Reports of Cases

OPINION OF ADVOCATE GENERAL
JÄÄSKINEN
delivered on 18 October 2012[1]

Case C-425/11

Katja Ettwein
v
Finanzamt Konstanz

(Reference for a preliminary ruling by the Finanzgericht Baden-Württemberg (Germany))

(Agreement between the European Community and its Member States on the one hand and the Swiss Confederation on the other hand, on the free movement of persons — Direct taxation of self-employed frontier workers — Refusal of a tax advantage in a Member State owing to the transfer of residence — Exclusion of spouses residing in Switzerland from mitigation of joint taxation (Ehegattensplitting) applicable to residents of the Member States of the European Union or of the European Economic Area — Equal treatment)

I – Introduction

1. This reference for a preliminary ruling requests the Court to interpret the relevant provisions of the agreement between the European Community and its Member States, on the one hand, and the Swiss Confederation, on the other, on the free movement of persons ('the EC-Switzerland Agreement'),[2] in particular those relating to self-employed persons. More specifically, the Finanzgericht Baden-Württemberg (Germany) is asking the Court whether that agreement precludes tax rules in a Member State of the European Union under which spouses from that Member State who carry on an independent professional activity in that State and are subject to income tax there for almost all of their taxable income are refused a tax advantage under those rules because they have transferred their private residence to Switzerland.

2. Indeed it is clear from those provisions of the legislation in question that the 'splitting' regime constitutes for the spouses a tax advantage where the income received by one of them is clearly higher than that received by the other. That regime was instituted in order to mitigate the progressive nature of the income tax scale.[3] Under the 'splitting' regime, the spouses' total income is aggregated, notionally attributed to each spouse as to 50% each and then taxed accordingly. If the income of one spouse is high and that of the other low, 'splitting' makes their taxable amounts the same and moderates the progressive nature of the income tax rates.

1 — Original language: French.

2 — Agreement signed in Luxembourg on 21 June 1999 (OJ 2002, L 114, p. 6).

3 — Case C-279/93 *Schumacker* [1995] ECR I-225, paragraph 7.

3. The regime is however applicable only in the event that the spouses are domiciled or have their habitual residence either in Germany or in another Member State of the Union or in a State to which the European Economic Area Agreement ('the EEA Agreement') [4] applies.

II – Legal context

A – *EC-Switzerland Agreement*

4. Under the second sentence of the preamble of the EC-Switzerland Agreement, the contracting parties are '[r]esolved to bring about the free movement of persons between them on the basis of the rules applying in the European Community'.

5. According to Article 1(a) and (d) of the EC-Switzerland Agreement, its objective is, inter alia, to accord nationals of the Member States and the Swiss Confederation a right of entry, residence, access to work as employed persons, establishment on a self-employed basis and the right to stay in the territory of the contracting parties, and to accord them the same living, employment and working conditions as those accorded to nationals.

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

'Nationals of one Contracting Party who are lawfully resident in the territory of another Contracting Party shall not, in application of and in accordance with the provisions of Annexes I, II and III to this Agreement, be the subject of any discrimination on grounds of nationality'.

7. Article 4 of the Agreement, 'Right of residence and access to an economic activity', provides:

'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'.

8. Under the heading 'Processing of appeals', Article 11(1) of the Agreement confers on the persons referred to in the EC-Switzerland Agreement with regard to the application of the provisions of the agreement a right of appeal to the competent authorities.

9. Article 16 of the Agreement, entitled 'Reference to Community law', provides 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 … 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.'

4 — Agreement of 2 May 1992 (OJ 1994 L 1, p. 3).

10. Article 21 of the Agreement, entitled 'Relationship to bilateral agreements on double taxation', provides at subparagraph 2:

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

11. Annex I to the Agreement concerns the free movement of persons. Chapter II of the annex contains the provisions on employed persons. Article 9 of that chapter, on equal treatment, and applicable to self-employed persons by virtue of the reference in Article 15(2) of Chapter III, provides as follows:

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

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

…'

12. Chapter III of that annex concerns 'Self-employed persons' who, in accordance with the definition given in Article 12(1) of that Chapter, are the nationals of a Contracting Party wishing to become established in the territory of another Contracting Party in order to pursue a self-employed activity.

