Reports of Cases

OPINION OF ADVOCATE GENERAL
CRUZ VILLALÓN
delivered on 17 March 2015 [1]

Case C-39/14

Bodenverwertungs- und -verwaltungs GmbH (BVVG)
joined parties:
Thomas Erbs
Ursula Erbs
Landkreis Jerichower Land

(Request for a preliminary ruling from the Bundesgerichtshof (Germany))

(Reference for a preliminary ruling — State aid — Programme for privatising land and buildings used for agricultural and forestry purposes in the new Länder in Germany — National law making sale of agricultural land subject to consent — Law on transactions in land (Grundstücksverkehrsgesetz) — Refusal of consent to a contract for the sale of land concluded, following a public call for bids, with the highest bidder — Agreed price grossly disproportionate to the market value of the land — Manner of determining the value of the land — Classification as State aid)

1. In the present case, a question has been raised before the Court relating to the interpretation of Article 107 TFEU in a dispute involving the conditions and manner of sale of agricultural and forestry land in connection with the privatisation of previously State-owned land and buildings in the new *Länder* in Germany. [2] It is therefore a sequel to the judgment in *Seydaland Vereinigte Agrarbetriebe*, [3] although it raises a number of new issues which will lead the Court to clarify its case-law on the conditions with which sales of publicly owned land must comply under the rules of the Treaty in the field of State aid.

I – Legal context

2. According to the order for reference, Bodenverwertungs- und -verwaltungs GmbH (BVVG) [4] has the statutory object inter alia of implementing the privatisation of formerly State-owned land and buildings used for agricultural and forestry purposes in the *Länder* of Brandenburg, Mecklenburg-Western Pomerania, Saxony, Saxony-Anhalt and Thuringia (the new *Länder*). BVVG, which is a private-law legal person, acts for that purpose on behalf of the Bundesanstalt für vereinigungsbedingte Sonderaufgaben, [5] a public-law institution with legal capacity and directly under federal control.

1 — Original language: French.

2 — See, very generally, Kadner, T., 'Die Transformation des Vermögensrechts in Ostdeutschland nach der Wiedervereinigung', ZEuP, 1997, p. 86; Rohde, G., 'Grundstückeigentums- und Bodennutzungsrechtsverhältnisse in den neuen Bundesländern nach dem Einigungsvertrag', DNotZ, 1991, p. 186.

3 — C-239/09, EU:C:2010:778.

4 — 'BVVG'.

5 — The Federal body responsible for special tasks connected with German reunification.

3. The sale of agricultural and forestry land in Germany is subject generally to the provisions of the Law on transactions in land (Grundstücksverkehrsgesetz),[6] which is concerned with protecting agricultural structures.

4. Paragraph 2(1) of the GrdstVG states:

'The sale of land by way of a legal transaction and the contractual agreement concerning it shall require consent. …'

5. However, Paragraph 4 of the GrdstVG states:

'Consent shall not be necessary where

1. The Federal Republic or a *Land* is a party to the sale;

…'

6. Paragraph 9 of the GrdstVG provides:

'(1) Consent may be refused or limited by obligations (Paragraph 10) or conditions (Paragraph 11) only if there are circumstances from which it appears that

1. the sale will result in unsound distribution of real property, or

2. as a result of the sale, the piece of land or a majority of geographically or economically connected pieces of land which belong to the vendor would be made smaller or split up in an economically inefficient way, or

3. the consideration for the sale is grossly disproportionate to the value of the piece of land.

(2) Unsound distribution of real property within the meaning of subparagraph 1, point 1, normally exists where the sale is inconsistent with measures for the improvement of agricultural structures.

(3) An economically inefficient reduction or splitting-up within the meaning of subparagraph 1, point 2, normally exists where, as a result of the distribution of the estate among heirs, a transfer agreement or other sale by way of a legal transaction,

1. an independent agricultural undertaking would cease to be viable;

2. a piece of agricultural land becomes smaller than one hectare;

…

(4) If the land is sold for other than agricultural or forestry purposes, consent may not be refused on the ground of subparagraph 1, point 3.

…'

6 — 'the GrdstVG'.

II – **Facts of the main proceedings**

7. According to the order for reference that, following a public call for bids in which they made the highest bid, Mr and Mrs Erbs purchased approximately 2.6 hectares of agricultural land from BVVG for EUR 29 000 by notarial contract of 31 March 2008.

8. However, by decision of 5 June 2008, the Landkreis Jerichower Land, as the competent local authority, refused consent for the contract of sale, under Paragraph 9(1)(3) of the GrdstVG,[7] on the ground that the agreed price was grossly disproportionate to the value of the piece of land sold.

9. The action brought by Mr and Mrs Erbs against the contested decision was dismissed at first instance and on appeal. The appeal court in this case considered that the agreed price of EUR 29 000 was grossly disproportionate to the value of the piece of land sold, since an expert report showed that the agricultural market value of the land was EUR 14168.61 if other, earlier BVVG sales were taken into account and EUR 13648.19 if those sales were not included in the comparison. Therefore it held that the agreed price exceeded those values by more than 50% and that a sale at this price would have adverse effects on agricultural structures, bearing in mind that, firstly, a farmer who was heard as a witness but had not taken part in the public call for bids stated that he was willing to purchase the land at a price up to 50% above the agricultural market value and, secondly, Mr and Mrs Erbs were not professional farmers.

