JUDGMENT OF THE COURT (Fourth Chamber)

12 November 2009 *

In Case C-351/08,

REFERENCE for a preliminary ruling under Article 234 EC, by the Bundessozialgericht (Germany), made by decision of 27 February 2008, received at the Court on 4 August 2008, in the proceedings

Christian Grimme

v

Deutsche Angestellten-Krankenkasse,

intervening parties:

Deutsche Rentenversicherung Bund,

* Language of the case: German.

Bundesagentur für Arbeit,

BGl Bertil Grimme AG Insurance Brokers,

THE COURT (Fourth Chamber),

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

Advocate General: J. Mazák,
Registrar: N. Nanchev, Administrator,

having regard to the written procedure and further to the hearing on 2 July 2009,

after considering the observations submitted on behalf of:

— Mr Grimme, by B. Koch, Rechtsanwalt,

— Deutsche Rentenversicherung Bund, by R. Mey, Leitender Verwaltungsdirektor,

— BGI Bertil Grimme AG Insurance Brokers, by B. Koch, Rechtsanwalt,

— the Commission of the European Communities, by E. Traversa and F. Hoffmeister, acting as Agents,

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

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 1, 5, 7 and 16 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') and Articles 12, and 17 to 19 of Annex I to the Agreement.

2 The reference was made in the course of proceedings between Mr Grimme and BGI Bertil Grimme AG Insurance Brokers ('Bertil Grimme'), a company limited by shares governed by Swiss law, and the Deutsche Angestellten-Krankenkasse (German sickness insurance scheme), the Deutsche Rentenversicherung Bund and the Bundesagentur für Arbeit, on the compulsory membership of the German pension insurance scheme for a member of a managing board of a company limited by shares governed by Swiss law, who is a director in Germany, of a branch of the company.

Legal context

Community legislation

3 The European Community and its Member States signed seven agreements with the Swiss Confederation on 21 June 1999 (OJ 2002 L 114, p. 6), including the Agreement at issue.

4 In the preamble to the Agreement, the Contracting Parties declared themselves '[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 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 With regard to persons providing services, Article 5 of the Agreement provides:

'1. 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.

…

4. The rights referred to in this Article shall be guaranteed in accordance with the provisions laid down in Annexes I, II and III. The quantitative limits of Article 10 may not be relied upon as against persons referred to in this Article.'

7 Article 7 of the Agreement stipulates:

‘The Contracting Parties shall make provision, in accordance with Annex I, for the following rights in relation to the free movement of persons:

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

…’

8 Article 16 of the Agreement is worded as follows:

‘1. In order to attain the objectives pursued by this Agreement, the Contracting Parties shall take all measures necessary to ensure that rights and obligations equivalent to those contained in the legal acts of the European Community to which reference is made are applied in relations between them.

2. In so far as the application of this Agreement involves concepts of Community law, account shall be taken of the relevant case-law of the Court of Justice of the European Communities prior to the date of its signature. Case-law after that date shall be brought to Switzerland’s attention. To ensure that the Agreement works properly, the Joint Committee shall, at the request of either Contracting Party, determine the implications of such case-law.’

9 Annex I to the Agreement, entitled 'Free movement of persons', provides in Article 9, which is set out in Chapter II:

'Equal treatment

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.

…'

10 Annex I to the Agreement contains a Chapter III, consisting of Articles 12 to 16, which contain specific provisions on self-employed persons. Thus, Article 12(1) of that Annex provides:

'A national of a Contracting Party wishing to become established in the territory of another Contracting Party in order to pursue a self-employed activity (hereinafter referred to as a "self-employed person") shall receive a residence permit valid for a

period of at least five years from its date of issue, provided that he produces evidence to the competent national authorities that he is established or wishes to become so.'

11 Article 15 of Annex I to the Agreement stipulates:

'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.'

12 Annex I to the Agreement also contains a Chapter IV which includes the following provisions on persons providing services:

'*Article 17*

Persons providing services

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.

Article 18

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.

Article 19

A person providing services who has the right or has been authorised to provide a service may, for the purposes of its provision, temporarily pursue his activity in the state in which the service is provided on the same terms as those imposed by that state on its own nationals, in accordance with the provisions of this Annex and Annexes II and III.'

National legislation

13 Book VI of the German Social Security Code (Sozialgesetzbuch, 'SGB VI') deals with the statutory pension insurance scheme.

