



Press and Information

Court of Justice of the European Union

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Luxembourg, 1 April 2014

Judgment in Case C-80/12

Felixstowe Dock and Railway Company Ltd and Others v  
The Commissioners for Her Majesty's Revenue & Customs

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**By providing that the link company must be established in the UK in order for companies to be entitled to consortium group relief, UK tax legislation infringes freedom of establishment**

*The fact that the ultimate parent company of the group and of the consortium as well as a number of intermediate companies are established in third States has no effect on the application of freedom of establishment in such a context*

In the United Kingdom the losses of a company may be deducted from the taxable profits of another company where those companies are members of the same group of companies. In certain cases, losses may also be transferred between a company that is a member of a consortium<sup>1</sup> and another company that is owned, directly or indirectly, by the consortium. Likewise, losses may be transferred between a company that is a member of a group and a company owned by a consortium where they are connected by a third company (link company) which is a member of both the group and the consortium.

Losses can be transferred only if the company which transfers them and the company which sets them against its profits are resident in the United Kingdom or have a permanent establishment there.

Hutchinson Whampoa Ltd, a Hong Kong company, is the parent of an international group of companies. Hutchinson 3G UK Ltd, a UK company operating in the telecommunications sector, is owned by a consortium. The consortium includes Hutchinson 3G UK Investment Sàrl, a Luxembourg company which is also a member of the group of companies referred to above. Hutchinson 3G UK Investment Sàrl is therefore a link company within the meaning of UK law. It is owned indirectly by Hutchinson Whampoa Ltd, through various companies some of which have their seat outside the EU.

Hutchinson 3G UK Ltd sustained losses following substantial investments made for the purpose of the establishment and operation of a mobile telephone network. UK companies that were members of the Hutchinson group sought to set those losses against their profits. The UK tax authorities rejected their claims on the ground that the link company involved in the transfer of losses was neither resident in the United Kingdom for tax purposes nor had a permanent establishment there.

The First-tier Tribunal (Tax Chamber) (UK), before which proceedings challenging the decision of the tax authorities were brought, has asked the Court of Justice whether the UK legislation on the transfer of losses is compatible with the freedom of establishment.

In its judgment delivered today, the Court finds that the residence condition laid down for the link company introduces a **difference in treatment** between resident companies connected by a UK link company, which are entitled to the tax advantage at issue, and resident companies connected by a link company established in another Member State of the EU, which are not entitled to it. That

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<sup>1</sup> Unlike a group of companies, where the group members are owned, directly or indirectly, by a parent company, a consortium is a temporary collaboration of several companies in a project or programme for the purpose of achieving a goal.

difference in treatment, which makes it less attractive in tax terms to set up a link company in another Member State, constitutes a **restriction on freedom of establishment**.

The Court observes that that restriction cannot be justified by overriding reasons in the public interest relating to the combating of tax avoidance or to the objective of preserving a balanced allocation of powers of taxation between the Member States.

Also, the fact that the group parent company and certain intermediate companies owned by it are established outside the EU does not affect the right of the companies in the group or consortium that are established in the EU to rely in full on freedom of establishment. The origin of the shareholders of those companies has no effect on the rights which those companies derive from the EU legal order.

Accordingly, the Court decides that **the contested legislation is not compatible with the freedom of establishment**.

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**NOTE:** A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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The [full text](#) of the judgment is published on the CURIA website on the day of delivery.

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