ECLI:EU:C:2021:907

JUDGMENT OF THE COURT (Third Chamber)

11 November 2021 (*)

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In Case C-168/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the High Court of Justice (England & Wales), Chancery Division (Business and Property Courts of England and Wales, Insolvency and Companies List) (United Kingdom), made by decision of 30 March 2020, received at the Court on 22 April 2020, in the proceedings

BJ, trustee in bankruptcy of Mr M,

OV, trustee in bankruptcy of Mr M,

v

Mrs M,

MH,

ILA,

Mr M,

THE COURT (Third Chamber),

composed of A. Prechal (Rapporteur), President of the Second Chamber, acting as President of the Third Chamber, J. Passer, F. Biltgen, L.S. Rossi and N. Wahl, Judges,

Advocate General: M. Szpunar,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– BJ and OV, joint trustees in bankruptcy of Mr M, by D.J. Rhee, QC, C. Harrison, Barrister, and I. Gill, Solicitor,

– Mrs M, MH, ILA and Mr M, by G. Peretz, QC, J. Briggs, Barrister, and S. Gilchrist, Solicitor,

– the European Commission, by L. Armati, L. Malferrari and M. Wilderspin, acting as Agents,

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

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 21 and 49 TFEU and of 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, and corrigendum OJ 2004 L 229, p. 35).

2 The request has been made in proceedings between BJ and OV, joint trustees in bankruptcy of Mr M ('the trustees in bankruptcy'), and Mrs M, MH, ILA and Mr M (together, 'Mr M and Others') concerning the claim of the trustees in bankruptcy for the benefit of the bankruptcy estate of pension rights in the name of Mr M, an Irish national, accrued under a pension scheme established in Ireland and approved under Irish tax law.

Legal context

European Union law

Regulation (EC) No 1346/2000

3 Article 3(1) of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (OJ 2000 L 160, p. 1), under the heading 'International jurisdiction', provided:

'The courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary.'

4 Under Article 4 of that regulation, under the heading 'Law applicable':

'1. Save as otherwise provided in this Regulation, the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened, hereafter referred to as the "State of the opening of proceedings".

2. The law of the State of the opening of proceedings shall determine the conditions for the opening of those proceedings, their conduct and their closure. It shall determine in particular:

…

(b) the assets which form part of the estate and the treatment of assets acquired by or devolving on the debtor after the opening of the insolvency proceedings;

…'

5 Regulation No 1346/2000 was repealed and replaced by Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (OJ 2015 L 141, p. 19). However, in the light of the time of the facts of the case in the main proceedings, only Regulation No 1346/2000 applies *ratione temporis* to the case.

Directive 2004/38

6 Article 24(1) of Directive 2004/38, which is entitled 'Equal treatment', provides:

'Subject to such specific provisions as are expressly provided for in the Treaty and secondary law, all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty. …'

Regulation (EC) No 492/2011

7 Recital 1 of Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union (OJ 2011 L 141, p. 1) reads as follows:

'Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ 1968 L 257, p. 2) has been substantially amended several times. In the interests of clarity and rationality the said Regulation should be codified.'

8 Under Article 7(1) and (2) of Regulation No 492/2011:

'1. A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and, should he become unemployed, reinstatement or re-employment.

2. He shall enjoy the same social and tax advantages as national workers.'

United Kingdom law

Rules on the effect of bankruptcy on pension rights in respect of approved pension arrangements

9 Section 11 of the Welfare Reform and Pensions Act 1999 ('the WRPA 1999'), which entered into force on 29 May 2000, provides:

'Effect of bankruptcy on pension rights: approved arrangements.

(1) Where a bankruptcy order is made against a person on a bankruptcy application made or petition presented after the coming into force of this section, any rights of his under an approved pension arrangement are excluded from his estate.

(2) In this section "approved pension arrangement" means-

(a) a pension scheme registered under section 153 of the Finance Act 2004;

…

(h) any pension arrangements of any description which may be prescribed by regulations made by the Secretary of State.

…'

10 In respect of approved pension arrangements, trustees in bankruptcy can, under Section 15 of the WRPA 1999, make a claim to recover 'excessive' pension contributions pursuant to a court order.

11 Regulation 2 of the Occupational and Personal Pension Schemes (Bankruptcy) (No 2) Regulations 2002 ('the 2002 Regulations') provides:

'Prescribed pension arrangements

(1) The arrangements prescribed for the purposes of Section 11(2)(h) of the [WRPA 1999] (pension arrangements which are "approved pension arrangements") are arrangements …

…

(c) to which Section 308A of [the Income Tax (Earnings and Pensions) Act 2003] (exemption of contributions to overseas pension scheme) applies;

…'

12 Section 308A of the Income Tax (Earnings and Pensions) Act 2003 ('the ITEPA 2003') provides:

'Exemption of contribution to overseas pension scheme

(1) No liability to income tax arises in respect of earnings where an employer makes contributions under a qualifying overseas pension scheme in respect of an employee who is a relevant migrant member of the pension scheme.

(2) In subsection (1) —

"qualifying overseas pension scheme", and

"relevant migrant member",

have the same meaning as in Schedule 33 to [the Finance Act] 2004 (overseas pension schemes: migrant member relief).'

13 The term ‘overseas pension scheme’, within the meaning of Section 308A of the ITEPA 2003, is defined in Section 150(7) of the Finance Act 2004 as follows:

‘… “overseas pension scheme” means a pension scheme (other than a registered pension scheme) which—

(a) is established in a country or territory outside the United Kingdom, and

(b) satisfies any requirements prescribed for the purposes of this subsection by regulations made by the Board of Inland Revenue.’

14 The Pension Schemes (Categories of Country and Requirements for Overseas Pension Schemes and Recognised Overseas Pension Schemes) Regulations 2006 provide that the requirements set out in Section 150(7)(b) of the Finance Act 2004 are fulfilled if, inter alia, the scheme is an occupational pension scheme, if there is, in the country or territory in which it is established, a body which regulates occupational pension schemes and which regulates the scheme in question and if the scheme is approved for tax purposes.

