JUDGMENT OF THE COURT (Third Chamber)

11 February 2010 *

In Case C-541/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Oberster Gerichtshof (Austria), made by decision of 4 November 2008, received at the Court on 4 December 2008, in the proceedings

Fokus Invest AG

v

Finanzierungsberatung-Immobilientreuhand und Anlageberatung GmbH (FIAG),

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, E. Juhász (Rapporteur), G. Arestis, J. Malenovský and T. von Danwitz, Judges,

* Language of the case: German.

Advocate General: Y. Bot,
Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— Fokus Invest AG, by C. Naske, Rechtsanwalt,

— the Austrian Government, by E. Riedl, 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 Article 25 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 part, on the free movement of persons, signed at Luxembourg on 21 June 1999 (OJ 2002 L 114, p. 6), and of Articles 63 TFEU and 64(1) TFEU.

2 The reference was made in proceedings pending before the Austrian courts relating to the conditions governing the acquisition, by a company established under Austrian law, the shares of which are held by a company established under Swiss law, of immovable property situated on Austrian territory.

Legal framework

The Agreement

3 On 21 June 1999, the European Community and its Member States, of the one part, and the Swiss Confederation, of the other part, signed seven agreements, including the Agreement on the free movement of persons ('the Agreement'). 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 they entered into force on 1 June 2002.

4 According to the preamble to the Agreement, the Contracting Parties concluded the Agreement '[c]onvinced that the free movement of persons between the territories of the Contracting Parties is a key factor in the harmonious development of their relations [and] [r]esolved 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, under the heading 'Objective', states:

'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;

(b) to facilitate the provision of services in the territory of the Contracting Parties, and in particular to liberalise the provision of services of brief duration;

(c) to accord a right of entry into, and residence in, the territory of the Contracting Parties to persons without an economic activity in the host country;

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

6 Article 5(1) of the Agreement, under the heading 'Persons providing services', provides:

'Without prejudice to other specific agreements between the Contracting Parties specifically concerning the provision of services (including the Government Procurement Agreement in so far as it covers the provision of services), persons providing services, including companies in accordance with the provisions of Annex I, shall have the right to provide a service in the territory of the other Contracting Party for a period not exceeding 90 days of actual work in a calendar year.'

7 Article 17 of Annex I to the Agreement, under the heading 'Persons providing services', states:

'With regard to the provision of services, the following shall be prohibited under Article 5 of this Agreement:

(a) any restriction on the cross-frontier provision of services in the territory of a Contracting Party not exceeding 90 days of actual work per calendar year;

(b) any restriction on the right of entry and residence in the cases covered by Article 5(2) of this Agreement concerning:

(i) persons providing services who are nationals of the Member States of the European Community or Switzerland and are established in the territory of a Contracting Party other than that of the person receiving services;

(ii) employees, irrespective of their nationality, of persons providing services, who are integrated into one Contracting Party's regular labour market and posted for the provision of a service in the territory of another Contracting Party without prejudice to Article 1.'

8 Under Article 18 of Annex I:

'The provisions of Article 17 of this Annex shall apply to companies formed in accordance with the law of a Member State of the European Community or Switzerland and having their registered office, central administration or principal place of business in the territory of a Contracting Party.'

9 Title VI of Annex I, under the heading 'Purchase of Immovable Property', contains only Article 25, which provides:

'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.

2. The national of a Contracting Party who has a right of residence but does not have his principal residence in the host State shall enjoy the same rights as a national as regards the purchase of immovable property needed for his economic activity. Leaving the host state shall not entail any obligation to dispose of such property. He may also be authorised to purchase a second residence or holiday accommodation. This Agreement shall not affect the rules applying to pure capital investment or business of unbuilt land and apartments.

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

10 The Austrian Law on the land register (Grundbuchgesetz) provides, in Paragraphs 53 and 57, that the owner of immovable property may request the registration of his right in the land register and the removal of other entries concerning the immovable property to which that right relates.

