Case C-371/10

National Grid Indus BV

v

Inspecteur van de Belastingdienst Rijnmond/kantoor Rotterdam

(Reference for a preliminary
ruling from the Gerechtshof Amsterdam)

(Transfer of a company's place of effective management to a Member State other than that in which it is incorporated — Freedom of establishment — Article 49 TFEU — Taxation of unrealised capital gains relating to the assets of a company transferring its place of management between Member States — Determination of the amount of tax at the time of the transfer of the place of management — Immediate recovery of the tax — Proportionality)

Summary of the Judgment

1. *Freedom of movement for persons — Freedom of establishment — Provisions of the Treaty — Scope — Transfer of the place of effective management of a company incorporated under national law to another Member State*

   (Arts 49 TFEU and 54 TFEU)

2. *Freedom of movement for persons — Freedom of establishment — Restrictions — Tax legislation — Transfer of the place of effective management of a company incorporated under national law to another Member State*

(Art. 49 TFEU)

3. *Freedom of movement for persons — Freedom of establishment — Restrictions — Tax legislation — Transfer of the place of effective management of a company incorporated under national law to another Member State*

(Art. 49 TFEU)

1. A company incorporated under the law of a Member State which transfers its place of effective management to another Member State, without that transfer affecting its status of a company of the former Member State, may rely on Article 49 TFEU for the purpose of challenging the lawfulness of a tax imposed on it by the former Member State on the occasion of the transfer of the place of effective management.

(see paras 27, 30, 33, operative part 1)

A Member State does indeed have the power to define both the connecting factor required of a company if it is to be regarded as incorporated under its national law and as such capable of enjoying the right of establishment, and that required if the company is to be able subsequently to maintain that status. A Member State is therefore able, in the case of a company incorporated under its law, to make the company's right to retain its legal personality under the law of that State subject to restrictions on the transfer abroad of the company's place of effective management. However, that power does not mean that the Treaty rules on freedom of establishment do not apply to national legislation on the incorporation and winding up of companies.

2. Even though, according to their wording, the Treaty provisions on freedom of establishment are aimed at ensuring that foreign nationals are treated in the host Member State in the same way as nationals of that State, they also prohibit the Member State of origin from hindering the establishment in another Member State of one of its nationals or of a company incorporated under its legislation.

National legislation under which the transfer of the place of effective management of a company incorporated under national law to another Member State entails the immediate taxation of the unrealised capital gains relating to the assets transferred, whereas such gains are not taxed when such a company transfers its place of management within the territory of the Member State in question and will not be taxed until they are actually realised and to the extent that they are realised, establishes a difference of treatment as regards the taxation of capital gains and is liable to deter a company incorporated under national law from transferring its place of management to another Member State. That difference of treatment constitutes a restriction that is in principle prohibited by the Treaty provisions on freedom of establishment.

However, the transfer of the place of effective management of a company of one Member State to another Member State cannot mean that the Member State of origin has to abandon its right to tax a capital gain which arose within the ambit of its powers of taxation before the transfer. Such a measure is intended to prevent situations capable of jeopardising the right of the Member State of origin to exercise its powers of taxation in relation to activities carried on in its territory, and may therefore be justified on grounds connected with the preservation of the allocation of powers of taxation between the Member States, and is is appropriate for ensuring that allocation of powers of taxation between the Member States concerned.

(see paras 35, 37, 41, 46, 48)

3. Article 49 TFEU must be interpreted as:

— not precluding legislation of a Member State under which the amount of tax on unrealised capital gains relating to a company's assets is fixed definitively, without taking account of decreases or increases in value which may occur subsequently, at the time when the company, because of the transfer of its place of effective management to another Member State, ceases to obtain profits taxable in the former Member State; it makes no difference that the unrealised capital gains that are taxed relate to exchange rate gains which cannot be reflected in the host Member State under the tax system in force there;

— precluding legislation of a Member State which prescribes the immediate recovery of tax on unrealised capital gains relating to assets of a

company transferring its place of effective management to another Member State at the very time of that transfer.

National legislation offering a company transferring its place of effective management to another Member State the choice between, first, immediate payment of the amount of tax, which creates a disadvantage for that company in terms of cash flow but frees it from subsequent administrative burdens, and, secondly, deferred payment of the amount of tax, possibly together with interest in accordance with the applicable national legislation, which necessarily involves an administrative burden for the company in connection with tracing the transferred assets, would constitute a measure which, while being appropriate for ensuring the balanced allocation of powers of taxation between the Member States, would be less harmful to freedom of establishment than the immediate recovery of that tax.

(see paras 64, 73, 86, operative part 2)