

ORDER OF THE COURT (Fifth Chamber)
10 July 2001 *

In Case C-86/00,

REFERENCE to the Court under Article 234 EC by the Amtsgericht Heidelberg, Germany, for a preliminary ruling in connection with an application for registration in the commercial register made by

HSB-Wohnbau GmbH

on the interpretation of Articles 43 EC and 48 EC,

THE COURT (Fifth Chamber),

composed of: A. La Pergola, President of the Chamber, M. Wathelet (Rapporteur), P. Jann, L. Sevón and S. von Bahr, Judges,

* Language of the case: German.

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: R. Grass,

after hearing the Opinion of the Advocate General,

makes the following

Order

- 1 By order of 3 March 2000, received at the Court on 7 March 2000, the Amtsgericht (Local Court) Heidelberg referred for a preliminary ruling under Article 234 EC two questions on the interpretation of Articles 43 EC and 48 EC.

- 2 Those questions were raised in the context of an application by HSB-Wohnbau GmbH, a company incorporated under German law, for entry in the German commercial register of the transfer of its registered office to Spain, without changing the identity of the company.

The main proceedings and the questions referred for a preliminary ruling

- 3 HSB-Wohnbau is a profit-making company incorporated under German law, formed in 1988 and duly registered in the commercial register kept by the Amtsgericht Heidelberg. Its registered office is in Sinsheim, Germany.

- 4 In August 1999 all the shares in HSB-Wohnbau were transferred to Paradies-Sonne-Meer SL, a company registered in the meantime in the Spanish register and now the sole shareholder. At the same time, the general meeting of shareholders of HSB-Wohnbau decided to cease all activities in Germany and to carry them on henceforth in Spain, and to transfer the actual place of establishment and the registered office to Orihuela Costa, Spain.

- 5 In December 1999 HSB-Wohnbau produced its duly amended articles of association to the Amtsgericht Heidelberg, in accordance with the requirements of German law, and applied for the transfer of the registered office to Spain to be entered in the German commercial register.

- 6 The Amtsgericht Heidelberg is uncertain whether a company incorporated under German law may have the transfer abroad of its registered office entered in the German commercial register, and hence whether HSB-Wohnbau's application should be granted.

- 7 The Amtsgericht states, on the one hand, that according to German case-law and the prevailing opinion of legal writers in Germany it is the '*Sitztheorie*' which applies to the recognition of companies. That means that in German legal practice a company has legal existence only if it has its actual establishment in the country under whose law it has been incorporated. From that viewpoint, the transfer abroad of a company's registered office necessarily entails its dissolution and liquidation, that is to say, in particular the loss of its legal personality in Germany, and the formation of a new company abroad. Since the (unwritten) international law of companies applicable in Germany does not permit the transfer abroad of the registered office without a change in the identity of the company, HSB-Wohnbau's application for entry in the German commercial register of the transfer of its registered office to Spain would have to be rejected.

- 8 On the other hand, the Amtsgericht raises the question of the effect of Community law on the international law of companies applicable in Germany.

The provisions of the EC Treaty on the right of establishment of companies, set out in Article 43 EC taken together with Article 48 EC, are relevant in this respect. They might preclude the German legal practice prohibiting companies from transferring their registered office outside German territory without a change of identity, and compelling them in such cases to be dissolved and re-formed abroad.

- 9 In those circumstances, the Amtsgericht Heidelberg finds it necessary for its decision to put questions to the Court to ascertain whether Articles 43 EC and 48 EC preclude national practices such as those resulting from the *Sitztheorie*. Since it considers that the Court's case-law, in particular the judgments in Case 81/87 *Daily Mail and General Trust* [1988] ECR 5483 and Case C-212/97 *Centros* [1999] ECR I-1459, does not provide an answer to that question, it has referred the following questions for a preliminary ruling:

'A. Does the transfer to Spain, with the company's identity being retained, of the registered office of a *Gesellschaft mit beschränkter Haftung* (GmbH, limited company) validly constituted under German law and registered in the German register, whose sole shareholder is a Spanish company, fall within the rights set out in Articles 43 EC and 48 EC?

B. Do Articles 43 EC and 48 EC preclude a rule prohibiting the transfer to Spain, with the company's identity being retained, of the registered office of a *Gesellschaft mit beschränkter Haftung* (GmbH, limited company) validly constituted under German law and registered in the German register, whose sole shareholder is a Spanish company?'

Jurisdiction of the Court

- 10 Under Article 92(1) of the Rules of Procedure, where it is clear that the Court has no jurisdiction to take cognisance of an action or where the action is manifestly inadmissible, the Court may, after hearing the Advocate General and without taking further steps in the proceedings, give a decision on the action by reasoned order.
- 11 According to settled case-law, it follows from Article 234 EC that a national court may refer a question to the Court only if there is a case pending before it and if it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature (order in Case 318/85 *Greis Unterweger* [1986] ECR 955, paragraph 4, and judgments in Case C-111/94 *Job Centre* [1995] ECR I-3361, paragraph 9 (*Job Centre I*), Case C-134/97 *Victoria Film* [1998] ECR I-7023, paragraph 14, and Case C-178/99 *Salzmann* [2001] ECR I-4421, paragraph 14).
- 12 In *Job Centre I* the reference for a preliminary ruling came from the Tribunale civile e penale di Milano (Civil and Criminal District Court, Milan), Italy, and concerned an application for confirmation of a company's articles of association, which in Italy is examined in non-contentious proceedings (*giurisdizione volontaria*). In paragraph 11 of the judgment, the Court held that it had no jurisdiction to rule on the reference, on the ground that when, in accordance with the applicable national legislation and under the *giurisdizione volontaria* procedure, the Tribunale civile e penale rules on an application for confirmation of a company's articles of association with a view to its registration, it is performing a non-judicial function which in other Member States is entrusted to administrative authorities. The Court considered that the national court was exercising administrative authority without being at the same time called upon to settle any dispute.
- 13 Also in paragraph 11 of that judgment, the Court stated that only if the person empowered under national law to apply for confirmation seeks judicial review of a decision rejecting the application, and thus refusing registration, may the court

seised be regarded as exercising a judicial function, for the purposes of Article 177 of the EC Treaty (now Article 234 EC), in respect of an application for the annulment of a measure adversely affecting the petitioner.

- 14 In the present case, it is apparent from the order for reference that the Amtsgericht made the reference to the Court in its capacity as authority responsible for keeping the commercial register, in a case concerning an entry in that register. There is nothing in the case-file to indicate that there is a dispute pending before the Amtsgericht between HSB-Wohnbau and any defendant.

- 15 Moreover, it does not appear from the documents before the Court that the situation of HSB-Wohnbau gave rise, before the Amtsgericht made the reference to the Court, 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 entry in the commercial register of the transfer of HSB-Wohnbau's registered office.

- 16 It follows that in the main proceedings the Amtsgericht, which made the reference to the Court in order to ascertain whether or not the decision it has to take under German law is compatible with Community law, is performing a non-judicial function.

- 17 Consequently, Article 92(1) of the Rules of Procedure must be applied, and it must be held that the Court clearly has no jurisdiction to rule on the questions put by the Amtsgericht Heidelberg.

Costs

- 18 The costs incurred by the German, Belgian, Italian, Austrian and United Kingdom Governments and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the Amtsgericht Heidelberg, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber)

hereby orders:

The Court of Justice of the European Communities clearly has no jurisdiction to answer the questions put by the Amtsgericht Heidelberg in its order of 3 March 2000.

Luxembourg, 10 July 2001.

R. Grass

Registrar

A. La Pergola

President of the Fifth Chamber

