



Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

16 July 2015*

(Reference for a preliminary ruling — State aid — Article 107(1) TFEU — Sale of agricultural land by public authorities — National provision allowing the competent authorities to object to the sale of agricultural land where the price offered is considered ‘grossly disproportionate’ to the market value — Advantage granted to certain undertakings or for the production of certain goods — Private investor test — Determination of the ‘value of the contract’)

In Case C-39/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesgerichtshof (Germany), made by decision of 29 November 2013, received at the Court on 27 January 2014, in the proceedings brought by

BVVG Bodenverwertungs- und -verwaltungs GmbH

joined parties:

Thomas Erbs,

Ursula Erbs,

Landkreis Jerichower Land,

THE COURT (First Chamber),

composed of A. Tizzano (Rapporteur), President of the Chamber, A. Borg Barthet, E. Levits, M. Berger and F. Biltgen, Judges,

Advocate General: P. Cruz Villalón,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 11 December 2014,

after considering the observations submitted on behalf of:

- BVVG Bodenverwertungs- und -verwaltungs GmbH, by C. von Donat, Rechtsanwalt,
- Mr and Mrs Erbs, by T. Rehmann, Rechtsanwalt,
- the Landkreis Jerichower Land, by W. Sonderhoff, acting as Agent,

* Language of the case: German.

— the German Government, by T. Henze and B. Beutler, acting as Agents,
— the European Commission, by P.-J. Loewenthal and R. Sauer, acting as Agents,
after hearing the Opinion of the Advocate General at the sitting on 17 March 2015,
gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 107(1) TFEU.
- 2 The request has been made in proceedings between BVVG Bodenverwertungs- und -verwaltungs GmbH ('BVVG') and the Landkreis Jerichower Land (district of Jerichower Land, Germany) concerning the latter's refusal to authorise the sale of agricultural land to Mr and Mrs Erbs.

Legal context

EU law

- 3 The first subparagraph of Title II, point 1, of the Commission Communication of 10 July 1997 on State aid elements in sales of land and buildings by public authorities (OJ 1997 C 209, p. 3, 'the Communication') states as follows:

'A sale of land and buildings following a sufficiently well-publicised, open and unconditional bidding procedure, comparable to an auction, accepting the best or only bid is by definition at market value and consequently does not contain State aid. ...'

- 4 According to Title II, point 2(a), of the Communication:

'If public authorities intend not to use the procedure described under [Title II, point 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. ...

...

"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 ...'

German law

- 5 Paragraph 1(1) of the Grundstückverkehrsgesetz (Law on measures for the improvement of agricultural structures and on the protection of agricultural and forestry undertakings) of 28 July 1961 (BGBl. I, p. 1091) ('the GrdstVG') reads as follows:

'The provisions of this Part apply to agricultural and forest land ...'

6 Paragraph 2(1) of the GrdstVG provides:

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

7 Paragraph 4 of the GrdstVG provides:

‘Consent shall not be necessary where

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

...’

8 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.

...

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

...’

The dispute in the main proceedings and the question referred for a preliminary ruling

9 According to the order for reference, BVVG is a legal person governed by private law, whose shares are held by the Bundesanstalt für vereinigungsbedingte Sonderaufgaben (a federal body responsible for special tasks connected with the reunification of Germany). BVVG has, inter alia, the statutory task of privatising land and buildings belonging to the State and used for agricultural and forestry purposes. In that context, it acts in its own name as the civil-law owner, but on behalf of the Bundesanstalt für vereinigungsbedingte Sonderaufgaben.

10 After a public call for tenders in which they made the highest bid, Mr and Mrs Erbs concluded a contract with BVVG on 31 March 2008 before a notary for the ‘sale and transfer’ of agricultural land of around 2.6 hectares (‘the land at issue’) at the price of EUR 29 000.

11 By decision of 5 June 2008, the Landkreis Jerichower Land, as the local authority competent to authorise such a sale and the instrument recording that sale, refused to approve the transaction under Paragraph 9(1)(3) of the GrdstVG on the ground that the price agreed was grossly disproportionate to the agricultural market value of the land at issue.

