

JUDGMENT OF THE COURT (Fourth Chamber)

22 December 2008 \*

In Case C-13/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Bundesgerichtshof (Germany), made by decision of 23 November 2007, received at the Court on 14 January 2008, in the proceedings brought by

**Erich Stamm,**

**Anneliese Hauser,**

interested party:

**Regierungspräsidium Freiburg,**

THE COURT (Fourth Chamber),

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

\* Language of the case: German.

Advocate General: P. Mengozzi,  
Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Mr Stamm, by J. Strick, Rechtsanwalt,
  
- the Regierungspräsidium Freiburg, by P. Brecht, acting as Agent,
  
- the Commission of the European Communities, by E. Traversa and F. Hoffmeister, acting as Agents,
  
- having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

## **Judgment**

- 1 This reference for a preliminary ruling concerns the interpretation of Articles 12(1), 13(1) and 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 (OJ 2002 L 114, p. 6, 'the Agreement').
  
- 2 The reference was made in the course of proceedings between Mr Stamm and Ms Hauser and the Regierungspräsident Freiburg concerning the applicability of the principle of equal treatment to self-employed frontier workers of Swiss nationality.

## **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 Under Article 2 of the Agreement, '[n]ationals 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 Article 16 of the Agreement, headed '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.'

- 6 Chapter III of Annex I to the Agreement, on the free movement of persons, includes specific provisions on self-employed persons. Article 12(1) of that annex provides that '[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'.
- 7 Article 12(2) to (6) contains procedural provisions concerning the right of residence of self-employed persons.
- 8 Concerning self-employed frontier workers, Article 13 of that annex provides:

'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.

2. Self-employed frontier workers shall not require a residence permit.

The relevant authorities of the state concerned may nevertheless issue a self-employed frontier worker with a special permit valid for at least five years provided that he produces evidence to the competent national authorities that he is pursuing or wishes to pursue a self-employed activity. The permit shall be extended for at least five years, provided that the frontier worker produces evidence that he is pursuing a self-employed activity.

3. Special permits shall be valid throughout the territory of the issuing state.’

9 Article 14 of the annex, headed ‘Occupational and geographical mobility’, provides:

‘1. Self-employed persons shall have the right to occupational and geographical mobility throughout the territory of the host state.

2. Occupational mobility shall include change of occupation and changing from self-employed to employed status. Geographical mobility shall include changes in the place of work and residence.’

10 Concerning equal treatment, Article 15 of the annex provides that:

‘1. 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.

2. The provisions of Article 9 of this Annex shall apply *mutatis mutandis* to the self-employed persons referred to in this Chapter.’

11 Under Article 16 of the annex, headed 'Exercise of public authority':

'A self-employed person may be denied the right to pursue an activity involving, even on an occasional basis, the exercise of public authority.'

12 According to Article 23(1) of the annex, a person receiving services does 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 is to be issued with a residence permit equal in duration to the service.

13 Article 25 of the annex provides that:

'1. A national of a Contracting Party who has a right of residence and his principal residence in the host state shall enjoy the same rights as a national as regards the purchase of immovable property. He may set up his principal residence in the host state at any time in accordance with the relevant national rules irrespective of the duration of his employment. Leaving the host state shall not entail any obligation to dispose of such property.'

...

3. 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 According to the order for reference, the German Law on the notification of and opposition to agricultural leases (Gesetz über die Anzeige und Beanstandung von Landpachtverträgen, BGBl. 1985 I, p. 2075, ‘the LPachtVG’) lays down specific provisions regarding agricultural leases. Lessors must declare leases to the competent authority, which may object to them being concluded, in particular if the lease would result in an ‘unsound’ distribution of land use.
- 15 The national court states that, according to Paragraph 4(1) and (2) of LPachtVG, the leasing results in an ‘unsound’ distribution of land use, in particular if it runs counter to measures for the improvement of the agricultural structure. This is the case, inter alia, where agricultural land, because it is leased to non-farmers, is no longer available for use by farmers who are in urgent need of it to create and maintain efficient and competitive businesses and who are in a position to take it on lease.
- 16 The national court adds that, according to its own case-law pre-dating the entry into force of the Agreement, it runs counter to measures for the improvement of the agricultural structure in Germany to deprive German full-time farmers who are in urgent need of agricultural land to create and maintain efficient and competitive



businesses of the use of that land by leasing it to Swiss farmers whose place of business is in Switzerland. It follows that, for the purpose of applying Paragraph 4 of the LPachtVG, those Swiss farmers are to be considered to fall outside the German agricultural structure and, therefore, to be non-farmers.

