Reports of Cases

OPINION OF ADVOCATE GENERAL
JÄÄSKINEN
delivered on 15 December 2011 [1]

Case C-378/10

VALE Építési kft

(Reference for a preliminary ruling from the Magyar Köztársaság Legfelsőbb Bíróság (Hungary))

(Freedom of establishment — Articles 49 TFEU and 54 TFEU — Transfer of the seat of a company governed by the law of a Member State to another Member State with a change in the national law applicable ('cross-border reincorporation of a limited company') — National legislation not permitting registration in the national commercial register of a company incorporated in another Member State as the predecessor in law of a company — National legislation permitting the registration of such a company if the predecessor is a company incorporated in Hungary)

I – Introduction

1. The present reference for a preliminary ruling concerns the issue of the cross-border movement of companies within the single market. The reference made to the Court relates to the interpretation of Articles 43 EC and 48 EC (now Articles 49 TFEU and 54 TFEU) and has been lodged in the context of non-contentious proceedings following the cross-border transfer of a company governed by Italian law to Hungary by means of the transfer of its seat, entailing its removal from the Italian commercial register, a change in the applicable law and its reincorporation as a company governed by Hungarian law which claims to be the universal successor to the Italian company.

2. The Hungarian legislation at issue in this case permits a company incorporated in Hungary to be registered in the national commercial register as the predecessor in law of a company. By contrast, the legislation does not permit such registration if the predecessor is a company formed in another Member State, as is the case in the main proceedings.

3. The present case is one in a line of cases before the Court concerning European company law, such as *Daily Mail and General Trust*, *Centros*, *Überseering*, *Inspire Art*, *SEVIC Systems* and *Cartesio*. [2] However, it introduces a new element as the Court is asked to give a ruling on the extent of a host Member State's obligations in the case of the 'cross-border reincorporation of a limited company'. [3]

1 — Original language: French.

2 — Case 81/87 *Daily Mail and General Trust* [1988] ECR 5483; Case C-212/97 *Centros* [1999] ECR I-1459; Case C-208/00 *Überseering* [2002] ECR I-9919; Case C-167/01 *Inspire Art* [2003] ECR I-10155; Case C-411/03 *SEVIC Systems* [2005] ECR I-10805; and Case C-210/06 *Cartesio* [2008] ECR I-9641.

3 — In the present Opinion, I shall refer to the operation which has given rise to the case in the main proceedings as 'a cross-border reincorporation of a limited company'. The reasons for this will be set out below.

II – The legal context

A – *European Union law*

4. Neither the primary nor the secondary law of the European Union contains any provisions governing the cross-border reincorporation of a company established in a Member State or the international transfer of the seat of such a company. [4]

5. However, Article 8 of Council Regulation (EC) No 2157/2001 of 8 October 2001 on the statute for a European company (SE) [5] sets out detailed provisions for the transfer of the seat of an SE. Likewise, Council Regulation (EC) No 1435/2003 of 22 July 2003 on the statute for a European cooperative society (ECS) [6] enables European cooperative societies to transfer their seat. In addition, Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies [7] lays down a legal framework for such mergers.

B – *National law*

6. The crucial provisions of national law are contained in two measures. [8]

7. The first is Law V of 200 6 on Public Company Information, Company Registration and Winding-up Proceedings (A cégnyilvánosságról, a bírósági cégeljárásról és a végelszámolásról szóló 2006. évi V. törvény) [9] ('Company Registration Law'). The relevant provisions of that law are set out in Paragraphs 24 to 29 and 57(4).

8. The other is Law IV of 2006 on Commercial Companies (A gazdasági társaságokról szóló 2006. évi IV. törvény) [10] ('Commercial Companies Law'). The provisions of that law which are relevant for the purpose of the present proceedings are set out in Paragraphs 3, 69(1), 71, 73, 74 and 75.

III – The dispute in the main proceedings and the questions referred

9. VALE Costruzioni Srl ('VALE Costruzioni'), a limited liability company governed by Italian law, was registered in the Rome (Italy) commercial register on 16 November 2000.

10. On 3 February 2006 VALE Costruzioni asked to be removed from that register on the ground that it intended to transfer its seat and its business to Hungary and to discontinue business in Italy.

11. In accordance with the request, the authority responsible for keeping the register in Rome removed VALE Costruzioni from the register on 13 February 2006. As appears from the file, an entry was made in the register under the heading 'Removal and transfer of seat', stating that 'the company has moved to Hungary'. The extract from the Italian commercial register shows that VALE Costruzioni designated Hungary as the country of its seat, giving an address in Budapest (Hungary).

4 — It may be mentioned that, in its communication of 21 May 2003 concerning the modernisation of company law (COM(2003) 284 final), the Commission of the European Communities gave notice of its intention to present a proposal for a 14th company law directive on the transfer of the seat from one Member State to another and opened a public consultation on the subject which closed on 15 April 2004. However, the Commission has not yet adopted a proposal.

