JUDGMENT OF THE COURT (Sixth Chamber)

21 September 2016 (*)

(Reference for a preliminary ruling — Taxation — 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 — Equal treatment — Income tax — Exemption of income derived from part-time employment as a teacher with a legal person governed by public law established in a Member State of the European Union or in a State to which the Agreement on the European Economic Area of 2 May 1992 applies — Legislation of a Member State excluding from that exemption income derived from such employment with a legal person governed by public law established in Switzerland)

In Case C-478/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Finanzgericht Baden-Württemberg (Finance Court, Baden-Wurtemberg, Germany), made by decision of 15 July 2015, received at the Court on 8 September 2015, in the proceedings

Peter Radgen,

Lilian Radgen

v

Finanzamt Ettlingen,

THE COURT (Sixth Chamber),

composed of A. Arabadjiev, President of the Chamber, C.G. Fernlund (Rapporteur) and E. Regan, Judges,

Advocate General: M. Wathelet,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the German Government, by T. Henze and J. Möller, acting as Agents,

– the European Commission, by B.-R. Killmann and W. Roels, acting as Agents,

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

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 'Agreement on the free movement of persons' or 'the Agreement').

2 The request has been made in proceedings between Mr Peter Radgen and his wife, Mrs Lilian Radgen (together, 'the Ragdens'), German nationals living in Germany, and the Finanzamt Ettlingen (Tax Office, Ettlingen, Germany) ('the tax authorities') concerning the tax authorities' refusal to take account of income received by Mr Radgen in connection with a part-time teaching activity for an establishment governed by public law established in Switzerland as income exempt from income tax for the 2009 tax year.

Legal context

EU law

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

4 According to the preamble to the Agreement on the free movement of persons, the contracting parties are 'resolved to bring about the free movement of persons between them on the basis of the rules applying in the European Community'.

5 Article 1 of the Agreement stipulates that:

'The objective of this Agreement, for the benefit of nationals of the Member States of the European Community and Switzerland, is:

(a) 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;

…

(d) to accord the same living, employment and working conditions as those accorded to nationals.'

6 Article 2 of the Agreement, entitled 'Non-discrimination', provides as follows:

'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.'

7 Article 4 of the Agreement, entitled 'Right of residence and access to an economic activity', states as follows:

'The right of residence and access to an economic activity shall be guaranteed … in accordance with the provisions of Annex I.'

8 Under the heading 'Processing of appeals', Article 11 of the Agreement on the free movement of

persons confers, in paragraph 1 thereof, on the persons referred to in the agreement, with regard to the application of the provisions of the agreement, a right of appeal to the competent authorities.

9 Under Article 15 of the Agreement on the free movement of persons, the Annexes and Protocols to that agreement are to form an integral part thereof.

10 Article 16 of the Agreement, entitled ‘Reference to Community law’, provides in paragraph 2 thereof as follows:

‘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.’

11 Article 21 of that agreement, entitled ‘Relationship to bilateral agreements on double taxation’, is worded as follows:

‘1. The provisions of bilateral agreements between Switzerland and the Member States of the European Community on double taxation shall be unaffected by the provisions of this Agreement. In particular, the provisions of this Agreement shall not affect the double taxation agreements’ definition of “frontier workers”.

2. No provision of this Agreement may be interpreted in such a way as to prevent the Contracting Parties from distinguishing, when applying the relevant provisions of their fiscal legislation, between taxpayers whose situations are not comparable, especially as regards their place of residence.

…’

12 Annex I to the Agreement deals with the free movement of persons and Chapter II of that annex contains provisions on employed persons.

13 Article 6 of Annex I to the Agreement, entitled ‘Rules regarding residence’, provides in paragraph 1 thereof as follows: ‘An employed person who is a national of a Contracting Party (hereinafter referred to as “employed person”) and is employed for a period of one year or more by an employer in the host state shall receive a residence permit which is valid for at least five years from its date of issue …’. Paragraph 2 of Article 6 governs residence permits issued to employed persons who are employed for a period of less than one year. Paragraphs 3 to 7 of Article 6 contain procedural provisions relating to an employed person’s right of residence.

14 Article 7(1) of Annex I to the Agreement states as follows: ‘An employed frontier worker is a national of a Contracting Party who has his residence in the territory of a Contracting Party and who pursues an activity as an employed person 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’.

