OPINION OF ADVOCATE GENERAL GEELHOED

delivered on 8 November 2001 [1]

I — Introduction

1. The Landesgericht (Regional Court) Wels (Republic of Austria), sitting as a commercial court, has referred to the Court of Justice for a preliminary ruling a number of questions on the validity of certain provisions of two directives concerning companies [2] and on the interpretation of the Treaty.

2. In the main proceedings, the referring court delivered a ruling in which it ordered a company, on pain of a periodic penalty, to comply with the disclosure obligations arising under harmonised company law. The company appealed against this decision to the Landesgericht Wels. The questions before the Landesgericht relate to the compatibility of the relevant provisions of the Directive relating to disclosure with overriding Community law, the general legal principle of proportionality, the fundamental law of property and the fundamental freedom to pursue economic activities. The Court must, however, first determine whether it has jurisdiction to consider the questions which have been referred to it for a preliminary ruling. Indeed, the question arises whether the Landesgericht Wels qualifies in the present proceedings as a 'national court or tribunal' within the meaning of Article 234 EC.

II — The legal framework

A — *Community law*

3. Under Article 2(1)(f) of the First Directive, Member States must ensure that the disclosure obligation on companies also covers their balance sheets and profit and loss accounts for each financial year.

4. Article 47 of the Fourth Directive provides that the duly approved annual accounts and the annual report, as well as

1 — Original language: Dutch.

2 — Directive 68/151/EEC: First Council Directive 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 (now, after amendment, the second paragraph of Article 48 EC), with a view to making such safeguards equivalent throughout the Community (OJ, English Special Edition 1968 (I), p. 41, 'the Disclosure Directive'; hereinafter referred to as the 'First Directive'), and Directive 78/660/EEC: Fourth Council Directive of 25 July 1978 based on Article 54(3)(g) of the Treaty (now, after amendment, Article 44(2)(g) EC) on the annual accounts of certain types of companies (OJ 1978 L 222, p. 11, 'the Annual Accounts Directive'; hereinafter referred to as the 'Fourth Directive').

the opinion submitted by the person responsible for auditing the accounts, must be published in the manner laid down by the laws of each Member State in accordance with Article 3 of the First Directive.

5. Article 54(3)(g) of the EC Treaty (now, after amendment, Article 44(2)(g) EC) provides for the Council and the Commission to carry out the duties devolving on them under Article 54(1) of the EC Treaty (now, after amendment, Article 44(1) EC) 'by coordinating to the necessary extent the safeguards which, for the protection of the interests of members and others, are required by Member States of companies or firms within the meaning of the second paragraph of Article 58 [now, after amendment, Article 48 EC] with a view to making such safeguards equivalent throughout the Community'.

B — *National law*

6. So far as material to the present proceedings, the referring court has stated the relevant national law to be as follows.

7. In order to transpose the abovementioned provisions of the First and Fourth Directives, Austria adopted the Rechnungslegungsgesetz (Law on Accounting) [3] and revised Paragraphs 277 and 283 of the Austrian Commercial Code (hereinafter also 'öHGB'). The second transposing law, namely the EU-Gesellschaftsrechtsänderungsgesetz [4] (Law amending Company Law for EU purposes) strengthened the disclosure obligation, ensuring that the Directive has been fully transposed.

8. As regards large capital companies within the meaning of Paragraph 221 of the öHGB, Paragraph 277(1) thereof, as amended by the second transposing law, provides as follows:

'The statutory representatives of capital companies must submit to the court keeping the register of companies in whose district they are established the annual accounts and the annual report, after they have been considered at the shareholders' general meeting, but no later than nine months after the balance sheet date, together with an auditor's report certifying them or a report rejecting them, or certifying them with qualifications. The opinion of the supervisory board, the proposal on approving the results and the resolution on the use thereof must be submitted within the same period.

Where the annual accounts and the annual report are submitted without the other

3 — BGBl. 475/1990.

4 — BGBl. 304/1996.

documents in order to comply with the time-limit, the opinion and the proposal must be submitted immediately after they become available, the resolutions immediately after they are adopted, and the auditor's report immediately after it is issued. Where the annual accounts are amended as a result of a subsequent audit or discovery, that amendment must also be submitted.'

9. Paragraph 283(1) of the öHGB, as amended by the second transposing law, provides the following sanction:

'The court shall, by means of a periodic penalty of up to ATS 50 000, require the members of the management board or the receivers, without prejudice to the general provisions of commercial law, to comply with Paragraphs 244, 245, 247, 248, 270, 272 and 277 to 280, the members of the supervisory board to comply with Paragraph 270 and, in the case of an Austrian branch of a foreign capital company, its authorised representatives to comply with Paragraph 280a.'