- 12 It is clear from the relevant national case-law that a sale price is grossly disproportionate where it exceeds 'the agricultural market value of the land' at issue by more than 50%. That value corresponds to the price paid for land of the same type and the same situation on the date the contract was concluded in a land transaction between two farmers. Transfers to non-farmers are also taken into consideration for the purposes of determining that value where the purpose of the transfers is continued use as farmland.
- 13 BVVG and Mr and Mrs Erbs challenged that decision of the Landkreis Jerichower Land before the Amtsgericht — Landwirtschaftsgericht (Local Court — Agricultural Court), which dismissed their application on the basis of an estimate of the market value of the land at issue obtained from a committee of experts.
- 14 In the appeal brought before it against that decision, the appeal court ordered a second expert report which concluded that the agricultural market value of the land was either EUR 14 168.61, with other BVVG sales of land in the region being included in the comparison, or EUR 13 648.19, without those sales being included in the comparison. Thus it confirmed that the price of EUR 29 000 offered by Mr and Mrs Erbs exceeded the market value of the land at issue by more than 50% and was, as a consequence, 'grossly disproportionate' for the purposes of Paragraph 9(1)(3) of the GrdstVG.
- 15 The appeal court also stated that consenting to a sale at such a price to non-professional farmers, such as Mr and Mrs Erbs, would have adverse effects on agricultural holdings because, if the price of agricultural land still available became excessive, farmers in need of land to expand their businesses would no longer be able to purchase that land. However, according to the appeal court, consent to sell agricultural land may only be refused if there is a farmer willing to purchase that land. Since the appeal court found that there was at least one other professional farmer who, although he did not take part in the public call for tenders, was willing to purchase the land at issue at a price which was up to 50% above its agricultural market value, it rejected the appeal by BVVG and Mr and Mrs Erbs.
- 16 BVVG appealed on a point of law to the referring court, the Bundesgerichtshof (Federal Court of Justice). That court is unsure whether the sale of publicly owned property by BVVG at a price below the price established by a public call for tenders amounts to preferential treatment of the purchaser, and if that is the case, whether such an advantage may be justified by the objective of Paragraph 9(1)(3) of the GrdstVG, that is to say, safeguarding the interests of agricultural holdings. In addition, the referring court seeks guidance on the issue of whether refusing to sell at the price determined by a public call for tenders infringes Article 107(1) TFEU, bearing in mind that, where such a refusal occurs, no decision has yet been taken as to whom the land concerned will be sold.
- 17 In those circumstances, the Bundesgerichtshof decided to stay the proceedings and to 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 BVVG, from selling to the highest bidder in a public call for tenders agricultural land available for sale, if the highest bid is grossly disproportionate to the value of the land?'

The question referred for a preliminary ruling

- 18 By its question the referring court asks, in essence, whether a rule of national law such as that at issue in the main proceedings constitutes aid that is incompatible with the internal market, within the meaning of Article 107(1) TFEU.

- 19 As regards the wording of the question, it must be borne in mind, at the outset, that the Court does not have jurisdiction to rule upon the compatibility of a national measure with EU law. Nor does the Court have jurisdiction to rule on the compatibility of State aid or of an aid scheme with the internal market, since that assessment falls within the exclusive competence of the European Commission, subject to review by the Court (judgment in *Fallimento Traghetti del Mediterraneo*, C-140/09, EU:C:2010:335, paragraph 22 and the case-law cited).
- 20 However, the Court does have jurisdiction to give the national court full guidance on the interpretation of EU law in order to enable it to determine the issue of compatibility of a national measure with that law for the purposes of deciding the case before it. In the area of State aid, the Court has jurisdiction, inter alia, to give the national court guidance on interpretation in order to enable it to determine whether a national measure may be classified as ‘State aid’ under EU law (judgment in *Fallimento Traghetti del Mediterraneo*, C-140/09, EU:C:2010:335, paragraph 24 and the case-law cited).
- 21 Consequently, the question referred must be understood as asking whether Article 107(1) TFEU must be interpreted as meaning that a rule of national law which, for the purposes of safeguarding the interests of agricultural holdings, effectively prohibits an emanation of the State from selling agricultural land to the highest bidder in a public call for tenders, where the local authority considers his bid to be grossly disproportionate to the estimated value of that land, can be classified as ‘State aid’.
- 22 In order to answer that question, it should be recalled that, in accordance with Article 107(1) TFEU, save as otherwise provided in the Treaties, 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 is, in so far as it affects trade between Member States, incompatible with the internal market.
- 23 According to the settled case-law of the Court, in order for a measure to be categorised as ‘aid’ for the purposes of Article 107(1) TFEU, all the conditions set out in that provision must be fulfilled (judgment in *Banco Privado Português and Massa Insolvente do Banco Privado Português*, C-667/13, EU:C:2015:151, paragraph 45 and the case-law cited).
- 24 It is thus not disputed that, for a measure to be classified as State aid for the purposes of Article 107(1) TFEU, first, there must be an intervention by the State or through State resources; second, the intervention must be liable to affect trade between Member States; third, it must confer an advantage on the recipient; and fourth, it must distort or threaten to distort competition (judgment in *Trapeza Eurobank Ergasias*, C-690/13, EU:C:2015:235, paragraph 17 and the case-law cited).
- 25 In the main proceedings, although the referring court considers, in essence, that Paragraph 9(1)(3) of the GrdstVG satisfies the first, second and fourth conditions set out in the preceding paragraph, it nevertheless has doubts with regard to the interpretation and application of the third condition, that the measure at issue must confer a selective advantage on the recipient.
- 26 In that respect, it should be borne in mind that, according to the settled case-law of the Court, the concept of aid may include not only positive benefits such as subsidies, loans or direct investment in the capital of undertakings, but also interventions 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 of the same character and have the same effect (judgment in *Seydaland Vereinigte Agrarbetriebe*, C-239/09, EU:C:2010:778, paragraph 30 and the case-law cited). To that end, for the purposes of establishing the existence of State aid, a sufficiently direct link must be established between, on the one hand, the advantage given to the recipient and, on the other, a reduction of the State budget or a sufficiently concrete economic risk of burdens on that budget (see, to that effect, judgment in *Bouygues and Bouygues Télécom v Commission and Others and Commission v France and Others*, C-399/10 P and C-401/10 P, EU:C:2013:175, paragraph 109).

