JUDGMENT OF THE COURT (Fifth Chamber)

27 June 1996 *

In Case C-234/94,

REFERENCE to the Court under Article 177 of the EC Treaty by the Bundesgerichtshof for a preliminary ruling in the proceedings pending before that court between

Waltraud Tomberger

and

Gebrüder von der Wettern GmbH,

on the interpretation of Articles 31(1) and 59 of the Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies (OJ 1978 L 222, p. 11), as amended by the Seventh Council Directive 83/349/EEC of 13 June 1983 based on Article 54(3)(g) of the Treaty on consolidated accounts (OJ 1983 L 193, p. 1),

* Language of the case: German.

THE COURT (Fifth Chamber),

composed of: D. A. O. Edward (Rapporteur), President of the Chamber, J.-P. Puissochet, J. C. Moitinho de Almeida, C. Gulmann and M. Wathelet, Judges,

Advocate General: G. Tesauro,
Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

— Mrs Tomberger, by Hansjürgen Herrmann, Rechtsanwalt, Cologne,

— Gebrüder von der Wettern GmbH, by Adelgund Hofmeister, Rechtsanwalt, Cologne,

— the German Government, by Alfred Dittrich, Regierungsdirektor in the Federal Ministry of Justice, and Bernd Kloke, Oberregierungsrat in the Federal Ministry for the Economy, acting as Agents,

— the Commission of the European Communities, by Antonio Caeiro and Jürgen Grunwald, Legal Advisers, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Mrs Tomberger, represented by Klaus Heinemann, Rechtsanwalt, Cologne, Gebrüder von der Wettern GmbH, represented by Adelgund Hofmeister, the German Government, represented by Alfred Dittrich, the United Kingdom, represented by David Anderson, Barrister, and the Commission, represented by Jürgen Grunwald, at the hearing on 16 November 1995,

after hearing the Opinion of the Advocate General at the sitting on 25 January 1996,

gives the following

Judgment

1 By order of 21 July 1994, received at the Court on 18 August 1994, the Bundesgerichtshof (Federal Court of Justice) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty a question on the interpretation of Articles 31(1) and 59 of the Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies (hereinafter 'the Fourth Directive'), as amended by the Seventh Council Directive 83/349/EEC of 13 June 1983 based on Article 54(3)(g) of the Treaty on consolidated accounts.

2 That question was raised in proceedings between Mrs Tomberger (hereinafter 'the plaintiff') and Gebrüder von der Wettern GmbH (hereinafter 'the defendant'), a company governed by German law and established in Germany.

3 Article 2(3) of the Fourth Directive provides, in the same terms as the fourth recital of the preamble, as follows:

'The annual accounts shall give a true and fair view of the company's assets, liabilities, financial position and profit or loss.'

4 Article 2(5) lays down that:

'Where in exceptional cases the application of a provision of this directive is incompatible with the obligation laid down in paragraph 3, that provision must be departed from in order to give a true and fair view within the meaning of paragraph 3.'

5 Article 31(1) of the Fourth Directive provides:

'(1) The Member States shall ensure that the items shown in the annual accounts are valued in accordance with the following general principles:

(...)

(c) valuation must be made on a prudent basis, and in particular:

(aa) only profits made at the balance-sheet date may be included;

(bb) account must be taken of all foreseeable liabilities and potential losses arising in the course of the financial year concerned or of a previous one, even if such liabilities or losses become apparent only between the date of the balance sheet and the date on which it is drawn up;

(...)

(d) account must be taken of income and charges relating to the financial year, irrespective of the date of receipt or payment of such income or charges;

(...)'.

6 Article 59(1) of the Fourth Directive, as amended by the Seventh Directive, provides as follows:

'A Member State may require or permit that participating interests, as defined in Article 17, in the capital of undertakings over the operating and financial policies of which significant influence is exercised, be shown in the balance sheet in accordance with paragraphs (2) to (9) below, as sub-items of the items "shares in affiliated undertakings" or "participating interests", as the case may be.'

7 Article 59(2) to (9), as amended, lays down two methods of valuing the holdings referred to in paragraph (1).

8 The plaintiff, a shareholder in the defendant company, challenges that company's annual accounts for the financial year 1 January 1989 to 31 December 1989 as approved on 19 October 1990 by the general meeting of the company.