13. Article 13(1) of that Chapter, entitled 'Self-employed frontier workers', provides:

'A self-employed frontier worker is a national of a Contracting Party who is resident in the territory of a Contracting Party and who pursues a self-employed activity in the territory of the other Contracting Party, returning to his place of residence as a rule every day or at least once a week'.

14. Article 15 of that Chapter, headed 'Equality of treatment', provides:

'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.'

B – *German law*

15. The relevant national provisions are those in the German law on income tax (Einkommensteuergesetz, 'the EStG'). [5]

16. Paragraph 1 of the EStG provides:

'1. Natural persons who have a permanent residence or their usual place of residence in Germany are subject to unlimited income tax liability …

5 — In the version published on 19 October 2002 (BGBl. 2002 I, p. 4215), as amended on 29 December 2003 (BGBl. 2003 I, p. 3080) and 20 December 2007 (BGBl. 2007 I, p. 3151).

…

3. At their request, natural persons who do not have a permanent residence or their usual place of residence in Germany are also treated as subject to unlimited income tax liability, in so far as they receive income in Germany within the meaning of Paragraph 49. This applies only if at least 90% of their income during the calendar year is subject to German income tax …'

17. Paragraph 1a (1) of the EStG reads:

'For nationals of a Member State of the European Union or of a State to which the [EEA Agreement] applies who … are to be treated as subject to unlimited income tax liability under Paragraph 1(3), for the purposes of … the first sentence of Paragraph 26(1) the following applies:

…

1. … It is a condition that the recipient has his permanent residence or usual place of residence in the territory of another Member State of the … Union or of a State to which the [EEA Agreement] applies.

…

2. A not permanently separated spouse with no permanent residence or usual place of residence in Germany is, on request, treated as subject to unlimited income tax liability for the purposes of the first sentence of Paragraph 26(1) …'

18. Paragraph 26(1) of the EStG confers on non-separated spouses who are subject to unlimited tax liability or who must be treated as such a right to opt either for separate taxation under Paragraph 26a or joint taxation under Paragraph 26b of the EStG.

19. Paragraph 26b of the EStG, entitled 'Joint taxation of spouses', provides in subparagraph 1:

'Where spouses are taxed jointly, the income received by the spouses is aggregated and attributed to the spouses jointly, and, unless provided otherwise, the spouses are then treated jointly as one taxpayer'.

20. Paragraph 32a of the EStG, entitled 'Income tax rate' provides in paragraph 5:

'In the case of spouses who are assessed jointly to income tax under Paragraphs 26 and 26b, the income tax … is twice the amount of tax which arises for half their jointly taxable income under subparagraph 1 (the "splitting" procedure).'

III – The dispute in the main proceedings

21. Mrs Ettwein and her husband are German nationals. They each pursue an independent professional activity and earn all their income in Germany. On 1 August 2007 the spouses moved their residence to Switzerland. After that change of residence they continued to pursue their professional activity in Germany and to earn almost all their income in Germany.

22. Having regard to the calculation of income tax on their income for the 2008 tax year, Mrs Ettwein and her husband applied, as in previous tax years, for joint taxation under the splitting method, pointing out that they had no taxable income in Switzerland. In the initial tax notification, the Finanzamt Konstanz granted their application.

23. On 1 December 2009, however, it cancelled that notification on the basis that the favourable splitting regime which is granted on the basis of the couple's personal and family situation was not applicable because their residence was neither in Germany, nor in one of the Member States of the Union, nor in a State which is a party to the EEA Agreement. Thus the Finanzamt Konstanz, by tax notification of 22 March 2010, placed the spouses under the separate taxation regime. The administrative claim brought against that notification did not succeed, and Mrs Ettwein therefore brought a claim for annulment before the Finanzgericht Baden-Württemberg.