- 27 As the Court has already held, it cannot therefore, as a rule, be precluded that a sale of public land at a price lower than the market value might constitute State aid (judgment in *Seydaland Vereinigte Agrarbetriebe*, C-239/09, EU:C:2010:778, paragraph 31).
- 28 Such a sale may confer on the purchaser, as a recipient, an advantage which, in essence, leads to a reduction of the State budget consisting in the State forgoing the difference between the market value of the land and the lower price paid by that purchaser.
- 29 In particular, in relation to 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, the Court has held that such a sale 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 (judgment in *Seydaland Vereinigte Agrarbetriebe*, C-239/09, EU:C:2010:778, paragraph 34 and the case-law cited).
- 30 It follows that, where national law establishes calculation rules used to estimate the market value of land for sale by public authorities, the application of those rules must, in order to comply with Article 107 TFEU, result in all cases in a price as close as possible to the market value (see, to that effect, judgment in *Seydaland Vereinigte Agrarbetriebe*, C-239/09, EU:C:2010:778, paragraph 35).
- 31 A number of methods are capable of providing prices corresponding to the market value. Those methods include sales to the highest bidder or an expert report, which are referred to in Title II, points 1 and 2, of the Communication. Likewise, it cannot be ruled out that other methods may also achieve the same result (see, to that effect, judgment in *Seydaland Vereinigte Agrarbetriebe*, C-239/09, EU:C:2010:778, paragraphs 35 and 39).
- 32 Specifically with regard to the method of sales to the highest bidder, the Court has previously held, in a case concerning the sale by a public authority of an undertaking belonging to it, that, where that authority undertakes an open, transparent and unconditional bidding procedure, it can be presumed that the market price corresponds to the highest offer, provided that it is established, first, that that offer is binding and credible and, secondly, that the consideration of economic factors other than the price is not justified (judgment in *Land Burgenland and Others v Commission*, C-214/12 P, C-215/12 P and C-223/12 P, EU:C:2013:682, paragraph 94).
- 33 In such circumstances, the Court has also stated that it is not necessary to resort to other methods in order to check the market price, such as independent expert reports (see, to that effect, judgment in *Land Burgenland and Others v Commission*, C-214/12 P, C-215/12 P and C-223/12 P, EU:C:2013:682, paragraph 95).
- 34 It must be observed that, pursuant to the national rule at issue in the main proceedings, the competent local authority may, following a public call for tenders, refuse to consent to the sale to the highest bidder of agricultural land belonging to the State where it considers that the price offered is grossly disproportionate to the value of the land.
- 35 As was stated in paragraph 12 above, a sale price is grossly disproportionate, according to the national case-law, where it exceeds by more than 50% ‘the agricultural market value of the land’ at issue, assessed against the price paid for land of the same type and the same situation at the date the contract was concluded in a land transaction within the agricultural sector. As part of that assessment, transfers to non-farmers are also taken into consideration for the purposes of determining that value where the purpose of the transfers is continued use as farmland.