15 In order to be regarded as a ‘qualifying overseas pension scheme’, within the meaning of Section 308A of the ITEPA 2003, and thus to fall within the scope of Section 11 of the WRPA 1999, an overseas pension scheme must satisfy the conditions set out in paragraph 5 of Schedule 33 to the Finance Act 2004, subparagraph (1) of which provides:

‘For the purposes of this Schedule an overseas pension scheme is a qualifying overseas pension scheme if—

(a) the scheme manager has given to the Inland Revenue notification that it is an overseas pension scheme and has provided any such evidence that it is an overseas pension scheme as the Inland Revenue may require,

(b) the scheme manager has undertaken to the Inland Revenue to inform the Inland Revenue if it ceases to be an overseas pension scheme,

(c) the scheme manager has undertaken to the Inland Revenue to comply with any prescribed benefit crystallisation information requirements imposed on the scheme manager, …

…’

Rules on the effect of bankruptcy on pension rights in respect of unapproved pension arrangements

16 Section 12 of the WRPA 1999 provides:

‘Effect of bankruptcy on pension rights: unapproved arrangements

(1) The Secretary of State may by regulations make provision for or in connection with enabling rights of a person under an unapproved pension arrangement to be excluded, in the event of a bankruptcy order being made against that person, from his estate …

(2) Regulations under this section may, in particular, make provision—

(a) for rights under an unapproved pension arrangement to be excluded from a person’s estate—

(i) by an order made on his application by a prescribed court, or

(ii) in accordance with a qualifying agreement made between him and his trustee in bankruptcy;

(b) for the court's decision whether to make such an order in relation to a person to be made by reference to—

(i) future likely needs of him and his family, and

(ii) whether any benefits (by way of a pension or otherwise) are likely to be received by virtue of rights of his under other pension arrangements and (if so) the extent to which they appear likely to be adequate for meeting any such needs;

…'

17 Pursuant to Section 12(2) of the WRPA 1999, by regulations 4 to 6 of the 2002 Regulations, a bankrupt can either apply to the court in which the bankruptcy proceedings were opened for an exclusion order for the purpose of excluding his rights wholly or in part under an unapproved pension arrangement from his bankruptcy estate by reference to the future likely needs of him and his family or reaching a qualifying agreement to similar effect with his trustee in bankruptcy.

The dispute in the main proceedings and the questions referred for a preliminary ruling

18 Prior to his bankruptcy Mr M had been a property developer operating primarily, if not exclusively, in Ireland, through a company incorporated under Irish law, MMC.

19 In 2002, that company established, with a payment from Mr M of a single premium in the amount of EUR 6 161 256, an occupational pension scheme in the form of an insurance policy taken out with ILA and governed by Irish law, under which benefits would be paid on Mr M's retirement or earlier death.

20 On 16 July 2009, Mr M and Mrs M established S Industries, a company incorporated under Irish law, of which Mr M was a director until 14 April 2012 and also an employee from 1 December 2009 to 31 January 2011.

21 By deed of 31 August 2009, S Industries established a pension scheme, governed by Irish law, with the employees of that company being eligible for inclusion but in fact the only members of which were Mr M, Mrs M and their son RM ('the pension scheme at issue in the main proceedings').

22 That pension scheme was established so as to be capable of being approved as a retirement benefits scheme under Irish tax law.

23 By letter of 28 October 2009, the Irish tax authorities wrote to MH to the effect that that scheme had been approved as a retirement benefits scheme for the purposes of the Irish tax legislation, with effect from 30 August 2009.

24 By deed of assignment of 7 December 2009, MMC assigned the insurance policy with ILA to MH and to Mr M and Mrs M as trustees of the pension scheme at issue in the main proceedings in order for that pension scheme to provide Mr M with a pension commensurate with that insurance

policy. As a result, that insurance policy formed part of the pension scheme at issue in the main proceedings.

25 In November 2010, as a result of the crash in the Irish property market, MMC was put into receivership in Ireland at the suit of the National Asset Management Agency (Ireland) which had acquired that company's debts owed to the Bank of Ireland.

26 As of February 2011, Mr M lived in London (United Kingdom) on a part-time basis. As of July 2011, Mr M and Mrs M moved to London permanently.

27 In the period ending 31 August 2011, the trustees of the pension scheme at issue in the main proceedings made certain payments to Mr M, who had turned 60 in 2010. No contributions were made into the pension scheme for the benefit of Mr M or Mrs M after they moved to the United Kingdom.

28 At the time Mr M moved to the United Kingdom he had very large personal liabilities, inter alia, to the National Asset Management Agency with, according to the trustees in bankruptcy, the total claims against his estate exceeding EUR 1 000 000 000.

29 By deed of 26 July 2011, Mr M was removed as trustee of the pension scheme at issue in the main proceedings, leaving MH and Mrs M as the sole trustees of that scheme.

30 From August 2011, Mr M rented offices in London for the purposes of trading as a property and construction consultant in the United Kingdom.

31 By letter of 26 March 2012, Mr M's tax advisers advised the Irish tax authorities that he now resided in London and submitted Mr M's VAT return for the period ending 31 July 2012 and a self-assessment tax return for the period ending 5 April 2012 with the UK tax authorities.

32 On 13 April 2012, S Industries was registered under UK law, namely the Companies Act 2006, as an overseas company that had a UK establishment. The application for registration of that company gave the date the establishment was opened as 1 December 2011, with an address in London, and with Mr M as director and Mrs M as director and company secretary.

33 On 2 November 2012, Mr M was declared bankrupt in the High Court of Justice (England & Wales), Chancery Division (Business and Property Courts of England and Wales, Insolvency and Companies List) (United Kingdom) on his own petition, presented that day.

34 Upon application before the referring court of 1 November 2018, the trustees in bankruptcy claimed that the benefits deriving from the insurance policy attached to the pension scheme at issue in the main proceedings should 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.

35 In their defence, Mr M and Others claimed that EU law, in particular Articles 21, 45 and 49 TFEU, Article 24 of Directive 2004/38 and Article 7(2) of Regulation No 492/2011, require that any rights accrued under the pension scheme at issue in the main proceedings be excluded from the bankruptcy estate as rights accrued under an approved pension arrangement for the purposes of Section 11 of the WRPA 1999. In the alternative, they ask the referring court to order that those rights be excluded from the bankruptcy estate pursuant to Section 12 of the WRPA 1999.

