JUDGMENT OF THE COURT (First Chamber)
15 January 2002 *

In Case C-182/00,

REFERENCE to the Court under Article 234 EC by the Landesgericht Wels (Austria) for a preliminary ruling in the application brought before that court by

Lutz GmbH and Others

on the validity of Article 2(1)(f) of First Council Directive 68/151/EEC of 9 March 1968 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) and Article 47 of Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies (OJ 1978 L 222, p. 11),

* Language of the case: German.

THE COURT (First Chamber),

composed of: P. Jann, President of the Chamber, L. Sevón and M. Wathelet (Rapporteur), Judges,

Advocate General: L.A. Geelhoed,

Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— Lutz GmbH and Others, by E. Chalupsky, Rechtsanwalt,

— the Austrian Government, by H. Dossi, acting as Agent,

— the Spanish Government, by N. Díaz Abad, acting as Agent,

— the Italian Government, by U. Leanza, acting as Agent, assisted by G. De Bellis, avvocato dello Stato,

— the Council of the European Union, by M.C. Giorgi-Fort and G. Houttuin, acting as Agents,

— the Commission of the European Communities, by M. Patakia, acting as Agent, assisted by B. Wägenbaur, avocat,

having regard to the Report for the Hearing,

after hearing the oral observations of Lutz GmbH and Others, represented by G. Schmidsberger, Rechtsanwalt; of the Italian Republic, represented by G. De Bellis; of the Council, represented by G. Houttuin; and of the Commission, represented by M. Patakia, assisted by B. Wägenbaur, at the hearing on 25 October 2001,

after hearing the Opinion of the Advocate General at the sitting on 8 November 2001,

gives the following

Judgment

1 By decision of 9 May 2000, received at the Court on 15 May 2000, the Landesgericht (Regional Court) Wels, sitting as a Handelsgericht (Commercial Court) in cases relating to the register of companies, referred for a preliminary ruling under Article 234 EC five questions concerning the validity of Article 2(1)(f) of First Council Directive 68/151/EEC of 9 March 1968 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) ('the First Companies Directive') and Article 47 of Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies (OJ 1978 L 222, p. 11) ('the Fourth Companies Directive').

2 Those questions have arisen in proceedings involving Lutz GmbH and Others ('Lutz and Others') and concerning the production of annual accounts and an annual report under the österreichisches Handelsgesetzbuch (Austrian Commercial Code), as amended by the EU-Gesellschaftsrechtsänderungsgesetz (Law amending Austrian company law for EU purposes) (*Bundesgesetzblatt* 304/1996) ('the HGB').

Community law

3 Under Article 54(3)(g) of the EC Treaty (now, after amendment, Article 44(2)(g) EC), the Council and Commission are required to work for the abolition of restrictions on freedom of establishment 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 of the EC Treaty (now the second paragraph of Article 48 EC) with a view to making such safeguards equivalent throughout the Community.

4 Article 2(1)(f) of the First Companies Directive obliges Member States to take the measures required to ensure compulsory disclosure by companies of their balance sheets and profit and loss accounts for each financial year.

5 Article 47 of the Fourth Companies Directive provides that annual accounts, duly approved, and an annual report, together with the opinion submitted by the person responsible for auditing the accounts, are to be published in the manner laid down by the laws of each Member State in accordance with Article 3 of the First Companies Directive.

National law

6 With regard to large capital companies within the meaning of Paragraph 221 of the HGB, Paragraph 277(1) thereof provides:

'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 qualification. 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 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. ...'

7 In the event of failure to comply with this obligation of disclosure, Paragraph 283(1) of the HGB authorises the imposition of a periodic penalty of up to ATS 50 000.

The main proceedings and the questions submitted for preliminary ruling

8 By decision of 13 September 1999 the Landesgericht Wels, sitting as a Handelsgericht, ordered Lutz and Others to submit within four weeks the annual accounts and annual report required under Paragraphs 277 to 280a of the HGB, failing which a periodic penalty of ATS 10 000 would be imposed on each person.

