OPINION OF ADVOCATE GENERAL JÄÄSKINEN
delivered on 20 May 2010[1]

I – Introduction

1. Two rates of hunting tax apply in the Province of Vorarlberg (Austria). A higher rate applies to nationals of non-member countries while a lower rate applies, inter alia, to citizens of the European Union and to persons with their main residence in Austria. Consequently, a higher rate was applied to two Swiss nationals resident in Switzerland who had leased a hunting ground than to lessees of hunting rights resident in Austria. In their complaint to the Vorarlberger Landesregierung (Government of the Province of Vorarlberg) against this difference in treatment, they relied on the Agreement on the free movement of persons concluded between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other ('the Agreement' or 'the EC-Switzerland Agreement').[2] When that complaint was rejected, the two applicants in the main proceedings then brought the matter before the referring court on the ground that the less favourable tax rate impaired the freedom of establishment to which they were entitled under the EC Treaty. The Austrian Verwaltungsgerichtshof (Administrative Court) wishes to know whether the carrying on of hunting, in the circumstances of the case before that court, is to be regarded as a self-employed activity within the meaning of Article 43 EC.

II – Legal context

A – *The Vienna Convention*

2. Under Article 1 of the Vienna Convention on the Law of Treaties of 23 May 1969 ('the Vienna Convention'),[3] entitled 'Scope of the present Convention', the Convention applies to treaties between States.

1 — Original language: French.
2 — OJ 2002 L 114, p. 6.
3 — *United Nations Treaty Series*, vol. 1155, p. 331.

3. Under Article 31 of the Vienna Convention, entitled 'General rule of interpretation':

'1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

...'

B – *The EC Treaty*

4. Article 43 EC prohibits restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State. Under the second paragraph of Article 43 EC, freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings.

C – *The EC-Switzerland Agreement on the free movement of persons*

1. The Agreement

5. The Agreement was signed in Luxembourg on 21 June 1999 and came into force on 1 June 2002. It is one of seven separate sectoral agreements governing relations between the European Community and the Swiss Confederation. [4]

4 — The seven agreements cover the free movement of persons, air transport, the carriage of passengers and goods by road and rail, trade in agricultural products, the mutual recognition of conformity assessment, certain aspects of government procurement, and scientific and technological cooperation. See 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).

6. Article 1 of the Agreement, which appears in Chapter I of the Agreement, provides:

'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;

…'

7. Article 2 of the Agreement, entitled 'Non-discrimination', reads 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.'

8. Article 4 of the Agreement stipulates:

'The right of residence and access to an economic activity shall be guaranteed unless otherwise provided in Article 10 and in accordance with the provisions of Annex I.'

9. Article 5 of the Agreement is entitled 'Persons providing services', and Article 5(3) provides:

'Nationals of a Member State of the European Community or Switzerland entering the territory of a Contracting Party solely to receive services shall have the right of entry and residence.'

10. Under Article 15 of the Agreement, the Annexes and Protocols to the Agreement form an integral part thereof.

11. Article 16 of the Agreement reads 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. 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.'

2. Annex I to the Agreement

12. Annex I to the Agreement, entitled 'Free movement of persons', contains seven chapters: I – General provisions; II – Employed persons; III – Self-employed persons; IV – Provision of services; V – Persons not pursuing an economic activity; VI – Purchase of immovable property; and VII – Transitional provisions and development of the Agreement.

13. Chapter II ('Employed persons') of Annex I includes, inter alia, Article 9, entitled 'Equal treatment', which provides:

'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.

…'

14. Chapter III ('Self-employed persons') of Annex I contains five articles (Articles 12 to 16). Article 12 of Annex I establishes the following conditions for obtaining a residence permit:

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

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

3. When issuing residence permits, the Contracting Parties may not require self-employed persons to produce more than the following:

(a) the document by virtue of which he entered their territory;

(b) the evidence referred to in paragraphs 1 and 2.