36 The referring court notes, first, as regards the UK legislation applicable to the case at issue in the main proceedings, that it is common ground that the pension scheme at issue in the main proceedings was not registered with the UK tax authorities under Section 153 of the Finance Act 2004 and that that pension scheme is therefore not an approved pension arrangement, as defined in Section 11(2)(a) of the WRPA 1999, the rights of which are excluded from the bankruptcy estate pursuant to paragraph (1) of that section.

37 That court states, in addition, that the purpose behind Sections 11 to 16 of the WRPA 1999 is that pension rights are intended, and tax relief given, to support individuals financially in their future retirement, not for the benefit of creditors if the individual becomes bankrupt before retirement, and that, save in the event of 'excessive' contributions, those rights should be excluded from the bankruptcy estate.

38 Section 11 of the WPRA 1999 is broadly limited to tax-approved schemes because one of their features is that the benefits that could be paid out of those schemes are limited.

39 There is, by contrast, no limit to the benefits that can be provided under the unapproved schemes to which Section 12 of the WRPA 1999 refers, which could, according to the referring court, explain why they are not excluded from the bankruptcy estate in their entirety but only to the extent that they are reasonably needed by the bankrupt and his family, with the agreement of his trustee in bankruptcy or an order by a court with discretionary powers in that regard.

40 Registration under Section 153 of the Finance Act 2004 of an overseas pension scheme such as the pension scheme at issue in the main proceedings leading to the exclusion of the rights accrued under that scheme from the bankruptcy estate is, in principle, possible pursuant to Section 11(1) of the WRPA 1999. That would give rise to certain advantages from a tax point of view, such as relief against income tax for contributions to the scheme and the benefits being exempt from any resulting capital gains tax, but would also involve a number of disadvantages, for instance, in particular, limitation of the payments from the scheme that can be made without tax becoming payable.

41 Consequently, such registration would not be a mere formality but a step carrying with it onerous consequences.

42 It considers that, in addition, it is evident that nationals of EU Member States are more likely than UK nationals to have acquired pension rights accrued under schemes which have not been registered pursuant to Section 153 of the Finance Act 2004.

43 In that regard, the referring court considers that the administrators of a pension scheme established in such a way as to comply with the requirements for approval under Irish tax legislation, such as the pension scheme at issue in the main proceedings, may not necessarily wish for that scheme also to have to comply with the requirements for approval under UK tax legislation.

44 Furthermore, the referring court considers that, provided that it complies with the requirements of the 2006 Regulations referred to in paragraph 14 above, the pension scheme, inter alia if it is an occupational pension scheme regulated by a body in the country or territory in which it is established, may be regarded as an 'overseas pension scheme', as defined in Section 150(7) of the Finance Act 2004.

45 However, since the administrators of the pension scheme in question did not take the necessary steps to ensure that the scheme complied with the requirements set out in Schedule 33(5)

(1) to the Finance Act 2004, relating, inter alia, to the notification of the scheme to the UK tax authorities, to evidence for those authorities that it is a pension scheme and to the undertaking to those authorities to comply with certain information requirements, the scheme cannot be regarded as a 'qualifying pension scheme' within the meaning of Section 308A of the ITEPA 2003, as a result of which rights accrued under the scheme are not to be excluded from the bankruptcy estate under Section 11(1) of the WRPA 1999.

46 Although it is true that those requirements were not – and would not in practice have been – particularly onerous, there is usually little reason for the administrators of a pension plan to take the necessary steps so as to become a 'qualifying pension scheme' within the meaning of Section 308A of the ITEPA 2003.

47 That would be the case only in a situation – other than that at issue in the main proceedings – in which it was expected that contributions were to be made to the scheme by or on behalf of members who have moved to the United Kingdom.

48 Furthermore, the referring court considers that, although the pension scheme at issue in the main proceedings may be regarded as an 'unapproved pension scheme' within the meaning of Section 12 of the WRPA 1999, the provisions governing the exclusion from the bankruptcy estate of rights accrued under such a scheme are less advantageous from the point of view of the bankrupt in that they are less protective of the bankrupt's pension rights than Section 11 of the WRPA 1999 for approved pension schemes.

49 Next, as regards its analysis of the situation at issue in the main proceedings in respect of EU law, the referring court considers that the critical question is whether the provisions of national law concerning the exclusion of pension rights from the bankruptcy estate is something that can impact on the right of establishment or otherwise within the scope of Article 49 TFEU.

50 The referring court notes that Mr M and Others have submitted in that regard that it is unnecessary to show that those provisions of national law are liable to have a deterrent effect on freedom of establishment or that what was required was a comparison between the position of the migrant worker in the host Member State and in the home Member State.

51 They submit that what is relevant is the comparison between the position of a migrant worker in the host Member State and the position of nationals of that host Member State. They maintain that retention of pension rights on bankruptcy of a person who has exercised his right to freedom of movement is a 'social advantage' protected by Article 49 TFEU, read in conjunction with Article 24 of Directive 2004/38.

52 By contrast, in the submission of the trustees in bankruptcy before the referring court, the provisions of national law at issue, in particular Section 11 of the WRPA 1999, do not constitute, even in of themselves, an obstacle to Mr M.'s freedom of establishment; they did not appear to have deterred him from exercising that right. It had also not been shown that those provisions as a whole were less favourable than the corresponding provisions of Irish law. As regards Article 24 of Directive 2004/38, account must be taken, for the purposes of applying Article 21 TFEU, and in the absence of harmonisation at EU level, of differences in national insolvency regimes.

53 Lastly, the referring court states that its provisional view is that the impact of insolvency on the pension rights accrued in a home Member State of a person exercising the right of establishment as a self-employed person in another Member State before being declared bankrupt in the latter is

sufficiently closely connected with the exercise of that right to fall within the scope of Article 49 TFEU.

