Neutral Citation Number: [2018] EWCA Civ 10

Case No: A3/2016/4623

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE HIGH COURT (CHANCERY DIVISION)**
**THE HON. MR JUSTICE BIRSS**
**[2016] EWHC 2681 (Ch)**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/01/2018

**Before:**

**LORD JUSTICE DAVIS**
**LORD JUSTICE SALES**
and
**LORD JUSTICE DAVID RICHARDS**

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**IN THE MATTER OF THE COMPANIES (CROSS-BORDER MERGERS) REGULATIONS 2007**

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|---|---|
| **Easynet Global Services Ltd** | **Appellant** |
| **- and -** | |
| **Secretary of State for Business, Energy & Industrial Strategy** | **Intervener** |

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**Stephen Horan and David Scannell** (instructed by **Bird & Bird LLP**) for the **Appellant**
**Katherine Apps** (instructed by **Government Legal Department**) for the **Intervener**

Hearing date: 28 November 2017

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# Approved Judgment

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## Lord Justice Sales:

1. This appeal is concerned with the operation of the Companies (Cross-Border Mergers) Regulations 2007 ("the Regulations") and the Cross-Border Mergers Directive 2005/56/EC of 25 October 2005 ("the 2005 Directive"), which the Regulations implement in domestic law. The appeal is from a judgment of Birss J dated 31 October 2016. Since that judgment, a further Directive has been promulgated which consolidates a range of EU instruments concerned with aspects of company law, including the 2005 Directive, into a single new instrument: Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law (codification) ("the 2017 Directive"). However, the 2017 Directive does not change the law in any material respect and the relevant provisions of the 2005 Directive are re-enacted in it. It is convenient to refer in this judgment to the provisions as they appeared in the 2005 Directive.

2. Under the scheme of the 2005 Directive, where it is proposed that there should be a cross-border merger of companies there is a process involving a review of the merger proposal in relation to each entity participating in it, before the proposal takes effect. These entities comprise both the companies which are to be merged into another company and hence which are to lose their independent corporate personality ("the transferor companies") and the company into which they are to be merged ("the transferee company"). The interests of the shareholders, creditors and persons contracting with these entities (in particular, their employees, whose rights are accorded special treatment under the 2005 Directive) will be affected by a merger and assurance is required that such interests will not be detrimentally affected to a disproportionate degree by implementation of the merger. The 2005 Directive requires there to be a review and certification of the merger proposal at the pre-merger stage in respect of each company involved by the "competent authority" in the Member State in which that company is incorporated and then that there is a final approval of the merger in the Member State of the transferee company.

3. Under the 2005 Directive, the designation of the competent authority is left to the discretion of each Member State and it may be a court, a notary or any other competent authority appointed by the Member State concerned. In several Member States the designated competent authority is a notary or an administrative body. In the United Kingdom and some other Member States, it is a court.

4. The present case concerns an application by the appellant, as the transferee company in a proposed merger, for permission under regulation 11 of the Regulations to convene a meeting of its sole shareholder. At the time of the application to the judge, this was intended to be the first in a series of procedural steps under the 2005 Directive and the Regulations whereby 22 companies out of a larger number of companies in the same group would be merged into the appellant.

5. However, all of the relevant companies were UK companies apart from one, which was registered in the Netherlands ("the Dutch company"). The Dutch company was dormant, had never traded and had no appreciable assets (only some modest inter-group receivables of about €17,000) and no relevant liabilities, employees or other obligations. The only purpose of including the Dutch company in the merger proposal was to make it into a *cross-border* merger proposal in relation to which the 2005 Directive would apply.

6. The regime under the 2005 Directive was considered to be more attractive than other more cumbersome, expensive or restrictive domestic procedures which might have been employed to achieve a merger of the participating UK companies into the appellant, whereby the appellant would come to hold all their assets and liabilities. Those domestic procedures, as identified by the judge, were a scheme of reconstruction under section 900 of the Companies Act 2006 and a scheme of reconstruction under section 110 of the Insolvency Act 1986.

7. The latter option would have tax disadvantages as compared with a cross-border merger under the 2005 Directive and the Regulations and might also have reputational disadvantages for the companies involved, since suggestions of insolvency in relation to a company can be damaging. The appellant and its associated companies did not wish to use the first option because of difficulties in relation to transferring contracts of transferor companies to the appellant as the transferee company, as explained by Henderson J in *Re TSB Nuclear Energy Investment UK Ltd* [2014] EWHC 1272 (Ch) at [11]-[12]; and see *Nokes v Doncaster Amalgamated Collieries* [1940] AC 1014. By contrast, under the procedure in the 2005 Directive and the Regulations the court can sanction transfers of contracts from transferor companies to the transferee company by a form of statutory novation.

