

OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 7 June 1988 *

*Mr President,
Members of the Court*

1. The issue in the main proceedings lies at the point where company law meets tax law. In the United Kingdom, the connecting factors governing the application to a legal person of those branches of law are not necessarily the same. The concept of incorporation, as it is understood in English law, makes it possible to dissociate a company's domicile, expressed through its registered office, and its nationality, on the one hand, from its residence, which largely determines the tax rules applicable to it, on the other. The proceedings pending before the national court arise from the possibility of such a separation.

2. In that regard, the legislation of the Member States is very diverse, and that situation is aggravated by differences in the content of the relevant concepts. In order to overcome the resulting difficulties recourse must be had to harmonization at Community level or agreements concluded by the Member States. In any event, the function of the Court of Justice is to interpret Community law as it now stands. Thus the context of the case in which the Queen's Bench Division of the High Court has referred questions to the Court for a preliminary ruling, as it appears from the file, calls for certain general observations in order to attempt to reply to the questions. Those questions raise delicate problems concerning the interpretation of the Community provisions in regard to the right of establishment which have not until now been considered by the Court. What is involved in this case is the claim by a company to exercise the right of establishment and, in particular, the conditions to

which the Member State of origin in which its registered office is situated may make subject the transfer of its central management and control to another Member State.

3. Does such a transfer come within the scope of the right of establishment guaranteed by the Treaty? Establishment 'means integration into a national economy'.¹ Thus, it is not contested that establishment within the meaning of the Treaty involves two factors: physical location and the exercise of an economic activity, both, if not on a permanent basis, at least on a durable one.²

4. Let me point out that the right of establishment, as laid down in Articles 52 to 58 of the Treaty, applies to 'companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community'.³ The right of establishment can manifest itself in two different ways.⁴ On the one hand, subsidiaries, branches or agencies may be set up. That is known as secondary establishment. The Court, in its judgment of 4 December 1986 (*Commission v Federal*

1 — J. Schapira, G. le Tallec and J. B. Blaise: *Droit européen des affaires*, PUF, Thémis, 1984, p. 534.

2 — See, for example, J. Renaud: *Droit européen des sociétés*, Brussels, Bruylant et Vander, 1969, p. 2.08; M. Colomès: *Le droit de l'établissement et des investissements dans la CEE*, Paris, J. Delmas, 1971, p. 78; F. Burrows: *Free movement in European Community law*, Oxford, Clarendon Press, 1987, p. 187.

3 — Article 58, first paragraph.

4 — See, for example, J. Temple Lang: 'The right of establishment of companies and free movement of capital in the European Economic Community', in W. R. Lafave and P. Hey (ed): *International Trade, Investment and Organization*, University of Illinois Press, 1967, p. 302, in particular p. 303.

* Translated from the French.

*Republic of Germany*⁵) stated that an undertaking is established in a Member State as soon as it has a permanent presence there even if that presence consists merely of

'an office managed by the undertaking's own staff or by a person who is independent but authorized to act on a permanent basis for the undertaking, as would be the case with an agency'.⁶

Establishment may also take the form of the setting-up of a new company or the transfer of the central management and control of the company, often regarded as its real head office. That is called 'primary establishment'. It has been said in that regard that 'central management and control is not a legal concept but an economic one'⁷ and that it 'is located where the company organs take the decisions that are essential for the company's operations'.⁸

5. The concept of establishment itself is essentially an economic one.⁹ It always implies a genuine economic link.¹⁰ The transfer of the central management and control of a company, understood by reference to 'criteria which are more economic than legal',¹¹ is covered by the right of establishment in so far as it is necessary to determine in concrete terms 'the economic centre of gravity of the undertaking'.¹² Thus 'the concept of central management and control... corresponds... not merely to the physical location of the principal administrative services but also, and perhaps principally, to the place from which the company is

actually run'.¹³ The real head office is normally the place where the company's central management and administration is located, since that is 'the place in which the decisions concerning the company's independent activity are made and from which that activity is set in motion; in other words, it is the centre from which that activity is exercised...'.¹⁴

