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Judgment of the Court of 27 September 1988. - The Queen v H. M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc. - Reference for a preliminary ruling: High Court of Justice, Queen's Bench Division - United Kingdom. - Freedom of establishment - Right to leave the Member State of origin - Legal persons. - Case 81/87.

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Summary

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Keywords

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1 . Free movement of persons - Freedom of establishment - Company incorporated under the legislation of a Member State and having its registered office there - Right to transfer the central management and control of a company to another Member State - None

(EEC Treaty, Arts 52 and 58)

2 . Free movement of persons - Freedom of establishment - Directive 73/148 - Not applicable to legal persons

(Council Directive 73/148)

Summary

1 . The Treaty regards the differences in national legislation concerning the connecting factor required of companies incorporated thereunder and the question whether - and if so how - the registered office or real head office of a company incorporated under national law may be transferred from one Member State to another as problems which are not resolved by the rules concerning the right of establishment but must be dealt with by future legislation or conventions, which have not yet been adopted or concluded . Therefore, in the present state of Community law, Articles 52 and 58 of the Treaty, properly construed, confer no right on a company incorporated

under the legislation of a Member State and having its registered office there to transfer its central management and control to another Member State .

2 . The title and provisions of Council Directive 73/148 of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services refer solely to the movement and residence of natural persons, and the provisions of the directive cannot, by their nature, be applied by analogy to legal persons . Therefore, Directive 73/148, properly construed, confers no right on a company to transfer its central management and control to another Member State .

Parties

In Case 81/87

REFERENCE to the Court under Article 177 of the EEC Treaty by the High Court of Justice, Queen' s Bench Division, for a preliminary ruling in the proceedings pending before that court between

The Queen

and

HM Treasury and Commissioners of Inland Revenue

ex parte Daily Mail and General Trust PLC

on the interpretation of Articles 52 and 58 of the EEC Treaty and the provisions of Council Directive 73/148 of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services (Official Journal 1973, L 172, p . 14),

THE COURT

composed of : Lord Mackenzie Stuart, President, G . Bosco, O . Due and G . C . Rodríguez Iglesias (Presidents of Chambers), T . Koopmans, U . Everling, K . Bahlmann, Y . Galmot, R . Joliet, T . F . O' Higgins and F . A . Schockweiler, Judges,

Advocate General : M . Darmon

Registrar : D . Louterman, Administrator

after considering the observations submitted on behalf of

Daily Mail and General Trust PLC, the applicant in the main proceedings, represented by David Vaughan, QC, and Derrick Wyatt, Barrister, instructed by F . Sandison, Solicitor, of Freshfields, London,

the United Kingdom, by S . J . Hay, Treasury Solicitor, Queen Anne' s Chambers, acting as Agent, assisted by R . Buxton, QC, of Gray' s Inn, and A . Moses and N . Green, Barristers,

the Commission, by its Legal Adviser D . Gilmour, acting as Agent,

having regard to the Report for the Hearing and further to the hearing on 22 March 1988,

after hearing the Opinion of the Advocate General delivered at the sitting on 7 June 1988,

gives the following

Judgment

Grounds

1 By an order of 6 February 1987, which was received at the Court on 19 March 1987, the High Court of Justice, Queen' s Bench Division, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty four questions on the interpretation of Articles 52 and 58 of the Treaty and Council Directive 73/148 of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services (Official Journal 1973, L 172, p . 14).

2 Those questions arose in proceedings between Daily Mail and General Trust PLC, the applicant in the main proceedings (hereinafter refered to as "the applicant "), and HM Treasury for a declaration, inter alia, that the applicant is not required to obtain consent under United Kingdom tax legislation in order to cease to be resident in the United Kingdom for the purpose of establishing its residence in the Netherlands .

3 It is apparent from the documents before the Court that under United Kingdom company legislation a company such as the defendant, incorporated under that legislation and having its registered office in the United Kingdom, may establish its central management and control outside the United Kingdom without losing legal personality or ceasing to be a company incorporated in the United Kingdom .

4 According to the relevant United Kingdom tax legislation, only companies which are resident for tax purposes in the United Kingdom are as a rule liable to United Kingdom corporation tax . A company is resident for tax purposes in the place in which its central management and control is located .

5 Section 482 (1) (a) of the Income and Corporation Taxes Act 1970 prohibits companies resident for tax purposes in the United Kingdom from ceasing to be so resident without the consent of the Treasury .

6 In 1984 the applicant, which is an investment holding company, applied for consent under the abovementioned national provision in order to transfer its central management and control to the Netherlands, whose legislation does not prevent foreign companies from establishing their central management there; the company proposed, in particular, to hold board meetings and to rent offices for its management in the Netherlands . Without waiting for that consent, it subsequently decided to open an investment management office in the Netherlands with a view to providing services to third parties .

