Provisional text

JUDGMENT OF THE COURT (First Chamber)

15 March 2018 (*)

(Reference for a preliminary ruling — 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 — Direct taxation — Transfer of the place of residence from a Member State to Switzerland — Taxation of unrealised gains on significant shareholdings in a number of companies established in the Member State of origin at the time of such transfer — Scope of the Agreement)

In Case C?355/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Conseil d'État (Council of State, France), made by decision of 23 June 2016, received at the Court on 28 June 2016, in the proceedings

Christian Picart

v

Ministre des Finances et des Comptes publics,

THE COURT (First Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, C.G. Fernlund (Rapporteur), J.-C. Bonichot, A. Arabadjiev and S. Rodin, Judges,

Advocate General: P. Mengozzi,

Registrar: V. Giacobbo-Peyronnel, Administrator,

having regard to the written procedure and further to the hearing on 16 February 2017,

after considering the observations submitted on behalf of:

– Mr Picart, by P.-J. Douvier and A. d'Aubigny, avocats,

– the French Government, by D. Colas and E. de Moustier, acting as Agents,

– the German Government, by T. Henze and R. Kanitz, acting as Agents,

– the European Commission, by N. Gossement and M. Šimerdová, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 26 July 2017,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation 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 (OJ 2002 L 114, p. 6) ('the AFMP').

2 The request has been made in the context of a dispute between Mr Christian Picart and the Ministre des Finances et des Comptes publics (Minister for Finance and Public Accounts, France) concerning the decision of the French tax authorities, first, to re-assess the amount of unrealised capital gains relating to substantial shareholdings, in the capital of companies established in France, held by Mr Picart and which he had declared at the time of transferring his residence from his State of origin to Switzerland and, second, to make him liable for additional assessments to income tax and social security contributions, with penalties.

Legal context

The AFMP

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

4 Article 16(2) of the AFMP provides:

'Insofar 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.'

5 Chapter III of Annex I to the AFMP deals with self-employed persons. Article 12 of that annex, entitled 'Rules regarding residence', is worded as follows:

'1. A national of a Contracting Party wishing to become established in the territory of another Contracting Party in order to pursue a self-employed activity (hereinafter referred to as a "self-employed person") shall receive a residence permit valid for a period of at least five years from its date of issue, provided that he produces evidence to the competent national authorities that he is established or wishes to become so.

2. The residence permit shall be extended automatically for a period of at least five years, provided that the self-employed person produces evidence to the competent national authorities that he is pursuing a self-employed economic activity.

... '

6 Article 13 of that annex, entitled 'Self-employed frontier workers', provides in paragraph 1:

'1. A self-employed frontier worker is a national of a Contracting Party who is resident in the territory of a Contracting Party and who pursues a self-employed activity in the territory of the other Contracting Party, returning to his place of residence as a rule every day or at least once a week. '

French legislation

7 In the words of Article 167 *bis* of the code général des impôts (French General Tax Code

(‘the GTC’)), in the version in force at the time of the facts at issue in the main proceedings:

‘ I. — 1. Taxpayers resident for tax purposes in France for at least six of the previous ten years shall be subject to tax, at the date of transfer of their residence from France, on the capital gains determined in company shares referred to in Article 150-0 A and held under the conditions set out in point (f) of Article 164 B.

...

II. — 1. Payment of the tax on the increase in value determined may be deferred until the time of the transmission, redemption, repayment or cancellation of the company shares concerned.

Suspension of payment shall be subject to the condition that the taxpayer declares the amount of the increase in value determined in accordance with the conditions in [point] I above, applies for the benefit of suspension, designates a representative established in France authorised to receive communications concerning the basis of assessment, collection of the tax and any disputes relating thereto, and, before his departure abroad, provides guarantees to the official responsible for collection sufficient to ensure recovery of the debt by the Treasury.

...