9 The defendant, in particular, has a 100% shareholding in the companies Technische Sicherheitssystem GmbH and Gesellschaft für Bauwerksabdichtungen mbH (hereinafter 'TSS and GfB').

10 On 29 June 1990 the annual accounts of TSS and GfB, likewise for the financial year 1 January 1989 to 31 December 1989, were approved by resolutions of their respective general meetings. Those accounts showed that certain profits had been appropriated to the defendant for the financial year 1989 but had not yet been paid to it.

11 The defendant's annual accounts for 1989 showed the profits distributed to it by TSS and GfB for the financial year 1988 but not those appropriated to it for the financial year 1989.

12 The plaintiff considered that under the Fourth Directive the defendant's annual accounts for the financial year 1989 should have included the profits appropriated to it by TSS and GfB for that same year; she therefore brought an action before the Landgericht (Regional Court) for annulment of the resolution of the general meeting approving the defendant's annual accounts for 1989. The action was

dismissed at first instance and on appeal, whereupon the plaintiff appealed to the Bundesgerichtshof on a point of law.

13 The Bundesgerichtshof considers that the entitlement of an undertaking (the parent company) which is the sole or majority shareholder of another company (the subsidiary) to the profits of the subsidiary is sufficiently certain at the balance-sheet date for it to be regarded as forming part of the assets of the parent company. It follows, in its view, that the debt receivable by the parent company from its subsidiary company must be included in the annual accounts of the parent company as from the date when the corresponding liability of the subsidiary company came into being. However, the Bundesgerichtshof is in doubt as to the compatibility of that view with the requirements of the Fourth Directive.

14 The Bundesgerichtshof therefore decided to stay proceedings pending a ruling from the Court of Justice on the following question:

'Is there an infringement of Article 31(1)(c)(aa) of the Fourth Directive 78/660/EEC of 25 July 1978, according to which only profits made at the balance-sheet date may be included, and of the principles laid down in Article 59 of that directive on the "equity method", if the profit entitlement of an undertaking, as against a private limited company in which it is the sole or majority shareholder and in respect of which the presumptions of dependency within the meaning of Paragraph 17(2) of the Aktiengesetz (Law on Private Companies) and of belonging to a single group within the meaning of the third sentence of Paragraph 18(1) of that Law have not been rebutted, is regarded as forming part as from the balance-sheet date of the subsidiary company of the assets of the undertaking which is the sole or majority shareholder and must therefore be shown as an asset of the latter "as from that date", on the assumption that the financial years of the two undertakings coincide and the meeting of shareholders in the private limited company

controlled by the other resolves to adopt the annual accounts and appropriate the profits at a time when the auditing of the annual accounts of the undertaking which is the sole shareholder has not yet been completed?'

15 It should be emphasized at the outset that, as appears from the terms of the question referred and the order for reference, the question arises in the context of a highly specific set of circumstances:

— the parent company is the sole shareholder in the subsidiary, and controls it,

— under national law, the parent company and the subsidiary form a group,

— the financial years of the two companies coincide,

— the subsidiary's annual accounts for the financial year in question were adopted by its general meeting before completion of the audit of the parent company's annual accounts for that year,

— the subsidiary's annual accounts for the financial year in question, as adopted by its general meeting, show that on the subsidiary's balance-sheet date — namely the last day of that financial year — the subsidiary appropriated profits to the parent company, and

— in the light of the presumptions of national law as to the relationship between the parent company and its subsidiary, the national court considers that the parent company's entitlement to the profits in question is sufficiently certain at

the balance-sheet date of the two companies for it to be regarded as forming, at that date, part of the assets of the parent company.

16 As regards Article 59 of the Fourth Directive, as amended, to which the national court refers, it is sufficient to note, as the Advocate General has done at point 12 of his Opinion, that this provision can have no bearing on the resolution of the dispute in the main proceedings since the German legislature has not exercised the option made available to it under that article, so that the methods of valuation there provided for do not apply in Germany.

