OPINION OF ADVOCATE GENERAL COSMAS

delivered on 5 June 1997 *

I — Introductory remarks

Within the European Communities the direct expression of political and State authority has to a large extent been entrusted to the Commission, which must act within the rules of lawfulness, transparency and sound administration. In the present case the Court is called upon to decide whether, in initiating infringement proceedings against the Federal Republic of Germany under Article 169 of the EC Treaty, the Commission has acted in a manner consistent with those obligations.

II — The facts of the case

1. In its application of 16 June 1995 the Commission seeks a declaration that, by not providing for appropriate penalties in cases where companies limited by shares fail to disclose their annual accounts, the Federal Republic of Germany (hereinafter 'Germany') has failed to fulfil its obligations first under the EC Treaty (hereinafter 'the Treaty') and secondly under the First and Fourth Council Directives on company law; [1] those directives require the disclosure of annual accounts. Previously, the Commission had notified Germany, by its letter of 26 June 1990, that, according to the information available to it, 93% of German companies limited by shares had not met the obligation to disclose annual accounts; at the same time, it had requested that State to submit its observations within a period of two months in accordance with Article 169 of the Treaty. Subsequently, since the replies from Germany were not deemed satisfactory, on 2 June 1992 the Commission issued to that State, in accordance with the first paragraph of Article 169 of the Treaty, a reasoned opinion signed by Commission Vice-President Bangemann. Following a lengthy series of unsuccessful contacts and consultations, which were continued even after 30 September 1992, the date on which the time-limit that had been set for Germany to comply with the content of the reasoned opinion expired, on 16 June 1995 the Commission brought the present action before the Court.

* Original language: Greek.

1 — First Council Directive of 9 March 1968 (68/151/EEC) on co-ordination 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') and Fourth Council Directive of 25 July 1978 (78/660/EEC) 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').

III — Admissibility of the action

2. Before considering the validity of the Commission's claims against Germany, it is appropriate to examine the plea of inadmissibility raised by the defendant on the ground that the Commission decisions which led to the present action were vitiated by serious procedural defects. In particular, Germany began by expressing doubts as to whether the acts of the Commission constituted first by the reasoned opinion and secondly by the decision to bring the present action had been adopted in observance of the principle of collegiality which governs the general activities of the Commission, and in accordance with the procedural requirements laid down in the Commission's Rules of Procedure. It was for that reason that Germany, in its letter of 4 September 1995, asked the Commission to clarify whether the reasoned opinion and the decision to bring the action were adopted by the Commission itself or by its Vice-President under a delegation of authority; it also requested a copy of the decisions concerned. Since the Commission made no response to its requests, Germany asked the Court itself to call on the applicant to produce the relevant documentation that had been requested.

3. By its order of 23 October 1996 the Court called on the Commission to produce, within a period of three weeks from notification of the Order, its decisions, adopted by the College of Commissioners and in accordance with the requirements laid down by its own Rules of Procedure, whereby it first formulated the reasoned opinion in respect of Germany and secondly decided to bring the present action.

4. In complying with the said order the Commission produced before the Court a series of documents which do not, however, correspond to what was requested under that Order. More specifically, it laid before the Court extracts from the minutes of certain meetings of the Commission and documents in which reference is made to the aforesaid minutes. Those documents show that, at its 1 071st meeting on 31 July 1991, the Commission approved the proposals of its competent departments as given in Document SEC(91) 1387. The latter comprises a summary list prepared from computerised data in which one item mentions the directive at issue here and proposes (in one word) the issue to Germany of a reasoned opinion. Correspondingly, in the minutes of the meeting of the Commission held on 18 December 1991 (COM(91) PV 1087), it is stated that the Commission approves the proposal contained in Document SEC(91) 2213; this latter document proposes, without further elucidation, the immediate implementation of the abovementioned decision by the Commission on 31 July 1991 to deliver a reasoned opinion to Germany. Lastly, the Commission approved in a similarly succinct manner, as can be seen from the minutes of the meeting held on 13 December 1994 (COM(95) PV 1227), the proposal to bring before the Court an action against Germany under Article 169 of the Treaty, as contained in Document SEC(94) 1808.