4. A residence permit shall be valid throughout the territory of the issuing state.

5. Breaks in residence of less than six consecutive months and absences for the purposes of fulfilling military service obligations shall not affect the validity of the residence permit.

…'

15. Article 15 ('Equal treatment') of Annex I reads as follows:

'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.'

16. Article 23 ('Persons receiving services') of Annex I provides:

'1. A person receiving services within the meaning of Article 5(3) of this Agreement shall 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 shall be issued with a residence permit equal in duration to the service. He may be excluded from social security schemes during his period of residence.

2. A residence permit shall be valid throughout the territory of the issuing state.'

D – *The regional legal context*

17. Paragraph 2 of the Vorarlberger Gesetz über das Jagdwesen (Law of the Province of Vorarlberg on hunting), in the version applicable to the facts of the case before the referring court, [5] provides:

'Content and exercise of the right to hunt

5 — LGBl. 32/1988. Law as subsequently amended.

(1) The right to hunt is the basis of any carrying on of hunting. It is linked to land ownership and encompasses the right to preserve, hunt and appropriate game. …'

18. Paragraph 20 of the law reads as follows:

'Letting of hunting

1. Hunting may be let by private treaty, by award on the basis of a public procedure, or by means of public auction. The persons entitled to dispose of the hunting right must when letting the hunting ensure that the right to hunt is exercised in accordance with the principles in Paragraph 3.

…

6. The provincial government shall enact by regulation more detailed provisions on the procedure for the letting of hunting.'

19. According to Paragraph 1 of the Vorarlberger Gesetz über die Erhebung einer Jagdabgabe (Law of the Province of Vorarlberg on the charging of a hunting tax),[6] a tax is payable for the exercise of the right to hunt. According to Paragraph 2 of the law, the taxable person is the person entitled to dispose of the hunting rights and, in the case of transfer of exploitation to lessees, the person entitled to exploit the right to hunt.

20. Paragraph 3 of the law provides that, where the hunting is let, the tax is to be assessed by reference to the annual rent, together with the value of any contractually agreed ancillary services. Expenses incurred for game wardenship and in making good damage caused by hunting and game do not count as ancillary services.

21. According to Paragraph 4(1) of the law, the tax is levied on persons with their principal residence in Austria, on citizens of the European Union and on natural and legal persons who are equated with such citizens under European Union law, at 15% of the basis of assessment. Under Paragraph 4(2) of the law, tax is levied on all other persons at 35% of the basis of assessment.

III – Main proceedings and questions referred for a preliminary ruling

22. On 8 January 2002, Alexander Hengartner and Rudolf Gasser, who are Swiss nationals, leased a hunting ground in Austria for a period of six years (namely from 1 April 2002 to 31 March 2008).

6 — LGBl. 28/2003.

23. In order to carry on their hunting activities, the applicants in the main proceedings maintain a hunting-box in the Province of Vorarlberg. They go there regularly, once a week, to hunt. They have rented a cold room and a butcher's shop for the sale of the game. In addition, they have paid compensation for expenses to two people acting as gamekeepers and have taken on the expenses of feeding the wildlife.

24. By a decision of the Landesabgabenamt für Vorarlberg (Tax Office for the Province of Vorarlberg) of 1 April 2007, the applicants in the main proceedings were assessed for hunting tax in an amount of EUR 4 359.30, representing 35% of the basis of assessment for the hunting year from 1 April 2007 to 31 March 2008. The applicants appealed against that decision.

25. By a decision of 17 October 2007, the Landesabgabenamt für Vorarlberg dismissed the appeal on the ground that application of the higher tax rate to the applicants in the main proceedings was consistent with the law. It also stated that the EC-Switzerland Agreement did not have to be applied to the exercise of a right to hunt and to taxes related thereto.

26. Mr Hengartner and Mr Gasser then brought proceedings matter before the Verwaltungsgerichtshof, essentially alleging an infringement of their rights to freedom of establishment and equal treatment. They argued that hunting, just like fishing or agriculture, was an economic activity, especially where more than 50 animals were shot and more than a tonne of meat sold, each year. According to them, it was immaterial whether or not the activity in question generated a profit.

