OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 10 June 1986 *

Mr President,
Members of the Court,

1. From 1980 Mr Segers, a Netherlands national, ran a commercial undertaking known as 'Free Promotion International' which had its registered office in the Netherlands. Being anxious to extend his activities, *inter alia*, to brokerage on the financial market, he decided to transform his business into a limited liability company. Since he considered that the time required under Netherlands law for completing such an operation was too long and that the designation 'Ltd' was more attractive than its Netherlands equivalent, 'BV', he took the following steps:

(a) He set up in the United Kingdom a private company limited by shares, known as 'Slenderose Ltd'; and

(b) He converted the Netherlands undertaking into a subsidiary of the British company under the name of 'Free Promotion International Company Ltd', which in fact conducts all of Slenderose's business.

Following that operation and in order to obtain sickness benefits provided for by the Ziektewet [the Netherlands Law establishing a general sickness insurance scheme] Mr Segers applied to the competent institution, the Bestuur van de Bedrijfsvereniging voor Bank- en Verzekeringswezen, Groothandel en Vrije Beroepen [Banking, Insurance, Wholesale Trade and Professions' Association, hereinafter referred to as 'the Association'].

The Association rejected his application on the ground that Mr Segers could not be regarded as an employed person in his business since his employment did not entail a subordinate relationship with an employer. He was equally unsuccessful before the court of first instance. He then appealed to the Centrale Raad van Beroep [Court of last instance in social security matters], which made an order requesting a preliminary ruling from the Court of Justice on the problem of interpretation.

2. The Ziektewet applies to persons with the status of employees and that status is defined in terms of the existence of a subordinate relationship with an employer. As the Netherlands court points out, in principle such status cannot be attributed to the director of a company who holds 50% of the shares of his undertaking whilst his wife owns the other 50%. Nevertheless, in view of the legislature's desire to coordinate social security law and tax law in that matter, the Centrale Raad van Beroep departed from its previous case-law. By two judgments of 10 December 1968, it held that the director of a company holding 50% or more of the shares of a company was to be regarded as an employee.

It is the Association's contention that the effect of that ruling should be limited solely to directors who are majority shareholders of companies *whose registered office is in the Netherlands.* That is why it considers that although Mr Segers is a Netherlands national he cannot rely on that decision

* Translated from the French.

because he is the director of a company whose registered office is in London.

The Centrale Raad van Beroep therefore decided to refer to the Court for a preliminary ruling the following two questions:

'(1) Do the principles of freedom of establishment within the EEC and freedom to provide services within the EEC — in particular the last sentence of Article 52 read with Article 58 of the EEC Treaty and the last sentence of Article 60 read with Article 66 of that Treaty — mean that, when deciding whether there is an insurance obligation under Netherlands social security legislation, Netherlands courts may not make any distinction between the director/major shareholder of a private company incorporated under Netherlands law and a director/major shareholder of a private company incorporated under the laws of another Member State, even if the foreign company clearly does not carry on any actual business in the other Member State concerned but carries on business only in the Netherlands?

(2) If that question is answered in the negative, does Community social security law (in particular Article 3 (1) of Regulation No 1408/71) or any other provision of Community law prohibit such a distinction?'

3. In order to define the scope of the problem of interpretation before the Court and to provide the Netherlands court with a useful reply, it is necessary to make the following two preliminary observations.

In the first place, it must be stressed that the difference in treatment in question is not based on the nationality of the person concerned. The factor which determines entitlement to benefits under the social security scheme is the location — in the Netherlands and not in another Member State — of the registered office of the parent company.

Secondly it must be noted that Mr Segers, the director of Slenderose Limited, is established in the Netherlands where he also runs that company's subsidiary, through which, it may be recalled, all the parent company's business is conducted. He does not therefore come within the scope of the provisions of Article 59 of the EEC Treaty, which guarantee the freedom to provide services. Indeed, as the Court has consistently held, those provisions

'entail the abolition of all discrimination against a person providing a service on the grounds of his nationality or the fact that he is established in a Member State other than that in which the service must be provided' (Joined Cases 62 and 63/81 *Seco* v *Evi* [1982] ECR 223, paragraph 8 of the decision).

Ultimately the different treatment which, in the Association's view, should be accorded to Mr Segers is not based either on the nationality or place of residence of the person concerned but on the establishment in another Member State of the registered office of the parent company of which he is the director. It follows that it is necessary to consider Articles 52 to 58 of the Treaty concerning freedom of establishment in order to determine whether a national of a Member State may be deprived, solely for that reason, of his entitlement under national social security legislation.

