Case C-70/09

Alexander Hengartner

and

Rudolf Gasser

v

Landesregierung Vorarlberg

(Reference for a preliminary ruling from the

Verwaltungsgerichtshof (Austria))

(Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons – Lease of hunting ground – Regional tax – Concept of economic activity – Principle of equal treatment)

Summary of the Judgment

1. *Freedom to provide services – Services – Definition*

2. *International agreements – EC-Switzerland Agreement on the free movement of persons – Freedom to provide services*

(EC-Switzerland Agreement on the free movement of persons, Arts 1, 2 and 15 and Annexes I, II and III)

1. Where a contractual obligation consists in the making available to the parties, in return for payment and on certain conditions, of an area of land in a Member State in order to hunt there, the letting contract relates to a provision of services. It is also of a cross-border nature if the lessees are of Swiss nationality. Such lessees must be regarded as the recipients of a service which consists in the grant, in return for payment, of the exploitation of a right to hunt in that area of land for a limited time.

(see paras 31-33)

2. The provisions of the Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons do not preclude a national of one of the contracting parties from being subjected in the territory of the other contracting party, as a recipient of services, to different treatment from that reserved to persons whose principal residence is in that territory, citizens of the Union, and persons who are equated to those citizens under European Union law, with respect to the charging of a tax payable for the provision of services such as the making available of a right to hunt.

While Article 2 of the Agreement deals with the principle of non-discrimination, it imposes a general and absolute prohibition not on all discrimination against nationals of one of the contracting parties who are staying in the territory of the other party but only on discrimination on grounds of nationality where the situation of those nationals falls within the material scope of the

provisions of Annexes I to III to the Agreement. The Agreement and its annexes do not contain any specific rule intended to allow recipients of services to benefit from the principle of non-discrimination in connection with the application of fiscal provisions relating to the commercial transactions whose subject is the provision of services. Moreover, since the Swiss Confederation has not joined the internal market of the Community, the aim of which is the removal of all obstacles to create an area of total freedom of movement analogous to that provided by a national market, which includes the freedom to provide services and the freedom of establishment, the interpretation given to the provisions of European Union law concerning the internal market cannot be automatically applied by analogy to the interpretation of the Agreement, unless there are express provisions to that effect laid down by the Agreement itself.

(see paras 39-43, operative part)

JUDGMENT OF THE COURT (Third Chamber)

15 July 2010 (*)

(Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons – Lease of hunting ground – Regional tax – Concept of economic activity – Principle of equal treatment)

In Case C?70/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Verwaltungsgerichtshof (Austria), made by decision of 21 January 2009, received at the Court on 17 February 2009, in the proceedings

Alexander Hengartner,

Rudolf Gasser

v

Landesregierung Vorarlberg,

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, R. Silva de Lapuerta (Rapporteur), G. Arestis, J. Malenovský and T. von Danwitz, Judges,

Advocate General: N. Jääskinen,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 27 January 2010,

after considering the observations submitted on behalf of:

– Mr Hengartner and Mr Gasser, by A. Wittwer, Rechtsanwalt,

– Vorarlberger Landesregierung, by J. Müller, acting as Agent,

– the Austrian Government, by E. Riedl, E. Pürgy and W. Hämmerle, acting as Agents,

– the European Commission, by W. Mölls and T. Scharf, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 20 May 2010,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of provisions of Annex I to the Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons, signed in Luxembourg on 21 June 1999 (OJ 2002 L 114, p. 6).

2 The reference was made in the course of proceedings between Mr Hengartner and Mr Gasser, who are Swiss nationals, and Landesregierung Vorarlberg (Government of the Province of Vorarlberg) concerning the charging of a hunting tax with a higher rate of tax being applied to them that which applies inter alia to nationals of the European Union.

