OPINION OF ADVOCATE GENERAL COSMAS

delivered on 17 December 1998 *

I — Introduction

1. In this action under Article 169 of the EC Treaty, the Commission is asking the Court for a declaration that, by failing to adopt within the prescribed period all the 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, [1] the Federal Republic of Germany has failed to fulfil its obligations under that directive.

II — Facts and procedure

2. 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 that directive before 1 January 1993 and that they are forthwith to inform the Commission thereof.

3. Since the above time-limit expired without the Commission receiving any notification or other information relating to the adoption by the German authorities of measures transposing Directive 90/605 into national law, it sent a letter of formal notice to the German Government on 12 March 1993. In its reply dated 2 June 1993, the German Government informed the Commission that it had begun the procedure for transposing the directive. In the absence of more explicit information regarding transposition, the Commission sent a reasoned opinion to the German Government calling on it to adopt the measures necessary in order for it to comply with its obligations arising from the directive within two months. After that period had expired without the German Government replying to the reasoned opinion, the Commission brought the present action, in which it seeks from the Court a declaration that, by failing to adopt within the prescribed period all the measures necessary to comply with Directive 90/605, the Federal Republic of Germany has failed to fulfil its obligations under the EC Treaty, together with an order for costs against that State. The German Government contends that the Court should dismiss the action as inadmissible or, in the alternative, as unfounded and order the Commission to pay the costs.

* Original language: Greek.

1 — OJ 1990 L 317, p. 60.

III — Admissibility of the action

4. The German Government submits that the action is inadmissible because the reasoned opinion of 13 June 1994 was drawn up in contravention of the principle of collegiality, a principle laid down by Article 163 of the EC Treaty and Article 16 of the Rules of Procedure of the Commission. [2] The German Government does not rule out the possibility that the reasoned opinion was adopted by way of delegation. However, in that case the decision adopted is invalid on two grounds: first, the special procedure and the publicity requirements which are laid down for delegated decisions were not adhered to and, secondly, since the reasoned opinion is a decision of principle, it cannot in any event have been adopted under delegated powers but only by the Commission acting as a college. The German Government states that, under the principle of collegiality, decisions must be adopted jointly, a requirement which means that when the collegiate body — in this instance the Commission — meets, its members must be aware of both the operative part and the grounds of the decision being adopted. The facts which emerged when Cases C-191/95 and C-186/97 were heard lead the German Government to the conclusion that the text submitted to the Commissioners as a draft decision for the adoption of a reasoned opinion was, in essence, an administrative document containing merely the number of the directive in question, the name of the infringing Member State and the proposal, consisting of a single word, of the responsible staff that a decision to issue a reasoned opinion should be adopted. The Commissioners therefore did not possess the full text and the grounds of the reasoned opinion at the time of the relevant meeting, nor could they collectively determine them at that meeting. The detailed text was not drawn up until after the Commissioners had met. According to the German Government, the above procedure directly infringes Article 16 of the Rules of Procedure of the Commission. While that provision might refer only to the acts listed in Article 189 of the Treaty, reasoned opinions nevertheless should also be regarded as covered by it because of their particular importance. Accordingly, the infringement of essential procedural requirements when the reasoned opinion was adopted must result in the action being inadmissible.

5. The Commission maintains that the contested reasoned opinion was adopted by the Commission as a college. It is true that the Commissioners made their decision without having the full text of the final draft of the reasoned opinion, but they acted on the basis of the record of infringement (fiche d'infraction), which takes the form of a table containing all the necessary information and the grounds for the decision proposed for adoption. Therefore, the Commission maintains, its members as a college drew up a 'decision of principle' which was implemented by the competent staff under the responsibility and supervision of the competent Commissioner. The administrative implementation of the above decision of principle does not amount to delegation to a member of the Commission under the first paragraph of Article 11 of the Rules of Procedure, nor to the assignment of the drafting of the final text to a single Commissioner under the second paragraph of that article. The procedure followed is justified by the Commission's workload and the breadth of its discretion.

2 — These are the Rules of Procedure of 17 February 1993 (OJ 1993 L 230, p. 15), which were in force at the time when the reasoned opinion at issue was adopted.