54 That court considers that the provisions of UK law on the exclusion of pension rights from a bankruptcy estate, under which the full protection of Section 11 of the WRPA 1999 is available only to those persons with rights accrued under approved pension arrangements, although not expressly drafted by reference to nationality, are liable to affect a substantially higher proportion of nationals of other Member States exercising their right of establishment in the United Kingdom than UK nationals, and they therefore constitute discrimination in enjoyment of a social advantage which is prohibited by Article 49 TFEU and by Article 24 of Directive 2004/38.

55 Furthermore, the referring court considers that such discrimination, if so found by the Court in response to its questions, may be eliminated by applying an interpretation of Section 11 of the WRPA 1999 in conformity with EU law by the extension its application to a pension scheme approved by or registered with the tax authorities of another Member State since this is in line with the purpose of the legislation at issue which is to ensure that pension rights are fully protected on bankruptcy only when they arise under arrangements approved by, registered with, or recognised by, the relevant tax authorities in the Member State in which they are established.

56 In those circumstances the High Court of Justice (England & Wales), Chancery Division (Business and Property Courts of England and Wales, Insolvency and Companies List) (United Kingdom) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘1. Where a national of a Member State has exercised his rights under Articles 21 and 49 TFEU and [Directive 2004/38] by moving to or establishing himself in the United Kingdom, is it compatible with those provisions for Section 11 of the WRPA 1999 to make exclusion from bankruptcy of pension rights in a pension scheme, including those established and tax approved in another Member State, dependent on the pension scheme being, at the time of the bankruptcy, registered under Section 153 [of the Finance Act 2004] or prescribed by regulation 2 of the 2002 Regulations and thus tax approved in the United Kingdom?

2. In answering Question (1), is it relevant or necessary:

(a) to determine whether the individual moved to the United Kingdom in order, primarily, to declare his bankruptcy in the United Kingdom?

(b) to take into account (i) the protections which may be available to the bankrupt in respect of unapproved pension schemes under Section 12 of the WRPA 1999 and (ii) the possibility for the trustees in bankruptcy to recover sums in respect of approved pension arrangements?

(c) to take into account the requirements to which pension schemes registered and tax approved in the United Kingdom are subject?’

Consideration of the questions referred

Preliminary observations

57 As a preliminary matter, it should be noted, in the first place, that, as also observed by the referring court, the Court 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 Community (OJ 2020 L 29, p. 7, 'the Withdrawal Agreement') 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.

58 In addition, since it is common ground that Mr M is an EU citizen, by virtue of his Irish nationality, who exercised, in accordance with EU law, his right to reside in the United Kingdom before the end of that transition period and that he has continued to reside there after that period, he can, pursuant to Article 10(1)(a) of the Withdrawal Agreement, be afforded the protection of that agreement.

59 Thus, in accordance with Article 25(1) of the Withdrawal Agreement, Mr M, as a self-employed person, enjoys in his 'host State', namely the United Kingdom, subject to the limitations set out in Articles 51 and 52 TFEU, which are irrelevant to the facts of the case in the main proceedings, in particular, the rights guaranteed by Article 49 TFEU, including 'the right to take up and pursue activities as self-employed persons'.

60 In the second place, since the referring court has sought an answer to its questions as regards Articles 21 and 49 TFEU and Article 24(1) of Directive 2004/38, it is necessary to determine which of those provisions are applicable in a situation such as that at issue in the main proceedings.

61 According to settled case-law, Article 21(1) TFEU, which sets out in general terms the right of every citizen of the Union to move and reside freely within the territory of the Member States, finds specific expression in Article 45 TFEU concerning freedom of movement for workers, in Article 49 TFEU concerning freedom of establishment and in Article 56 TFEU concerning the freedom to provide services. Therefore, if the national legislation at issue falls within the scope of Article 45 TFEU, of Article 49 TFEU or of Article 56 TFEU, it will not be necessary for the Court to rule on the interpretation of Article 21 TFEU (see to that effect, inter alia, judgments of 11 September 2007, *Schwarz and Gootjes-Schwarz*, C-76/05, EU:C:2007:492, paragraph 34, and of 11 September 2007, *Commission* v *Germany*, C-318/05, EU:C:2007:495, paragraph 35 and the case-law cited).

62 Furthermore, according to equally settled case-law, freedom of establishment for nationals of one Member State on the territory of another Member State includes the right to take up and pursue activities as self-employed persons (judgments of 21 February 2006, *Ritter-Coulais*, C-152/03, EU:C:2006:123, paragraph 19, and of 14 March 2019, *Jacob and Lennertz*, C-174/18, EU:C:2019:205, paragraph 21 and the case-law cited).

63 Nationals of a Member State have in particular the right, which they derive directly from the FEU Treaty, to leave their State of origin to enter the territory of another Member State and reside there in order to pursue an economic activity there (judgment of 1 April 2008, *Government of the French Community and Walloon Government*, C-212/06, EU:C:2008:178, paragraph 44).

64 In the light of those principles, it must be found that the case in the main proceedings falls unquestionably within the scope of Article 49 TFEU.

65 It is common ground that, before being declared bankrupt in the United Kingdom, Mr M left Ireland, where he was pursuing a self-employed economic activity principally, if not exclusively, in the Irish property market, with a view to settling permanently in the United Kingdom in order to pursue the same activity in the UK property market.

66 Furthermore, 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 (see, by analogy, judgment of 14 March 2019, *Jacob and Lennertz*, C-174/18, EU:C:2019:205, paragraph 22).

67 It follows that Article 49 TFEU is clearly applicable to facts such as those at issue in the main proceedings, so that, in accordance with the case-law cited in paragraph 61 above, it is not necessary for the Court to rule on the interpretation of Article 21 TFEU.

68 The same is true of Article 24(1) of Directive 2004/38, which mirrors Article 18 TFEU in enshrining the general principle of non-discrimination on the ground of nationality and is applicable to any EU citizen residing in the host Member State under that directive.

69 Since Article 24(1) of Directive 2004/38 expressly provides that it applies only 'subject to such specific provisions as are expressly provided for in the Treaty and secondary law', that provision cannot apply independently if a specific rule on non-discrimination laid down by the FEU Treaty is applicable to the situation in question (see, to that effect, judgment of 6 October 2020, *Jobcenter Krefeld*, C-181/19, EU:C:2020:794, paragraph 78 and the case-law cited).

