OPINION OF ADVOCATE GENERAL COSMAS

delivered on 17 February 1998 *

Summary

I — Introductory remarks

I find myself in the fortunate or unfortunate position of delivering a second Opinion in Case C-191/95 in which I delivered an Opinion on 5 June 1997. I do not consider that the reopening of the oral procedure enabled evidence to be submitted which tended to weaken either the reasoning of or the conclusions drawn in my original Opinion, to which I would refer. Nevertheless I believe it will be useful to make certain supplementary remarks inasmuch as the Commission, in its appearance at the hearing, attempted to sketch out a legal situation different from that which I had described in my previous Opinion. I

* Original language: Greek.

will, however, confine myself to dealing with the legal issues which dominated at the hearing, that is to say, those concerning the procedural legality of the Commission's reasoned opinion which preceded this action; in that reasoned opinion the Commission alleged that Germany had not transposed Council Directives 68/151/EEC and 78/660/EEC correctly as regards the penalties which the Member States should impose for non-disclosure of the annual accounts of companies limited by shares.

II — Facts and procedure before the Court

1. For the facts which prompted the Commission to bring an action before the Court, I would refer to point 1 of my Opinion of 5 June 1997, and for the course taken by the procedure before I delivered that Opinion I would refer to points 2 to 6 thereof. I consider it useful, however, to remind the reader rapidly that Germany had, from the outset, raised a plea of inadmissibility, claiming that the Commission's decisions which gave rise to the action before the Court were vitiated by serious procedural defects. Germany doubted, in particular, whether the reasoned opinion and the decision to bring the present action were adopted in observance of the principle of collegiality and in accordance with the procedure required by the Commission's Rules of Procedure, It asked the Commission, furthermore, to clarify whether those measures were adopted by the Commission as a college or under a delegation of authority and sought copies of those decisions. In the absence of a reply from the Commission to the above requests, the defendant asked the Court to require the applicant to produce the relevant documentation sought. In its order of 23 October 1996, the Court asked the Commission to produce the decisions that it had adopted as a college and in accordance with the procedural requirements under its Rules of Procedure whereby, first, it had formulated the reasoned opinion as regards Germany and, secondly, had decided to bring the present action. The Commission produced a certain amount of documentation for the Court to which I shall return in more detail at a later point, [1] but which, in my opinion, did not correspond to that requested in the order of the Court. In the light of the documentation produced to the Court and of the claims and arguments put forward by both parties at the hearing, I delivered an Opinion on 5 June 1997 in which I concluded that the application should be dismissed as inadmissible on the ground of non-compliance with the principle of collegiality in the adoption of the reasoned opinion. I also stated that, in any case, a reasoned opinion may not be adopted by delegation of authority and that it was also not possible in that way to remedy the defects that I had found with regard to compliance with the principle of collegiality in respect of the reasoned opinion in question. By order of 14 October 1997, in view of the significance of the question of the conditions under which the reasoned opinion must be adopted for the admissibility of the action, the Court ordered the oral procedure to be reopened and invited the parties to put forward their views on the matter at a fresh hearing. While Germany maintained its orig-

1 — See below at point 10.

inal position, the Commission put forward a line of argument to the effect that the reasoned opinion, by its nature, is an act which may not be adopted by delegation of authority and is governed by the principle of collegiality, but which is nevertheless not subject to the strict procedural requirements, failure to comply with which had been noted in my Opinion of 5 June 1997.

III — Admissibility of the action

A — *The principle that the Commission should act as a college*

2. I can only welcome the position taken by the Commission in acknowledging, albeit at the level of principle, that there is an obligation to comply with the principle of collegiality when it adopts a reasoned opinion. As will be explained in more detail below, I nevertheless retain some reservations as regards the extent to which the Commission, while excluding *de jure* the possibility of issuing a reasoned opinion by way of delegation of authority, in practice introduces, in its reasoning, a method of indirect delegation of authority in infringement of the rules of collegiality.