5 — OJ 2001 L 294, p. 1.

6 — OJ 2003 L 207, p. 1.

7 — OJ 2005 L 310, p. 1.

8 — The wording of these measures is set out, in so far as it appears relevant, in the following points.

9 — *Magyar Közlöny* 2006/1 (I.4.), 4 January 2006, p. 99.

10 — *Magyar Közlöny* 2006/1 (I.4.), 4 January 2006, p. 24.

12. On 14 November 2006, that is to say, nine months later, in Rome, the managing director of VALE Costruzioni and another natural person adopted the articles of association of VALE Építési kft ('VALE Építési'), a limited liability company governed by Hungarian law, with a view to registration in the Hungarian commercial register. The preamble to the instrument of incorporation states that 'the company originally established in Italy in accordance with Italian law has decided to transfer its seat to Hungary and to conduct business in accordance with Hungarian law'. According to the instrument of incorporation, one half of the share capital was paid to the extent required under Hungarian law and paid into an account opened in the name of VALE Építési in Hungary on 14 December 2006. The instrument of incorporation shows the seat at the same address in Budapest.

13. On 19 January 2007 the representative of VALE Építési lodged an application at the Fővárosi Bíróság (Budapest Metropolitan Court, Hungary), acting as the Cégbíróság (Companies Court), for the registration of the company in accordance with Hungarian law. The application refers to VALE Costruzioni as the predecessor in law of VALE Építési.

14. The abovementioned court, which is responsible in the first instance for keeping the register, refused the application for registration by VALE Építési. On appeal by the company, the order for refusal was upheld by the Fővárosi Ítélőtábla (Regional Court of Appeal of Budapest). According to the judgment, the company, which was incorporated and registered in Italy, cannot, by virtue of Hungarian company law, transfer its seat to Hungary and cannot obtain registration there in the form requested. According to the Fővárosi Ítélőtábla, under the Company Registration Law, a company which is not Hungarian cannot be shown as predecessor in law. The only particulars which can be shown in the commercial register are those listed in Paragraphs 24 to 29 of the Company Registration Law.

15. VALE Építési brought an appeal on a point of law before the referring court, the Magyar Köztársaság Legfelsőbb Bírósága (Supreme Court of Hungary). VALE Építési claimed that the contested decision infringed the provisions of Articles 43 EC and 48 EC, which were directly applicable, because the decision made no distinction between, on the one hand, the international transfer of a company's seat, which does not involve a change in its original legal personality nor a change in the law applicable, and, on the other hand, the international conversion of a company, which does entail such change.

16. According to the referring court, the practical difficulty in the present case is that the commercial register is organised according to a 'box' system, the content of the different boxes being determined by Paragraphs 24 to 29 of the Company Registration Law. An undertaking wishing to exercise its freedom of establishment, not by transferring its seat to Hungary, but by forming a new Hungarian company, and wishing to show in its articles of association that it previously operated in a different Member State, can refer to that circumstance only by stating the date of conversion. On that point, the referring court upholds the assessment by the Fővárosi Bíróság in finding that a transfer of seat entailing the reincorporation of the company in accordance with Hungarian law and a reference to the original Italian company, as requested by VALE Építési, cannot be considered a conversion under Hungarian law.

17. In those circumstances, the national court decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must the host Member State pay due regard to Articles 43 [EC] and 48 EC when a company established in another Member State (the Member State of origin) transfers its seat to that host Member State and, at the same time and for this purpose, deletes the entry regarding it in the commercial register in the Member State of origin, and the company's owners adopt a new instrument of constitution under the laws of the host Member State, and the company applies for registration in the commercial register of the host Member State under the laws of the host Member State?

(2) If the answer to the first question is yes, must Articles 43 [EC] and 48 EC be interpreted in such a case as meaning that they preclude legislation or practices of such a (host) Member State which prohibit a company established lawfully in any other Member State (the Member State of origin) from transferring its seat to the host Member State and continuing to operate under the laws of that State?

(3) With regard to the response to the second question, is the basis on which the host Member State prohibits the company from registration of any relevance, specifically:

— if, in its instrument of constitution adopted in the host Member State, the company designates as its predecessor the company established and deleted from the commercial register in the Member State of origin, and applies for the predecessor to be registered as its own predecessor in the commercial register of the host Member State?

— in the event of international conversion within the Community, when deciding on a company's application for registration, must the host Member State take into consideration the instrument recording the fact of the transfer of company seat in the commercial register of the Member State of origin, and, if so, to what extent?

(4) Is the host Member State entitled to decide on the application for company registration lodged in the host Member State by the company carrying out international conversion within the Community in accordance with the rules of company law of the host Member State as they relate to the conversion of domestic companies, and to require the company to fulfil all the conditions (e.g. by drawing up lists of assets and liabilities and property inventories) laid down by the company law of the host Member State in respect of domestic conversion, or is the host Member State obliged under Articles 43 [EC] and 48 EC to distinguish international conversion within the Community from domestic conversion and, if so, to what extent?'