27. In those circumstances, the applicants in the main proceedings claim that the Landesabgabenamt für Vorarlberg should have applied a lower tax rate of 15% in order to avoid discrimination on the basis of nationality, which is prohibited by European Union law.

28. The Landesabgabenamt für Vorarlberg replied that hunting should be regarded as a sport which does not serve towards the continuous earning of income and that the sale of the game meat was not commercial. The purchasing of feed for wild animals and the sale of the meat by the applicants in the main proceedings is not a self-employed economic activity.

29. The Verwaltungsgerichtshof states that the scope of Article 43 EC is characterised by the features of establishment and self-employed economic activity. It does not exclude the possibility that, in the present case, there may be a fixed establishment for at least a lengthy period and that the characteristics of self-employment are present. The question therefore arises as to whether the exercise of a right to hunt is an economic activity at all, especially if the purpose of gain is not the primary consideration. However, the intention

to make a profit in the areas of activity possibly constituting self-employed activity could also be a relevant factor.

30. The national court, which has doubts as to the interpretation of European Union law in this regard, decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Is the carrying on of hunting, if the person entitled to hunt sells the shot game within the country, a self-employed activity within the meaning of Article 43 EC, even if that activity is not intended to make a profit overall?'

IV – Answers proposed to the Court

31. In the opinion of the applicants in the main proceedings, the question referred for a preliminary ruling should be answered as follows:

'Hunting is a self-employed activity within the meaning of Article 43 EC, even if no overall profit is derived from this activity, in particular when the person entitled to hunt sells the game in the country or makes the necessary purchases (for example, feed for wild animals) in the country or hunts for at least six years (period of the lease), or when the person maintains fixed, permanent structures in another Member State (hunting-box, cold room and gamekeepers).'

32. The Vorarlberger Landesregierung suggests that the Court give the following answer to the question referred for a preliminary ruling:

'The carrying on of hunting is not a self-employed activity within the meaning of Article 12 of Annex I to [the Agreement], even if the person entitled to hunt sells the game within the country, where the person does not derive profits from the sale and carries on hunting primarily as a leisure pursuit and not for purposes of gain.'

33. The Austrian Government submits that the question referred to the Court should be answered as follows:

'The carrying on of hunting is not a self-employed activity within the meaning of Article 12 of Annex I to [the Agreement] in conjunction with Article 16 of the Agreement and with Article 43 EC, even if the person entitled to hunt sells the game within the country, where the person does not derive profits

from the sale and, in accordance with the facts in the present case, carries on this activity primarily as a leisure pursuit and not for purposes of gain.'

34. The European Commission proposes that the Court should rule:

'The carrying on of hunting under a hunting lease is not an activity within the meaning of Article 43 EC, when it is carried on for leisure purposes and the sale of the game obtained is merely incidental.'

V – Analysis

A – *The applicability of Article 43 EC*

35. In the question referred for a preliminary ruling, the referring court has asked whether and to what extent the carrying on of hunting may be a self-employed activity within the meaning of Article 43 EC, even if that activity is not intended to show a profit.

36. The applicants in the main proceedings and the Commission have adopted this legal basis in their written observations. On the other hand, the Vorarlberger Landesregierung and the Austrian Government take the view that it is the EC-Switzerland Agreement that should be interpreted.

37. There is no doubt that Swiss nationals, as nationals of a non-member country, are unable to rely on Article 43 EC in order to invoke the rights which arise from this provision in a situation such as that in the main proceedings. [7]

38. Since Mr Hengartner and Mr Gasser are Swiss nationals, their situation does not fall within the scope of Article 43 EC. Therefore, as far as the main proceedings are concerned, the question of whether or not the exercise of a right to hunt under a hunting lease is a self-employed activity within the meaning of Article 43 EC does not arise.

39. However, it remains to be seen whether the Court is in a position to provide other elements of the interpretation of European Union law which are of assistance to the national court.