5. The documents produced before the Court do not prove that the Commission, at the times when it decided in plenary session to issue a reasoned opinion and to bring the action against Germany, had before it the texts of the acts at issue (that is, the reasoned opinion and the application) even in the form of complete drafts prepared by its competent departments. It follows, logically, that it is not possible to ascertain from the documents laid before the Court whether the procedural requirements of Article 12 of the Commission's Rules of Procedure, [2] in the version in force at the time when the relevant events occurred, were observed. That Article provided that: 'Acts adopted by the Commission, at a meeting or by written procedure, shall be authenticated in the language or languages in which they are binding by the signatures of the President and the Executive Secretary;' it also required that the texts of such acts be annexed to the minutes of the meeting of the Commission in which the adoption of those acts is recorded.

6. On the basis of the foregoing, Germany maintained its plea that the action was inadmissible and also developed a corresponding line of argument at the hearing before the Court. The applicant, on the other hand, considers that the inference from the above documents is that the procedural rules applicable, in particular the principle that the Commission should act as a college, have been observed.

7. I shall begin by investigating whether the reasoned opinion issued to Germany complied with the legal requirements. I shall examine whether the principle of collegiality was observed and, if the answer is in the negative, whether it was permissible for the reasoned opinion to be adopted under a delegation of authority, or in any event without observing the obligation on the Commission to act as a college.

A — *The scope and limits of the principle that the Commission should act as a college*

8. According to the case-law of the Court, the principle that the Commission should act as a college occupies a primordial position in the Community legal order and forms part of the institutional system of the Community (and the Union) as an organisational principle. It is set out in Article 17 of the Merger Treaty and Article 163 of the Treaty; the latter expressly provides that: 'The Commission shall act by a majority of the number of members ...'. Likewise, Article 1 of the Commission's Rules of Procedure provides that: 'The Commission shall act collectively in accordance with these Rules'.

2 — Provisional Rules of Procedure of the Commission (63/41/EEC) of 9 January 1963 (OJ, English Special Edition, Second Series VII, p. 9).

9. The two major judgments of the Court which define the principle of collegiality and delineate its scope and limits are the following:

10. The first is the judgment in the *AKZO Chemie* case, [3] from paragraph 36 et seq. of which it follows, first and foremost, that collegiality is the general rule governing the Commission's activities and that, although it is possible to grant delegations of authority for the adoption of decisions, [4] such delegation is an exception. In order to avoid impairing the principle of collegiality it is appropriate, first, not to confer on the member to whom authority is delegated powers to act in his own right and, secondly, to exclude delegations of authority by definition for 'decisions of principle'. In accordance with Article 27 of the abovementioned Rules of Procedure of the Commission, to which the judgment refers, the system of delegation of authority is restricted to clearly defined categories of measures of management and administration. At all events, in the judgment concerned the Court took the view that, in the context of the powers conferred on the Commission for the purpose of safeguarding free competition, a decision ordering an undertaking to submit to an investigation under Article 14(3) of Council Regulation No 17/62: First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87) must be regarded as a straightforward measure of management and may therefore be the subject of a delegation of authority. [5] In any event, the principle of legal certainty and the need for administrative decisions to be transparent require that decisions granting delegations of authority should be published. However, applicants contesting decisions of the Commission are not able to rely on failure to publish a decision delegating authority if that failure '... did not deprive the applicants of the opportunity of contesting that decision or the decision adopted under the delegation of authority on the ground that they were defective.' [6]

11. Secondly, there is the judgment in *Commission* v *BASF and Others,* [7] in which it is first pointed out, as the general rule, [8] that the functioning of the Commission is governed by the principle of collegiality. [9] The Court then goes on to state expressly that: 'Compliance with that principle, and especially the need for decisions to be deliberated upon by the Commissioners together, must be of concern to the individuals affected by the legal consequences of such decisions, in the sense that they must be sure that those decisions were actually taken by the college of Commissioners and correspond exactly to its intention.' [10] As regards the adoption of decisions for which the Commission is required to state the reasons on which they are based, the Court recognises that: 'The operative part of such a decision can be understood, and its full effect ascertained, only in the light of the

3 — Case 5/85 *AKZO Chemie* v *Commission* [1986] ECR 2585.

4 — See also Joined Cases 43/82 and 63/82 *VBVB and VBBB* v *Commission* [1984] ECR 19.

5 — See, to the same effect, Joined Cases 97/87 to 99/87 *Dow Chemical Ibérica and Others* v *Commission* [1989] ECR 3165.

6 — Paragraph 39 of the *AKZO Chemie* judgment (see footnote 3 above).

7 — Case C-137/92 P *Commission* v *BASF and Others* [1994] ECR I-2555, '*PVC*' (paragraph 62).