11 The Law of the province of Vienna on the purchase of immovable property by foreign nationals (Wiener Ausländergrunderwerbsgesetz) (*Wiener Landesgesetzblatt* 1998/11 of 3 March 1998; 'the WrAuslGEG'), which entered into force on 4 March 1998, provides in Paragraph 1(1) that:

'The inter vivos acquisition by a foreign national of ownership (or co-ownership) rights, a right to build, a personal easement over immovable property of all kinds whether built on or not, or the registrable leasing of such immovable property to foreign nationals, shall require official authorisation in order to have effect.'

12 Paragraph 2 of that law provides:

'For the purposes of the present law, the following persons shall be regarded as foreign nationals:

1. Natural persons who do not possess Austrian nationality;

2. Legal persons and partnerships with legal capacity whose seat is outside Austria;

3. Legal persons and partnerships with legal capacity whose seat is in Austria, in which foreign nationals as defined in points 1 and 2 have a majority holding;

…'.

13 In accordance with Paragraph 3(2) of that law, the provisions of Paragraph 1 do not apply, inter alia, to natural and legal persons who are entitled to rights under European Union law or under the Agreement on the European Economic Area or, in accordance with Paragraph 3(3) of that law, 'in so far as precluded by other treaty obligations'.

14 Paragraph 5 of that law states:

'1. The rights mentioned in Paragraph 1(1) may be entered in the land register to the benefit of a foreign national … only if the applicant produces the decision granting authorisation in accordance with the present law ….

…

4. If on the basis of point 2 or 3 of Paragraph 3 an acquisition is exempt from the obligation to obtain authorisation in accordance with Paragraph 1, on a request accompanied by suitable evidence presented by the acquirer the municipal administration shall provide written confirmation of that exemption (negative confirmation).'

15 The requirement of a negative confirmation where the acquisition of immovable property by foreign nationals is exempt from the obligation to obtain authorisation was introduced on 4 March 1998 by the WrAuslGEG, which repealed, as of that date, the Law of the province of Vienna on the purchase of immovable property by foreign

nationals in Vienna (Wiener Landesgesetz betreffend den Grunderwerb durch Ausländer in Wien) of 1967 (*Wiener Landesgesetzblatt* 1967/33; 'the AuslGEG').

16 According to the AuslGEG, the acquisition of ownership (co-ownership) of immovable property by foreign nationals was, in principle, subject to the obligation of obtaining an authorisation. The term 'foreign national' also applied to legal persons in which foreign nationals had a majority holding, and registration in the land register was conditional on production of the decision granting authorisation. The difference between the regime introduced by the AuslGEG and the current regime is that, under the earlier law, the land register court ('Grundbuchsgericht') had the power itself to examine whether an acquirer of immovable property satisfied the requirements for a statutory exemption, but lacked authority to resolve questions of fact. It was accordingly for the party seeking registration to prove that the factual requirements for an acquisition not subject to authorisation were satisfied, by producing convincing documents. A 'negative confirmation' was therefore not required.

17 Under the current regime, the authority empowered in that regard is not the land register court but the municipal administration. That administration, on the request of the acquirer, who must produce the necessary evidence, must confirm in writing that the conditions for obtaining an exemption from the authorisation obligation are satisfied, supplying it for that purpose with the 'negative confirmation' provided for in Paragraph 5(4) of the WrAuslGEG.

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

18 The limited liability company Finanzierungsberatung-Immobilientreuhand und Anlageberatung GmbH ('FIAG'), established under Austrian law, which has its seat

in Vienna (Austria), acquired, by a sales contract of 18 April 2007, for the sum of EUR 4 208 333.34, shares in a Vienna property, giving it ownership of 28 flats and 24 parking spaces, which were let. With regard to the 'status as Austrian national' of that company, its managing director at the time had declared on oath, in the sales contract, that the company's seat was situated in Austrian territory and that all the company's shares were held by Swiss companies. It was also mentioned that, pursuant to Article 25 of Annex I to the Agreement, the sales contract did not require authorisation to be obtained for the acquisition of immovable property by a foreign national. At that time, Fokus Invest AG ('Fokus Invest'), which has its seat in Switzerland, held shares in FIAG. Currently, a company whose seat is in Switzerland still holds the majority of the shares in FIAG.

19 Pursuant to the sales contract, FIAG requested registration of its right of ownership in the land register and the removal of various entries in that register, including the low-priority entry in favour of Fokus Invest regarding the commencement of an auction procedure to recover certain debts and costs.