40. It seems to me that it is. Having regard to the sufficiently detailed particulars provided by the referring court, the question referred

7 — See, inter alia, Case C-147/91 *Ferrer Laderer* [1992] ECR I-4097, paragraph 7, and Case C-230/97 *Awoyemi* [1998] ECR I-6781, paragraph 29.

for a preliminary ruling should be understood as relating not to freedom of establishment under the EC Treaty, but to the rights of 'self-employed persons' within the meaning of Article 12 of Annex I to the Agreement. The referring court seems essentially to be asking whether the provisions concerning the rights of self-employed persons under the Agreement prevent the levying in a Member State on lessees who are Swiss nationals of a tax such as the one at issue in the main proceedings, where a higher rate is being applied than the one applicable to Member State nationals.

B – *The Agreement*

1. General points concerning the Agreement

41. The Court has already ruled on the interpretation of this agreement on several occasions, inter alia in *Grimme*. [8]

42. In that judgment, the Court observed, as a preliminary point, that the EC-Switzerland Agreement was signed after the rejection by the Swiss Confederation, on 6 December 1992, of the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3) ('the EEA Agreement'), 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. [9]

43. In the light of these findings, the Court concluded that the Swiss Confederation had not joined the internal market of the European Union and that consequently the interpretation given to the provisions of European Union law concerning that market could not be automatically applied by analogy to the interpretation of the Agreement, unless there were express provisions to that effect laid down by the Agreement itself. [10]

44. I should reiterate that an international treaty must be interpreted not only in accordance with the terms in which it is written, but also in the light of its objectives. Article 31 of the Vienna Convention states that a treaty shall be interpreted in good faith in

8 — Case C-351/08 *Grimme* [2009] ECR I-10777. See also Case C-13/08 *Stamm and Hauser* [2008] ECR I-11087 and Case C-541/08 *Fokus Invest* [2010] ECR I-1025. All these cases were decided without Opinions from the Advocates General.

9 — See, in support of this, *Grimme*, paragraph 27, and *Fokus Invest*, paragraph 27.

10 — See, to that effect, *Grimme*, paragraphs 27 and 29 and the case-law cited.

accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. [11]

45. Therefore it is important to remember that interpretation of the EC-Switzerland Agreement involves an international treaty concluded by the European Community and its Member States with a non-member country. It is true that there are some international agreements whose declared objective is to extend the fundamental freedoms to non-member countries, or which provide for the prospect of accession to the European Union at a later date. [12] However, this is not the case for the Agreement concluded with the Swiss Confederation. Not all the freedoms are covered by the Agreement and there is no prospect of Switzerland joining the EU. Therefore the EC-Switzerland Agreement must be interpreted as a standard international agreement, that is to say by remaining faithful to the text of the Agreement, as the Vienna Convention requires. [13] Therefore I do not think that a dynamic, teleological approach is justified when interpreting the provisions of the Agreement.

46. Furthermore, although the Agreement covers many areas of European Union law, the fact remains that this coverage is limited by the specific nature of its provisions and because it contains provisions designed to limit or to clarify its material or temporal scope [14] and which are foreign to European Union law. [15] Furthermore, although Article 16(2) of the Agreement makes the case-law of the Court relevant, this renvoi concerns only case-law prior to the date of signature of the Agreement on 21 June 1999. According to the same provision, all subsequent case-law shall be brought to the Swiss Confederation's attention and, at the request of either Contracting Party, the Joint Committee shall determine the implications of such case-law for Switzerland as a non-member country.

47. These considerations must illuminate the analysis of the situation described by the reference for a preliminary ruling.

2. The provisions of the Agreement relating to the rights of self-employed persons

48. The provisions of the Agreement relating to self-employed persons are brief. Chapter III of Annex I contains five articles. In outline,

11 — See, inter alia, Case C-416/96 *El-Yassini* [1999] ECR I-1209, paragraph 47.

