



## Reports of Cases

JUDGMENT OF THE COURT (Tenth Chamber)

6 February 2014\*

(Reference for a preliminary ruling — Company law — Directive 78/660/EEC — Publication of consolidated annual accounts of certain types of company — Application of the rules on the publication of accounts to companies governed by the law of one Member State and forming part of a group whose parent company is governed by the law of another Member State)

In Case C-528/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Landgericht Bonn (Germany), made by decision of 12 November 2012, received at the Court on 21 November 2012, in the proceedings

**Mömax Logistik GmbH**

v

**Bundesamt für Justiz,**

THE COURT (Tenth Chamber)

composed of E. Juhász (Rapporteur), President of the Chamber, A. Rosas and C. Vajda, Judges,

Advocate General: P. Mengozzi,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 14 November 2013,

after considering the observations submitted on behalf of:

- Mömax Logistik GmbH, by H. Meichelbeck, Wirtschaftsprüfer, and W. Krauß, Rechtsanwalt,
- the Bundesamt für Justiz, by H.-J. Friehe, acting as Agent,
- the German Government, by T. Henze and J. Kemper, acting as Agents,
- the European Commission, by G. Braun and K.-P. Wojcik, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

\* Language of the case: German.

## Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 49 TFEU and Article 57 of 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), as amended by Directive 2006/46/EC of the European Parliament and of the Council of 14 June 2006 (OJ 2006 L 224, p. 1) ('Directive 78/660').
- 2 The request has been made in proceedings between Mömax Logistik GmbH ('Mömax Logistik') and the Bundesamt für Justiz (Federal Office of Justice) concerning the obligation to publish annual accounts for the accounting period ending 31 March 2009 in the electronic version of the Bundesanzeiger (German Federal Gazette).

### Legal context

#### *European Union law*

- 3 Article 47(1) of Directive 78/660 provides as follows:

'The annual accounts, duly approved, and the annual report, together with the opinion submitted by the person responsible for auditing the accounts, shall be published as laid down by the laws of each Member State in accordance with Article 3 of [First Council Directive 68/151/EEC on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community (OJ, English Special Edition 1968(I), p. 41)].

...'

- 4 Article 50b of Directive 78/660 is worded as follows:

'Member States shall ensure that the members of the administrative, management and supervisory bodies of the company have collectively the duty to ensure that the annual accounts, the annual report and, when provided separately, the corporate governance statement to be provided pursuant to Article 46a are drawn up and published in accordance with the requirements of this Directive and, where applicable, in accordance with the international accounting standards adopted in accordance with Regulation (EC) No 1606/2002 [of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards (OJ 2002 L 243, p. 1)]. Such bodies shall act within the competences assigned to them by national law.'

- 5 Article 57 of Directive 78/660 states as follows:

'Notwithstanding the provisions of [Directive 68/151] and [Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (OJ 1977 L 26, p. 1)], a Member State need not apply the provisions of this Directive concerning the content, auditing and publication of annual accounts to companies governed by their national laws

which are subsidiary undertakings, as defined in [Seventh Council Directive 83/349/EEC of 13 June 1983 based on the Article 54(3)(g) of the Treaty on consolidated accounts (OJ 1983 L 193, p. 1)], where the following conditions are fulfilled:

- (a) the parent undertaking must be subject to the laws of a Member State;
- (b) all shareholders or members of the subsidiary undertaking must have declared their agreement to the exemption from such obligation; this declaration must be made in respect of every financial year;
- (c) the parent undertaking must have declared that it guarantees the commitments entered into by the subsidiary undertaking;
- (d) the declarations referred to in (b) and (c) must be published by the subsidiary undertaking as laid down by the laws of the Member State in accordance with Article 3 of [Directive 68/151];
- (e) the subsidiary undertaking must be included in the consolidated accounts drawn up by the parent undertaking in accordance with Directive [83/349];
- (f) the above exemptions must be disclosed in the notes on the consolidated accounts drawn up by the parent undertaking;
- (g) the consolidated accounts referred to in (e), the consolidated annual report, and the report by the person responsible for auditing those accounts must be published for the subsidiary undertaking as laid down by the laws of the Member State in accordance with Article 3 of [Directive 68/151].'

*German law*

- 6 Paragraph 264(3) of the Handelsgesetzbuch (Commercial Code) ('HGB'), in the version in force at the material time, contains the following provisions:

'A company which is the subsidiary of a parent company required under Paragraph 290 [HGB] to draw up consolidated accounts need not apply the provisions of this Subsection or of the Third and Fourth Subsections of this Section where:

1. all shareholders of the subsidiary company have approved the exemption in respect of the financial year concerned and their decision has been published in accordance with Paragraph 325;
2. the parent company is obliged to cover losses in accordance with Paragraph 302 of the Law on public limited companies, or has voluntarily assumed such an obligation, and a declaration to that effect has been published in accordance with Paragraph 325;
3. the subsidiary company has been included in the consolidated accounts in accordance with the provisions of this Section; and
4. the exemption of the subsidiary company
  - (a) has been declared in a note to the consolidated accounts drawn up by the parent company and published in accordance with Paragraph 325 by submission to the publisher of the electronic version of the Bundesanzeiger, and

(b) has in addition been published vis-à-vis the subsidiary company in the electronic version of the Bundesanzeiger by reference to this provision and to the parent company.’

