Case C-411/03

SEVIC Systems AG

(Reference for a preliminary ruling from the Landgericht Koblenz)

(Freedom of establishment – Articles 43 EC and 48 EC – Cross-border mergers – Refusal of registration in the national commercial register – Compatibility)

Summary of the Judgment

1. *Freedom of movement for persons – Freedom of establishment – Provisions of the Treaty – Scope – Cross-border mergers – Included*

(Art. 43 EC)

2. *Freedom of movement for persons – Freedom of establishment – National provision preventing registration of cross-border mergers in the national commercial register – Restriction on the freedom of establishment – Justification – Conditions*

(Arts 43 EC and 48 EC)

1. The right of establishment covers all measures which permit or even merely facilitate access to another Member State and the pursuit of an economic activity in that State by allowing the persons concerned to participate in the economic life of the country effectively and under the same conditions as national operators.

Cross-border merger operations, like other company transformation operations, respond to the needs for cooperation and consolidation between companies established in different Member States. They constitute particular methods of exercise of the freedom of establishment, important for the proper functioning of the internal market, and are therefore amongst those economic activities in respect of which Member States are required to comply with the freedom of establishment laid down by Article 43 EC.

(see paras 18-19)

2. Articles 43 EC and 48 EC preclude registration in the national commercial register of the merger by dissolution without liquidation of one company and transfer of the whole of its assets to another company from being refused in general in a Member State where one of the two companies is established in another Member State, whereas such registration is possible, on compliance with certain conditions, where the two companies participating in the merger are both established in the territory of the first Member State.

Such a difference in treatment can be permitted only if it pursues a legitimate objective compatible with the Treaty and is justified by imperative reasons in the public interest, such as protection of the interests of creditors, minority shareholders and employees, and the preservation of the effectiveness of fiscal supervision and the fairness of commercial transactions. Furthermore, application of such a difference in treatment must be appropriate for ensuring the attainment of the objectives pursued and not go beyond what is necessary to attain them.

(see paras 23, 28, 31, operative part)

JUDGMENT OF THE COURT (Grand Chamber)

13 December 2005 (*)

(Freedom of establishment – Articles 43 EC and 48 EC – Cross-border mergers – Refusal of registration in the national commercial register – Compatibility)

In Case C-411/03,

REFERENCE for a preliminary ruling under Article 234 EC from the Landgericht Koblenz (Germany), made by decision of 16 September 2003, received by the Court on 2 October 2003, in the proceedings:

SEVIC Systems AG,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas and K. Schiemann, Presidents of Chambers, C. Gulmann (Rapporteur), J.N. Cunha Rodrigues, R. Silva de Lapuerta, K. Lenaerts, P. K?ris, E. Juhász, G. Arestis and A. Borg Barthet, Judges,

Advocate General: A. Tizzano,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 10 May 2005,

after considering the observations submitted on behalf of:

– SEVIC Systems AG, by C. Beul, Rechtsanwalt,

– the German Government, by M. Lumma and A. Dittrich, acting as Agents,

– the Netherlands Government, by H.G. Sevenster and N.A.J. Bel, acting as Agents,

– the Commission of the European Communities, by C. Schmidt and G. Braun, acting as Agents,

after hearing the Opinion of the Advocate General at the hearing on 7 July 2005,

gives the following

Judgment

1 The reference for a preliminary ruling concerns the interpretation of Articles 43 EC and 48 EC.

2 The reference is made in the context of an action brought by SEVIC Systems AG (‘SEVIC’), a company established in Neuwied (Germany), against a decision of the Amtsgericht Neuwied rejecting its application for registration in the national commercial register of the merger between itself and Security Vision Concept SA (‘Security Vision’), a company established in Luxembourg, on the ground that the German law on company transformations provides only for mergers between companies established in Germany.

Legal context

3 Paragraph 1 of the German Law on transforming companies (Umwandlungsgesetz), of 28 October 1994 (BGBl. 1994 I, p. 3210), as amended in 1995 and subsequently (‘the UmwG’), headed ‘Types of transformation, statutory restrictions’, provides:

‘(1) Legal entities established in Germany may be transformed

1. by merger;

2. by demerger … ;

3. by transfer of assets;

4. by change of legal form.

(2) Apart from the cases governed by this law, transformation within the meaning of subparagraph (1) is possible only if express provision is made for it by another federal law, or by a law of a Land.

(3) Derogations from the provisions of this law are possible only if expressly authorised. Supplementary provisions appearing in contracts, memoranda and articles of association or statements of intention are permitted, save where this law makes exhaustive provision.’

4 Paragraph 2 of the UmwG, headed ‘Types of merger’, provides:

‘Legal entities may merge by dissolution without liquidation

1. by way of absorption through the transfer of all the assets of one or more legal entities (the absorbed entities) to another existing legal entity (the absorbing entity) or

2. ...

by the allocation of shares … in the absorbing entity or the new entity to the shareholders … of the absorbed entity.’