3. According to the case-law, the principle that the Commission should act as a college occupies a primordial position in the Community legal order and is an expression of the institutional philosophy of the Community (and of the Union). It is set out in Article 17 of the Merger Treaty and in Article 163 of the Treaty; the latter expressly lays down that '[t]he Commission shall act by a majority of the number of Members ...'. Article 1 of the Commission's Rules of Procedure provides that '[t]he Commission shall act collectively in accordance with these Rules'.

4. In its *PVC* judgment, [2] the Court began by pointing out that, as a general rule, [3] 'the functioning of the Commission is governed

At all events, it suffices to mention, by way of introduction, that the interest of the present case is focused on the procedural rules which result from the principle of collegiality and govern the adoption of the Commission's decisions as regards sending out the reasoned opinion.

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

3 — Inasmuch as collegiality is the rule for the functioning of the Commission, the Court avoids an exact definition of its scope of application. Moreover, for that reason, when referring to the principle of collegiality, the Court indicates that that is 'particularly' so in the case of enforceable administrative acts by which it finds an infringement of the competition rules and issues directions to or imposes pecuniary sanctions upon the undertakings involved pursuant to Regulation No 17/62 (paragraph 65). It would consequently be wrong to maintain that in cases in which the Commission's action does not take the form of the issuing of enforceable administrative acts it is not essential to comply with the principle of collegiality.

by the principle of collegiate responsibility ...'. [4] It also expressly stated that '[c]ompliance 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.' [5] As regards Commission decisions which are required to state the reasons on which they are based, the Court accepted that '[t]he operative part of such a decision can be understood, and its full effect ascertained, only in the light of the 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.' [6] Lastly the Court expressly states in the *PVC* judgment that the authentication of the Commission's acts provided for in 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.' [7]

5. It follows from the above that the principle that decisions should be adopted by the Commission as a college constitutes the general rule for Commission action. In particular, as regards acts requiring a statement of reasons, whether by virtue of some provision or by their nature, collegiality requires that the operative part of and the statement of reasons for an act should be adopted simultaneously by the Commission as a collegiate body. Compliance with the principle in question is ensured by the procedure of authentication of decisions adopted by the Commission, as laid down by its Rules of Procedure.

(a) The Commission's position on the principle of collegiality

6. In its submissions at the second hearing, the Commission put forward its own interpretation of the principle of collegiality and restricted the scope of application of the *PVC* judgment solely to acts producing direct and binding effects. The Commission rightly points out, on the one hand, that the *PVC* judgment concerned the imposition of a fine, in other words was an enforceable administrative act, and, on the other hand, that before reaching its final position the Court took account of the fact that the fines in question have legal effects to the detriment of the individual. [8] Taking that as its starting point, the Commission concludes by maintaining that the principle of collegiality does not require compliance with the same procedural requirements for all the decisions that it takes; it suggests that a distinction should be drawn between acts which produce direct legal effects — with regard to which the strict requirements imposed by the Court in the *PVC* judgment apply — and acts which do not have such characteristics — in respect of which

4 — See *Commission* v *BASF*, cited in footnote 2, paragraph 62.

5 — Ibid., para. 64.

6 — Ibid., paragraph 67.

7 — Ibid., paragraph 75.

8 — In fact the Court states that compliance with the principle of collegiality 'must' be of concern to the individuals affected by the legal consequences of such decisions, and accepts that individuals with a lawful interest may rely on breach of the essential procedural requirement constituted by authentication of the Commission's acts provided for in Article 12 of its Rules of Procedure to prevent the act improperly adopted by the Commission having legal effect (paragraph 75 of the *PVC* judgment cited in footnote 2).

it suffices for the college of Commissioners, having been properly informed, to take a 'basic decision' (*sic*) [9] on the facts submitted to it and their legal nature. According to the Commission, the further drawing up of acts in the second category, which are preparatory in nature, after adoption of the 'basic decision' (*sic*) by the Commissioners as a college, is entrusted to its competent departments. [10] It also maintains that adoption of the 'basic decision' (*sic*) by the college of Commissioners is alone subject to the requirements of the principle of collegiality as formulated in paragraph 63 of the *PVC* judgment, in other words subject to collective deliberation and the collective responsibility of the Commission. [11]

