ORDER OF THE COURT (Fifth Chamber)
22 January 2002 *

In Case C-447/00,

REFERENCE to the Court under Article 234 EC by the Landesgericht Salzburg (Austria) for a preliminary ruling concerning the application for registration in the commercial register made to that court by

Holto Ltd,

on the interpretation of Articles 43 EC and 48 EC,

THE COURT (Fifth Chamber),

composed of: P. Jann, President of the Chamber, D.A.O. Edward, A. La Pergola, M. Wathelet (Rapporteur) and C.W.A. Timmermans, Judges,

* Language of the case: German.

Advocate General: S. Alber,

Registrar: R. Grass,

after hearing the Advocate General,

makes the following

Order

1 By order of 27 November 2000, received at the Court on 4 December 2000, the Landesgericht Salzburg referred to the Court for a preliminary ruling under Article 234 EC five questions on the interpretation of Articles 43 EC and 48 EC.

2 The questions arose in the context of an application made by Holto Ltd (hereinafter 'Holto'), a company constituted under the law of England and Wales, for the registration of its branch established in Austria in the Austrian Commercial Register.

The main proceedings and the questions referred for a preliminary ruling

3 Holto was established on 19 October 2000 as a private limited company in accordance with the Companies Act 1985. It is recorded in the Register of Companies for England and Wales under number 4093079. In the memorandum of association, its registered office is stated to be in Southampton (United Kingdom). The nominal share capital is GBP 100 divided into 100 shares of GBP 1 each.

4 When the company was first established, Lise Lohse and Melvyn John Lohse, two shareholders residing in Southampton, were director and company secretary respectively.

5 On 20 October 2000, Mr and Ms Lohse transferred their shares to Wolfgang Holzer and Erika Tockner, domiciled in Hallein (Austria), who were also appointed directors of Holto. It was decided that the company secretary, Mr Lohse, should send Form 288A, concerning the appointment of a director or secretary, to Companies House for registration and that the registered office of the company would be Mede House, Salisbury Street, Southampton SO15 2TZ. It was also decided that from then on Holto would be managed from Austria and that its bookkeeping would be carried out there.

6 Moreover, the Landesgericht Salzburg points out that because Holto conducts no business in the United Kingdom, no registration for tax purposes in that Member State was required, the company paying its taxes in Austria.

7 By written application of 30 October 2000, received by the Landesgericht Salzburg on 2 November 2000, Mr Holzer and Ms Tockner applied to have Holto entered in the Austrian Commercial Register together with its Austrian branch, established in Hallein.

8 The Landesgericht Salzburg is asking whether, in those circumstances, the registration applied for falls under secondary freedom of establishment, ensured by the second sentence of the first paragraph of Article 43 EC, or under primary freedom of establishment, ensured by the first sentence of the first paragraph of Article 43 EC.

9 Assuming one of the types of freedom of establishment under Article 43 EC is applicable, the question is raised as to whether the provisions of the Treaty on freedom of establishment preclude national rules applying the 'seat theory', according to which the legal capacity of a company is determined by the law of the State in which the actual seat of the central company administration is located, so that recognition of the legal capacity of a company constituted in accordance with the law of that State is subject to certain conditions in a Member State other than that in which it has such capacity.

10 In this regard the Landesgericht Salzburg explains that the relevant Austrian rules stem from the Bundesgesetz über das internationale Privatrecht (Austrian Federal Law on Private International Law, hereinafter 'the IPRG'). According to Paragraph 12 of the IPRG, the capacity of a person to be a subject of legal rights and duties and to act in such a way as to produce legal consequences is to be determined in accordance with the law governing that person, which, under Paragraph 10 of the IPRG, is the Law of the State in which 'the legal entity has the actual seat of its central administration'.

11 The national court making the reference states that on the basis of these provisions, until a judgment of the Oberster Gerichtshof of 15 July 1999 (Case 6 Ob 123/99 b), the Austrian courts applied provisions of domestic law to companies constituted in accordance with the legislation of another State but having the actual seat of their central administration in Austria (the seat theory). Under those provisions a company acquires legal personality and capacity only from the date when it is entered in the Austrian Companies Register. It follows that a company properly constituted under foreign law but having the actual seat of its central administration in Austria is not recognised by Austrian courts as a legal person having legal capacity and thus may not be entered in the Commercial Register, on the ground that it has failed to satisfy all the procedural and substantive conditions required for the constitution of companies under Austrian law.

12 However, in a case where the factual circumstances were comparable to those which gave rise to the judgment in Case C-212/97 *Centros* [1999] ECR I-1459, the Oberster Gerichtshof considered that a preliminary reference to the Court was unnecessary and held that Paragraph 10 of the IPRG was no longer applicable to intra-Community situations because of the primacy of Community law (Case 6 Ob 123/99 b, cited above). According to that court, with regard to the creation of a branch in Austria, the legal capacity of a legal person constituted under the law of another Member State should therefore be evaluated in accordance with the laws of the State in which that legal person was constituted, insofar as its statutory head office or central administration, or even its principal place of business, is in a Member State.

13 However, the Landesgericht Salzburg considers that in the *Centros* case, cited above, the Court did not rule on the applicability of the seat theory nor, more generally, on the evaluation of the legal capacity of companies in the Community as regards conflict of law rules. According to the Landesgericht Salzburg, since the case that gave rise to the *Centros* decision concerned two Member States applying the said 'Gründungstheorie' (formation theory), the problem of the non-recognition of legal capacity on the basis of national conflict of law rules did not arise.