9 In view of the fact that the Oberster Gerichtshof (Supreme Court), Austria, has consistently ruled that the threat of a periodic penalty, as provided for by the decision of 13 September 1999, cannot be the subject of an action, Lutz and Others brought an application ('Individualantrag') before the Verfassungsgerichtshof (Constitutional Court), Austria, for a declaration that the national provisions on disclosure of annual accounts and the annual report are contrary to a number of fundamental rights and to Community law. By decision of 2 November 1999 the Landesgericht Wels, sitting as a Handelsgericht, extended the period for submission of the accounting documents requested to the date on which the Verfassungsgerichtshof should make its order. By order of 29 November 1999 the Verfassungsgerichtshof dismissed the application lodged by Lutz and Others on the ground that a periodic penalty may be suspended until a ruling has been given on the legality of the obligation breach of which attracts that penalty.

10 The Landesgericht Wels, sitting as a Handelsgericht, thereupon decided to submit the following questions to the Court for a preliminary ruling:

'(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 EEC 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?'

The jurisdiction of the Court

11 The first paragraph of Article 234 EC provides that the Court shall have jurisdiction to give preliminary rulings concerning, *inter alia*, the interpretation of

the Treaty and of the acts of the Community institutions. The second paragraph of Article 234 EC adds that '[w]here such a question is raised before any court or tribunal of a Member State, that 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 give a ruling thereon.'

12 In this regard, in order to determine whether a referring body is a court or tribunal within the meaning of Article 234 EC, which is a question governed by Community law alone, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent (see, in particular, Case C-54/96 *Dorsch Consult* [1997] ECR I-4961, paragraph 23 and the case-law cited therein, Joined Cases C-110/98 to C-147/98 *Gabalfrisa and Others* [2000] ECR I-1577, paragraph 33, and Case C-178/99 *Salzmann* [2001] ECR I-4421, paragraph 13).

13 Furthermore, while Article 234 EC does not make a reference to the Court subject to there having been an *inter partes* hearing in the proceedings in the course of which the national court refers a question for a preliminary ruling (see Case C-18/93 *Corsica Ferries* [1994] ECR I-1783, paragraph 12), it follows none the less from that article that a national court may refer a question to the Court only if there is a case pending before it and if it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature (see orders in Case 138/80 *Borker* [1980] ECR 1975, paragraph 4, and in Case 318/85 *Greis Unterweger* [1986] ECR 955, paragraph 4, and judgments in Case C-111/94 *Job Centre* [1995] ECR I-3361, paragraph 9, and *Salzmann*, cited above, paragraph 14).

14 Thus, when it makes an administrative decision without being required to resolve a legal dispute, the referring body, even if it satisfies the other conditions mentioned in paragraph 12 of the present judgment, cannot be regarded as exercising a judicial function. Such is the case, for example, when it determines an application for registration of a company according to a procedure, the object of which is not the annulment of a measure adversely affecting the applicant (*Job Centre*, cited above, paragraph 11, and *Salzmann*, paragraph 15).

15 It is clear from the documents on the case-file that, when it is ruling in its capacity as a Handelsgericht pursuant to the national provisions governing the obligations to disclose annual accounts and the annual report, the Landesgericht Wels is not dealing with a dispute but is simply maintaining a register of companies. In this it limits itself to establishing whether the statutory requirements as to disclosure have been satisfied and, if necessary, orders production of those accounting documents on pain of a periodic penalty. Moreover, there is nothing on the case-file to suggest that any dispute is pending before the Landesgericht Wels between Lutz and Others and a potential defendant.

16 The unavoidable conclusion is therefore that, in performing such an activity, the Landesgericht Wels is exercising a non-judicial function.

17 It follows that the Court has no jurisdiction to rule on the questions raised by the Landesgericht Wels, acting as a Handelsgericht, in connection with the maintenance of the register of companies.

Costs

18 The costs incurred by the Austrian, Spanish and Italian Governments, and by the Council and Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for Lutz and Others, a step in the proceedings before the Landesgericht Wels, the decision on costs is a matter for that court.

On those grounds,

THE COURT (First Chamber)

hereby rules:

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.

Jann Sevón Wathelet

Delivered in open court in Luxembourg on 15 January 2002.

R. Grass
Registrar

P. Jann
President of the First Chamber