JUDGMENT OF THE COURT

9 March 1999 *

In Case C-212/97,

REFERENCE to the Court under Article 177 of the EC Treaty by the Højesteret (Denmark) for a preliminary ruling in the proceedings pending before that court between

Centros Ltd

and

Erhvervs-og Selskabsstyrelsen,

on the interpretation of Articles 52, 56 and 58 of the EC Treaty,

* Language of the case: Danish.

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, P. J. G. Kapteyn, J.-P. Puissochet, G. Hirsch and P. Jann (Presidents of Chambers), G. F. Mancini, J. C. Moitinho de Almeida, C. Gulmann, J. L. Murray, D. A. O. Edward, H. Ragnemalm, L. Sevón, M. Wathelet (Rapporteur), R. Schintgen and K. M. Ioannou, Judges,

Advocate General: A. La Pergola,
Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

— Erhvervs-og Selskabsstyrelsen, by Kammeradvokaten, represented by Karsten Hagel-Sørensen, Advokat, Copenhagen,

— the Danish Government, by Peter Biering, Head of Division in the Ministry of Foreign Affairs, acting as Agent,

— the French Government, by Kareen Rispal-Bellanger, Deputy Director in the Legal Affairs Directorate of the Ministry of Foreign Affairs, and Gautier Mignot, Secretary for Foreign Affairs in that Directorate, acting as Agents,

— the Netherlands Government, by Adriaan Bos, Legal Adviser in the Ministry of Foreign Affairs, acting as Agent,

— the United Kingdom Government, by Stephanie Ridley, of the Treasury Solicitor's Department, acting as Agent, and Derrick Wyatt QC,

— the Commission of the European Communities, by Antonio Caeiro, Legal Adviser, and Hans Støvlbæk, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Erhvervs-og Selskabsstyrelsen, represented by Karsten Hagel-Sørensen; the French Government, represented by Gautier Mignot; the Netherlands Government, represented by Marc Fiestra, Legal Adviser in the Ministry of Foreign Affairs, acting as Agent; the Swedish Government, represented by Erik Brattgård, Departementsråd in the Legal Service of the Ministry of Foreign Affairs, acting as Agent; the United Kingdom Government, represented by Derrick Wyatt; and the Commission, represented by Antonio Caeiro and Hans Støvlbæk, at the hearing on 19 May 1998,

after hearing the Opinion of the Advocate General at the sitting on 16 July 1998,

gives the following

Judgment

1 By order of 3 June 1997, received at the Court on 5 June 1997 the Højesteret referred to the Court for a preliminary ruling under Article 177 of the EC Treaty a question on the interpretation of Articles 52, 56 and 58 of the Treaty.

2 That question was raised in proceedings between Centros Ltd, a private limited company registered on 18 May 1992 in England and Wales, and Erhvervs-og Selskabsstyrelsen (the Trade and Companies Board, 'the Board') which comes under the Danish Department of Trade, concerning that authority's refusal to register a branch of Centros in Denmark.

3 It is clear from the documents in the main proceedings that Centros has never traded since its formation. Since United Kingdom law imposes no requirement on limited liability companies as to the provision for and the paying-up of a minimum share capital, Centros's share capital, which amounts to GBP 100, has been neither paid up nor made available to the company. It is divided into two shares held by Mr and Mrs Bryde, Danish nationals residing in Denmark. Mrs Bryde is the director of Centros, whose registered office is situated in the United Kingdom, at the home of a friend of Mr Bryde.

4 Under Danish law, Centros, as a 'private limited company', is regarded as a foreign limited liability company. The rules governing the registration of branches ('filialer') of such companies are laid down by the Anpartsselskabslov (Law on private limited companies).

5 In particular, Article 117 of the Law provides:

'1. Private limited companies and foreign companies having a similar legal form which are established in one Member State of the European Communities may do business in Denmark through a branch.'

6 During the summer of 1992, Mrs Bryde requested the Board to register a branch of Centros in Denmark.

7 The Board refused that registration on the grounds, *inter alia*, that Centros, which does not trade in the United Kingdom, was in fact seeking to establish in Denmark, not a branch, but a principal establishment, by circumventing the national rules concerning, in particular, the paying-up of minimum capital fixed at DKK 200 000 by Law No 886 of 21 December 1991.

8 Centros brought an action before the Østre Landsret against the refusal of the Board to effect that registration.

9 The Østre Landsret upheld the arguments of the Board in a judgment of 8 September 1995, whereupon Centros appealed to the Højesteret.

10 In those proceedings, Centros maintains that it satisfies the conditions imposed by the law on private limited companies relating to the registration of a branch of a foreign company. Since it was lawfully formed in the United Kingdom, it is entitled to set up a branch in Denmark pursuant to Article 52, read in conjunction with Article 58, of the Treaty.

