JUDGMENT OF THE COURT (Fifth Chamber)
4 December 1997 *

In Case C-97/96,

REFERENCE to the Court under Article 177 of the EC Treaty by the Oberlandesgericht Düsseldorf (Germany) for a preliminary ruling in the proceedings pending before that court between

Verband deutscher Daihatsu-Händler eV

and

Daihatsu Deutschland GmbH

on the interpretation of Article 6 of the 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),

THE COURT (Fifth Chamber),

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

Advocate General: G. Cosmas,
Registrar: H. A. Rühl, Principal Administrator,

* Language of the case: German.

after considering the written observations submitted on behalf of:

— the German Government, by Ernst Röder, Ministerialrat in the Federal Ministry of Economic Affairs, and A. Dittrich, Regierungsdirektor in the Federal Ministry of Justice, acting as Agents,

— the Spanish Government, by L. Pérez de Ayala Becerril, Abogado del Estado, acting as Agent,

— 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 the German Government, represented by A. Dittrich, the Spanish Government, represented by L. Pérez de Ayala Becerril, the French Government, represented by G. Mignot, Foreign Affairs Secretary in the Legal Affairs Directorate of the Ministry of Foreign Affairs, acting as Agent, and the Commission, represented by J. Grunwald, at the hearing on 12 June 1997,

after hearing the Opinion of the Advocate General at the sitting on 3 July 1997,

gives the following

Judgment

1 By order of 22 November 1995, received at the Court on 26 March 1996, the Oberlandesgericht Düsseldorf (Düsseldorf Higher Regional Court) referred to the

Court for a preliminary ruling under Article 177 of the EC Treaty a question on the interpretation of Article 6 of the 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, hereinafter 'the First Directive').

2 That question was raised in proceedings brought by the Verband Deutscher Daihatsu-Händler eV ('the Verband'), an association of German dealers in Daihatsu motor vehicles, before the Amtsgericht (Local Court). In Germany, each Amtsgericht is responsible for maintaining the Commercial Register within its area of jurisdiction. The Verband applied to the Amtsgericht Kempen (Kempen Local Court) for an order requiring Daihatsu Deutschland GmbH, the general agent responsible for the importation of Daihatsu vehicles into Germany, to publish its annual accounts, which it had not done since 1989, or, in default, to pay a fine in the form of a periodic penalty payment.

3 That application was dismissed by the Amtsgericht Kempen by decision of 24 October 1994, which was confirmed by decision of the Landgericht Krefeld (Krefeld Regional Court) of 13 December 1994.

4 Like the Amtsgericht, the Landgericht based its decision on point 6 in the first sentence of Paragraph 335 of the German Commercial Code in conjunction with the second sentence of that paragraph, pursuant to which proceedings for the imposition of a fine in the form of a periodic penalty payment may be brought only by a member or creditor of the company, the general works council or the company's works council. The Verband does not fall within any of those categories.

5 On appeal by the Verband, the Oberlandesgericht Düsseldorf confirmed the decision of the lower courts.

6 It considered, nevertheless, that Paragraph 335 of the German Commercial Code incorrectly transposed Article 6 of the First Directive, which requires Member States to provide for appropriate penalties 'in case of failure to disclose the balance sheet and profit and loss account as required by Article 2(1)(f)'.

7 Article 2(1)(f) provides:

'1. Member States shall take the measures required to ensure compulsory disclosure by companies of at least the following documents and particulars:

...

(f) the balance sheet and the profit and loss account for each financial year. The document containing the balance sheet shall give particulars of the persons who are required by law to certify it.

However, in respect of the *Gesellschaft mit beschränkter Haftung*, *société de personnes à responsabilité limitée*, *personenvennootschap met beperkte aansprakelijkheid*, *société à responsabilité limitée* and *società a responsabilità limitata* under German, Belgian, French, Italian or Luxembourg law, referred to in Article 1, and the *besloten naamloze vennootschap* under Netherlands law, the compulsory application of this provision shall be postponed until the date of implementation of a Directive concerning coordination of the contents of balance sheets and of profit and loss accounts and concerning exemption of such of those companies whose balance sheet total is less than specified in the Directive from the obligation to make disclosure, in full or in part, of the said documents. The Council will adopt such a directive within two years following the adoption of the present Directive;

...'