- 36 As a consequence, the application of Paragraph 9(1)(3) of the GrdstVG may undermine the attainment of the objectives of a public call for tenders in that it leads to the rejection of the highest bid, even though that bid may be presumed to correspond to the market price of the land at issue, as has already been stated in paragraph 32 above.
- 37 Furthermore, since it enables a third party who may not have even taken part in the public call for tenders to purchase the same land, following the refusal by the competent local authority, at a price below the price offered in that call for tenders, the rule laid down in Paragraph 9(1)(3) of the GrdstVG may come under the definition of ‘State aid’, within the meaning of Article 107(1) TFEU.
- 38 The application of such a measure results in an advantage being conferred on a third-party purchaser, as a recipient, through a reduction of the State budget consisting in the State forgoing the difference between the value of the land, as assessed by the competent local authorities, and the higher price offered by the highest bidder in a public call for tenders.
- 39 Having said that, it is conceivable that, in specific circumstances, the method of a sale to the highest bidder does not result in a price which corresponds to the market value of the property in question and that, as a result, taking into consideration factors other than the price may be justified.
- 40 That could be the case in particular where, as the Advocate General observed in point 71 of his Opinion, the highest bid is distinctly higher than any other price offered in the public call for tenders and the estimated market value of the land on the basis of its manifestly speculative nature.
- 41 In such circumstances, the method of a sale to the highest bidder would not be appropriate for reflecting the market value of the land in question.
- 42 Consequently, a rule of national law enabling the competent national authority, in those circumstances, to reject a bid which in its opinion is disproportionate and to refuse, on that ground, to consent to the sale of the agricultural land which that bid relates to, cannot be classified as ‘State aid’, provided that the application of that rule results in a price which is, in accordance with the case-law set out in paragraph 30 above, as close as possible to the market value of the land at issue.
- 43 In the present case, as the Advocate General observed in point 65 of his Opinion, the Court does not have all the information relating to the methodology used by the competent local authorities or by the experts appointed by the national courts to estimate the price of the land in connection with the implementation of Paragraph 9(1)(3) of the GrdstVG.
- 44 In particular, there is nothing in the documents submitted to the Court which makes it possible to identify either the market indicators or the valuation standards which form the basis of the calculation of the actual market value of agricultural land.
- 45 Consequently, the Court is not in a position to establish whether the application of the national rule at issue in the main proceedings in fact makes it possible, as required by the case-law set out in paragraph 30 above, to achieve a price corresponding as close as possible to the market value of the land at issue.
- 46 It is therefore for the referring court to carry out such an assessment in the main proceedings.
- 47 In that assessment, it will have to ensure, in particular, that the method for valuing the agricultural land includes an update mechanism which takes into account the development of market prices in such a way that the estimate provided corresponds as closely as possible to the current market value of the land (see, to that effect, judgment in *Seydaland Vereinigte Agrarbetriebe*, C-239/09, EU:C:2010:778, paragraph 43).

- 48 Furthermore, it is in the light of all the factual circumstances of the case, and in particular the detailed rules by which the bidding procedure at issue was conducted in that case, that the referring court must establish whether the highest bid corresponds to the market value of the land at issue or whether it is necessary to take into account factors other than the price, thus justifying the application of the measure referred to in Paragraph 9(1)(3) of the GrdstVG.
- 49 In that regard, the German Government submits that that measure is justified by requirements relating to safeguarding the interests of agricultural holdings.
- 50 In particular, the measure aims to ensure that professional farmers are not burdened with the purchase costs of new land which might endanger the profitability of their farms.
- 51 However, it must be noted in that regard that such an argument is not sufficient in itself to exclude such a measure outright from classification as ‘State aid’ within the meaning of Article 107(1) TFEU.
- 52 In accordance with well-established case-law of the Court, 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 (see judgment in *3M Italia*, C-417/10, EU:C:2012:184, paragraph 36 and the case-law cited).
- 53 Similarly, the fact alluded to by the referring court that, under Paragraph 9(1)(3) of the GrdstVG, the refusal to sell at the price determined by a public call for tenders occurs where no decision has yet been taken as to whom the land concerned will be sold has no bearing on the classification of that measure as ‘State aid’ for the purposes of Article 107(1) TFEU.
- 54 It would be contrary to the rationale of the permanent system for monitoring State aid, established by Articles 107 and 108 TFEU, to make the classification of a national measure as ‘aid’ conditional on ascertaining that each recipient actually profits from the advantages conferred by the measure at issue.
- 55 In the light of all the foregoing considerations, the answer to the question referred is that Article 107(1) TFEU must be interpreted as meaning that a rule of national law, such as that at issue in the main proceedings, which, for the purposes of safeguarding the interests of agricultural holdings, effectively prohibits an emanation of the State from selling agricultural land to the highest bidder in a public call for tenders, where the competent local authority considers that his bid is grossly disproportionate to the estimated value of that land, cannot be classified as ‘State aid’, provided that the application of that rule results in a price which is as close as possible to the market value of the agricultural land concerned, that being a matter for the referring court to ascertain.

Costs

- 56 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

Article 107(1) TFEU must be interpreted as meaning that a rule of national law, such as that at issue in the main proceedings, which, for the purposes of safeguarding the interests of agricultural holdings, effectively prohibits an emanation of the State from selling agricultural land to the highest bidder in a public call for tenders, where the competent local authority considers that his bid is grossly disproportionate to the estimated value of that land, cannot be

classified as ‘State aid’, provided that the application of that rule results in a price which is as close as possible to the market value of the agricultural land concerned, that being a matter for the referring court to ascertain.

[Signatures]