III – **The question referred for a preliminary ruling and the proceedings before the Court**

10. In those circumstances, the Bundesgerichtshof (Federal Court of Justice, Germany), hearing the appeal on a point of law brought by BVVG, decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

‘Does Article 107(1) TFEU preclude a national provision such as Paragraph 9(1)(3) of the GrdstVG which, for the improvement of agricultural structures, effectively prohibits an emanation of the State, such as Bodenverwertungs- und -verwaltungs GmbH (BVVG), from selling to the highest bidder in a public call for bids agricultural land available for sale, if the highest bid is grossly disproportionate to the value of the land?’

11. The referring court has been careful to explain that, from its point of view, this question involves three queries. The first problem is whether the sale of publicly owned real property by BVVG at a price below the price established as a result of a public call for bids amounts to preferential treatment for the purchaser if the sale at the price established as a result of the public call for bids is prevented by a general law which also applies to all private sellers. Secondly, if preferential treatment is taken to exist, the further question arises as to whether it may be justified by the purpose of the law, which is the improvement of agricultural structures. Finally, it is necessary to decide whether refusal of the sale at the price determined by a public call for bids is in itself unlawful under Article 107(1) TFEU, even if it does not yet constitute aid, because of its advance effect.

12. Written observations have been submitted by BVVG, Mr and Mrs Erbs, the German Government and the European Commission. BVVG, Landkreis Jerichower Land, the German Government and the Commission also made oral submissions at the public hearing on 11 December 2014.

7 — ‘The provision at issue’.

IV – **Summary of the parties' observations**

13. BVVG takes the view, in a very general way, that the question referred for a preliminary ruling by the Bundesgerichtshof should be answered in the affirmative, since all the constituent elements of State aid are present.

14. Application of the provision at issue involves, first of all, the use of federal resources, in so far as the proceeds from privatising previously State-owned land and buildings are paid into the federal budget. Therefore any refusal to sell land at the highest price offered in a public bidding procedure entails a loss of income for the State, while also having a more general price-squeezing effect. Application of the contested provision also favours professional farmers, who have the opportunity to purchase land which is subject to a public call for bids at a price below the highest bid.

15. This advantage stems from the method of determining the market value of the land, on the basis of which the competent local authorities can establish the existence of gross disproportion within the meaning of the provision at issue and therefore make a decision to refuse consent. BVVG submits that a value determined by means of an expert valuation can be close to the market value only if the valuation is based on the results of a large number of public bidding procedures, which is not the case here.

16. Mr and Mrs Erbs take the view, in essence, that the sale of the land did not lead to an uneconomic reduction or splitting up of parcels of land and did not affect an independent agricultural undertaking or a farmer's profitability.

17. The German Government submits that the question referred for a preliminary ruling should be answered in the negative, in so far as the provision at issue does not grant any advantage either in the form of a subsidy or by easing a burden. It takes the view that, in any event, no particular undertaking is being favoured, since BVVG has no obligation to sell to a farmer who has applied to purchase land. Although it is true that the decision to refuse consent has a restrictive effect on BVVG and Mr and Mrs Erbs, it does not, on the other hand, create any advantage.

18. Finally, the Commission points out that it is not, in principle, for the national court to rule on the compatibility of any aid with the Treaty, and submits that the national legislation may constitute 'State aid' within the meaning of Article 107(1) TFEU, focusing its observations on whether a selective advantage exists, while leaving it to the referring court to review whether in the present case there is any intervention through State resources.

V – **Preliminary observations**

19. Consideration of the question referred by the national court for a preliminary ruling calls for a series of preliminary observations. First of all, I shall consider the scope of the question referred for a preliminary ruling, and this will lead me to propose that the Court reformulate the question. I shall next attempt to explain why a law on transactions in land such as the GrdstVG, which is generally applicable, including regionally, may and, in this case, must be considered in the light of the Treaty provisions on State aid. Having clarified that point, I shall discuss the contents of the provision at issue. Finally, the last part of this Opinion will address the fundamental objection raised by the German Government that the provision at issue cannot be classified as State aid because there is no actual advantage granted to any undertaking.

A – *The scope of the question referred for a preliminary ruling*

20. By its question, the referring court is formally requesting the Court to rule on whether Article 107(1) TFEU precludes the provision at issue, that is, whether the measure provided for by that legislation constitutes aid incompatible with the internal market.

21. Yet, as the Commission has pointed out in its written observations, it is not for the Court or for the referring court to rule on the compatibility of a national measure with Article 107(1) TFEU, since the Commission, subject to review by the judicature of the European Union,[8] has exclusive competence in that regard. Consequently, a national court or tribunal may not, in a reference for a preliminary ruling under Article 267 TFEU, ask the Court for guidance as to the compatibility with the internal market of a given State aid or an aid scheme.[9] From this point of view, the Court cannot give an answer, within the context of the present proceedings, to the referring court's second query.