Legal context

The Agreement on the free movement of persons

3 The European Community and its Member States of the one part and the Swiss Confederation of the other part signed seven agreements on 21 June 1999, including the Agreement on the free movement of persons ('the Agreement'). They were approved on behalf of the Community by Decision 2002/309/EC, Euratom of the Council and of the Commission of 4 April 2002 (OJ 2002 L 114, p. 1) and entered into force on 1 June 2002.

4 The objective of the Agreement is inter alia, in accordance with Article 1(a) and (b), for the benefit of nationals of the Member States of the European Community and the Swiss Confederation, to accord a right of entry, residence, access to work as employed persons, establishment on a self-employed basis and the right to stay in the territory of the contracting parties and to facilitate the provision of services in the territory of the contracting parties, in particular those of brief duration.

5 Article 2 of the Agreement, entitled 'Non-discrimination', provides:

'Nationals of one Contracting Party who are lawfully resident in the territory of another Contracting Party shall not, in application of and in accordance with the provisions of Annexes I, II and III to this Agreement, be the subject of any discrimination on grounds of nationality.'

6 Article 4 of the Agreement, 'Right of residence and access to an economic activity', provides:

'The right of residence and access to an economic activity shall be guaranteed unless otherwise provided in Article 10 and in accordance with the provisions of Annex I.'

7 Article 5 of the Agreement contains rules relating to the provision of services. Under Article

5(3), ‘[n]ationals of a Member State of the European Community or Switzerland entering the territory of a Contracting Party solely to receive services shall have the right of entry and residence’. Article 5(4) states that the rights referred to in Article 5 are to be guaranteed in accordance with the provisions laid down in Annexes I to III to the Agreement.

8 In accordance with Article 15 of the Agreement, the annexes and protocols to the Agreement form an integral part of it.

9 Article 16 of the Agreement, entitled ‘Reference to Community law’, reads as follows:

‘1. In order to attain the objectives pursued by this Agreement, the Contracting Parties shall take all measures necessary to ensure that rights and obligations equivalent to those contained in the legal acts of the European Community to which reference is made are applied in relations between them.

2. In so far as the application of this Agreement involves concepts of Community law, account shall be taken of the relevant case-law of the Court of Justice of the European Communities prior to the date of its signature. Case-law after that date shall be brought to Switzerland’s attention. To ensure that the Agreement works properly, the Joint Committee shall, at the request of either Contracting Party, determine the implications of such case-law.’

10 Article 17 of Annex I to the Agreement prohibits, in the cases covered by Article 5 of the Agreement, any restriction on the cross-frontier provision of services in the territory of another contracting party not exceeding 90 days of actual work per calendar year and, subject to certain conditions, any restriction on the right of entry and residence.

11 Article 23 of Annex I to the Agreement reads:

‘1. A person receiving services within the meaning of Article 5(3) of this Agreement shall not require a residence permit for a period of residence of three months or less. For a period exceeding three months, a person receiving services shall be issued with a residence permit equal in duration to the service. He may be excluded from social security schemes during his period of residence.

2. A residence permit shall be valid throughout the territory of the issuing state.’

National legislation

12 Paragraph 2 of the Law of the Province of Vorarlberg on hunting (Vorarlberger Gesetz über das Jagdwesen, LGBl. 32/1988), in the version applicable at the material time (LGBl. 54/2008), provides:

‘Content and exercise of the right to hunt

(1) The right to hunt is the basis of any carrying on of hunting. It is linked to land ownership and encompasses the right to preserve, hunt and appropriate game.

(2) The landowner can dispose of his right to hunt only in so far as his land forms a private hunting ground (private hunting-right-holder). The disposal of the right to hunt over all other land belongs to hunting collectives.

(3) Persons entitled to dispose of the right to hunt (subparagraph 2) must either use their hunting grounds for hunting purposes themselves or transfer the exploitation to lessees (persons entitled to exploit hunting).'

13 Paragraph 20 of that law reads as follows:

'Letting of hunting

(1) Hunting may be let by private treaty, by award on the basis of a public procedure, or by means of a public auction. The persons entitled to dispose of the hunting right must when letting the hunting ensure that the right to hunt is exercised in accordance with the principles in Paragraph 3.