6. The Commission adds that reasoned opinions are merely preparatory acts which do not have binding effect. Therefore, the Court's case-law relating to the adoption of legal acts which have binding effect cannot be transposed to the procedure for drawing up reasoned opinions, nor can it be maintained that the first paragraph of Article 16 of the Rules of Procedure applies to them. The Commission also considers that, even if a procedural error is found to have occurred in the drawing up of the reasoned opinion, that error does not necessarily result in the dismissal of the action as inadmissible. However, if the Court holds that the present action is inadmissible for the reasons invoked by the German Government, the Commission asks the Court to limit the temporal effects of its judgment, first, by precluding the reopening of the procedure where a judgment holding that a Member State has failed to fulfil its obligations has already been given, and, secondly, with regard to pending cases where no plea of inadmissibility corresponding to that raised by Germany in the present case has been put forward.

IV — My view on the admissibility of the action

7. The views expounded by both the German Government and the Commission have already been considered by the Court in Case C-191/95, in which it gave judgment recently. [3] In that case I was asked to give two Opinions, [4] whose essential points I will now summarise.

8. I consider that the starting point for dealing correctly with the question raised is an understanding of the position held in the Community legal system by the principle that the Commission should act as a college and of the importance of the reasoned opinion in the procedure under Article 169 of the Treaty. As regards the principle of collegiate action, it is to be noted that its observance is of importance not only for the addressees of the decision adopted, who incur the direct consequences in respect of their legal situation, but also for the proper functioning of the Commission as a Community body; it therefore does not concern solely the drawing up of enforceable administrative acts but all the decisions expressing the final political and legal will of the Commission. [5] Reasoned opinions must be considered to be such decisions; their legal importance does not stem from the direct consequences which they have for their addressee upon notification but from the legal consequences which they produce under the Article 169 procedure, by binding the Commission as regards the content and scope of the grounds which it may raise before the Court and correspondingly restricting the extent of the review by the Court. In other words, 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; thus, the fact that it does not constitute an enforceable administrative act does not mean that it automatically amounts to a decision of

3 — Case C-191/95 *Commission* v *Germany* [1998] ECR I-5449.

4 — Opinions of 5 June 1997 and 17 February 1998.

5 — Point 18 of my Opinion of 17 February 1998 in Case C-191/95.

secondary importance so that it is justifiable to relax the strict procedural rules which should characterise Commission action. [6]

9. With regard to such action, I placed particular emphasis on the obligation to demonstrate that the principle of collegiality has been complied with: the Commission, as a collegiate body, is bound by special procedural rules which are derived from that principle and intended to ensure compliance with it. It is necessary for compliance to be proved easily and reliably. The only sure means of proof is to incorporate the content of the decision adopted in the text that will represent the result of the collegiate examination of the case by the college of Commissioners and define the extent of collegiate responsibility of the Commissioners who participated in the college. In other words, the principle of collegiate action is one of the bases of the Community administrative machinery and indissolubly linked to the principle that the true intention of the body of Commissioners should be incorporated in a text; it is necessary for that text to contain the basic points of the decision adopted, the statement of reasons for it and its operative part. [7]

10. In view of the above considerations, I maintained, and continue to believe, that the Commission's practice of adopting as a college only a 'decision of principle' consisting of a single word when it issue a reasoned opinion, leaving the drafting of the text of the reasoned opinion to the administrative services, is contrary to the abovementioned obligation to incorporate the content of the decision adopted in a written text; it also infringes the rule under which both the operative part and the grounds of a Community act must be adopted simultaneously by the body which has the power of decision (in this instance, the body of Commissioners).

11. However, the Court did not follow the above reasoning, it found that the Commission practice described above for drawing up reasoned opinions is entirely consistent with the principle of collegiality and Community law generally. The Court may, therefore, again choose the solution which it adopted in Case C-191/95 [8] and hold the present action admissible. I, for my part, retain the views which I expounded in that case.