70 It is clear from the case-law that the principle of non-discrimination on the ground of nationality has been given effect by a specific rule, in particular, in the area of the free movement of workers, in Article 45 TFEU, in the area of freedom of establishment, in Article 49 TFEU, and in the area of freedom to provide services, in Articles 56 TFEU to 62 TFEU (see, to that effect, judgments of 24 May 2011, *Commission* v *Luxembourg*, C-51/08, EU:C:2011:336, paragraph 80, and of 18 June 2019, *Austria* v *Germany*, C-591/17, EU:C:2019:504, paragraph 40 and the case-law cited).

71 Since the situation at issue in the main proceedings is clearly covered by the principle of non-discrimination on the ground of nationality given effect, in the area of freedom of establishment, by the specific rule laid down in Article 49 TFEU, it is unnecessary for the Court to rule on the interpretation of Article 24(1) of Directive 2004/38.

72 It follows that the questions referred for a preliminary ruling must be examined solely in the light of Article 49 TFEU.

73 Therefore, by its two questions, which it is appropriate to consider together, the referring court asks, in essence, whether Article 49 TFEU must be interpreted as precluding 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 accrued 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 accrued under a pension scheme established and tax approved in his home Member State.

Whether there is a restriction on the freedom of establishment

74 As a preliminary matter, it must be borne in mind, as appears from the order for reference, that the case at issue in the main proceedings concerns an Irish national, Mr M, in respect of whom bankruptcy proceedings were opened in the United Kingdom pursuant to Article 3 of Regulation No 1346/2000 since he had moved there and had shifted the centre of his main interests there

following the relocation of his activities in the property market before being declared bankrupt there.

75 In that regard, it should be noted that the fact that, in accordance with the rules on the applicable law laid down in Article 4 of Regulation No 1346/2000, Section 11 of the WRPA 1999 applies as a rule of the *lex fori concursus* does not mean that that provision cannot be subject to a review as to its conformity with the fundamental freedoms guaranteed by the FEU Treaty.

76 Although, in the absence of harmonisation at EU level, the substantive rules of insolvency law fall, at this point in time, largely within the competences of the Member States, Member States must nevertheless exercise such competencies in conformity with EU law, including with the fundamental freedoms under the FEU Treaty.

77 As stated by the referring court, the rules of UK bankruptcy law governing the assets which form part of the bankruptcy estate consist effectively in two forms of protection for a bankrupt's pension rights.

78 The first protection, characterised as the 'gold standard' by Mr M and Others, provided for in Section 11 of the WRPA 1999 for rights accrued in 'approved pension arrangements' including pension schemes registered pursuant to Section 153 of the Finance Act 2004 and 'qualifying overseas pension schemes', within the meaning of Section 308A of the ITEPA 2003, constitutes protection which is full, in so far as, in principle, all such pension rights are excluded from the bankruptcy estate, and automatic, in so far as the bankrupt is entitled to their exclusion provided that the requirements of the tax legislation are fulfilled in respect of the scheme in question, even if, in respect of the protection laid down in Section 11 of the WRPA 1999, first, 'excessive' contributions may be 'clawed back' by the trustees in bankruptcy for the benefit of the bankruptcy estate and, second, the payments that may be made by the administrator of the scheme without incurring liability to tax are limited.

79 By contrast, the second protection, characterised as the 'bronze standard' by Mr M and Others, laid down in Section 12 of the WRPA 1999 for rights in 'unapproved pension arrangements', constitutes protection which is partial, in so far as pension rights are excluded from the bankruptcy estate only to the extent required to meet the future needs of the bankrupt and his family, and discretionary, in so far as that exclusion must be applied for by the bankrupt and granted either by agreement with the trustee in bankruptcy or by means of an exclusion order from a court which has a discretion in that regard.

80 As to whether, in a situation such as that at issue in the case in the main proceedings, Section 11 of the WRPA 1999, by precluding the exclusion of pension rights from the bankruptcy estate as provided for by that provision, constitutes a restriction on the freedom of establishment laid down in Article 49 TFEU, it should be noted that that article confers on nationals of one Member State who wish to pursue activities as self-employed persons in another Member State the benefit of the same treatment as the host State's own nationals and prohibits any discrimination on the ground of nationality which hinders the taking up or pursuit of such activities. Any measure which, pursuant to any provision laid down by law, regulation or administrative action in a Member State, or as the result of the application of such a provision, or of administrative practices, hinders nationals of other Member States in their pursuit of activities as self-employed persons by treating nationals of other Member States differently from nationals of the country concerned is prohibited (see, to that effect, judgment of 8 June 1999, *Meeusen*, C-337/97, EU:C:1999:284, paragraph 27).

81 In that regard, it is settled case-law that the equal-treatment rule laid down in Article 45 TFEU and in Article 7 of Regulation No 492/2011 prohibits not only overt discrimination by reason of nationality but also all covert forms of discrimination which, through the application of other distinguishing criteria, lead in fact to the same result (judgment of 10 October 2019, *Krah*, C-703/17, EU:C:2019:850, paragraph 23 and the case-law cited).

82 In that context, the Court has stated that a provision of national law, even if it applies to all workers regardless of nationality, must be regarded as indirectly discriminatory if it is intrinsically liable to affect workers who are nationals of other Member States more than national workers and if there is a consequent risk that it will place the worker from a different Member State at a particular disadvantage, unless it is objectively justified and proportionate to the aim pursued (judgment of 10 October 2019, *Krah*, C-703/17, EU:C:2019:850, paragraph 24 and the case-law cited).

83 In order for a measure of national law to be regarded as being indirectly discriminatory, it is not necessary for it to have the effect of placing at an advantage all the nationals of the State in question or of placing at a disadvantage only nationals of other Member States, but not nationals of the State in question (judgment of 5 December 2013, *Zentralbetriebsrat der gemeinnützigen Salzburger Landeskliniken*, C-514/12, EU:C:2013:799, paragraph 27).

84 It is also not necessary, in that respect, to establish that the national provision in question does in practice affect a substantially higher proportion of migrant workers. It is sufficient that it is liable to have such an effect (judgment of 18 December 2014, *Larcher*, C-523/13, EU:C:2014:2458, paragraph 33; see also, to that effect, judgment of 2 April 2020, *PF and Others*, C-830/18, EU:C:2020:275, paragraphs 31 and 32).