(2) The term of the hunting lease must be six hunting years in the case of collective hunting grounds and six or twelve hunting years in the case of private hunting grounds. If the hunting lease is terminated prematurely, the hunting may be let only for the remainder of the term.

(3) The hunting lease must be concluded in writing. It must include all the agreements relating to the exploitation of hunting, as well as any ancillary provisions such as those on the provision of a security, minimum rates of compensation for damage caused by game, or the provision, use or removal of hunting installations. Agreements not included in the hunting lease are deemed not to have been concluded. The hunting lease must include in any event the names of the person entitled to dispose of the right to hunt and the lessee, the description, location and size of the hunting ground, the beginning and end of the term of the lease, and the amount of the rent.

(4) Before letting a private hunting ground to which a parcel of land belonging to another owner of an area of over ten hectares is allocated, the private hunting-right-holder must consult the owner of that parcel of land.

(5) The person entitled to dispose of the right to hunt is required to submit the hunting lease to the authorities for examination, at the earliest one year and at the latest one month before the envisaged beginning of the term of the lease. The hunting lease acquires legal force on the agreed date if the authorities do not object to it within one month or the reasons for the objection are remedied within a period to be fixed reasonably. These provisions also apply to amendments to hunting leases in force.

(6) The provincial government shall enact by regulation more detailed provisions on the procedure for the letting of hunting.'

14 Under Paragraph 1 of the Law of the Province of Vorarlberg on the charging of a hunting tax (Vorarlberger Gesetz über die Erhebung einer Jagdabgabe, LGBl. 28/2003, 'the Vlbg JagdAbgG'), a tax is payable for the exercise of the right to hunt. Under Paragraph 2 of that law, the person entitled to dispose of the right to hunt or, if the exploitation has been transferred to lessees, the person entitled to exploit the hunting is obliged to pay the tax.

15 Paragraph 3 of the Vlbg JagdAbgG determines the basis of assessment of the tax as follows:

'(1) Where hunting is let, the tax is to be assessed according to the annual rent together with the value of any contractually agreed ancillary services. Expenditure on supervision of hunting and in respect of damage caused by hunting and game does not count as ancillary services.

(2) Where hunting is not let, the tax is to be assessed according to the sum which could be

obtained as annual rent in the event of a letting.

(3) Where hunting is let, if the annual rent together with the value of any contractually agreed ancillary services is substantially less than the sum which could be obtained in the event of a letting, the tax is to be calculated in the same way as for hunting that is not let.

…’

16 In accordance with Paragraph 4(1) of the Vlbg JagdAbgG, the tax amounts to 15% of the basis of assessment for persons whose principal residence is in Austria, citizens of the Union, and natural and legal persons who are equated to those citizens under European Union law. Under Paragraph 4(2), the tax amounts to 35% of the basis of assessment for all other persons.

The main proceedings and the question referred for a preliminary ruling

17 On 8 January 2002 Mr Hengartner and Mr Gasser, who are Swiss nationals, concluded a contract with a hunting collective for the lease of a hunting ground in Austria for a term of six years from 1 April 2002 to 31 March 2008. The annual rent was EUR 10 900 and the area of the hunting ground was 1 598 hectares.

18 According to the documents before the Court, Mr Hengartner and Mr Gasser regularly visit the Province of Vorarlberg in order to hunt there.

19 By decision of 16 April 2002, the competent authorities of that province approved the appointment of two persons as hunting protection officers for the duration of the hunting lease.

20 By decision of the Tax Office of the Province of Vorarlberg of 1 April 2007, Mr Hengartner and Mr Gasser were required to pay a hunting tax of 35% of the basis of assessment, that is, EUR 4 359, for the hunting year from 1 April 2007 to 31 March 2008. They thereupon appealed against that decision.