14 On the other hand, according to the national court, the considerations set out by the Court in paragraphs 19 to 21 of Case 81/87 *Daily Mail and General Trust* [1988] ECR 5483 appeared to have some relevance for the purposes of the present case, insofar as it might be deduced from that judgment that a private international law rule of a Member State which, by taking as the connecting factor the actual seat of the central administration of a company, entails, under certain circumstances, refusal of recognition as a legal person having legal capacity of a company properly constituted under the law of another Member State is compatible with Community law. However, for the Landesgericht Salzburg those observations are not directly transposable to the case before it.

15 The national court considered it necessary, before reaching a decision, to ask the Court whether Articles 43 EC and 48 EC preclude national provisions such as

those resulting from the seat theory, since the Court's case-law, in particular the above-cited judgments in *Daily Mail and General Trust* and *Centros*, does not provide an answer to that question. In those circumstances the Landesgericht Salzburg decided to stay proceedings and to refer the following questions to the Court for preliminary ruling:

'(1) Is the second sentence of the first paragraph of Article 43 EC to be interpreted as meaning that a branch may exist even if a company within the meaning of Article 48 EC does not have a principal place of business where it conducts at least a substantial part of its business activity anywhere else?

If so:

(2) Is the second sentence of the first paragraph of Article 43 EC to be interpreted as meaning that the requirement of establishment is fulfilled if a company merely has its seat as declared in its constitution in a Member State in which it was effectively constituted and conducts no business there?

If so:

(3) Is the establishment of an Austrian branch of a company that has been effectively constituted under English law but merely has its seat as declared in its constitution in England and conducts no business there covered by the rights under the second sentence of the first paragraph of Article 43 EC and by Article 48 EC?

If any of Questions 1, 2 or 3 are answered in the negative:

(4) Is the establishment of an Austrian branch and its entry in the Austrian Companies Register (Commercial Register) by a company effectively constituted under English law which merely has its seat as declared in its constitution in England and conducts no business there covered by the rights under the first sentence of the first paragraph of Article 43 EC and Article 48 EC?

If either Question 3 or Question 4 is answered in the affirmative:

(5) Do Articles 43 EC and 48 EC prohibit the application of a domestic conflict of laws rule which determines the legal capacity of a company in accordance with the law of the State in which the company has the actual seat of its central administration (the seat theory), even if, as a result, a company that has been effectively constituted under English law but merely has its seat as declared in its constitution in England and conducts no business there is refused recognition as a legal person and consequently refused entry in the Companies Register (Commercial Register)?'

Jurisdiction of the Court

16 Under Article 92(1) of the Rules of Procedure, where it is clear that the Court has no jurisdiction to take cognisance of an action or where the action is manifestly inadmissible, the Court may, after hearing the Advocate General and without taking further steps in the proceedings, give a decision on the action by reasoned order.

17 According to settled case-law, it follows from Article 234 EC that a national court may refer a question to the Court only if there is a case pending before it and if it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature (orders in Case 318/85 *Greis Unterweger* [1986] ECR 955, paragraph 4, and Case C-86/00 *HSB-Wohnbau* [2001] ECR I-5353, paragraph 11, and judgments in Case C-111/94 *Job Centre* ('*Job Centre I*') [1995] ECR I-3361, paragraph 9, Case C-134/97 *Victoria Film* [1998] ECR I-7023, paragraph 14, and Case C-178/99 *Salzmann* [2001] ECR I-4421, paragraph 14).

18 In *Job Centre I* the reference for a preliminary ruling came from the Tribunale civile e penale di Milano (Civil and Criminal District Court, Milan), Italy, and concerned an application for confirmation of a company's articles of association, which in Italy is examined in non-contentious proceedings (*giurisdizione volontaria*). In paragraph 11 of the judgment, the Court held that it had no jurisdiction to rule on the reference, on the ground that when, in accordance with the applicable national legislation and under the *giurisdizione volontaria* procedure, the Tribunale civile e penale rules on an application for confirmation of a company's articles of association with a view to its registration, it is performing a non-judicial function which in other Member States is entrusted to administrative authorities. The Court considered that the national court was exercising administrative authority without being at the same time called upon to settle any dispute.

19 Also in paragraph 11 of that judgment, the Court stated that only if the person empowered under national law to apply for confirmation seeks judicial review of a decision rejecting the application, and thus refusing registration, may the court seised be regarded as exercising a judicial function, for the purposes of Article 177 of the EC Treaty (now Article 234 EC), in respect of an application for the annulment of a measure adversely affecting the petitioner.

20 In the present case it is apparent from the order for reference that the Landesgericht Salzburg made the reference for a preliminary ruling to the Court in its capacity as an authority responsible for keeping the commercial register in a

case concerning an entry in that register. There is nothing in the case-file to indicate that there is a dispute pending before the Landesgericht Salzburg between Holto and any defendant.

21 Moreover, it does not appear from the documents before the Court that the situation of Holto gave rise, before the Landesgericht Salzburg made the reference to a decision against which an application for review was made to the Landesgericht. That court is thus the first authority to have before it the application for entry in the commercial register of the Austrian branch of Holto.

22 It follows that in the main proceedings the Landesgericht Salzburg, which made the reference to the Court in order to ascertain whether or not the decision it has to take under Austrian law is compatible with Community law, is peforming a non-judicial function.

23 Consequently Article 92(1) of the Rules of Procedure must be applied and it must be held that the Court clearly lacks jurisdiction to rule on the questions referred by the Landesgericht Salzburg.

Costs

24 The costs incurred by the German, Italian, Dutch and British Governments and by the Commission and the EFTA Surveillance Authority, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber)

hereby orders:

The Court of Justice of the European Communities clearly lacks jurisdiction to answer the questions put by the Landesgericht Salzburg in its order of 27 November 2000.

Luxembourg, 22 January 2002.

R. Grass

Registrar

P. Jann

President of the Fifth Chamber