7. Applying that reasoning to this case, the Commission states that when the 'basic decision' (*sic*) was adopted to issue a reasoned opinion to Germany in respect of the incorrect transposition of Council Directives 68/151/EEC and 78/660/EEC, the Commissioners had before them, if nothing else, the 'fiche d'infraction' (record of infringement); that record constitutes a proposal by the competent departments — fully documented from the factual and legal point of view — to adopt the reasoned opinion in question. For further evidence and information they could also refer to the administrative file concerning the infringement on the part of Germany. Consequently the Commissioners, when deciding that a reasoned opinion should be sent to Germany, did so, as is attested by the minutes of their meetings, [12] in full knowledge of what they were deciding and hence of the operative part of and statement of reasons for the reasoned opinion. In that light the Commission considers that the procedural requirements of the principle of collegiate action were wholly satisfied; it also points out that its general practice (that is to say, with regard to the Article 169 procedure, solely a 'basic decision' (*sic*) is taken by the college of Commissioners on the basis of the record of infringement and the administrative file on the infringement, while the drawing up of the text of the reasoned opinion is left to the administrative departments under the supervision of the competent Commissioner) is wholly lawful and fully complies with the principle of collegiate action.

9 — The French term used by the Commission's agent at the second hearing was 'décision de base'. It should be noted that that term does not correspond to any relevant legislative text or the case-law of the Court with the content and sense attributed to it by the Commission's Agents in this case. When the Community Court has recourse to that term it is referring to a decision of a Community body that is *perfectly regular and taken in accordance with the procedural rules laid down in the Treaty and the appropriate rules of procedure* defining the legal and regulatory framework of the matter to be regulated and on which other special or subsequent Community acts are based. (See, for instance, point 2 of the Opinion of Advocate General Jacobs in Case C-177/96 *Belgian State* v *Banque Indosuez and Others* [1997] ECR I-5659, and paragraph 62 of the order in Case T-585/93 *Greenpeace and Others* v *Commission* [1995] ECR II-2205.) The inappropriate use of that term by the Commission's representatives should not, therefore, encourage mistaken conclusions to be drawn.

10 — In the specific terms used by the Commission's Agents at the second hearing, 'the college reaches its decisions on the basis of preparatory documents from the Commission's departments and adopts merely a basic decision, leaving the task of drawing up, finalising the details of and putting the finishing touches to the text to the Commission's departments, under the responsibility of the competent Commissioner.

11 — '... the principle of collegiality so laid down was based on the equal participation of the Commissioners in the adoption of decisions, from which it followed in particular that decisions should be the subject of collective deliberation and that all the members of the college of Commissioners should bear collective responsibility at political level for all decisions adopted', paragraph 63 of the judgment cited in footnote 2.

12 — To be precise, the Commission refers to the adoption of what it calls the 'basic decision' (*sic*) in respect of the specific reasoned opinion.

(b) My view on the construction put forward by the Commission

8. I cannot support that position at all.

(i) As regards this action

9. In the first place it is worth pointing out that even if the construction put forward by the Commission were accepted, that does not undermine the conclusion in my Opinion of 5 June 1997 to the effect that the action is inadmissible by reason of procedural defects in the reasoned opinion. The Commission did not produce to the Court, as it should have done, the record of infringement or the file on the basis of which the 'basic decision' (*sic*) was supposed to have been adopted by the college of Commissioners. Nor, in particular, did the Commission adduce such evidence either when Germany cast doubts on the procedural validity of the reasoned opinion or when the Court asked it to produce the decisions adopted by the Commission as a college and in accordance with the formalities required under its Rules of Procedure in connection with this action. The Commission's Agent appeared at the hearing and attempted, contrary to the applicable procedural time-limits, to produce a record of infringement and an administrative file, as he claimed, for the first time at the hearing. After the procedure was re-opened and at the second hearing in the case, the Commission's Agent proposed to send those texts to the Court in the event that the latter wished to take cognisance thereof at that stage in the case.