2. Taxpayers benefiting from suspension of payment pursuant to this article shall be required to make the declaration referred to in Article 170(1) of the GTC. The total amount of the tax payment of which has been suspended shall be indicated on that declaration, which shall be accompanied by a statement set out on a form issued by the administration showing the amount of tax relating to the securities concerned for which the suspension of payment has not expired and also, where appropriate, the nature and date of the event entailing the expiry of the suspension.

...

The tax paid locally by the taxpayer and relating to the increase in value actually realised outside France may be set off against the income tax established in France provided it is comparable with that tax.

…

4. Failure to produce the declaration and the statement referred to in [paragraph] 2 above, or the omission of all or part of the information that must be contained therein, shall result in the suspended tax becoming immediately payable.’

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

8 Mr Picart transferred his residence from France to Switzerland in the course of 2002. On the date of that transfer, he held significant shareholdings in a number of French companies.

9 At the time of that transfer, Mr Picart, in accordance with Article 167 *bis* of the GTC, declared an unrealised capital gain on the shares and, in order to benefit from suspension of payment of the tax payable on that capital gain, appointed a tax representative in France and provided a bank guarantee to ensure recovery of the debt to the French Treasury.

10 In 2005, Mr Picart transferred the shares in question, thus bringing the suspension of the payment of that taxation to an end. Following an examination of his personal tax position, the French tax authorities re-assessed the amount of the capital gain declared and made Mr Picart liable for additional assessments to income tax and social security contributions, with penalties.

11 Mr Picart filed a complaint with a view to obtaining a discharge from those assessments and penalties. Following the rejection of that complaint by the tax authorities, Mr Picart brought an action before the Tribunal administratif de Montreuil (Administrative Court, Montreuil, France) before which he argued unsuccessfully that Article 167 *bis* of the GTC was incompatible with the AFMP in that the freedom of establishment guaranteed by that agreement allowed him to be established in Switzerland and to pursue in that State an economic activity as a self-employed person consisting in the management of his various direct or indirect shareholdings in a number of companies which he controlled in France. As that argument was also rejected in an appeal before the cour administrative d'appel de Versailles (Administrative Court of Appeal, Versailles, France), Mr Picart brought an appeal on a point of law before the Conseil d'État (Council of State).

12 The referring court is unsure, in essence, whether the right of establishment as a self-employed person, within the meaning of the AFMP, has the same scope as the freedom of establishment which Article 49 TFEU guarantees to nationals of the Member States of the European Union and, if it does have the same scope, whether account must be taken, for the purposes of its application, of the case-law deriving from the judgment of 7 September 2006, *N* (C?470/04, EU:C:2006:525), which was delivered after the date on which that agreement was signed.

13 In those circumstances, the Conseil d'État (Council of State) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. May the right of establishment as a self-employed person, as defined in Articles 1 and 4 of the [AFMP] and Article 12 of Annex I to that agreement, be regarded as equivalent to the freedom of establishment which Article [49 TFEU] guarantees in respect of activities pursued as a self-employed person?

2. In this case, account being taken of the terms in Article 16 of the agreement, should the case-law deriving from the judgment [of 7 September 2006, *N* (C?470/04, EU:C:2006:525)], which was made after the agreement, be applied in the case of a national of a Member State who transferred his residence to Switzerland and who merely keeps his shareholding in companies under the law of that Member State (which gives him a definite influence over the decisions of those companies and enables him to determine their activities), without proposing to pursue in Switzerland an activity as a self-employed person which is different to the activity he pursued in the Member State of which he was a national and which consists in the management of his shareholdings?

3. If that right is not equivalent to the freedom of establishment, must it be interpreted in the same way as the Court of Justice of the European Union interpreted the freedom of establishment in the judgment [of 7 September 2006, *N* (C?470/04, EU:C:2006:525)]?'

