OPINION OF ADVOCATE GENERAL TIZZANO
delivered on 7 July 2005 [1]

I — Introduction

1. The present case concerns a question on the interpretation of Articles 43 EC and 48 EC which was referred to the Court by the Landgericht (Regional Court) Koblenz (Germany) pursuant to Article 234 EC.

2. The national court essentially seeks to determine whether national legislation which precludes registration in the German register of companies of mergers between German companies and companies of other Member States is contrary to the principle of freedom of establishment.

1 — Original language: Italian.

II — Legal background

Relevant Community law

3. The main proceedings are essentially concerned with the provisions of the Treaty on the freedom of establishment. In this regard particular importance attaches to Article 43 EC which, as we know, establishes the right of establishment of Community nationals either as a primary place of business (second paragraph) or as a secondary place of business (first paragraph). In particular, it provides that:

'Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 48, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.'

4. Also relevant is Article 48 EC, under which:

'Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States.

"Companies or firms" means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making.'

5. However, under Article 46(1) EC:

'The provisions of this Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health.'

6. For the purposes of this case, it is also appropriate to mention the provisions of the Treaty relating to freedom of movement of capital and in particular Article 56(1) EC which provides as follows:

'Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.'

7. Finally, it should be recalled that the Commission has, for several years, been making efforts to introduce in relation to cross-border mergers a Community legal instrument that meets the needs for cooperation and consolidation between companies from different Member States.

8. At the moment, however, the proposal for a directive on cross-border mergers of companies with share capital [2] has not been finally adopted by the Parliament and the Council, although it is at a very advanced stage. [3]

National law

9. In Germany mergers are governed by the Umwandlungsgesetz (national law on transforming companies: 'the UmwG'). [4]

10. Paragraph 1(1) of this law, which governs transformations, refers only to the merger of companies established in Germany and provides as follows:

'Legal entities established in Germany may be transformed

1. by means of merger

...'.

11. Paragraph 1(2) of this law goes on to describe the various kinds of merger with the dissolution of the company and without liquidation including, is so far as it is relevant here, merger through incorporation which is effected by transferring the assets of one or more legal entities to another, existing legal entity.

12. Finally, the other provisions of the UmwG, which relate specifically to mergers by incorporation, lay down a number of conditions including, in so far as it is relevant here, registration of the merger in the register of companies at the place where the incorporating company is established (Paragraph 19).

III — Facts and procedure

13. In 2002 Systems Aktiengesellschaft ('Sevic'), established in Neuwied (Germany), and Security Vision Concept SA ('SVC'), established in Luxembourg (Luxembourg), entered into a merger agreement in which

2 — COM(2003) 703 final. The principle underlying this proposal is that the Member States should afford the possibility of concluding cross-border mergers in their own legislation.

3 — On 10 May 2005 the European Parliament did in fact approve the proposal for the directive at the first reading.

4 — 1994, 3210 (1995, 428), most recently amended on 12 June 2003.

they agreed to dissolve SVC without liquidation and to transfer the whole of its assets to Sevic.

14. The Amtsgericht (Local Court) Neuwied (Local Court, Neuwied) refused the application for registration of the merger in the German register of companies, citing as grounds Paragraph 1(1) of the UmwG which permits mergers solely between legal entities established in Germany. However, in the present case the merger involves a German company and a company incorporated under Luxembourg law.

15. Consequently, Sevic lodged an appeal against this decision with the Landgericht Koblenz which, because it was uncertain as to the interpretation of Articles 43 EC and 48 EC, decided to stay the proceedings pending before it and refer the following question to the Court for a preliminary ruling:

'Are Articles 43 and 48 EC to be interpreted as meaning that it is contrary to freedom of establishment for companies if a foreign European company is refused registration of its proposed merger with a German company in the German register of companies under Paragraphs 16 et seq. of the Umwandlungsgesetz (Law on transformations), on the ground that paragraph 1(1)(1) of that law provides only for transformation of legal entities established in Germany?'

16. In the ensuing proceedings, written observations were submitted by the applicant in the main proceedings, the German Government, the Netherlands Government and the Commission.