IV – The procedure before the Court

18. The reference for a preliminary ruling was received at the Court Registry on 28 July 2010. Written observations were submitted by VALE Építési, the Hungarian and German Governments, Ireland, the Italian, Austrian and United Kingdom Governments, the Commission and the EFTA Surveillance Authority.

19. To supplement the information in the file, the Court sent the Italian Government and the representative of VALE Építési some questions to be answered in writing concerning the scope of the provisions of Italian law and the facts of the case. The answers were received at the Court Registry on 22 July 2011.

20. VALE Építési, the Hungarian and German Governments, Ireland, the Italian, Austrian and United Kingdom Governments, the Commission and the EFTA Surveillance Authority were represented at the hearing on 14 September 2011.

V – Assessment

A – *Introductory remarks*

21. The questions from the referring court seek to establish whether European Union law applies, and if so, with what effects, to the case of a transfer of the seat, or conversion, of a limited company duly formed in Member State A and then removed from the commercial register of that Member State with a view to transfer to, and registration in, Member State B, with a change in the applicable law.

As Hungarian law does not authorise the registration of such a company with a reference to a company of another Member State as its legal predecessor, the referring court asks the Court of Justice how to resolve the case at hand in the light of the provisions of European Union law on the freedom of establishment.

22. In view of the issues before the Court, I propose to deal with the questions in two parts, the first concerning the applicability of Articles 49 TFEU and 54 TFEU[11] in relation to the conversion of companies, and the second concerning the effects of the provisions on the freedom of establishment on national provisions which may constitute restrictions on the freedom of establishment.

23. However, three points should be mentioned before I consider the questions referred. First, certain parties question whether the reference to the Court is admissible. Second, I think the terminology to be used must be clarified. Third, a final crucial preliminary issue is the existence in law of VALE Costruzioni at the date of lodging of the application for registration in Hungary.

B – *Admissibility*

24. In their written observations, the United Kingdom Government and the EFTA Surveillance Authority observe, with regard to the last two questions, that the order for reference contains gaps which could result in the questions being inadmissible. They submit that the order does not specify the legal consequences under Italian law of the removal of VALE Costruzioni from the commercial register. The Hungarian Government and the Commission submit that it is not clear from the order whether VALE Costruzioni carried on a business after its removal from the register. The Hungarian, Austrian and United Kingdom Governments add that the articles of association of VALE Építési were approved by persons some of whom were not shareholders of VALE Costruzioni. Finally, according to Ireland, it is not clear whether the transfer of the company's 'seat' means the registered office or actual office.

25. However, I think there is no doubt that the questions referred are admissible. In my opinion, this follows from the Court's case-law which states that, in proceedings under Article 267 TFEU, where the questions submitted concern the interpretation of European Union law, the Court is in principle bound to give a ruling.[12] The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of European Union law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it.[13]

26. That is clearly not the case here. In spite of the vagueness of the order for reference with regard to specific aspects of Italian law, it seems to me that the Court has sufficient information to enable it to give a ruling. The questions are reasonably within the legal and factual framework and relate to a genuine problem which may have cross-cutting effects for the whole of the single market. Furthermore, the questions have not yet received precise answers from the Court.

27. Moreover, the problem of the legal effects attaching to the removal of a limited company from the Italian commercial register, a fact expressly mentioned by the national court, appears particularly complex and it has given rise to considerable disagreement.

11 — New numbering following the entry into force of the Treaty of Lisbon.

12 — See, inter alia, Joined Cases C-395/08 and C-396/08 *Bruno and Others* [2010] ECR I-5119, paragraph 18 and the case-law cited.

13 — As regards settled case-law, see, inter alia, Joined Cases C-222/05 to C-225/05 *van de Weerd and Others* [2007] ECR I-4233, paragraph 22; Joined Cases C-188/10 and C-189/10 *Melki and Abdeli* [2010] ECR I-5667, paragraph 27; and *Bruno and Others*, paragraph 19.

C – Precise definition to be given to the present case

28. I think it is essential to clarify the terminology to be used to describe the nature of the act of formation of VALE Építési by persons carrying on a business in the form of a limited liability company governed by Italian law, that is to say, VALE Costruzioni, with the intention that VALE Építési should succeed to the rights of VALE Costruzioni. On that point, the first question that arises is whether similar situations exist under Hungarian national law.

29. It appears from the file that a limited liability company governed by Hungarian law can of course transfer its seat from one place to another within the country. In that case, there is no change in the legal form or the applicable law, and the legal person remains the same.