7 Paragraph 290(1) HGB is worded as follows:

‘The statutory representatives of a capital company (parent company) established in Germany must, if that company is able to exert a dominant influence, whether directly or indirectly, over another company (subsidiary), within the first five months of the group’s financial year, draw up consolidated accounts and a group annual report for the previous financial year. If the parent company is a capital company within the meaning of the first sentence of Paragraph 325(4), the consolidated accounts and group annual report must be drawn up within the first four months of the group’s financial year in respect of the previous financial year.’

8 Paragraph 302(1) of the Aktiengesetz (Law on public limited companies) of 6 September 1965 (BGBl. 1965 I, p. 1089), as amended by Paragraph 3 of the Law of 20 December 2012 (BGBl. 2012 I, p. 2751) is worded as follows:

‘Where there exists an agreement for the control or transfer of profits, the other party to the agreement must make good all annual losses arising during the period of the agreement, unless such losses are offset by other undistributed profits attributed to it during the period of the agreement.’

#### **The dispute in the main proceedings and the question referred for a preliminary ruling**

9 Lutz Service GmbH (‘Lutz Service’) is the parent company of Mömax Logistik, which provides logistical services to the Lutz Group, the principal business of which is the sale of furniture.

10 By letter of 26 August 2010, received on 1 September 2010, the Bundesamt für Justiz set a deadline of six weeks for Mömax Logistik to submit the accounting documents required under Paragraph 325 HGB, for the accounting period ending 31 March 2009, to the publisher of the electronic version of the Bundesanzeiger, in order for those documents to be published in that gazette. Mömax Logistik lodged an administrative appeal against that decision with the Bundesamt für Justiz by letter of 6 October 2010. In its appeal, it relied on the exemption provided for in Paragraph 264(3) HGB, on the ground that it was included in the consolidated accounts of Lutz Service, established in Wels (Austria).

11 Lutz Service drew up consolidated accounts for the financial year from 1 April 2008 to 31 March 2009, which included, inter alia, the annual accounts of Mömax Logistik. Those consolidated accounts of Lutz Service were published in the electronic version of the Bundesanzeiger. Mömax Logistik’s exemption was declared in the notes to the consolidated accounts. Moreover, Lutz Service gave a voluntary commitment to Mömax Logistik to cover its losses, in accordance with Paragraph 302 of the Law on public limited companies of 6 September 1965. That declaration was published. In addition, notice was given in the Bundesanzeiger of the fact that Mömax Logistik was invoking the exemption under Paragraph 264(3) HGB, with Lutz Service named as parent company. That information was accompanied by a reference to the fact that the consolidated accounts of Lutz Service had been published. Mömax Logistik’s shareholder approved the application of the exemption provided for in Paragraph 264(3) HGB in respect of the financial year from 1 April 2008 to 31 March 2009. That decision was also published.

12 By decision of 13 December 2010, the Bundesamt für Justiz dismissed Mömax Logistik’s administrative appeal and imposed on it a fine of EUR 2 500 on the ground that, as its parent company was not established in Germany, Mömax Logistik was not exempt from the requirement to publish its accounts laid down in Paragraph 264(3) HGB in conjunction with Paragraph 290 HGB.

- 13 By letter of 27 December 2010, Mömax Logistik lodged a further administrative appeal against that decision with the Bundesamt für Justiz. In support of that appeal, it submitted that the transposition of Article 57 of Directive 78/660 by the combined provisions of Paragraph 264(3) HGB and Paragraph 290 HGB was contrary to European Union law, in particular the principle of freedom of establishment.
- 14 The Bundesamt für Justiz dismissed the appeal. It took the view, inter alia, that the unequal treatment of a subsidiary whose parent company is resident in Germany as compared to a subsidiary whose parent company is resident in another Member State is justified on grounds of overriding reasons in the public interest.
- 15 In those circumstances, the Landgericht Bonn decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

‘Is a rule of national law which exempts companies governed by the law of the Member State concerned from the provisions of Article 57 ... of Directive [78/660] concerning the content, auditing and publication of annual accounts only if their parent company is governed by the law of the same Member State and has prepared consolidated accounts in accordance with the law of that State compatible with freedom of establishment (Article 49 TFEU)?’