22. However, national courts retain jurisdiction to rule on the classification of a measure as State aid and to draw the appropriate conclusions from this pursuant to the last sentence of Article 108(3) TFEU.[10] In particular, they must offer to individuals the certain prospect that all appropriate conclusions will be drawn from an infringement of the last sentence of Article 108(3) TFEU, in accordance with their national law, as regards the validity of measures giving effect to the aid, the recovery of financial support granted in disregard of that provision, and possible interim measures.[11]

23. More precisely, the Court has held that the Commission's power to assess whether aid is compatible with the internal market does not preclude a national court from referring to the Court of Justice a question on the interpretation of the concept of aid.[12] Accordingly, the Court has jurisdiction, inter alia, to give the national court guidance on the interpretation of EU law to enable it to determine whether a national measure may be classified as State aid under that law.[13]

24. It should also be borne in mind, in this context, that the Court has stated that, if a national court entertains doubts as to how a measure should be classified, it may ask the Commission for clarification on that point. In its Notice of 23 November 1995 on cooperation between national courts and the Commission in the State aid field,[14] the Commission expressly encouraged national courts to contact it when they encounter difficulties in applying Article 108(3) TFEU and explained what kind of information it was able to supply.[15] It should be noted, in that regard, that as a consequence of the duty of sincere cooperation between the Community institutions and the Member States resulting from Article 4(3) TEU,[16] the Commission must respond as quickly as possible to requests from national courts.[17]

8 — See, inter alia, judgment in *Lucchini* (C-119/05, EU:C:2007:434, paragraph 52).

9 — See, inter alia, judgment in *Enirisorse* (C-237/04, EU:C:2006:197, paragraph 23) and order in *Acanfora* (C-181/13, EU:C:2014:127, paragraph 22).

10 — See, inter alia, judgments in *Steinike & Weinlig* (78/76, EU:C:1977:52, paragraph 2); *Fédération nationale du commerce extérieur des produits alimentaires and Syndicat national des négociants et transformateurs de saumon* (C-354/90, EU:C:1991:440, paragraphs 8 to 14); and *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* (C-143/99, EU:C:2001:598, paragraphs 26 to 29).

11 — See, inter alia, judgments in *Fédération nationale du commerce extérieur des produits alimentaires and Syndicat national des négociants et transformateurs de saumon* (EU:C:1991:440, paragraph 12) and *SFEI and Others* (C-39/94, EU:C:1996:285, paragraph 40).

12 — See, inter alia, judgment in *DM Transport* (C-256/97, EU:C:1999:332, paragraph 15).

13 — See, inter alia, judgments in *Fallimento Traghetti del Mediterraneo* (C-140/09, EU:C:2010:335, paragraph 24) and *Paint Graphos and Others* (C-78/08 to C-80/08, EU:C:2011:550, paragraph 36).

14 — OJ 1995 C 312, p. 8.

15 — See also Commission notice of 9 April 2009 on the enforcement of State aid law by national courts (OJ 2009 C 85, p. 1, paragraph 89 et seq.).

16 — See order in *Zwartveld and Others* (C-2/88 IMM, EU:C:1990:315, paragraphs 17 and 18).

17 — See, inter alia, judgment in *SFEI and Others* (EU:C:1996:285, paragraph 50).

25. Therefore, if it were to be concluded that the consent mechanism established by the provision at issue may constitute State aid, the competent German authorities would have to notify the Commission for it to decide on its compatibility with the internal market. Pending a final decision from the Commission, the referring court should give direct effect to the last sentence of Article 108(3) TFEU, that is to say, it should safeguard the rights available to the interested parties under that provision by preventing the refusal of consent to the contract of sale concluded between BVVG and Mr and Mrs Erbs and the effects of the refusal. [18]

26. It should also be borne in mind that, except in instances of *de minimis* aid, [19] the Member States must also send the Commission [20] a summary of information relating to measures likely to be covered by a block exemption, with a view to its publication on the Commission's website, [21] and this is to include aid granted in the agricultural sector. [22]

27. In the light of the above explanations, I propose that the Court should reformulate the question referred for a preliminary ruling by the Bundesgerichtshof as follows: 'Must Article 107(1) TFEU be interpreted as meaning that a rule of national law which, for the improvement of agricultural structures, in effect prohibits an emanation of the State from selling agricultural land to the highest bidder in a public call for bids, if the highest bid is grossly disproportionate to the value of the land, may be classified as State aid?'

B – *The specific nature of the measure at issue*

28. The provision at issue, [23] in summary, allows the competent local authorities to prevent sales of agricultural or forestry land in public bidding procedures where they consider that the prices agreed are grossly disproportionate to the value of the land.

29. The measure of which this provision forms part [24] is based, in this case, on a mechanism for granting consent prior to certain transfers of property relating to agricultural or forestry land covered by contracts of sale; it is triggered when a price threshold is exceeded, and the evaluation of this threshold is based on a system for determining the agricultural market value of the land. The referring court defines the provision at issue as 'a provision of price law which constitutes a lawful property obligation'.