IV – Question referred

24. The referring court considers that Mrs Ettwein and her husband are self-employed frontier workers within the meaning of Article 13(1) of Annex I of the EC-Switzerland Agreement. Indeed, it points out in this connection that they are German nationals resident in Switzerland, they pursue a self-employed activity in Germany and return each day from the place where they carry on their professional activity to their place of residence. Under the combined provisions of Articles 9(2) and 15(2) of Annex I to the EC-Switzerland Agreement, self-employed frontier workers enjoy the same tax and social security advantages as self-employed nationals pursuing a professional activity. According to the referring court, the refusal by the tax authorities to grant Mr and Mrs Ettwein the benefit of the splitting method on the sole ground that they reside in Switzerland is contrary to the provisions of the EC-Switzerland Agreement.

25. In the opinion of the national court, that conclusion is compatible with the principles laid down by the case-law of the Court before 21 June 1999, the date of signature of the EC-Switzerland Agreement on freedom of establishment and the free movement of workers, which are reproduced in the EC-Switzerland Agreement. The national court refers in particular to the case-law on the principle of equal treatment, which applies also to tax law, and prohibits not only overt discrimination on the ground of nationality, but also all covert forms of discrimination which, by the application of other distinguishing criteria, lead in fact to the same result.[6] The national court also points out that that principle entails prohibiting provisions which prevent or dissuade nationals of one Member State from leaving that State to exercise their right to freedom of movement.[7]

26. The referring court also points out that it is in principle for the State of residence to tax the taxable person in full, taking account of the specific facts of his personal and family situation. However where he is taxed in full in the State where the income is received because he earns his income almost exclusively there, that State cannot refuse to take account of his personal and family situation where it is not possible to do so in the State of residence. Under the same case-law, the splitting method is one of the elements of the personal and family situation to be taken into account in such circumstances.[8]

27. Accordingly, Mr and Mrs Ettwein's situation, which could not be taken into account in the State of residence since they had no income there, had to be taken into account in Germany for the purposes of calculating the tax, otherwise there would be discrimination as compared to couples who are resident in Germany, earn their income there and are in the same personal and family situation as Mr and Mrs Ettwein.

6 — Judgment in *Schumacker*, (paragraph 26).

7 — Case C-415/93 *Bosman* [1995] ECR I-4921.

8 — *Schumacker*, and Case C-107/94 *Asscher* [1996] ECR I-3089.

28. Having regard to those considerations, the Finanzgericht Baden-Württemberg decided, by an order received at the Court on 16 August 2011, to stay the proceedings and to refer the following question to the Court:

'Are the provisions of the [EC-Switzerland Agreement], in particular Articles 1, 2, 11, 16 and 21 thereof and Articles 9, 13 and 15 of Annex I thereto, to be interpreted as precluding the benefit of joint taxation with the use of the "splitting" procedure from being refused to spouses residing in Switzerland who are subject to taxation in the Federal Republic of Germany on their entire taxable income?'

29. Written observations were submitted by the parties in the main proceedings and by the Spanish Government and the European Commission. Mrs Ettwein, the German Government, and the Commission were represented at the hearing of 4 July 2012.

V – Analysis

A – *Preliminary observations*

1. Nature of the EC-Switzerland Agreement

30. It must first of all be pointed out that, as an international treaty, the EC-Switzerland Agreement must be interpreted under Article 31 of the Vienna Convention on the law of treaties, [9] 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. [10]

31. As the Court has repeatedly stated, since the Swiss Confederation did not join the internal market of the European Union, that 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, the interpretation given to the provisions of European Union law concerning the internal market cannot be automatically applied by analogy to the interpretation of the agreement, unless expressly so provided for in the agreement itself. [11]

32. It is true that Article 16(2) of the EC-Switzerland Agreement takes account of the case-law of the Court but only to the case-law preceding signature of the agreement on 21 June 1999. I note that that provision is based on Article 6 of the EEA Agreement. The objective of Article 16(2) is that the Swiss Confederation should not be subject to future interpretations of the EC-Switzerland Agreement by the judicial body of the other contracting party, namely the Court, and it guarantees a 'parallel legal context' in relation to the areas covered by Union law. [12]

9 — Convention signed in Vienna on 23 May 1969 (UN Treaty Series, vol. 1155 p. 331).