V — Merits of the action

A — *Community legislation*

12. Directive 90/605 [9] extends the scope of Fourth Directive 78/660 [10] and Seventh Directive 83/349. [11] Until that legislative

6 — Points 28 and 32 of that Opinion.

7 — Points 17 and 21 of that Opinion.

8 — Cited above.

9 — See footnote 1 above.

10 — 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).

11 — 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).

amendment, Directives 78/660 and 83/349 applied in Germany only to the following types 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). The objective of Directive 90/605 is to bring within the scope of Directives 78/660 and 83/349 certain categories of partnerships whose members with unlimited liability are companies having a share capital. Under Articles 1 and 2 of Directive 90/605, the coordination measures prescribed by Directives 78/660 and 83/349 are also to apply to the Member States' laws, regulations and administrative provisions relating to the following types of German company: the *offene Handelsgesellschaft* (commercial partnership) and the *Kommanditgesellschaft* (limited partnership). In order for Directive 90/605 to apply to those partnerships, all members having unlimited liability must be in the form of one of the types of company having a share capital listed in Directives 78/660 and 83/349 [12] or be companies which are not governed by the laws of a Member State but which have a legal form comparable to those referred to in Directive 68/151. [13]

13. In addition, Directive 90/605 extends the field of application of Directives 78/660 and 83/349 to commercial and limited partnerships where all members having unlimited liability are companies of the types prescribed in the second subparagraph of Article 1(1) of Directive 78/660, as amended by Directive 90/605. In other words, Directives 78/660 and 83/349 cover a commercial or limited partnership all of whose members having unlimited liability are other commercial or limited partnerships which themselves have as members with unlimited liability only public limited companies, limited liability companies or companies limited by shares but having one or more general partners.

VI — My views on the merits of the action

14. I consider that the Federal Republic of Germany has failed to comply with Directive 90/605.

15. As the Commission correctly observes, the infringement which has taken place is — in part at least — not disputed by the German Government. Its acknowledgment that it has failed to comply with the directive results from three points. First, while conceding that it has not adopted specific measures to transpose Directive 90/605, it maintains that German legislation covers large parts thereof;

12 — That is to say the companies which are listed in the original version of Article 1 of Directive 78/660 and of Article 4 of Directive 83/349.

13 — 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).

it follows *a contrario* that the German legislation in force does not cover the entire directive. Second, Germany indicates that it will undertake the transposition of the directive into national law immediately after delivery of judgment by the Court in Case C-191/95. Third, it invokes the difficulties in implementing the directive which result from the fact that the competent authorities and the bodies concerned in Germany have not yet agreed on the national transposing measures which are necessary and appropriate in order to bring national law into line with the directive.

16. The above submissions amount to an indirect admission of the alleged infringement. The Court has consistently held that, under the third paragraph of Article 189 and the first paragraph of Article 5 of the EC Treaty, the Member States to which a directive is addressed are obliged to achieve all the objectives of that directive within the period laid down so that its provisions are fully effective on the expiry of the time-limit for transposition. A submission that national legislation in force nevertheless meets a large part of the Community objectives contained in the directive to be transposed must be rejected as irrelevant. [14] It is also necessary to reject submissions by a Member State that it is lawful to delay the transposition of a directive until the Court has interpreted another provision of the same directive in Treaty infringement proceedings brought against the same State. A Member State cannot rely on alleged failures by it to fulfil its obligations, in respect of which it has been brought before the Court, in order to justify its lateness in transposing other Community provisions with similar content. Finally, it is irrelevant whether the transposition of the directive into national law has been delayed because of the opposing views which have been expressed as to the need for the national transposing measures and their appropriateness. It is settled law [15] that a Member State cannot rely on internal circumstances to escape its obligations under a directive.

Irrespective of the above, however, if it is assumed that the German Government contests in its entirety the infringement alleged against it by the Commission, the views which it puts forward regarding the extent to which the national legislation in force transposes the directive at issue are incorrect. The German Government refers to Paragraph 6(1) of the Handelsgesetzbuch (German Commercial Code; hereinafter the 'HGB'), which classifies commercial and limited partnerships as traders and makes them automatically subject to Section I of Book III of the HGB (Paragraphs 238 to 261). According to the submissions of the German Government, those provisions amount to a transposition of the requirements of Directive 78/660. The German Government sets out in its pleadings a detailed table of the provisions of the directive which, in its view, have been incorporated in

14 — See Case C-298/97 *Commission* v *Spain* [1998] ECR I-3301.