18 — See, inter alia, judgments in *SFEI and Others* (EU:C:1996:285, paragraph 28) and *Piaggio* (C-295/97, EU:C:1999:313, paragraphs 29 to 32).

19 — See Article 3 of Commission Regulation (EC) No 1535/2007 of 20 December 2007 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid in the sector of agricultural production (OJ 2007 L 337, p. 35). However, the second subparagraph of Article 4(1) of this regulation states that where the *de minimis* ceiling laid down in Article 3(2) of the regulation is exceeded (EUR 7 500 granted to any one undertaking over any period of three fiscal years), the Member State concerned shall ensure that the aid measure leading to the ceiling being exceeded is notified to the Commission or recovered from the beneficiary. In accordance with the second paragraph of Article 7 of the regulation, it applied from 1 January 2008 to 31 December 2013. It was replaced by Commission Regulation (EU) No 1408/2013 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* aid in the agriculture sector (OJ 2013 L 352, p. 9), which came into force on 1 January 2014. This new regulation, apart from amending the *de minimis* ceiling, provides in Article 6 for a new monitoring mechanism, which no longer includes the notification requirement provided for in the second subparagraph of Article 4(1) of Regulation No 1535/2007.

20 — See Article 3(2) of Council Regulation (EC) No 994/98 of 7 May 1998 on the application of Articles 92 and 93 of the Treaty establishing the European Community to certain categories of horizontal State aid (OJ 1998 L 142, p. 1).

21 — See Article 1(3) of Council Regulation (EU) No 733/2013 of 22 July 2013 amending Regulation (EC) No 994/98 on the application of Articles 92 and 93 of the Treaty establishing the European Community to certain categories of horizontal State aid (OJ 2013 L 204, p. 11), amending inter alia Article 3(2) of Regulation No 994/98.

22 — Commission Regulation (EC) No 1857/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to State aid to small and medium-sized enterprises active in the production of agricultural products and amending Regulation (EC) No 70/2001 (OJ 2006 L 358, p. 3); that regulation was repealed by Commission Regulation (EU) No 702/2014 of 25 June 2014 declaring certain categories of aid in the agricultural and forestry sectors and in rural areas compatible with the internal market in application of Articles 107 and 108 of the Treaty on the Functioning of the European Union (OJ 2014 L 193, p. 1), which has been in force since 1 July 2014.

23 — See, inter alia, Schramm, L., 'Probleme der Grundstücksverkehrsgenehmigung und des siedlungsrechtlichen Vorkaufsrechts in den neuen Bundesländern', NL-BzAR, 2005, No 8, p. 322.

24 — 'The measure at issue'.

30. Consent to the transfer of agricultural or forestry land by way of a contract of sale is not necessary, under Paragraph 4(1) of the GrdstVG, where the State or a *Land* is a party to the sale; on the other hand, it is necessary, under the case-law of the Bundesgerichtshof,[25] where BVVG is a party to the sale, which is the situation in the main proceedings. Notwithstanding its statutory object, which is to implement the privatisation of land in the new *Länder*, BVVG is a private-law legal person and is not covered by the exemption provided for by Paragraph 4(1) of the GrdstVG.

31. Accordingly, it should be noted that the GrdstVG — a law that, in a very general way, makes transfers of agricultural and forestry land taking place in Germany between private persons subject to consent — is also applicable to all land transactions taking place in connection with the process administered by BVVG of privatising formerly State-owned property, inasmuch as BVVG is not covered by the exemption provided for by Paragraph 4(1) of the GrdstVG.

32. Consequently, it is that exemption which results in sales of publicly owned agricultural and forestry land being subject to consent where inter alia the conditions of the provision at issue are met. And it is because BVVG conducts sales of formerly State-owned land and pays the proceeds of these sales into the federal budget that the measure at issue may involve State resources and, consequently, may be covered by the Treaty provisions on State aid.

33. However, the contents of the provision at issue should be considered in greater detail.

C – *The contents of the provision at issue*

34. Consent to a transfer of land can be refused only on condition, firstly, that it is agricultural or forestry land and, secondly, that certain circumstances apply, in particular, as far as the provision at issue is concerned, that the price offered and agreed in the contract of sale is grossly disproportionate to the agricultural market value of the land.

35. Since the GrdstVG does not define the concept of 'grossly disproportionate', it has been defined by the German courts and, in particular, by the referring court. A gross disproportion exists where the agreed price exceeds the agricultural market value of the land by more than 50%.[26]

36. The referring court explains that the provision at issue aims to prevent professional farmers being burdened with such high purchase costs for new land that the continued profitability of their farms would be threatened. Therefore its purpose is to put an end to speculation in farm and forestry land and to promote the improvement of agricultural structures.