17. At the hearing held on 10 May 2005 submissions were made by Sevic, the German Government and the Commission.

IV — Legal analysis

A — *Applicability to the present case of the provisions of the Treaty relating to the freedom of establishment*

18. I note first of all that, although it governs only mergers between companies established in Germany, the national legislation in question directly affects the possibility of concluding international mergers. As demonstrated by the present case and confirmed by the German Government at the hearing, it is by virtue of Paragraph 1(1)

of the UmwG — and precisely because this provision envisages only 'national' mergers — that in Germany registration in the register of companies of the contract relating to the merger between a company incorporated under German law and a company of another Member State is generally [5] refused with the result that the merger cannot produce its effects.

19. Having said that, I would observe that the parties concerned dispute primarily the very possibility of classifying the mergers under discussion as exercise of the freedom of establishment. Therefore, before considering whether or not the relevant German rules are consistent with Articles 43 EC and 48 EC, as the national court seeks to ascertain, it is necessary to establish whether, in relation to a case such as that in question, these rules fall within the scope of those provisions.

20. The German Government and the Netherlands Government contend that they do not because, in their view, the merger in question does not give rise to an 'establishment' within the meaning of the Treaty.

21. The German Government explains that this term refers to the pursuit by a natural or legal person of an economic activity in another Member State through a permanent presence resulting, as regards companies, from the location in or transfer to that State of a principal place of business (second paragraph of Article 43) or from the setting-up there of a secondary place of business (first paragraph of Article 43).

22. The German Government goes on to state that in the present case, however, the Luxembourg company (SVC) is taken over, by way of merger, by the incorporating German company (Sevic) and consequently loses its legal personality. Since a dissolved company cannot, by definition, be 'established' either as a primary or secondary place of business in another Member State, it must be concluded, in the view of the German Government, that the conditions for the application of Articles 43 EC and 48 EC are not satisfied in this case.

23. On the basis of similar reasoning the Netherlands Government adds that the dissolution of a company directly affects the formation and functioning thereof, that is to say aspects which, as the Court acknowledged in the well-known judgment in *Daily Mail,* [6] at present fall outside the scope of

5 — However, in its order for reference the national court states that, recently and although it constitutes minority case-law, some German courts have accepted registration of mergers of companies established in Germany with foreign companies.

6 — Case 81/87 *Daily Mail and General Trust* [1988] ECR 5483.

Community law and are governed, in the same way as nationality in relation to natural persons, exclusively by national legal systems. Therefore, Articles 43 EC and 48 EC cannot be interpreted as granting companies the right to dissolve themselves by taking part in cross-border mergers.

24. For my part, I should state immediately that I do not share this view.

25. That is primarily because it appears to me that it follows an inverted logic in the sense that it concludes that a consequence of the merger, namely the dissolution of the incorporated company, is the reason why that company is unable (even before it is dissolved!) to carry out the merger and therefore the justification for the prohibition on registration which precisely precludes this operation.

26. However, the truth of the matter is that throughout the stage preceding the merger and up to the registration thereof both companies exist and operate as legal persons entirely capable of negotiating and entering into the merger contract. It is only when the merger is completed, and in particular when this act is registered, that one of the two persons ceases to exist.[7] However, until such time that is not the case because if the operation has not been completed the company which was to have been incorporated would continue to exist as an autonomous legal person.

27. Therefore, the contested national legislation affects legal entities in full possession of their legal capacity which precisely this legislation, and this legislation alone, bars from benefiting from freedom of establishment. Consequently, only by confusing cause and effect is it possible to justify the claim that the Treaty provisions are not applicable to cross-border mergers on the grounds that the incorporated company is purportedly devoid of legal personality.

28. However, in my view the very subject-matter of this provision is such as to dispel any doubt as to the fact that the provision in question falls within the scope of Articles 43 EC and 48 EC, as interpreted by settled Community case-law.

7 — Moreover, this is expressly provided for in Paragraph 20 of the UmwG.

