JUDGMENT OF THE COURT (Second Chamber)

1 June 2006 *

In Case C-453/04,

REFERENCE for a preliminary ruling under Article 234 EC from the Landgericht Berlin (Germany), made by decision of 31 August 2004, received at the Court on 28 October 2004, in the proceedings brought by

innoventif Limited,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, R. Schintgen, R. Silva de Lapuerta, P. Kūris and L. Bay Larsen (Rapporteur), Judges,

Advocate General: A. Tizzano,
Registrar: R. Grass,

* Language of the case: German.

having regard to the written procedure,

after considering the observations submitted on behalf of:

— the German Government, by C. Schulze-Bahr, acting as Agent,

— the Spanish Government, by F. Díez Moreno, acting as Agent,

— the Slovak Government, by R. Procházka, acting as Agent,

— the Commission of the European Communities, by G. Braun, acting as Agent,

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

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 43 EC and Article 48 EC.

2 The reference was made in the course of proceedings brought by innoventif Limited ('innoventif') against a decision of the Amstgericht Charlottenburg (Local Court, Charlottenburg) rejecting its application to register its branch established in Germany in the national register of companies on the ground that innoventif had refused to pay an advance on the anticipated cost of publication of the objects of the company as set out in its memorandum of association.

Legal context

Community law

3 First Council Directive 68/151/EEC of 9 March 1968 on co ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community (OJ, English Special Edition 1968 (I), p. 41) ('the First Directive') applies to companies with share capital. It is intended to protect third parties dealing with those companies and provides, inter alia, for the establishment of a file containing certain information. A file is maintained for each company registered in the register of companies covering a given area.

4 Under Article 2(1)(a) of the First Directive:

'1. Member States shall take the measures required to ensure compulsory disclosure by companies of at least the following documents and particulars:

(a) The instrument of constitution, and the statutes if they are contained in a separate instrument'.

5 Article 3(2) and (4) of the First Directive provides:

'2. All documents and particulars which must be disclosed in pursuance of Article 2 shall be kept in the file or entered in the register ...

...

4. Disclosure of the documents and particulars referred to in paragraph 2 shall be effected by publication in the national gazette appointed for that purpose by the Member State, either of the full or partial text, or by means of a reference to the document which has been deposited in the file or entered in the register.'

6 Eleventh Council Directive 89/666/EEC of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State (OJ 1989 L 395, p. 36) ('the Eleventh Directive') relates to branches of companies with share capital.

7 Under Article 1(1) of the Eleventh Directive:

'Documents and particulars relating to a branch opened in a Member State by a company which is governed by the law of another Member State and to which [the First] Directive ... applies shall be disclosed pursuant to the law of the Member State of the branch, in accordance with Article 3 of that Directive.'

8 Article 2(1) of the Eleventh Directive lists the documents and particulars that must be disclosed in the Member State where a branch is established. Article 2(2)(b) permits the Member State in which a branch has been opened to prescribe additional compulsory disclosure relating, inter alia, to 'the instruments of constitution and the memorandum and articles of association if they are contained in a separate instrument in accordance with Article 2(1)(a), (b) and (c) of [the First] Directive'.

9 Article 4 of the Eleventh Directive provides that the Member State in which a branch has been opened may stipulate that the documents referred to, inter alia, in Article 2(2)(b) of that directive must be published in another official language of the European Community and that the translation of such documents must be certified.

National law

10 Paragraph 8(1) and (2) of the Gesetz über die Kosten in Angelegenheiten der freiwilligen Gerichtsbarkeit (Federal Law on costs in non-contentious matters) of 26 July 1957 (BGBl. 1957 I, p. 960 ('the KostO'), provides under the heading 'Advances':

'(1) With regard to operations to be undertaken upon application, the party liable for the costs shall pay an advance sufficient to cover such costs ...

(2) With regard to operations to be undertaken upon application, the carrying out of such operations shall be subject to the payment or guarantee of payment of an advance.'

11 Paragraph 14 of the KostO, entitled 'Determination of costs, applications for review, appeals', provides:

'(1) The costs shall be determined by the court before which the matter is pending or was last pending, even where they were incurred before the court seised of the matter ...

(2) The court which has determined the costs shall rule on applications for review made by the party liable for the costs or by the Treasury against the determination.

(3) The party liable for the costs or the Treasury may appeal against the decision given on the application for review if the value of the subject-matter of the appeal exceeds EUR 200.'

12 The Handelsgesetzbuch (Commercial Code) of 10 May 1897 (RGBl. 1897, p. 219), as amended most recently by Article 1 of the Law of 15 December 2004 (BGBl. 2004 I, p. 3408) ('the HGB'), contains rules on the entry of branches in the register of companies.