21 By decision of 17 October 2007, the Tax Office dismissed the appeal on the ground that the application of the higher rate of the tax was in accordance with national legislation. The decision stated that the provisions of the Agreement did not apply to the carrying on of hunting and the associated taxes.

22 Mr Hengartner and Mr Gasser then brought proceedings before the Verwaltungsgerichtshof (Administrative Court), pleading essentially an infringement of the rights to freedom of establishment and equal treatment with citizens of the Union. They submitted that hunting, like fishing or agriculture, constitutes an economic activity, especially in circumstances such as those of the main proceedings in which the shot game is sold in Austria. The Tax Office of the Province of Vorarlberg should therefore have applied a tax rate of 15% in order to avoid discrimination on grounds of nationality.

23 The Tax Office submitted that hunting was to be regarded as a sport which was not intended to produce income on a permanent basis.

24 The Verwaltungsgerichtshof thereupon decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

‘Is the carrying on of hunting, if the person entitled to hunt sells the shot game within the country, a self-employed activity within the meaning of Article 43 EC, even if that activity is not intended to make a profit overall?’

Consideration of the question referred

Applicability of Article 43 EC

25 It should be noted, as a preliminary point, that although the referring court expressly mentions in its question Article 43 EC (now Article 49 TFEU), the rules of the EC Treaty on freedom of establishment can be relied on only by a national of a Member State of the Union who wishes to establish himself in the territory of another Member State, or by a national of that State who finds himself in a situation which is connected with any of the situations contemplated by European Union law (see, to that effect, Case C?147/91 *Ferrer Laderer* [1992] ECR I?4097, paragraph 7).

26 In those circumstances, the Treaty provisions on freedom of establishment cannot apply to a national of a non-member country such as the Swiss Confederation.

27 However, in order to provide the referring court with elements of interpretation which may be of use to it, the Court can consider provisions of the European Union legal order which the national court has not referred to in the question submitted for a preliminary ruling (see Case C?241/99 *SARPP* [1990] ECR I?4695, paragraph 8, and Case C?506/06 *Mayr* [2008] ECR I?1017, paragraph 43).

28 In view of the factual and legal context of the main proceedings, the question referred should therefore be considered from the point of view of the provisions of the Agreement.

Interpretation of the Agreement

29 By its question the referring court seeks essentially to know whether the provisions of the Agreement preclude a Member State from charging a regional tax on persons of Swiss nationality if a higher rate of tax is applied to them than that to which inter alia nationals of the Member States of the Union are subject.

30 The Court is therefore called on to examine whether the provisions of the Agreement can apply to a dispute of a fiscal nature, such as that in the main proceedings, and if so to determine the scope of those provisions. Since the Agreement contains differing provisions relating to the provision of services and to establishment, it is necessary to define the character of the activity carried on in Austria by the applicants in the main proceedings with respect to the tax rules in question.

Classification of the activity at issue

31 The Vblg JagdAbgG makes the exercise of the right to hunt in the Province of Vorarlberg subject to payment of an annual tax. However, since, first, in the case of a lease of hunting rights, the lessee is the person liable to pay the tax and, second, the tax is payable regardless of the intensity of the hunting carried on by him, it must be considered that, in a case such as that in the main proceedings, the event which gives rise to the tax is the lease of a right to hunt in the Province of Vorarlberg.

32 The contractual obligation at issue before the referring court is thus the making available to the applicants in the main proceedings, in return for payment and on certain conditions, of an area of land in order to hunt there. The letting contract therefore relates to a provision of services which, in the main proceedings, is of a cross-border nature, since the applicants in the main proceedings, the lessees of the hunting in that area, have to travel to the Province of Vorarlberg in order to exercise their right there.

33 The applicants in the main proceedings must therefore be regarded as the recipients of a service which consists in the grant, in return for payment, of the exploitation of a right to hunt in an area of land for a limited time (see, to that effect, Case C?97/08 *Jägerskiöld* [1999] ECR I?7319, paragraph 36).