30. In addition, under Hungarian law, 'a commercial company may be formed by means of conversion (that is to say, by changing the company form, by merger or by division)'.[14] For example, a limited liability company may be converted into a joint stock company. When the company form is changed, a new legal person is created, but it is the universal successor to the converted legal person which loses its legal capacity at the time of conversion.[15] Under the Hungarian legislation, a change in company form may also be effected by transfer of the seat within the country.[16]

31. The operation carried out in the present case differs from a transfer of the seat at the national level in so far as that operation necessitates the constitution of a new legal person and the removal of the existing company from the register because the Hungarian legislation makes no provision for the cross-border transfer of the seat of a company incorporated in another country.

32. In addition, the referring court points out that, under Hungarian law, the case of a move by a company, such as that which is the subject of the main proceedings, cannot be described as 'conversion of a company' because Hungarian company law has only the three forms of conversion mentioned above.

33. Furthermore, under European Union law, VALE Costruzioni and VALE Építési have the same company form, that of a limited liability company.[17] It is clear that there is no need, in the national legal system, to provide for the conversion of a limited liability company into a company of the same type if it is not a question of a merger or division.

34. Therefore, I think it is necessary to describe the operation in this case as a 'cross-border reincorporation of a company'. This entails the transfer of the seat with a change in the applicable law (resulting from the need to form a new company in accordance with the law of the host Member State in order to be able to continue the business of the original company), and also the removal of the original company from the register in the country of origin.

14 — See Paragraph 3(3) of the Commercial Companies Law.

15 — See Paragraph 70(1) of the Commercial Companies Law. Under Paragraph 57(3) of the Company Registration Law, 'in the event of a change in the company form, the commercial court within whose territorial jurisdiction the seat of the predecessor in law is situated shall be notified of the conversion of the company within 60 days from the signature or adoption of the instrument of constitution. The declaration shall be accompanied by an application for the removal of the predecessor from the register'. It appears from the wording of the provision that the change in company form is regarded more as a universal succession as between two legal persons with the same identity than as a conversion of one and the same legal person.

16 — See Paragraph 57(4) of the Company Registration Law.

17 — For the regime for such companies at the European level, see, for example, De Kluiver, H.-J., 'Europe and the Private Company — An Introduction', in De Kluiver, H.-J. and Van Gerven, W.M. (eds), *The European Private Company?*, Maklu, Antwerp, 1995, p. 23. I observe that this form of company falls within the scope of First Council Directive 68/151/EEC of 9 March 1968 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community (OJ, English Special Edition 1968 (I), p. 41, see Article 1 thereof), but is excluded from the ambit of Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (OJ 1977 L 26, p. 1, see also Article 1 thereof).

35. I also observe that the companies and their shareholders could have achieved their object also by carrying out a cross-border merger whereby VALE Costruzioni would have merged with VALE Építési in accordance with Directive 2005/56. [18]

D – *The existence in law of VALE Costruzioni under Italian law*

1. Preliminary observations

36. As the Court has pointed out on a number of occasions, companies exist only by virtue of the national legislation which determines their incorporation and functioning. [19] From that point of view, the present case involves the conversion of a limited liability company governed by Italian law into a limited liability company governed by Hungarian law. However, a conversion of that kind is not at present provided for under European Union law [20] or Hungarian law.

37. It must be noted that the applicant in the context of the registration procedure in Hungary is a Hungarian company in formation (VALE Építési) which, it seems, has a limited capacity to act in procedural matters although it is not registered. Furthermore, according to the information given at the hearing by the representative of VALE Építési, the company has assets in the form of part of the share capital required for registration, as well as directors and shareholders who, however, are not the same as those of the Italian company.

38. As VALE Costruzioni has been removed from the commercial register in Italy, the question that arises is whether a predecessor of VALE Építési actually exists.

39. As it was necessary to clarify a number of points of national law, VALE Építési and the Italian Government were asked by the Court to reply to some supplementary questions.

2. Positions taken by VALE Építési and the Italian Government

40. The first question put to the Italian Government by the Court concerned the conditions to be fulfilled by an Italian company wishing to convert into a company governed by the law of another Member State by means of transferring the seat. In reply, the Italian Government confirms that Italian law permits the legal seat of a company incorporated in Italy to be moved to another State. Under Italian law, a transfer of seat is effective only if it is carried out in accordance with the legislation of the two Member States concerned. According to the Italian Government, the company continues to exist as a legal person governed by Italian law only if the States between which it moves agree on the effects of that move. If, in addition to transferring the seat, the company wishes no longer to be governed by Italian law, it can be removed from the register only after it has been registered abroad. [21]

41. The Court's second question to the Italian Government concerned the effects under Italian law of the removal of a company from the register. According to the Italian Government, following the reform of Italian company law in 2003, the removal of a limited company from the register means that the company ceases to exist. However, the question remains where legal relationships or assets subsist or appear after removal from the register. However, it is possible to annul the removal of a limited company from the register, which means that the company is still considered to be active until

18 — The technique of cross-border merger is frequently used in the United States in order to change the law applicable to an undertaking from one federal state to another, see Armour, J. and Ringe, W.-G., 'European Company Law 1999-2010: Renaissance and Crisis', *Common Market Law Review*, Vol. 48 (2011), No 1, pp. 125 to 174, in particular pp. 161 and 162.