14 Paragraph 1 of that Book, entitled 'Employees', provides:

'Persons required to join the insurance scheme are:

1. persons who are employed for remuneration or for the purposes of their professional training; the insurance obligation continues to apply while payments are received under Book III by reason of short-time work;

…'

15 That paragraph also contains a provision which establishes an exemption for members of the managing board of a company limited by shares.

The main proceedings and the question referred for a preliminary ruling

16 Since 26 September 1996, Mr Grimme, a German national, has been the director of the branch established in Hamburg (Germany) of Bertil Grimme, the registered office of which is located in Zug (Switzerland). Since 29 December 2003, the applicant in the main proceedings has been registered in the commercial registrar of the canton of Zug, as a member of the managing board of Bertil Grimme, with authority to bind the company.

17 During the month of June 2003, Mr Grimme asked the Deutsche Angestellten-Krankenkasse to assess the status of his activity in the Hamburg branch from the point of view of social security law. In support of his request, the applicant in the main proceedings referred to his contract of appointment as a person with authority to sign in the name of the company and director of the branch as well as the fact that he received a basic salary which would continue to be paid for a period of six weeks in the event of incapacity for work. In addition, he received a share of the profits, depending on the economic results of the company.

18 By decision of 7 August 2003, the Deutsche Angestellten-Krankenkasse found that, with regard to his activity in the Hamburg branch, the applicant in the main proceedings was in an employment relationship and was obliged as a result to join, inter alia, the statutory pension insurance scheme.

19 Mr Grimme challenged that decision arguing that he should be treated, in his capacity as a member of a managing board of a company limited by shares governed by Swiss law

and, thus, from the date of the acquisition of that status, as if he were a member of a managing board of a company limited by shares governed by German law. Consequently, since 29 December 2003, he was not obliged to be a member of the statutory pension insurance scheme. That challenge was rejected by decision of 8 September 2004.

20 By judgment of 1 November 2005, the Sozialgericht Hamburg (the Social Court, Hamburg) granted the applicant' s application and annulled the decision at issue in the main proceedings in so far as it provides for the compulsory membership of Mr Grimme in the statutory pension insurance and unemployment insurance schemes.

21 Following the appeal brought by the Deutsche Rentenversicherung Bund, the Landessozialgericht Hamburg (Higher Social Court of Hamburg) upheld, by judgment of 11 October 2006, the judgment at first instance of the Sozialgericht Hamburg. Members of a managing board of a company limited by shares governed by Swiss law should be treated in the same way as members of a managing board of a company limited by shares governed by German law, and for that purpose, they are eligible for the derogation provided for in Paragraph 1 of SGB VI from compulsory membership of the statutory pension insurance scheme.

22 The Deutsche Rentenversicherung Bund appealed on a point of law to the Bundessozialgericht (Federal Social Court). The referring court observes that, contrary to the interpretation adopted by the courts in the main proceedings, under German law, the members of a managing board of a company limited by shares governed by Swiss law are not equivalent to members of a managing board of a company limited by shares governed by German law. However, the Bundessozialgericht raises the question whether the non-application of the exemption provision for members of a managing board of a company limited by shares provided for in Paragraph 1 of SGB VI to persons such as the applicant in the main proceedings is compatible with the provisions of the Agreement, and in particular with those provisions concerning the right of establishment and freedom to provide services.

23 In the view of the referring court, the Agreement, albeit providing solely for a right to establishment in the territory of a Contracting Party for natural persons, could also be extended to cover companies formed in accordance with the law of a Member State or Swiss law. The extension of the Agreement's ambit may be inferred from the provisions of its preamble, which do not distinguish between the concept of a natural person and that of a legal person and from its Final Act, which provides that all necessary measures are to be taken to ensure the application of the *acquis communautaire* and also from Article 16(1) thereof which refers to Community law.

24 In addition, in the event that the Agreement is not applicable to companies, the Bundessozialgericht raises the question of the concordance between the right to provide services offered, under Articles 5(1) of the Agreement and 18 of Annex I thereto, to companies in the territory of the Contracting Parties and Articles 48 EC to 50 EC concerning the right of establishment and freedom to provide services in the territory of the Community. In the view of the referring Court, the freedom to provide services laid down in the Agreement, although more narrowly defined in time and with a more limited scope than the freedom in Community law, may none the less allow the provision of services in the longer term, on a case by case basis.