10. However, it appears from the evidence produced by the Commission at the appropriate time — in other words the evidence sent to the Court in compliance with its abovementioned order of 20 October 1996 [13] — which concerned extracts from the minutes of certain meetings of the Commission and documents referred to in those minutes, as follows: 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 of the Commission on 31 July 1991 to issue 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.

13 — See point 4 of my Opinion of 5 June 1997.

11. In brief, from the above it is clear that the Commissioners, when taking their 'basic' decision, had before them an administrative document which mentioned, first, the number of the directive that had not been properly transposed, secondly, the name of the Member State that had committed the infringement, and thirdly the (one-word) proposal by the competent departments to adopt a decision to issue a reasoned opinion. That is the only documentation which, from the legal point of view, we can be sure the Commissioners were aware of and on which they reached their decision. Consequently, even if the Court accepts the Commission's view that the principle of collegiality is not impaired if the Commissioners decided as a college to issue a reasoned opinion by reference to the record of infringement or the evidence in the administrative file, nevertheless in this case, the decision adopted is defective. Consequently, I would reiterate the view I took in my Opinion of 5 June 1997 that the Commission did not produce sufficient evidence to the Court from which it might be concluded that the principle of collegiality has been observed, although it bears the burden of proof in that respect. [14]

Consequently the present action must be dismissed as inadmissible even on the basis of the Commission's view of the meaning of the principle of collegiality.

(ii) In general

12. My examination of the above crucial legal issue must inevitably go beyond the scope of this action. It is appropriate to examine whether (regardless of the way in which the Commission's Agents dealt with this action as regards the submission at the appropriate time of the record of infringement and the administrative file in respect of the reasoned opinion in question) it is legally conceivable, as was maintained at the hearing, that the decision to issue a reasoned opinion should be taken on the basis of a procedure in which the Commissioners did not, as a college, draw up the text of the reasoned opinion or reach a decision on the basis of a draft text which had previously been submitted to them by the competent departments; in other words, whether it should be accepted that the Commissioners, with solely the record of infringement and the administrative file on the case at their disposal, should take a one-word 'basic decision' (*sic*) on the reasoned opinion and leave the task of preparing and drawing up the text of that opinion to the administrative departments under the supervision of the competent Commissioner. As stated above, the Commission maintains that that procedure, which it has always followed, is compatible with the principle that it should act as a college.

13. I consider that the Commission's reasoning is, first of all, legally weak. It is not based on existing texts of primary or secondary Community law, nor on consequences drawn from the Court's case-law. Specifically, both the Community legislature and the Community Court have safeguarded the principle that the Commission should act as a college in an absolute and uniform manner. The distinction drawn between decisions taken on the basis of whether or not they produce

14 — In that case the rule that each party bears the burden of proof in respect of the allegations of fact it puts forward is reversed. As the case-law shows, that presumption is overturned when the evidence lies solely in the hands of the other party (see Case 45/64 *Commission* v *Italy* [1965] ECR 857), or the latter has, by its conduct, made access to the evidence impossible (Case 49/65 *Ferriere e Acciaierie Napoletane* v *High Authority of the ECSC* [1966] ECR 73). For those reasons, the Commission bears the burden of proving that it complied with the principle of collegiality and with the procedural formalities linked to that principle.

direct and binding legal effects as the criterion governing the manner in which the principle of collegiate action should be converted into specific procedural rules conflicts with what has so far been accepted to be the case in Community law. In fact it has not hitherto been accepted that that principle is 'dual in nature', in other words that it imposes a strict, formal procedure for the adoption of decisions with direct legal consequences and a more lax procedure for other decisions of the Commission. The fact that in the *PVC* judgment the Court was examining an enforceable administrative act of the Commission does not mean, as the Commission wrongly submitted, that the basic procedural parameters of the principle of collegiality accepted by the Community Court in that case relate only to the drawing up of enforceable administrative acts. Such an interpretation is, in my opinion, mistaken, as I shall try to explain in more detail below.