20 The Bezirksgericht (District Court) Döbling (Austria) approved the application for registration in the land register made by FIAG, the entry being made on 19 November 2007. Fokus Invest, which did not want the entry in the register in its favour to be removed, contested that registration before the Landesgericht für Zivilrechtssachen (Regional Civil Court), Vienna (Austria). That court upheld the registration on the ground that, under Article 25 of Annex I to the Agreement, a company with its seat in Austria, all the shares of which are held by Swiss companies, had the right to be treated in the same way as an Austrian company. Consequently, there was no need for a 'negative confirmation' from the competent authority that the transaction in question was exempt from the authorisation requirement.

21 Fokus Invest appealed on a point of law ('Revision') against that decision to the Oberster Gerichtshof (Supreme Court) (Austria).

22 The referring court points out that the Agreement also grants, in Article 1, a right of establishment 'on a self-employed basis' and that, in identifying the beneficiaries of the rights under the Agreement, it refers in Articles 1, 2 and 3 to 'nationals of one Contracting Party'. In addition, Article 5(1) of the Agreement and Article 17 of Annex I thereto concern 'persons providing services'. Article 17 of Annex I prohibits in principle restrictions on the provision of services of brief duration and its provisions also apply, in accordance with Article 18 of Annex I, to companies.

23 The referring court also observes that Article 48 EC expressly requires that legal persons be treated in the same way as natural persons who are nationals of Member States, for the purposes of the application of the provisions on the freedom of establishment. It states that the Agreement also concerns the right of establishment 'as a self-employed person' but does not contain a comparable provision to Article 48 EC expressly requiring legal persons to be treated in the same way as natural persons. The national court accordingly concludes that if the Agreement applies only to natural persons, in particular where the right of establishment is concerned, the undertaking in question cannot be treated in the same way as an Austrian national or as a citizen of the European Union for the purposes of the purchase of the immovable property concerned.

24 If such a response were to be given to that question, the referring court observes that the free movement of capital, laid down in Article 56(1) EC, also applies to the right of foreign nationals to invest in real estate in a Member State. However, Article 57(1) EC permits, with regard to third countries, the retention of restrictions which existed on 31 December 1993. The question therefore arises whether the restrictions provided for with effect from 4 March 1998 by the WrAuslGEG concerning the acquisition of immovable property by foreign nationals, that is the obligation to hold an authorisation

or else to be exempt from that obligation as a result of obtaining a 'negative confirmation', can be regarded as restrictions which existed on 31 December 1993 under the AuslGEG as then in force.

25 In the light of all of those considerations, the Oberster Gerichtshof decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is Article 25 of Annex I to the Agreement … to be interpreted as meaning that the requirement of equal treatment with nationals in relation to the acquisition of immovable property applies only in relation to natural persons, but not to companies?

(2) If the first question is answered in the affirmative:

Do the provisions of [the WrAuslGEG], which in the case of acquisition of immovable property by foreign companies as defined in point 3 of Paragraph 2 of the WrAuslGEG require the production of a confirmation attesting to exemption from the requirement to obtain authorisation (Paragraph 5(4) and point 3 of Paragraph 3 of the WrAuslGEG), constitute a restriction on the free movement of capital (Article 56 EC) permitted under Article 57(1) EC in relation to [the Swiss Confederation] as a third country?'

The questions referred for a preliminary ruling

First question

26 The question whether the provisions of the Agreement may be interpreted as also applying to legal persons had been raised, with regard to the specific issue of the right of establishment, in the case which gave rise to the judgment in Case C-351/08 *Grimme* [2009] ECR I-10777.

27 In that judgment, the Court pointed out, first, that the Agreement was signed after the rejection by the Swiss Confederation, on 6 December 1992, of the Agreement on the European Economic Area (EEA) and that, by its refusal, the Swiss Confederation did not subscribe to the project of an economically integrated entity with a single market, based on common rules between its members, but chose the route of bilateral arrangements between the European Union and its Member States in specific areas (see, to that effect, *Grimme*, paragraph 27).

28 In the light of those findings, the Court concluded that the Swiss Confederation did not join the internal market of the European Union and that, consequently, the interpretation given to the provisions of Union law concerning that market cannot be automatically applied by analogy to the interpretation of the Agreement, unless there are express provisions to that effect laid down by the Agreement itself (see, to that effect, *Grimme*, paragraphs 27 and 29 and the case-law cited).