Beyond that question, in the order requesting the preliminary ruling and the observations which have been submitted to the Court it is suggested that, in view of the finding that the Netherlands subsidiary of Slenderose Ltd in fact conducts all of that

company's business, it may also be necessary to consider whether such a difference of treatment may be justified in order to prevent any attempt at fraud.

I propose to consider those two aspects of the problem of interpretation in turn.

4. The second paragraph of Article 52 of the EEC Treaty provides that:

'Freedom of establishment shall include the right to . . . set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 58, under the conditions laid down for its own nationals by the law of the country where such establishment is effected . . . '.

The first paragraph of Article 52 extends the removal of restrictions on the freedom of establishment of nationals of one Member State in the territory of another Member State

'to restrictions on the setting up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State'.

That provision must be read in conjunction with Article 58 of the Treaty, according to which:

'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 shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States'.

The fundamental principle of equal treatment of nationals of the Member States, which is thus guaranteed by Article 52 after the expiry of the transitional period and independently of the directives provided for in Articles 54 and 57 for its implementation (see Case 2/74 *Reyners* [1974] ECR 631, paragraphs 24 to 30 of the decision), therefore applies not only to natural persons but also to companies, provided that they fulfil the two cumulative conditions laid down in the first paragraph of Article 58, namely that they must be formed in accordance with the law and that they must have the requisite connection with one of the Member States.

Freedom of establishment therefore consists of the right for any national of a Member State to establish, even on an ancillary basis, a company in another Member State under the conditions which its law imposes on its nationals (second paragraph of Article 52) and the right for a company to conduct its businesss in another Member State through an agency, branch or a subsidiary (first paragraph of Article 52).

On that last point the Court, in its judgment of 28 January 1986 in Case 270/83 (*Commission* v *France* [1986] ECR 273) concerning the refusal of France to grant tax exemption to French branches and agencies of insurance companies whose registered office is in another Member State, stated in the following terms the extent to which companies are treated as natural persons for the purposes of Article 58 of the Treaty:

'With regard to companies, it should be noted in this context that it is their registered office in the . . . sense (of Article 58) that serves as the connecting factor with the legal system of a particular State, like nationality in the case of natural persons'.

The Court concluded that:

'Acceptance of the proposition that the Member State in which a company seeks to establish itself may freely apply to it a different treatment solely by reason of the

fact that its registered office is situated in another Member State would . . . deprive that provision of all meaning' (Case 270/83, paragraph 18 of the decision).

As I have just stated, the fact that the registered office of Mr Seger's company is in London is the sole basis for the rejection of his application. From that point of view the rejection must therefore be regarded as discriminatory.

But that is not all. In addition to that first finding of principle, another conclusion is to be drawn from the facts of the case. There is no danger that such a difference of treatment in the application of social security provisions may have the effect of dissuading a national already established in the Netherlands, irrespective of his nationality, from setting up a company abroad or from becoming a majority shareholder in such a company. Seen in that light, it is the right of natural persons guaranteed by the second paragraph of Article 52 of the EEC Treaty to set up and manage companies in another Member State which would ultimately be deprived of any meaning.

From that point of view again, the difference in the application of social security provisions which the Association seeks to establish appears to constitute an obstacle to the exercise of the right of establishment of Community nationals residing in the Netherlands inasmuch as it withdraws from the companies run by such persons the entitlement to equal treatment with national companies accorded to companies whose directors have maintained their registered office in the territory of that State.

5. I consider that none of the arguments put forward by the Association in order to establish that Articles 52 and 58 do not apply is tenable.

In the first place, although it is true that Article 58 of the EEC Treaty does not expressly provide that companies of foreign origin are to be treated as national companies, that does not mean that the provision does not apply in this instance. By bringing companies within the scope of Article 52 of the EEC Treaty, Article 58 accords them the same freedoms as individuals, and requires Member States to accord companies whose registered office is in another Member State of the Community equality of treatment with national companies.

Secondly, I cannot accept the Association's view that the fact that this case concerns a Netherlands national residing in the Netherlands where he in practice conducts all his business means that it is a purely internal matter. As I have repeatedly stressed, the different treatment which the Association seeks to apply to Mr Segers is based exclusively on the fact that the parent company's registered office is established in the United Kingdom. The circumstances of this case therefore come within the scope of the Community rules laid down in Articles 52 and 58 of the EEC Treaty. Moreover, it makes no difference that the subsidiary in fact conducts all the business of the United Kingdom company provided that company was formed in accordance with United Kingdom law and is linked to that State by one of the three alternative connecting factors listed in Article 58, in this case the establishment in London of the registered office.