8 — Since collegiality is the rule for action by the Commission, the Court avoids defining its scope precisely. For the same reason, when mentioning the principle of collegiality the Court also states that it applies 'particularly' in the case of enforceable administrative acts of the Commission, such as those it adopts under Council Regulation No 17 for the purpose of finding infringements of competition law, issuing directions to the undertakings concerned and imposing pecuniary sanctions upon them (paragraph 65). It would therefore be wrong to maintain that, in cases where action by the Commission does not take the form of enforceable administrative acts, the principle of collegiality need not necessarily be observed.

9 — *PVC* judgment (see footnote 7 above), paragraph 62.

10 — *PVC* judgment (see footnote 7 above), paragraph 64.

statement of reasons. Since the operative part of, and the statement of reasons for, a decision constitute an indivisible whole, it is for the college of Commissioners alone to adopt both the operative part and the statement of reasons, in accordance with the principle of collegiate responsibility.' [11] Lastly, the *PVC* judgment states expressly that the procedure for the authentication of acts adopted by the Commission provided for in the first paragraph of Article 12 of its Rules of Procedure 'is intended to guarantee legal certainty by ensuring that the text adopted by the college of Commissioners becomes fixed in the languages which are binding'; [12] consequently, anyone who has a legitimate interest may rely on failure to observe the said procedural requirement in order to prevent an act adopted by the Commission in infringement of the procedural requirements from producing legal effects.

12. It follows from the foregoing that the principle of the collegiate adoption of decisions is the rule governing the general activities of the Commission. In the particular case of the adoption of acts for which the Commission is obliged, either under a specific provision or because of their nature, to state the reasons on which they are based, the principle of collegiality requires the simultaneous adoption by the Commission, as a collegiate body, of both the operative part of and the statement of reasons for the act concerned. The procedure for the authentication of decisions adopted by the Commission, as laid down in its Rules of Procedure, ensures observance of the said principle. As an exception, the Commission may empower its members to act in its name; in the case of acts adopted under such delegations of authority observance of the authentication procedure as laid down by the Rules of Procedure is not, of course, required; such delegations of authority are, however, excluded for decisions of principle, are restricted to acts of management or administration and must be expressly laid down, be clearly defined and be published. [13]

B — *The application of collegiality in this case*

13. The question also arises whether, in the context of the present action, the Commis-

11 — *PVC* judgment (see footnote 7 above), paragraph 67.

12 — *PVC* judgment (see footnote 7 above), paragraph 75.

13 — At this point it is, I think, useful to draw attention to the recent case-law of the Court of First Instance in order to demonstrate the way in which the latter applies the guiding principles that have been formulated by the Court of Justice, as described above, with regard to the validity and scope of the principle of collegiality.
Case T-442/93 *AAC and Others* v *Commission* [1995] ECR II-1329 concerned, in connection with the application of Article 92 of the Treaty, a decision approving a State aid programme granted pursuant to a general aid scheme which had already been approved by the Commission in a relevant decision adopted by the full college of Commissioners. In its judgment (paragraph 78 et seq.) the Court of First Instance considered that '... the fact that in the present case the contested decision was rightly adopted on the sole basis of an examination limited to ensuring observance of the conditions laid down in the decision approving the general scheme is not in itself sufficient for it to be described as a measure of management or administration ...' (paragraph 87). Consequently, the contested decision should not have been adopted under a delegation of authority. (See also Case T-435/93 *ASPEC and Others* v *Commission* [1995] ECR II-1281.)
In its judgment in Joined Cases T-80/89, T-81/89, T-83/89, T-87/89, T-88/89, T-90/89, T-93/89, T-95/89, T-97/89, T-99/89, T-100/89, T-101/89, T-103/89, T-105/89, T-107/89 and T-112/89 *BASF and Others* v *Commission* [1995] ECR II-729, '*LdPE*', at paragraph 99 et seq., the Court of First Instance held that, even when an act has been adopted by the full college of Commissioners but only in some of the languages in which it is binding, it is not permissible to grant a delegation of authority for the purpose of adopting that text in the other languages in which it is binding, since the establishment of the text in one of those languages cannot be regarded merely as a measure of management or administration. In considering whether or not an act falls into the category of those for which a delegation of authority is permissible, the determining criterion consists in considering its legal effects. I would point out that the question of delegation of authority is treated particularly strictly precisely because delegation of authority is the exception, whereas collegiality remains the general rule for action by the Commission. That rule cannot be challenged by the Commission's arguments regarding the need to follow more flexible procedures and to avoid the institutional paralysis which, it argues, would ensue from strict observance of the principle of collegiality. It is also clear that the existence of an express political will on the part of the members of the Commission (which was unquestionable in the cases cited above) was not sufficient, in the Court's view, to ensure the lawfulness of acts adopted under a delegation of authority.

