

Commission of the European Communities

v

French Republic

(Freedom of establishment in regard to insurance —
Corporation tax and shareholders' tax credits)

Summary

1. *Free movement of persons — Freedom of establishment — Article 52 of the Treaty — Direct effect — Purpose*
(EEC Treaty, Art. 52)
2. *Free movement of persons — Freedom of establishment — Tax law — Rules drawing a distinction on the basis of the Member State of residence or in which the registered office is situated — Acceptable under certain conditions — Taxation of company profits — Insurance companies whose registered office is on the national territory and those whose registered office is abroad — Different treatment in regard to an advantage related to taxation such as shareholders' tax credits — Not permissible*
(EEC Treaty, Art. 52)
3. *Free movement of persons — Freedom of establishment — Discrimination — Prohibition — Discrimination in regard to taxation against insurance companies whose registered office is in another Member State limited to certain forms of establishment — Not permissible*
(EEC Treaty, Art. 52, first paragraph)
4. *Free movement of persons — Freedom of establishment — Tax law — Rules concerning taxation of the profits of insurance companies which discriminate on the basis of the Member State in which the registered office is located — Justification based on the absence of harmonization of the laws of the Member States — Not permissible*
(EEC Treaty, Art. 52)
5. *Free movement of persons — Freedom of establishment — Rights conferred by Article 52 of the Treaty — Unconditional nature — Conditions of reciprocity — Not permissible*
(EEC Treaty, Art. 52)

1. Article 52 of the Treaty embodies one of the fundamental principles of the Community and has been directly applicable in the Member States since the end of the transitional period. It is intended to ensure that all nationals of Member States who establish themselves in another Member State, even if that establishment is only secondary, for the purpose of pursuing activities there as self-employed persons receive the same treatment as nationals of that State and it prohibits, as a restriction on freedom of establishment, any discrimination on grounds of nationality resulting from the legislation of the Member State, even if only of a limited nature.

2. It is possible that a distinction based on the location of the registered office of a company or the place of residence of a natural person may, under certain conditions, be justified in an area such as tax law.

However, if the tax rules of a Member State place insurance companies whose registered office is on the national territory and branches and agencies situated on its territory of companies whose registered office is abroad on the same footing for the purposes of taxing their profits, those rules cannot, without giving rise to discrimination, treat them differently in regard to the grant of an advantage related to taxation, such as shareholders' tax credits. By treating the two forms of establishment in the same way for the purposes of taxing their profits, the legislature of that Member State has in fact admitted that there is no objective difference between their positions in regard to the detailed rules and conditions relating to that taxation which could justify different treatment.

3. The second sentence of the first paragraph of Article 52 of the Treaty

expressly leaves traders free to choose the appropriate legal form in which to pursue their activities in another Member State and that freedom of choice must not be limited by discriminatory tax provisions.

Consequently, discrimination in regard to taxation practised in a Member State against branches and agencies of insurance companies having their registered office in another Member State cannot be justified on the ground that they can escape any discrimination by choosing to set up a subsidiary.

4. The fact that the laws of the Member States on corporation tax have not been harmonized cannot justify discrimination practised in a Member State against branches and agencies of insurance companies having their registered office in another Member State. Although it is true that in the absence of such harmonization, a company's tax position depends on the national law applied to it, Article 52 of the Treaty prohibits the Member States from laying down in their laws conditions for the pursuit of activities by persons exercising their right of establishment which differ from those laid down for their own nationals.

5. The rights conferred by Article 52 of the Treaty are unconditional and a Member State cannot make respect for them subject to the contents of a double-taxation agreement concluded with another Member State. In particular, that article does not permit those rights to be made subject to a condition of reciprocity imposed for the purpose of obtaining corresponding advantages in other Member States.