29. As we know, in order to guarantee full enjoyment of the right of establishment, which is understood as being allowed 'to participate, on a stable and continuous basis, in the economic life of [another] Member State', [8] the Court subjected to Articles 43 EC and 48 EC not only the national rules and practices relating directly and specifically to the pursuit of the economic activity in question but also all those 'relating to the various general facilities which are of assistance in the pursuit of those activities'. [9]

30. Therefore, the right of establishment covers all measures which permit or even merely facilitate access to another Member State and/or the pursuit of an economic activity in that Member State by allowing the persons concerned to participate in the economic life of the country effectively and under the same conditions as national operators. [10]

31. In laying down these principles the Court has almost always referred specifically to the General Programme for the abolition of restrictions on freedom of establishment adopted by the Council on 18 December 1961, under which the following restrictions are to be eliminated: 'provisions and practices which, in respect of foreign nationals only, exclude, limit or impose conditions on the power to exercise rights normally attaching to an activity as a self-employed person'. [11] The Programme provides, purely by way of illustration, a list of those 'powers' including, in so far as it is relevant here, the power to 'enter into contracts' and 'to acquire, use or dispose of movable or immovable property'.

32. To sum up, the right of establishment does not concern only the right to move to another Member State in order to purse an activity there, but also all the aspects which are linked in any way in complementary or functional terms with the pursuit of that activity and thus the exercise in full of the freedom laid down by the Treaty.

33. It appears to me evident that this is so also in the case of the national legislation in question. It relates to aspects which are not complementary but actually essential to the activity of an economic operator since it precludes the conclusion of specific legal transactions (mergers) and in particular operations relating to acquisition/disposal or formation of new companies.

8 — Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 25.

9 — Case 63/86 *Commission* v *Italy* [1988] ECR 29, paragraph 14, and Case 305/87 *Commission* v *Greece* [1989] ECR 1461, paragraph 21.

10 — See, inter alia, *Commission* v *Italy*, paragraphs 14 and 16; *Commission* v *Greece*, paragraph 19; Case C-302/97 *Konle* [1999] ECR I-3099, paragraph 22; Case C-251/98 *Baars* [2000] ECR I-2787, paragraph 22; and Case C-208/00 *Überseering* [2002] ECR I-9919, paragraph 93.

11 — OJ No 2 of 15 January 1962.

34. None the less, there is another aspect which, by concentrating solely on the dissolution of the incorporated company, the governments making submissions have ultimately lost sight of but which could, in my view, be of direct relevance to the present appraisal.

35. I am referring in particular to the fact that the merger in question could be seen not only as a case of primary establishment but also as a case of secondary establishment. That is because the takeover of a company established in another Member State (in this case the Luxembourg company) does not prevent the incorporating company (in this case the German company) from being in a situation, precisely as a consequence of the merger, of operating on a stable basis in the Member State in which the incorporated company was established, and thus in a Member State other than its own, with the result that it forms there an establishment, albeit a secondary one.

36. As was confirmed at the hearing, in the present case the incorporating company (Sevic) did indeed maintain in Luxembourg, under the merger contract, assets, personnel and means of production belonging to the incorporated company (SVC) and thus had a 'secondary' place of business abroad.

37. This case involves a particular means of exercising the right to 'secondary' establishment which is also provided for in Article 43 EC, that is to say 'secondary' establishment in a Member State by a company established in another Member State, by virtue of the freedom specifically provided for in that provision, 'to set up and maintain ... more than one place of work within the Community.' [12]

38. Nor can the fact that in the present case the secondary establishment would result in an entity devoid of autonomous legal personality lead to a different conclusion. Article 43(1) EC provides for the possibility of exercising the right of establishment through entities which either have legal personality (subsidiaries) or are devoid of such autonomy (agencies and branches).

39. On the other hand, it is clear from Community case-law that the reference in that provision to 'agencies, branches or subsidiaries' must be regarded as a purely illustrative and non-exhaustive indication of the forms of establishment which can be used by companies operating in another Member State. Accordingly, the Court has upheld the application of the rules on establishment in cases where, for example, the presence of a company in another country of the Community does not 'take

12 — Case 107/83 *Klopp* [1984] ECR 2971, paragraph 19.

the form of a branch or agency, but consists merely of an office managed by the undertaking's own staff or by a person who is independent but authorised to act on a permanent basis for the undertaking, as would be the case with an agency'. [13]

40. In the light of the foregoing, it appears to me that the German Government's objection that exercise of the right of establishment of necessity requires the setting-up of a new or additional establishment abroad and therefore cannot take the form of the takeover of a pre-existing company, as occurs in the principal proceedings, is likewise unfounded.