10 — See further, for example, Opinion 1/91 of 14 December [1991] ECR I-6079, paragraph 14; Cases C-312/91 *Metalsa* [1993] ECR I-3751, paragraph 12; C-416/96 *Eddline El-Yassini* [1999] ECR I-1209, paragraph 47; C-268/99 *Jany and Others* [2001] ECR I-8615, paragraph 35; C-386/08 *Brita* [2010] ECR I-1289, paragraphs 42 and 43); and C-70/09 *Hengartner and Gasser* [2010] ECR I-7233, paragraph 36.

11 — See to this effect, in particular, Cases C-351/08 *Grimme* [2009] ECR I-10777, paragraphs 27 and 29, C-541/08 *Fokus Invest* [2010] ECR I-1025, paragraph 28, and *Hengartner and Gasser*, cited above, paragraphs 41 and 42.

12 — Epiney, A., and Mosters, R., 'Un exemple d'interprétation des accords conclus entre la Suisse and l'Union européenne: l'accord sur la libre circulation des personnes', *Interprétation et application des 'traités d'intégration'*,Schulthess, Zürich, 2006, pp. 57 to 73, and, to the same effect, Boillet, V., 'La détermination du champ d'application de l'accord sur la libre circulation des personnes au regard de la jurisprudence de la Cour européenne de justice: les implications des arrêts Zambrano and McCarty', *Pratique juridique actuelle*, 2012, pp. 49 to 55. See also Aubry Girardin, F., 'L'interprétation and l'application de l'accord sur la libre circulation des personnes du paragraph de vue de la jurisprudence', *L'accord sur la libre circulation des personnes Suisse-UE*, Schulthess, Zürich, 2011, pp. 29 to 48.

33. That specific interpretation of the EC-Switzerland Agreement must inform the assessment of the situation described in the order for reference in which moving residence to Switzerland leads to disadvantageous tax treatment of spouses who are nationals of the Member State in which they work on a self-employed basis.

2. Objectives of the EC-Switzerland Agreement

34. The objectives of the EC-Switzerland Agreement are defined in Article 1. It grants nationals of the Member States and the Swiss Confederation a right of entry, residence, access to work as employed persons, establishment on a self-employed basis and the right to stay in the territory of the Contracting Parties, together with the same living, employment and working conditions as those granted to nationals.

35. It should be emphasised that that desire to facilitate the free movement of persons between the European Union and the Swiss Confederation is different in spirit and purpose from the freedoms of movement laid down in the treaties in the context of the internal market between the Member States of the Union.

36. In this connection, analysis of the political context of the signature of the EC-Switzerland Agreement shows that bilateral agreements do not have as their objective the creation of an internal market.[13] It is common ground that the EC-Switzerland Agreement is one of seven sectorial agreements governing relations between the European Community and the Swiss Confederation,[14] signed on 21 June 1999, following the rejection on 6 December 1992 by the Swiss Confederation of the EEA Agreement. That rejection concerns the project of creating an integrated economic whole with a single market based on common rules between its members, in favour of bilateral arrangements with the Community and its Member States in specific areas.

37. The EC-Switzerland Agreement therefore seeks to strengthen relations between the contracting parties,[15] without any prospect of extending the application of the fundamental freedoms *in toto* to the Swiss Confederation, or of subsequent accession to the Union.

38. In that regard, the Court clearly establishes a difference between the interpretation given to European Union law relating to the internal market and the interpretation of an international agreement, such as the EC-Switzerland Agreement, by contrasting the objectives and context of the EC-Switzerland Agreement, on the one hand, with those of European integration, on the other.[16]

39. In this the Swiss Confederation continues to lag behind in relation to the freedoms applicable between the Member States of the European Union and those which are party to the EEA Agreement, which means that restrictions on the free movement of persons may subsist in the context of the bilateral EC-Switzerland Agreement, whereas they would be impermissible within the European Union or the EEA.

13 — Kaddous, C., 'Stamm et Hauser, Grimme, Fokus Invest AG, Hengartner et Gasser ou les accords bilatéraux ne créent pas un marché intérieur', *Revue suisse de droit international et européen*, 2010, pp. 129 to 136.

