REPORT FOR THE HEARING
delivered in Case C-38/89 *

I — Facts and procedure

1. *Legal background*

The Fourth Council Directive (78/660/EEC) of 25 July 1978 in the field of company law is based on Article 54(3)(g) of the EEC Treaty. It relates to the coordination of national provisions concerning the annual accounts of certain types of companies.

Article 55 of the directive provides that the Member States are to bring into force the laws, regulations and administrative provisions necessary for them to comply with the directive within two years of its notification. Since the directive was notified on 31 July 1978, that period expired on 31 July 1980.

The Fourth Directive was transposed into French law by Law No 83-353 of 30 April 1983 and by Decree No 83-1026 of 29 November 1983 amending Decree No 67-236 of 23 March 1967.

Article 44-1(1) of the Decree of 23 March 1967, as amended, requires all private limited liability companies (*sociétés à responsabilité limitée*) to lodge at the Registry of the tribunal de commerce (Commercial Court) two copies of the following documents, within one month of their approval by the shareholders in ordinary general meeting:

(1) The annual accounts, the annual report and, where appropriate, the auditors' report for the previous year;

(2) The proposal for appropriation of the profit or treatment of the loss put to the meeting and the resolution passed regarding that appropriation or treatment.

Failure to comply with that requirement is punishable under Article 53 of the decree by a fine of FF 1 200 to 3 000.

2. *Facts*

Guy Blanguernon is the financial director of Pakem, a private limited liability company governed by French law. The company is a member of the Newtec group, which specializes in packing. That group has to face competition from foreign manufacturers, in particular German and Italian producers.

On instructions from the Newtec group, Guy Blanguernon did not lodge Pakem's annual accounts at the Registry of the tribunal de commerce, Chambéry, within one month of their approval by the shareholders in general meeting. As a result of that failure, a prosecution was brought against Guy Blanguernon in the tribunal de police (Local Criminal Court), Aix-les-Bains, for failure to comply with Article 44-1 of the Decree of 23 March 1967.

* Language of the case: French.

At the hearing on 16 June 1988, the accused claimed that the Law of 30 April 1983 and the Decree of 29 November 1983, enacted for the purpose of bringing French internal law into line with the Fourth Council Directive, are prejudicial to French companies. French companies are required to publish their accounts, while German and Italian companies are under no such obligation. Italy and the Federal Republic of Germany have not adopted measures similar to the French measures in implementation of the directive.

3. *The preliminary question*

The tribunal de police, Aix-les-Bains, states that it is not disputed that the EEC Treaty overrides national law and applies directly to the nationals of the Member States and their courts and that, in accordance with that principle of primacy, Council Directives must be applied in the Member States. It points out that, according to the Fourth Council Directive of 25 July 1978 and Article 54(3)(g) of the Treaty, the Council and the Commission are to carry out their duties by coordinating to the necessary extent the safeguards which are required by Member States of companies or firms within the meaning of the second paragraph of Article 58 of the Treaty 'with a view to making such safeguards equivalent throughout the Community'.

It considers, further, that in the present case the Fourth Directive has not been implemented in either German or Italian law and that, consequently, the rule of reciprocity enacted by the EEC Treaty cannot apply.

In those circumstances, the national court decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Is it in accordance with the wording and spirit of Article 53(3)(g) of the EEC Treaty and the Fourth Council Directive of 25 July 1978 for national laws enacted pursuant thereto to enter into force individually so long as not all the Member States have adopted equivalent legislation, which is a necessary condition for the simultaneous coordination required by the Fourth Directive?'

4. *Procedure*

The order for reference of the tribunal de police, Aix-les-Bains, of 30 June 1988 was received at the Court Registry on 16 February 1989.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the European Communities, written observations were submitted by the Government of the French Republic, represented by its Agents, Edwige Belliard and Sylvie Grassi, and by the Commission, represented by its Legal Advisers, Antonio Caeiro and Étienne Lasnet.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

II — Summary of the written observations

The French Government considers, in the light of the Court's consistent case-law, that the entry into force of national legislation enacted in implementation of a directive cannot be dependent on the adoption of equivalent measures by other Member

States. Community law is not subject to the rule of reciprocity to which the tribunal de police alludes. The Community's own legal order incorporated into that of the Member States renders an objection based on an absence of reciprocity inoperative. If a Member State fails to fulfil its obligations under Community law then the machinery set up by Articles 169 and 170 of the Treaty comes into play, with the result that the Commission, in the case of Article 169, and the other Member States, in the case of Article 170, may bring proceedings in respect of that failure if they consider that another Member State is not abiding by the Community rules and is disturbing that legal order. A Member State is not, therefore, freed from its Community obligations by the mere fact that another Member State is not fulfilling them.

The French Government also points out that, in any event, Community law does not prevent a Member State from adopting, with regard to its own nationals, measures stricter than those prescribed in a directive.

In those circumstances, the French Government suggests that the Court should rule, in answer to the question raised, that national legislation enacted in accordance with the Treaty of Rome and a directive may enter into effect even though other Member States have not adopted equivalent legislation.

In the Commission's view, it is necessary, first, to clarify the facts as regards the extent to which the Fourth Directive has been transposed in the various Member States. The provisions necessary for the transposition of that directive have been adopted by all the Member States except Spain, Portugal and Italy. The Commission points out that, as a result of proceedings brought under Article 169 of the Treaty, the Court, in its judgment of 20 March 1986 in Case 17/85 *Commission* v *Italian Republic* [1986] ECR 1199, declared that by failing to adopt the measures referred to in the Fourth Directive within the prescribed period the Italian Republic had failed to fulfil its obligations under Community law. Since Italy has taken no steps in response to that judgment, the Commission has brought further infringement proceedings under Article 171 of the Treaty.

The Commission points out, however, that, in accordance with the Court's consistent case-law, the fulfilment by each Member State of its obligations under Community law cannot in any event be made conditional upon compliance with those obligations by the other Member States. Consequently, the Commission suggests that the national court's question should be answered in the affirmative and that it should be stated that it is a matter of obligation and not choice for each Member State to implement the measures necessary for the transposition into its own internal law of the provisions of the Fourth Directive before the expiry of the period laid down therein, even if other Member States have not yet taken the measures necessary for that purpose.

T. Koopmans
Judge-Rapporteur