8. It is usual for an application to convene a meeting of shareholders to be made to a Registrar of the Companies Court. However, the practice has grown up to make an application under regulation 11 of the Regulations to a judge in the Companies Court, where it is thought that novel or substantial issues may arise either at that stage or on a subsequent application under regulation 16 for an order approving the completion of the merger. This procedure potentially allows any serious problems with a cross-border merger proposal to be flushed out at an early stage, before other expensive parts of the procedure are embarked upon.

9. In this case, since the Dutch company had no substance and was only included in the merger proposal in order to engage the 2005 Directive and the Regulations, the judge found that the proposed merger did not fall within the scope of the Directive and the Regulations, interpreting them in a purposive way: para. [32] ("… it is not, in reality, a cross-border merger at all"). The court therefore had no jurisdiction to sanction the merger arrangements. In the alternative, if the proposed merger did come within the scope of the 2005 Directive and the Regulations, he indicated that since this was so "purely as a result of the device of including [the Dutch company]", the court would refuse to exercise its discretionary power to give its sanction for the merger to take effect: para. [33].

10. The judge granted permission to appeal. When this court reviewed the papers for the appeal, we considered that it would be helpful to have more substantial submissions on the issues of EU law raised by the appeal and the benefit of submissions from the Secretary of State for Business, Energy and Industrial Strategy, as the Minister with responsibility for the Regulations and for ensuring that the UK's obligations under the 2005 Directive and the 2017 Directive are properly implemented in domestic law. We therefore adjourned the hearing of the appeal, giving directions for further submissions from the appellants and inviting the Secretary of State to appear and make representations as an interested party. The Secretary of State appeared by counsel at the hearing of the appeal to make submissions in support of allowing the appeal.

11. By the time of the appeal, the precise details of the proposed merger had changed. Fewer UK companies are now involved. However, the basic feature of the proposal which created the difficulty at first instance, namely the inclusion of the dormant Dutch company which has no economic substance in order to bring the proposal within the scope of the 2005 Directive and the Regulations, remains in place. The issue of principle for us remains the same as it was before the judge.

12. On the appeal, the appellant submits that the proposed merger arrangements, by including the Dutch company, fall within the scope of the 2005 Directive and the Regulations, on their proper construction. It also submits that the proposed merger does not involve any abuse of right by the appellant and the companies involved in it and that the judge was wrong to rule that a court would refuse to give its sanction for the merger in the exercise of its discretion under the Regulations.

*The legislative framework*

13. Article 49 of the Treaty on the Functioning of the European Union ("TFEU") (ex Article 43 EC) sets out one of the principal freedoms in the EU legal order, namely freedom of establishment. In Case C-411/03 *SEVIC Systems AG v Amstgericht Neuwid* [2005] ECR I-10805; [2006] All ER (EC) 363, decided by reference to general provisions of the EC Treaty before the 2005 Directive came into effect, the ECJ held that cross-border merger operations

> "constitute particular methods of exercise of the freedom of establishment, important for the proper functioning of the internal market, and are therefore amongst those economic activities in respect of which Member States are required to comply with the freedom of establishment laid down by Art. 43 EC" (para. [19]).

14. The ECJ held that a provision of German law which prohibited mergers between corporate entities registered in states other than Germany could not be justified by reference to relevant overriding interests identified at para. [28] (protection of the interests of creditors, minority shareholders and employees and preservation of the effectiveness of fiscal supervision and the fairness of commercial transactions) and therefore infringed Article 43.

15. Directive 90/434 concerns the common system of taxation applicable to, amongst other things, cross-border mergers. The CJEU (First Chamber) considered the material scope of Article 11 of that Directive in Case C-14/16 *Euro Park Service v Ministre des finances et des comptes publics* EU:C:2017:177; [2017] 3 CMLR 17, judgment of 8 March 2017. The case concerned a challenge to the refusal of the French tax authorities to permit a company's claim to defer a charge to capital gains tax relating to its assets at the time of its merger through acquisition of a company established in another Member State, where the company had not sought the prior approval of the tax authorities to verify that the transaction was carried out for commercial reasons and not with the objective of avoiding tax. At para. [28] the CJEU affirmed the ruling in *SEVIC* that cross-border mergers, by their nature, fall within the scope of protection of the free movement of establishment. At para. [59] the court observed:

> "All measures which prohibit, impede or render less attractive the exercise of the freedom of establishment must be considered to be restrictions on that freedom …"

16. The 2005 Directive lays down Community provisions "to facilitate the carrying out of cross-border mergers" in order to reduce legislative and administrative difficulties and "with a view to the completion and functioning of the single market" (recitals (1) and (2)).