19 — *Daily Mail and General Trust*, paragraph 19, and *Cartesio*, paragraph 104.

20 — See COM(2003) 284 final.

21 — It must be said that in the present case the Italian authorities do not appear to have complied with that chronological order.

proof of the contrary. At the hearing, the Italian Government pointed out that the entry 'transferred to Hungary' at present appearing in the commercial register could be annulled with retroactive effect, by an application for annulment by the shareholders, if the removal of the company from the register had been based on an unlawful decision. If that were so, the problem concerning the existence or non-existence of VALE Costruzioni would necessarily have disappeared.

42. The question to VALE Építési concerned in particular the factors showing an intention to convert on the part of VALE Costruzioni. In reply, VALE Építési states repeatedly that the conversion and the transfer of the seat of VALE Costruzioni to Hungary are based on a genuine intention actually to carry on business permanently. VALE Építési claims that that resolution, which was duly adopted by VALE Costruzioni well before the company was removed from the commercial register, proves a settled and express intention which is not affected by the — relatively long — period of time between the removal of VALE Costruzioni from the register in Italy and the application for registration by VALE Építési in Hungary.

3. Assessment

43. In view of the foregoing, the situation can be examined from two different angles.

44. First, VALE Costruzioni no longer exists for the purposes of Italian law and the transfer which has been accepted by Italian law cannot be completed because the company no longer exists. However, the questions then arise as to whom the company's assets belong, in particular the capital paid up with a view to registration in Hungary, and who is liable for the company's obligations towards third parties. [22] In particular, the nature of the relationship between the shareholders of the company which has been removed from the register must be examined.

45. Second, VALE Építési does not yet exist as a legal person under Hungarian law since registration of the company in Hungary was refused. However, the company in formation had the legal capacity required to initiate proceedings as a party before the national court and before the Court of Justice.

46. Those two aspects are capable of giving rise to metaphysical discussions of academic theories concerning the existence and nature of legal persons, in particular the continuity of their identity in time in the event of conversion or succession. However, I think that, for the purpose of applying the European Union law provisions on the freedom of establishment, the practical realities of trade and commerce are of more concern than the theoretical aspects of the law governing legal persons.

47. In that connection, I should like to call to mind the words of Advocate General Darmon in the *Daily Mail and General Trust* case concerning the purpose of the freedom of establishment. He observed that establishment 'means integration into a national economy' and that '[t]he concept of establishment itself is essentially an economic one. It always implies a genuine economic link'. [23] In addition, as Advocate General La Pergola observed in the *Centros* case, '[t]he right of establishment is essential to the achievement of the objectives set in the [EC] Treaty, the purpose of which is to guarantee to all Community citizens alike the freedom to engage in business activities through the instruments provided by national law, thus giving them the chance to enter the market' and 'it is the opportunity to exercise business activities that is protected, and with it the contractual freedom to make use of the instruments provided for that purpose in the legal systems of the Member States'. [24]

22 — This question appears particularly relevant where the company has not been liquidated. According to *Cartesio*, paragraph 112, the Italian Republic was unable to require liquidation as a prior condition for the transfer of the seat, accompanied by a change in the applicable law.

23 — Opinion of Advocate General Darmon in *Daily Mail and General Trust*, points 3 and 5.

24 — Opinion of Advocate General La Pergola in *Centros*, point 20.

48. The case of VALE Costruzioni involves a business entity formed under Italian law by the shareholders, their mutual obligations, company assets and a company object of carrying on the business of VALE Costruzioni in Hungary in the form of a corresponding company governed by Hungarian law. Even though that entity has lost its legal personality under Italian law and its successor has not yet acquired it under Hungarian law, VALE Építési or its shareholders ought to be able to rely on the freedom of establishment in Hungary in order to continue a business there, as laid down in the articles of association of the company which was removed from the register and in those of the company in formation.

49. This aspect of the shareholders' intention seems to me of primary importance in considering whether the freedom of establishment is applicable.[25] It is not the Italian company, which is probably non-existent as matters stand, although it may be brought back to life, but the Hungarian company in formation and the natural persons who are its members who are relying on the freedom of establishment.

50. That being so, it is of little consequence, in relation to the freedom of establishment, whether VALE Costruzioni continued in existence after February 2006 or whether it ceased to exist prematurely as a result of a register entry which may have been mistaken and which is said to have been made in the Rome commercial register. In any case, there are natural persons in existence, nationals of a Member State, who have exercised the freedom of establishment in one Member State and who still intend to exercise it in another. Therefore, the situation falls within the scope of either Article 54 TFEU or Article 49 TFEU.