7 It is common ground that the principal reason for the proposed transfer of central management and control was to enable the applicant, after establishing its residence for tax purposes in the Netherlands, to sell a significant part of its non-permanent assets and to use the proceeds of that sale to buy its own shares, without having to pay the tax to which such transactions would make it liable under United Kingdom tax law, in regard in particular to the substantial capital gains on the assets which the applicant proposed to sell . After establishing its central management and control in the Netherlands the applicant would be subject to Netherlands corporation tax, but the transactions envisaged would be taxed only on the basis of any capital gains which accrued after the transfer of its residence for tax purposes .

8 After a long period of negotiations with the Treasury, which proposed that it should sell at least part of the assets before transferring its residence for tax purposes out of the United Kingdom, the applicant initiated proceedings before the High Court of Justice, Queen' s Bench Division, in 1986 . Before that court, it claimed that Articles 52 and 58 of the EEC Treaty gave it the right to transfer its central management and control to another Member State without prior consent or the right to obtain such consent unconditionally .

9 In order to resolve that dispute, the national court stayed the proceedings and referred the following questions to the Court of Justice :

(1) Do Articles 52 and 58 of the EEC Treaty preclude a Member State from prohibiting a body corporate with its central management and control in that Member State from transferring without prior consent or approval that central management and control to another Member State in one or both of the following circumstances, namely where :

(a) payment of tax upon profits or gains which have already arisen may be avoided;

(b) were the company to transfer its central management and control, tax that might have become chargeable had the company retained its central management and control in that Member State would be avoided?

(2) Does Council Directive 73/148/EEC give a right to a corporate body with its central management and control in a Member State to transfer without prior consent or approval its central management and control to another Member State in the conditions set out in Question 1? If so, are the relevant provisions directly applicable in this case?

(3) If such prior consent or approval may be required, is a Member State entitled to refuse consent on the grounds set out in Question 1?

(4) What difference does it make, if any, that under the relevant law of the Member State no consent is required in the case of a change of residence to another Member State of an individual or firm?

10 Reference is made to the Report for the Hearing for a fuller account of the facts and the background to the main proceedings, the provisions of national legislation at issue and the observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court .

First question

11 The first question seeks in essence to determine whether Articles 52 and 58 of the Treaty give a company incorporated under the legislation of a Member State and having its registered office there the right to transfer its central management and control to another Member State . If that is so, the national court goes on to ask whether the Member State of origin can make that right subject to the consent of national authorities, the grant of which is linked to the company' s tax

position .

12 With regard to the first part of the question, the applicant claims essentially that Article 58 of the Treaty expressly confers on the companies to which it applies the same right of primary establishment in another Member State as is conferred on natural persons by Article 52 . The transfer of the central management and control of a company to another Member State amounts to the establishment of the company in that Member State because the company is locating its centre of decision-making there, which constitutes genuine and effective economic activity .

13 The United Kingdom argues essentially that the provisions of the Treaty do not give companies a general right to move their central management and control from one Member State to another . The fact that the central management and control of a company is located in a Member State does not itself necessarily imply any genuine and effective economic activity on the territory of that Member State and cannot therefore be regarded as establishment within the meaning of Article 52 of the Treaty .

14 The Commission emphasizes first of all that in the present state of Community law, the conditions under which a company may transfer its central management and control from one Member State to another are still governed by the national law of the State in which it is incorporated and of the State to which it wishes to move . In that regard, the Commission refers to the differences between the national systems of company law . Some of them permit the transfer of the central management and control of a company and, among those, certain attach no legal consequences to such a transfer, even in regard to taxation . Under other systems, the transfer of the management or the centre of decision-making of a company out of the Member State in which it is incorporated results in the loss of legal personality . However, all the systems permit the winding-up of a company in one Member State and its reincorporation in another . The Commission considers that where the transfer of central management and control is possible under national legislation, the right to transfer it to another Member State is a right protected by Article 52 of the Treaty .

15 Faced with those diverging opinions, the Court must first point out, as it has done on numerous occasions, that freedom of establishment constitutes one of the fundamental principles of the Community and that the provisions of the Treaty guaranteeing that freedom have been directly applicable since the end of the transitional period . Those provisions secure the right of establishment in another Member State not merely for Community nationals but also for the companies referred to in Article 58 .

16 Even though those provisions are directed mainly to ensuring that foreign nationals and companies are treated in the host Member State in the same way as nationals of that State, they also prohibit the Member State of origin from hindering the establishment in another Member State of one of its nationals or of a company incorporated under its legislation which comes within the definition contained in Article 58 . As the Commission rightly observed, the rights guaranteed by Articles 52 et seq . would be rendered meaningless if the Member State of origin could prohibit undertakings from leaving in order to establish themselves in another Member State . In regard to natural persons, the right to leave their territory for that purpose is expressly provided for in Directive 73/148, which is the subject of the second question referred to the Court .