5 The other provisions of the UmwG specifically concerning merger by absorption make the merger contract subject to certain conditions (Paragraphs 4 to 6), and require the drawing up of a merger report (Paragraph 8), verification of the merger by experts (Paragraph 9 et seq.), and notification of the merger (Paragraph 16 et seq.) prior to its registration in the commercial register of the place of establishment of the absorbing entity (Paragraph 19). Paragraph 20 et seq. of the UmwG enumerates the effects of registration in that register. Protective provisions in favour of third parties concerned by the merger, particularly creditors, complete the general provisions concerning merger by absorption.

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

6 The merger contract concluded in 2002 between SEVIC and Security Vision provided for the dissolution without liquidation of the latter company and the transfer of the whole of its assets to SEVIC, without any change in the latter's company name.

7 The Amtsgericht Neuwied rejected the application for registration of the merger in the commercial register, arguing that Paragraph 1(1)(1) of the UmwG provides only for mergers between legal entities established in Germany.

8 SEVIC brought an action against that rejection decision before the Landgericht Koblenz.

9 For the Landgericht Koblenz, the question whether registration of the merger between the abovementioned companies in the commercial register can be refused on the basis of Paragraph 1(1)(1) of the UmwG depends on the interpretation of Articles 43 EC and 48 EC in the context of mergers between companies established in Germany and companies established in other Member States ('cross-border mergers').

10 In those circumstances, taking the view that resolution of the dispute before it depended on the interpretation of those EC Treaty provisions, the Landgericht Koblenz decided to stay the proceedings and refer the following question to the Court of Justice for a preliminary ruling:

'Are Articles 43 and 48 EC to be interpreted as meaning that it is contrary to freedom of establishment for companies if a foreign European company is refused registration of its proposed merger with a German company in the German register of companies under Paragraphs 16 et seq. of the Umwandlungsgesetz (Law on transformations), on the ground that Paragraph 1(1)(1) of that law provides only for transformation of legal entities established in Germany?'

The question referred for a preliminary ruling

Preliminary observations

11 SEVIC has applied for registration in the commercial register, in accordance with the UmwG, of the merger with Security Vision, the relevant contract providing for the absorption of the latter company and its dissolution without liquidation.

12 That application was rejected by the Amtsgericht Neuwied on the ground that, in Paragraph 1(1)(1), the UmwG provides that only legal entities established in national territory may be the subject of transformation by merger ('internal mergers') and that, therefore, that law does not apply to transformations resulting from cross-border mergers.

13 In Germany, there are no general rules, analogous to those laid down by that law, which apply to cross-border mergers.

14 There is therefore a difference in treatment in Germany between internal and cross-border mergers.

15 In those circumstances, the question referred by the national court should be understood as asking essentially whether Articles 43 EC and 48 EC preclude registration in the national commercial register of the merger by dissolution without liquidation of one company and transfer of the whole of its assets to another company from being refused in general in a Member State where one of the two companies is established in another Member State, whereas such registration is possible, on compliance with certain conditions, where the two companies participating in the merger are both established in the territory of the first Member State.

Applicability of Articles 43 EC and 48 EC

16 Contrary to the arguments of the German and Netherlands Governments, Articles 43 EC and 48 EC apply to a merger situation such as that at issue in the main proceedings.

17 In accordance with the second paragraph of Article 43 EC, read in conjunction with Article 48 EC, the freedom of establishment for companies referred to in that latter article includes in particular the formation and management of those companies under the conditions defined by the legislation of the State of establishment for its own companies.

18 As the Advocate General points out in point 30 of his Opinion, the right of establishment covers all measures which permit or even merely facilitate access to another Member State and the pursuit of an economic activity in that State by allowing the persons concerned to participate in the economic life of the country effectively and under the same conditions as national operators.

19 Cross-border merger operations, like other company transformation operations, respond to the needs for cooperation and consolidation between companies established in different Member States. They constitute particular methods of exercise of the freedom of establishment, important for the proper functioning of the internal market, and are therefore amongst those economic activities in respect of which Member States are required to comply with the freedom of establishment laid down by Article 43 EC.

The existence of a restriction on the freedom of establishment

20 In this regard, it is sufficient to note that in German law, unlike what exists for internal mergers, there is no provision for registration in the commercial register of cross-border mergers, and that, therefore, applications for the registration of such mergers are generally refused.

21 As the Advocate General has pointed out in point 47 of his Opinion, a merger such as that at issue in the main proceedings constitutes an effective means of transforming companies in that it makes it possible, within the framework of a single operation, to pursue a particular activity in new forms and without intrerruption, thereby reducing the complications, times and costs associated with other forms of company consolidation such as those which entail, for example, the dissolution of a company with liquidation of assets and the subsequent formation of a new company with the transfer of assets to the latter.