12 — Such as the EEA Agreement or the Agreement establishing an Association between the European Economic Community and Turkey, signed at Ankara on 12 September 1963 by the Republic of Turkey, on the one hand, and by the Member States of the EEC and the Community, on the other hand, and concluded, approved and confirmed on behalf of the Community by Council Decision 64/732/EEC of 23 December 1963 (OJ 1977 L 361, p. 29) ('the EEC-Turkey Association Agreement').

13 — According to Borghi, A., *La libre circulation des personnes entre la Suisse et l'UE*, Éditions Interuniversitaires Suisses, 2010, p. 2, this point of view is unanimously supported by the legal literature.

14 — As regards persons providing services, for example, see Article 17 et seq. of Annex I to the Agreement.

15 — See, inter alia, the non-discrimination clauses in the seven agreements (see footnote on page 19 of this Opinion).

Article 12 of the Annex relates solely to the conditions for obtaining a residence permit which apply to a self-employed person, while the other articles (13 to 16) merely contain more details of this right. The provisions in question relate only to natural persons. [16]

49. The Agreement simply affords all self-employed persons a right of entry and of residence as well as the right to enjoy no less favourable treatment in the host country than that accorded to its own nationals as regards access to a self-employed activity and the pursuit thereof.

50. Therefore the definition of guaranteed rights afforded to self-employed persons by the EC-Switzerland Agreement is much narrower than the freedom of establishment covered by the EC Treaty, as interpreted in the case-law of the Court.

51. Questions of taxation are only occasionally addressed in the EC-Switzerland Agreement. It is true that Article 15(2) of Annex I to the Agreement refers to Article 9(2) of Annex I. However, the tax issues mentioned there are connected with social security and do not relate to taxes connected with carrying on specific activities such as those at issue in the main proceedings. [17] Nor are the provisions of Article 21 of the Agreement, concerning agreements on double taxation, relevant for the purposes of this case. Therefore neither the objectives of the Agreement nor the particulars relating to the intentions of the Contracting Parties can justify interpreting the Agreement as implying an obligation of non-discrimination in the taxation of self-employed persons in a situation such as that in the case before the referring court.

52. Thus, without its being necessary to examine here the question of whether and on what conditions, if any, hunting could be considered a self-employed economic activity, I take the view that the rights afforded to self-employed persons by the Agreement relate primarily to the conditions for obtaining a residence permit, to access to a self-employed activity and to carrying on such an activity on the basis of non-discriminatory treatment. In

16 — In *Fokus Invest*, the Court confirmed that the objectives of the Agreement, defined in Article 1 of the Agreement, are established – according to the wording of that article – for the benefit of nationals of the Member States and of 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, and *Fokus Invest*, paragraph 29).

17 — Article 9(2) provides that an employed person and the members of his family referred to in Article 3 of the Annex shall enjoy the same tax concessions and welfare benefits as national employed persons and members of their family. It should be pointed out that the concept of 'tax concessions and welfare benefits' contained in this article is based on Article 7(2) of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475).

any event, it does not follow from these provisions that it is incompatible with the provisions of the Agreement concerning self-employed persons to levy a tax on hunting leases in Austria calculated at a higher rate from nationals of non-member countries than from Member State nationals.

53. Therefore I do not consider that Articles 12 and 15 of Annex I prevent Swiss nationals and European Union citizens being treated differently for taxation with regard to the tax at issue.

54. However, it is relevant to establish whether or not such treatment is contrary to the general principle of non-discrimination contained in the Agreement.

3. The principle of non-discrimination in the Agreement

55. Article 2 of the Agreement prohibits discrimination on grounds of nationality. This article provides that nationals of one Contracting Party who are lawfully resident in the territory of another Contracting Party are not, in application of and in accordance with the provisions of Annexes I to III to the Agreement, to be the subject of any discrimination on grounds of nationality.

56. The question which then arises is whether the scope of this prohibition is analogous to the one laid down in the EC Treaty.

57. It seems to me that non-discrimination in relations between the European Community and the Swiss Confederation has a relative meaning, as the relevant legal framework now stands, and is not commensurate with non-discrimination in relations within the European Union or the European Economic Area. In this regard, it must be borne in mind that Article 12 EC and Article 4 of the EEA Agreement prohibit any discrimination on grounds of nationality in their respective spheres of application. The EC-Switzerland Agreement also includes a principle of non-discrimination, but restrictively and conditionally.