11 According to Centros the fact that it has never traded since its formation in the United Kingdom has no bearing on its right to freedom of establishment. In its judgment in Case 79/85 *Segers* v *Bedrijfsvereniging voor Bank- en Verzekeringswesen, Groothandel en Vrije Beroepen* [1986] ECR 2375, the Court ruled that Articles 52 and 58 of the Treaty prohibited the competent authorities of a Member State from excluding the director of a company from a national sickness insurance scheme solely on the ground that the company had its registered office in another Member State, even though it did not conduct any business there.

12 The Board submits that its refusal to grant registration is not contrary to Articles 52 and 58 of the Treaty since the establishment of a branch in Denmark would seem to be a way of avoiding the national rules on the provision for and the paying-up of minimum share capital. Furthermore, its refusal to register is justified by the need to protect private or public creditors and other contracting parties and also by the need to endeavour to prevent fraudulent insolvencies.

13 In those circumstances, the Højesteret has decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Is it compatible with Article 52 of the EC Treaty, in conjunction with Articles 56 and 58 thereof, to refuse registration of a branch of a company which has its registered office in another Member State and has been lawfully founded with company capital of GBP 100 (approximately DKK 1 000) and exists in conformity with the legislation of that Member State, where the company does not itself carry on any business but it is desired to set up the branch in order to carry on the entire business in the country in which the branch is established, and where, instead of incorporating a company in the latter Member State, that procedure must be regarded as having been employed in order to avoid paying up company capital of not less than DKK 200 000 (at present DKR 125 000)?'

14 By its question, the national court is in substance asking whether it is contrary to Articles 52 and 58 of the Treaty for a Member State to refuse to register a branch

of a company formed in accordance with the legislation of another Member State in which it has its registered office but where it does not carry on any business when the purpose of the branch is to enable the company concerned to carry on its entire business in the State in which that branch is to be set up, while avoiding the formation of a company in that State, thus evading application of the rules governing the formation of companies which are, in that State, more restrictive so far as minimum paid-up share capital is concerned.

15 As a preliminary point, it should be made clear that the Board does not in any way deny that a joint stock or private limited company with its registered office in another Member State may carry on business in Denmark through a branch. It therefore agrees, as a general rule, to register in Denmark a branch of a company formed in accordance with the law of another Member State. In particular, it has added that, if Centros had conducted any business in England and Wales, the Board would have agreed to register its branch in Denmark.

16 According to the Danish Government, Article 52 of the Treaty is not applicable in the case in the main proceedings, since the situation is purely internal to Denmark. Mr and Mrs Bryde, Danish nationals, have formed a company in the United Kingdom which does not carry on any actual business there with the sole purpose of carrying on business in Denmark through a branch and thus of avoiding application of Danish legislation on the formation of private limited companies. It considers that in such circumstances the formation by nationals of one Member State of a company in another Member State does not amount to a relevant external element in the light of Community law and, in particular, freedom of establishment.

17 In this respect, it should be noted that a situation in which a company formed in accordance with the law of a Member State in which it has its registered office desires to set up a branch in another Member State falls within the scope of Community law. In that regard, it is immaterial that the company was formed in the first Member State only for the purpose of establishing itself in the second, where its main, or indeed entire, business is to be conducted (see, to this effect, *Segers* paragraph 16).

18 That Mrs and Mrs Bryde formed the company Centros in the United Kingdom for the purpose of avoiding Danish legislation requiring that a minimum amount of share capital be paid up has not been denied either in the written observations or at the hearing. That does not, however, mean that the formation by that British company of a branch in Denmark is not covered by freedom of establishment for the purposes of Article 52 and 58 of the Treaty. The question of the application of those articles of the Treaty is different from the question whether or not a Member State may adopt measures in order to prevent attempts by certain of its nationals to evade domestic legislation by having recourse to the possibilities offered by the Treaty.

19 As to the question whether, as Mr and Mrs Bryde claim, the refusal to register in Denmark a branch of their company formed in accordance with the law of another Member State in which its has its registered office constitutes an obstacle to freedom of establishment, it must be borne in mind that that freedom, conferred by Article 52 of the Treaty on Community nationals, includes the right for them to take up and pursue activities as self-employed persons and to set up and manage undertakings under the same conditions as are laid down by the law of the Member State of establishment for its own nationals. Furthermore, under Article 58 of the Treaty 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 are to be treated in the same way as natural persons who are nationals of Member States.

20 The immediate consequence of this is that those companies are entitled to carry on their business in another Member State through an agency, branch or subsidiary. The location of their registered office, central administration or principal place of business serves as the connecting factor with the legal system of a particular State in the same way as does nationality in the case of a natural person (see, to that effect, *Segers*, paragraph 13, Case 270/83 *Commission* v *France* [1986] ECR 273, paragraph 18, Case C-330/91 *Commerzbank* [1993] ECR I-4017, paragraph 13, and Case C-264/96 *ICI* [1998] I-4695, paragraph 20).