sion formulated the contested reasoned opinion in respect of Germany in compliance with the requirements of the principle of collegiality. I shall begin by considering whether that act was adopted by the college of Commissioners. I shall then consider whether the reasoned opinion could be made the subject of a delegation of authority and whether, if a delegation of authority was granted, it was lawful.

(a) Was the contested reasoned opinion adopted by a decision of the college of Commissioners?

14. As notified to Germany, the reasoned opinion is dated 2 June 1992 and signed by the then Vice-President Bangemann. However, as mentioned above, that text was not drafted, finalised or even submitted for approval at a meeting of the Commission. The Commission had merely approved the proposal from its competent departments that a reasoned opinion should be issued to Germany, as is apparent from the minutes of its meeting of 31 July 1991 and 18 December 1991. Furthermore, the authenticated text of the reasoned opinion was not annexed to the minutes of those meetings in accordance with Article 12 of the Commission's Rules of Procedure in the version in force at the time when the decision to issue the reasoned opinion was adopted. [14] Consequently, the Commission failed to observe the essential procedural requirements laid down by that article. Irrespective of the requirements of its Rules of Procedure, however, the Commission has not produced before the Court sufficient evidence for it to be inferred that the principle of collegiality was observed. [15] According to the case-law of the Court, [16] in order to have observed the said principle the Commission, on the date on which the decision was adopted, that is, 31 July 1991 or 18 December 1991 at the latest, would have had to adopt not only the decision to issue the reasoned opinion but also the detailed statement of reasons on which that decision is based. Consequently, an expression of the Commission's political will regarding the need to formulate a reasoned opinion does not suffice for the principle of collegiality to have been observed. That act under Article 169 of the Treaty must, by its very nature, be reasoned; [17] consequently collegiality requires both the operative part of, and the statement of the reasons for, the decision to be adopted simultaneously by the Commission acting as a college in each case. [18]

15. Lastly, for the principle of collegiality to have been observed it would have been neces-

14 — See footnote 2 above.

15 — There is an exception in this case to the rule that each party bears the burden of proof regarding the facts it puts forward. As has been accepted in the case-law of the Court, that presumption is reversed whenever the evidence is in the exclusive possession of the other party (see Case 45/64 *Commission* v *Italy* [1965] ECR 857) or the latter has, by its conduct, made access to that evidence impossible (Case 49/65 *Ferriere e Acciaierie Napoletane* v *High Authority of the ECSC* [1966] ECR 73). For those reasons, it is for the Commission to prove here that it observed the principle of collegiality and the procedural requirements associated with that principle.

16 — See Case C-137/92 P, cited in footnote 7 above.

17 — As regards the extent to which the Commission's opinion must be reasoned and the nature of the reasons see, for example, Case 7/61 *Commission* v *Italy* [1961] ECR 317, Case 325/82 *Commission* v *Germany* [1984] ECR 777, Case C-347/88 *Commission* v *Greece* [1990] ECR I-4747 and Case C-289/94 *Commission* v *Italy* [1996] ECR I-4405.

18 — It also follows from the consistent case-law of the Court that the requirement for a full statement of reasons is directly linked to the right of the Member State concerned to a fair hearing. The purpose of issuing a reasoned opinion is precisely to give that State the opportunity to present its arguments with a view to possibly enabling the dispute that has arisen between it and the Commission to be resolved without any need for a judgment by the Court (Case 124/81 *Commission* v *United Kingdom* [1983] ECR 203 and Case C-274/93 *Commission* v *Luxembourg* [1996] ECR I-2019).

sary for the actual text of the act, as it was notified to Germany, to have been shown to the Commissioners, in draft form, on the day on which the decision was adopted. According to the view taken by the Court in the *'Laying Hens'* case [19] the only changes that could subsequently have been made to that text would have been spelling and typographical corrections.

16. I therefore conclude that in this case it has not been proved that the reasoned opinion was adopted by the Commission acting as a college. It remains to be considered, however, whether authority could be delegated to the competent Commissioner to issue it. If that were the case, the reasoned opinion of 2 June 1992 that was sent to Germany would be procedurally lawful.