6. The parties to the main proceedings take entirely opposite views on the question whether the transfer of the management of a company constitutes 'establishment' within the meaning of the Treaty. According to Daily Mail and General Trust, such a transfer comes within the scope of the right of establishment. Arguing on the basis of Articles 52 to 58 of the Treaty and the General Programme for the abolition of restrictions on freedom of establishment,¹⁵ the applicant in the main proceedings considers that the location in a Member State of the central management and control of a company is sufficient to permit the existence of a 'real and continuous link'¹⁶ with the economy of that State to be presumed, and thus constitutes 'establishment' within the meaning of the Treaty. Conversely, the United Kingdom takes the view that a change of residence by a company does not constitute establishment. It does not necessarily imply a change in the company's economic activities, especially since a company wishing to conduct economic activity in another Member State can do so through secondary establishments. Finally, the Commission is of the opinion that it is for national law to determine whether a company may transfer its residence without being wound up. It considers that Article 52 applies where national legislation permits a company to

5 — Case 205/84 [1986] ECR 3755.

6 — Paragraph 21.

7 — M. Schwartz: *Le droit d'établissement des sociétés commerciales dans le traité instituant la Communauté économique européenne*, Geneva, Editions médecine et hygiène, 1963, p. 61.

8 — U. Everling: *The right of establishment in the Common Market*, Commerce Clearing House, 1964, p. 75.

9 — J. Renaud, op. cit., pp. 2.19 and 2.35.

10 — R. W. Harding: 'Freedom of establishment and the rights of companies', *Current legal problems*, 1963, p. 162, at p. 163.

11 — J. Renaud, op. cit., p. 2.43.

12 — *Ibid.*, p. 2.44.

13 — *Ibid.*, p. 2.31.

14 — B. Goldman and A. Lyon-Caen: *Droit commercial européen*, Fourth Edition, Dalloz, 1983, p. 357.

15 — OJ, English Special Edition, Second Series, IX, p. 7.

16 — Expression borrowed from the general programme, Title I.

transfer its residence without losing its nationality.

7. In my view, the problem should be expressed in different terms. The concept of central management is difficult to pin down. Even where it designates the place at which the board of directors meets, it is not sufficient to provide a satisfactory connecting factor. As has been noted, 'owing to the progress made by means of communication, it is no longer necessary to arrange formal board meetings. The telephone, telex and telecopier enable each director to state his point of view and to take part in the decision-making without being physically present in a given place. The board meetings each director will attend via television will soon form part of a company's everyday life. The board of directors can meet in a place chosen arbitrarily, which bears no real relation with the decision centre of the company'.¹⁷ The place in which the board of directors meets cannot therefore constitute the sole criterion making it possible to designate with certainty in each case the place in which the central management is located. That designation cannot be arrived at by means of a formal legal assessment which does not take account of a number of factual elements the respective scope of which may vary according to the type of company involved.

8. In order to determine whether the transfer of the central management and control of a company constitutes establishment within the meaning of the Treaty it is therefore necessary to take into consideration a range of factors. The place at which the management of the company meets is undoubtedly one of the foremost of those factors, as is the place, normally the same, at which general policy decisions are made. However, in certain circumstances those factors may be neither exclusive nor

even decisive. It might be necessary to take account of the residence of the principal managers, the place at which general meetings are held, the place at which administrative and accounting documents are kept and the place at which the company's principal financial activities are carried on, in particular, the place at which it operates a bank account. That list cannot be regarded as exhaustive. Moreover, those factors may have to be given different weight according to whether, for example, the company is engaged in production or investment. In the latter case, it may be perfectly legitimate to take account of the market on which the company's commercial or stock exchange transactions are mainly carried out and the scale of those transactions.

9. In the light of the judgment in *Leclerc*¹⁸ it is clear that Community law offers no assistance where 'objective factors' show that a particular activity was carried out 'in order to circumvent' national legislation.¹⁹ The fact that the essential activities of a company take place on the territory of a Member State other than that to which it intends to transfer its central management may not be ignored. Such circumstances may, in certain cases, constitute an indication that what is involved is not genuine establishment, in particular when the effect of the transfer of the central management is to cause the company to cease to be subject to legislation which would otherwise apply to it. I believe that that conclusion can be drawn from the judgments of the Court in *Van Binsbergen*²⁰ and *Knoors*.²¹ As a general rule it appears that the national

17 — J.-M. Rivier: 'General Report: The fiscal residence of companies', *Studies on international fiscal law*, Vol. LXXIIa, p. 75.