21 Where it is the practice of a Member State, in certain circumstances, to refuse to register a branch of a company having its registered office in another Member State, the result is that companies formed in accordance with the law of that other Member State are prevented from exercising the freedom of establishment conferred on them by Articles 52 and 58 of the Treaty.

22 Consequently, that practice constitutes an obstacle to the exercise of the freedoms guaranteed by those provisions.

23 According to the Danish authorities, however, Mr and Mrs Bryde cannot rely on those provisions, since the sole purpose of the company formation which they have in mind is to circumvent the application of the national law governing formation of private limited companies and therefore constitutes abuse of the freedom of establishment. In their submission, the Kingdom of Denmark is therefore entitled to take steps to prevent such abuse by refusing to register the branch.

24 It is true that according to the case-law of the Court a Member State is entitled to take measures designed to prevent certain of its nationals from attempting, under cover of the rights created by the Treaty, improperly to circumvent their national legislation or to prevent individuals from improperly or fraudulently taking advantage of provisions of Community law (see, in particular, regarding freedom to supply services, Case 33/74 *Van Binsbergen* v *Bedrijfsvereniging Metaalnijverheid* [1974] ECR 1299, paragraph 13, Case C-148/91 *Veronica Omroep Organisatie* v *Commissariaat voor de Media* [1993] ECR I-487, paragraph 12, and Case C-23/93 *TV 10* v *Commissariaat voor de Media* [1994] ECR I-4795, paragraph 21; regarding freedom of establishment, Case 115/78 *Knoors* [1979] ECR 399, paragraph 25, and Case C-61/89 *Bouchoucha* [1990] ECR I-3551, paragraph 14; regarding the free movement of goods, Case 229/83 *Leclerc and Others* v *'Au Blé Vert' and Others* [1985] ECR 1, paragraph 27; regarding social security, Case C-206/94 *Brennet* v *Paletta* [1996] ECR I-2357, *'Paletta II'*, paragraph 24; regarding freedom of movement for workers, Case 39/86 *Lair* v *Universität Hannover* [1988] ECR 3161, paragraph 43; regarding the common agricultural policy, Case C-8/92 *General Milk Products* v *Hauptzollamt Hamburg-Jonas* [1993] ECR I-779, paragraph 21, and regarding company law, Case C-367/96 *Kefalas and Others* v *Greece* [1998] ECR I-2843, paragraph 20).

25 However, although, in such circumstances, the national courts may, case by case, take account — on the basis of objective evidence — of abuse or fraudulent conduct on the part of the persons concerned in order, where appropriate, to deny them the benefit of the provisions of Community law on which they seek to rely, they must nevertheless assess such conduct in the light of the objectives pursued by those provisions (*Paletta II*, paragraph 25).

26 In the present case, the provisions of national law, application of which the parties concerned have sought to avoid, are rules governing the formation of companies and not rules concerning the carrying on of certain trades, professions or businesses. The provisions of the Treaty on freedom of establishment are intended specifically to enable companies 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 to pursue activities in other Member States through an agency, branch or subsidiary.

27 That being so, the fact that a national of a Member State who wishes to set up a company chooses to form it in the Member State whose rules of company law seem to him the least restrictive and to set up branches in other Member States cannot, in itself, constitute an abuse of the right of establishment. The right to form a company in accordance with the law of a Member State and to set up branches in other Member States is inherent in the exercise, in a single market, of the freedom of establishment guaranteed by the Treaty.

28 In this connection, the fact that company law is not completely harmonised in the Community is of little consequence. Moreover, it is always open to the Council, on the basis of the powers conferred upon it by Article 54(3)(g) of the EC Treaty, to achieve complete harmonisation.

29 In addition, it is clear from paragraph 16 of *Segers* that the fact that a company does not conduct any business in the Member State in which it has its registered office and pursues its activities only in the Member State where its branch is established is not sufficient to prove the existence of abuse or fraudulent conduct which would entitle the latter Member State to deny that company the benefit of the provisions of Community law relating to the right of establishment.

30 Accordingly, the refusal of a Member State to register a branch of a company formed in accordance with the law of another Member State in which it has its registered office on the grounds that the branch is intended to enable the company to carry on all its economic activity in the host State, with the result that the secondary establishment escapes national rules on the provision for and the paying-up of a minimum capital, is incompatible with Articles 52 and 58 of the Treaty, in so far as it prevents any exercise of the right freely to set up a secondary establishment which Articles 52 and 58 are specifically intended to guarantee.

31 The final question to be considered is whether the national practice in question might not be justified for the reasons put forward by the Danish authorities.