(b) Could the reasoned opinion be adopted under a delegation of authority?

17. That question could be expressed as follows: is a reasoned opinion issued under Article 169 of the Treaty 'a measure of management or administration?' [20]

18. First, it is possible to maintain that the very choice of the term concerned by the Community legislature implies that a reasoned opinion is not an 'act' and for that reason *a fortiori* may be issued under a delegation of authority. Furthermore, the last paragraph of Article 189 of the Treaty provides that: 'Recommendations and opinions shall have no binding force;' consequently, if it were accepted that a 'reasoned opinion' under Article 169 is an 'opinion' within the meaning of Article 189, it could possibly be argued that a text with no binding effect cannot, by definition, be one of those which have been assigned to the exclusive competence of the Commission as a collegiate body.

19. I would, however, point out that the Community judicature is not satisfied with this literal criterion and does not consider it decisive. The case-law that has developed in connection with determining which acts of the Community institutions may be the subject of an action for annulment under Article

19 — Case 131/86 *United Kingdom* v *Council* [1988] ECR 905.

20 — It could, of course, be maintained that in any case it is not apparent from the documents before the Court that the Commission granted a delegation of authority, by its decision, to the Commissioner who signed the reasoned opinion. As already mentioned, a delegation of authority must be express and must meet the requirements of clarity and publication, as opposed to what appears to have occurred in this case. In any event, it is appropriate to point out that the Court has held that defects of this kind in the delegation of authority can be accommodated provided that the judicial protection of those affected by an act adopted under a delegation of authority is not ultimately affected (see the *AKZO* case, cited in footnote 3 above). It is therefore appropriate to start by elucidating whether a particular competence is one of those for which a delegation of authority may be granted.

173 is particularly revealing on this point; the Court does not so much consider the outward form that each contested act takes but rather concentrates on appraising its content and legal effects. [21]

20. In respect of this last-mentioned criterion it is appropriate to point out, first of all, that, according to the inference from the case-law, a reasoned opinion under Article 169 of the Treaty does not constitute a directly enforceable administrative act and that an action under Article 173 of the Treaty is therefore not available as a legal remedy against it. [22] That does not, however, mean that a reasoned opinion has no legal consequences, nor that those consequences are of no importance or only secondary importance.

21. The judgment in *Essevi and Salengo* [23] is informative on this point. In that judgment the Court ruled that: '... opinions delivered by the Commission pursuant to Article 169 have legal effect only in relation to the commencement of proceedings before the Court against a State alleged to have failed to fulfil its obligations under the Treaty and ... the Commission may not, by adopting an attitude in the context of that procedure, release a Member State from its obligations or impair rights which individuals derive from the Treaty.' [24] At the same time, a reasoned opinion is described as a 'preliminary procedure' the function of which, in the event that the Member State concerned fails to comply, '... is to define the subject-matter of the dispute.' [25] In any event, the Court avoided expressly categorising a reasoned opinion as a non-binding internal measure or treating it as one of the 'opinions' and 'recommendations' provided for under Article 189 of the Treaty, despite the fact that the parties had put forward an argument to that effect. [26] In my view, the correct approach is not to assimilate a reasoned opinion under Article 169 to the non-binding recommendations and opinions mentioned in Article 189 of the Treaty, but, rather, to treat it as an act *sui generis* with a special position and manner of functioning of its own in the Community legal order.

22. Certainly, at all events, the fact that a reasoned opinion does not constitute an enforceable administrative act does not mean that it automatically falls into the category of acts of administration or management for which a delegation of authority is permissible. In my view, it is not appropriate to place these two legal categories on the same footing. A dis-

21 — With that approach, actions challenging 'internal instructions' or 'communications' have frequently been ruled admissible; see, for example, Case C-366/88 *France* v *Commission* [1990] ECR I-3571, Case C-303/90 *France* v *Commission* [1991] ECR I-5315, Case C-325/91 *France* v *Commission* [1993] ECR I-3283 and the Opinion delivered by Advocate General Tesauro on 16 January 1997 in Case C-57/95 *France* v *Commission* [1997] ECR I-1627 (paragraphs 8 to 11).

