JUDGMENT OF THE COURT (First Chamber)

16 December 2010 *

In Case C-239/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Landgericht Berlin (Germany), made by decision of 18 June 2009, received at the Court on 1 July 2009, in the proceedings

Seydaland Vereinigte Agrarbetriebe GmbH & Co. KG

v

BVVG Bodenverwertungs- und -verwaltungs GmbH,

* Language of the case: German.

THE COURT (First Chamber),

composed of A Tizzano (Rapporteur), President of the Chamber, J.-J. Kasel, A. Borg Barthet, E. Levits and M. Safjan, Judges,

Advocate General: P. Cruz Villalón,
Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— Seydaland Vereinigte Agrarbetriebe GmbH & Co. KG, by G. Korth, Rechtsanwalt,

— BVVG Bodenverwertungs- und -verwaltungs GmbH, by C. von Donat, Rechtsanwalt,

— the German Government, by M. Lumma and B. Klein, acting as Agents,

— the Commission of the European Communities, by B. Stromsky and B. Martenczuk, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 30 September 2010,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 87 EC.

2 The reference has been made in proceedings between Seydaland Vereinigte Agrarbetriebe GmbH & Co. KG ('Seydaland') and BVVG Bodenverwertungs- und -verwaltungs GmbH ('BVVG') concerning the calculation methods used by BVVG to determine the selling price of agricultural land.

Legal context

European Union law

Rules on State aid

3 The first subparagraph of Title II, point 1, of the Commission Communication 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 Under the first subparagraph of Title II, point 2(a), of the Communication, if 'public authorities intend not to use the procedure described under [Title II, point 1]' State aid can be excluded only by 'an independent evaluation … 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'.

5 Under the fifth subparagraph of Title II, point 2(a), of the Communication:

> '"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 …'

6 By its Decision 1999/268/EC of 20 January 1999 on the acquisition of land under the German Indemnification and Compensation Act (OJ 1999 L 107, p. 21; 'Decision of 20 January 1999'), the Commission of the European Communities found the aid scheme, established by the Federal Republic of Germany's programme for re-privatisation of land in the territories of the new Länder, to be, in part, incompatible with the common market.

7 The second paragraph of Article 2 of that decision provides:

> '[That aid], the maximum rate of which exceeds 35 % for farmland in areas other than less-favoured areas as defined in [Council] Regulation (EC) No 950/97 [of 20 May 1997 on improving the efficiency of agricultural structures (OJ 1997 L 142, p. 1)], is not compatible with the common market.'

8 Following an examination of the amendments which were introduced into that programme by the Federal Republic of Germany in response to the Decision of 20 January 1999, the Commission adopted the Decision of 22 December 1999 on authorisation

for State aid pursuant to Articles 87 and 88 (ex-Articles 92 and 93) of the EC Treaty (OJ 2000 C 46, p. 2; 'the Decision of 22 December 1999'), notified to the Federal Republic of Germany by a letter from the Commission dated 19 January 2000 concerning that programme as amended.

9 The Decision of 22 December 1999 did not raise any objections in particular to the amendment of the scheme at issue in relation to the criterion used to calculate the selling price of agricultural land. According to that criterion, the Germany authorities had, thenceforth, to act on the basis of the market value of the land for sale, reduced by 35 %.

Specific rules on aid in the area of agricultural policy

10 Article 7(2) of Regulation No 950/97 provided:

'The total value of the aid expressed as a percentage of the amount of the investment, shall not exceed:

…

(b) in the case of [less-favoured] areas:

— 35 % for investments in fixed assets;

…'

11 Article 12(2) of that regulation provides:

'(Aids generally allowed) The Member States may grant aid for investments for:

(a) land purchase;

…'

12 Subsequently, that regulation was repealed and replaced by Council Regulation (EC) No 1257/1999 of 17 May 1999 on support for rural development from the European Agricultural Guidance and Guarantee Fund (EAGGF) and amending and repealing certain Regulations (OJ 1999 L 160, p. 80), in force since 3 July 1999. The second paragraph of Article 7 of that regulation states:

'The total amount of support, expressed as a percentage of the volume of eligible investment, is limited to a maximum of 40 % …'

National law

13 In order to adapt the system of ownership over agricultural and forestry land of the new Länder to the Federal Republic of Germany's legal system, the Federal Republic of Germany adopted the Indemnification and Compensation Act (Ausgleichsleistungsgesetz) of 27 September 1994 (BGBl. I 1994, p. 2624; 'AusglLeistG'). That law included a programme for the acquisition of land, subsequently implemented by the Land Purchase Order (Flächenerwerbsverordnung) of 20 December 1995 (BGBl. I 1995, p. 2072; 'FlErwV').