51. Regarding the applicability of the abovementioned provisions of the Treaty on the Functioning of the European Union (TFEU), I wish to make it clear that the nationality of the members should not play a decisive role. If they are Italian nationals, the cross-border element to Hungary exists and, even if they were Hungarian nationals, the outcome would be the same because, in that case, the members would be repatriating the undertaking from Italy to their country of origin.

52. On the other hand, the continued legal existence of the first company at the date of the legal birth of the company intended to succeed it in law presents another aspect relating to the conditions laid down by the host Member State for the company in formation to be considered the successor to the first company. The Italian legislation and the corresponding provisions of European Union law[26] start from the principle that succession is possible only if the successor exists before the predecessor loses its legal capacity. The scope of this principle must be considered in the context of the third and fourth questions.

E – *Applicability of the freedom of establishment in the present case (first and second questions)*

53. The movement of companies within the single market may take many forms, such as the formation of subsidiaries or branches, the transfer of the seat or a cross-border merger. The company law problems relate to, first, the freedom of establishment, at the level of primary law, and, second, specific legislative implementation, at the level of secondary law.

54. It is well known that legislative harmonisation in this field is far from complete in the European Union. However, the European Union legislature has already taken action in specific areas.

25 — I recall that the articles of association of VALE Építési were approved by shareholders some of whom were not shareholders of VALE Costruzioni.

26 — See Article 8 of Regulation No 2157/2001, which states that deletion of the old registration is to be effected only after the new registration. See also, *mutatis mutandis*, Article 13 of Directive 2005/56.

55. For example, Regulation No 2157/2001 [27] provides that a European company may transfer its seat from one Member State to another and retain its legal personality, without the transfer giving rise to the creation of a new legal person. However, a transfer necessarily entails a change in the national law applicable to the company. Likewise Regulation No 1435/2003 [28] permits the transfer of the seat in the case of European cooperative societies. Furthermore, Directive 2005/56 covers situations where a company merges with a company incorporated in another Member State.

56. Consequently, the phenomenon of transfer of the seat is not unknown in European Union law. Of course, the possibility provided for by the abovementioned legislative measures applies only to the types of companies which are covered by those measures. Nevertheless, the possibility exists and the approach proposed by the European Union legislature is fairly consistent in the three areas.

57. So far as the conversion of a legal person from one legal system to another is concerned, apart from the three cases mentioned above, there are no measures at European Union level. Consequently, as European Union law stands at present, it is for the Member States to regulate the arrangements relating to conversion in that respect. It should be observed that Article 293 EC required the Member States, so far as necessary, to enter into negotiations with each other with a view to securing for the benefit of their nationals the mutual recognition of companies or firms, the retention of legal personality in the event of transfer of their seat from one Member State to another and the possibility of mergers between companies or firms governed by the laws of different countries. However, Article 293 EC was repealed by the Treaty of Lisbon, so that primary law no longer provides for the possibility of agreements to be concluded between the Member States for the mutual recognition of companies or firms.

58. However, in spite of various legal difficulties in relation to company law, national tax law and private international law, it has fallen to the Court of Justice to provide the main impetus for the development of European Union law concerning companies by means of its judgments of principle opening the way for the cross-border movement of companies or firms.

59. Accordingly, the TFEU provisions on the freedom of establishment guarantee the right of establishment in another Member State not only of European Union nationals pursuant to Article 49 TFEU, but also of the companies or firms specified in Article 54 TFEU. The Court has consistently held that those provisions are directed mainly to ensuring that foreign nationals and companies are treated in the host Member State in the same way as nationals of that State, but they also preclude any obstacle to the establishment in another Member State of a national of a Member State or of a company incorporated in accordance with the law of a Member State. [29]

60. Since the *Überseering* judgment, the Member States have been required to recognise companies validly formed under the legislation of their Member State of origin, even without a material connection with that State. Once validly formed, that entity is deemed to be able to exercise the freedom of establishment within the European Union. [30]

61. The freedom of movement enshrined in case-law may be limited by national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the TFEU. However, such measures are admissible only if they fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by overriding reasons in the public interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it. [31]

27 — See Article 8.

28 — See Article 7.

29 — See, to that effect, inter alia, *Daily Mail and General Trust*, paragraphs 15 and 16.

30 — *Centros*, paragraph 26, *Überseering*, paragraph 95, and *Inspire Art*, paragraph 137.

31 — See, to that effect, the judgment of 11 June 2009 in Case C-564/07 *Commission* v *Austria*, paragraph 31 and the case-law cited.