14. Moreover, to maintain the position that a collegiate body, when it takes a 'basic decision' (*sic*) which has not been crystallised in a specific text and leaves the drawing up of the text to other departments, is observing the general principle of collegiality, in accordance with which both the operative part of and the reasoning for the decision must be adopted at the same time, leads inevitably to logical contradictions. According to the Commission's Agents at the second hearing, when the college of Commissioners takes the 'basic decision' (*sic*) on the reasoned opinion, it leaves to the administration solely 'the formulation of the text', in other words the task of drawing up, finalising the details of and putting the finishing touches to the text. [15] If the administrative departments really confined themselves to such secondary operations no question of a challenge to the principle of collegiality could arise. How is it possible, however, for those departments to confine themselves to that secondary role where there is no text containing the college of Commissioners' 'basic decision' (*sic*)?

15. In reality what the Commission's Agents call the 'basic decision' is a decision lacking any substance or content, in other words a 'phantom decision'. The true meaning of the principle of collegiality, as the Community Court has rightly indicated, consists in the obligation of the collegiate body that has to reach a decision to determine itself, as a college, the principal and integral points of the content of its decision, leaving the administrative departments to play a wholly secondary role. In other words, if I may draw the comparison, the added value of the administrative departments in the decision adopted must be, if not zero, at least insignificant. However, if the practice as described above by the Commission is followed, the contribution of the administrative departments cannot be either insignificant or secondary. Moreover, how can there be judicial review of the relationship between the text drawn up by the administrative departments and the original decision of the body of Commissioners where the original (or, if you wish, 'basic')

15 — '... le libellé du texte', '... d'élaborer, de peaufiner, de mettre la dernière main au texte'. Those were the terms used by the Commission's agent at the second hearing.

decision does not exist either in substance or even as a draft?

16. In particular, for decisions requiring a statement of reasons, the Court has set out clearly its position and that is not open to further interpretation: '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'. [16] It is worth reiterating that the Court makes no distinction between decisions requiring a statement of reasons that have direct legal effects and decisions requiring a statement of reasons that are preparatory in nature. The reasoned opinion, as its name suggests, falls within the scope of the rule. How is it possible, however, to adopt with any precision the statement of reasons for the decision taken if, prior to the meeting of the college of Commissioners, no draft decision exists for approval that contains those items or, following the meeting, there is no approved text containing the items in question?

17. In my opinion the error into which the Commission has fallen when it seeks to define the semantic content of the principle of collegiality turns on that point. The requirement that the Commission should act as a college is not confined to the need to deliberate collectively upon decisions to be adopted and the collegiate responsibility of the Commissioners, but extends to the requirement of *attesting* to compliance with the principle of collegiality. In other words, the Commission, as a collegiate body, is bound by special procedural rules which are derived from the principle of collegiality and are intended to ensure that that principle is complied with and attest to that fact. Thus those principles coincide to ensure transparency and, in the final analysis, morality, as was recorded in history by the saying that Caesar's wife had not only to be virtuous but had to be seen to be virtuous. [17] Otherwise, if, that is, it is not possible to prove that a specific decision was in fact adopted by the college, that general principle becomes a dead letter without any legal value. The only sure way of proving that it has been complied with is by the *incorporation* of 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. [18] Moreover, there must be a link between that text and the specific collegiate deliberation at which it was approved or drawn up. For that reason, the Commission's Rules of Procedure provided for a procedure to authenticate the decision

16 — *PVC*, cited above in footnote 2, paragraph 67.

17 — That saying is attributed to Caesar himself, who was thus justifying his decision to repudiate his wife Pompeia even though, when he was cited as a witness against Clodius, her alleged lover, he did not accuse her of adultery. That incident is preserved *inter alia* in Plutarch's '*Moralia*': 'He put away his wife Pompeia because her name was linked in gossip with Clodius, but later, when Clodius was brought to trial on this charge, and Caesar was cited as a witness, he spoke no evil of his wife. And when the prosecutor asked, "Then why did you put her out of the house?" he replied, "Because Caesar's wife must be free from suspicion".' (Plutarch's '*Moralia*', Sayings of Kings and Commanders, 206, Translated by Frank Cole Babbitt, pub. Heinemann.)