15 Article 9 of the Annex I to the Agreement on the free movement of persons, entitled ‘Equal treatment’, provides in paragraphs 1 and 2 thereof as follows:

‘1. An employed person who is a national of a Contracting Party may not, by reason of his nationality, be treated differently in the territory of the other Contracting Party from national employed persons as regards conditions of employment and working conditions, especially as regards pay, dismissal, or reinstatement or re-employment if he becomes unemployed.

2. An employed person and the members of his family referred to in Article 3 of this Annex shall enjoy the same tax concessions and welfare benefits as national employed persons and members of their family.'

16 Chapter III of Annex I to the Agreement, entitled 'Self-employed persons', contains provisions on self-employed workers.

German law

17 Paragraph 1(1) of the Einkommensteuergesetz (Law on Income Tax, BGB1. 2002 I, p. 4212), in the version resulting from the Annual Tax Law of 19 December 2008 for the 2009 tax year (BGB1. 2009 I, p. 2794) ('EStG'), provides that the income of natural persons who are permanently or normally resident in national territory is subject to unlimited tax liability.

18 Paragraph 3(26) EStG provides that income from part-time activities as lecturer, trainer, instructor or supervisor or other comparable activities carried out on a part-time basis for or on behalf of a legal person governed by public law established in a Member State of the European Union or a State to which the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3) ('the EEA Agreement') applies is exempt from tax up to a total amount of EUR 2 100 per year.

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

19 It is apparent from the documents before the Court that the Radgens are German nationals living in Germany. They are subject to joint assessment for income tax purposes in that Member State. It is also apparent from those documents that Mr Radgen is subject to unlimited income tax liability in Germany.

20 In 2009, Mr Radgen taught on a part-time basis at an establishment governed by public law in Switzerland. That activity was the subject of an employment contract between Mr Radgen and the establishment. In order to give his lectures, Mr Radgen travelled to Zurich, in Switzerland, and then returned to Germany. He received for that work 4 095 Swiss francs (CHF) (approximately EUR 2 702). The Radgens were of the view that the exemption provided in Paragraph 3(26) EStG was applicable to that remuneration.

21 In their income tax assessment notice for 2009, the tax authorities charged income tax on that amount, after deducting from the sum payable by way of income tax the amount deducted at source by the Swiss tax authorities, namely EUR 121.44.

22 The Radgens lodged an objection to that notice. The tax authorities rejected the objection as unfounded on the ground that the refusal to grant the exemption provided for in Paragraph 3(26) EStG does not constitute a breach of the Agreement on the free movement of persons.

23 The Radgens brought proceedings before the referring court, the Finanzgericht Baden-Württemberg (Finance Court, Bad-Wurtemberg, Germany). Classifying Mr Radgen as an 'employed frontier worker' within the meaning of Article 7(1) of Annex I to the Agreement on the free movement of persons, the referring court is uncertain whether the principles established by the judgment of 18 December 2007, *Jundt* (C-281/06, EU:C:2007:816) may also be applicable in the context of that agreement.

24 Against that background, the referring court states that, under German tax law, it is irrelevant whether the activity in respect of which the exemption is sought is carried out in the capacity of self-employed person or employee. Moreover, that court considers that, even though the judgment

of 18 December 2007, *Jundt* (C-281/06, EU:C:2007:816), postdates the signature of the agreement, that judgment simply sets out the law as it already stood before the agreement was signed.

25 In those circumstances, the Finanzgericht Baden-Württemberg (Finance Court, Baden-Württemberg) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Must the provisions of the Agreement on the free movement of persons, in particular its preamble, Articles 1, 2, 4, 11, 16 and 21 thereof and Articles 7, 9 and 15 of Annex I thereto, be interpreted as precluding legislation of a Member State under which a citizen with unlimited tax liability in that State is denied the deduction of a tax-free allowance for a part-time teaching activity because that activity is not carried out for or on behalf of a legal person governed by public law established in a Member State of the European Union or in a State to which the EEA Agreement applies, but is carried out for or on behalf of a legal person governed by public law established in the territory of the Swiss Confederation?'

