JUDGMENT OF THE COURT (Third Chamber)

6 October 2011 *

In Case C-506/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Amtsgericht Waldshut-Tiengen (Germany), made by decision of 22 September 2010, received at the Court on 21 October 2010, in the proceedings

Rico Graf,

Rudolf Engel

v

Landratsamt Waldshut,

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, D. Šváby, R. Silva de Lapuerta, E. Juhász (Rapporteur) and J. Malenovský, Judges,

* Language of the case: German.

Advocate General: N. Jääskinen,
Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— R. Engel, by H. Hanschmann, Rechtsanwalt,

— Landratsamt Waldshut, by M. Núñez-Müller, Rechtsanwalt,

— European Commission, by F. Erlbacher and S. Pardo Quintillán, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 The reference for a preliminary ruling concerns the interpretation of the relevant 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 (OJ 2002 L 114, p. 6, the 'Agreement').

2 The reference was made in the course of proceedings between Mr Graf, a Swiss national, and Mr Engel, a German national, on the one hand, and Landratsamt Waldshut (Waldshut Agricultural Office, the 'Agricultural Office') on the other, concerning the refusal of the latter to approve, in accordance with the applicable legislation, an agricultural lease concluded between Mr Graf and Mr Engel.

Legal context

The Agreement

3 According to Article 1(a) and (d) of the Agreement, its objective is, inter alia, to accord nationals of the Member States of the European Community and the Swiss Confederation 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 accord them the same living, employment and working conditions as those accorded to nationals.

4 Article 2, 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.'

5 Under Article 7, entitled 'Other rights', '[t]he Contracting Parties shall make provision, in accordance with Annex I, for the following rights in relation to the free movement of persons:

(a) the right to equal treatment with nationals in respect of access to, and the pursuit of, an economic activity, and living, employment and working conditions;

…'

6 Article 13, entitled 'Standstill' provides:

'The Contracting Parties undertake not to adopt any further restrictive measures vis-à-vis each other's nationals in fields covered by this Agreement.'

7 Article 16 of the Agreement, entitled 'Reference to Community law', is worded 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.'

8 Annex I to the Agreement is dedicated to the free movement of persons. Under Article 2, 'Residence and economic activity',

'[w]ithout prejudice to the provisions for the transitional period, which are laid down in Article 10 of this Agreement and Chapter VII of this Annex, nationals of a

Contracting Party shall have the right to reside and pursue an economic activity in the territory of the other Contracting Party under the procedures laid down in Chapters II to IV. That right shall be substantiated through the issue of a residence permit or, for persons from frontier zones, by means of a special permit.

…'

9 Article 5 of that same annex, entitled 'Public order', provides in paragraph 1:

'The rights granted under the provisions of this Agreement may be restricted only by means of measures which are justified on grounds of public order, public security or public health.'

10 Chapter 3 of that Annex is dedicated to 'self-employed persons' who, in accordance with the definition given in Article 12(1) of that Chapter, are the nationals of a Contracting Party wishing to become established in the territory of another Contracting Party in order to pursue a self-employed activity.

11 Article 13(1) of that Chapter, entitled 'Self-employed frontier workers' provides:

'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.'

12 Article 15(1) of the same Chapter, entitled 'Equal treatment' provides:

'As regards access to a self-employed activity and the pursuit thereof, a self-employed worker shall be afforded no less favourable treatment in the host country than that accorded to its own nationals.'

13 Article 25(3), the only article in Chapter VI to Annex I of the Agreement, entitled 'Purchase of immovable property', provides:

'A frontier worker shall enjoy the same rights as a national as regards the purchase of immovable property for his economic activity and as a secondary residence. Leaving the host state shall not entail any obligation to dispose of such property. He may also be authorised to purchase holiday accommodation. This Agreement shall not affect the rules applying in the host state to pure capital investment or business of unbuilt land and apartments.'

National legislation

14 It is apparent from the file before the Court that, pursuant to Article 2 of the Federal Law on Notification of and Objection to Agricultural Tenancy Dealings (Gesetz über die Anzeige und Beanstandung von Landpachtverträgen), of 8 November 1985 (BGBl. I, p. 2075), the competent authority, the Agricultural Office, must be notified of the conclusion of an agricultural lease within the period of one month. Thus

notified, that authority may, in accordance with Article 4(1) of that law, object to the lease in so far as the latter results in an 'unsound' division of land use or an unprofitable division in the light of its use, or if the rent is disproportionate in relation to the yield. Pursuant to Article 4(6) of the same law, the Länder may provide other grounds for objection in respect of certain parts of their territory, in so far as that is absolutely necessary to prevent serious harm to the agricultural structure.