17. These recitals reflect the Explanatory Memorandum dated 18 November 2003 prepared by the EU Commission in support of its proposal for enactment of the 2005 Directive, in which it emphasised

> "the need to facilitate cross-border mergers of commercial companies without national laws governing them – as a rule the laws of the countries where their head offices are situated – forming an obstacle"

and said

> "More than ever, all companies, whether they be public limited liability companies or any other type of company with share capital, must have at their disposal a suitable legal instrument enabling them to carry out cross-border mergers under the most favourable conditions. The costs of such an operation must therefore be reduced, while guaranteeing the requisite legal certainty and enabling as many companies as possible to benefit."

18. Recital (3) of the 2005 Directive provides that provisions and formalities of national law should not

> "introduce restrictions on freedom of establishment or on the free movement of capital save where these can be justified in accordance with the case-law of the Court of Justice and in particular by requirements of the general interest and are both necessary for, and proportionate to, the attainment of such overriding requirements."

19. Recitals (5) and (8), in particular, make it clear that the interests of members and others are to be protected by the procedures set out in the Directive.

20. Relevant provisions of the 2005 Directive are as follows. Article 1, headed "Scope", provides:

> "The Directive shall apply to mergers of limited liability companies 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, provided at least two of them are governed by the laws of different

> Member States (hereinafter referred to as cross-border mergers)."

21. Article 2 provides in relevant part as follows:

> "*Definitions*
>
> For the purposes of this Directive:
>
> […]
>
> 2. 'merger' means an operation whereby:
>
> (a) one or more companies, on being dissolved without going into liquidation, transfer all their assets and liabilities to another existing company, the acquiring company, in exchange for the issue to their members of securities or shares representing the capital of that other company and, if applicable, a cash payment not exceeding 10% of the nominal value, or, in the absence of a nominal value, of the accounting par value of those securities or shares; or
>
> (b) two or more companies, on being dissolved without going into liquidation, transfer all their assets and liabilities to a company they form, the new company, in exchange for the issue to their members of securities or shares representing the capital of that other company and, if applicable, a cash payment not exceeding 10% of the nominal value, or, in the absence of a nominal value, of the accounting par value of those securities or shares; or
>
> (c) a company, on being dissolved without going into liquidation, transfers all its assets and liabilities to the company holding all the securities or shares representing its capital."

22. Article 5 provides for common draft terms of cross-border mergers to be drawn up and Article 6 provides for them to be published in advance of meetings of the members of participating companies. Article 7 provides for the management of each participating company to draw up a report for members to explain and justify the proposed merger and its implications for members, creditors and employees. Article 8 provides for an independent expert report on these matters to be drawn up in relation to each participating company. Article 9 states that it is for the general meeting of each participating company to decide whether to approve the merger.

23. Article 10 provides for pre-merger certification by the competent authority of the Member State of each participating company "attesting to the proper completion of the pre-merger acts and formalities." Article 11, headed "Scrutiny of the legality of the cross-border merger," provides for such scrutiny to be by the competent authority of the Member State of the transferee company.

24. The Regulations implement the 2005 Directive in domestic law. It is not suggested that they have any meaning or effect at variance with the 2005 Directive. Regulation 2

defines "cross-border merger" in line with the definition in the 2005 Directive. Regulation 6 corresponds to Article 10 and provides for approval of pre-merger requirements by the court, as the UK's competent authority. Regulation 11 confers power on the court to order a meeting of members or a class of members of a participating company and a meeting of creditors or a class of creditors of such company for the purposes of giving approval for a merger.

25. Regulation 16 corresponds to Article 11. It is headed "Court approval of cross-border merger" and provides that in various cases, including where the transferee company is a UK company, "The court may, on the joint application of all the merging companies, make an order approving the completion of the cross-border merger for the purposes of Article 11 of the Directive …".