18 — In the absence of a text it is impossible to ascertain, in the case of review, the real intention of the collegiate body. In the words of the well-known Latin maxim, *verba volant scripta manent*.

adopted; that procedure constitutes the best way of attesting to compliance with the principle of collegiality.

18. The place occupied in the Community legal order by the principle that the Commission should act as a college must also be underlined. It is not without significance that the Court began its reasoning in the *PVC* case by stating that '... the functioning of the Commission *is governed* by the principle of collegiate responsibility ...'. [19] That principle is not only of importance 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 and hence to the proper application of Community law more generally. For that reason, moreover, equivalent procedural issues of a formal nature and any defects as regards the lawfulness of the action of collegiate bodies fall within the area of review by the courts of their own motion in most national legal systems. The strict legal conditions to which the fundamental principle that the Commission should act as a college give rise do not concern solely the drawing up of enforceable administrative acts which that body is competent to issue but *all the decisions expressing the final political and legal will of that body*. It would, in my opinion, be inconsistent with generally accepted legal theory and logic were the principle of collegiality to be applied more fully when the Commission decides to impose a fine on an undertaking pursuant to Articles 85 and 86 of the Treaty than when it binds itself on important political and legal questions by adopting, for example, a proposal for a regulation or a recommendation. Those latter decisions may not directly bind individuals but the Commission binds itself and for that reason compliance with the principle of collegiality is required. Moreover, the principle in question is directly associated not solely with the institutional functioning of the Treaty but also with legal certainty and hence compliance therewith should be easily and clearly ascertainable. For that reason it is indispensable that collegiality should be linked to specific and absolutely binding procedural rules, regardless of the nature of the decision adopted. In other words the Commission is required to cover its decisions in strict procedural clothing rather than the 'fig-leaf' that its Agents appear to suggest in their arguments at the second hearing.

19. I consider, moreover, that the reasoning of the Commission set out above is contrary not only to the case-law of the Court of Justice on the principle of collegiality but also to the position of the Community judicature on the question of the delegation of authority. With its statements on the distinction between acts with direct legal consequences, in respect of which a strict procedure must be followed, and decisions of a preparatory nature, in respect of which the principle of collegiality is satisfied by the adoption on the part of the collegiate body of a 'basic decision' (*sic*), whilst the drawing up of the text is left to administrative departments, the Commission is attempting in reality to introduce an indirect procedure for delegating authority. I would point out that, according to the case-law of

19 — *PVC*, cited in footnote 2, at paragraph 62, emphasis added.

the Court, [20] collegiality is the rule for Commission action, whilst the delegation of authority to adopt a decision, although possible, is nevertheless exceptional in character. [21] In order not to affect the principle of collegiality, autonomous authority may not be delegated and delegation of authority should be excluded by definition for 'decisions of principle'. At all events, the principle of legal certainty and transparency of administrative acts require decisions delegating authority to be published.

20. The procedure which the Commission puts forward as its settled practice when adopting reasoned opinions offers even fewer safeguards for legal certainty than the exceptional procedure for delegating authority. In particular, if it was possible to delegate the authority to adopt a reasoned opinion, [22] the Commission should, if nothing else, take a collegiate decision to delegate authority, defining the limits and setting guidelines for the action of the body to which authority has been delegated, and this should be published. However, in the context of the Commission's settled practice when adopting a reasoned opinion as described above, its Agents, while defending the principle of collegiality, are essentially undermining it; they are replacing the decision delegating authority which should be adopted by the college with an obscure 'basic decision' (*sic*) which is neither published nor has any substance or content on the basis of which the actions of the administrative departments called upon to put it into effect can be reviewed. From that point of view the practice relied upon by the Commission's Agents, that is, the drawing up of a 'basic decision' (*sic*) by the college of Commissioners, is more unsafe than the procedure whereby authority is delegated.