22 — Joined Cases 142/80 and 143/80 *Amministrazione delle Finanze dello Stato* v *Essevi and Salengo* [1981] ECR 1413. For the same reason, an action against a refusal on the part of the Commission to initiate the procedure provided for under Article 169 against a Member State is also inadmissible (Case 48/65 *Lütticke and Others* v *Commission* [1966] ECR 19 and, more recently, the order in Case T-47/96 *SDDDA* v *Commission* [1996] ECR II-1559): the Commission cannot be required to adopt a non-enforceable act.

23 — Joined Cases 142/80 and 143/80, cited in footnote 22 above.

24 — Ibid., paragraph 18.

25 — Ibid., paragraph 15.

26 — Ibid., p. 1420.

tinction needs to be drawn, as indeed is provided for by the Commission's Rules of Procedure and recognised by the existing case-law, between straightforward acts of administration or management and 'decisions of principle', which the Commission is obliged to adopt as a collegiate body. Decisions of the latter kind are mainly ones whereby the Commission expresses a final verdict on a significant point of law and where that verdict gives rise to legal effects. In the event of doubt, there is a presumption against the permissibility of granting a delegation of authority.

23. From that point of view it is appropriate to accept that, in cases where an action under Article 169 is brought before the Court, a reasoned opinion constitutes a 'decision of principle', in the sense that, in respect of certain questions at least, it expresses the Commission's final verdict and produces definitive legal effects in the context of that procedure. More particularly, a reasoned opinion defines the matters in which the Member State to which it is addressed has failed to fulfil its obligations as well as the relevant grounds on which the Commission's complaints are based, and accordingly delimits the subject-matter of the dispute brought before the Court. The Commission may not alter that subject-matter; it can only either refrain from referring the matter to the Court or discontinue the legal remedy it has initiated, just as it can also withdraw an unfavourable administrative act.

24. That is to say, the legal significance of a reasoned opinion, which makes it a 'decision of principle' and excludes it from the category of acts that can be adopted under a delegation of authority, stems not from any direct adverse effects it creates for its addressee when notified [27] but from the legal consequences which it produces in the course of the Article 169 procedure, in that it binds the Commission as to the content and extent of the complaints that it may bring before the Court and thereby limits the scope of judicial review. [28] In addition, it is appropriate to point to the special importance and position of the Article 169 procedure within the Community legal order, from both the legal point of view and the political point of view. It would, I believe, be contrary to the system of the Treaty to underestimate the role played by the Commission in the context of that procedure by categorising the reasoned opinion as an act of administration or management.

25. In my view, the thesis I have just put forward is borne out by the case-law regarding the legal effects of a reasoned opinion. As already stated, the latter defines the subject-

27 — As I have already mentioned, the mere issue by the Commission of a reasoned opinion to the effect that the Member State concerned has failed to fulfil its obligations does not in itself establish the existence of such failure. However, it is not without its consequences, since in practice the Member State cannot ignore it. That is also why the Court is particularly rigorous as regards observing the rights of the Member State concerned to defend itself against the complaints raised against it by the Commission in a reasoned opinion. See footnote 18 above.

28 — See paragraph 25 immediately following.

-matter of the dispute before the Court in that both the application and the reasoned opinion must be founded on the same grounds and submissions. [29] It is inadmissible for the Commission to raise new complaints or even to widen its argument by relying on new evidence in the context of the same complaints. [30] Correspondingly, when the Court rules on an action under Article 169 its powers are clearly defined; they are confined to reviewing the legality of the evidence which is contained in the reasoned opinion and reproduced in the application. [31] To understand the role of the reasoned opinion in the Article 169 procedure, it is important to refer to the case-law according to which, even if the Member State has complied after the time-limit laid down in the reasoned opinion has expired, the infringement is deemed to have already occurred and the subject-matter of the proceedings initiated accordingly remains unchanged. [32] Lastly, the distinction which the Court draws between the letter of formal notice and the reasoned opinion is significant. Whereas the former is not characterised by a strict regard for formalities, the latter must be correct in terms of both form and procedure, since it 'concludes the pre-litigation procedure' provided for in Article 169 of the Treaty. [33] Moreover, for that reason, the Court applies a more rigorous review to the reasoned opinion than to the letter of formal notice. [34]

26. To conclude, the formulation of the reasoned opinion constitutes, in terms of its political importance and legal effects, the most significant contribution made by the Commission in the Article 169 procedure. In my view it is inconceivable for that act, with the content with which it is notified to the Member State concerned, not to be adopted directly by the Commission acting as a collegiate body. The special importance accorded to it in the case-law of the Court is not compatible with its categorisation as a straightforward act of administration or management which may be adopted under a delegation of authority. Hence, in the dispute under consideration the reasoned opinion on which the present action is based was not formulated under the proper procedure, by the Commission acting as a collegiate body, and the plea of inadmissibility raised by Germany is well founded.