14 In order to comply with the Decision of 20 January 1999, the Federal Republic of Germany thereafter introduced a number of amendments both to the AusglLeistG and to the FlErwV, which were referred to in the Decision of 22 December 1999.

15 Thus, the AusglLeistG amended the valuations of agricultural land which had, thenceforth, to be calculated by reducing its market value by 35 %, and not by multiplying certain unit values — which had been established in 1935 — by three, as was originally planned.

16 Paragraph 5(1) of the FlErwV introduces a method for calculating that valuation, which is no longer based on the market value of the agricultural land, but on expert reports prepared by regional valuation committees. That provision states:

'The market value of agricultural land under Paragraph 3(7) … of the AusglLeistG shall be determined in accordance with the Land Valuation Order of 6 December

1988 … Where there are regional reference valuations of arable and pasture land, the market value shall be determined according to them. The regional reference valuations shall be published by the Federal Finance Minister in the *Bundesanzeiger* [Federal Gazette]. The potential purchaser or the Privatisation Authority may seek a determination of the market value which differs from those valuations by means of an expert report prepared by the competent regional valuation committee, established under Paragraph 192 of the Federal Law on Construction, where there is genuine evidence that the regional reference valuations are not a suitable basis for determining market value.'

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

17 Seydaland is a company operating in the agro-industrial sector. BVVG is a wholly-owned subsidiary of the Bundesanstalt für vereinigungsbedingte Sonderaufgaben (the federal body responsible for special tasks connected with German reunification), responsible for the privatisation of agricultural and forestry land.

18 It is apparent from the order for reference that, by contract dated 18 December 2007, BVVG sold land for agricultural use to Seydaland. The total selling price was EUR 245 907.91, of which agricultural land accounted for EUR 210 810,18.

19 As it considered that the price it paid was excessive, Seydaland sought reimbursement of part of the selling price of the land, claiming that, calculated on the basis of the regional reference valuations, that selling price was only EUR 146 850.24.

20 As BVVG did not accede to that request, Seydaland brought an action before the Landgericht Berlin (Berlin Regional Court) seeking reimbursement. In support of its action, Seydaland claimed that Article 2(5) of the contract of 18 December 2007 explicitly enabled the purchaser to verify the selling price and how it had been calculated, and gave it a right to have that price amended by the courts.

21 According to Seydaland, BVVG ought to have calculated the selling price of the land at issue on the basis of the regional reference valuations, or to have referred to the valuation committee pursuant to Paragraph 5(1) of the FlErwV. Seydaland also claimed that, in any event, it was not permissible to determine that selling price on the basis of the prevailing market situation, as BVVG did.

22 By contrast, BVVG contended that it was not appropriate for it to take account of the regional reference valuations to determine the selling price of the land at issue because, in general, those values did not reflect the prevailing market situation but rather the situation one or two years earlier. Thus, fixing a price on the basis of those values would amount to granting aid contrary to European Union law ('EU law').

23 In that regard, BVVG explained that the Federal Finance Ministry had recognised that discrepancy and therefore issued, on 10 July 2007, an instruction that the regional reference valuations published in the *Bundesanzeiger* should be subject to a substantive review, since those values could not be used as a basis for calculating the market value of agricultural land, where they varied by more than 20 % from average selling prices for comparable land. According to BVVG's calculations, that was the situation in the present case.

24 In those circumstances the Landgericht Berlin, taking the view that the outcome of the dispute before it depends on an interpretation of EU law, decided to stay the proceedings and refer the following question to the Court of Justice for a preliminary ruling:

'Do the second and fourth sentences of Paragraph 5(1) of the FlErwV, which was passed in application of the first sentence of Paragraph 4(3) of the AusglLeistG, infringe Article 87 EC?'

Consideration of the question referred

25 By its question, the referring court asks the Court of Justice to assess whether Paragraph 5(1) of the FlErwV is consistent with Article 87 EC.

26 In that regard, it should be borne in mind that, according to settled case-law, the procedure laid down in Article 267 TFEU is based on a clear separation of functions between national courts and tribunals and the Court of Justice, and the latter is empowered to rule only on the interpretation or the validity of the acts of the European Union referred to in that article, and not on the interpretation of national laws (see, inter alia, Case C-220/05 *Auroux and Others* [2007] ECR I-385, paragraph 25, and Case C-515/08 *Dos Santos Palhota and Others* [2010] ECR I-9133, paragraph 18).

27 However, with regard to the need to provide the national court with an answer which will be of use to it and enable it to determine the case before it, the Court may have to reformulate the questions referred to it (Case C-286/05 *Haug* [2006] ECR I-4121, paragraph 17, and Case C-420/06 *Jager* [2008] ECR I-1315, paragraph 46).