*Discussion*

26. On applications of the kind in issue in this case, the usual pattern is that the court only hears submissions on behalf of the companies which propose to participate in the merger. The court is not a rubber stamp, but has an important role to fulfil under the scheme of the 2005 Directive. The judge in this case was rightly alert to scrutinise with care the submission which was being made to him, that the proposed merger was indeed a cross-border merger for the purposes of the Regulations and the 2005 Directive purely by virtue of the inclusion of a dormant Dutch company in arrangements which otherwise involved only UK companies. The submissions in respect of EU law which were made to the judge to allay his concerns about application of the Regulations in that context were much less developed than those which have been made to us, and I do not find it surprising that he reached the conclusion that he did.

27. However, with the benefit of submissions by the appellant and the Secretary of State on issues of EU law which are far more developed than those made to the judge, I consider that on a correct view of EU law the proposed merger does qualify as a cross-border merger falling within the scope of the 2005 Directive and the Regulations. I also consider that on the information currently available to the court there is no objection to the implementation of the merger in accordance with its terms and that a domestic court would err in the exercise of its discretion under regulation 16 if it withheld its approval for such implementation. That would be a step which would conflict with the EU law regime applicable to the proposed merger.

28. I deal first with the proper interpretation of the 2005 Directive and the Regulations. The legal context for interpretation of the 2005 Directive is one in which Article 49 TFEU (ex Art. 43 EC) applies, protecting the right of freedom of establishment. The recitals to the 2005 Directive make it clear that it has been promulgated to facilitate cross-border mergers by providing for a common framework for their implementation by Member States.

29. There is nothing in the 2005 Directive to suggest that it is intended to allow for any restriction on the right of freedom of establishment in any Member State, other than for the objectives identified in the Directive of protecting the interests of members and others, i.e. creditors, employees and persons dealing with the companies involved in a cross-border merger. Those objectives will be satisfied in this case by, among other things, the pre-merger reviews provided for in Article 10 of the 2005 Directive

(and, as regards the UK companies, regulation 11 of the Regulations) and the final approval required under Article 11 of the 2005 Directive (and regulation 16 of the Regulations). The UK has not sought to stipulate in the Regulations for any other restrictions on the right of freedom of establishment, nor does it seek to maintain that any additional restrictions would be justified under EU law.

30. In my view, there would be a material restriction on the right of freedom of establishment if the UK purported to impede or prohibit a company in another Member State (here, the Dutch company) from arranging its affairs by way of participation in a cross-border merger so as to become absorbed by being incorporated into a company established in the UK. Further, the UK companies wish to establish themselves in a new corporate entity which will subsume the Dutch company, and in my opinion this means that there is a sufficient cross-border element to engage their rights of freedom of establishment as well. I also consider that there would be a material restriction on the right of freedom of establishment if the UK's cross-border mergers regime made it more difficult to proceed with a cross-border merger where it was proposed to include a foreign subsidiary of a UK company in another Member State which had operations which were small in scale or which was dormant, as compared with a merger involving a more substantial foreign subsidiary. In light of the potential commercial importance of maintaining flexibility in the organisation of a corporate group's affairs across jurisdictions of different Member States, such a restriction would tend to deter UK companies from setting up small-scale or dormant subsidiaries in other Member States with a view to maintaining such freedom of manoeuvre in organising their affairs. It could in effect impose a practical requirement of setting up subsidiaries which are capitalised or expected to trade at a significant level as the price of achieving such flexibility. There is nothing in the 2005 Directive which indicates that it was intended to permit the introduction of such restrictions or conditions on the right of freedom of establishment.

31. Moreover, the re-arrangement of a group's corporate structure by means of a cross-border merger will often be undertaken with a view to reorganising its affairs so as to achieve costs savings and to minimise tax liabilities. As the CJEU observed in *Euro Park Service* at para. [38], "the Court has already held that the requirement of legal certainty must be observed all the more strictly in the case of EU rules liable to entail financial consequences, in order that those concerned may know precisely the extent of the obligations which those rules impose on them", citing as authorities to that effect Case C-255/02 *Halifax Plc* EU:C: 2006:121; [2006] Ch 487 at [72] and Case C-144/14 *Cabinet Medical Veterinar Dr Tomoiaga Andrei* EU:C:2015:452 at [34]. Corporate groups which plan to reorganise their structure by means of a cross-border merger need to know where they stand so that they can plan their affairs effectively. The principle of legal certainty indicates that the provisions of the 2005 Directive should be given a straightforward interpretation according to their natural meaning.