41. As the Court has had occasion to specify, in complete conformity with the case-law cited above, the right afforded by Article 43 EC includes the freedom 'to choose the most appropriate legal form for the pursuit of activities in another Member State'. [14] Therefore, this can be exercised in a number of ways, even by acquiring shares in a company already in existence and established in another Member State, provided that such a holding gives the acquirer 'influence over the company's decisions and allows him to determine its activities', [15] a criterion which is always satisfied, by definition, in cases of the incorporation of another company, as in the present case.

42. In the light of the foregoing, I therefore consider that national legislation, such as that at issue in the main proceedings, falls completely within the scope of Articles 43 EC and 48 EC.

B — *Assessment of the national legislation at issue*

43. Having clarified that point and now moving on to the substance of the question, it is necessary to ask whether the national measure at issue constitutes a restriction on freedom of establishment in that it does not,

13 — Case 205/84 *Commission* v *Germany* [1986] ECR 3755, paragraph 21.

14 — Case C-307/97 *Saint-Gobain ZN* [1999] ECR I-6161, paragraph 43.

15 — See, inter alia, *Baars*, paragraphs 21 and 22, and *Überseering*, paragraph 77. However, it should be noted that the acquisition of a shareholding which does not give such influence is not, for that reason, excluded from the scope of the Treaty because it is still subject to the rules on freedom of movement of capital.

in any event, allow mergers between companies established in Germany and companies of other Member States to be registered in the German register of companies.

44. I should start this appraisal by pointing out that on the basis of the broad definition of freedom of establishment which, as we have seen (paragraphs 24 to 27 above), is evident from Community case-law, 'all measures which prohibit, impede or render less attractive the exercise of that freedom' [16] must be regarded as restrictions thereof. Consequently, national measures which are merely likely to 'discourage' an operator from availing himself of the right of establishment can also be covered by this prohibition. [17]

45. Furthermore, it is evident from this case-law that Article 43 EC does not merely prohibit a Member State from impeding or restricting the establishment of foreign operators in its territory, it also precludes it from hindering the establishment of national operators in another Member State. [18] In other words, restrictions 'on entering' or 'on leaving' national territory are prohibited.

46. When these principles are applied to the present case, there would appear to be no doubt that legislation such as that at issue in the main proceedings is likely at least to discourage exercise of freedom of establishment both by national and foreign operators.

47. The instrument of merger is a particularly effective means of transforming a company in so far as it makes it possible, within the framework of a single operation, to pursue a particular activity in new forms and without interruption, thereby reducing considerably the complications, times and costs associated with other forms of company consolidation such as those which entail, for example, the dissolution of a company with liquidation of assets and the subsequent formation of a new company, the transfer of individual assets, and the exchange of title deeds, etc.

48. As a consequence of the contested national legislation, and solely because of it, Sevic loses, in the same way as all companies incorporated in German law which are in a similar situation and for the sole reason that it intends to incorporate a company established in another Member State, the possi-

16 — See, most recently, Case C-442/02 *Caixa Bank France* [2004] ECR I-8961, paragraph [26] and the case-law cited therein.

17 — See, for example, *Daily Mail*, paragraph 16; Case C-200/98 *X and Y* [1999] ECR I-8261, paragraph 26, and Case C-9/02 *Hughes de Lasteyrie du Saillant* [2004] ECR I-2409, paragraph 45.

18 — See, inter alia, *Baars*, paragraph 28, and *Hughes de Lasteyrie du Saillant*, paragraph 42.

bility of carrying out a merger which would otherwise have been available to it. It therefore loses a possibility of considerable and manifest importance in a common market such as the European market, unless it is prepared to use alternative means which, as I have just stated, do not present the same characteristics and advantages.