14 — 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, and in particular Article 2 thereof (OJ 2002 L 114, p. 1).

15 — *Grimme*, paragraph 28.

16 — See in this regard, inter alia, Case 270/80 *Polydor and RSO Records* [1982] ECR 329, paragraphs 15 to 19, Opinion 1/91, (paragraph 14), *Metalsa,*(paragraphs 11 and 15 to 19), and case-law cited in footnote on page 11.

B – *The Member State's right to refuse a tax advantage to its own nationals who are non-resident self-employed workers*

40. The situation in this case must be recalled. Two German nationals working as self-employed persons in Germany moved their personal residence to Switzerland but carry on no professional activity there. The Court is therefore requested to interpret the provisions of the EC-Switzerland Agreement on the status of self-employed workers, and to assess the relevance of its case-law to the case in the main proceedings.

1. Scope *ratione materiae* of the EC-Switzerland Agreement

41. The provisions of the EC-Switzerland Agreement on self-employed persons are in Chapter III of Annex I thereto, which comprises five articles. Article 12 of the Annex establishes the conditions for obtaining a residence permit applicable to self-employed persons. Articles 13 to 16 add further details in relation to that right. The EC-Switzerland Agreement essentially affords all self-employed persons a right of entry and of residence in the territory of the Contracting Parties and the right to enjoy no less favourable treatment in the host country than that granted by the host country to its own nationals as regards access to a self-employed activity and the pursuit thereof.

42. I am of the view that the position of Mr and Mrs Ettwein does not fall within their scope *ratione materiae*. Indeed the wording of Article 12 of Annex I refers to '[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* …'.[17] To the same effect, Article 15(2) of Annex I, by reference to Article 9 of the same annex, ensures equality of treatment for self-employed persons who are nationals of a contracting party on the territory of another contracting party. Accordingly they cannot be treated differently from national workers on the ground of their nationality.[18]

43. With regard to the principle of non-discrimination cited in the order for reference, I would point out that Article 2 of the EC-Switzerland Agreement prohibits discrimination on the ground of nationality.[19]

44. As was held in the judgment in the *Bergström* case,[20] a national of a contracting party is not precluded from relying on the EC-Switzerland Agreement against its own State.

45. I would none the less point out that the possibility of invoking the EC-Switzerland Agreement against a national's own State is limited under the wording of Article 16(1) of the agreement to the rights and obligations which flow from the acts of secondary legislation of the European Union referred to in the annex to that agreement. Conversely, there is nothing in the EC-Switzerland Agreement to lead to the conclusion that such a possibility could also extend to provisions of primary law.

46. Therefore, the wording of the EC-Switzerland Agreement, like its objective, does not lead to that conclusion in regard to the provisions on self-employed persons which relate only to the situation of discrimination on the ground of nationality against a national of a contracting party on the territory of another contracting party.

17 — Emphasis added.

18 — See Article 9(2) of Annex I to the EC-Switzerland Agreement.

19 — Under Article 2 of the Agreement, '[n]ationals of one Contracting Party who are lawfully resident in the territory of another Contracting Party shall not, in application of and in accordance with the provisions of Annexes I, II and III to this Agreement, be the subject of any discrimination on grounds of nationality.'

20 — Case C-257/10 [2011] ECR I-13227, paragraphs 26 to 30 and 33 to 34.

47. Yet it is clear from the facts submitted to the Court that Mr and Mrs Ettwein are German nationals working as self-employed persons in Germany where they are subject to the disputed tax. In the present case there is therefore no question of discrimination by the authorities of a contracting party against a national of another contracting party. The mere fact that Mr and Mrs Ettwein moved their private residence to Switzerland has no relevance in this connection. [21]