8 In those circumstances, the Oberlandesgericht Düsseldorf referred the following question to the Court for a preliminary ruling:

'Does Article 6 of the First Council Directive on company law of 9 March 1968 have direct effect if under German law the (sole) penalty to ensure enforcement of

the duty to disclose the annual accounts of a private limited company is the imposition by the Registration Court of an administrative fine of up to DM 10 000, but the Registration Court may intervene only on application from a member or creditor of the company, the central works council or the company's works council and does any such possible direct effect of that provision mean that, in addition to the persons entitled under German law to make an application, any person may apply for an administrative fine to be imposed or that such a right is available at least to an association of traders which under its articles of association must protect the interests of its members who have a contractual relationship with the private limited company which has failed to comply with its duty to disclose those accounts?'

9 That question raises three distinct issues.

10 First, the national court is essentially asking whether Article 6 of the First Directive must be construed as precluding the legislation of a Member State from restricting to members or creditors of the company, the central works council or the company's works council the right to apply for imposition of the penalty provided for by national law in the event of failure by a company to fulfil the obligations regarding disclosure of annual accounts laid down by the First Directive.

11 If the answer to that question is in the negative, the national court wishes to know whether Article 6 of the First Directive is sufficiently clear, precise and unconditional to have direct effect in the domestic legal order of a Member State.

12 If the answer to the latter question is in the affirmative, the national court wishes to know whether an individual may rely on the First Directive in order to apply to the competent national authority for the imposition of a penalty on a company which has failed to disclose its annual accounts where that individual is excluded under the national rules from the class of persons entitled to make such an application.

The transposition of the Directive

13 The German Government maintains, as a preliminary point, that the obligation to provide for appropriate penalties for failure to disclose the balance sheet and profit and loss account, as required by Article 6 of the First Directive, is not yet applicable to German private limited companies. It submits that, as far as those companies are concerned, Article 2(1)(f) of the First Directive postponed the entry into force of the disclosure obligation 'until the date of implementation of a Directive concerning coordination of the contents of balance sheets and of profit and loss accounts'. According to the German Government, no directive has yet been adopted in that regard.

14 In that connection, it is sufficient to note that the legislative lacuna left by the First Directive was filled by 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, hereinafter 'the Fourth Directive').

15 The Fourth Directive, the second recital in the preamble to which expressly refers to Article 2(1)(f) of the First Directive, coordinated the national provisions concerning the presentation and content of annual accounts and annual reports, the valuation methods used therein and their publication in respect of joint-stock companies, including *inter alia* German limited liability companies (see the first recital in the preamble to the Fourth Directive).

16 As regards the publication of annual accounts, Article 47(1) of the Fourth Directive provides:

'1. The annual accounts, duly approved, and the annual report, together with the opinion submitted by the person responsible for auditing the accounts, shall be published as laid down by the laws of each Member State in accordance with Article 3 of Directive 68/151/EEC.

The laws of a Member State may, however, permit the annual report not to be published as stipulated above. In that case, it shall be made available to the public at the company's registered office in the Member State concerned. It must be possible to obtain a copy of all or part of any such report free of charge upon request.'

17 Next, the German Government maintains that the Federal Republic of Germany has correctly transposed Article 6 of the First Directive. In accordance with Article 54(3)(g) of the EC Treaty, the coordination of national systems of company law is designed to safeguard the interests of members 'and others'. The latter do not comprise all natural and legal persons but only those who have a legal relationship with the company. In that regard, it is generally recognized in German academic legal writing that the term 'others', within the meaning of Article 54(3)(g) of the Treaty, covers only creditors of the company.

18 It must be pointed out that Article 54(3)(g) must be read in the light not only of Articles 52 and 54 of the EC Treaty, which clearly show that the coordination of systems of company law forms part of the general programme for the abolition of restrictions on freedom of establishment, but also of Article 3(h) of that Treaty, which provides that the activities of the Community are to include the approximation of national laws to the extent required for the functioning of the common market.