29 The Court then noted that the objectives of the Agreement, defined in Article 1, are established — according to the wording of that article — for the benefit of nationals of the Member States and the Swiss Confederation, and thus for the benefit of natural persons, and that all the categories of persons, whether Member State nationals or Swiss nationals, covered by the Agreement, with the exception of persons providing

services and recipients of services, are by their nature categories of natural persons (see, to that effect, *Grimme*, paragraphs 33 and 34).

30 The Court reached the conclusion that, with the exception of Article 5(1) of the Agreement and Article 18 of Annex I thereto, which provide that companies have a right to provide specific services, no provision of the Agreement or its Annex grants any right to legal persons (see, to that effect, *Grimme*, paragraph 35).

31 After finding that, under the Agreement, the right of establishment in the territory of a Contracting Party applies only to a self-employed person who is a national of a Member State of the European Union or of the Swiss Confederation, and that Article 1(a) of the Agreement, as an objective, explicitly grants the right of establishment on a self-employed basis only to natural persons, the Court held that it could not be argued that legal persons were granted the same right of establishment as natural persons under the Agreement (see, to that effect, *Grimme*, paragraphs 36, 37 and 39).

32 That interpretation of the Agreement by the Court in *Grimme*, and in particular the fundamental position stated in that case with regard to the scope of the right of establishment under the Agreement, are also applicable to the assessment of the present case.

33 The question raised in the present case concerns the right of a legal person to purchase immovable property situated in the territory of one Contracting Party, where that legal person has its seat in that territory but is owned by legal persons established under the law of the other Contracting Party.

34 It must be pointed out in that regard that Article 48 EC, in so far as it equates companies with natural persons where the freedom of establishment is concerned, cannot be relied upon in the present case. It should be recalled that the interpretation of the provisions of European Union law, including Treaty provisions, concerning the internal market, cannot be automatically applied by analogy to the interpretation of the Agreement and that, in any case, legal persons are not, under the Agreement, granted a right of establishment.

35 It should be noted that Article 25 of Annex I to the Agreement, governing the purchase of immovable property, refers to a 'national of a Contracting Party who has a right of residence' and a 'frontier worker' as the persons having rights in that regard.

36 Consequently, the wording of Article 25 leaves no doubt that the categories of persons enjoying the right in question, covered by the provisions of that article, are by their nature categories of natural persons who exercise that right in the context of the freedom of movement.

37 In those circumstances, the answer to the first question is that Article 25 of Annex I to the Agreement must be interpreted as meaning that the requirement of equal treatment with nationals in relation to the acquisition of immovable property applies only in relation to natural persons.

Second question

38 By its second question, the referring court asks, in essence, whether Article 64(1) TFEU must be interpreted as meaning that provisions of national law such as those of the WrAuslGEG, which require foreign nationals, within the meaning of that law, when acquiring immovable property, to obtain authorisation in respect of that acquisition, or else to produce a confirmation that the conditions laid down in that law for exemption

from that requirement are satisfied, constitute a restriction on the free movement of capital which is permitted with regard to the Swiss Confederation as a third country.

39 Although that question, as formulated by the referring court, refers only to the confirmation which must be granted by the competent municipal administration attesting to exemption from the abovementioned obligation, the requirement to obtain such a confirmation is a condition which results from the basic obligation on foreign nationals to obtain authorisation in order to be able to acquire immovable property. Therefore, the Court's assessment must be extended to that basic obligation.

40 It should be observed that under Article 64(1) TFEU, the prohibition of restrictions on the free movement of capital, within the meaning of Article 63 TFEU, is without prejudice to the application to third countries of any restrictions which existed on 31 December 1993 under national or European Union law adopted in respect of the movement of capital to or from third countries involving direct investment — including in real estate.

41 Therefore, it must be ascertained whether the restrictions contained in the abovementioned provisions of the WrAuslGEG can be regarded as restrictions which existed on 31 December 1993, given that that law entered into force after that date, namely on 4 March 1998.