18 — Judgment of 10 January 1985 in Case 229/83 *Association des Centres distributeurs Edouard Leclerc and Others v SARL 'Au bleu vert' and Others* [1985] ECR I.

19 — Paragraph 27 of *Leclerc*.

20 — Case 33/74 [1974] ECR 1299.

21 — Case 115/78 [1979] ECR 399.

court may assess whether, in a specific case and having regard to the circumstances, there is a suggestion of abuse of a right or circumvention of the law and whether it should decide not to apply Community law.

10. However, when the proper conclusion to be drawn from the circumstances is that the transfer of the central management genuinely constitutes establishment within the meaning of the Treaty, the question then arises whether the right to make such a transfer may be made subject to the authorization of the national authorities and whether those authorities may object to the transfer for fiscal reasons.

11. Generally, in most of the Member States, the transfer of the central management of a company, in the sense of its real head office, may take place only through the winding-up of the company and its reconstitution in the host Member State. That solution, the 'legal death' of the company, involves the settlement of its tax position, determined on the day of the winding-up, both in regard to the existing debt and in regard to matters in respect of which the event normally giving rise to tax liability has not yet occurred. Capital gains are thus taxed even though no disposition of assets has taken place. In regard to the Member States referred to above, the transfer of the central management of a company without loss of legal personality or nationality may take place under agreements between Member States of the kind provided for in Article 220 of the Treaty.

12. No prior authorization may be required for the exercise of a fundamental freedom laid down in the Treaty. Similarly, a Member State cannot prevent a company from exercising its right of establishment on the ground that such exercise entails a loss of revenue in respect of taxes which would have been due on the basis of the company's

future activities if it had remained subject to the tax laws of that State.

13. However, I consider that as Community law now stands, Member States are not prevented from requiring a company to settle its fiscal position upon any transfer of its central management, even where winding-up is not required. It is generally accepted that the winding-up required by national legislation as a condition for the emigration of a company is not contrary to Community law.²² It would be paradoxical if a Member State not requiring winding-up were to find itself placed by Community law in a less favourable fiscal position precisely because its legislation on companies is more consistent with Community objectives in regard to establishment. A company set up under the legislation of a Member State in which 'fiscal allegiance'²³ is determined in the light of the location of the central administration will maintain its registered office in that country and continue to have that country's nationality even after transferring its residence or, more precisely, the seat of its management, to another Member State. However, for the reasons indicated above, that does not seem to me, in the present state of Community law, to preclude national authorities from attaching to such a transfer fiscal consequences similar to those of winding-up.

14. The guidelines which I propose should enable the Court to reply to the first and third questions referred to it by the Queen's Bench Division of the High Court. They make a reply to the fourth question unnecessary. The remaining question does

22 — J. Renauld, *op. cit.*, p. 2.47.

23 — This expression comes from J.-M. Rivier, *op. cit.*, p. 15.

not require any long discussion. Although the first paragraph of Article 58 provides that companies or firms are, for the purposes of the provisions of the Treaty on freedom of establishment, to be treated in the same way as natural persons who are

nationals of Member States, they clearly cannot be placed entirely on the same footing; along with the United Kingdom and the Commission, therefore, I consider that Council Directive 73/148/EEC does not apply to legal persons.

15. Consequently, I propose that the Court should rule that:

- (1) The transfer to another Member State of the central management of a company may constitute a form of exercise of the right of establishment, subject to the assessment by the national court of any elements of fact showing whether or not such a transfer reflects a genuine integration of the said company into the economic life of the host Member State;
- (2) Under Community law a Member State may not require a company wishing to establish itself in another Member State, by transferring its central management there, to obtain prior authorization for such transfer;
- (3) However, Community law does not prohibit a Member State from requiring a company established on its territory, upon establishing itself in another Member State by transferring its central management there, to settle its tax position in regard to the part of its assets affected by the transfer, the value of which is to be determined at the date of transfer;
- (4) Council Directive 73/148/EEC is applicable only to natural persons.