25 The Bundessozialgericht considered that an interpretation of the provisions of the Agreement was necessary for its decision and therefore decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Are 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, in particular Articles 1, 5, 7 and 16 thereof and Articles 12, and 17 to 19 of Annex I thereto, to be interpreted as meaning that they preclude a rule which obliges a member of a managing board of a company limited by shares governed by Swiss law who is employed in Germany to be insured in the German statutory pension insurance scheme, whereas members of managing boards of companies limited by shares governed by German law are exempt from that obligation?'

The question referred for a preliminary ruling

26 It should be borne in mind at the outset that the Agreement is one of a series of seven sectoral agreements between the same Contracting Parties, signed on 21 June 1999.

27 Those agreements were signed after the rejection by the Swiss Confederation, on 6 December 1992, of the Agreement on the European Economic Area (EEA). The Swiss Confederation, by its refusal, 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 Community and its Member States in specific areas. Therefore, the Swiss Confederation did not join the internal market of the Community the aim of which is the removal of all obstacles to create an area of total freedom of movement analogous to that provided by a national market, which includes inter alia the freedom to provide services and the freedom of establishment.

28 Thus, in order to reinforce the link between the Contracting Parties, the bilateral Agreement was signed between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other part. Since 1 April 2006, it has been extended by a Protocol on extension signed on 26 October 2004 to the states which acceded to the European Union on 1 May 2004 (OJ 2006 L 89, p. 30).

29 In that context, the interpretation given to the provisions of Community law concerning the internal 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, Case 270/80 *Polydor and RSO* [1982] ECR 329, paragraphs 15 to 19).

30 With regard to the effects of the Agreement on the membership of the applicant in the main proceedings of the German statutory pension insurance scheme, the question

referred by the Court requires a determination, at the outset, as to whether the Agreement guarantees a right to freedom of establishment not just to natural persons but also to legal persons formed in accordance with the law of a Member State or Swiss law and having their registered office, central administration or principal place of business within the territory of a Contracting Party. It must next be established whether the applicant in the main proceedings derives rights from the provisions of the Agreement on freedom to provide services and, finally, it must be examined whether, under the Agreement, compulsory membership of the German statuary pension scheme prejudices the equal treatment of the applicant in the main proceedings in his capacity as an employee.

31 First, as regards the question of the freedom of establishment of legal persons, the applicant in the main proceedings claims that no provision of the Agreement explicitly excludes legal persons from benefiting from that freedom. The provisions of the preamble to the Agreement refer to persons without distinguishing between natural and legal persons and establish the free movement of persons on the basis of the *acquis communautaire*. In addition, Article 16(1) of the Agreement expressly refers to the fact that the Contracting Parties are to 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. Consequently, the freedom of establishment guaranteed by the Agreement for the benefit of natural persons can be interpreted as also applying to legal persons.

32 That interpretation cannot, however, be accepted.

33 It is apparent from the wording of Article 1 of the Agreement which defines its objectives, that those objectives are established for the benefit of nationals of the Member States of the European Community and the Swiss Confederation, and thus for the benefit of natural persons. According to Article 1(a) of that Agreement, its objectives are 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.

34 It should also be noted that the provisions of the Agreement are intended for the following categories of persons, whether Community or Swiss nationals: the self-employed, which include also self-employed frontier workers, workers, which include employed workers, workers on secondment and employed frontier workers, persons providing services, recipients of services, persons employed for a period of less than one year in the territory of a Contracting Party, students, jobseekers, persons not engaged in gainful activity and members of the families of those various categories of nationals. All those categories of persons, with the exception of persons providing services and recipients of services, are by their nature categories of natural persons.

35 Clearly, with the exception of Articles 5(1) of the Agreement and 18 of Annex I to the Agreement, which provide that companies have a right to provide specific services, no provision of that Agreement or its Annex grants any right to legal persons, such as the right of establishment in the territory of one or other of the Contracting Parties.

36 According to 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 Community or of the Swiss Confederation. Under Article 12(1) of Annex I to that Agreement, a self-employed person wishing to become established in the territory of another Contracting Party in order to pursue a self-employed activity is to receive a renewable residence permit valid for a period of at least five years from its date of issue.

37 It should be added that Article 16(1) of the Agreement, which refers to the application of the *acquis communautaire* in relations between the Contracting Parties, provides for that application only in the framework of the objectives of the Agreement. Those objectives are listed in Article 1 of the Agreement, subparagraph (a) of which explicitly grants natural persons the right of establishment on a self-employed basis. That right is confirmed by case-law (see, to that effect, Case C-13/08 *Stamm and Hauser*, ECR [2009] I-11087, paragraph 44). By contrast, the grant of such a right to a legal person is not among the objectives pursued by the Agreement.