32. Having regard to the legal context, in which participation in cross-border mergers is a mode of exercise of the right of freedom of establishment; to the absence of any relevant restriction on that right being stipulated in the 2005 Directive; to the stated object of the 2005 Directive, namely to facilitate cross-border mergers; and to the principle of legal certainty, I consider that it is clear that the proposed cross-border merger in this case involving the Dutch company fell within the scope of the 2005 Directive as stated in Article 1 and within the definition of "cross-border merger" as

set out in Article 2. It plainly did so according to the ordinary meaning of the words used in those provisions and there is nothing in the legal context to support any suggestion that some undefined limitation should be implied into those provisions. Since the Regulations are to be interpreted in line with the 2005 Directive, it follows that the proposed cross-border merger also came within the scope of the Regulations.

33. I turn next to consider the question whether the EU law principle of abuse of law (sometimes referred to as abuse of rights) might apply in the context of this case to prevent the appellant and the companies associated with it from seeking to include the Dutch company in the proposed merger purely in order to take advantage of the cross-border merger procedure set out in the 2005 Directive for the benefit of the participating UK companies. Absent the cross-border element constituted by the involvement of the Dutch company, a merger involving the UK companies by themselves would not have been within the scope of the 2005 Directive and the Regulations.

34. Abuse of law is recognised as a general principle of EU law: see case C-321/05 *Kofoed v Skatteministeriet* EU:C:2007:408; [2007] ECR I-5795, at [38]; Case C-16/05 *Tum and Dari v Secretary of State for the Home Department* EU:C:2007:530; [2007] ECR I-7415, [64]; and *Revenue and Customs Commissioners v Pendragon plc* [2015] UKSC 37; [2015] 1 WLR 2838, paras. [4]-[13]. "In its simplest form, [the principle] confines the exercise of legal rights to the purpose for which they exist, and precludes their use for a collateral purpose", per Lord Sumption JSC at [4]. A finding of abuse of law requires

> "first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the [EU] rules, the purpose of those rules has not been achieved"
>
> and
>
> "second, a subjective element consisting in the intention to obtain an advantage from the [EU] rules by creating artificially the conditions laid down for obtaining it"

see Case C-110/99 *Emsland-Stärke GmbH* EU:C:2000:695; [2000] ECR I-11569, at [52]-[53]; also see Case C-202/13 *R (McCarthy) v Secretary of State for the Home Department* EU:C:2014:2450, at [54].

35. In my judgment, it is clear that the proposed cross-border merger in this case does not offend against the principle of abuse of law. I say that essentially because of the ambit of the rights which the appellant and other participating companies, including the Dutch company, are seeking to exercise by participating in the proposed cross-border merger.

36. They seek to exercise wide rights of freedom of establishment as contained in Article 49 TFEU. They also seek to exercise what are intended to be wide rights of participation in cross-border mergers, as set out in the 2005 Directive itself. Unlike in the tax avoidance context considered in the *Pendragon* case, no criterion of what would count as an improper attempt to make use of these rights appears from the TFEU or the 2005 Directive. Both sets of rights are of very wide ambit and

contemplate that they may be exercised wherever it suits the purposes of the rights-holders, whatever those purposes might be (leaving aside cases of fraud). The object of the 2005 Directive is to facilitate cross-border mergers, for whatever purpose. The procedure set out in the 2005 Directive is available for the proposed merger in this case involving the Dutch company according to the natural meaning of the language used in Articles 1 and 2 of the Directive.

37. Lord Sumption's discussion in *Pendragon*, at [11], of Case C-103/09 *Revenue and Customs Commissioners v Weald Leasing Ltd* EU:C:2010:804; [2011] STC 596, is relevant here. In *Weald Leasing Ltd*, in order to obtain a tax advantage a taxpayer chose to take equipment on lease from an intermediate company rather than buy it outright. The choice was held not to involve an abuse of rights, although it was an unusual one for that taxpayer. This was because:

> "The choice between leasing and outright purchase was a choice accommodated by the scheme of the VAT legislation. The tax treatment of lease payments being a facility available under the legislation itself, resort to it could not be regarded as contrary to its purpose. For the same reason, a transaction is not abusive merely because it falls within an exception or derogation from ordinary principles of EU law governing the incidence of VAT, such as the right enshrined in the Sixth Directive to deduct input tax generated by transactions in another member state. It follows that the sourcing of goods or services from a country in which the VAT regime is more favourable is not in itself abusive, even though the object and effect is to allow the deduction of input tax without the payment of output tax: *Revenue and Customs Comrs v RBS Deutschland Holdings GmbH* (Case C-277/09) [2011] STC 345. The reason, as the court explained in that case at paras. 51-52, is that this is a choice inherent in a scheme of taxation that is designed to be fiscally neutral as between different member states while allowing for some differences between their implementing laws …"

38. Similarly, in the present case the participating companies are seeking to make use of wide and unconditional rights which are made available to them in EU law to take part in a cross-border merger involving the Dutch company. As Lord Neuberger of Abbotsbury PSC observed in *Secret Hotels2 Ltd v HMRC* [2014] UKSC 16; [2014] STC 937 at [57], "… EU law, like English law, treats parties as free to arrange or structure their relationship so as to maximise its commercial attraction, including the incidence of taxation – see *RBS Deutschland* [supra]".