85 Although the principles in the case-law set out in paragraphs 80 to 84 above, that case-law being at the core of the line of argument put forward by Mr M and, in essence, regarded as relevant by the referring court in its preliminary assessment of the case in the main proceedings, were indeed developed, inter alia, following the judgment of 23 May 1996, *O'Flynn* (C-237/94, EU:C:1996:206, paragraph 21), specifically regarding the rule of equal treatment enshrined in both Article 45 TFEU and Article 7 of Regulation No 492/2011, those principles do not apply solely to employed migrant workers but also apply, *mutatis mutandis*, in respect of Article 49 TFEU, to self-employed migrant workers, such as Mr M (see, to that effect, judgment of 14 March 2019, *Jacob and Lennertz*, C-174/18, EU:C:2019:205, paragraph 23).

86 According to settled case-law of the Court, all of the Treaty provisions relating to the freedom of movement for persons are intended to facilitate the pursuit by EU nationals of occupational activities of all kinds throughout the European Union, and preclude measures which might place EU nationals at a disadvantage when they wish to pursue an economic activity in the territory of another Member State (judgments of 21 February 2006, *Ritter-Coulais*, C-152/03, EU:C:2006:123, paragraph 33, and of 1 April 2008, *Government of the French Community and Walloon Government*, C-212/06, EU:C:2008:178, paragraph 44 and the case-law cited).

87 In the light of the principles enshrined in the case-law set out in paragraphs 80 to 84 above, it must be found, in essence as was found by the referring court, that, while the preclusion from bankruptcy protection under Section 11 of the WRPA 1999 applies indistinctly to migrant workers and to national workers, the intrinsic nature of that provision and, in particular, the fact that it does not permit applications for approval of overseas pension schemes to be made following bankruptcy – which is for the referring court to ascertain – is liable, in practice, to affect a substantially higher proportion of migrant workers than national workers and there is a consequent risk that it will place migrant workers at a particular disadvantage, as a result of which that provision of national law

must be regarded as indirectly discriminatory, unless it is objectively justified and proportionate to the aim pursued.

88 As stated by the referring court, national self-employed workers would generally be afforded the protection laid down in Section 11 of the WRPA 1999 in respect of their pension rights in pension schemes established, and to which they contributed, in the United Kingdom since, in most cases, owing to the resulting tax advantages under UK tax law, such schemes would be registered under Section 153 of the Finance Act 2004 and, therefore, approved for tax purposes in the United Kingdom.

89 By contrast, self-employed migrant workers will, in most cases, have pension rights accrued under pension schemes established and registered for tax purposes in their home Member State or in another Member State in which they have been economically active, which would not, in general, be approved for tax purposes in the United Kingdom, so that, having regard also to the fact that an application for approval for such schemes cannot be made after bankruptcy, which is for the referring court to ascertain, pension rights accrued under those schemes will be afforded, in most cases, only the much more limited protection laid down in Section 12 of the WRPA 1999 for unapproved pension arrangements.

90 According to the referring court, the administrators of such overseas pension schemes will generally not take the necessary steps, even if they are not difficult per se, either to ensure that such schemes are also approved in the United Kingdom for the purpose of furthering the individual needs of some of their members by way of registration of the scheme in question pursuant to Section 153 of the Finance Act 2004, or to satisfy the conditions required for those schemes to be regarded as 'qualifying pension schemes' within the meaning of Section 308A of the ITEPA 2003.

91 The referring court states, however, that registration under Section 153 of the Finance Act 2004 of overseas pension schemes, such as that at issue in the main proceedings, is, in principle, possible but is a step which carries with it potentially onerous obligations in so far as it would bring with it a number of disadvantages, relating, in particular, to limitation of the payments from the scheme that can be made without tax becoming payable.

92 That court also notes that although, in practice, fulfilment of the requirements for overseas pension schemes being approved as a 'qualifying pension scheme', within the meaning of Section 308A of the ITEPA 2003, is not particularly onerous, there is nevertheless usually little reason for an administrator of an overseas pension scheme to take the necessary steps for the scheme to fulfil those requirements save, which does not apply to the case at issue in the main proceedings, where the payment of contributions is planned by or on behalf of members who have moved to the United Kingdom.

93 In those circumstances, the Court finds that Section 11 of the WRPA 1999, in so far as it makes, in principle, the full and automatic exclusion of pension rights from a bankruptcy estate dependent on the pension scheme in which those rights accrued obtaining prior approval for tax purposes, including those schemes 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, as in the case at issue in the main proceedings, is 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.

94 That interpretation is not called into question by the arguments put forward by the trustees in bankruptcy.

95 In the first place, the Court rejects the line of argument based, in essence, on the settled case-law of the Court and, in particular on paragraphs 24 and 25 of the judgment of 27 January 2000, *Graf* (C-190/98, EU:C:2000:49), according to which it cannot be maintained that the national legislation at issue in the main proceedings is such as to deter a self-employed worker from exercising his freedom of establishment provided that, in the event of subsequent bankruptcy in the host Member State, his pension rights may not be covered by appropriate protection in so far as, at the time of exercising that freedom, bankruptcy was a future and hypothetical event which must be regarded as too uncertain and indirect a possibility within the meaning of that case-law.

96 Appropriate protection, in the event of bankruptcy, for pension rights acquired by an EU citizen in his or her home Member State is a factor which he or she may take into account in deciding whether to move to another Member State in order to pursue a professional activity there on a permanent basis, particularly if that citizen has already acquired pension rights in that home Member State or in another Member State in which he or she has been economically active.

97 Therefore, the bankruptcy of an economically active self-employed migrant worker, whilst generally a future and hypothetical event at the time when that worker exercises his or her right to freedom of movement, cannot be regarded as too uncertain and indirect a possibility such as to prevent the national measure at issue from constituting a potential restriction on the freedom of establishment.