48. Furthermore, Article 13 of Annex I to the EC-Switzerland Agreement on self-employed frontier workers, [22] read in conjunction with Article 12 of the same annex, supports that interpretation of the wording, which excludes the situation at issue in the main proceedings from the scope of the provisions of the Agreement. I must point out in this connection that, under Article 12 of Annex I, a self-employed person is 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. Pursuant to Article 13 of Annex I, 'a self-employed frontier worker' who in my view necessarily constitutes a sub-category of self-employed persons is a national of a contracting party who is resident in the territory of another contracting party and carries on a self-employed activity on the territory of the other contracting party and usually returns to his residence every day. In other words the State in which the self-employed person works is different than that in which he lives, and the latter may or may not be his State of origin. [23]

49. I therefore emphasise that the situation involving simply moving residency to the territory of a contracting party without the prospect of working there as a self-employed person does not come within the scope of Articles 12 and 13 of the EC-Switzerland Agreement.

50. In this case it is the fact that Mr and Mrs Ettwein live in Switzerland which, under the German rules, precludes the application of the more favourable tax regime. The tax disadvantage is not a result of the fact that, as nationals of a contracting party resident in the territory of a contracting party, the spouses are using their right of establishment in a contracting party other than the State of which they are nationals.

51. It follows that Mr and Mrs Ettwein, as they pursue a professional activity as self-employed persons in the Member State of which they are nationals, do not derive rights from the provisions of the EC-Switzerland Agreement on freedom of establishment, equal treatment and non-discrimination, which do not apply to them. That restrictive interpretation of the relevant provisions of the EC-Switzerland Agreement in accordance with its wording is corroborated by its objectives, as examined previously. [24]

2. Relevance of the case-law of the Court to the present case

52. Article 16 of the EC-Switzerland Agreement refers expressly to the law of the European Union as a homogeneous source of interpretation of the provisions of that agreement that are identical in substance to the provisions of European Union law. [25] Article 16(1) provides that the contracting parties are to take all measures necessary to implement rights and obligations equivalent to those

21 — For a comparable line of reasoning, see *Grimme*, paragraphs 47 to 49.

22 — Article 13(1) defines the self-employed frontier worker as 'a national of a Contracting Party who is resident in the territory of a Contracting Party and who pursues a self-employed activity in the territory of the other Contracting Party'. Article 13(2) and (3) lays down the more favourable detailed arrangements regarding the right of residency. See Case C-13/08 *Stamm and Hauser* [2008] ECR I-11087, paragraph 39.

23 — A Swiss national established in Germany therefore remains a self-employed frontier worker for the purposes of Article 13 of Annex I to the EC-Switzerland Agreement even if he lives in Austria, but the agreement does not apply to any economic activity he carries on in Switzerland. In the same way, a German national established in Switzerland is an independent worker within the meaning of Article 13 of Annex I if he lives in Germany or in another Member State of the Union but is established in Germany he does not fulfil the criteria laid down by that article.

24 — See further, points 34 et seq. of this Opinion.

25 — See to this effect and on the Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area, Opinions 1/91, and 1/92 [1992] ECR I-2821.

contained in the legal acts of the European Community. Article 16(2) provides that the case-law of the Court is to be applicable in this connection but only in regard to case-law prior to the signature of the EC-Switzerland Agreement, on 21 June 1999; case-law subsequent to that date is to be communicated to the Swiss Confederation. [26]

53. In that context, brief consideration must be given to the relevant case-law of the Court prior to 21 June 1999 on the scope of the provisions of the EC-Switzerland Agreement.

54. In regard to the principles of equal treatment and non-discrimination linked to the free movement of self-employed workers, I would as a preliminary matter point out that the question whether their scope is analogous to that provided for in the context of the law of the Union and in particular under the judgments in *Schumacker* and *Bosman*, does not arise in this case because I find the corresponding provisions of the EC-Switzerland Agreement not to be applicable to the case of Mr and Mrs Ettwein. [27]

55. Reference must none the less be made to the judgment in *Werner*, [28] in which the Court found that Article 52 of the EEC Treaty on the right of establishment does not preclude a Member State from imposing on its nationals who carry on their professional activities within its territory and who earn all or almost all of their income there or possess all or almost all of their assets there a heavier tax burden if they do not reside in that State than nationals who are resident. That case concerned a German national who pursued his activity as a self-employed dentist in Germany and earned almost all his income there but moved his residence to the Netherlands.