21. In conclusion, I consider the principle that the Commission should act as a college to be one of the bases of the Community system and indissolubly linked to the *principle that the true intention of the college of Commissioners should be incorporated in a text* containing the basic points of, the statement of reasons for and the operative part of the decision adopted; it should, further, be possible to link that text with the relevant meetings of the collegiate body at which the decision was taken. That rule, which is self-evident in any legal system, is contained in Article 12 of the Commission's Rules of Procedure, as it applied at the time when the decision regarding the reasoned opinion in question was taken. I believe that that particular procedural requirement of the Rules of Procedure should have been complied with by the Commission before the present action was brought and that the Court was right to order the Commission to produce the necessary evidence to show that the relevant provision had been complied with. However, even if it were to be accepted that the authentication procedure, as laid down in the Rules of Procedure, does not concern the adoption of

20 — See in particular Case 5/85 *AKZO Chemie* [1986] ECR 2585.

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

22 — Something which, as I explained in detail in my first Opinion in this case of 5 June 1997, is not, in my opinion, legally possible.

the reasoned opinion, [23] once again the principle of collegiate action and the ancillary principle of incorporation impose corresponding obligations on the Commission. At all events it is essential, when a reasoned opinion is issued, either that the draft of that act has previously been laid before the college of Commissioners for approval or, in any case, once the work of the college is complete, that there is an approved text containing the essential items in the reasoned opinion as adopted, as set out above; moreover that text must be included in the minutes of the meeting in question or be linked to them in a manner that is easily demonstrated.

22. I shall deal in a later section of my Opinion with the practical difficulties for the normal performance of the Commission's work to which that procedure might give rise. [24] Priority must be given, however, to underlining the particular importance of compliance with the above procedural requirements (and, consequently, with the principle of collegiality) especially for the adoption and issue of the reasoned opinion under Article 169 of the Treaty.

B — *The nature of the reasoned opinion*

23. In my Opinion of 5 June 1997 referred to above I had examined the nature of the reasoned opinion under Article 169 of the Treaty from the point of view of whether it constitutes 'an act of management or administration' or 'a decision of principle' in order to ascertain whether it can be issued under a delegation of authority. [25] Despite the fact that the Commission no longer disputes that a reasoned opinion cannot constitute the subject-matter of a delegation of authority, it maintains that the principle of collegiality, in particular for the adoption of a reasoned opinion, does not require compliance with the strict procedural requirements governing the issue of acts having binding legal effects. Consequently it is necessary to return to the question of the legal nature of the reasoned opinion.

24. At first sight the reasoned opinion, as the choice of the specific term by the Community legislature indicates, is hardly an 'act'. Moreover, according to the last paragraph of Article 189 of the EU Treaty, 'Recommendations and opinions shall have no binding force'; consequently if it were accepted that a 'reasoned opinion' under Article 169 is 'an opinion' for the purposes of Article 189, it might be possible to argue that a text that is not binding in nature cannot by definition belong to those of the Commission's powers in respect of which the principle of collegiality should be complied with in its most strict form.

25. It should be noted, however, that the Community judicature does not confine itself

23 — That interpretation may perhaps be defended in the context of the Rules of Procedure applicable now.

24 — See point 37 et seq. below.

25 — See points 17 to 26 of my Opinion of 5 June 1997.

to that literal criterion, nor does it regard it as decisive. Particularly revealing on that point is the case-law which has developed in relation to determining the acts of Community bodies in respect of which an action for annulment lies under Article 173; the Court examines not so much the outward form taken by the act in question, but insists upon assessing its content and legal effects. [26]

26. As regards the latter criterion, it should be stressed, first of all, that, in accordance with the conclusions drawn in the case-law, the reasoned opinion under Article 169 of the Treaty does not constitute an enforceable administrative act and accordingly cannot be challenged by means of the legal remedy provided for under Article 173 of the Treaty. [27] That does not mean, however, that a reasoned opinion is deprived of legal consequences nor that those consequences are without, or of only secondary, significance.