37. The German Government has explained that the decision to refuse consent has the effect of preventing the purchaser registering as owner of the land, which blocks the transfer of the land, with the result that the contract of sale remains temporarily ineffective until there is a final judicial ruling on the decision. If the decision to refuse consent is set aside, the temporarily ineffective contract of sale becomes enforceable at the sale price agreed and the purchaser can be registered as owner of the land. Otherwise, the decision to refuse consent becomes final and the contract becomes null and void. However, if the decision to refuse consent becomes final, that does not entail any right, for a farmer expressing his interest within the framework of the bidding procedure or the contentious procedure against the decision to refuse consent, to acquire the land.

25 — Judgment of 27 November 2009 (BLw 4/09, NJW-RR 2010, 886, No 12).

26 — See judgment of the Bundesgerichtshof of 27 April 2001 (BLw 14/00, NJW-RR 2001, 1021), cited by the German Government.

38. The provision at issue therefore aims to prevent agricultural or forestry land being sold in a bidding procedure at prices which differ substantially — by more than 50% — from prices viewed by the competent local authorities as 'acceptable', that is to say, proportionate to what the authorities consider to be the agricultural market value of the land.

39. That point having been clarified, it should be noted that implementation of the measure at issue, which by definition means that the highest price offered for a given piece of land in a bidding procedure is more than 50% above the agricultural market valuation by the competent local authorities, may theoretically come about in very different situations, which vary inter alia according to the number of bids submitted and the structure of the prices offered.

40. This underlines the fact that it is not possible to assess the measure at issue and to resolve the question of its classification from the point of view of Article 107 TFEU without taking into account the specific conditions of its implementation and, more precisely, the circumstances in which it is implemented. As I shall have occasion to show, assessment of the disproportionate nature of the price offered in a bidding procedure for a given piece of land differs according to whether this procedure has given rise to a single bid, a very small number of bids, or a large number of bids.

41. Accordingly, when assessing whether the price offered was disproportionate, the specific manner in which the competent local authorities determined the agricultural market value of the land must be examined, but the number of bids submitted and the structure of the prices offered in the bidding procedure must also be taken into account.

D – *The particular circumstances of the situation in the main proceedings*

42. Finally, it is appropriate to dwell on the particular circumstances of the situation in the main proceedings, which are the subject of the referring court's third query[27] and which provide the German Government with one of the main arguments in support of its conclusion that the measure at issue cannot be classified as State aid.

43. The German Government states that the decision to refuse consent at issue in the main proceedings does not entail any obligation for BVVG to sell the land in question to the professional farmer who expressed his interest in acquiring it. Therefore the view cannot be taken that the land in question has been sold at a price below the market price as determined in the public call for bids. The provision at issue cannot, as a result, be classified as State aid, since there has been no actual intervention through State resources.

44. It is true that, since there has been no sale of the land in question, at a price lower than the highest bid, to the professional farmer who expressed his interest in the framework of the public bidding procedure at issue in the main proceedings the view cannot be taken that there has been actual granting of aid.

45. However, although that sale has not actually taken effect in the case in the main proceedings, this is first and foremost and essentially because of the fact that the two parties to the contract which is the subject of the decision to refuse consent have challenged this decision before the German courts, and BVVG has raised precisely the question of whether the provision at issue is to be classified as State aid — the question that is at the origin of the present proceedings.

27 — See point 11 of this Opinion.

46. Furthermore, the fact that the competent local authorities have not yet acted on their decision to refuse consent in a given case cannot support the conclusion that the question of classifying the provision at issue as State aid is hypothetical. In particular, the view cannot be taken that the alleged conduct of the competent local authorities will be repeated systematically and indefinitely, as otherwise the provision at issue would be rendered completely meaningless and ineffective.

47. In any event, the fact that the competent local authorities have a discretionary power to decide what action is to be taken on their decision to refuse consent has no bearing on the question of whether the measure at issue may constitute State aid. The classification of a measure as State aid cannot, without calling into question the permanent system for monitoring State aid set out in Articles 107 and 108 TFEU, be conditional either on a prior finding that it has actually been put into effect or even on a prospective assessment of how frequently it will be applied.

48. Following these initial arguments, I am now in a position to address the heart of the problem raised by the main proceedings, which is to determine whether and to what extent implementation of the measure at issue may be classified as State aid.

VI – **Classification of the measure at issue as State aid**

49. For a national measure to be classified as 'aid' within the meaning of Article 107(1) TFEU, there must, inter alia, first of all be an intervention by the State or through State resources and the measure must confer an advantage on the recipient. [28]

50. According to the case-law of the Court, only advantages granted directly or indirectly through State resources are to be regarded as aid within the meaning of Article 107(1) TFEU. 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 but is intended merely to bring within that definition both advantages which are granted directly by the State and those granted by a public or private body designated or established by the State. [29]

51. That said, the concept of 'aid' within the meaning of Article 107(1) TFEU embraces not only positive benefits, such as subsidies, but also, more generally, measures which in various forms mitigate the charges which are normally included in the budget of an undertaking and which therefore, without being subsidies in the strict sense of the word, are similar in character and have the same effect. [30] It suffices in that regard to establish a sufficiently direct link between, on the one hand, the advantage given to the beneficiary and, on the other hand, inter alia, a reduction of revenue of the State budget. [31]

52. It should also be pointed out, in order to supplement the answer to be given to the referring court's second query, [32] that the mere fact that a measure has a social purpose does not suffice to exclude it outright from classification as 'aid' within the meaning of Article 107(1), TFEU, since that provision does not distinguish between measures of State intervention by reference to their causes or their aims but defines them in relation to their effects. [33]

28 — See, inter alia, judgments in *Altmark Trans and Regierungspräsidium Magdeburg* (C-280/00, EU:C:2003:415, paragraphs 74 and 75) and *Libert and Others* (C-197/11 and C-203/11, EU:C:2013:288, paragraph 74).