17 In the case of a company, the right of establishment is generally exercised by the setting-up of agencies, branches or subsidiaries, as is expressly provided for in the second sentence of the first paragraph of Article 52 . Indeed, that is the form of establishment in which the applicant engaged in this case by opening an investment management office in the Netherlands . A company may also exercise its right of establishment by taking part in the incorporation of a company in another Member State, and in that regard Article 221 of the Treaty ensures that it will receive the same treatment as nationals of that Member State as regards participation in the capital of the new company .

18 The provision of United Kingdom law at issue in the main proceedings imposes no restriction on transactions such as those described above . Nor does it stand in the way of a partial or total transfer of the activities of a company incorporated in the United Kingdom to a company newly incorporated in another Member State, if necessary after winding-up and, consequently, the settlement of the tax position of the United Kingdom company . It requires Treasury consent only where such a company seeks to transfer its central management and control out of the United Kingdom while maintaining its legal personality and its status as a United Kingdom company .

19 In that regard it should be borne in mind that, unlike natural persons, companies are creatures of the law and, in the present state of Community law, creatures of national law . They exist only by virtue of the varying national legislation which determines their incorporation and functioning .

20 As the Commission has emphasized, the legislation of the Member States varies widely in regard to both the factor providing a connection to the national territory required for the incorporation of a company and the question whether a company incorporated under the legislation of a Member State may subsequently modify that connecting factor . Certain States require that not merely the registered office but also the real head office, that is to say the central administration of the company, should be situated on their territory, and the removal of the central administration from that territory thus presupposes the winding-up of the company with all the consequences that winding-up entails in company law and tax law . The legislation of other States permits companies to transfer their central administration to a foreign country but certain of them, such as the United Kingdom, make that right subject to certain restrictions, and the legal consequences of a transfer, particularly in regard to taxation, vary from one Member State to another .

21 The Treaty has taken account of that variety in national legislation . In defining, in Article 58, the companies which enjoy the right of establishment, the Treaty places on the same footing, as connecting factors, the registered office, central administration and principal place of business of a company . Moreover, Article 220 of the Treaty provides for the conclusion, so far as is necessary, of agreements between the Member States with a view to securing *inter alia* the retention of legal personality in the event of transfer of the registered office of companies from one country to another . No convention in this area has yet come into force .

22 It should be added that none of the directives on the coordination of company law adopted under Article 54 (3) (g) of the Treaty deal with the differences at issue here .

23 It must therefore be held that the Treaty regards the differences in national legislation concerning the required connecting factor and the question whether - and if so how - the registered office or real head office of a company incorporated under national law may be transferred from one Member State to another as problems which are not resolved by the rules concerning the right of establishment but must be dealt with by future legislation or conventions .

24 Under those circumstances, Articles 52 and 58 of the Treaty cannot be interpreted as conferring on companies incorporated under the law of a Member State a right to transfer their central management and control and their central administration to another Member State while

retaining their status as companies incorporated under the legislation of the first Member State .

25 The answer to the first part of the first question must therefore be that in the present state of Community law Articles 52 and 58 of the Treaty, properly construed, confer no right on a company incorporated under the legislation of a Member State and having its registered office there to transfer its central management and control to another Member State .

26 Having regard to that answer, there is no need to reply to the second part of the first question .

Second question

27 In its second question, the national court asks whether the provisions of Council Directive 73/148 of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services give a company a right to transfer its central management and control to another Member State .

28 It need merely be pointed out in that regard that the title and provisions of that directive refer solely to the movement and residence of natural persons and that the provisions of the directive cannot, by their nature, be applied by analogy to legal persons .

29 The answer to the second question must therefore be that Directive 73/148, properly construed, confers no right on a company to transfer its central management and control to another Member State .

Third and fourth questions

30 Having regard to the answers given to the first two questions referred by the national court, there is no need to reply to the third and fourth questions .

Decision on costs

Costs

31 The costs incurred by the United Kingdom and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable . Since these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the action pending before the national court, the decision on costs is a matter for that court .

Operative part

On those grounds,

THE COURT,

in answer to the questions referred to it by the High Court of Justice, Queen' s Bench Division, by order of 6 February 1987, hereby rules :

(1) In the present state of Community law, Articles 52 and 58 of the Treaty, properly construed, confer no right on a company incorporated under the legislation of a Member State and having its registered office there to transfer its central management and control to another Member State .

(2) Council Directive 73/148 of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services, properly construed, confers no right on a company to transfer its central management and control to another Member State .