10. In addition, Paragraph 24(1) of the Firmenbuchgesetz (Law on the Companies Register — hereinafter 'FBG')[5] provides as follows:

'Anyone who is required to effect a registration, provide a signature or submit documents to the Companies Register, or who uses a commercial name which he is not entitled to use, shall be required by the court, by means of a periodic penalty of up to ATS 50 000, to fulfil his obligation or to cease using the commercial name, or to demonstrate that he is not so required, or that the use of the commercial name is lawful.'

III — Facts and procedure and the questions referred for a preliminary ruling

11. Proceedings pursuant to Paragraph 277 of the öHGB are pending before the Landesgericht Wels, sitting as a commercial court. By decision of 13 September 1999, the Landesgericht Wels ordered Lutz Gesellschaft mbH and Others (hereinafter 'Lutz'), established in Wels, to submit the documents required under Paragraphs 277 to 280a of the öHGB (annual accounts and annual report) within four weeks, failing which a periodic penalty of ATS 10 000 would be imposed.

12. Given that, according to the settled case-law of the Oberster Gerichtshof (Supreme Court) (Austria), the threat of a periodic penalty contained in the decision

5 — As amended by BGBl. 10/1991.

of 13 September 1999 cannot be the subject of an action, Lutz submitted an application ('Individualantrag') to the Verfassungsgerichtshof (Constitutional Court) for a declaration that the provisions relating to disclosure infringe certain fundamental rights and provisions of Community law. By decision of 2 November 1999, the Landesgericht Wels, sitting in its commercial capacity, extended the time-limit for submission of the documents relating to the accounts to the date on which the Verfassungsgerichtshof should make its order. The Verfassungsgerichtshof dismissed Lutz's application by order of 29 November 1999. It based its decision on the fact that a periodic penalty may be suspended pending a ruling on the lawfulness of the requirement with which the penalty is associated.

13. In its order of 9 May 2000, the Landesgericht Wels, sitting as a commercial court, accordingly ruled of its own motion and pursuant to Lutz's application of 20 January 2000 that the following questions should be referred to the Court of Justice for a preliminary ruling in accordance with Article 234 EC:

'1. Do the measures provided for in Article 2(1)(f) of First Directive 68/151/EEC and Article 47 of Fourth Directive 78/660/EEC regarding the disclosure obligation on capital companies infringe Article 44(2)(g) EC, which confers power to coordinate the safeguards which, for the protection of the interests of members and creditors, are required by Member States of companies?

2. Do the measures provided for in Article 2(1)(f) of First Directive 68/151/EEC and Article 47 of Fourth Directive 78/660/EEC regarding the disclosure obligation on capital companies infringe Article 44(2)(g) EC, in that they are not necessary to eliminate restrictions on establishment or to attain other objectives of the EC Treaty (in particular the establishment of uniform general legal requirements)?

3. Is the fact that Article 2(1)(f) of First Directive 68/151/EEC in conjunction with Article 47 of Fourth Directive 78/660/EEC compels undertakings to reveal business secrets by imposing the obligation to disclose the balance sheet and the profit and loss account for each financial year on pain of a penalty, and that the protective objective provided for can be adequately attained by other — less intrusive — measures, compatible with the general legal principle of proportionality?

4. Is the fact that Article 2(1)(f) of First Directive 68/151/EEC in conjunction with Article 47 of Fourth Directive 78/660/EEC compels undertakings to reveal business secrets by imposing the obligation to disclose the balance sheet and the profit and loss account for each financial year on pain of a penalty, and

that the protective objective provided for can be adequately attained by other — less intrusive — measures, compatible with the fundamental right to property in Community law?

5. Is the fact that Article 2(1)(f) of First Directive 68/151/EEC in conjunction with Article 47 of Fourth Directive 78/660/EEC compels undertakings to reveal business secrets by imposing the obligation to disclose the balance sheet and the profit and loss account for each financial year on pain of a penalty, and that the protective objective provided for can be adequately attained by other — less intrusive — measures, compatible with the fundamental right of freedom to pursue an economic activity in Community law?'

14. Written observations were submitted, in accordance with Article 20 of the EC Statute of the Court of Justice, by Lutz, by the Spanish, Italian and Austrian Governments, and by the Council and the Commission. The hearing took place on 25 October 2001 and Lutz, the Italian Government, the Council and the Commission were represented.

