OPINION OF ADVOCATE GENERAL LA PERGOLA

delivered on 13 November 1997 *

1. The Oberlandesgericht (Higher Regional Court) Frankfurt am Main has referred the following question to the Court for a preliminary ruling:

'Is Article 5(a) of Council Regulation (EEC) No 2137/85 of 25 July 1985 on the European Economic Interest Grouping to be interpreted as meaning that, apart from the additions of "European Economic Interest Grouping" or "EEIG", the name or business name of an EEIG may consist of a purely descriptive designation, even where internal law in principle precludes the use of such a name for the formation of a European Economic Interest Grouping?'

2. The facts giving rise to the dispute in the main proceedings may be summarized as follows. An undertaking in the process of formation applied for entry in the commercial register kept by the Amstgericht (Local Court), Frankfurt am Main, under the name 'European Information Technology Observatory (EEIG)' ('EITO'). The Amstgericht, however, refused to register it, on the ground that that business name did not contain any reference to the names of the members of the group. The order for reference makes it clear that under the German legislation, which was adopted in order to implement Council Regulation (EEC) No 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG) [1] ('the Regulation'), partnerships are a matter for national law. [2] In accordance with those provisions, the business name of a partnership, and hence of an EEIG, must include the name of at least some of its members, and may include invented additions or words describing the objective of the undertaking; however, what is not permitted is a purely objective business name, that is to say, a name referring to the nature of the activity carried on or composed exclusively of invented names. [3] It was on the basis of those provisions that EITO was refused entry in the commercial register.

The applicant sought to have that decision annulled, but it was upheld. EITO then appealed against that judgment to the Ober-

1 — OJ 1985 L 199, p. 1.

2 — Naturally, the referral to national law applies only where there is no express provision of Community law or of the national implementing legislation.

3 — The order for reference states that the relevant national provisions are Paragraphs 18(2) and 19 of the Commercial Code. In its written observations, the German Government has observed that it is at present bringing in legislation to allow EEIGs to have descriptive names.

* Original language: Italian.

landesgericht, which referred the question set out above to the Court.

3. The question of interpretation before the Court entails determining whether or not a provision of national law such as that described by the national court is compatible with the Community regulation introducing EEIGs. More specifically, we must see what requirements are laid down by the Community legislation relating to the business name of an EEIG: that is to say, whether it is possible for the name simply to describe the sphere of the group's activity, or whether it must also mention the names of the members of the group.

The Commission and the German Government suggest that the answer is that, on the registration of an EEIG, national law may require a subjective name to be chosen, it being understood, however, that the name must include the words 'European Economic Interest Grouping' or the initials 'EEIG'.

EITO, however, takes the opposite view and argues that the rules governing the business names of EEIGs must permit objective names too, as is the case in respect of capital companies.

4. Let me say immediately, however, that EITO's arguments in its written observations do not strike me as persuasive. First of all, I would mention the argument that the actual wording of Article 5(a) must make it possible for a name to consist of no more than a description of the object of the undertaking. EITO notes that that provision, while stipulating that the words 'European Economic Interest Grouping' or the initials 'EEIG' must precede or follow the name of the grouping, then adds 'unless those words or initials already form part of the name'. In its view, the only explanation for that clause is that it is intended to allow an objective name: indeed, EITO maintains that a business name consisting of the names of the members could not contain the initials in question. But I cannot see any grounds for that argument. The national court itself, in the order for reference, pointed out that the national legislation governing business names definitely allows partnerships to add 'EEIG' not only before (e. g. 'EEIG Musterman & Co., Financial Consultants') or after (e. g. 'Musterman & Co., Financial Consultants, EEIG') the name of the grouping, but also within the name itself (e. g. 'Financial Consultants EEIG Musterman & Co.', or 'Musterman & Co. EEIG of Financial Consultants'). [4]

Nor is it possible to agree with EITO's argument that, in order to guarantee equal

4 — These examples are taken directly from the order for reference.

treatment for the members, the requirement of a personal name for the grouping must entail inclusion of the names of all the members in the business name. In EITO's view, that solution would in any case be impracticable for large groupings; the result in such situations would be to discourage undertakings from setting up EEIGs, thus undermining cooperation between them and running counter to one of the objectives pursued by the Regulation. To my mind, however, EITO's fears are unfounded: the requirement of a personal name subsists, in German law and in other legal orders, in relation to various forms of association, yet it has not prevented those legal forms from developing and growing in importance as essential instruments of cooperation in economic life.