### **The main proceedings and the question referred for a preliminary ruling**

- 17 Mr Stamm, a Swiss farmer whose place of business is in Switzerland, concluded on 10 October 2005 with Ms Hauser, resident in Germany, an agricultural lease in respect of 2.75 hectares of agricultural land situated in Germany. The lease was for five years at an annual rent of EUR 686.
- 18 The Landwirtschaftsamt (German Agricultural Office) objected to the agricultural lease and ordered the parties to the Agreement to cancel it immediately. A legal action including claims in the alternative brought by Mr Stamm was dismissed by the Amtsgericht Waldshut-Tiengen (Local Court, Waldshut-Tiengen), which annulled that contract on the ground that the lease in question implied an ‘unsound’ distribution of land use.
- 19 After unsuccessfully appealing to the Oberlandesgericht Karlsruhe in Freiburg (Higher Regional Court, Karlsruhe, in Freiburg), Mr Stamm sought a declaration from the Bundesgerichtshof (Federal Court of Justice) that his lease with Ms Hauser was valid.

According to that court, given that, in this case, German farmers wishing to extend their businesses hoped to take a lease of the land concerned, the agricultural lease, in view of the case-law cited, had to be annulled.

20 The Bundesgerichtshof pointed out, however, that it would not be possible to continue to apply that case-law if the obligation to ensure equal treatment laid down in Article 15(1) of Annex I to the Agreement applied not only to self-employed persons within the meaning of Article 12(1) of that annex, but also to self-employed frontier workers within the meaning of Article 13(1) of the annex. In those circumstances, for the purpose of applying Paragraph 4 of the LPachtVG, it would be inadmissible to consider Swiss full-time farmers with a business situated in Switzerland to be non-farmers. Indeed, they would have to be afforded no less favourable treatment than German full-time farmers.

21 Considering an interpretation of the Agreement necessary for its decision, the Bundesgerichtshof decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Under Article 15(1) of Annex I to the Agreement ..., as regards access to a self-employed activity and the pursuit thereof, is it only self-employed persons within the meaning of Article 12(1) of Annex I to the Agreement who must be afforded no less favourable treatment in the host country than that accorded to its own nationals, or does this also apply to self-employed frontier workers within the meaning of Article 13(1) of Annex I to the Agreement?’

**The question referred for a preliminary ruling***Admissibility*

- 22 The Regierungspräsidium Freiburg claims that the reference is inadmissible, since the question referred is irrelevant for the resolution of the dispute in the main proceedings. It is of the view that Mr Stamm is neither a 'self-employed person' nor a 'self-employed frontier worker' falling under Annex I to the Agreement and that, irrespective of his nationality, a farmer whose place of business is situated in Switzerland and who restricts himself to farming agricultural land in Germany before importing into Switzerland, free of duty, agricultural produce from that land does not fall, in any event, under Article 12 or 13 of that annex.
- 23 The Commission of the European Communities also expresses reservations as to the relevance of the question referred. It submits that a self-employed frontier worker must be established on the territory of the other contracting party, as Article 12(1) of Annex I to the Agreement provides generally for all self-employed persons. In view of the fact that the case-file does not show that Mr Stamm has another business situated on the territory of the Federal Republic of Germany, through which he is integrated into the German economy and addresses the nationals of that State, the Commission cannot rule out the possibility that he may be regarded as not established in Germany and not a 'self-employed frontier worker' within the meaning of the Agreement.
- 24 Those objections cannot be upheld.

25 It is settled case-law that questions on the interpretation of Community law referred by a national court in the factual and legislative context which that court is responsible for defining and the accuracy of which is not a matter for the Court to determine enjoy a presumption of relevance (Case C-300/01 *Salzmann* [2003] ECR I-4899, paragraphs 29 and 31, and Joined Cases C-222/05 to C-225/05 *van der Weerd and Others* [2007] ECR I-4233, paragraph 22). The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (Joined Cases C-94/04 and C-202/04 *Cipolla and Others* [2006] ECR I-11421, paragraph 25, and *van der Weerd and Others*, paragraph 22).

