ORDER OF THE COURT (Third Chamber)

12 January 2010 *

In Case C-497/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Amtsgericht Charlottenburg (Germany), made by decision of 7 November 2008, received at the Court on 17 November 2008, in the proceedings

Amiraike Berlin GmbH

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, R. Silva de Lapuerta (Rapporteur), G. Arestis, J. Malenovský and T. von Danwitz, Judges,

Advocate General: P. Mengozzi,
Registrar: R. Grass,

after hearing the Advocate General,

* Language of the case: German.

makes the following

Order

1 The present reference for a preliminary ruling concerns the interpretation of Articles 10 EC, 43 EC and 48 EC.

2 That reference was submitted in connection with an application brought by Amiraike Berlin GmbH ('Amiraike'), a company incorporated under German law, for the appointment of a liquidator in respect of the assets in Germany of Aero Campus Cottbus Ltd ('AeroCC'), a company incorporated under English law.

Legal context

The German law

3 Under the title 'Conclusion of winding-up operations', Paragraph 273 of the Law on public limited companies (Aktiengesetz) of 6 September 1965 (BGB1. 1965 I, p. 1086), provides:

'1. If winding-up has been terminated and the final accounts laid, the liquidators shall report the conclusion of winding-up operations for the purposes of registration thereof in the register of companies. The company shall be struck off the register.

…

4. Subsequently, should it become apparent that further winding-up measures are necessary, on application by a party, the court shall reappoint the previous liquidators or appoint other liquidators....

5. An immediate appeal may be brought against decisions made under subparagraphs 2 and 3 and the first sentence of subparagraph 4.'

4 Pursuant to Paragraph 145 on the Law on non-contentious proceedings (Gesetz über die Angelegenheiten der freiwilligen Gerichtsbarkeit) of 17 May 1898, the Amtsgericht (Local Court) has jurisdiction to appoint a liquidator under Paragraph 273(4) of the Law on public limited companies.

5 In accordance with Article 43(1) of the Law introducing the Civil Code (Einführungsgesetz zum Bürgerlichen Gesetzbuch), rights in property are governed by the law of the State in which the property is situated.

The English law

6 The Companies Act 2006 ('CA 2006') imposes on limited liability companies the obligation to file annual accounts.

7 Article 1000 of the CA 2006 provides:

‘1. If the registrar has reasonable cause to believe that a company is not carrying on business or in operation, the registrar may send to the company by post a letter inquiring whether the company is carrying on business or in operation.

2. If the registrar does not within one month of sending the letter receive any answer to it, the registrar must within 14 days after the expiration of that month send to the company by post a registered letter referring to the first letter, and stating (a) that no answer to it has been received, and (b) that if an answer is not received to the second letter within one month from its date, a notice will be published in the Gazette with a view to striking the company's name off the register.

3. If the registrar (a) receives an answer to the effect that the company is not carrying on business or in operation, or (b) does not within one month after sending the second letter receive any answer, the registrar may publish in the Gazette, and send to the company by post, a notice that at the expiration of three months from the date of the notice the name of the company mentioned in it will, unless cause is shown to the contrary, be struck off the register and the company will be dissolved.

4. At the expiration of the time mentioned in the notice the registrar may, unless cause to the contrary is previously shown by the company, strike its name off the register.

5. The registrar must publish notice in the Gazette of the company's name having been struck off the register.

6. On the publication of the notice in the Gazette the company is dissolved.

7. However (a) the liability (if any) of every director, managing officer and member of the company continues and may be enforced as if the company had not been dissolved, and (b) nothing in this section affects the power of the court to wind up a company the name of which has been struck off the register.'

8 Under Article 1012 of the CA 2006:

'1. When a company is dissolved, all property and rights whatsoever vested in or held on trust for the company immediately before its dissolution (including leasehold property, but not including property held by the company on trust for another person) are deemed to be bona vacantia and —

(a) accordingly belong to the Crown, or to the Duchy of Lancaster or to the Duke of Cornwall for the time being (as the case may be), and

(b) vest and may be dealt with in the same manner as other bona vacantia accruing to the Crown, to the Duchy of Lancaster or to the Duke of Cornwall.

…'

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

9 The dispute in the main proceedings concerns non-contentious proceedings for the appointment of a 'supplementary' liquidator for the assets of AeroCC located in Germany, by applying by analogy Paragraph 273(4) of the Law on public limited companies, in accordance with the principles of German law relating to rump or split companies.

10 AeroCC was established as a limited liability company in England and Wales on 8 April 2005, and was entered in the register of companies in Cardiff.

11 The directors of that company subsequently failed to file annual accounts audited by a United Kingdom auditor as required by United Kingdom company law. According to the referring court, AeroCC was therefore struck off the register of companies in January 2008, which resulted in its assets being vested in the British Crown.

12 AeroCC simply maintained an office for correspondence in Germany. AeroCC however holds various assets in Germany, which are, essentially, a holding in a partnership established in Berlin, which possesses immovable assets in Germany, several claims to the transfer of land situated in Germany and various claims for compensation.