22 In so far as, under national rules, recourse to such a means of company transformation is not possible where one of the companies is established in a Member State other than the Federal Republic of Germany, German law establishes a difference in treatment between companies according to the internal or cross-border nature of the merger, which is likely to deter the exercise of the freedom of establishment laid down by the Treaty.

23 Such a difference in treatment constitutes a restriction within the meaning of Articles 43 EC and 48 EC, which is contrary to the right of establishment and can be permitted only if it pursues a legitimate objective compatible with the Treaty and is justified by imperative reasons in the public interest. It is further necessary, in such a case, that its application must be appropriate to ensuring the attainment of the objective thus pursued and must not go beyond what is necessary to attain it (see Case C-436/00 *X and Y* [2002] ECR I-10829, paragraph 49; Case C-9/02 *De Lasteyrie du Saillant* [2004] ECR I-2409, paragraph 49).

Possible justification for the restriction

24 The German and Netherlands Governments argue that internal mergers are subject to

conditions more particularly designed to protect the interests of creditors, minority shareholders and employees, and to preserve the effectiveness of fiscal supervision and the fairness of commercial transactions. They submit in that respect that specific problems arise in relation to cross-border mergers and that the solution to those problems presupposes the existence of specific rules designed to protect those interests in the context of a cross-border merger that involves the application of several national legal systems in a single legal operation. Such rules, they submit, presuppose a harmonisation of the legislation at the Community level.

25 In that context, the Netherlands Government points out that the Commission of the European Communities submitted to the Community legislature on 18 November 2003 the Proposal for a Directive of the European Parliament and of the Council on cross-border mergers of companies with share capital (COM(2003) 703 final), the first and second recitals of which state:

‘(1) The need for cooperation and consolidation between companies from different Member States and the difficulties encountered, at the legislative and administrative levels, by cross-border mergers of companies in the Community make it necessary, with a view to the completion and functioning of the single market, to lay down Community provisions to facilitate the carrying-out of cross-border mergers …

(2)– … The above-mentioned objectives cannot be sufficiently attained by the Member States in so far they involve laying down rules with common features applicable at transnational level; owing to the scale and impact of the proposed action, they can therefore best be achieved at Community level …’

26 It should be noted in that respect that, whilst Community harmonisation rules are useful for facilitating cross-border mergers, the existence of such harmonisation rules cannot be made a precondition for the implementation of the freedom of establishment laid down by Articles 43 EC and 48 EC (see, to that effect, Case C?204/90 *Bachmann* [1992] ECR I?249, paragraph 11).

27 It should nevertheless also be noted that whilst, by reason of the adoption of the Third Council Directive 78/855/EEC of 9 October 1978 based on Article 54 (3) (g) of the Treaty concerning mergers of public limited liability companies (OJ 1978 L 295, p. 36), harmonised rules exist in the Member States concerning internal mergers, cross-border mergers pose specific problems.

28 In that respect, it is not possible to exclude the possibility that imperative reasons in the public interest such as protection of the interests of creditors, minority shareholders and employees (see Case C-208/00 *Überseering* [2002] ECR I-9919, paragraph 92), and the preservation of the effectiveness of fiscal supervision and the fairness of commercial transactions (see Case C-167/01 *Inspire Art* [2003] ECR I?10155, paragraph 132), may, in certain circumstances and under certain conditions, justify a measure restricting the freedom of establishment.

29 But such a restrictive measure would also have to be appropriate for ensuring the attainment of the objectives pursued and not go beyond what is necessary to attain them.

30 To refuse generally, in a Member State, to register in the commercial register a merger between a company established in that State and one established in another Member State has the result of preventing the realisation of cross-border mergers even if the interests mentioned in paragraph 28 of this judgment are not threatened. In any event, such a rule goes beyond what is necessary to protect those interests.

31 In those circumstances, the answer to the question referred must be that Articles 43 EC and

48 EC preclude registration in the national commercial register of the merger by dissolution without liquidation of one company and transfer of the whole of its assets to another company from being refused in general in a Member State where one of the two companies is established in another Member State, whereas such registration is possible, on compliance with certain conditions, where the two companies participating in the merger are both established in the territory of the first Member State.

Costs

32 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 (Grand Chamber) hereby rules:

Articles 43 EC and 48 EC preclude registration in the national commercial register of the merger by dissolution without liquidation of one company and transfer of the whole of its assets to another company from being refused in general in a Member State where one of the two companies is established in another Member State, whereas such registration is possible, on compliance with certain conditions, where the two companies participating in the merger are both established in the territory of the first Member State.

[Signatures]

* Language of the case: German.