17 With regard to Article 31 of the Fourth Directive, it should be borne in mind that the Fourth Directive seeks to coordinate national provisions concerning the presentation and content of annual accounts of certain types of companies (see the first recital of the preamble). In order to coordinate the content of annual accounts, the directive lays down the principle of the 'true and fair view', compliance with which is the primary objective of the directive. According to that principle, the annual accounts of the companies to which the Fourth Directive applies must give a true and fair view of their assets and liabilities, financial position and profit or loss (see the fourth recital in the preamble to the Fourth Directive and Article 2(3) and (5) thereof).

18 Application of that principle must, as far as possible, be guided by the general principles contained in Article 31 of the Fourth Directive. In this case, the principles set out in Article 31(1)(c)(aa) and (bb) and (d) are of particular importance.

19 First, Article 31(1)(c)(aa) provides that only profits made at the balance-sheet date may be included in the balance sheet.

20 Second, Article 31(1)(d) provides that account must be taken in the balance sheet for a financial year of all income and charges relating to that year, irrespective of the date of receipt or payment of such income or charges.

21 Third, in accordance with Article 31(1)(c)(bb), account must be taken of liabilities and losses arising in the course of a financial year even if they become apparent only between the end of the financial year and the date on which the balance sheet for that year is drawn up.

22 It is clear from those provisions that taking account of all elements — profits made, charges, income, liabilities and losses — which actually relate to the financial year in question ensures observance of the requirement of a true and fair view.

23 In the present case, according to the subsidiary's annual accounts, the profits in question were made by that company during the financial year 1989 and were appropriated by it to the parent company as at 31 December 1989, that is to say before the end of that financial year. Before examining the parent company's accounts, the national court must be satisfied that there is no reason to question that that presentation of the subsidiary's financial position complies with the principle of the true and fair view.

24 It follows from all the foregoing that, if the subsidiary's accounts themselves comply with the principle of the true and fair view, it is not contrary to the rule laid down in Article 31(1)(c)(aa) of the Fourth Directive for the national court to consider that, in the circumstances described, the profits in question must be entered in the parent company's balance sheet for the financial year in respect of which the subsidiary appropriated them.

25 The answer to the question referred by the national court must therefore be that, where

— one company (the parent company) is the sole shareholder in another company (the subsidiary), and controls it,

— under national law, the parent company and the subsidiary form a group,

— the financial years of the two companies coincide,

— the subsidiary's annual accounts for the financial year in question were adopted by the general meeting before completion of the audit of the parent company's annual accounts for that year,

— the subsidiary's annual accounts for the financial year in question, as adopted by its general meeting, show that on the subsidiary's balance-sheet date — namely the last day of that financial year — the subsidiary appropriated profits to the parent company, and

— the national court is satisfied that the subsidiary's annual accounts for the financial year in question give a true and fair view of its assets and liabilities, financial position and profit or loss,

it is not contrary to the rule laid down in Article 31(1)(c)(aa) of the Fourth Directive for the national court to consider that the profits in question must be entered in the parent company's balance sheet for the financial year in respect of which they were appropriated by the subsidiary.

Costs

26 The costs incurred by the German Government and the United Kingdom, 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 national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the question referred to it by the Bundesgerichtshof by order of 21 July 1994, hereby rules:

Where

— one company (the parent company) is the sole shareholder in another company (the subsidiary), and controls it,

— under national law, the parent company and the subsidiary form a group,

— the financial years of the two companies coincide,

— the subsidiary's annual accounts for the financial year in question were adopted by the general meeting before completion of the audit of the parent company's annual accounts for that year,

— the subsidiary's annual accounts for the financial year in question, as adopted by its general meeting, show that on the subsidiary's balance-sheet date — namely the last day of that financial year — the subsidiary appropriated profits to the parent company, and

— the national court is satisfied that the subsidiary's annual accounts for the financial year in question give a true and fair view of its assets and liabilities, financial position and profit or loss,

it is not contrary to the rule laid down in Article 31(1)(c)(aa) of the Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies, as amended by the Seventh Council Directive 83/349/EEC of 13 June 1983 based on Article 54(3)(g) of the Treaty on consolidated accounts, for the national court to consider that the profits in question must be entered in the parent company's balance sheet for the financial year in respect of which they were appropriated by the subsidiary.

Edward Puissochet Moitinho de Almeida

Gulmann Wathelet

Delivered in open court in Luxembourg on 27 June 1996.

R. Grass D. A. O. Edward

Registrar President of the Fifth Chamber