29 — See, for example, Case 166/82 *Commission* v *Italy* [1984] ECR 459 (paragraph 16), Case C-234/91 *Commission* v *Denmark* [1993] ECR I-6273 (paragraph 16) and Case C-296/92 *Commission* v *Italy* [1994] ECR I-1 (paragraph 11).

30 — See Case 166/82, cited in footnote 29 above.

31 — Thus, the Community judicature cannot substitute a different time-limit for that laid down in the reasoned opinion. See Cases 28/81 and 29/81 *Commission* v *Italy* [1981] ECR 2577 and 2585.

32 — See Case 39/72 *Commission* v *Italy* [1973] ECR 101, Case 103/84 *Commission* v *Italy* [1986] ECR 1759, Case 283/86 *Commission* v *Belgium* [1988] ECR 3271 and Case C-263/88 *Commission* v *France* [1990] ECR I-4611.

33 — See Case 74/82 *Commission* v *Ireland* [1984] ECR 317 (paragraph 13).

34 — See, for example, Case 274/83 *Commission* v *Italy* [1985] ECR 1077 (paragraphs 20 and 21): 'As the Court held in its judgment of 11 July 1984 (Case 51/83 *Commission* v *Italy* [1984] ECR 2793) the opportunity for the Member State concerned to submit its observations constitutes an essential guarantee required by the Treaty and, even if the Member State does not consider it necessary to avail itself thereof, observance of that guarantee is an essential formal requirement of the procedure under Article 169. Although it follows that the reasoned opinion provided for in Article 169 of the EEC Treaty must contain a coherent and detailed statement of the reasons which led the Commission to conclude that the State in question has failed to fulfil one of its obligations under the Treaty, the Court cannot impose such strict requirements as regards the initial letter, which of necessity will contain only an initial brief summary of the complaints ...'. See also Case C-289/94 *Commission* v *Italy* [1996] ECR I-4405.

IV — Validity of the action

To complete the above, I will express my opinion regarding the validity of the action brought by the Commission, which is as follows:

27. I should first like to point out that, in accordance with Community law, the necessary protection of the interests '... of [company] members and others' [35] requires the publication of the statutes and the annual accounts of certain types of company; the adoption of the measures required to ensure such disclosure is entrusted to the Member States. In particular, under Article 3 of the First Directive all documents and particulars regarding companies subject to that disclosure requirement must be published in a national gazette to be appointed for the purpose by the Member State. In addition, Article 6 of the same Directive states that: 'Member States shall 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) ...'. That part of the wording of Article 2 of the First Directive is as follows: 'Member States shall take the measures required to ensure compulsory disclosure by companies of at least the following documents and particulars: ... 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 [types of company limited by shares] under German ... law referred to in Article 1, ... 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 ... The Council will adopt such a Directive within two years following the adoption of the present Directive ...'. Lastly, Article 47 of the Fourth Directive states that: '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 13 of Directive 68/151/EEC.'.

28. The Commission considers that Germany has failed to fulfil its obligation under the provisions cited above, in that it has not provided for appropriate penalties in case of failure to comply with the disclosure requirement. The provisions on the publication of the annual accounts of companies limited by shares in Germany are contained in Paragraph 325 et seq. of the Handelsgesetzbuch (Commercial Code, hereinafter 'HGB'). Under Paragraph 335 of the HGB, a penalty payment of up to DM 10 000 is fixed for the case where a company's annual accounts are not published; however, that penalty payment is not imposed automatically by the Registergericht (Registration Court), but only if a member or a creditor of the company or its entire company-level or establishment-level works council so requests. The Commission contends that that penalty is not at all effective and cannot be regarded as meeting the requirements of Community law; the overwhelming

35 — A requirement which is expressly recognised in Article 54(3)(g) of the Treaty.

majority of the companies subject to the obligation to disclose their annual accounts disregard that obligation.

29. In my opinion, the above submission by the Commission is well founded and all the arguments put forward by Germany to counter those claims must be rejected.