58. Furthermore, the seven separate agreements that govern relations between the European Community and the Swiss Confederation are clearly sectoral in nature. [18] These agreements were negotiated at the same time, but separately. Neither their structure nor their objectives are identical. The relevant

18 — See footnote 4 of this Opinion.

provisions of these seven agreements concerning the equal treatment principle, in so far as they exist, are not identical, from the point of view of either their substance or their scope. [19]

59. Moreover, as far as hunting tax is concerned, the relevant laws in at least two of the Contracting Parties, namely the Republic of Austria and the Swiss Confederation, appear to assume that the principle of non-discrimination does not apply to this matter. [20]

60. Thus the principle of non-discrimination as laid down by the Agreement and interpreted in accordance with the Vienna Convention does not, on its own, preclude the provisions in question, which provide for a tax to be levied in a higher amount from Swiss nationals who hold hunting leases in Austria.

4. The extent of the rights of persons receiving services under the Agreement

61. The order for reference shows that the provisions relating to the freedom to provide services were referred to in the appeal to the Vorarlberger Landesregierung. In order to complete my analysis, I think it is necessary to tackle this aspect as well.

62. In *Jägerskiöld*, the Court examined the legal characterisation of a similar situation. [21] That case concerned the grant of fishing rights and the issue of fishing permits. The Court held that the activity consisting of making fishing waters available to third parties, for consideration and upon certain conditions, so that they can fish there constitutes a provision of services which is covered by Article 59 et seq. of the EC Treaty (now, after amendment, Article 49 EC et seq.) if it has a cross-frontier character. The Court also expressed a view as to the applicability of the other freedoms laid down by the Treaty. It

19 — As regards the principle of non-discrimination in the other agreements (cited in footnote 4 of this Opinion), see, inter alia, Articles 3 and 23 of the Agreement on air transport; Articles 1, 17, 20, 27, 28, 32, 38, 40 and 52 of the Agreement on the carriage of passengers and goods by road and rail; and Articles 3, 4 and 6 of the Agreement on certain aspects of government procurement.

20 — The defendant in the main proceedings has attached to its written observations the decision of 17 October 2007 taken by the national authorities (mentioned in paragraph 25 of this Opinion), which is the subject of the main proceedings. In this decision, the Austrian authorities refer, inter alia, to the provisions which apply in Switzerland. It appears from this that the relevant legislation discriminates not only between Swiss nationals and foreign nationals, but also between Swiss nationals on the basis of their canton of origin. Some Contracting Parties, therefore, did not feel bound to amend their national provisions in this regard, so the practice of the Contracting Parties does not correspond to the interpretation proposed by the applicants in the main proceedings.

21 — Case C-97/98 *Jägerskiöld* [1999] ECR I-7319.

stated that the fact that fishing rights or the relevant permits are set down in documents which, as such, may be the subject of trade is not sufficient to bring them within the scope of the provisions of the Treaty relating to the free movement of goods.

63. This case-law seems to me capable of being applied to leases of hunting rights.

64. Thus the activity consisting of making hunting grounds available to third parties, for consideration and upon certain conditions, so that they can hunt there constitutes a provision of services which is within the scope of the freedom to provide services if it has a cross-frontier character.

65. However, in the present case, Mr Hengartner and Mr Gasser are not persons providing services, but persons receiving services. Consequently, it is necessary to consider the interpretation of the specific provisions laid down by the Agreement concerning the rights of persons receiving services.

66. It is common ground that, even though the Agreement covers the freedom to provide services, its scope is not identical to that of the corresponding provisions of the EC Treaty.