### **Consideration of the question referred**

#### *Admissibility*

- 16 The Bundesamt für Justiz and the German Government consider that the question referred is hypothetical and, as a result, inadmissible. They submit in that regard that the conditions for the application of Paragraph 264(3) HGB are not satisfied in the main action, since Mömax Logistik did not submit, within the statutory time-limits, the declaration to the effect that the parent company would cover any losses in respect of the financial year in question, which is required in order to claim the exemption under that provision.
- 17 It must be borne in mind in that regard that it has been consistently held that the procedure provided for by Article 267 TFEU is an instrument of cooperation between the Court of Justice and the national courts by which the Court provides the national courts with the points of interpretation of European Union law which they need in order to decide the disputes before them (see, inter alia, Case C-279/12 *Fish Legal and Shirley* [2013] ECR, paragraph 29).
- 18 Questions on the interpretation of European Union law referred by a national court in the factual and legislative context which that court is responsible for defining, the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred for a preliminary ruling from a national court only where it is quite obvious that the interpretation of European Union law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, inter alia, *Fish Legal and Shirley*, paragraph 30).
- 19 In the present case, as is apparent from paragraph 12 above, the referring court has stated that it is the fact that Mömax Logistik’s parent company was not established in Germany which led the Bundesamt für Justiz to dismiss the appeal lodged by Mömax Logistik seeking to rely on the exemption from the requirement to publish its annual accounts provided for under national law. The referring court also indicated that if the provisions of national law at issue in the main proceedings are at odds with the principles of European Union law, the fine imposed on Mömax Logistik must be annulled.



20 In those circumstances, the request for a preliminary ruling is admissible.

### *Substance*

- 21 It is apparent from Article 50b of Directive 78/660 that the members of the administrative, management and supervisory bodies of a company are required to ensure that the annual accounts, the annual report and the corporate governance statement are drawn up and published in accordance with the requirements of that directive and, where applicable, in accordance with the international accounting standards adopted in accordance with Regulation No 1606/2002.
- 22 Article 47 of Directive 78/660 provides that '[t]he annual accounts, duly approved, and the annual report, together with the opinion submitted by the person responsible for auditing the accounts, shall be published as laid down by the laws of each Member State in accordance with Article 3 of Directive [68/151]'. Directive 68/151 was repealed and replaced by Directive 2009/101/EC of the European Parliament and of the Council of 16 September 2009 on coordination of safeguards which, for the protection of the interests of members and third parties, are required by Member States of companies within the meaning of the second paragraph of Article 48 of the Treaty, with a view to making such safeguards equivalent (OJ 2009 L 258, p. 11).
- 23 In accordance with Article 57 of Directive 78/660, a Member State need not apply the provisions of that directive concerning the content, auditing and publication of annual accounts to companies governed by their national law which are subsidiary undertakings, as defined in Directive 83/349, where the conditions set out in points (a) to (g) of Article 57 are fulfilled. Article 57(a) of Directive 78/660 sets out the condition that the parent undertaking must be subject to the laws of a Member State.
- 24 It is common ground that the Federal Republic of Germany has exercised the option provided in Article 57 of Directive 78/660. However, it is apparent from the wording of Paragraphs 264(3) and 290(1) HGB that the exemption is available only to a group of undertakings in which both the subsidiary undertaking and the parent undertaking are established in Germany.
- 25 By using the words 'the laws of a Member State', Article 57(a) of Directive 78/660 unequivocally indicates that, for the purpose of the application of the exemption provided for in Article 57, the parent undertaking may be governed by the law of any Member State of the European Union and does not have to be governed by the law of the Member State of the subsidiary undertaking seeking to rely on that exemption.
- 26 That interpretation of those words is borne out by the fact that, unlike that reference to the parent undertaking, the introductory part of Article 57 of Directive 78/660 states that Member States may exempt subsidiary undertakings 'governed by their national law'.
- 27 Moreover, where a Member State opts for that exemption, it cannot introduce, in the conditions for the application of the exemption, a difference of treatment between parent undertakings established in that State and parent undertakings established in another Member State.
- 28 As a consequence, the national provisions at issue in the main proceedings, which confine eligibility for the exemption from the requirement to publish annual accounts to subsidiaries whose parent companies are established in the same Member State as the subsidiaries, is at odds with the wording of Article 57(a) of Directive 78/660.
- 29 In view of the foregoing, there is no need to consider whether the combined national provisions at issue in the main action are contrary to the principle of freedom of establishment under Article 49 TFEU (see, to that effect, Case C-456/98 *Centrosteeel* [2000] ECR I-6007, paragraph 18).

- 30 Accordingly, the answer to the question referred is that Article 57 of Directive 78/660 must be interpreted as precluding the national legislation of a Member State which exempts a subsidiary undertaking governed by the law of that State from the provisions of the directive concerning the content, auditing and publication of annual accounts only if the parent company is also governed by the law of that State.

### **Costs**

- 31 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Tenth Chamber) hereby rules:

**Article 57 of 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, as amended by Directive 2006/46/EC of the European Parliament and of the Council of 14 June 2006, must be interpreted as precluding the national legislation of a Member State which exempts a subsidiary undertaking governed by the law of that State from the provisions of that directive concerning the content, auditing and publication of annual accounts only if the parent company is also governed by the law of that State.**

[Signatures]