49. Evidently this all constitutes an 'obstacle' likely to have a direct effect on the decision by German undertakings to establish themselves or expand their presence in other Member States and consequently to exercise the freedom to which they are entitled under Articles 43 EC and 48 EC.

50. However, the measure in question has a restrictive effect also in respect of companies established in other Member States. It completely prevents them from using a means of access to the German market. In particular, a company established abroad would be unable to develop its activities in German by merging with one or more German companies by taking over an existing company or forming a new company. To achieve such a result, it would most probably first have to set up a new company in Germany, which, as the Court has had occasion to specify, is 'tantamount to outright negation of freedom of establishment.' [19]

51. In the light of the foregoing, I therefore consider that the German measure constitutes, in the sense set out above, a restriction on freedom of establishment and is consequently contrary to Articles 43 EC and 48 EC.

C — *Purported justification for the national legislation at issue*

52. Nevertheless, it is also necessary to ask whether the incompatibility of the national legislation in question might be removed on general grounds which, as we shall soon see, could be relied on to justify it.

53. The German Government, with the support of the Netherlands Government, argues that, as things stand, in the absence of Community harmonisation measures it is not possible for that Member State to recognise cross-border mergers on account of the considerable differences which still

19 — *Überseering*, paragraph 81.

exist between the company laws of the Member States and consequently the particular complex nature of such operations. Therefore, the reason given for the prohibition in question is the need to ensure an adequate level of legal certainty in commercial transactions and to safeguard the interests of the employees, creditors and minority shareholders of German companies.

54. Even if the Court rules that Paragraph 1 (1)(1) of the UmwG constitutes a restriction on freedom of establishment, that restriction could none the less be lawful in so far as it is intended to satisfy requirements which, in the view of the two governments making submissions, have been acknowledged by Community case-law as capable of justifying such measures.

55. For my own part, I would point out firstly that, as regards exemptions granted to fundamental freedoms, Community law draws a clear distinction between discriminatory and non-discriminatory measures. The former are permitted only if they can be brought within the scope of a derogation expressly laid down in the Treaty and that means, as regards the right of establishment, Article 46 EC. On the other hand, those which are applicable without distinction to nationals and citizens of other Member States may be granted only where they are justified by possible overriding requirements and even then on condition that they are suitable for securing the attainment of the objective pursued and do not go beyond what is necessary for that purpose. [20]

56. The present case clearly concerns a discriminatory rule. As we have seen, the provision in question treats companies quite differently in accordance with their place of establishment since it permits mergers if the companies in question are established in Germany but precludes them if one of those companies is established abroad.

57. Therefore, in such cases the only derogation which could apply is that laid down in Article 46 EC, under which discriminatory measures can be justified only on grounds of public policy, public security or public health. Furthermore, as an exception to a fundamental principle of the Treaty, this provision must be interpreted strictly and that is why the Court has in particular made the applicability thereof dependent on the

20 — See, inter alia, Case C-19/92 *Kraus* [1993] ECR I-1663, paragraph 32; *Gebhard*, paragraph 37; Case C-212/97 *Centros* [1999] ECR I-1459, paragraph 34, and *Caixa Bank*, paragraph 17.

existence of a 'genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society'. [21]

58. It appears to me evident that possible coordination problems or the risk of incompatibility between different national company laws, which, moreover, are cited in extremely vague and general terms by the German and Netherlands authorities, cannot constitute a 'threat' of such a nature and extent to one of the abovementioned 'fundamental interests of society' and consequently fall within the scope of Article 46 EC.

59. However, even if it is concluded that the contested legislation is not discriminatory in nature, the outcome would not change since the conditions laid down by Community case-law, to which I have just referred, in relation to cases of restrictions without distinction would none the less not be satisfied (see paragraph 55 above).

60. Let us begin with the existence of overriding reasons relating to public interest. From this point of view it may perhaps be possible to understand, albeit merely in hypothetical terms, the reasons why the State of origin of the incorporated company opposes the merger for reasons relating to public interest. [22] That State is witnessing the dissolution, as a result of its incorporation into a company of another Member State, of a company which formed part of its legal system and thus over which it will no longer be able to exercise direct control.