38 In addition, Article 16(1) of the Agreement makes the application of the *acquis communautaire* in relations between the parties to the Agreement subject to reference being made to rights and obligations equivalent to those contained in the legal acts of the European Community. Therefore, the provisions of Article 16(1) and (2) may not be relied on in the main proceedings, since the Agreement does not make reference in any provision to the right of establishment of legal persons.

39 Consequently, it cannot be argued that legal persons were granted the same right of establishment as natural persons under that Agreement.

40 Secondly, as regards the influence of the provisions of the Agreement on the provision of services on the situation of the applicant in the main proceedings, it should be 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.

41 It should be pointed out that Article 5(1) of the Agreement provides that persons providing services, that it to say natural persons and also legal persons, are the beneficiaries of that liberalisation of services. In accordance with Article 18 of Annex I to the Agreement, the provisions of Article 17(a) of Annex I, which prohibits 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, are to apply to companies formed in accordance with the law of a Member State of the European Community or the Swiss Confederation and having their registered office, central administration or principal place of business in the territory of a Contracting Party.

42 Clearly, first, as is apparent from Article 17(a) of Annex I to the Agreement, the provision of services referred to by the Agreement is only the provision of cross-frontier services and, secondly, 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 that that those imposed by that State on its own nationals, in accordance with the provisions of this Annex and Annexes II and III.

43 It follows from paragraphs 40 to 42 of this judgment that the Agreement authorised only a limited freedom, as between the Community and the Swiss Confederation, to provide cross-frontier services for a period not exceeding 90 days of actual work in a calendar year.

44 Consequently, a national of a Member State, who carries out continuous work in that State, necessarily exceeds 90 days of actual work in a calendar year, and even if his activity may be considered cross-frontier, may not derive any rights on the provision of services from the provisions of the Agreement.

45 Thirdly, the Court is asked to rule, as is implicit in the question referred for a preliminary ruling and the submissions made by Mr Grimme at the hearing on the application of the principle of equal treatment of employed persons, as that principle is set out in the Agreement.

46 Mr Grimme claims that, as an employed worker, compulsory membership of the German statutory pension insurance scheme constitutes a breach of equal treatment. Such compulsory membership, as an employee of Bertil Grimme and a member of the managing board of that company, when members of the managing boards of companies limited by shares governed by German law are exempted, is contrary to the principle of equal treatment of employees guaranteed in Article 9 of Annex I to the Agreement.

47 Article 9 of Annex I to the Agreement guarantees equal treatment of employed persons who are nationals of a Contracting Party in the territory of another Contracting Party. Thus, they may not 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 they become unemployed.

48 Therefore, that Article only concerns the case of discrimination by reason of nationality against a national of a Contracting Party in the territory of another Contracting Party.

49 It follows from the facts put before the Court that Mr Grimme is a German national and carries out his activity as an employee for the Hamburg branch of Bertil Grimme. There can be no question in the present case of discrimination by the authorities of a Contracting Party against a national of another Contracting Party. Mr Grimme's position as a member of the managing board of a company limited by shares governed by Swiss law is of no relevance in that respect.

50 In the light of all the foregoing considerations, the answer to the question referred is that the provisions of the Agreement, in particular, Articles 1, 5, 7 and 16 thereof as well as Articles 12, and 17 to 19 of Annex I thereto, do not preclude the legislation of a Member State from requiring persons, who are nationals of that Member State and employed in the territory thereof to join the statutory pension insurance scheme of that Member State, despite the fact that that person is a member of the managing board of a company limited by shares governed by Swiss law, when members of the managing board of a company limited by shares governed by the law of that Member States are not obliged to become members of that insurance scheme.

Costs

51 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

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 and, in particular, Articles 1, 5, 7 and 16 thereof as well as Articles 12, and 17 to 19 of Annex I thereto, do not preclude the legislation of a Member State from requiring a person, who is a national of that Member State and employed in the territory thereof to join the statutory pension insurance scheme of that Member State, despite the fact that that person is a member of the managing board of a company limited by shares governed by Swiss law when members of the managing board of a company limited by shares governed by the law of that Member State are not obliged to join that insurance scheme.

[Signatures]