56. In this connection, as the Commission notes in its written observations, that judgment shows that before the signature of the EC-Switzerland Agreement, a mere change of residence could not be regarded as establishing oneself for the purposes of pursuing an activity as a self-employed person in a host country within the meaning of Article 52 of the Treaty.

57. With regard, next, to the *Asscher* case cited above which, like *Werner*, precedes the signature of the EC-Switzerland Agreement, it must first of all be pointed out that in that case the fact that the applicant was pursuing an activity as a self-employed person in a Member State other than his Member State of origin was the precondition enabling him to rely, in relation to the latter State, on the benefit of freedom of establishment. That was so as a result of the fact that he was, in relation to his Member State of origin, in a situation which may be regarded as equivalent to that of any other person relying as against the host Member State on freedom of establishment. [29]

58. That is not the position in this case since Mr and Mrs Ettwein are subject to tax in respect of all their taxable income in their Member State of origin, the Federal Republic of Germany.

26 — Under Article 16(2), third sentence, of the EC-Switzerland Agreement, to ensure that the agreement works properly, at the request of either contracting party, the joint committee is to determine the implications of case-law arising after the reference date both for Switzerland and for the Union. See by comparison Article 6 of the Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area, Opinions 1/91, (paragraphs 8, 24 and 44), and 1/92, (paragraph 5).

27 — Cases, *Schumacker* (paragraph 26) and *Bosman* (paragraphs 95 to 97). In the view of the referring court, it is clear from those cases that the rules on equal treatment prohibit not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation (such as a residence condition), lead in fact to the same result. The principle of non-discrimination extends to provisions which preclude or deter a national of a Member State from leaving his country of origin in order to exercise his right to freedom of movement in that they constitute obstacles to that freedom even if they apply without regard to the nationality of the workers concerned. According to the national court a national rule such as that in the main proceedings which distinguishes between residents and non-residents and treats taxable married persons unfavourably where they live outside the Union and the EEA regardless of their nationality would be likely to discourage married couples form exercising their right to freedom of movement.

28 — Case C-112/91 *Werner* [1993] ECR I-429, paragraph 17.

29 — See paragraphs 34 and 62 of that judgment. After signature of the EC-Switzerland Agreement, the Court developed a different solution with regard to the free movement of employees, taking the view that any national of the Union carrying on an employed activity in a Member State other than that where he is resident may rely on that freedom as a migrant worker regardless of his State of origin and the State where he is employed. See, in particular, Case C-527/06 *Renneberg* [2008] ECR I-7735, paragraph 35 and 36 and the case-law cited therein.

59. According to the Finanzgericht Baden-Württemberg, it is clear from *Asscher* that, in tax matters, it is, in principle, for the State of residence to tax the taxable person in full, taking account of the inherent elements of his personal and family situation including marriage and the 'splitting' method which may result from it. None the less, where the taxable person obtains his income almost exclusively, as in this case, in the State where he works, the tax competence reverts to the latter which, in light of the principle of non-discrimination, must take account of the personal and family situation of the person concerned if that is impossible in the State in which he resides.

60. In the view of the national court, it follows from that case-law, and from Article 21(2) of the EC-Switzerland Agreement, that refusing non-residents a tax advantage may be regarded as discriminatory where there is no difference in the objective situations of resident and non-resident taxable persons such as to constitute the basis for a difference in treatment [30].

61. In this connection, I would point out that the position of the Federal Republic of Germany on the interpretation of Article 21(2) of the EC-Switzerland Agreement, which moreover is not applicable in this case, cannot be accepted. The German Government considers that residency must always be regarded as a criterion for differentiating between taxable persons. Yet that provision expressly authorises the contracting parties to establish in the field of tax a distinction according to place of residence between taxable persons only if they are not in objectively comparable situations.

62. It is sufficient to recall in this case that the principle of non-discrimination on the ground of nationality, as guaranteed in the EC-Switzerland Agreement, does not apply to the situation of Mr and Mrs Ettwein since they are already nationals. Therefore the interpretation of that principle by the Court in the context of the Union cannot in the present case be transposed to the corresponding provisions of the EC-Switzerland Agreement.