28 In the light of that case-law, the question referred must be understood as meaning that the referring court asks, in essence, whether Article 87 EC must be interpreted as precluding national legislation laying down calculation methods for determining the value of agricultural and forestry land, being offered for sale by public authorities in the context of a privatisation programme, such as those laid down in the second and third sentences of Paragraph 5(1) of the FlErwV.

29 Moreover, in order to provide a useful answer to the referring court, the question must be considered, as requested by the German Government, to relate to the whole of Paragraph 5(1), that is to say, taking into account the first and fourth sentences of that paragraph as well.

30 That being made clear, it should be borne in mind that, according to settled case-law of the Court, the notion 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 (see, inter alia, Case C-156/98 *Germany* v *Commission* [2000] ECR I-6857, paragraph 25; Joined Cases C-341/06 P and C-342/06 P *Chronopost and La Poste* v *UFEX and Others* [2008] ECR I-4777, paragraph 123; and Case C-169/08 *Presidente del Consiglio dei Ministri* [2009] ECR I-10821, paragraph 56).

31 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.

32 However, it must also be pointed out that, in the context of the common agricultural policy, any sale of public land at a price lower than the market value need not necessarily be considered to be contrary to the EC Treaty. In the context of the wide discretion which it enjoys where the common agricultural policy is concerned (Case 139/79 *Maizena* v *Council* [1980] ECR 3393, paragraph 23, and Case C-365/08 *Agrana Zucker* [2010] ECR I-4341, paragraph 30), the European Union legislature adopted new rules specifically concerning the grant of aid in the area of agricultural policy, including, in particular, aid for investment in agricultural holdings, first, by means of Regulation No 950/97, applicable *ratione temporis* to the dispute in the main proceedings, and subsequently repealed by Regulation No 1257/1999.

33 Thus, pursuant to Article 7(2)(b) of Regulation No 950/97, the total value of the aid expressed as a percentage of the amount of the eligible investment was limited to 35 % for investments in fixed assets, and that limit was extended to 40 % under Regulation No 1257/1999.

34 Furthermore, 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, it must be pointed out that 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 (see, to that effect, Case C-290/07 P *Commission* v *Scott* [2010] ECR I-7763, paragraph 68).

35 It follows from the foregoing considerations that, where the national law establishes rules for calculating the market value of land for their sale by public authorities, the application of those rules must, in order to comply with Article 87 EC, lead in all cases to a price as close as possible to the market value. As that market value is theoretical, except in the case of sales accepting the highest bid, a margin for variation on the price obtained as compared with the theoretical price must be tolerated, as the Commission correctly states in Title II, point 2(b), of the Communication.

36 As regards the provision at issue in the present case, it must first be stated that, contrary to the claims of Seydaland and the German Government, the Decision of 22 December 1999 did not declare that that provision complies with Article 87 EC. As Seydaland points out, it is apparent from that decision that the Commission referred to the provision in question only with the aim of describing the amendments made to the FlErwV in relation to that aid scheme, which it had examined in the Decision of 20 January 1999.

37 Moreover, Paragraph 5(1) of the FlErwV was not the subject of a substantive examination in the Decision of 22 December 1999, as the Commission restricted itself to analysing the level of aid granted by the German privatisation plan and those aspects of the Decision of 20 January 1999 which it considered to be discriminatory.

38 Next, it must be observed that the referring court considers that only a sale accepting the best bid, or the determination of the price by an expert, are suitable for establishing the market value of a piece of land. Thus, it takes the view that the methods laid down in the second and third sentences of Paragraph 5(1) of the FlErwV do not enable the market value to be determined correctly.

39 In that regard, it must be stated that, while it is clear that the best bid or an expert report are likely to provide prices corresponding to actual market values, as the Commission states in Title II, points 1 and 2(a), of the Communication, it cannot be ruled out that other methods may also achieve the same result.

40 Paragraph 5(1) of the FlErwV in fact provides for some of those methods.

41 In the first place, it provides a calculation method which entails establishing the value of agricultural land on the basis of regional reference valuations. The referring court considers that that method allows the market value of the land for sale to be fixed only imprecisely, in particular since it does not reflect the significant rise in prices for agricultural land in the east of Germany since 2007.

42 In that regard, the German Government accepts, in its written observations, that the evolution in market prices is reflected in the real estate reference values used in the context of that assessment procedure only after a certain delay. In addition, as BVVG and the German Government indicate, account must be taken of the fact that, generally, those values are updated only every two years.

43 In those circumstances, it must be held, as the Advocate General stated in point 47 of his Opinion, that in cases in which the method based on the regional reference valuations does not include a mechanism for updating those valuations which would allow the selling price of the land to reflect in so far possible, the market value of that land, especially when prices are rising sharply, that method is not suitable for reflecting the actual market prices in question. As that assessment requires an interpretation of national law, it is for the referring court to carry it out.