98 In the second place, the Court does not accept the argument that a person who voluntarily moves to another Member with a view to declaring himself or herself bankrupt there, or with knowledge of his or her probable bankruptcy in that Member State, should in no circumstances be allowed to challenge the insolvency regime of that Member State, as the *lex fori concursus*, on the basis of a fundamental freedom under the FEU Treaty.

99 Even supposing that Mr M moved to the United Kingdom with the intention of declaring himself bankrupt there so as, either in part or principally, to be capable of benefiting from certain advantages under UK insolvency law, such as the relatively short period of 12 months after which the bankrupt is, in principle, discharged from bankruptcy, whereas that period was, according to the trustees in bankruptcy, 12 years in Ireland, the fact remains that there is no evidence in the file before the Court from which it could be concluded that there had been a ‘misuse of rights’ or ‘fraud’, within the meaning of the case-law of the Court, by Mr M (see, inter alia, judgment of 9 March 1999, *Centros*, C-212/97, EU:C:1999:126, paragraph 24).

100 It is common ground that, prior to his bankruptcy, Mr M did in fact shift the centre of his main interests from Ireland to the United Kingdom thereby accepting all of the consequences entailed by such a choice, including liability to tax in accordance with the legislation of that country, as a result of which the UK courts had jurisdiction to open insolvency proceedings against him in accordance with Article 3 of Regulation No 1346/2000, so that he also cannot be accused of ‘forum shopping’.

101 In the third place, according to the trustees in bankruptcy, Mr M cannot, by invoking a fundamental freedom, ‘cherry pick’, thereby allowing him to create a bespoke insolvency regime by choosing those parts of the UK insolvency regime which are beneficial to him whilst rejecting those which are not since such an approach would undermine the *effet utile* of Regulation No 1346/2000.

102 In that regard, in addition to what has already been stated in paragraphs 75 and 76 above, it should be noted that although Section 11 of the WRPA 1999 is part of a broader framework of UK insolvency rules, certain of which are more favourable to the bankrupt than others, that provision

must, in so far as it provides for a system of protection for pension rights accrued under approved pension arrangements that is much more favourable to the bankrupt than the system in Section 12 of the WRPA 1999 which applies to pension rights accrued under unapproved pension arrangements, in itself comply with the fundamental freedoms.

103 In the fourth place, the Court also rejects the line of argument that Section 11 of the WRPA 1999 does not fall within the scope of Article 49 TFEU since it applies after the freedom of establishment has been exercised, namely on the bankruptcy of a migrant worker. In addition, the existence of a potential restriction on a fundamental freedom cannot be called into question by the mere fact that, apparently, Section 11 of the WRPA 1999 did not actually have any dissuasive effect on Mr M since he moved to the United Kingdom notwithstanding that provision.

104 In that regard, the Court notes that the fact that it is impossible for a migrant worker, once bankrupt, to make an application for the purposes of benefiting, in respect of his pension rights accrued under a pension scheme approved in his home Member State or in another Member State in which he has been economically active, from the exclusion, in principle in full and automatically, from the bankruptcy estate, as provided for in Section 11 of the WRPA 1999, is, prima facie, liable to render the exercise by such a migrant worker of his freedom of establishment by moving to the United Kingdom on a permanent basis less attractive, without it being necessary to examine whether or not, in the situation at issue in the main proceedings, Mr M was actually dissuaded from moving to the United Kingdom due to the application of that provision.

105 Moreover, according to settled case-law of the Court, the articles of the Treaty relating to the free movement of goods, persons, services and capital are fundamental provisions of EU law and any restriction of that freedom, however minor, is prohibited (judgment of 5 December 2013, *Zentralbetriebsrat der gemeinnützigen Salzburger Landeskliniken*, C-514/12, EU:C:2013:799, paragraph 34 and the case-law cited).

Whether there is a restriction on freedom of establishment

106 As stated in paragraph 93 above, Section 11 of the WRPA 1999, in so far as it makes, in principle, the full and automatic exclusion of pension rights from a bankruptcy estate dependent on the pension scheme in which those rights accrued obtaining prior approval for tax purposes, including those established and tax approved in the home Member State of the EU citizen concerned, as in the case at issue in the main proceedings, is 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 such a restriction is justified within the meaning of EU law, which must therefore be examined.

107 In that regard, it must be borne in mind that it follows from settled case-law of the Court that a restriction on a fundamental freedom guaranteed by the FEU Treaty 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 (judgment of 3 February 2021, *Fussl Modestraße Mayr*, C-555/19, EU:C:2021:89, paragraph 52 and the case-law cited).

108 In addition, since Section 11 of the WRPA 1999 constitutes a restriction on the freedom of establishment in that it is indirectly discriminatory on the ground of nationality, such a restriction is valid only if it is objectively justified and proportionate to the aim pursued (judgment of 10 October 2019, *Krah*, C-703/17, EU:C:2019:850, paragraph 24 and the case-law cited).

109 However, since the examination of whether the restriction at issue is objectively justified is, in essence, that of whether it is possibly justified by an overriding reason relating to the public interest, it follows that both examinations must be carried out in the same way (see, to that effect, judgment of 3 February 2021, *Fussl Modestraße Mayr*, C-555/19, EU:C:2021:89, paragraph 105).

Whether there is an overriding reason relating to the public interest capable of justifying the restriction on the freedom of establishment

110 As a preliminary matter, it must be found that the United Kingdom Government has not made any written submissions in the present proceedings and that it follows from the guidance issued by the UK Government Insolvency Service that, according to that UK government body, a requirement of parity of treatment for pension schemes recognised or approved in Member States must be applied, so that the rights accrued under those schemes must be able to benefit from the exclusion from the bankruptcy estate laid down in Section 11 of the WRPA 1999, which suggests, as is maintained by Mr M, that, in the view of that service, the unequal treatment at issue cannot be justified by an overriding reason relating to the public interest.

111 In addition, although, in the order for reference, the referring court does not specifically address any potential justification for the restriction at issue in respect of an overriding reason relating to the public interest, that court notes, as regards the objective of Section 11 of the WRPA 1999, that pension rights are intended, and the corresponding tax relief is given, to support individuals financially in the future in retirement, not for the benefit of creditors if the individual becomes bankrupt before retirement, and that, save in the event of 'excessive' contributions, those rights are excluded from the bankruptcy estate.

