JUDGMENT OF THE COURT (Sixth Chamber)
22 April 1999 *

In Case C-272/97,

Commission of the European Communities, represented by António Caeiro and Jürgen Grunwald, Legal Advisers, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Federal Republic of Germany, represented by Ernst Röder, Ministerialrat in the Federal Ministry of the Economy, and Alfred Dittrich, Ministerialrat in the Federal Ministry of Justice, acting as Agents, Postfach 13 08, D-53003 Bonn,

defendant,

APPLICATION for a declaration that, by failing to implement within the prescribed period all measures necessary to comply with Council Directive 90/605/EEC of 8 November 1990 amending Directive 78/660/EEC on annual accounts and

* Language of the case: German.

Directive 83/349/EEC on consolidated accounts as regards the scope of those Directives (OJ 1990 L 317, p. 60), the Federal Republic of Germany has failed to fulfil its obligations under the EC Treaty,

THE COURT (Sixth Chamber),

composed of: P. J. G. Kapteyn, President of the Chamber, G. Hirsch, G. F. Mancini, H. Ragnemalm (Rapporteur) and R. Schintgen, Judges,

Advocate General: G. Cosmas,
Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 17 December 1998,

gives the following

Judgment

1 By application lodged at the Registry of the Court on 28 July 1997, the Commission of the European Communities commenced proceedings under Article 169 of the EC Treaty for a declaration that, by failing to implement within the prescribed period all measures necessary to comply with Council Directive 90/605/EEC of 8 November 1990 amending Directive 78/660/EEC on annual accounts and

Directive 83/349/EEC on consolidated accounts as regards the scope of those Directives (OJ 1990 L 317, p. 60), the Federal Republic of Germany has failed to fulfil its obligations under that Treaty.

Directive 90/605

2 The purpose of Directive 90/605 is to amend the scope of 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) and of 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).

3 Directives 78/660 and 83/349 prescribe measures to coordinate national provisions concerning the annual accounts and consolidated accounts respectively of companies with share capital. They apply, as regards Germany, to the following forms of company: the *Aktiengesellschaft* (public limited company), the *Kommanditgesellschaft auf Aktien* (company limited by shares, but having one or more general partners) and the *Gesellschaft mit beschränkter Haftung* (limited liability company).

4 Directive 90/605 extends the scope of Directives 78/660 and 83/349 to include certain categories of partnership whose members are constituted as certain types of company.

5 Articles 1 and 2 of Directive 90/605 extend the coordination measures prescribed by Directives 78/660 and 83/349, in Germany, to two types of company, the *offene Handelsgesellschaft* (commercial partnership) and the *Kommanditgesellschaft* (limited partnership), where all members having unlimited liability are companies of the types referred to in paragraph 3 of this judgment or companies which are not governed by the laws of a Member State but have a legal form comparable to those referred to in First Council Directive 68/151/EEC of 9 March 1968 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community (OJ, English Special Edition 1968 (I), p. 41).

6 Directive 90/605 also extends the coordination measures to include the types of company referred to in paragraph 5 of this judgment where all members having unlimited liability are constituted as one of the types of company referred to in paragraph 3 or paragraph 5 of this judgment.

7 Article 3(1) of Directive 90/605 provides that the Member States are to bring into force the laws, regulations and administrative provisions necessary for them to comply with the directive by 1 January 1993 and forthwith inform the Commission thereof.

Pre-litigation procedure and forms of order sought by the parties

8 On the expiry of the time-limit provided for in Article 3(1) of Directive 90/605, the Commission had received no communication or any other information regarding implementing measures; consequently, on 12 March 1993, it addressed a letter of formal notice to the German Government.

9 On 2 June 1993 the German Government replied that Directive 90/605 was in the process of being transposed.

10 Since the Commission subsequently received no communication to indicate that Directive 90/605 had been transposed, it addressed to the Federal Republic of Germany a reasoned opinion on 13 June 1994 concluding that, by failing to adopt the laws, regulations and administrative provisions necessary to comply with Directive 90/605, that Member State had failed to fulfil its obligations under the directive, and inviting it to adopt the measures necessary to comply with the reasoned opinion within two months.

11 Having received no reply from the German Government, the Commission commenced the present action in which it asks the Court to declare that the Federal Republic of Germany has failed to fulfil its obligations and to order it to pay the costs.

12 The German Government asks the Court to dismiss the action as inadmissible or, in the alternative, as unfounded, and to order the Commission to pay the costs.

Admissibility

13 The German Government contends, principally, that the action is inadmissible because the reasoned opinion of 13 June 1994 was drawn up in breach of the principle of collegiality laid down in Article 163 of the EC Treaty and Article 16 of the Commission's Rules of Procedure.

14 In its view, the principle of collegiality requires decisions to be the subject of collective deliberation, which presupposes that the members of the college of Commissioners are aware, at their meeting, of both the operative part of the decision envisaged and the statement of reasons. The German Government considers that those requirements were not complied with in this case.

15 The Commission states that the reasoned opinion was adopted by the institution acting in college. It took the decision without having the full text of the draft reasoned opinion before it, but relied on a document presented in the form of a table and containing much detailed information together with a statement of reasons relating to the procedural measure proposed. The Commission therefore considers that it validly adopted a decision of principle which was then implemented by the competent departments under the supervision of the Commissioner responsible for the area concerned.