39. In my view, therefore, it cannot be said that it is proposed to exercise the relevant rights for a purpose other than that for which they exist. Nor can it be said that it is proposed to use them for a collateral purpose other than what was contemplated when rights of this wide ambit were created. The companies which want to participate in the cross-border merger involving the Dutch company are not abusing the law or their EU law rights.

40. With the assistance of the helpful submissions made by Mr Scannell for the appellant and Ms Apps for the Secretary of State, I would expand upon these points as follows.

41. The abuse of law doctrine is a general principle of EU law and as such it can, in principle, apply in the field of company law: see in that regard Case C-467/96 *Kefalas v Elliniko Dimosio* [1998] ECR I-2843; [1999] 2 CMLR 144, [20] and [28].

42. However, where a company established in one Member State opens a branch in another Member State in order to avoid more stringent company law rules in the first state, that "cannot, in itself, constitute an abuse of the right of establishment": Case C-212/97 *Centros Ltd v Erhvervs-og Selkabsstyrelsen* EU:C:1999:126; [2000] Ch 446 at [27]. The purely subjective reasons why a company chooses to incorporate in one Member State are irrelevant, except in a case of fraud: Case C-167/01 *Kamer van Koophandel en Fabreken voor Amsterdam v Inspire Art Ltd* EU:C:2003:512; [2005] 3 CMLR 34 at [95]. In that case, a company with its registered office in the UK, where the conditions of incorporation were easier to satisfy, undertook no commercial activities there but only traded via a branch in the Netherlands. This was held not to constitute abuse of law or fraudulent conduct such as would allow the Netherlands to deny to the company the benefits of EU law relating to the right of establishment: see [95]-[98], [104]-[105] and [136]-[139]. Whether a company is dormant or not in its state of incorporation does not supply the test of whether it is open to it to rely upon its rights of free establishment:

> "95. The Court has held that it is immaterial … that the company was formed in one Member State only for the purpose of establishing itself in a second Member State… where its main, or indeed entire, business is to be conducted. The reasons for which a company chooses to be formed in a particular Member State are, save in the case of fraud, irrelevant with regard to application of the rules on freedom of establishment…
>
> "96. The Court has also held that the fact that the company was formed in a particular Member State for the sole purpose of enjoying the benefit of more favourable legislation does not constitute abuse even if that company conducts its activities entirely or mainly in that second State…"

43. Consideration of the case-law in relation to tax avoidance also indicates that there is no relevant restriction on the rights in EU law of the participating companies in the present case. In relation to abuse of law with a view to obtaining a tax advantage, the ECJ has held that "in order for a restriction [sc. imposed by a Member State] on the freedom of establishment to be justified on the ground of prevention of abusive practices, the specific objective of such a restriction must be to prevent conduct involving the creation of wholly artificial arrangements which do not reflect economic reality, with a view to escaping the tax normally due on the profits generated by activities carried out on national territory": Case C-196/04 *Cadbury Schweppes plc v Inland Revenue Commissioners* EU:C:2006:544; [2007] Ch 30, [55]. In the present context, however, the UK has not sought to impose any restriction on the freedom of establishment of the participating companies, so one does not even get to the question whether such a restriction could be justified. The Secretary of State does not contend

that there is some UK public interest in ensuring that companies are compelled to use the merger regimes in domestic law under the Companies Act 2006 and the Insolvency Act 1986, such as to justify restricting their rights to use the cross-border merger process under the 2005 Directive. The highly limited scope for a Member State to be able to impose a restriction indicates the strength and amplitude of the rights in issue in this case. Moreover, the fact that a person has a subjective intention of avoiding tax is not sufficient to establish that there has been an abuse of rights: *ibid*. at [64]. There must be objective factors to show that an abuse of rights is involved, and what constitutes such objective factors is given a narrow interpretation. It is not enough to show that one company is carrying out activities which could "just as well have been carried out by a company established in the territory of the Member State in which the resident company is established": *ibid*. [68]-[69].