112 In view of that objective, the European Commission submits, in essence, that the social policy objective of ensuring that a bankrupt retains pension rights up to a certain level so that he or she has an appropriate income and thereby does not become a burden on the State is potentially an overriding reason relating to the public interest.

113 Whilst such an overriding reason relating to the public interest, subject to verification by the referring court, may be valid, it may require further clarification with regard to the specific objective of Section 11 of the WRPA 1999 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 bankruptcy estate.

Whether the restriction on freedom of establishment is proportional

114 Although the objective of ensuring a fair balance between the necessarily conflicting interests of the bankrupt and his creditors in respect of the bankrupt's pension rights furthered by Section 11 of the WRPA 1999 potentially constitutes an overriding reason relating to the public interest, it is, however, necessary, as stated in paragraph 107 above, for the restriction on the freedom of establishment constituted by that national provision to be justified, that that restriction be capable of ensuring the attainment of the objective which it pursues and not go beyond what is necessary to attain it.

115 In particular, the question arises whether the restriction on the freedom of establishment formed by Section 11 of the WRPA 1999 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 so far as that provision limits the protection of the full and automatic exclusion from the bankruptcy estate only to pension rights accrued under UK tax-approved pension arrangements, precluding, inter alia, pension rights

accrued under pension arrangements which are tax approved not in the United Kingdom but in an EU Member State, such as the home Member State of the migrant worker whose pension rights are at issue, which are subject to partial and discretionary exclusion from the bankruptcy estate under Section 12 of the WRPA 1999.

116 In that regard, it will be for the referring court to ascertain whether, as regards pension arrangements already tax approved in an EU Member State but not in the United Kingdom, the requirement of additional approval prior to bankruptcy of such pension arrangements by the UK tax authorities as a condition to be satisfied in order for the pension rights in question to qualify for the protection laid down in Section 11 of the WRPA 1999 is proportionate to the objective pursued by that provision.

117 In that context, it must be added that, if such a requirement were intended to limit the exclusion from the bankruptcy estate to rights accrued under pension arrangements regulated on a statutory footing, it is liable to go beyond what is necessary if it has the effect of excluding pension rights accrued under pension schemes which are tax approved in a Member State but not in the United Kingdom from the protection of the exclusion in so far as such arrangements are also regulated on a statutory footing, albeit potentially in a different manner.

118 Furthermore, it is for the referring court to ascertain whether there is a relationship between the tax rules relating to the legislation and to the regulation of pension schemes and the purpose of the national provision at issue which appears to consist of ensuring, in bankruptcy proceedings, a fair balance between the interests of the bankrupt in excluding his or her pension rights from the bankruptcy estate and those of the creditors in having those rights included in the bankruptcy estate as far as is possible.

119 The requirement of tax approval for a pension scheme as a condition in order to benefit from certain tax advantages linked to contributions into such a scheme and payments made from that scheme appears to have no connection with that same requirement for non-tax-related purposes as a condition for benefiting from, in principle, the full and automatic exclusion from the bankruptcy estate laid down in Section 11 of the WRPA 1999, in particular if, as is the case in the main proceedings, the bankrupt has not claimed any of those tax advantages.

120 In other words, although, for tax purposes, a requirement for the approval of a pension arrangement may be justified in order to limit and monitor the tax advantages attaching thereto, such a rationale may be absent if such a requirement is imposed specifically for insolvency purposes, in particular in the light of the rules determining which assets are excluded from the bankruptcy estate.

121 In addition, if, and it is for the referring court to ascertain, the purpose of that requirement for tax approval was to ensure that the pension arrangement under which the bankrupt has accrued rights is an arrangement that is subject to some form of publicly accessible registration, so that those rights do not improperly escape the reach of the bankrupt’s creditors, that provision would go beyond what is necessary if it were confirmed that, as the Commission maintains, UK bankruptcy law provided, at the time of the opening of the bankruptcy proceedings, that the bankrupt was required to disclose to his trustee in bankruptcy all his assets including any pension rights he may have in an overseas pension arrangement.

122 Furthermore, if, as the trustees in bankruptcy maintain, the purpose of imposing a requirement for the approval, in the United Kingdom, of a foreign pension scheme previously approved in a Member State prior to the bankruptcy was to enable the UK tax authorities to verify

whether the pension scheme at issue is indeed an overseas pension scheme which has actually been approved, such a requirement would be likely to go beyond what is necessary. If, as is the case in the main proceedings, the tax authorities of the Member State in which the pension scheme was drawn up confirm in writing and unequivocally that that scheme was indeed approved in accordance with the tax legislation of that Member State, the imposition of an inspection designed to ensure that that approval actually took place would be superfluous and would appear disproportionate, in particular, since the tax authorities of the Member States are bound by a duty of mutual trust.

123 Lastly, the restriction constituted by Section 11 of the WRPA 1999 would also appear to be disproportionate if, which it is also for the referring court to ascertain, it is the case that the requirement of tax approval must imperatively be fulfilled at the latest by the time of the declaration of bankruptcy, thus precluding a bankrupt from applying for approval of the overseas pension scheme at issue after that date in order to be able to be afforded the exclusion under that provision of the rights under that scheme from the bankruptcy estate.

124 In the light of all the foregoing, the answer to the questions referred is that Article 49 TFEU must be interpreted as precluding 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 accrued under a pension scheme dependent on the requirement that, at the time of the bankruptcy, the pension scheme concerned be tax approved in that Member 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 accrued under a pension scheme established and tax approved in his home Member State unless the restriction on freedom of establishment constituted by that national provision is 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.

Costs

125 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 (Third Chamber) hereby rules:

Article 49 TFEU must be interpreted as precluding 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 accrued under a pension scheme dependent on the requirement that, at the time of the bankruptcy, the pension scheme concerned be tax approved in that Member 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 accrued under a pension scheme established and tax approved in his home Member State unless the restriction on freedom of establishment constituted by that national provision is 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.

Prechal Passer Biltgen
Rossi Wahl

Delivered in open court in Luxembourg on 11 November 2021.

A. Calot Escobar	K. Lenaerts
Registrar	President

* Language of the case: English.