Finally, in reply to the complaint relating to discrimination, the Association contends that nationals of the Member States may, in full knowledge of the circumstances, choose to set up a company either in the Netherlands or in another Member State. In reality that argument amounts to depriving the freedom of establishment of companies of any meaning: although it implies, misleadingly, that the parties concerned are given freedom of choice, foreign companies

are dissuaded from establishing themselves in the Netherlands by the refusal to accord them protection under social security provisions. Such an effect is to be regarded as a restriction contrary to Article 52 in conjunction with Article 58. As the Commission stated, the rule of equal treatment for foreign nationals applied to companies whose registered office is in another Member State entails for the members of their staff, whether they are directors or not, the application of the social security provisions which apply to their opposite numbers in companies whose registered office is in the Member State in which they are established. In that connection, as the Court has stated (see, for example, its judgment of 18 June 1985 in Case 197/84 *Steinhauser* [1985] ECR 1819, paragraph 15 of the decision), 'useful guidance' may be found in the General Programme for the abolition of restrictions on freedom of establishment of 18 December 1961 (Official Journal, English Special Edition, Second Series IX, p. 87), according to which restrictions on the freedom of establishment include those which:

'deny or restrict the right to participate in social security schemes . . .' (Title III, Section A, point (i)).

It follows that the refusal to accord the directors of a company the advantages provided for by the national legislation on sickness insurance, which advantages are however accorded to the directors of companies whose registered office is in the Netherlands, solely because the registered office of the company in question is in another Member State, must be regarded as a restriction on the freedom of establishment prohibited since the end of the transitional period by Article 52 of the EEC Treaty in conjunction with Article 58, not only because it has the effect of restricting the right of companies established in another Member State to carry out their business in the Netherlands through the intermediary of a branch, agency or a subsidiary set up for that purpose, but also because it may dissuade nationals established in the Netherlands from setting up such a company or from becoming majority shareholders therein.

6. It remains to consider the possibility of fraud.

In the Association's view, the conversion of an undertaking of one Member State into a subsidiary of a company established in another Member State could make it possible for the nationals of the first State to circumvent their national rules. It is therefore in the public interest to limit the right of establishment in order to prevent abuses of that nature.

That argument calls for the following observations.

The operation described above is made possible by the combination of the right which is accorded to natural persons of setting up a company in another Member State and that, for legal persons, including companies created in that way, of conducting their business through the intermediary of a subsidiary in the country of origin of the natural person.

However paradoxical that situation may appear, it is the logical consequence of the rights guaranteed under the Treaty. Moreover, it is consistent with the objective behind the inclusion of the freedom of establishment in the EEC Treaty, namely the need to promote the free movement of persons and, by the same token, the achievement of a common market. In that

respect, the fact that a national of a Member State may take advantage of the flexibility of United Kingdom company law and may exploit the effect of the attraction, which in his view, an Anglo-Saxon designation has for his customers must be viewed in that context.

Consequently, and although the Association acknowledged at the sitting that its refusal was not based on any attempt at fraud on the part of the plaintiff in the main proceedings, the possibility cannot be excluded that an operation of the same type as that carried out by him could have a fraudulent purpose. Nevertheless, the mere possibility of that happening cannot justify a general restriction on the right of establishment of natural and legal persons. On the other hand, the national authorities must be permitted to verify in individual cases that the companies thus formed have been, as is expressly provided in Article 58 of the EEC Treaty, formed in accordance with the legal provisions laid down to that effect. Similarly, they may control the activities of such companies with regard to the requirements of public policy. In that respect Article 56 of the EEC Treaty provides that the rules of the Treaty

'shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health'.

Subject to those reservations and notwithstanding the legality of its supervisory power, a Member State must ensure that companies from other Member States may be set up and may conduct their business under the same conditions as those laid down for 'national' companies.

It is therefore not necessary to consider the second question submitted by the Centrale Raad van Beroep and I propose that the Court should rule as follows:

The refusal to accord the advantages of a social security scheme to the director of a company solely because the registered office of that company is in another Member State constitutes a restriction on the freedom of establishment contrary to Articles 52 and 58 of the EEC Treaty.