30. In the first place, Germany's assertion that Article 6 of the First Directive does not require Member States, in the context of transposing the Fourth Directive, to provide for appropriate penalties to enforce the disclosure of annual accounts, is erroneous. The Fourth Directive is the one which is referred to in Article 2(1)(f) of the First Directive, the applicability of the obligation to publish the balance sheet and the profit and loss account for each financial year being made dependent on its entry into force. Consequently, once the legal provision '... concerning coordination of the contents of balance sheets and of profit and loss accounts ...' [36] was introduced, through the Fourth Directive, into the Community legal order, Article 2(1)(f) of the First Directive became fully binding. Accordingly, Member States are subject to the obligation to provide for appropriate penalties in case of failure to disclose the balance sheet and profit and loss account, as set out in Article 6 of the First Directive.

36 — Article 2(1)(f) of the First Directive.

31. Germany also maintains that the aforementioned penalty provided for in Paragraph 335 of the HGB is in keeping with the obligation imposed by Community law, and in particular by Article 6 of the First Directive. To support that assertion, it develops the argument that the Community provisions concerned are not intended to protect every natural or legal person who is a third party in relation to a company limited by shares, but only its creditors, including its employees. Consequently, according to the defendant, it is right that the penalty payment provided for in Paragraph 335 of the HGB is not imposed automatically but only at the request of a member or a creditor of the company or of its company-level or establishment-level works council.

32. In my opinion that assertion is erroneous. In the first place, Article 54(3)(g) of the Treaty, on which the First and Fourth Directives are based, makes a general reference to the '... protection of the interests of [company] members and others' without making any distinction, in the case of 'others', between creditors and non-creditors. Hence, 'others' also include third parties such as future creditors, business partners and everybody interested in acquiring shares. Secondly, in the preamble to the First Directive it is stated that '... the basic documents of the company should be disclosed in order that third parties may be able to ascertain their contents and other information concerning the company ...'. It is apparent from that wording that the purpose of the disclosure requirement in question is the provision of information to persons who have insufficient knowledge of the company's situation and its plans, precisely in order to enable them to judge whether it is advisable to enter into any kind of legal relationship with it. More generally, both the First and the Fourth Direc-

tives are intended to ensure the greatest possible transparency in the activities of companies and for that reason provide for the *erga omnes* disclosure of a range of information from which anybody can draw conclusions regarding their legal and financial situation. Consequently, it is against both the spirit and the letter of these provisions to restrict the circle of persons able to benefit from that transparency; it is precisely because it is impossible to list them exhaustively — business and commercial activity exceeds the legislature's powers of imagination — that it was preferred to impose an *erga omnes* obligation, as the only way of ensuring comprehensive legal protection. To conclude, the restriction of the circle of persons able to claim, under German law, that a penalty payment should be imposed for non-disclosure of annual accounts is not consistent with the relevant Community provisions.

33. On the basis of the foregoing, I am of the opinion that the German legislation in force does not comply with the requirements of Article 6 of the First Directive and accordingly it has not been properly transposed into national law. A penalty for which a necessary precondition of its imposition is an application from one of a relatively small number of entitled persons cannot be regarded as an 'appropriate penalty' which, within the meaning of Article 6 of the First Directive, is intended to introduce an *erga omnes* obligation, particularly since those entitled persons do not always have an interest in bringing such a legal action. Consequently, since in the majority of cases of non-observance of the disclosure of company information it is not possible in practice for the penalty procedure in question to be implemented, it cannot be regarded as complying with the requirement for appropriate penalties as set out in Article 6 of the First Directive. In the light of the foregoing, I am of the opinion that Germany has failed to fulfil its obligations under that Community provision. Lastly, such infringement cannot be justified or excused by the fact that the imposition of penalties on all companies which fail to disclose their annual accounts would, because they are so numerous, create special difficulties for the German authorities disproportionate, according to Germany's submission, to the Community legislature's intended purpose. The Court has consistently held that '... a Member State may not plead internal circumstances in order to justify a failure to comply with obligations and time-limits resulting from Community law ...'. [37]

34. To conclude, Germany has failed to fulfil its obligations under primary and secondary Community law; were it not for the obstacle of its inadmissibility, the Commission's claim would be well founded.

37 — Case C-374/89 *Commission* v *Belgium* [1991] ECR I-367 (paragraph 10), Case C-45/91 *Commission* v *Greece* [1992] ECR I-2509 (paragraph 21) and Joined Cases C-109/94, C-207/94 and C-225/94 *Commission* v *Greece* [1995] ECR I-1791 (paragraph 11).

V — Conclusion

35. In the light of the foregoing I propose that the Court:

(1) dismiss the Commission's application;

(2) order the applicant to pay the costs.