13 Amiraike, the majority shareholder in AeroCC, applied to the referring court on 16 June 2008 for the appointment of a 'supplementary' liquidator, in order to wind up those of AeroCC's assets situated in Germany, in accordance with the principles of the rump or split company.

14 According to the referring court, a measure such as that provided for by Article 1012 of the CA 2006 is an expropriatory measure. Whereas, generally, such measures cannot have an effect outside the territory of the State which establishes them, that is nevertheless not the case in the main proceedings. According to that court, in so far as a company exercising its right to freedom of establishment under Articles 43 EC and 48 EC has deliberately elected to submit itself to the company law of one Member State, it cannot rely on the more advantageous company law of another Member State in whose territory part of its assets are situated in order to avoid some negative legal effects resulting from the dissolution of that company under the law of the Member State where it is incorporated. Such 'cherry-picking' is contrary to Community law, and it is impossible to rely in this respect on the German concept of the 'rump or split company', the latter being an old legal concept which dates from the Cold War.

15 Those were the circumstances in which the Amtsgericht Charlottenburg decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Are the provisions of primary Community law, in particular, Articles 10 EC, 43 EC and 48 EC and the principle according to which Member States as between each other must accord mutual recognition to their respective legal orders to be interpreted as meaning that in ratifying [European] Community law a Member State ("the first Member State") has indicated, in principle, its acceptance of the effects on its national territory of expropriatory measures imposed under the legal order of a second Member State, at any rate, where the company (created as a matter of private law) affected by the expropriatory measure has previously elected on an intentional basis — exercising its Community right to freedom of establishment — to submit itself to the company law regime of the second Member State, responsible for imposing the expropriation, notwithstanding the fact that it exercises its business activities in the first Member State and holds company assets affected by the expropriatory measure situated in that State?'

The Court's jurisdiction

16 According to Amiraike and the German Government, the decision to be given by the Amtsgericht Charlottenburg is not of a judicial nature. It must therefore first of all be ascertained whether, in the present case, the Amtsgericht Charlottenburg must take a decision of a judicial nature, in order to determine whether the Court has jurisdiction to rule, in accordance with Article 234 EC, on the question referred to it.

17 In that regard, while, admittedly, there is no doubt that the Amtsgericht Charlottenburg is a 'court', in order for it to be able to make a reference to the Court under Article 234 EC it is also necessary for there to be a case pending before it and for it to be called upon to give judgment in proceedings intended to lead to a decision of a judicial nature (see orders in Case 138/80 *Borker* [1980] ECR 1975, paragraph 4, and Case 318/85 *Greis Unterweger* [1986] ECR 955, paragraph 4; Case C-111/94 *Job Centre* ('*Job Centre I*') [1995] ECR I-3361, paragraph 9; Case C-178/99 *Salzmann* [2001] ECR I-4421, paragraph 14; Case C-182/00 *Lutz and Others* [2002] ECR I-547, paragraph 13; Case C-165/03 *Längst* [2005] ECR I-5637, paragraph 25; and Case C-96/04 *Standesamt Stadt Niebüll* [2006] ECR I-3561, paragraph 13).

18 In the case in the main proceedings, it is apparent from the file that the Amtsgericht referred the question to the Court for a preliminary ruling as an administrative authority. The subject-matter of the decision to be taken is the appointment of a 'supplementary' liquidator for the assets of AeroCC located in Germany. In the direct application or application by analogy of Paragraph 273(4) of the Law on public limited companies, the essential task of the judge consists in deciding whether the person suggested by the applicant or another person is appropriate to wind-up the remaining assets of a company struck off the register.

19 In addition, there is nothing in the file to indicate that, in the present instance, there is a case pending before the Amtsgericht between Amiraike and any defendant. On the contrary, according to the introduction to the order for reference, it is only a commercial law 'matter' and not 'proceedings'. That introduction quotes only the name and address of AeroCC. Furthermore, the description of the facts in the order for

reference does not refer to any person or institution challenging the application brought by Amiraike in relation to AeroCC, of which Amiraike is the majority shareholder.

20 Moreover, it does not appear from the documents before the Court that Amiraike's situation gave rise, before the Amtsgericht Charlottenburg made the reference, to a decision against which an application for review was made to the Amtsgericht. That court is thus the first authority to have before it the application for the appointment of a liquidator for AeroCC.

21 Accordingly, in the case in the main proceedings, the Amtsgericht Charlottenburg's acts are those of an administrative authority, it not being at the same time called upon to decide a legal dispute, so that it acts in a non-judicial capacity.

22 In the light of the foregoing, it must be held, applying Articles 92(1) and 103(1) of the Rules of Procedure, that the Court clearly has no jurisdiction to rule on the question referred by the Amtsgericht Charlottenburg.

Costs

23 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby orders:

The Court of Justice of the European Union clearly has no jurisdiction to rule on the question referred by the Amtsgericht Charlottenburg in its decision of 7 November 2008.

[Signatures]