29 — See, inter alia, judgments in *van Tiggele* (82/77, EU:C:1978:10, paragraphs 24 and 25) and *PreussenElektra* (C-379/98, EU:C:2001:160, paragraph 58).

30 — See, inter alia, judgments in *Banco Exterior de España* (C-387/92, EU:C:1994:100, paragraph 13); *SFEI and Others* (EU:C:1996:285, paragraph 58); *Seydaland Vereinigte Agrarbetriebe* (EU:C:2010:778, paragraph 30); and *Eventech* (C-518/13, EU:C:2015:9, paragraph 33).

31 — See, inter alia, judgment in *Eventech* (EU:C:2015:9, paragraph 34).

32 — See points 11 and 20 of this Opinion.

33 — See, inter alia, judgment in *Heiser* (C-172/03, EU:C:2005:130, paragraph 46).

53. As the Court has already made clear, it cannot be ruled out that a sale of publicly owned land at a price lower than the market value might constitute State aid.[34] In that case, the Court explained that the sale by public authorities of land or buildings to an undertaking or to an individual involved in an economic activity, such as agriculture or forestry, may include elements of State aid, 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 have been able to fix.[35]

54. The Court concluded that, where national law establishes rules for calculating the market value of land for sale by public authorities, the application of those rules must, in order to comply with Article 107 TFEU, lead in all cases to a price as close as possible to the market value.[36]

55. It is by reference to these different factors that it is necessary to consider whether and to what extent the application of the provision at issue involves the granting of an advantage to an undertaking and may, consequently, be classified as State aid; this requires me first of all to analyse the system used by the competent local authorities to determine the agricultural market value of agricultural and forestry land.

A – *The system for determining the agricultural market value of land*

56. The agricultural market value of land, which is not defined by the GrdstVG, is, according to the order for reference (paragraph 32), the price that can be obtained for land of the same kind and the same situation in free legal transactions between farmers at the date of conclusion of the contract, that is to say, land transactions within the agricultural sector, bearing in mind that sales to non-farmers must also be taken into account if the object of the sale is continued use as farmland.

57. Neither the referring court nor the parties who have made written and oral submissions have provided very precise particulars of the manner in which the competent local authority empowered to refuse the consent required by the provision at issue determined the agricultural market value of the land which was the subject of the contract, that being the value which was the basis of the finding of a gross disproportion justifying refusal of consent. However, it is apparent from BVVG's written observations that this value is determined from reference prices set by valuation committees according to regional reference indicators and values (paragraphs 41 and 42).

58. The referring court merely explains that, in the main proceedings, the appellate court confirmed the competent local authority's decision not to give consent on the basis of a valuation which it had commissioned, but does not provide further details. However, in its written observations, BVVG stated that the bids submitted by agricultural undertakings in the public bidding procedure are not taken into account.

59. For the prior consent mechanism to be triggered, it is thus also necessary that, within the framework of a public bidding procedure for the sale of agricultural land which has resulted in a contract of sale concluded with a purchaser who is not a farmer or with an amateur farmer, a professional farmer has expressed interest in acquiring the land which is the subject of the contract and the price agreed in the contract is more than 50% above the price at which this farmer has declared himself prepared to purchase the land.

34 — Judgment in *Seydaland Vereinigte Agrarbetriebe* (EU:C:2010:778, paragraph 31).

35 — See judgments in *Commission* v *Scott* (C-290/07 P, EU:C:2010:480, paragraph 68) and *Seydaland Vereinigte Agrarbetriebe* (EU:C:2010:778, paragraph 34).

36 — See judgment in *Seydaland Vereinigte Agrarbetriebe* (EU:C:2010:778, paragraph 35).

B – *The existence of an intervention through State resources*

60. There is no doubt that implementation of the provision at issue may involve an intervention through State resources, in that it may entail a loss of income for the State from the proceeds of privatising the land which is the subject of a decision to refuse consent to the transfer of the land. As BVVG has submitted, since its annual profit is paid into the federal budget, it follows that application of the provision at issue could automatically lead to the State forgoing resources corresponding to the difference between the agricultural market value assessed by the competent local authorities and the highest price offered in the public call for bids. [37]

C – *The conditions for the existence of an advantage granted to an undertaking*

61. The German Government submits, in essence, that the measure at issue cannot be classified as State aid since it does not favour any undertaking and does not involve granting any tangible advantage to an undertaking or to a particular branch of production. It considers, in particular, that it would be wrong to take the view that the market price of the land in question corresponds to the highest bid submitted in the public bidding procedure, since the case-law of the Court and the Commission Communication of 10 July 1997 on State aid elements in sales of land and buildings by public authorities (Notice No 97/C 209/03) [38] accept that the market price can perfectly well be established by an independent expert valuation.