16 In Case C-191/95 *Commission* v *Germany* [1998] ECR I-5449 the Court examined the conditions governing the adoption of reasoned opinions by the Commission.

17 At paragraphs 36 and 41 of that judgment the Court stated that the decision of the Commission to issue a reasoned opinion is subject to the principle of collegiality but that the formal requirements for effective compliance with that principle vary according to the nature and legal effects of the acts adopted by that institution.

18 At paragraph 44 of that judgment the Court observed that the issue of a reasoned opinion constitutes a preliminary procedure, which does not have any binding legal effect for the addressee. It is merely a pre-litigation stage of a procedure which may lead to an action before the Court.

19 The Court therefore held, at paragraph 48, that the Commission's decision to issue a reasoned opinion must be the subject of collective deliberation by the college of Commissioners, which implies that the information on which those decisions are based must be available to the members of the college. It is not necessary, however, for the college itself formally to decide on the wording of the acts which give effect to those decisions and put them in final form.

20 At paragraphs 49 and 50 of the judgment the Court pointed out that it was not disputed that the members of the college had available to them all the information they considered would assist them for the purposes of adopting the decision when the college had decided to issue the reasoned opinion, and held that in those circumstances the rules relating to the principle of collegiality had been complied with.

21 In this case there is no reason to draw any conclusions different from those reached by the Court in Case C-191/95 *Commission* v *Germany*, cited above, as regards the availability of the information that the members of the college considered would assist them for the purposes of adopting the decision to issue the reasoned opinion and, consequently, as regards compliance with the principle of collegiality.

22 Accordingly the plea of inadmissibility must be rejected as unfounded.

Substance

23 The German Government acknowledges that it has not adopted specific measures to transpose Directive 90/605. It maintains, nevertheless, that the German legislation complies with large parts of the directive.

24 Thus the provisions of Section I of Book III of the Handelsgesetzbuch (German Commercial Code, hereinafter the 'HGB') which applies to all partnerships, corresponds to Articles 2(1) and (2), 7, 14, 15(1) and (2), 18 to 21, 31, 35, 37(2), 38, 39 (with the exception of paragraph (1)(d)), 40(1), 41 and 42 of Directive 78/660.

25 Furthermore, the provisions of the Gesetz über die Rechnungslegung von bestimmten Unternehmen und Konzernen of 15 August 1969 (Law on the Accounts to be disclosed by certain Undertakings and Groups, BGBl. I 1969, p. 1189, hereinafter 'the Publizitätsgesetz' (Disclosure Law)), which require partnerships of a certain size to draw up annual accounts and consolidated accounts, are based almost entirely on the provisions of Directives 78/660 and 83/349. The Publizitätsgesetz also requires auditing and disclosure of the annual accounts and consolidated accounts of partnerships of a certain size.

26 Moreover, the German Government contends that transposing Directive 90/605 has proved difficult because of divergent opinions in the sectors involved in Germany concerning the measures necessary to achieve it.

27 The Court has consistently held, first, that a Member State cannot rely on provisions, practices or situations arising in its own internal legal order to justify its failure to respect the obligations and time-limits laid down by a directive (see, in particular, Case C-8/97 *Commission* v *Greece* [1998] ECR I-823, paragraph 8).

28 Secondly, although the provisions in Section I of Book III of the HGB relied upon by the German Government are applicable to all traders, and consequently to all partnerships, it is not disputed that they constitute only partial transposition of the rules contained in Directive 78/660.

29 In so far as the provisions in Section II of Book III of the HGB complete the transposition of Directive 78/660, it must be noted that, according to the Commission's allegations in its reply, which have not been contested by the German Government, the provisions of that latter section, entitled 'Supplementary provisions for companies with share capital (public limited companies, companies limited by shares but having one or more general partners and limited liability companies), do not apply to partnerships and, accordingly, the German legislature has omitted to make them applicable, in accordance with the rules introduced by the Directive in question, to that type of company.

30 It is common ground that the provisions of the *Publizitätsgesetz* which were also relied upon by the German Government apply only to certain large companies and are therefore not capable of constituting transposition of Directive 90/605.

31 Consequently, it must be held that, by failing to adopt within the prescribed period all the laws, regulations and administrative provisions necessary to comply with Directive 90/605, the Federal Republic of Germany has failed to fulfil its obligations under that directive.

Costs

32 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission applied for an order that the Federal Republic of Germany pay the costs and the latter has been unsuccessful in its defence, it must be ordered to pay the costs.

On those grounds,

THE COURT (Sixth Chamber),

hereby:

1. **Declares that, by failing to adopt within the prescribed period all the laws, regulations and administrative provisions necessary to comply with Council Directive 90/605/EEC of 8 November 1990 amending Directive 78/660/EEC on annual accounts and Directive 83/349/EEC on consolidated accounts as regards the scope of those Directives, the Federal Republic of Germany has failed to fulfil its obligations under that directive;**

2. **Orders the Federal Republic of Germany to pay the costs.**

Kapteyn Hirsch Mancini

Ragnemalm Schintgen

Delivered in open court in Luxembourg on 22 April 1999.

R. Grass P. J. G. Kapteyn

Registrar President of the Sixth Chamber