19 Furthermore, the very wording of Article 54(3)(g) of the Treaty refers to the need to protect the interests of 'others' generally, without distinguishing or excluding any categories falling within the ambit of that term.

20 Consequently, the term 'others', as contemplated in Article 54(3)(g) of the Treaty, cannot be limited merely to creditors of the company.

21 Moreover, the objective of abolishing restrictions on freedom of establishment, which is assigned in very broad terms to the Council and the Commission by Article 54(1) and (2) of the Treaty, cannot be circumscribed by the provisions of Article 54(3). Article 54(3) merely sets out a non-exhaustive list of measures to be taken in order to attain that objective, as is borne out by the use in that provision of the words 'in particular'.

22 As regards Article 6 of the First Directive, the fourth recital in the preamble shows that disclosure of annual accounts is primarily designed to provide information for third parties who do not know or cannot obtain sufficient knowledge of the company's accounting and financial situation. Article 3 of the First Directive, which provides for the maintenance of a public register in which all documents and particulars to be disclosed must be entered, and pursuant to which copies of the annual accounts must be obtainable by any person upon application, confirms the concern to enable any interested persons to inform themselves of these matters. That concern also finds expression in the recitals in the preamble to the Fourth Directive, which refer to the need to establish in the Community minimum equivalent legal requirements as regards the extent of the financial information that should be made available to the public by companies that are in competition with one another (see, in particular, the third recital).

23 In view of the foregoing considerations, the answer to this part of the question must be that Article 6 of the First Directive is to be interpreted as precluding the legislation of a Member State from restricting to members or creditors of the company, the central works council or the company's works council the right to apply for imposition of the penalty provided for by the law of that Member State in the event of failure by a company to fulfil the obligations regarding disclosure of annual accounts laid down by the First Directive.

The question whether Article 6 of the First Directive is unconditional and sufficiently clear, and whether it may be relied upon by an individual for the purposes of applying to the competent public authority for the imposition of penalties on a private company

24 As the Court has consistently held, a directive may not of itself impose obligations on an individual and may therefore not be relied upon as such against such a

person (see, in particular, Case 152/84 *Marshall I* [1986] ECR 723, paragraph 48, Case C-91/92 *Faccini Dori* v *Recreb* [1994] ECR I-3325, paragraph 20, and Case C-192/94 *El Corte Inglés* v *Blázquez Rivero* [1996] ECR I-1281, paragraph 15). Consequently, there is no need to examine whether Article 6 of the First Directive is capable of having direct effect in the domestic legal order of a Member State.

25 This finding is without prejudice to the possible applicability of the principle that Community law requires Member States to make good loss and damage caused to individuals by reason of their failure to transpose a directive or their failure to do so correctly (Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029, paragraph 51, and Case C-392/93 *The Queen* v *H. M. Treasury, ex parte British Telecommunications* [1996] ECR I-1631, paragraph 39).

26 In view of the foregoing considerations, the answer to the national court's question must be that, since a directive cannot of itself impose obligations on an individual, and cannot therefore be relied upon as such against such a person, there is no need to examine whether Article 6 of the First Directive has direct effect.

Costs

27 The costs incurred by the French, German and Spanish 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 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 Oberlandesgericht Düsseldorf by order of 22 November 1995, hereby rules:

1. **Article 6 of the 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, must be interpreted as precluding the legislation of a Member State from restricting to members or creditors of a company, the central works council or the company's works council the right to apply for imposition of the penalty provided for by the law of that Member State in the event of failure by a company to fulfil the obligations regarding disclosure of annual accounts laid down by the First Directive 68/151.**

2. **Since a directive cannot of itself impose obligations on an individual, and cannot therefore be relied upon as such against such a person, there is no need to examine whether Article 6 of the First Directive 68/151 has direct effect.**

Gulmann Wathelet Moitinho de Almeida

Edward Puissochet

Delivered in open court in Luxembourg on 4 December 1997.

R. Grass C. Gulmann

Registrar President of the Fifth Chamber