61. On the other hand, opposition on the part of the State to which the incorporating company belongs would appear to be more difficult to justify since the merger does not affect that company's link with the legal system of that State. In the present case, Sevic would retain its principal place of business in Germany also after the planned merger and German law would continue to apply to all that company's activities.

62. However, even if a certain degree of importance is attached to these considerations, it remains doubtful whether the purported problems of compatibility or coordination between various legal systems could rightly be classified as overriding reasons relating to public interest. This is

21 — See, among many, Case 30/77 *Bouchereau* [1977] ECR 1999, paragraph 35, and Case C-100/01 *Oteiza Olazabal* [2002] ECR I-10981, paragraph 39.

22 — In the present case it is clear from the file that the Luxembourg Government raised no objection at all and proceeded to remove SVC from the national register of companies.

particularly true when it is considered that, as far as can be seen, international mergers are permitted in many national legal systems without creating insurmountable difficulties, contrary to what the governments making submissions appear to contend. [23]

63. In any event, even if the arguments of these governments were accepted in this respect, quod non, it would still be necessary to establish whether the other conditions set out above are satisfied in the case in hand, namely the necessity and proportionality of the measure at issue.

64. However, as we have seen, this measure lays down an absolute and automatic prohibition which is consequently applicable in a general and preventative manner to all cases of cross-border merger, irrespective of the possible harm or risks associated with them.

65. To that extent, it appears to me, in particular in the light of the Court's case-law, [24] that this measure goes well beyond the purpose of resolving the possible difficulties set out above and must therefore be regarded as disproportionate to the pursuit of this aim. This aim could have been attained by less restrictive measures, such as, for example, the possibility of refusing registration on a case-by-case basis and only where there was manifest and proven difficulty as regards coordination between the legal systems involved which was likely to give rise to serious risks in terms of legal certainty or the protection of the rights of the employees, creditors or minority shareholders of the companies concerned.

66. I repeat, a measure which envisages such an absolute and automatic prohibition certainly cannot be regarded as proportionate.

67. Finally, the fact that the Community directive on cross-border mergers of companies with share capital has not yet been adopted, which was also cited by the governments making submissions, likewise cannot be cited as justification for this

23 — As far as can be seen, the conclusion of such mergers is permitted, for example, by Spanish, Portuguese, Italian, French and Belgian law, albeit in accordance with different procedures.

24 — As regards the disproportionate nature of absolute and general prohibitions, see, for example, Case 96/85 *Commission* v *France* [1986] ECR 1475, paragraph 14; Case C-351/90 *Commission* v *Luxembourg* [1992] ECR I-3945, paragraph 19; Case C-478/98 *Commission* v *Belgium* [2000] ECR I-7587, paragraph 45; and Case C-334/02 *Commission* v *France* [2004] ECR I-2229, paragraphs 28 and 34.

measure. According to those governments, it is not possible to carry out such operations in the absence of Community harmonisation.

68. It is known, and confirmed by the Court's settled case-law, that exercise of the freedom of establishment cannot be made dependent on the adoption of a directive on harmonisation. [25] That is because these directives do not establish the rights laid down in the Treaty but are merely designed to facilitate the exercise thereof. Moreover, with specific regard to the case before the Court, this is confirmed by the first recital in the preamble to the proposed directive referred to above, according to which it is intended 'to *facilitate* the carrying out of cross-border mergers'. [26] The argument that prior Community harmonisation is necessary is therefore disproved by the texts.

69. In summary, it appears to me that in the present case the conditions to which I referred above as essential to justify a national measure incompatible with the Treaty are not satisfied.

25 — See, inter alia, Case 71/76 *Thieffry* [1977] ECR 765, paragraphs 17 and 27; *Kraus*, paragraph 30; and *Überseering*, paragraph 55.

26 — Emphasis added.

70. I therefore conclude that the national legislation at issue is not justified either under Article 46 EC or by the imperative reasons invoked by the governments making submissions. It must therefore be regarded as contrary to Articles 43 EC and 48 EC.