63. With regard to the development of the case-law after the signature of the EC-Switzerland Agreement, it must be pointed out that the judgments in *Ritter-Coulais*, [31] *Stamm and Hauser*, [32] and *Graf and Engel*, [33] cited in the course of the written procedure and at the hearing, and dating respectively from 2006, 2008 and 2011, cannot be taken into account in this case. In accordance with Article 16(2) of the EC-Switzerland Agreement, the Joint Committee [34] keeps the development of the relevant case-law of the Court after 21 June 1999 under permanent review and has sole competence to determine the possible implications in relation to the Swiss Confederation under the corresponding provisions of the EC-Switzerland Agreement. [35]

64. It follows that the consideration the case-law of the relevant court, as required by Article 16(2) of the EC-Switzerland Agreement, does not extend to the development of that case-law after the reference date laid down in that provision. Any other solution would constitute an erroneous assessment of the applicability *ratione temporis* of the relevant case-law of the Court under the EC-Switzerland Agreement and would run counter to the contracting parties' desire not to subject the Swiss Confederation to the jurisdiction of the Court with regard to the future. Yet moves in favour of more advanced economic integration between the two partners can only be made at the political level.

30 — *Asscher*, cited above in paragraphs 40 to 44.

31 — Case C-152/03 [2006] ECR I-1711.

32 — Case C-13/08 [2008] ECR I-11087.

33 — Case C-506/10 [2011] ECR I-9345.

34 — Under Article 14 of the EC-Switzerland Agreement, the Joint Committee is composed of representatives of the contracting parties. It is responsible for the management and proper application of the agreement and to that end it issues recommendations and take decisions for which it states itself to be in agreement. It meets as and when necessary and at least once a year. Either party may request the convening of a meeting. The Joint Committee may decide to set up any working party or group of experts to assist it in the performance of its duties. Under Article 19, the contracting parties may bring a matter under dispute which concerns the interpretation or application of the agreement to the Joint Committee.

35 — Furthermore, Article 18 of the EC-Switzerland Agreement provides for a particular revision procedure. Under that article, a contracting party may submit to the Joint Committee a proposal for revision which may enter into force after the respective internal procedures have been completed.

65. In the absence of any such wish, the objective of homogeneity in the interpretation and application of the law is frustrated by the differences between the purposes and context of the EC-Switzerland Agreement on the one hand, and of European Union law on the other. The application of the *acquis communautaire* provided for in the EC-Switzerland Agreement, which offers support for a consistent interpretation of equivalent rules, must however confine itself to the context of the objectives of that agreement.

66. I conclude from this that the provisions of the EC-Switzerland Agreement on self-employed workers do not preclude a couple who are nationals of a Member State of the Union and work there as self-employed persons from being subject, as residents of Switzerland and therefore outside the Union and the EEA, to different treatment in regard to the payment of income tax in a situation such as that in the main proceedings.

67. Finally, I should like to add that, even if in this case there is discrimination by a Member State against its own nationals who decide to move their private residence outside the Union, and even if such discrimination does not come within Union law, I find such discriminatory treatment to be scarcely defensible in any event in the light of the constitutional values common to the Member States with regard in particular to the equal treatment of individuals in a comparable situation. [36]

VI – Conclusion

68. In the light of all of the foregoing, I propose that the Court of Justice should reply as follows to the question referred for a preliminary ruling by the Finanzgericht Baden-Württemberg:

The provisions of the agreement between the European Community and its Member States, on the one hand, and the Swiss Confederation, on the other hand, on the free movement of persons signed in Luxembourg on 21 June 1999, and in particular Articles 1, 2, 11, 16 and 21 thereof and Articles 9, 13 and 15 of Annex I, do not preclude a rule in a Member State under which the benefit of joint taxation under the method known as splitting is refused to a married couple who are nationals of that State, pursue a self-employed activity there and are subject to tax on all their taxable income there on the sole ground that that couple has moved its place of residence from that State to Switzerland.

36 — See, to this effect, point 72 of my Opinion in *Hengartner and Gasser*.