62. First of all, it should be noted that, in its 1997 Communication, the Commission recognises that the sale of publicly owned land and buildings will be deemed not to contain State aid if it follows an open and unconditional bidding procedure or if, in the absence of such procedure, it is preceded by an evaluation by one or more independent asset valuers in order to establish the market value on the basis of generally accepted market indicators and valuation standards.

63. As I have already pointed out, [39] the Court has held, in *Seydaland Vereinigte Agrarbetriebe*, [40] that if, for the sale by public authorities of agricultural land, national law has established rules for calculating its market value, the application of those rules can be viewed as complying with Article 107 TFEU only provided that it leads in all cases to a price as close as possible to the market value. [41] The Court confirmed that the best bid or an expert report were likely to provide prices corresponding to actual market values, although it could not rule out that other methods might also achieve the same result. [42] However, it further stated that a method for valuing agricultural land which does not include a mechanism for updating those valuations which would allow the selling price of the land to reflect, in so far as possible, the market value of that land, especially when prices are rising sharply, is not suitable for reflecting the actual market prices in question. [43]

64. In the present case, although the measure at issue has some characteristics comparable to those of a market valuation procedure carried out by independent asset valuers, such as the one described in Title II, point 2, of the 1997 Communication, it also has, above all, the specific feature of neutralising the effects of an unconditional bidding procedure such as that contemplated in Title II, point 1, of the 1997 Communication.

37 — See, inter alia, *a contrario*, judgment in *Eventech* (EU:C:2015:9, paragraph 44).

38 — OJ 1997 C 209, p. 3, 'the 1997 Communication'.

39 — See points 53 and 54 of this Opinion.

40 — EU:C:2010:778.

41 — See paragraphs 35 and 48.

42 — Paragraph 39.

43 — See paragraph 43.

65. As I have already observed, the Court has very little information about the method used by the competent local authorities or by the experts designated by the national courts to evaluate the price of land in connection with implementation of the provision at issue or, more specifically, about the market indicators and valuation standards they use. Therefore it is not possible for the Court to establish whether the valuation procedure is inherently capable of satisfying the requirements of its own case-law and the indications in the 1997 Communication.

66. However, responsibility for carrying out this assessment lies solely with the referring court, while the Court should make every effort to provide guidance on the interpretation of EU law relevant for that purpose. In that regard, it must be pointed out that this assessment must relate not only to the measure at issue itself, but also to its practical application, and the referring court should satisfy itself in particular that the market valuation of the land by the competent local authorities or by the experts designated by the national courts does not lead to a result far removed from the market value. [44]

67. As I have already stressed, [45] this assessment depends not only on the method and the valuation standards used but also on the circumstances of each bidding procedure, in particular the number of bids submitted and the structure of the prices offered.

68. In that regard, it should first of all be observed that the method used for the agricultural market valuation of land can, in itself, in the spirit of *Seydaland Vereinigte Agrarbetriebe* [46] and of the updating requirements established by that judgment, be regarded as satisfying those requirements only to the extent that it takes into account the prices offered in the bidding procedure, this consideration of prices being all the more important where the number of bids submitted is itself high.

69. Indeed, by definition, the prices offered in an open and unconditional bidding procedure in any event provide the most reliable and most up-to-date indication of the market value of a given piece of land. Consequently, the agricultural market value of land can be as close as possible to the market value, [47] where it has been set by the competent local authorities or by the experts after a bidding procedure, only to the extent that the valuation method takes into account all the prices offered in that procedure.

70. Next, and as I have already observed, the classification of the measure at issue depends not only on the method used for the agricultural market valuation by the competent local authorities or the national courts, but also on the circumstances particular to each case, in the different situations which could theoretically be envisaged.

71. Thus, in a first possible situation, the agricultural market valuation estimated by the competent local authorities could be close to the majority of bids submitted in a bidding procedure, and it may be that the highest bid alone is significantly higher than both the other prices offered and the estimated market value. It may be presumed, in this case, that the highest bid is speculative and that the estimated value corresponds to the market price, so that it could be inferred that the application of the measure at issue does not include elements of State aid.

72. In a second possible situation, the highest bid may be close to all the other bids submitted in a bidding procedure and the agricultural market value estimated by the competent local authorities may alone be significantly lower than all the bids. It is difficult, in such a case, the view can scarcely be taken that the market valuation corresponds to the market price, and it could accordingly be considered that the application of the measure at issue includes elements of State aid.

44 — See judgment in *Seydaland Vereinigte Agrarbetriebe* (EU:C:2010:778, paragraph 52).

45 — See point 40 of this Opinion.

46 — EU:C:2010:778, paragraph 43.