44. Although regulation 16 of the Regulations confers a discretion on the domestic court whether to give final approval for the implementation of a cross-border merger, that provision is intended to reflect Article 11 of the 2005 Directive and does not introduce any distinct restriction on the EU rights under Article 49 TFEU and the 2005 Directive to engage in a cross-border merger. Nor has the Secretary of State sought to justify it as a distinct restriction on those rights. The discretion conferred by regulation 16 is to be exercised in a manner which is compatible with rights under EU law. Accordingly, absent other relevant matters emerging in the course of the procedure under the 2005 Directive, the court would be obliged to exercise its power under regulation 16 to give effect to the cross-border merger in this case.

45. Finally, I should refer to a separate topic which was mentioned by the judge and in the written submissions in this court. This is the issue whether, in a case where the transferee company in a cross-border merger is located in the UK, the domestic court at the Article 11 / regulation 16 stage of the merger process has any function to review whether the interests of members, creditors and other persons dealing with participating companies which are located in other Member States have been properly taken into account and are sufficiently protected under the proposed merger arrangements. The members, creditors and others may be located throughout the EU.

46. According to the scheme of the 2005 Directive, the primary responsibility for checking in relation to their interests lies with the competent authorities of those other Member States at the Article 10 stage. However, a question can arise whether the domestic court at the Article 11 stage might also have some role in this regard, e.g. if it emerges that the competent authority of another Member State has not considered this aspect of the merger at all. Different views have been expressed about this at first instance, including by me: see *Re Diamond Resorts (Europe) Ltd* [2012] EWHC 3576 (Ch); [2013] BCC 275 (Sales J); *Re Livanova Plc* [2015] EWHC 2865 (Ch) (Morgan J); and most recently, *Re M2 Property Invest Ltd* [2017] EWHC 3218 (Ch) (Snowden J). Some difficulty has arisen in arriving at a definitive position on this because of the absence of adversarial argument on such applications, *Diamond Resorts* being a case in point.

47. In the present appeal the court indicated at the hearing that it would not venture to try to resolve this issue. It does not arise on the present application, since the Dutch company is dormant and the appellant proposes to establish by evidence which will be before the court at the Article 11 / regulation 16 stage that the interests of members and creditors of all participating companies and employees and others dealing with

them would be properly and sufficiently protected under the proposed merger arrangements. Also, we were not going to have the benefit of full adversarial argument on the point.

*Conclusion*

48. For the reasons given above, I would allow this appeal. The proposed merger arrangements constitute a cross-border merger and fall within the scope of the 2005 Directive and the Regulations. Carrying that cross-border merger into effect will not involve any abuse of law on the part of the participating companies.

**Lord Justice David Richards:**

49. I agree that this appeal should be allowed for the reasons given by Sales LJ.

50. Although we are disagreeing with the judge, I wish in particular to endorse what Sales LJ has said in his judgment at [26]. On applications of this sort under companies legislation – applications for the sanction of the court to a scheme of arrangement under part 26 of the Companies Act 2006 are another example – it is right that judges bring an independent analysis, and if necessary a critical eye, to the proposal which they are asked to approve. This is all the more important because, for various reasons, such applications are rarely opposed and the judge does not therefore have the benefit of adverse argument. If judges have concerns, they should raise them and they should not approve the proposal unless satisfied by the submissions, and where appropriate further evidence, provided on behalf of the applicant.

51. In the absence of authority dealing with it, the issue considered by the judge in this case was an obvious cause for concern on the facts of the case. Indeed, it was largely because of this issue that the application was listed before a High Court Judge. The judge was right to consider the issue in detail and, like Sales LJ, I am not surprised that, in the absence of the extensive submissions on EU law addressed to us, he refused the application.

52. The core of the judge's reasoning is contained in his judgment at [32]:

> "In my judgment this proposed transaction is not the kind of transaction which the Regulations and the Directive were enacted to facilitate. The Regulations as a whole and Reg 2 in particular have to be interpreted having regard to the purpose for which the regulation was enacted. Read that way this transaction does not satisfy the requirements of Reg 2 when it is properly interpreted and does not fall in the jurisdiction of the court. While it can be said to be a merger, it is not, in reality, a cross-border merger at all."

53. The judge had earlier explained his view that the Directive and the Regulations were not intended to facilitate a merger between domestic companies where the only cross-border element was a dormant company incorporated in another member state. In this sense, the inclusion of the Dutch company was, in the judge's view, a device.

