However, it might be useful, for both parties, to know the conclusions of the investigation by DG COMP.

In case the services maintain the principle of a correction the Body suggests that composition and calculation of the preferential price be examined with a view to defining components, which might possibly be considered elements of double financing. As an example, the Body wonders whether the component “operational costs” can be considered as an investment aid. The Body, however, does not have elements enabling it to assess whether, in the end, this exercise would influence the amount of the proposed correction.

Finally, the Body assumes that the services in calculating the financial impact of the preferential price have given full consideration to the different preferential price levels for panels with and without RDP-investment aid.

D. CONCLUSION

The Conciliation Body:

- considers that conciliation in this case has not been possible;
- invites the parties to take note of point 6 above; and
- instructs its secretariat to submit this report in accordance with the second subparagraph of Article 40(4) of Regulation (EU) No 908/2014.

Conciliation Body
Report done on 17 June 2015.



Chairman



Member



Member



Member



Member

The Secretariat
E. CREMERS
Adviser

could not attend the hearing with the authorities.