IV — Jurisdiction of the Court

15. No comment was made in the written procedure with regard to the Court's jurisdiction to reply to the questions referred by the Landesgericht Wels. Having invited the parties to make written representations on this issue, the Court examined this issue at the hearing.

16. Under the first paragraph of Article 234 EC, the Court of Justice has jurisdiction to give preliminary rulings on the interpretation of the Treaty and of acts of the institutions of the Community. Under the second paragraph of Article 234 EC, a national court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to rule on the question.

17. The Court has now established in a number of cases that national courts and tribunals which, as in this case, satisfy the institutional requirements, but which apply the procedure for obtaining a preliminary ruling when exercising a non-judicial function, are not courts or tribunals within the meaning of Article 234 EC. In such cases, they are considering a particular administrative matter in a judicial manner, and the Court has held that it has no jurisdiction to answer the questions raised. The first

authority for this is the judgment in *Job Centre I*,[6] recently confirmed by the Court's judgment in *Salzmann*[7] and its order in *HSB-Wohnbau GmbH*.[8]

18. In *Job Centre I*, the questions had been referred by the Tribunale Civile e Penale di Milano (Civil and Criminal District Court, Milan) (Italy), which had pending before it an application for approval of a company's articles of association under proceedings known as 'voluntary jurisdiction'. Under the Italian Civil Code, the Tribunale must order the registration of a company if, after hearing submissions of the public authorities, it finds that the company's articles of association satisfy the conditions laid down by law. The Court took the view that a national court is entitled to refer questions for a preliminary ruling only 'if there is a case pending before it and if it is called upon to give a judgment in proceedings intended to lead to a decision of a judicial nature ... .' That was, however, not the position in that case. The Court held there that the referring court 'is performing a non-judicial function which, in other Member States, is entrusted to administrative authorities. It is exercising administrative authority without being at the same time called upon to settle any dispute.'[9]

19. The *Salzmann* case concerned a reference for a preliminary ruling by the Bezirksgericht (District Court) Bregenz (Austria) in connection with the registration in the land register of a contract for the sale of land for development. According to the Austrian Federal Land Register Law of 1955, the Bezirksgericht is competent to register real property transactions in the land register. In this regard, it considers whether an application for registration satisfies the conditions laid down by law. In its judgment of 14 June 2001, the Court held that, in such cases, the Bezirksgericht is not determining a dispute, but is being called on to declare whether the application satisfies the statutory requirements. In carrying out such an activity it is exercising a non-judicial function. The applicant in the main proceedings claimed that she had applied to the Bezirksgericht by way of appeal for registration of her title in the land register in view of the fact that a Rechtspfleger — a judicial officer — had rejected her application at first instance, but the Court held that the decision of the Rechtspfleger had the character of an internal administrative complaint within the responsible body.[10]

20. In *HSB-Wohnbau*, the Court, ruling in its order of 10 July 2001, declared that it clearly had no jurisdiction to answer the questions put to it. The Amtsgericht (Local Court) — Registergericht — Heidelberg had requested the Court to give a preliminary ruling on the interpretation of Articles 43 EC and 48 EC following a dispute concerning entry in the German commercial register of the transfer of the registered office of a GmbH (limited company) from Germany to Spain, on which the Amtsgericht had to give its decision. It

6 — Case C-111/94 *Job Centre* ('*Job Centre I*') [1995] ECR I-3361.

7 — Case C-178/99 *Salzmann* [2001] ECR I-4421.

8 — Case C-86/00 *HSB Wohnbau* [2001] ECR I-5353.

9 — Paragraphs 9 to 11 of the *Job Centre I* judgment, cited above.

10 — Paragraphs 13 to 22 of *Salzmann*, cited above. See in particular, with regard to the position of the Rechtspfleger in those proceedings, points 38 to 43 of my Opinion in that case.

is clear from the order of reference that the Amtsgericht applied to the Court in its capacity as an authority responsible for maintaining the commercial register in Germany, and in the context of a case involving entry in that register. The Amtsgericht was the first authority to deal with that application for entry of the company. It followed, according to the Court, that the Amtsgericht was not performing a judicial function in relation to that activity. [11]

21. The conclusion to be drawn from these three cases is that the activities concerned had an administrative, not judicial, character, on the basis of the following factors:

— the questions arose in proceedings in which the application related to the entry of a particular legal situation in a register;

— the referring body was seised at first instance of an application for registration;

— before proceeding with the entry, the referring authorities confined themselves to establishing that the application satisfied statutory requirements;

— a judicial remedy lay against the decision taken.