34 Since the event which gives rise to the tax is the letting of the right to hunt, only the rules of the Agreement concerning the provision of services are relevant for assessing the lawfulness of the tax at issue.

Effect of the provisions of the Agreement on the tax at issue in the main proceedings

35 As regards the tax treatment of the commercial transaction at issue in the main proceedings, it must be examined whether the provisions of the Agreement which relate to the provision of services must be interpreted as precluding a tax such as that at issue which, depending on the nationality of the lessee of the right to hunt, is charged at a rate of 15% or 35% of the basis of assessment of the tax in question.

36 According to settled case-law, an international treaty must be interpreted not solely by reference to the terms in which it is worded but also in the light of its objectives. Article 31 of the Vienna Convention on the Law of Treaties of 23 May 1969 provides in that respect that a treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose (see, to that effect, inter alia, Opinion 1/91 [1991] ECR I?6079, paragraph 14; Case C?416/96 *El-Yassini* [1999] ECR I?1209, paragraph 47; Case C?268/99 *Jany and Others* [2001] ECR I?8615, paragraph 35; and Case C?386/08 *Brita* [2010] ECR I?0000, paragraphs 42 and 43 and the case?law cited).

37 It must be noted here that, in accordance with Article 1(b) of the Agreement, the objective of the Agreement is to facilitate the provision of services in the territory of the contracting parties, for the benefit of nationals of the Member States of the Community and Switzerland, and to liberalise the provision of services of brief duration.

38 It must also be observed that Article 5(3) of the Agreement grants persons who are to be regarded as recipients of services within the meaning of the Agreement a right of entry and residence in the territory of the contracting parties. Article 23 of Annex I to the Agreement contains specific provisions on residence permits for such persons.

39 As to the question whether, beyond the rules on the right of entry and residence for recipients of services, the Agreement aims to establish a general principle of equal treatment in relation to their legal status in the territory of one of the contracting parties, it must be pointed out that, while Article 2 of the Agreement deals with the principle of non-discrimination, it imposes a general and absolute prohibition not on all discrimination against nationals of one of the contracting parties who are staying in the territory of the other party but only on discrimination on grounds of nationality where the situation of those nationals falls within the material scope of the provisions of Annexes I to III to the Agreement.

40 The Agreement and its annexes do not contain any specific rule intended to allow recipients of services to benefit from the principle of non-discrimination in connection with the application of fiscal provisions relating to the commercial transactions whose subject is the provision of services.

41 Moreover, the Court has observed that the Swiss Confederation did not join the internal market of the Community, the aim of which is the removal of all obstacles to create an area of total freedom of movement analogous to that provided by a national market, which includes inter alia the freedom to provide services and the freedom of establishment (see Case C?351/08 *Grimme* [2009] ECR I?0000, paragraph 27).

42 The Court has also stated that, in those circumstances, the interpretation given to the provisions of European Union law concerning the internal market cannot be automatically applied by analogy to the interpretation of the Agreement, unless there are express provisions to that effect laid down by the Agreement itself (see Case C?541/08 *Fokus Invest* [2010] ECR I?0000, paragraph 28).

43 Having regard to the above considerations, the answer to the question is that the provisions of the Agreement do not preclude a national of one of the contracting parties from being subjected in the territory of the other contracting party, as a recipient of services, to different treatment from that reserved to persons whose principal residence is in that territory, citizens of the Union, and persons who are equated to those citizens under European Union law, with respect to the charging of a tax payable for the provision of services such as the making available of a right to hunt.

Costs

44 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 (Third Chamber) hereby rules:

The provisions of the Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons, signed in Luxembourg on 21 June 1999, do not preclude a national of one of the contracting parties from being subjected in the territory of the other contracting party, as a recipient of services, to different treatment from that reserved to persons whose principal residence is in that territory, citizens of the Union, and persons who are equated to those citizens under European Union law, with respect to the charging of a tax payable for the provision of services such as the making available of a right to hunt.

[Signatures]

* Language of the case: German.