13 Paragraph 13b of the HGB, entitled 'Branches of limited companies having their registered office in national territory', provides in subparagraphs (2) and (3):

'(2) The establishment of a branch shall be notified by the officers of a company. A certified copy of the statutes ... shall be attached to the notification.

(3) The registration shall also contain the details referred to at Paragraph 10(1) and (2) of the Law on limited companies.'

14 With regard to branches of limited companies having their registered offices abroad, Paragraph 13g(2) and (3) of the HGB provides:

'(2) A certified copy of the statutes and, where the statutes are not in German, a certified translation in that language, shall be attached to the notification. ...

(3) Registration of the establishment of a branch shall also contain the details set out at Paragraph 10(1) and (2) of the Law on limited companies ...'.

15 Paragraph 10(1) of the Gesetz betreffend die Gesellschaften mit beschränkter Haftung (Law on limited companies) of 20 April 1892 (RGBl. 1892, p. 477), as amended most recently by Article 13 of the Law of 9 December 2004 (BGBl. 2004 I, p. 3214) ('the GmbHG'), provides, under the heading 'Entry in the register of companies':

'The entry made in the register of companies shall include the name and registered office of the company, the object of the undertaking ... and its officers' powers of representation.'

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

16 Innoventif, a limited company under English law having its registered office in Birmingham (United Kingdom), was registered at Companies House in Cardiff (United Kingdom) on 1 April 2004. The objects of the company are described in detail in Clause 3 of the Memorandum of Association, headed 'The objects of which the Company is established are [sic]:–'. Clause 3 consists of 23 sub-clauses from (A) to (W) and covers several pages.

17 On 13 April 2004, innoventif set up a branch in Berlin and applied to the Amtsgericht Charlottenburg for registration of the branch in the register of companies.

18 By order of 23 April 2004 the Amtsgericht Charlottenburg required an advance on costs of EUR 3 000 as a condition of its effecting the registration applied for. It based that amount on the anticipated cost of the publication of the objects of the company as set out in innoventif's memorandum of association and, as it considered that the description in Clause 3(A) to (W) of the memorandum corresponded to the objects of the company, decided that it was necessary for them to be recorded in the register in their entirety.

19 On 18 May 2004, taking the view that its objects were defined in Clause 3(A) and (B) of its memorandum only, innoventif made an application for review to the Amtsgericht Charlottenburg under Paragraph 14(2) of the KostO.

20 That court dismissed the application, stating that an advance on anticipated costs, such as that requested in the main proceedings, is demanded where it is likely that the party liable for the costs in unaware of the amount of costs to be incurred.

21 Innoventif appealed to the referring court under Paragraph 14(3) of the KostO, arguing that a requirement to pay an advance in the amount requested is contrary to the Eleventh Directive and infringes the principle of freedom of establishment.

22 For the Landgericht Berlin (Regional Court, Berlin), the determination as to whether the registration of innovatif's branch in the register of companies may be subject to the payment of an advance on the anticipated cost of the publication of the objects of that company, as required under national law, hinges on the interpretation of Article 43 EC and Article 48 EC.

23 In those circumstances, the Landgericht Berlin decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Is it consistent with the freedom of establishment for companies provided for by Article 43 EC and Article 48 EC for the registration, in the register of companies, of a branch set up in ... Germany of a company limited by shares which has its registered office [in the United Kingdom] to be made subject to the payment of an advance calculated on the basis of the anticipated cost of the publication of the objects of the company as set out in the relevant clauses of the memorandum of association?'

Consideration of the question referred for a preliminary ruling

Admissibility

24 The Commission of the European Communities and the Spanish Government entertain doubts as to whether the question referred for a preliminary ruling is admissible.

25 The Commission considers that the question may be inadmissible in that the national court failed to state the reasons which led it to refer that question.

26 In that regard, it should be noted that the Court has stressed that it is important for the referring court to set out the precise reasons why it was unsure as to the interpretation of Community law and why it considered it necessary to refer questions to the Court for a preliminary ruling. The Court has thus ruled that it is essential that the referring court provide at the very least some explanation of the reasons for the choice of the Community provisions which it requires to be interpreted and of the link it establishes between those provisions and the national legislation applicable to the dispute (see, inter alia, the order in Case C-190/02 *Viacom* [2002] ECR I-8287, paragraph 16, and the judgment in Joined Cases C-453/03, C-11/04, C-12/04 and C-194/04 *ABNA and Others* [2005] ECR II-10423, paragraph 46).

27 In the main proceedings, the national court has, firstly, set out the factual and legislative background to the question it has referred and, secondly, stated, concisely but adequately, that the reason causing it to refer the question for a preliminary ruling is because it is uncertain as to whether the requirement under national law for payment of an advance on the anticipated cost of the publication of the objects of a company which has its registered office in another Member State and seeks registration of its branch in the national register of companies may restrict the freedom of establishment conferred on that company by the EC Treaty.