22. In the present case, the decision to refer provides little information on the factual circumstances of this particular case, although the referring court and the parties which submitted written observations have set out the most relevant provisions of national law. In my opinion, it may be concluded from the Austrian law relating to disclosure obligations and the law relating to judicial structures that the Landesgericht Wels — sitting as a commercial court — has referred questions for a preliminary ruling not as a judicial authority, but in the context of activities of an administrative nature.

23. What principally distinguishes the aforementioned cases *Job Centre I*, *Salzmann* and *HSB-Wohnbau* is the fact that the national court here does not have before it an application for entry of a particular legal situation in a register. The Landesgericht Wels — sitting as a commercial court — is responsible for maintaining the commercial register. According to the Handelsgesetzbuch, the annual accounts and related documents must be lodged for disclosure purposes. In performing this administrative task, the commercial court may direct companies, on pain of a periodic penalty, to lodge those documents. Under Paragraph 24 of the FBG, any company which has not fulfilled its obligation within the prescribed period may be

11 — Paragraphs 14 to 17 of the order in *HSB-Wohnbau*, cited above.

subject to a periodic penalty. Further, the commercial court is the first court to rule on disclosure. [12]

24. The commercial court must simply establish that the statutory conditions of disclosure have not been met. On that basis, it may order the company in default to lodge the accounting documents. The periodic penalty is essentially an administrative penalty designed to induce the company concerned to fulfil its statutory obligations, and it is frequently applied in Austrian law. It is imposed automatically. The commercial court has a discretionary power only to determine the amount of the fine. [13] Where the commercial court exercises these powers, it is bound by the exhaustive statutory provisions of the Handelsgesetzbuch and of the Firmenbuchgesetz. [14]

25. To challenge a decision ordering the submission of documents and the associated threat of a periodic penalty, a company may, according to Austrian law, request the commercial court which made the decision to review it ('Vorstellung'), or it may lodge an appeal to the Oberlandesgericht (Higher Regional Court) ('Rekurs'). [15] In the present proceedings, Lutz submitted an application to the commercial court for review of the decision of 13 September 1999. That being so, it is clear that there has, in this case, been an administrative appeal against the decision. [16]

26. The Landesgericht Wels has, therefore, referred the questions for a preliminary ruling in the context of an administrative appeal procedure, in the exercise of a non-judicial, administrative function. Those questions do not, therefore, emanate from a court or tribunal performing a judicial function within the meaning of Article 234 EC. The Court has no jurisdiction to reply to them. [17]

27. A company wishing to challenge a decision ordering disclosure and the penalty associated with it may apply to the Oberlandesgericht. If the Oberlandesgericht is required to rule on an appeal, in its judicial capacity, on the lawfulness of the obligation imposed and of the associated penalty, it may apply to the Court for a preliminary ruling.

12 — See Paragraph 120(1) of the FBG. The activities in question are, moreover, carried out by a single judge ('Einzelrichter'); see Paragraph 7a, subparagraph 3, of the Jurisdiktionsnorm (most recently amended in BGBl. 140/1997).

13 — Under Paragraph 24(1) and (2) of the FBG, this may be to a maximum of ATS 50 000 and, if there is no compliance with the first order within two months, to a maximum of ATS 100 000.

14 — See, in particular, Paragraph 282(1) of the öHGB and Paragraph 24 of the FBG.

15 — See Paragraph 9 of the Ausserstreitgesetz (RGBl. 208/1854).

16 — In this context, see also paragraph 21 of the *Salzmann* judgment, referred to above.

17 — In this respect, see also the Opinion of Advocate General Ruiz-Jarabo Colomer of 28 June 2001 in Case C-17/00 *De Coster*. In his detailed Opinion, the Advocate General proposes a new definition of the concept of court or tribunal within the meaning of Article 234 EC. As a general rule, he recommends that the Court should have jurisdiction to answer the questions which have been referred for a preliminary ruling from all courts or tribunals forming part of the national judicial structure. He nevertheless couples this proposition with a stipulation that the referring body must also be exercising its judicial powers (point 85).

V — Conclusion

28. Having regard to the foregoing, I propose that it be declared that the Court of Justice of the European Communities has no jurisdiction to answer the questions submitted by the Landesgericht Wels in its decision of 9 May 2000.