26 The national court had no hesitation in classifying Mr Stamm as a ‘self-employed frontier worker’.

27 In those circumstances, it does not appear that the interpretation of the provisions of the Agreement sought bears no relation to the actual facts of the main action or its purpose. Consequently, the objections raised by the Regierungspräsidium Freiburg and by the Commission cannot rebut the presumption of relevance which the reference for a preliminary ruling enjoys.

28 It follows that the reference for a preliminary ruling is admissible.

*Substance*

- 29 It should be noted, as a preliminary point, that the context of the case in the main proceedings is determined by the reference for a preliminary ruling and that, accordingly, the Court is not required to examine the transitional provisions and provisions concerning the development of the Agreement which appear in Article 10 and Chapter VII of Annex I.
- 30 By its question, the national court asks, essentially, whether the equal treatment laid down in Article 15 of Annex I to the Agreement is applicable to ‘self-employed frontier workers’ referred to in Article 13 of that annex.
- 31 The Regierungspräsidium Freiburg claims that the principle that self-employed persons are to be treated no less favourably, which is laid down in Article 15(1) of Annex I to the Agreement, applies only to ‘self-employed persons’ within the meaning of Article 12(1) of that annex, and not to ‘self-employed frontier workers’ within the meaning of Article 13(1) of that annex. It is of the view that its interpretation is confirmed by the general scheme and wording of the Agreement, which does not treat self-employed persons in exactly the same way as it does self-employed frontier workers, but instead intentionally distinguishes between those two categories of persons.
- 32 That interpretation cannot, however, be accepted.
- 33 It should at once be pointed out that Chapter III of Annex I to the Agreement, headed ‘Self-employed persons’, is comprised of Articles 12 to 16. Article 12 refers to self-employed persons, namely nationals of a contracting party established or wishing to become established in the territory of another contracting party in order to pursue a self-employed activity. Article 13 of that annex refers to self-employed frontier workers,

a category of self-employed persons resident in the territory of a contracting party who pursue a self-employed activity in the territory of the other contracting party. Articles 14 and 15 of the annex relate to occupational and geographical mobility and equal treatment for self-employed persons, respectively. Article 16 of the annex provides for the possibility of denying self-employed persons the right to pursue an activity involving the exercise of public authority.

<sup>34</sup> Clearly, Chapter III contains no provision to the effect that Articles 14 to 16 of Annex I to the Agreement should be applied solely to ‘self-employed persons’ within the meaning of Article 12(1) of that annex and not to ‘self-employed frontier workers’ within the meaning of Article 13(1).

<sup>35</sup> There is nothing in Chapter III to indicate that self-employed frontier workers do not enjoy, pursuant to Article 14 of Annex I to the Agreement, occupational and geographical mobility throughout the territory of the host State, or that they cannot be denied, under Article 16 of that annex, the right to pursue an activity involving the exercise of public authority. With regard to geographical mobility, this finding remains valid even though the right to that mobility must be exercised in such a way that the status of ‘self-employed frontier worker’, as defined in Article 13 of the Annex, is preserved.

<sup>36</sup> Neither does any provision of Chapter III of Annex I to the Agreement indicate, with regard to the principle of equal treatment laid down in Article 15 of that annex, that self-employed frontier workers cannot rely on that principle.

37 Since neither the wording of the provisions of Chapter III of Annex I to the Agreement nor the general scheme of that chapter provides evidence on the basis of which the applicability of Articles 14 to 16 of that annex to self-employed frontier workers may be excluded, it cannot be maintained that those workers, referred to in Article 13(1) of that annex, are not considered to be self-employed persons, in the context of that chapter, on the same basis as the persons to whom Article 12 of the annex applies.

38 That finding is supported by Article 15(2) of Annex I to the Agreement, which provides that '[t]he provisions of Article 9 of this Annex shall apply *mutatis mutandis* to the self-employed persons referred to in [Chapter III].' Since that paragraph makes reference to 'self-employed persons referred to' in that chapter and not to self-employed persons referred to in Article 12 of the annex, the parties to the Agreement did not intend to make a distinction between self-employed persons and self-employed frontier workers with regard to the applicability to them of Articles 14 to 16 of Annex I to the Agreement. On the contrary, that circumstance shows that occupational and geographical mobility, equal treatment and the right to deny certain persons the right to pursue an activity involving the exercise of public authority, laid down in those articles, apply without distinction, first, to the persons referred to in Article 12 of that annex and, second, to those referred to in Article 13 of the annex.