47 — *Seydaland Vereinigte Agrarbetriebe* (EU:C:2010:778, paragraph 35).

73. Consequently, when the competent local authorities and/or the national courts consider whether the conditions for application of the provision at issue have been met and assess whether the highest price offered in a bidding procedure is disproportionate, by comparing it to the agricultural market value they have estimated, they must take account of the circumstances of each case with particular consideration the structure of the prices offered.

74. It remains for me to discuss the possible situation in which the bidding procedure gives rise to only one offer. In such a case, the method used by the competent local authorities and the national courts for the agricultural market valuation undoubtedly has a decisive influence.

75. In the assessment which the referring court will have to make in this connection, it could reasonably take into account, by way of comparison, the system for determining land values developed by BVVG itself, the comparative price system (*Vergleichspreissystem*, VPS),[48] which the Federal Republic of Germany has taken care to notify to the Commission.[49] In the event, the Commission, having obtained an expert opinion on the VPS method,[50] decided that its application ruled out the presence of elements of State aid within the meaning of Article 107(1) TFEU. More precisely, the Commission considered that the VPS method did not confer any advantage on the purchaser of land in so far as it reflected the market value of that land, bearing in mind that that conclusion was limited solely to sales concluded by BVVG in the course of privatisation of agricultural and forestry land in the new *Länder* in Germany.

76. The VPS method, which is based on the comparative value method (*Vergleichswertverfahren*) used by independent valuation experts in Germany,[51] sets an average sale price by comparing relevant data from a large number of similar past transactions. The relevant data, which relate inter alia to the regional location, situation, size and quality of the land sold,[52] are compiled in a database which is continuously refreshed with new transactions and other market indicators, at least once a month and more frequently if necessary.[53]

77. It is by reference to these factors, inter alia, that the referring court must determine whether the measure at issue and its application favour certain undertakings or the production of certain goods within the meaning of Article 107(1) TFEU, bearing in mind that, according to the case-law of the Court, a measure must be regarded as selective even where it concerns a whole economic sector[54] if it favours undertakings which, in the light of the objective pursued, are in a comparable factual and legal situation[55] and in so far as it is not justified by the nature or general scheme of the system of which it is part.[56]

78. The application of the provision at issue is such as to favour professional farmers who, following bidding procedures organised by BVVG in order to sell agricultural land, have the opportunity to acquire it at a price below the highest bid, or even below all the bids submitted.

48 — 'The VPS method'.

49 — Commission Decision C(2012) 9457 of 19 December 2012 on a proposed alternative method for the valuation of agricultural and forestry land in Germany sold by the public agency BVVG (http://ec.europa.eu/competition/state_aid/cases/246093/246093_1396874_125_2.pdf).

50 — See points 21 to 23 of the decision, where it is explained that the expert whose opinion had been sought had to ascertain whether the VPS method was a suitable way to establish the market value of agricultural and forestry land and was based on commonly recognised valuation principles, in accordance with Title II, point 2(a), of the 1997 Communication.

51 — The valuation standards in this instance are laid down in the Allgemeine Grundsätze der Immobilienwertermittlungsverordnung ('ImmoWertV'); see point 28 of the decision.

52 — See points 17 and 29 of the decision.

53 — See point 32 of the decision.

54 — See, inter alia, judgment in *Unicredito Italiano* (C-148/04, EU:C:2005:774, paragraph 45).

55 — See, inter alia, judgments in *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* (EU:C:2001:598, paragraph 41); *GIL Insurance and Others* (C-308/01, EU:C:2004:252, paragraph 68); *Heiser* (EU:C:2005:130, paragraph 40); and *Eventech* (EU:C:2015:9, paragraph 55).

56 — See, inter alia, judgment in *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* (EU:C:2001:598, paragraph 42).

79. It follows from all the above arguments that Article 107 TFEU must be interpreted as meaning that a rule of national law such as that at issue in the main proceedings which, for the improvement of agricultural structures, in effect prohibits an emanation of the State from selling agricultural land to the highest bidder in a public call for bids, if the highest bid is grossly disproportionate to the value of the land, can escape classification as State aid only in so far as this value is as close as possible to the market value, which requires inter alia that the prices offered in the bidding procedure are taken into account when the land is valued. It is for the referring court to assess whether such a rule satisfies those requirements and whether its practical application may lead to a price being set that is far removed from the market value, and to draw the appropriate conclusions.

VII – **Conclusion**

80. I propose that the Court reply to the Bundesgerichtshof's question as follows:

Article 107 TFEU must be interpreted as meaning that a rule of national law such as that at issue in the main proceedings which, for the improvement of agricultural structures, in effect prohibits an emanation of the State from selling agricultural land to the highest bidder in a public call for bids, if the highest bid is grossly disproportionate to the value of the land, can escape classification as State aid only in so far as this value is as close as possible to the market value, which requires inter alia that the prices offered in the bidding procedure be taken into account when the land is valued. It is for the referring court to assess whether such a rule satisfies these requirements and whether its practical application may lead to a price being set that is far removed from the market value, and to draw the appropriate conclusions.