Consideration of the question referred

Admissibility

26 In the first place, the German Government and the European Commission submit that the interpretation of Article 11 of the Agreement on the free movement of persons, concerning the processing of appeals, and the interpretation of Article 15 of Annex I to the Agreement, concerning self-employed workers, are irrelevant to the outcome of the dispute before the referring court.

27 According to the Court's settled case-law, questions on the interpretation of EU 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. The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of EU 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 (judgment of 7 April 2016, *KA Finanz*, C-483/14, EU:C:2016:205, paragraph 41 and the case-law cited).

28 In the present case, it is clear from Article 11 of the Agreement on the free movement of persons that that provision ensures persons covered by the agreement a right of appeal to the competent authorities with regard to the application of the provisions of the agreement. There is nothing in the documents submitted to the Court to suggest that the Radgens were denied such a right.

29 On the other hand, it is common ground that the Mr Radgen worked in Switzerland in the capacity of employee. Article 15 of Annex I to the Agreement on the free movement of persons is applicable to self-employed persons. Mr Radgen does not fall within the scope of that article.

30 Accordingly, it is quite obvious that an interpretation of Article 11 of the Agreement on the free movement of persons and of Article 15 of Annex I to that agreement is irrelevant to the outcome of the dispute before the national court. Therefore, in so far as it concerns the interpretation of those provisions, the question referred is inadmissible.

31 In the second place, the German Government is of the view that Mr Radgen cannot be classified as an 'employed frontier worker' within the meaning of Article 7 of Annex I to the Agreement on the free movement of persons. That Government does not, however, claim that, for the purposes of the

employment in question, Mr Radgen did not exercise his right to freedom of movement.

32 As is apparent from paragraph 27 above, the national court is responsible for defining the factual and legislative context of the dispute before it. As the national court has classified Mr Radgen unequivocally as an 'employed frontier worker' within the meaning of Article 7 of Annex I to the Agreement, the Court must proceed on the basis that Mr Radgen has that status.

33 In any event, as it is common ground that Mr Radgen has exercised his right to freedom of movement to work as an employee in the territory of a contracting party to the Agreement on the free movement of persons, namely the Swiss Confederation, the interpretation sought of the provisions of that agreement relating to the equal treatment of employees does not appear to be hypothetical, so that the question referred is admissible, in so far as it concerns that interpretation.

34 The Agreement on the free movement of persons distinguishes employed frontier workers in only one of its articles, namely Article 7 of Annex I thereto, and for a specific purpose, that is, as is apparent from Article 7 of Annex I in conjunction with Article 6 of that annex, to fix more favourable rules for such workers as regards the right of residence than those established for other employed persons falling within the scope of the Agreement (see, to that effect, judgment of 22 December 2008, *Stamm and Hauser*, C-13/08, EU:C:2008:774, paragraph 39).

Substance

35 By its question, the referring court seeks to ascertain, in essence, whether the provisions of the Agreement on the free movement of persons are to be interpreted as precluding the legislation of a Member State, such as the legislation at issue in the main proceedings, under which a resident national with unlimited liability to income tax who has exercised the right to freedom of movement in order to work as an employee in the teaching profession on a part-time basis for a legal person governed by public law established in Switzerland is denied a tax exemption in respect of the income from that employment, whereas such an exemption would be granted if that person had been so employed by a legal person governed by public law established in that Member State, in another Member State or in a State to which the EEA Agreement applies.

36 As is apparent from the preamble to and Articles 1 and 16(2) of the Agreement on the free movement of persons, the objective of the Agreement is to bring about, for the benefit of nationals of the European Union and of the Swiss Confederation, the free movement of persons in the territory of the contracting parties to that agreement based on the rules applying in the European Union, the terms of which must be interpreted in accordance with the case-law of the Court of Justice (judgment of 19 November 2015, *Bukovansky*, C-241/14, EU:C:2015:766, paragraph 40).

37 In that context, it should be noted that that objective includes, pursuant to Article 1(a) and (d) of the Agreement, the objective of granting to those nationals, inter alia, a right of entry, residence, access to work as employed persons and the same living, employment and working conditions as those accorded to nationals of the individual states in question.

38 Thus, Article 4 of the Agreement on the free movement of persons guarantees the right of access to an economic activity in accordance with the provisions of Annex I to the Agreement, Chapter II of that annex containing provisions on freedom of movement for employed persons, in particular those relating to the principle of equal treatment.