42 According to the Court's case-law, the condition laid down in Article 64(1) TFEU concerning restrictions which existed in respect of third countries on 31 December 1993 is satisfied where national legislation adopted after that date contains provisions which are, in substance, identical to the previous legislation, which existed at that date. That condition is not satisfied where provisions adopted after that date are based on an

approach which differs from that of the previous law and establish new procedures (see, to that effect, Case C-157/05 *Holböck* [2007] ECR I-4051, paragraph 41 and case-law cited).

43 It is clear from the documents before the Court that, already under the Austrian legislation in force on 31 December 1993, that is the AuslGEG, the acquisition of ownership or co-ownership of immovable property situated in the province of Vienna by foreign nationals within the meaning of that legislation, including companies, was not unrestricted. It was subject to the basic obligation to obtain authorisation, from which the person concerned was exempt if he could prove that he was covered by a derogation, for example under the Republic of Austria's treaty obligations.

44 The term 'foreign national' already applied to legal persons in which foreign nationals had a majority holding, and registration in the land register was conditional on production of the decision granting the required authorisation or on proof that a statutory exemption applied.

45 The current law differs from the earlier one in that whereas, under the earlier law, the competent authority for confirming the existence of a statutory exemption from the obligation to obtain authorisation was the land register court, it is now the municipal administration in whose area of jurisdiction the immovable property is situated which enjoys that power. That administration must, on the request of the acquirer, ascertain whether the conditions for obtaining such an exemption are satisfied and, if that is the case, grant the 'negative confirmation' provided for under Paragraph 5(4) of the WrAuslGEG.

46 However, it is common ground that under both the earlier legislation and the WrAuslGEG prior authorisation is required for the acquisition of immovable property

in Austria by a foreign national. In those circumstances, the obligation to obtain prior authorisation imposed on a foreign company such as FIAG must be regarded as permitted under Article 64(1) TFEU.

47 The procedural amendments referred to in the decision making the reference concern only those acquisitions of immovable property by foreign nationals which could be the subject of an exemption under the national legislation. However, since under both the former law and the WrAuslGEG a company such as FIAG must be considered to be a foreign national who is not entitled to an exemption for the purposes of acquisition of immovable property in Austria, as is clear from the answer to the first question (see paragraph 37 of the present judgment) and from paragraph 46 of this judgment, the procedural amendments introduced by the WrAuslGEG cannot influence the outcome of the dispute in the main proceedings.

48 In any case, were any doubt to remain concerning the scope of the exemptions provided for under the national legislation, the points of divergence between the legislation now in force and the earlier legislation, concerning the question which authority has power to confirm the existence of an exemption and the procedure to be followed in that respect, are limited to factors which are not relevant to the very essence of the applicable legislation, consisting in the fundamental requirement for foreign nationals to obtain authorisation in order to acquire immovable property, and in the obligation on them to produce proof that the conditions for an exemption are met. Thus, the legislation now in force is not based on a different approach from that of the earlier law and does not introduce any substantially new procedures.

49 The answer to the second question is, therefore, that Article 64(1) TFEU must be interpreted as meaning that the provisions of the WrAuslGEG, which require foreign nationals, within the meaning of that law, when acquiring immovable property situated in the province of Vienna, to obtain authorisation in respect of that acquisition or else to produce a confirmation that the conditions laid down in that law for exemption from

that requirement are satisfied, constitute a restriction on the free movement of capital which is permitted with regard to the Swiss Confederation as a third country.

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 (Third Chamber) hereby rules:

1. **Article 25 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 part, on the free movement of persons, signed at Luxembourg on 21 June 1999, must be interpreted as meaning that the requirement of equal treatment with nationals in relation to the acquisition of immovable property applies only in relation to natural persons.**

2. **Article 64(1) TFEU must be interpreted as meaning that the provisions of the Law of the province of Vienna on the purchase of immovable property by**

foreign nationals (Wiener Ausländergrunderwerbsgesetz) of 3 March 1998, which require foreign nationals, within the meaning of that law, when acquiring immovable property situated in the province of Vienna, to obtain authorisation in respect of that acquisition or else to produce a confirmation that the conditions laid down in that law for exemption from that requirement are satisfied, constitute a restriction on the free movement of capital which is permitted with regard to the Swiss Confederation as a third country.

[Signatures]