15 Having made use of that opportunity, the Land of Baden-Wurtemberg adopted a law applying the (federal) laws on land transactions and agricultural tenancy agreements (Baden-Württembergisches Ausführungsgesetz zum Grundstücksverkehrsgesetz und zum Landpachtverkehrgesetz, Law of the German *Land* of Baden-Württemberg Law on Implementation of the Law on property transactions and of the Law on agricultural tenancy transactions, 'the Implementation Law'), in its version of 21 February 2006 (*Gesetzblatt* (2006) p. 85), Article 6(1) of which reads as follows:

'In addition to the grounds referred to in Paragraph 4 of the Law on Agricultural Tenancy Dealings, in order to safeguard against serious risks to agricultural structures, objections to agricultural tenancy agreements in the part of the Land concerned may also be raised where the land leased is used for the production of agricultural goods which are exported free of duty outside the common market, and distortions of competition arise as a result.'

16 From 1 July 2010, the Implementation Law was replaced by the law concerning measures for the improvement of the agricultural structure in the Land of Baden-Wurtemberg (Gesetz über Maßnahmen zur Verbesserung der Agrarstruktur in Baden-Württenberg) of 10 November 2009 (*Gesetzblat*, p. 645). The second sentence of Article 13(3) of that law is identical in content to Article 6(1) of the Implementation Law.

Main proceedings and the question referred for preliminary ruling

17 On 22 April 2010, Mr Graf, a Swiss farmer whose business is established in Switzerland, in the area bordering Germany, and Mr Engel, the owner of farmland in the Land of Baden-Wurtemberg in Germany, submitted a lease signed on 26 February 2006 to the Waldshut Agricultural Office for approval. Under that contract, Mr Engel leases an area of 369 ares of arable land situated in the area bordering Switzerland to Mr Graf for an annual rent of EUR 1 200. Mr Graf intends to export the produce yielded by that land to Switzerland.

18 By decision of 17 June 2010, the Agricultural Office objected to the lease and ordered the parties to that agreement to terminate it immediately. Although stating that, as self-employed frontier workers, Swiss farmers are treated in the same way as German farmers with regard to approval procedures under the Law on Agricultural Tenancy Dealings, the Agricultural Office took the view, nevertheless, that the refusal to approve the agricultural lease was based on Paragraph 6(1) of the Implementation Law. The Agricultural Office stated that there was distortion of competition and that German farmers, needing to expand their holdings of small size, had expressed their interest in taking a lease of the land at a rent customary for the area. Accordingly, there is an unsound distribution of land in the present case.

19 Mr Graf and Mr Engel challenged that decision before the Amtsgericht Waldshut-Tiengen (Waldshut-Tiengen District Court), submitting, inter alia, that Paragraph 6(1) of the Implementation Law is contrary to the Agreement.

20 The national court notes that there is distortion of competition since Mr Graf will receive considerably more in Switzerland for produce grown in Germany than he would in Germany. That court holds that the objection to the contract made by the

Agricultural Office would be valid if Paragraph 6(1) of the Implementation Law was compatible with the Agreement.

21 Having regard to those considerations, the national court stayed proceedings pending a preliminary ruling from the Court of Justice on the following question:

'Is Paragraph 6(1) of the [Implementation Law] compatible with the Agreement (…)?'

The question referred for a preliminary ruling

22 It is to be noted that the situation of a self-employed border farmer who is established in the territory of one Contracting Party and leases farmland situated in the territory of the other Contracting Party falls within the scope of the Agreement, regardless of the purpose of the economic activity for which the agricultural lease is used.

23 It should further be noted that it is apparent from the case-law that the principle of equal treatment, laid down in Article 15(1) of Annex I to the Agreement, concerning access to a self-employed activity and the pursuit thereof, is valid not only for 'self-employed persons', within the meaning of Article 12(1) of that Annex, but also for 'self-employed frontier workers', within the meaning of Article 13(1) of that Annex, such as the self-employed Swiss border farmers (see judgment in Case C-13/08 *Stamm and Hauser* [2008] ECR I-11087, paragraphs 47 to 49 and the operative part of the judgment).

24 Consequently, it must be examined whether the principle of equal treatment with regard to access to a self-employed activity and the pursuit thereof, established, for self-employed frontier workers, in Article 15(1) of Annex I to the Agreement, precludes legislation such as that at issue in the main proceedings.

25 It should be stated that, according to its wording, the legislation at issue in the main proceedings does not introduce any direct discrimination on grounds of nationality, given that the competent authority may object to agricultural leases irrespective of the nationality of the parties, as long as the conditions laid down by the legislation are fulfilled.