39 In that context, it should be recalled that Article 9 of Annex I to the Agreement on the free movement of persons, entitled 'Equal treatment', ensures the application of the principle of non-discrimination laid down in Article 2 of the Agreement in connection with the free movement of

workers (judgment of 19 November 2015, *Bukovansky*, C-241/14, EU:C:2015:766, paragraph 47).

40 Article 9(2) of Annex I to the Agreement establishes a specific rule intended to provide the employed person and the members of his family with the same tax concessions and welfare benefits as those available to national employed persons and members of their families. With regard to tax concessions, the Court has previously held that the principle of equal treatment, laid down in that provision, may also be relied on by a worker who is a national of a contracting party and has exercised his right to freedom of movement, with regard to his State of origin (judgment of 19 November 2015, *Bukovansky*, C-241/14, EU:C:2015:766, paragraph 36 and the case-law cited).

41 With regard to the case in the main proceedings, as indicated in paragraph 33 above, it is common ground that Mr Radgen exercised his right to freedom of movement by working as an employee in the territory of the Swiss Confederation. It follows that he falls within Chapter II of Annex I to the Agreement on the free movement of workers and may therefore rely on Article 9 of Chapter II of that annex with regard to his State of origin.

42 It is therefore necessary to ascertain whether Mr Radgen suffered a tax disadvantage by comparison with other resident German nationals engaged in paid employment similar to that of Mr Radgen and who, unlike him, are employed by a legal person governed by public law established in their national territory, in another Member State of the European Union or in a State to which the EEA Agreement applies.

43 In this case, it is sufficient to note that, by denying resident German taxpayers employed as part-time teachers by a legal person governed by public law established in Switzerland the benefit of the exemption from income tax in respect of the income earned from that employment, whereas such an exemption would be granted if that person had been so employed by a legal person governed by public law established in national territory, in another Member State of the European Union or in a State to which the EEA Agreement applies, the national legislation at issue in the main proceedings treats resident German taxpayers differently for tax purposes, depending on the source of their income.

44 That different treatment is liable to deter resident German taxpayers from exercising their right to freedom of movement by taking up employment as a teacher in Swiss territory while at the same time continuing to live in their State of residence and therefore constitutes unequal treatment, which is, in principle, contrary to Article 9(2) of Annex I to the Agreement on the free movement of persons.

45 Nevertheless, it is also necessary to bear in mind, first, Article 21(2) of that agreement, which permits taxpayers whose situations are not comparable, especially as regards their place of residence, to be treated differently for tax purposes.

46 Second, where tax payers are in a comparable situation, it follows from the Court’s established case-law on freedom of movement guaranteed by the Treaty that different treatment may nonetheless be justified by overriding reasons in the public interest. It would, however, also be necessary in such a case for the different treatment to be appropriate for ensuring attainment of the objective in question and not to go beyond what is necessary for that purpose (see, inter alia, judgments of 31 March 1993, *Kraus*, C-19/92, EU:C:1993:125, paragraph 32 and the case-law cited, and 16 March 2010, *Olympique Lyonnais*, C-325/08, EU:C:2010:143, paragraph 38 and the case-law cited).

47 As the principle of equal treatment is a concept of EU law (judgment of 6 October 2011, *Graf and Engel*, C-506/10, EU:C:2011:643, paragraph 26), in order to ascertain whether there may be an

instance of unequal treatment in the context of the Agreement on free movement of persons, it is necessary, as is apparent from paragraphs 36 above, to refer, by analogy, to the principles established by the Court's case-law cited in paragraph 46 above.

48 In this case, it should be noted that it has not been claimed that resident German taxpayers employed as teachers on a part-time basis in Swiss territory are not, in so far as concerns income tax, in a comparable situation to resident German taxpayers to whom the exemption at issue in the main proceedings is granted.

49 Any justification for unequal treatment may therefore be based only on overriding reasons in the public interest. It is further necessary, in such a case, that such treatment be appropriate for ensuring attainment of the objective in question and not go beyond what is necessary for that purpose.