Next, EITO refers to the Commission's document concerning EEIGs, in which the Commission adopted a position clearly in favour of allowing EEIGs to be given names descriptive of their object. [5] In that regard I cannot, however, accept that that document is of the slightest relevance for the purposes of the question before us. In the first place, the document begins by saying that it is intended for the internal use of the Commission and does not represent the institution's official view; a view which, moreover, could clearly not be decisive for the purposes of interpreting a provision of secondary legislation. In any event, the Commission itself, while seeming in that document to acknowledge the possibility of invented names, nevertheless recognizes in a general fashion that the members of an EEIG must 'comply with the legal restrictions existing at national level which limit free choice of a name'. [6]

I must add one last consideration concerning the observation, again by EITO, that about 80% of EEIGs are formed with names of an objective nature; and so if they were required to adopt a different name this would create differences under the laws of the various Member States and discourage the establishment of EEIGs in Germany. Here, I shall merely say that the consequences envisaged by EITO seem to me frankly to be exaggerated. It may be possible that national legislation on business names plays a part in the choice of a country as the seat of an EEIG; I do not, however, believe that it is a decisive factor. If anything, the point is to discover whether or not the regulation permits national legislatures to apply rules governing the names of EEIGs, and if so within what limits. And to my mind, for the reasons I shall now set out, the answer to the question must be that it does.

5 — See 'GEIE, l'Émergence d'une Nouvelle Coopération Européenne, Bilan de Trois Années d'Expérience', Brussels-Luxembourg, 1993, p. 51.

6 — See the document cited in the last footnote, p. 51. Translated from the French.

5. When it introduced EEIGs as an instrument of cooperation between Community undertakings, the Community legislature simply sketched the broad outlines of the institution, leaving the national systems to regulate all aspects not governed by the regulation. This is clearly stated in the 17th recital, which says that 'the Member States are free to apply or adopt any laws, regulations or administrative provisions which do not conflict with the scope or objectives of this regulation'. Furthermore, Article 2(1) expressly provides that 'Subject to the provisions of this regulation, the law applicable, on the one hand, to the contract for the formation of a grouping, except as regards matters relating to the status or capacity of natural persons and to the capacity of legal persons and, on the other hand, to the internal organization of a grouping shall be the internal law of the State in which the official address is situated, as laid down in the contract for the formation of the grouping.' [7] EEIG matters are in substance regulated concurrently by two different sources of law: first, the Regulation; and, second, the provisions of the internal law of the State in which the group has established its seat.

In light of that preliminary consideration, I can now examine the important question, namely the business name of the grouping. The only provision of the Regulation of any relevance is Article 5(a): a contract for the formation of a grouping must contain certain information, including 'the name of the grouping preceded or followed either by the words "European Economic Interest Grouping" or by the initials "EEIG", unless those words or initials already form part of the name'.

It says nothing, however, concerning the content of the name. It seems to me no accident that the Regulation is silent on this point; certainly it reflects the express decision of the legislature to refer that aspect of the rules governing EEIGs to the national law of the State in which the group establishes its seat, particularly having regard to the difficult legal consequences arising from the choice of one form of name rather than another and from the fact that when the Regulation was adopted it proved impossible to draw up comprehensive rules on the subject. For this reason, the question of an EEIG's name is not governed by Community law but is left to national legal systems. The one requirement imposed by Community law, specifically by Article 5(a), is that the group should be identified and distinguished in its relations with the outside world by the mention of the form of association established by the Regulation; this is to be done by including in the name the words 'European Economic Interest Grouping' or the initials 'EEIG'. Provided that that requirement is satisfied, the content of the name is of no concern to Community law.

7 — Moreover, it expressly provides that it is national law which applies in regulating important matters such as, for example, determining whether or not groupings have legal personality (Article 1(3)); limiting to 20 the number of members (Article 4(3)), or prohibiting or restricting participation in groupings by certain classes of natural persons, companies, firms or other legal bodies on grounds of public interest (Article 4(4)); permitting legal persons to be managers (Article 19(2)); the liquidation of a grouping and the conclusion of its liquidation (Article 35(2)), and the rules governing insolvency and cessation of payments (Article 36); prohibiting activity in contravention of public interest (Article 38). Furthermore, the Community legislature was well aware of the fact that the institution of EEIGs is not subject to completely uniform rules throughout the Community: I need only cite Article 14(1), which provides for the situation where a transfer of the official address results in precisely 'a change in the law applicable'.

Given the silence of the Regulation, it is therefore for domestic law to regulate this aspect of the institution.

Consequently, no problem arises from the fact that the national legislature makes EEIGs subject, as a subsidiary matter, to the application of domestic legislation concerning partnerships, with the result that the name of a grouping, like that of partnerships, must contain the names of its members.

6. In conclusion, I do not consider that it is possible to derive any support from the Regulation for the argument that the name of an EEIG should be governed by the rules applicable to capital companies, so allowing the use of names which are invented or simply descriptive of the object of the undertaking. Community law is indifferent to the content of the name, which is left to national law, subject to the one condition that it must make clear the kind of association chosen, by means of the words 'European Economic Interest Grouping' or the initials 'EEIG'.

7. I therefore propose that the Court reply as follows to the question referred by the Oberlandesgericht Frankfurt am Main:

On a proper construction, Article 5(a) of Council Regulation (EEC) No 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG) requires only that the name of a grouping should be preceded or followed by the words 'European Economic Interest Grouping' or the initials 'EEIG', unless those words or initials already form part of the name. On the other hand, the Regulation lays down no requirements as to the content of the name. It is therefore for the national legislature to determine whether the name may be made up entirely of terms describing the object of the undertaking.