Consideration of the questions referred

14 By its questions, which it is appropriate to examine together, the referring court asks whether, in a situation such as that at issue in the main proceedings, the terms of the AFMP must be interpreted as precluding legislation of a State party to that agreement, such as that at issue in the main proceedings, which, when a natural person transfers his residence from that State to another State party to that agreement, while maintaining his economic activity in the first of those

two States, provides for the immediate taxation of the unrealised capital gains on significant shareholdings held by that person in companies governed by the laws of the first State at the time of that transfer of residence, and which allows the deferred recovery of the tax due only if suitable guarantees to ensure recovery of the tax are provided, whereas a person who also holds such shareholdings, but who continues to reside in the territory of the first of those States, need pay tax only at the time of the transfer of those shareholdings.

15 Mr Picart claims that the activity of managing, from Switzerland, his shareholdings in companies established in France is covered by his right of establishment as a self-employed person, within the meaning of the AFMP, a right which he claims that he should also be able to invoke with regard to his State of origin.

16 It should be noted in this respect that the Court has already held that, in certain circumstances and in the light of the applicable provisions, nationals of a Contracting Party may claim rights under the AFMP not only against the country towards which they exercise freedom of movement but also against their own country (judgment of 28 February 2013, *Ettwein*, C?425/11, EU:C:2013:121, paragraph 33).

17 It is thus necessary to ascertain, first of all, whether a situation such as that of Mr Picart comes within the scope *ratione personae* of the notion of ‘self-employed persons’, within the meaning of the AFMP, and, where relevant, whether that agreement contains provisions that Mr Picart may invoke in relation to his State of origin.

18 In that regard, it should be noted that Chapter III of Annex I to the AFMP, which deals with self-employed persons, contains Articles 12 and 13, which define that scope of application.

19 In accordance with Article 12(1) of that annex, a national of a Contracting Party wishing to become established in the territory of another Contracting Party in order to pursue a self-employed activity is regarded as a self-employed person.

20 With regard to Article 13(1) of that annex, that provision deals with self-employed frontier workers, namely, nationals of a Contracting Party who have their residence in the territory of a Contracting Party and who pursue an activity as a self-employed person in the territory of the other Contracting Party, returning to their place of residence as a rule every day, or at least once a week.

21 In the case in the main proceedings, it must be held, without there being any need to ascertain, in the context of the present reference for a preliminary ruling, whether a shareholding-management activity, such as that at issue, amounts to a self-employed activity, within the meaning of Article 12(1) or Article 13(1) of that annex, that the situation of Mr Picart does not come within the scope of either of those provisions.

22 In the first place, as is apparent from the wording of Article 12(1) of Annex I to the AFMP, the right of establishment, within the meaning of that provision, is restricted to natural persons who are nationals of a Contracting Party and wish to become established in the territory of another Contracting Party in order to pursue a self-employed activity in that territory.

23 Thus, in order for that provision to apply, the person concerned must pursue his self-employed activity in the territory of a Contracting Party other than that of which he is a national.

24 In the case in the main proceedings, however, it is apparent from the file available to the Court that Mr Picart, a French national, does not intend to pursue his economic activity in the territory of the Swiss Confederation, but to maintain an activity in the territory of his State of origin. It follows that Mr Picart’s situation does not come within the scope of Article 12(1) of Annex I to the

AFMP.

25 In the second place, it follows from the wording of Article 13(1) of Annex I to the AFMP that the situation of a national of a Contracting Party who has his residence in the territory of another Contracting Party and who pursues a self-employed activity in the territory of the other Contracting Party, returning to his place of residence as a rule every day, or at least once a week, comes within the scope of that provision.

26 As regards that provision, it should be recalled that the Court held, in its judgment of 28 February 2013, *Ettwein* (C?425/11, EU:C:2013:121, paragraphs 34 and 35), that the situation of a self-employed couple who had transferred their residence from their State of origin to Switzerland, while maintaining their activity in that State of origin, and who returned every day from the place of their professional activity to their place of residence, came within the scope of that provision.