50 In that regard, in its judgment of 18 December 2007, *Jundt* (C-281/06, EU:C:2007:816), the Court was required to examine, in respect of natural persons exercising their right to freedom of movement by teaching part-time on a self-employed basis at a university established in another Member State, while at the same time living in their State of residence, whether the different treatment of those persons and persons engaged in such activity in national territory resulting from Paragraph 3(26) EStG may be justified by overriding reasons in the public interest.

51 The Court found, in paragraphs 63 and 64 of the judgment of 18 December 2007, *Jundt* (C-281/06, EU:C:2007:816), that that different treatment could not be justified by the public interest in the promotion of education, research and development, as such treatment infringes the freedom of teachers exercising their activity on a part-time basis to choose where within the European Union to provide their services, without it having been established that, in order to achieve the supposed objective of promoting education, it is necessary to limit the enjoyment of the tax exemption in question to those taxpayers engaged in similar activities in universities established on national territory.

52 Any justification based on an overriding reason in the public interest connected with the need to safeguard the cohesion of the German tax system, in the absence of any direct link, from the point of view of the tax system, between the exemption from tax of expense allowances paid by national universities and an offsetting of that concession by a particular tax levy was similarly dismissed by the Court in paragraphs 69 to 71 of that judgment.

53 Lastly, in paragraphs 83 to 88 of that judgment, the Court stated, first, that the tax exemption provided in Paragraph 3(26) EStG is not a measure which concerns the content of teaching or the organisation of the education system but a fiscal measure of a general nature which grants a tax concession where an individual engages in activities of benefit to the general public. Second, when exercising their powers and discharging their responsibilities to organise their education systems, the Member States are bound, in any event, to comply with the Treaty provisions on freedom of movement. It follows that even if national legislation constituted a measure linked to the organisation of the education system, the fact remains that it is incompatible with the Treaty in so far as it influences the choice of persons teaching on a part-time basis with regard to the place in which they provide their services.

54 Those considerations may be transposed to a situation such as that in the main proceedings. The fact that the activity in question is carried out on a self-employed basis, as in the case giving rise to the judgment of 18 December 2007, *Jundt* (C-281/06, EU:C:2007:816), or as an employee, as in the case in the main proceedings, is not decisive. On the contrary, in both cases the tax provision in question, namely Paragraph 3(26) EStG, is liable to affect the choice of resident tax payers teaching on a part-time basis as regards the place in which they carry out that activity.

55 Those considerations are also in keeping with the objective of the Agreement on the free movement of persons, which, as is made clear in the preamble thereto, is to bring about, for the benefit of nationals of the European Union and those of the Swiss Confederation, freedom of movement for persons on the territory of the contracting parties to that agreement, on the basis of the rules applying in the European Union.

56 It follows that national tax legislation, such as that at issue in the main proceedings, which refuses to grant an exemption to resident tax payers who have exercised their right to freedom of movement by being engaged as part-time employees in the teaching profession by a legal person established in Swiss territory, on the basis of the place in which that activity is carried out, gives rise to unjustified unequal treatment and is, therefore, contrary to Article 9(2) of Annex I to the Agreement on the free movement of persons.

57 Accordingly, the answer to the question referred is that the provisions of the Agreement on the free movement of persons concerning the equal treatment of employees must be interpreted as precluding the legislation of a Member State, such as the legislation at issue in the main proceedings, under which a resident national with unlimited liability to income tax who has exercised the right to freedom of movement in order to work as an employee in the teaching profession on a part-time basis for a legal person governed by public law established in Switzerland is denied a tax exemption in respect of the income from that employment, whereas such an exemption would be granted if that person had been so employed by a legal person governed by public law established in that Member State, in another Member State of the European Union or in another State to which the EEA Agreement applies.

Costs

58 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 (Sixth 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, concerning the equal treatment of employees must be interpreted as precluding the legislation of a Member State, such as the legislation at issue in the main proceedings, under which a resident national with unlimited liability to income tax who has exercised the right to freedom of movement in order to work as an employee on a part-time basis in the teaching profession for a legal person governed by public law established in Switzerland is denied a tax exemption in respect of the income from that employment whereas such an exemption would be granted if that person had been so employed by a legal person governed by public law established in that Member State, in another Member State of the European Union or in another State to which the Agreement on the European Economic Area of 2 May 1992 applies.

[Signatures]

* Language of the case: German.