15 — See, for example, Case C-208/96 *Commission* v *Belgium* [1997] ECR I-5375, paragraph 9, and Case C-8/97 *Commission* v *Greece* [1998] ECR I-823, paragraph 8.

corresponding provisions of Section I of Book III of the HGB.

17. Indeed, the abovementioned national provisions in Section I of Book III of the HGB, which relate to the drawing up of trading accounts and to commercial data, appear to be consistent with the provisions of Directive 78/660; that does not mean, however, that they also transpose the provisions of the directive into national law. As the Commission correctly observes, when that directive was adopted it laid down certain strict requirements relating to the presentation and content of annual accounts and annual reports, the valuation methods used and the publication of those documents, *especially for companies having a share capital.* Directive 83/349, which dealt with the particular question of consolidated accounts, related to the same companies. The abovementioned Community legislation does not merely lay down piecemeal provisions relating to trading accounts but forms a coherent and detailed body of requirements and conditions for the operation of companies having a share capital, that is to say it creates an *independent system of rules.* That special system was specifically incorporated into German law in a separate part of the national legislation, that is to say in Section II of Book III of the HGB, which expressly relates to companies having a share capital. That part of the HGB is divided into six subsections, of which the first relates to the annual accounts of a company having a share capital and the report on its economic position, the second to the consolidated accounts, the fourth to the disclosure requirements and the sixth to the penalties for failure to comply with the above provisions. I do not wish to broach the question as to whether Section II of Book III of the HGB correctly transposes Directives 78/660 and 83/349, an issue which falls outside the ambit of the present proceedings. It is clear, however, that the transposition of those directives into German law must be sought in Section II, and not Section I, of Book III of the HGB. The fact that Section I of Book III of the HGB appears to contain provisions which are consistent with the requirements laid down by those directives does not in any way mean that that part of the German legislation also transposes them since, first, they do not merely contain piecemeal provisions but lay down a coherent system of rules and, second, another part of the German legislation covers their subject-matter.

Turning now to the legislation specifically at issue in this action, Directive 90/605 is designed to extend the scope of Directives 78/660 and 83/349 to concerns which, while ostensibly partnerships, do not in fact consist of natural persons, but of companies having a share capital; that is to say, so far as concerns Directive 90/605 at any rate, companies 'having a share capital under a presumption of law' are at issue. The only acceptable way of transposing Directive 90/605 into German law correctly is to extend the field of application of Section II of Book III of the HGB so that it covers, in addition to the companies having a share capital to which it currently relates, the companies 'having a share capital under a presumption of law' set out in Directive 90/605. [16]

16 — Irrespective of the issue as to whether the relevant part of the German legislation ultimately amounts to a correct transposition of Directives 78/660 and 83/349.

Finally, so far as concerns the specific issue of the disclosure requirements laid down by Directives 78/660 and 83/349, the German Government's submission that the Publizitätsgesetz of 1969 [17] is sufficient for the corresponding Community provisions to be regarded as having been transposed into national law must be rejected. As the Commission observes, the set of companies to which the Publizitätsgesetz relates is much narrower than that covered by the disclosure requirements laid down by the Community legislation; it corresponds to just 1% of all companies. The national legislation therefore does not amount to a correct and complete transposition of the Community provisions.

VII — Conclusion

In view of the foregoing I propose, subject to the reservation which I have expressed regarding admissibility, that the Court should:

(1) allow the application and declare that, by failing to adopt within the prescribed period all the 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, the Federal Republic of Germany has failed to fulfil its obligations under that directive;

(2) order the Federal Republic of Germany to pay the costs.

17 — Law on the disclosure of accounts: Gesetz über die Rechnungslegung von bestimmten Unternehmen und Konzernen BGBl. I, 1969, p. 1189 and BGBl. I, 1970, p. 1113.