28 According to the Spanish Government, the question referred for a preliminary ruling is inadmissible since it concerns the interpretation of a national provision.

29 In that connection, it must be noted that the jurisdiction of the Court is confined to considering provisions of Community law only (see the order in Case C-307/95 *Max Mara* [1995] ECR I-5083, paragraph 5). It is for national courts to assess the scope of

national provisions and the manner in which they must be applied (see the judgment in Case C-45/94 *Ayuntamiento de Ceuta* [1995] ECR I-4385, paragraph 26).

30 In the main proceedings, whilst the national court alone has jurisdiction to determine whether there should be a requirement for payment of an advance on costs such as that provided for in Paragraph 8 of the KostO and, as the case may be, to calculate the amount of that payment and refuse an application for registration in the event of non-payment, the question of whether the requirement for payment of such an advance may be regarded as a restriction on freedom of establishment falls within the jurisdiction of the Court.

31 It follows that the question referred for a preliminary ruling is admissible.

Substance

32 By its question, the national court asks, in essence, whether Article 43 EC and Article 48 EC preclude national legislation which makes registration, in the register of companies, of a branch of a limited company established in another Member State subject to the payment of an advance on the anticipated cost of the publication of the objects of the company as set out in its instrument of constitution.

33 Firstly, it must be stated that the requirement in a Member State where a branch of a company having its registered office in another Member State is established that the full text is to be published of the objects of limited companies applying for registration of their branches in the register of companies is consistent with the Eleventh Directive.

34 Article 2(2)(b) of the Eleventh Directive expressly authorises Member States to require publication of the instrument of constitution of a foreign company and of the memorandum and articles of association, if they are contained in a separate instrument, on registration of its branch in the register of companies.

35 Paragraph 13b(3) and Paragraph 13g(3) of the HGB, in conjunction with Paragraph 10(1) of the GmbHG, which applies in the same way to companies established in national territory and abroad, merely require publication of the objects of limited companies applying for the registration of a branch in the register of companies and not, as the Eleventh Directive permits, publication of the full text of the instrument of constitution of those companies.

36 Further, it is clear from Article 3 of the First Directive, to which, in accordance with Article 1(1) of the Eleventh Directive, reference must be made with regard to branches, that the documents and particulars which must be disclosed are to be published in one of the various forms set out in Article 3 of the First Directive.

37 Secondly, with regard to whether the requirement for payment of an advance on costs calculated on the basis of the publication of the full text of the objects of a company is consistent with Article 43 EC and Article 48 EC, it must be considered whether such a requirement constitutes an obstacle to freedom of establishment where it requires a branch of a company constituted in accordance with the law of another Member State to comply with the rules of the State of establishment on advances on the anticipated cost of publication.

38 The requirement for payment of an advance that merely reflects the actual administrative costs of publication in accordance with the Eleventh Directive cannot constitute a restriction on freedom of establishment in so far as it neither prohibits, impedes nor renders less attractive the exercise of that freedom.

39 Moreover, legislation which, in circumstances such as those in the main proceedings, requires the payment of an advance is not liable to place companies from other Member States in a less favourable factual or legal situation than companies from the Member State of establishment (see, to that effect, Case C-70/95 *Sodemare and Others* [1997] ECR I-3395, paragraph 33).

40 It follows that, for a limited company established in a Member State, the requirement to pay such an advance on the anticipated cost of publication does not constitute an obstacle to the pursuit of its activities in another Member State through a branch situated there.

41 It is for national courts, on the basis of the length of the text recording the objects of a company, to satisfy themselves that the amount of the advance demanded corresponds to the anticipated cost of publication in the relevant gazette. In so doing, they should have regard to the objects as set out in the instrument of constitution of the company applying for the registration of a branch.

42 In that connection, national courts cannot be required to investigate whether, under the law of the Member State in which a company applying for registration of a branch is established, the objects of the company may be regarded as being fully defined by only some of the provisions under the heading 'Objects of the company' in that company's instrument of constitution.

43 The answer to the question referred must therefore be that Article 43 EC and Article 48 EC do not preclude legislation of a Member State which makes registration, in the register of companies, of a branch of a limited company established in another Member State subject to the payment of an advance on the anticipated cost of the publication of the objects of the company as set out in its instrument of constitution.

Costs

44 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 (Second Chamber) hereby rules:

Article 43 EC and Article 48 EC do not preclude legislation of a Member State which makes registration, in the register of companies, of a branch of a limited company established in another Member State subject to the payment of an advance on the anticipated cost of the publication of the objects of the company as set out in its instrument of constitution.

[Signatures]