D — *Freedom of movement of capital*

71. Finally, I note that at the hearing the Commission observed that the measure in question could be regarded as a restriction on the free movement of capital which is, in principle, prohibited by Article 56 EC. That is because the refusal to register cross-border mergers poses an obstacle to the movements of capital inherent in such operations.

72. Firstly, I should point out that the national court did not request the Court to give a preliminary ruling on the interpretation of Article 56 EC.

None the less, an answer in relation to this matter may still be necessary. As Community case-law makes clear, 'in order to provide a satisfactory answer to a national court which has referred a question to it, the Court of

Justice may deem it necessary to consider provisions of Community law to which the national court has not referred in the text of its question'. [27]

'73. However, in the present case it does not appear to me, in principle, that an interpretation of Article 56 EC is actually necessary to resolve the principal case. Since I have already concluded that the measure in question constitutes an unjustified restriction under Article 43 EC, an examination of its compatibility with Article 56 EC would, strictly speaking, be superfluous. We know that where the Court previously found a restriction on the freedom of establishment it considered that it was unnecessary, in principle, to examine whether a particular measure also ran counter to the Treaty provisions on the free movement of capital. [28]

74. Nevertheless, this may be necessary here if the Court accepts the arguments put forward by the governments making submissions and rules that the provisions on the freedom of establishment have not been infringed in this case.

75. If that were the case, however, and the matter were assessed from the point of view of the freedom of movement of capital, my conclusion would be that the contested national measure constitutes an unlawful restriction on that freedom, as the Commission contends.

76. I observe firstly that since they are 'inextricably linked to a capital movement', [29] the mergers clearly fall within the scope of Article 56 EC. Under point I, headed 'Directive Investments', of the nomenclature [30] contained in Annex I to Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty, [31] such investments include the 'acquisition in full of existing undertakings' (paragraph 1) and the '[p]articipation in new or existing

27 — Case 35/85 *Tissier* [1986] ECR 1207, paragraph 9; Case C-315/88 *Bagli Pennacchiotti* [1990] ECR I-1323, paragraph 10; Case C-107/98 *Teckal* [1999] ECR I-8121, paragraph 39.

28 — See, for example, Case C-118/96 *Safir* [1998] ECR I-1897, paragraph 35; Case C-200/98 *X and Y* [1999] ECR I-8261, paragraph 30; Case C-251/98 *Baars* [2000] ECR I-2787, paragraph 42; Joined Cases C-397/98 and C-410/98 *Metallgesellschaft and Others* [2001] ECR I-1727, paragraph 75; and Case C-436/00 *X and Y* [2002] ECR I-10829, paragraph 66.

29 — Case C-222/97 *Trummer and Mayer* [1999] ECR I-1661, paragraph 24.

30 — The nomenclature to which Community case-law has consistently referred to define the notion of movement of capital. See, most recently, *Trummer and Mayer*, paragraph 21, and Case C-35/98 *Verkooijen* [2000] ECR I-4071, paragraph 27.

31 — OJ 1988 L 178, p. 5.

undertaking with a view to establishing or maintaining lasting economic links' (paragraph 2). Therefore, it is clear that mergers constitute 'movements of capital'.

77. Secondly, as regards the restrictive nature of the measure at issue, it appears to me that the considerations set out in relation to freedom of establishment (paragraphs 37 to 43 above) can readily be applied here mutatis mutandis. The rules in question have at the very least a dissuasive effect on capital movements as they prohibit the use of a privileged instrument for carrying out operations to acquire or set up companies abroad.

78. Finally, and for the same reasons as those stated above (paragraphs 48 to 59), I consider that in the present case the conditions laid down by case-law for a derogation from the exercise of a fundamental freedom guaranteed by the Treaty, such as that in question here, to be justified, are not satisfied.

V — Conclusion

79. In the light of the considerations set out above, I propose that the Court reply as follows to the Landgericht Koblenz:

'Articles 43 EC and 48 EC preclude legislation of a Member State such as the Umwandlungsgesetz which does not permit registration in the national register of companies of mergers between companies established in that Member State and companies of other Member States.'