62. That limit also manifests itself in relation to the misuse of rights, a limit which the Member States may define and apply. [32]

63. Apart from the very broad interpretation of the provisions on the freedom of establishment, which is an independent concept of European Union law, another limit on the movement of companies arises from the rules under which the company in question was formed, the relevance of which is stressed by the Court. For example, in *Überseering*, the Court pointed out that the rules relating to the transfer of the seat are determined by the national law in accordance with which the company was incorporated. [33]

64. In *Cartesio*, the Court found that 'a Member State has the power to define both the connecting factor required of a company if it is to be regarded as incorporated under the law of that Member State and, as such, capable of enjoying the right of establishment, and that required if the company is to be able subsequently to maintain that status. That power includes the possibility for that Member State not to permit a company governed by its law to retain that status if the company intends to reorganise itself in another Member State by moving its seat to the territory of the latter, thereby breaking the connecting factor required under the national law of the Member State of incorporation'. [34]

65. However, that is a situation in which there is no change in the applicable law. As the Court also observed in *Cartesio*, the situation where the seat of a company incorporated under the law of one Member State is transferred to another Member State with no change as regards the law which governs that company falls to be distinguished from the situation where a company governed by the law of one Member State moves to another Member State with an attendant change as regards the national law applicable, since in the latter situation the company is converted into a form of company which is governed by the law of the Member State to which it has moved. [35] In the latter case, the power referred to in *Cartesio* cannot, in particular, justify the Member State of incorporation, by requiring the liquidation or winding-up of the company, in preventing that company from converting itself into a company governed by the law of the other Member State, to the extent that it is permitted under that law to do so. [36]

66. It follows that a change in the law applicable necessarily affects the applicability of the freedom of establishment.

67. By contrast, so far as the host Member State is concerned, reference should be made to the Court's judgment in *SEVIC Systems*, which concerns a discriminatory refusal to register a cross-border merger although national law made provision for the registration of national mergers. According to the Court, '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'. [37]

68. As the EFTA Surveillance Authority observes, companies within the single market should be recognised as having the right to choose freely the company law applicable to them. That freedom of choice enables them to choose the most favourable economic conditions and the most advantageous company law regime. [38] Generally, companies wish to transfer their seat to another Member State in

32 — See Case C-196/04 *Cadbury Schweppes and Cadbury Schweppes Overseas* [2006] ECR I-7995, paragraph 51 and the case-law cited; *Centros*, paragraph 24; and *Inspire Art*, paragraph 136.

33 — *Überseering*, paragraph 70.

34 — *Cartesio*, paragraph 110.

35 — Ibid., paragraph 111.

36 — Ibid., paragraph 112.

37 — *SEVIC Systems*, paragraph 18.

38 — See, to that effect, Impact assessment on the Directive on the cross-border transfer of registered office (SEC(2007) 1707, p. 11).

order to benefit from better access to finance and to reduce costs. In addition, the greater part of a company's business may henceforward be in another Member State. The cross-border reincorporation of a company, combined with a change in the law applicable, is thus a particular means of exercising the freedom of establishment, similar to cross-border mergers. Such reincorporation is therefore an economic activity for which the Member States are required to recognise the freedom of establishment laid down in Article 49 TFEU.

69. In the light of the foregoing, it must be concluded that the TFEU articles relating to the freedom of establishment apply to the cross-border reincorporation of a company entailing a change in the law applicable, the transfer of the seat and the formation of a company in accordance with the law of the host Member State which takes on as the legal successor the rights and obligations of the first company. It will be for the national court to ascertain whether the national law and practices in question may impede the fundamental freedom of establishment, which in my view seems to be the case.

F – *Restrictions and justification for them (third and fourth questions)*

70. In paragraph 112 of *Cartesio*, the Court stated that conversion into a company governed by the law of another Member State is possible 'to the extent that it is permitted under that law to do so'.[39] I think it is clear that the words 'that law' refer to the law of the host Member State. Can the judgment be interpreted as meaning that the host Member State could arbitrarily either prohibit or permit the transaction whereby the seat of a limited company and the law applicable are changed? In my view, it cannot.

71. The situation in the present case has a cross-border context combining elements of two operations permitted and recognised at the national level under Hungarian law: a move by a company and the conversion of one company into another by way of universal legal succession as between the two entities. Hungarian law expressly allows the move and conversion to be carried out in a single operation.[40]

72. I consider that the principle of non-discrimination, as applied by the Court in *SEVIC Systems*, requires the host Member State to permit in principle a cross-border reincorporation of a company.

73. It is true that the host Member State may require the company to fulfil all the conditions which, under national law, are applicable to similar situations. However, it cannot apply internal rules which are likely to impede cross-border reincorporation merely on the ground that the national law on companies does not contemplate a cross-border operation of that kind. That applies especially to obstacles arising from the rules concerning the registration of particulars in the relevant national register. In paragraph 30 of *SEVIC Systems*, the Court held that, 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 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 are not put at risk. In any case, such a rule would go beyond what is necessary for the protection of those interests.