67. In *Grimme*, the Court emphasised that, according to Article 1(b) of the Agreement, the objective of the Agreement is 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. [22] However, the Court added that the right to provide services in the territories of another Contracting Party is restricted by Articles 5(1) of the Agreement and 17(a) of Annex I thereto to 90 days of actual work in a calendar year. According to Article 19 of Annex I, during that period, the host State may not impose on those persons providing services less favourable conditions than those imposed by that State on its own nationals, in accordance with the provisions of Annexes I to III to the Agreement. [23]

68. The rights guaranteed by the Agreement to persons receiving services relate essentially to the right of residence. It is provided that persons receiving services shall not require a residence permit for a period of residence of three months or less. For a period exceeding three months, persons receiving services shall be issued with a residence permit equal in duration to the service. I should point out in this regard that Article 2 of the Agreement does not prohibit all discrimination on grounds of nationality, but only 'in application

22 — *Grimme*, paragraph 40.
23 — Ibid., paragraph 42.

of and in accordance with the provisions of Annexes I, II and III to this Agreement.'

69. Nothing in the EC-Switzerland Agreement indicates that its aim was to ensure equal tax treatment in respect of taxes levied on services such as the letting of hunting rights. It should be borne in mind that there is no prohibition on all discriminatory taxation in the context of trade in services expressly laid down either by the General Agreement on Trade in Services (GATS) [24] or by the treaties founding the European Union, unlike the provisions that apply to trade in goods. [25]

70. In the absence of any express provision prohibiting all tax discrimination against nationals of the other Contracting Parties in the EC-Switzerland Agreement, such a prohibition may be taken to exist only if interpretation of the rights guaranteed by other provisions of the Agreement warrants it. Within the European Union, that is to be inferred from the provisions relating to the fundamental freedoms.

71. A tax or a flat-rate payment affecting persons receiving services when obtaining a residence permit might be contrary to the Agreement if the amount were to exceed, without any objective reasons, the charges laid down for citizens of the host country for issuing supporting documents in a generally comparable situation. In my opinion, there is a risk of such a tax, closely linked to the rights guaranteed by the Agreement, directly impairing the rights which the Agreement provides for persons receiving services. [26] However, the tax at issue in the main proceedings is of an entirely different nature.

72. For the sake of completeness, however, I shall add that I do not think it is compatible with the ideal of equality of all individuals before the law to discriminate against individuals who are nationals of a non-member country residing legally in the European Union solely because of their nationality, in situations which are otherwise completely comparable. I take the view that discrimination of this nature should be precluded by our constitutional values. Such direct discrimination against foreign nationals receiving services might be understandable in a poor country suffering from a shortage of foreign currency, but within the European Union it is not. Therefore it is with regret that I have to state that this ideal has not been achieved, as

24 — See Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ 1994 L 336, p. 1), by which the Council approved the Agreement establishing the World Trade Organisation, and also the Agreements in Annexes 1, 2 and 3 to that agreement, one of which is GATS. Article XIV GATS excludes certain tax measures from the scope of the general obligations laid down by that agreement.

25 — See Article III:2 GATT, Article 90 EC and Article 14 of the EEA Agreement.

26 — The Court has already ruled on a somewhat similar situation in the context of another agreement, namely the EEC-Turkey Association Agreement; Case C-242/06 *Şahin* [2009] ECR I-8465, paragraph 75, specifically in connection with a standstill clause in Article 13 of Decision No 1/80 of the Association Council of 19 September 1980 relating to development of the Association.

European Union law now stands, as regards nationals of non-member countries.

73. In conclusion, for a Swiss national to be subject, as a person receiving services, to different treatment with regard to the levying of a tax to be paid on the basis of the letting of hunting rights in circumstances such as those in the case before the referring court is not contrary to the provisions of the Agreement relating to persons receiving services.

VI – Conclusion

74. Having regard to the above considerations, I propose that the Court should answer the Verwaltungsgerichtshof as follows:

Article 43 EC is not applicable in circumstances such as those in the case before the referring court.

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, do not preclude the application of national provisions such as those at issue in the main proceedings which lead, when levying a tax payable for the exercise of the right to hunt, to a higher rate being applied to Swiss nationals than to citizens of the European Union.