54. Perhaps the best-known example of a transaction being stigmatised as a device on an application under the Companies Acts is the decision of this court in *In re Bugle Press Ltd* [1961] Ch 270. Under section 209 of the Companies Act 1948 (now very much expanded in sections 974 – 991 of the Companies Act 2006), if an offer to purchase the shares of a company not held by the offeror was accepted by the holders of 90% of the shares under offer, the offeror was entitled to acquire compulsorily the remaining shares on the terms of the offer, subject to the power of the court, on the application of a minority shareholder, to order otherwise. The two majority shareholders in the company, who held 90% of the shares between them, formed a company which made an offer for all the shares. They accepted the offer in respect of the shares held by them and they sought to exercise the procedure under section 209 to purchase the shares of the third shareholder.

55. The minority shareholder succeeded on his application under the section. Although the offer literally satisfied the requirements of the section, it was in the striking words of Harman LJ "a bare-faced attempt to evade that fundamental rule of company law which forbids the majority of shareholders, unless the articles so provide, to expropriate a minority". Lord Evershed MR said that section 209 was directed to an offer made by an offeror independent of the shareholders to whom the offer was addressed. Both judges described the scheme as a device. It was a device because, while falling literally within the section, it sought to take advantage of the statutory procedure for an illegitimate purpose, to the detriment of the minority shareholder. In terms of EU law, it would probably qualify as an abuse of law.

56. For the reasons explained by Sales LJ, there was nothing illegitimate about the merger in this case proceeding under the Regulations and the inclusion of the Dutch company was not therefore a device.

**Lord Justice Davis:**

57. I also agree that this appeal should be allowed.

58. In refusing the application, the judge explicitly held that the proposed terms of the operation "literally" satisfied all the express criteria in Regulation 2. The problem, as he perceived it, was that the operation in question only came within the letter of Regulation 2 "as the result of a device". He thereafter made other references throughout his judgment to the arrangements as constituting a "device". He also said that the court should not "ignore the reality of what is proposed" and referred to the need for "seeing this transaction for what it truly is."

59. There can at all events be, and is, no suggestion whatsoever that the operation here was a sham. There was no unexpressed collateral purpose or subterfuge. To the contrary: the operation was an open and transparent procedure designed, for legitimate commercial considerations and objectives, to constitute a cross-border merger within the Regulations: taking advantage of the existence of the dormant Dutch company for this purpose.

60. In *Prest* v *Petrodel Resources Limited* [2013] 2 AC 415, [2013] UKSC 34 Lord Sumption, in paragraph 28 of his judgment, had described the term "sham" as "protean" – although the term "sham" is in practice well enough understood and widely used in the civil and criminal courts in England and Wales. But be that as it

may, the epithet "protean" can surely all the more be applied to the word "device" (and Birss J did not himself seek to define what he meant for present purposes by "device"). Such word usually conveys, to a greater or lesser extent, a pejorative connotation (not infrequently accompanied by another pejorative epithet: "ingenious"). It seems to me, however, that simply to start by labelling a particular transaction, in the context of applying the Regulations, as a "device" cannot *of itself* be a sufficient basis for then defeating, under the guise of having regard to "reality", the intended effect of the operation in accordance with the Regulations.

61. The *Centros* case (among other examples to which Sales LJ has referred) seems to me to be a good example of that. The sole reason in that case for establishing the company in England was to avoid the need for providing substantial paid up share capital if the company were established in Denmark: Denmark being the only country in which it was intended the company should trade and it not being intended that it would trade in the United Kingdom. Such a procedure can, if you like, subjectively be described as a "device". But it was adjudged permissible under Articles 52 and 58 of the EC Treaty. The same approach has been adopted by the Court of Justice in *Inspire Art Limited* (cited above) and other such cases. So the position was very different from, for instance, the example of *Bugle Press Ltd* cited by David Richards LJ: a case which, as he points out, would in any event probably qualify as an abuse of rights under EU law.

62. Thus it seems to me that to start by labelling an operation as a "device" and then to work from that labelling to a conclusion that the operation is not to be approved as a cross-border merger potentially can involve a wrong approach and could also lead to legal uncertainty. The correct approach, in the present context, is, in my view, to ascertain if the operation under consideration falls within the ambit and terms of Regulation 2. If it does, and if all the other relevant requirements of the Regulations are satisfied, then it is ordinarily to be approved unless it is fraudulent or otherwise infringes the principle of abuse of rights. In the present case, for the reasons given by Sales LJ, there is, on the materials currently available, no question of this operation constituting an abuse of rights in the sense of that principle as established under the European jurisprudence.