26 However, according to the Court's settled case-law, the principle of equal treatment, which is a concept of European Union law, prohibits not only overt discrimination, based on nationality, but also all covert forms of discrimination which, through application of other criteria of differentiation, lead in fact to the same result (see, by way of example, Case C-278/94 *Commission* v *Belgium* [1996] ECR I-4307, paragraph 27 and the case-law cited). That case-law, which was already in existence at the date of the signature of the Agreement, is also valid with regard to the application of that Agreement, in accordance with Article 16(2) thereof.

27 As regards the question whether the conditions laid down in the legislation at issue in the main proceedings for the purpose of the prohibition of an agricultural lease do, as a matter of fact, involve indirect discrimination, it is enough to hold that, in so far as the number of frontier workers established in Switzerland and working agricultural land in Germany comprise distinctly more persons of Swiss nationality than of German nationality, such indirect discrimination does exist (see, to that effect, Case C-107/94 *Asscher* [1996] ECR I-3089, paragraphs 37 and 38).

28 Indeed, the conditions laid down in the legislation at issue in the main proceedings operate primarily to the detriment of the Swiss farmers.

29 Where it is found that such discrimination exists, it is necessary to investigate whether that discrimination may be justified for reasons provided for in the Agreement.

30 It should be emphasised at the outset that the distortion of competition, alleged by the Agricultural Office, due to the fact that the Swiss frontier workers, such as Mr Graf, can receive considerably more in Switzerland for produce grown in Germany than they would if they sold it in Germany, does not constitute a reason, laid down in Article 5(1) of Annex I to the Agreement, that could be relied on to limit the rights granted by the provisions of that Agreement.

31 The Agricultural Office also raises the objective of agricultural land-use planning as a public order justification, for the purposes of Article 5(1) of Annex I to the Agreement.

32 Under that provision, 'public order' constitutes a reason which may limit the rights granted under the Agreement. If, for the most part, the contracting States remain free to determine, in accordance with their national needs which may vary from one State to another and from one era to another, the requirements of public policy and public order, their scope cannot be determined unilaterally by each Member State without any control by the Court (see, to this effect, Case C-33/07 *Jipa* [2008] ECR I-5157, paragraph 23 and the case-law cited). In the light of that finding, the concept of 'public order' should be contemplated and interpreted in the context of the Agreement and in conformity with the objectives pursued by that Agreement.

33 It is important to note that the Agreement falls within the more general context of relations between the European Union and the Swiss Confederation, which, although it did not opt to participate either in the European Economic Area or in the Union's internal market, is nevertheless linked to the Union by numerous agreements covering a wide range of areas and prescribing rights and specific obligations, analogous, in some respects, to those laid down by the Treaty. The general objective of these agreements, including the Agreement at issue in the main proceedings, is to strengthen the economic ties between the European Union and the Swiss Confederation. Therefore, the reasons, exhaustively listed in Article 5(1) of Annex I to the Agreement, as justifications for derogation from the fundamental rules of the latter such as the principle of equal treatment, must be interpreted strictly.

34 From that perspective, it must be concluded that, if agricultural land-use planning and the rational division of agricultural land can, in certain circumstances, constitute a legitimate objective in the public interest, rules, such as those at issue in the main proceedings, concerning the leasing of agricultural land could not in any way be covered by the concept of 'public order', for the purposes of Article 5(1) of Annex I to the Agreement nor limit the rights granted by that Agreement.

35 It must be added that national legislation such as that at issue in the main proceedings, which is discriminatory, would also contravene, as a new restrictive measure, the 'Standstill' clause provided for in Article 13 of the Agreement.

36 In view of the foregoing considerations, the reply to the question submitted by the national court must be that the principle of equal treatment laid down in Article 15(1) of Annex I to the Agreement precludes legislation of a Member State, such as that at issue in the main proceedings, under which the competent authority of that Member State may object to an agricultural lease – relating to land in a particular area of the territory of that Member State and concluded between a resident of that Member State and a frontier-zone resident of the other Contracting Party – on the grounds that the land leased is used for producing agricultural products intended for export, free of duty, outside the internal market of the European Union and so gives rise to

distortion of competition, if the application of that legislation affects a much greater number of nationals of the other Contracting Party than nationals of the Member State in whose territory that legislation applies. It is for the national court to determine whether that latter situation in fact exists.

Costs

37 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 principle of equal treatment laid down in Article 15(1) 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, precludes legislation of a Member State, such as that at issue in the main proceedings, under which the competent authority of that Member State may object to an agricultural lease – relating to land located in a given area of the territory of that Member State and concluded between a resident of that Member State and a frontier-zone resident of the other contracting party – on the grounds that the land leased is used for producing agricultural products intended for export, free of duty, outside the internal market of the European Union and so gives rise to distortion of competition, if

the application of that legislation affects a much greater number of nationals of the other Contracting Party than nationals of the Member State on whose territory that legislation applies. It is for the national court to determine whether that latter situation in fact exists.

[Signatures]