74. Consequently, I think that the condition referred to in paragraph 112 of *Cartesio* must be interpreted as meaning that the host Member State in the main proceedings had the right to apply the national law concerning the formation and conversion of a limited liability company and therefore to require VALE Építési to fulfil the obligations laid down by national law in such cases.

39 — *Cartesio*, paragraph 112.

40 — Paragraph 57 of the Company Registration Law.

75. Therefore, it is incumbent on VALE Építési to fulfil all the requirements imposed by national law in relation to limited liability companies concerning, for example, the share capital, shareholders and the terms of the articles of association. In addition, in order to be able to verify the transfer of assets and liabilities to the new company, the host Member State may require continuity in the accounts as between the companies so that the opening balance sheet of the company to be formed corresponds with the closing balance sheet of the predecessor company. It also seems to me that that Member State may require the company's assets and liabilities to be recorded and verified by an auditor so as to ensure compliance with the rules on share capital.

76. Moreover, I consider, like the Commission, that the Member State may also apply specific rules to cross-border situations so far as that is justified by the particular nature of those situations, provided that the rules are neither discriminatory nor disproportionate. Accordingly, where, in national law, the entries in the commercial register can be relied upon as against bona fide third parties and have the effect of creating a new legal situation, while giving rise to strict liability on the part of the State in the event of any inaccuracy, it is unnecessary to apply those principles to information originating from the authorities of other Member States, the accuracy of which cannot be verified by the host Member State.

77. The most important question is therefore whether the company in formation can require the company of the other Member State to be shown as its legal predecessor. I think the reply should be in the affirmative, provided that the said company can prove that the succession was authorised by the law of the Member State of origin. I consider that a transfer of the assets from the predecessor company to the company in formation can take place only by virtue of the legal system of the Member State of origin.

78. By contrast, regarding the debts and other liabilities of the predecessor company, I agree with the EFTA Surveillance Authority that an entry in the Hungarian commercial register concerning the legal succession is likely to protect the creditors since the *Cartesio* judgment made it possible for a company of a Member State to 'disappear' without liquidation. The national law of the host Member State must permit a company to give notice of its status as the successor to another company, which means that the company in formation takes over all the rights and obligations of the company which preceded it.[41]

79. However, universal transmission is not possible if the predecessor company has already lost its legal personality when the successor company is registered. In that situation, the holder of the rights and obligations of the predecessor company would be either a company which de facto has no legal personality or the shareholders, taken collectively or even individually. A situation of that kind does not permit universal legal succession between the two companies. In my opinion, in the present case it follows that the Hungarian authorities are not required to recognise VALE Építési as the legal successor to VALE Costruzioni, unless the removal of VALE Costruzioni from the commercial register in Italy is cancelled beforehand.

VI – Conclusion

80. In the light of the foregoing considerations, I propose that the Court should reply as follows to the questions referred to it for a preliminary ruling by the Magyar Köztársaság Legfelsőbb Bíróság:

(1) Articles 49 TFEU and 54 TFEU are applicable to a case of 'cross-border reincorporation of a company', that is to say, where a company incorporated in a Member State (Member State of origin) transfers its seat to another Member State (host Member State) while being

41 — Regarding the effects of a declaration of that kind in relation to tax, this assessment must take into account the prevention of abuse of rights on the one hand and the Court's case-law concerning fiscal obstacles to the freedom of establishment on the other.

removed — for that reason — from the commercial register of the Member State of origin, where the company shareholders approve the instrument incorporating the new company, drawn up in accordance with the law of the host Member State, and where the new company applies for registration in the commercial register of the host Member State in accordance with its law.

(2) Articles 49 TFEU and 54 TFEU preclude legislation or practices of a host Member State which deny a company duly incorporated under the law of another Member State of origin the right to transfer its seat to the host State and to continue its business there in the form of a company incorporated in accordance with the law of that State, unless that restriction is applied in a non-discriminatory way, is justified for imperative reasons in the public interest, is appropriate for attaining the objective which it pursues and does not go beyond what is necessary for attaining it.

(3) In the case of the cross-border reincorporation of a company, the company concerned must, in its application for registration, prove by credible means and on the basis of authenticated supporting documents, that the company incorporated in the other Member State must be deemed to be its predecessor in law. The fact that the company applies for the registration of the predecessor in law in the commercial register of the host Member State is not, as such, a valid reason for refusing the application for registration in the commercial register.

(4) In the case of the cross-border reincorporation of a company, the Member States may prescribe the application of the provisions of national law on companies relating to the transfer of the seat and to national conversion, provided that those provisions are applied in a non-discriminatory way, are justified for imperative reasons in the public interest, are appropriate for attaining the objective which they pursue and do not go beyond what is necessary for attaining it. However, the Member States may also prescribe the application of provisions specific to cross-border situations, provided that those provisions do not impose on companies wishing to exercise their freedom of establishment a burden that is greater than in the case of a domestic transfer of seat or a domestic conversion.