27 In the present case, however, it is apparent from the file before the Court that Mr Picart, unlike that self-employed couple, remains in the territory of his State of residence, namely the Swiss Confederation, from which he intends to pursue his economic activity in his State of origin, and that, contrary to what is provided for in Article 13(1) of Annex I to the AFMP, he does not undertake every day, or at least once a week, a journey from the place of his economic activity to his place of residence. Therefore, a situation such as that of Mr Picart cannot be regarded as comparable to that which gave rise to the judgment of 28 February 2013, *Ettwein* (C?425/11, EU:C:2013:121). Consequently, a situation such as that of Mr Picart does not come within the scope of that provision.

28 It follows that a situation such as that of Mr Picart does not come within the scope *ratione personae* of the notion of ‘self-employed person’, within the meaning of the AFMP and, accordingly, he cannot rely on that agreement.

29 Finally, as regards the interpretation of Article 43 EC (now Article 49 TFEU) deriving from the judgment of 7 September 2006, *N* (C?470/04, EU:C:2006:525), suffice it to recall that, as the Swiss Confederation has not joined the internal market of the European Union, the interpretation given to the provisions of EU law concerning that market cannot automatically be applied by analogy to the interpretation of the AFMP, unless there are express provisions to that effect laid down by that agreement itself (see, to that effect, judgments of 12 November 2009, *Grimme*, C?351/08, EU:C:2009:697, paragraph 29; of 11 February 2010, *Fokus Invest*, C?541/08, EU:C:2010:74, paragraph 28; and of 15 July 2010, *Hengartner and Gasser*, C?70/09, EU:C:2010:430, paragraph 42).

30 The AFMP does not contain any such express provisions.

31 Moreover, the interpretation of Article 43 EC (now 49 TFEU), given by the Court in its judgment of 7 September 2006, *N* (C?470/04, EU:C:2006:525) has even less bearing on the considerations set out above, as is apparent from point 63 et seq. of the Advocate General’s Opinion, since neither the wording nor the scope of that article can be treated as analogous to those of the relevant provisions of the AFMP.

32 In the light of all of the foregoing considerations, the answer to the questions referred is that, where a situation, such as that at issue in the main proceedings, does not come within the scope *ratione personae* of the notion of ‘self-employedpersons’, within the meaning of the AFMP, the terms of that agreement must be interpreted as not precluding the legislation of a State party to that agreement, such as that at issue in the main proceedings, which, when a natural person transfers his residence from that State to another State party to that agreement, while maintaining his economic activity in the first of those two States, without undertaking every day, or at least

once a week, a journey from the place of his economic activity to that of his residence, provides for the immediate taxation of the unrealised capital gains on significant shareholdings held by that person in companies governed by the laws of the first State at the time of the transfer of residence and which allows deferred recovery of the tax due only if suitable guarantees to ensure recovery of the tax are provided, whereas a person who also holds such shareholdings, but who continues to reside in the territory of the first of those States, need pay tax only at the time of transfer of those shareholdings.

Costs

33 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:

Where a situation, such as that at issue in the main proceedings, does not come within the scope *ratione personae* **of the notion of 'self-employed persons', within the meaning 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, the terms of that agreement must be interpreted as not precluding the legislation of a State party to that agreement, such as that at issue in the main proceedings, which, when a natural person transfers his residence from that State to another State party to that agreement, while maintaining his economic activity in the first of those two States, without undertaking every day, or at least once a week, a journey from the place of his economic activity to that of his residence, provides for the immediate taxation of the unrealised capital gains on significant shareholdings held by that person in companies governed by the laws of the first State at the time of the transfer of residence and which allows deferred recovery of the tax due only if suitable guarantees to ensure recovery of the tax are provided, whereas a person who also holds such shareholdings, but who continues to reside in the territory of the first of those States, need pay tax only at the time of transfer of those shareholdings.**

[Signatures]

* Language of the case: French.