39 In that regard, it is necessary to add, like the Commission, that the Agreement distinguishes self-employed frontier workers in only one of its articles and for a specific purpose, namely in order to fix more favourable rules in their respect concerning the right of residence. Unlike other self-employed persons referred to in Article 12 of Annex I to the Agreement, self-employed frontier workers do not require a residence permit. It is clear that the parties to the Agreement, who conferred advantages on frontier workers, could not have intended to disadvantage them with regard to the applicability of the principle of equal treatment.

40 The argument put forward by Mr Stamm, that self-employed frontier workers benefit from the principle of equal treatment, is, moreover, corroborated by the scheme of

Chapters II and III of Annex I to the Agreement, by the general objectives of that agreement and by the interpretation which must be given to Article 25 of that annex.

41 First, an analysis of the structure of Chapters II and III of Annex I to the Agreement, headed 'Employed persons' and 'Self-employed persons' respectively, shows that those chapters are identically constructed.

42 Thus Chapter II of that annex, in Articles 6 and 7, contains provisions concerning employed persons and employed frontier workers respectively, and, in Articles 8 to 10, lays down the principles of occupational and geographical mobility, equal treatment and the right to deny employed persons the right to take up certain employment in the public service. There is nothing in that chapter to indicate that those principles and that right apply solely to employed persons and not to employed frontier workers. There is no provision in that chapter capable of supporting the contention that employed frontier workers do not benefit from occupational and geographical mobility, provided that they preserve that status, as well as equal treatment, or that they cannot, where appropriate, be denied employment in the public service.

43 It follows, first, from the fact that the principle of equal treatment refers both to employed persons and to employed frontier workers and, second, from the fact that the scheme of Chapter II and that of Chapter III of Annex I to the Agreement are analogous, that the parties to the Agreement did not intend to introduce a distinction between self-employed persons and self-employed frontier workers with regard to the applicability to them of the principle.

44 Second, with regard to the purpose of the Agreement, it should be pointed out that, according to Article 1(a) and (d) of the Agreement, it has inter alia the objective of according to nationals of the Member States of the European Community and the Swiss Confederation a right of establishment on a self-employed basis as well as the same



living, employment and working conditions as those accorded to nationals. As the Commission contends, that objective would be only partially attained if self-employed frontier workers, in the exercise of their activities, could be subject to specific restrictions which do not apply to other self-employed persons.

45 Moreover, nationals of one contracting party who are lawfully resident in the territory of another contracting party cannot, in accordance with Article 2 of the Agreement, be the object, for the purposes of the application of the provisions of Annexes I to III of the Agreement, of discrimination by reason of their nationality.

46 A teleological interpretation of Articles 12, 13 and 15 of Annex I to the Agreement, in the light of Articles 1(a) and (d) and 2 of the Agreement, thus precludes self-employed frontier workers from being deprived of a treatment which is no less favourable in the host State than that accorded by that State to its own nationals with regard to access to a self-employed activity and the pursuit thereof.

47 Third, concerning Chapter VI of Annex I to the Agreement, headed 'Purchase of immovable property', it should be pointed out that the single article in that chapter, namely Article 25, provides, in Article 25(3), that a frontier worker shall enjoy the same rights as a national as regards the purchase of immovable property for his economic activity.

48 Even though the article cited in the paragraph above does not cover agricultural leases, the contracting parties could not have intended to treat those contracts less favourably than the purchase of immovable property, which normally ensures greater enjoyment of the rights *in rem* concerned.

49 In the light of all of the foregoing, the answer to the question referred must be that, pursuant to Article 15(1) of Annex I to the Agreement, a contracting party must accord to the 'self-employed frontier workers', within the meaning of Article 13 of that annex, of the other contracting party no less favourable treatment as regards access to self-employed activity and the pursuit thereof in the host State than that which is accorded by that State to its own nationals.

### **Costs**

50 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 (Fourth Chamber) hereby rules:

**Pursuant to 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, a contracting party must accord to the 'self employed frontier workers', within the meaning of Article 13 of that annex, of the other contracting party no less favourable treatment as regards access to self-employed activity and the pursuit thereof in the host State than that which is accorded by that State to its own nationals.**

[Signatures]