44 In addition, Seydaland's claim, that the method based on the regional reference valuation — which is laid down in the provision at issue in the main proceedings — would result in a price falling between the market value and the price which would result from the 35 % reduction corresponding to the level of aid established by the national rules in accordance with Regulation No 950/97, is irrelevant.

45 Such a claim fails to have regard to the fact that the calculation of the market value of land or buildings constitutes a precondition which must be met before the level of aid, pursuant to the specific European Union rules set out in paragraphs 32 and 33 above, can be applied to that value.

46 In the second place, Paragraph 5(1) of the FlErwV lays down another method which entails the possibility, where there is actual evidence showing that the regional reference valuations are not a suitable basis for determining the value of a specific piece of real estate, for the potential purchaser or the Privatisation Authority to request a valuation committee to prepare an expert report in order to determine that value pursuant to Paragraph 192 of the Federal Law on Construction.

47 As regards that latter provision, the German Government indicated, in reply to a written question from the Court, that that valuation committee relies on an office which prepares a report taking account of a number of relevant parameters for assessing

land, such as real estate reference values, a compilation of selling prices, rents, interest rates, normal construction costs and other market-related factors.

48 In that regard, for the reasons set out in paragraph 43 above, it must be held that only if the workings of that valuation committee result in a determination of the price which is equivalent to the market value, will it be likely to meet the criteria for compatibility with the rules of the Treaty in the area of State aid.

49 In the third place, in so far as it can be assumed, as the German Government does, that Paragraph 5(1) of the FlErwV provides for a third calculation method in that it refers to the Land Valuation Order of 6 December 1988, it must be borne in mind, first, that it is for the referring court to determine, in the cases before it, what the correct interpretation of national law is (Joined Cases C-188/10 and C-189/10 *Melki and Abdeli* [2010] ECR I-5667, paragraph 49).

50 Second, the principle that national law must be interpreted in conformity with EU law — which is inherent in the Treaty system in that it enables the national court to ensure, for matters within its jurisdiction, the full effectiveness of EU law when it determines the dispute before it (see, to that effect, Case C-160/01 *Mau* [2003] ECR I-4791, paragraph 34) — requires the national court to consider national law as a whole in order to assess to what extent it may be applied so as not to produce a result contrary to that sought by EU law (see, to that effect, Case C-131/97 *Carbonari and Others* [1999] ECR I-1103, paragraphs 49 and 50, and Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others* [2004] ECR I-8835, paragraph 115).

51 In the present case, it is therefore for the referring court to examine whether Paragraph 5(1) of the FlErwV can be interpreted in a manner consistent with Article 87 EC, in particular, in the light of other provisions of national law which may be applicable, such as the Land Valuation Order of 6 December 1988 or, as BVVG points out, if necessary, Paragraph 404(2) of the German Code of Civil Procedure.

52 In addition, it must also be observed that, even if the referring court were to find that Paragraph 5(1) of the FlErwV is consistent with Article 87 EC, it cannot be ruled out that, in certain instances, the method laid down in that provision of national law may lead to a result far removed from market value. In such circumstances, pursuant to the obligation on all the organs of the State, including the national courts and administrative authorities, to set aside a rule of national law which is contrary to EU law, those courts or administrative authorities which are responsible for the application of that rule are required to disapply the provision of national law in question (see, to that effect, Case 103/88 *Costanzo* [1989] ECR 1839, paragraph 31, and Case C-198/01 *CIF* [2003] ECR I-8055, paragraphs 48 and 49).

53 In that respect, the national court must bear in mind that that implies, if the circumstances so require, the obligation to take all appropriate measures to enable EU law to be fully applied (see, to that effect, Case 48/71 *Commission* v *Italy* [1972] ECR 529, paragraph 7, and *CIF*, paragraph 49).

54 In those circumstances, the answer to the question referred is that Article 87 EC must be interpreted as not precluding a provision of national law laying down calculation methods for determining the value of agricultural and forestry land, offered for sale by public authorities in the context of a privatisation plan, such as those laid down in Paragraph 5(1) of the FlErwV, to the extent that those methods provide for the updating

of the prices, where prices for such land are rising sharply, so that the price actually paid by the purchaser reflects, in so far as is possible, the market value of that land.

Costs

55 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 87 EC must be interpreted as not precluding a provision of national law laying down calculation methods for determining the value of agricultural and forestry land, offered for sale by public authorities in the context of a privatisation plan, such as those laid down in Paragraph 5(1) of the Land Purchase Order (Flächenerwerbsverordnung), to the extent that those methods provide for the updating of the prices, where prices for such land are rising sharply, so that the price actually paid by the purchaser reflects, in so far as is possible, the market value of that land.

[Signatures]