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Court of Justice of the European Union
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Judgment in Case C-168/20
MH and ILA (Pension rights in case of bankruptcy)

A Member State cannot make, in principle, the full and automatic exclusion of pension rights from a bankruptcy estate dependent on the pension scheme in which those rights are held obtaining prior tax approval in that country where that scheme has already been tax approved in the home Member State of the migrant EU citizen concerned

Such a restriction on freedom of establishment may, however, be justified if it furthers an overriding reason relating to the public interest, is appropriate to ensure that the objective it pursues is achieved and does not go beyond what is necessary to achieve that objective

Mr M had been a high-profile property developer operating primarily, if not exclusively, in Ireland. In December 2002, a company incorporated under Irish law (MMC), through which Mr M operated, established for his benefit an occupational pension scheme in the form of an insurance policy taken out with ILA and governed by Irish law. In July 2009, Mr M established a new company incorporated under Irish law (S Industries), in which he was a director and employee. By deed of 31 August 2009, S Industries established its own pension scheme governed by Irish law, the only members of which were in fact Mr M, his wife and their son. That pension scheme was approved by the Irish tax authorities as a retirement benefits scheme. On 7 December 2009, MMC assigned the insurance policy with ILA to Mr M in the main proceedings, his wife and MH. As a result, that insurance policy was included in the S Industries pension scheme. Under that insurance policy, benefits would be paid on Mr M's retirement or earlier death.

As a result of the financial crisis and the crash in the Irish property market, MMC was put into receivership in Ireland in November 2010. In July 2011, Mr M moved to London (United Kingdom) with his wife on a permanent basis. In April 2012, S Industries, which had opened an establishment in London in December 2011, was also registered in the United Kingdom as an overseas company.

Having accumulated very large personal liabilities, Mr M was made bankrupt in the High Court of Justice (United Kingdom) on 2 November 2012 on his own petition. Upon application before that court, the trustees in bankruptcy claimed that the rights in the insurance policy held in the pension scheme be vested in them for the benefit of the bankruptcy estate. According to the trustees, the value of that insurance policy, as at 19 August 2020, was EUR 8 462 870.24, which Mr M disputes.

The High Court of Justice asks, in essence, the Court to clarify whether the freedom of establishment enshrined in EU law precludes rules of UK bankruptcy law which require that, in order for pension rights in pension schemes registered with the tax authorities of another EU Member State, in the present case that of Ireland, be protected through exclusion from the bankruptcy estate, which is in principle full and automatic, in proceedings opened in the United Kingdom, such schemes must also be approved in that State.

In today's judgment, the Court of Justice holds that **EU law precludes a provision of the law of a Member State which makes, in principle, the full and automatic exclusion from the bankruptcy estate of pension rights under a pension scheme dependent on the requirement that, at the time of the bankruptcy, the pension scheme be tax approved in that State, where that requirement is imposed in a situation where an EU citizen who had, prior to becoming bankrupt, exercised his right of free movement by moving permanently to that Member State for the purposes of pursuing a self-employed economic activity there, has pension**

rights under a pension scheme established and tax approved in his home Member State. The restriction on freedom of establishment constituted by that national provision may, however, be justified in so far as it furthers an overriding reason relating to the public interest, is appropriate to ensure that the objective it pursues is achieved and does not go beyond what is necessary to achieve that objective.

Findings of the Court

The Court notes, as a preliminary matter, that it is to continue to have jurisdiction under Article 86(2) of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community¹ to give preliminary rulings on the present request since it was made before the end of the transition period, which ended on 31 December 2020. As an EU citizen by virtue of his Irish nationality, Mr M, who exercised his right to reside in the United Kingdom before the end of that transition period and continued to reside there after that period, can be afforded the protection under that agreement. Mr M, as a self-employed person, enjoys in his 'host State', namely the United Kingdom, inter alia, the rights guaranteed by Article 49 TFEU, including 'the right to take up and pursue activities as self-employed persons'.

The Court notes that the case in the main proceedings concerns Mr M's pension rights in a pension scheme derived from a self-employed activity carried out in his home Member State before he established himself in the host Member State. It follows that Article 49 TFEU is clearly applicable to facts such as those at issue in the main proceedings, so that it is not necessary for the Court to rule on the interpretation of Article 21 TFEU or Article 24(1) of Directive 2004/38².

Next, the Court notes that UK bankruptcy law makes, in principle, the full and automatic exclusion of pension rights from a bankruptcy estate dependent on the pension scheme in which those rights are held obtaining prior approval for tax purposes in that State. That requirement is also applied in the case of a pension scheme established and tax approved in the home Member State of the EU citizen concerned prior to his or her move to the United Kingdom on a permanent basis.

Since, de facto, such pension schemes would not, in general, be approved for tax purposes in the United Kingdom, the rights in those pension schemes will be afforded, in most cases, the protection only of a system of exclusion from the bankruptcy estate which is much more limited, namely partial and discretionary exclusion.

In those circumstances, the Court holds that the national legislation at issue must be regarded as indirectly discriminatory and precluded by the rule of equal treatment laid down in Article 49 TFEU and, therefore, amounts to a restriction on the freedom of establishment, which is prohibited by that article, unless justified within the meaning of EU law.

The Court then examines whether that restriction is justified in the light of EU law, stating that such a restriction on a fundamental freedom guaranteed by the TFEU may be permitted only if the national measure in question meets an overriding reason relating to the public interest, that it is appropriate to ensure that the objective it pursues is achieved and that it does not go beyond what is necessary to achieve it.

In that regard, the Court considers that whilst such an overriding reason relating to the public interest, subject to verification by the referring court, may be valid, that reason may require further clarification as against the specific objective of the national legislation of aiming to ensure a fair balance between appropriate protection for the interests of the bankrupt and the protection of the financial interests of the bankrupt's creditors in satisfying, at least in part, their claims against the

¹ Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (OJ 2020 L 29, p. 1).

² Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77).

bankruptcy estate. The Court therefore takes the view that, as regards pension arrangements already tax approved in an EU Member State but not in the United Kingdom, it will be for the referring court to ascertain whether it is proportionate to the objective pursued for additional approval prior to bankruptcy of such pension arrangements by the UK tax authorities to be required as a condition which must be satisfied in order for the pension in question to qualify for the protection of exclusion, in principle full and automatic, from the bankruptcy estate.

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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