32 Referring both to Article 56 of the Treaty and to the case-law of the Court on imperative requirements in the general interest, the Board argues that the requirement that private limited companies provide for and pay up a minimum share capital pursues a dual objective: first, to reinforce the financial soundness of those companies in order to protect public creditors against the risk of seeing the public debts owing to them become irrecoverable since, unlike private creditors, they cannot secure those debts by means of guarantees and, second, and more generally, to protect all creditors, whether public or private, by anticipating the risk of fraudulent bankruptcy due to the insolvency of companies whose initial capitalisation was inadequate.

33 The Board adds that there is no less restrictive means of attaining this dual objective. The other way of protecting creditors, namely by introducing rules making it possible for shareholders to incur personal liability, under certain conditions, would be more restrictive than the requirement to provide for and pay up a minimum share capital.

34 It should be observed, first, that the reasons put forward do not fall within the ambit of Article 56 of the Treaty. Next, it should be borne in mind that, according to the Court's case-law, national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it (see Case C-19/92 *Kraus* v *Land Baden-Wiirttemberg* [1993] ECR I-1663, paragraph 32, and Case C-55/94 *Gebhard* v *Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165, paragraph 37).

35 Those conditions are not fulfilled in the case in the main proceedings. First, the practice in question is not such as to attain the objective of protecting creditors which it purports to pursue since, if the company concerned had conducted business in the United Kingdom, its branch would have been registered in Denmark, even though Danish creditors might have been equally exposed to risk.

36 Since the company concerned in the main proceedings holds itself out as a company governed by the law of England and Wales and not as a company governed by Danish law, its creditors are on notice that it is covered by laws different from those which govern the formation of private limited companies in Denmark and they can refer to certain rules of Community law which protect them, such as the Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies (OJ 1978 L 222, p. 11), and the Eleventh Council Directive 89/666/EEC of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State (OJ 1989 L 395, p. 36).

37 Second, contrary to the arguments of the Danish authorities, it is possible to adopt measures which are less restrictive, or which interfere less with fundamental freedoms, by, for example, making it possible in law for public creditors to obtain the necessary guarantees.

38 Lastly, the fact that a Member State may not refuse to register a branch of a company formed in accordance with the law of another Member State in which it has its registered office does not preclude that first State from adopting any appropriate measure for preventing or penalising fraud, either in relation to the company itself, if need be in cooperation with the Member State in which it was formed, or in relation to its members, where it has been established that they are in fact attempting, by means of the formation of the company, to evade their obligations towards private or public creditors established on the territory of a Member State concerned. In any event, combating fraud cannot justify a practice of refusing to register a branch of a company which has its registered office in another Member State.

39 The answer to the question referred must therefore be that it is contrary to Articles 52 and 58 of the Treaty for a Member State to refuse to register a branch of a company formed in accordance with the law of another Member State in which it has its registered office but in which it conducts no business where the branch is intended to enable the company in question to carry on its entire business in the State in which that branch is to be created, while avoiding the need to form a company there, thus evading application of the rules governing the formation of companies which, in that State, are more restrictive as regards the paying up of a minimum share capital. That interpretation does not, however, prevent the authorities of the Member State concerned from adopting any appropriate measure for preventing or penalising fraud, either in relation to the company itself, if need be in cooperation with the Member State in which it was formed, or in relation to its members, where it has been established that they are in fact attempting, by means of the formation of a company, to evade their obligations towards private or public creditors established in the territory of the Member State concerned.

Costs

40 The costs incurred by the Danish, French, Netherlands, Swedish and United Kingdom Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the question referred to it by the Højesteret by order of 3 June 1997, hereby rules:

It is contrary to Articles 52 and 58 of the EC Treaty for a Member State to refuse to register a branch of a company formed in accordance with the law of another Member State in which it has its registered office but in which it conducts no business where the branch is intended to enable the company in question to carry on its entire business in the State in which that branch is to be created, while avoiding the need to form a company there, thus evading application of the rules governing the formation of companies which, in that State, are more restrictive as regards the paying up of a minimum share capital. That

interpretation does not, however, prevent the authorities of the Member State concerned from adopting any appropriate measure for preventing or penalising fraud, either in relation to the company itself, if need be in cooperation with the Member State in which it was formed, or in relation to its members, where it has been established that they are in fact attempting, by means of the formation of a company, to evade their obligations towards private or public creditors established in the territory of the Member State concerned.

Rodríguez Iglesias Kapteyn Puissochet

Hirsch Jann Mancini

Moitinho de Almeida Gulmann Murray

Edward Ragnemalm Sevón

Wathelet Schintgen Ioannou

Delivered in open court in Luxembourg on 9 March 1999.

R. Grass G. C. Rodríguez Iglesias

Registrar President