27. The judgment in *Essevi and Salengo* [28] 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 is obligations or impair rights which individuals derive from the Treaty'. [29] At the same time, the reasoned opinion is described as a 'preliminary procedure' the function of which, if the State in question does not comply therewith, is 'to define the subject-matter of the dispute.' [30] In any event, the Court avoided expressly categorising the 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.* [31] In my view the correct approach is not to assimilate a reasoned opinion under Article 169 to the non-binding recommendations and opinions referred to 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. [32]

28. Certainly, at all events, the fact that a reasoned opinion does not constitute an enforceable administrative act does not mean that it automatically constitutes a decision of the second category and that it is accordingly justifiable to relax the strict procedural rules which should characterise Commission action. Contrary to what the latter maintains, the

26 — In accordance with that reasoning, actions against 'internal instructions' or 'communications' have frequently been held admissible; see, for instance, 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 of Advocate General Tesauro in Case C-57/95 *France* v *Commission* [1997] ECR I-1627 (points 8 to 11).

27 — Joined Cases 142/80 and 143/80 *Amministrazione delle Finanze dello Stato* v *Essevi and Salengo* [1981] ECR 1413. For the same reason, moreover, an action against refusal on the part of the Commission to institute the Article 169 procedure against a Member State is inadmissible (Case 48/65 *Lütticke* [1966] ECR 19, and more recently, the unpublished order of 12 November 1996 in Case T-47/96 *SDDDA*): the Commission cannot be required to issue a non-enforceable act.

28 — See *Amministrazione delle Finanze dello Stato* v *Essevi and Salengo* cited in footnote 27.

29 — Ibid., paragraph 18.

30 — Ibid., paragraph 15.

31 — Ibid., p. 1420.

32 — The parties appeared to agree on categorising the reasoned opinion as an act 'sui generis' when they set out their views at the second hearing.

non-existence of direct legal consequences flowing from the reasoned opinion to its addressees does not suffice for the principle of collegiality to be applied in the circumstances in question in a way that is less binding on the Commission, in other words without compliance with the procedural rules which are indissolubly bound up with that general principle.

29. What is decisive is the fact that, in the event that an action under Article 169 of the Treaty is brought before the Court, the reasoned opinion contains, at least on certain issues, the Commission's final assessment, and it produces definitive legal effects in the context of that procedure. More particularly, the 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.

30. In other words, the legal significance of the reasoned opinion does not stem principally from the direct adverse effects it creates for its addressee when notified, [33] 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. [34] 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 characterising the reasoned opinion as an act of a secondary character.

31. 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-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. [35] It is inadmissible for the Commission to raise new complaints or even to widen its arguments by relying on new evidence in the context of the same complaints. [36] 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

33 — 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 (see above, point 33 et seq. of my Opinion). 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 the reasoned opinion.

34 — See point 31 immediately following.

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

36 — See Case 166/82 *Commission* v *Italy*, cited in footnote 35.

application. [37] 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. [38] 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. [39] Moreover, for that reason, the Court applies a more rigorous review to the reasoned opinion than to the letter of formal notice. [40]

32. It follows from the above that 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. A text which constitutes the final legal expression of the political will of the Commission in a procedure which has a primordial place in the institutional mechanism of the Treaty and is directly bound up with the role of the Commission as 'guardian of the Treaties' [41] cannot be reduced to an act of secondary importance. As stated above, [42] the strict procedural requirements to which the fundamental principle that the Commission should act as a college gives rise do not concern solely the drawing up of enforceable administrative acts which that body is competent to issue but all the decisions by which the final political and legal will of that body is expressed.

33. In particular as regards the reasoned opinion, the serious consequences that may ensue for a Member State from completion of the procedure under Article 169 et seq. of the Treaty should be properly evaluated. If the reasoned opinion concerns an infringement by a Member State that has already been established by the Court and that State fails to comply with the Court's judgment delivered in an Article 169 procedure, a further finding by the Court against that State may lead, under Article 171 of the Treaty, [43] to the

37 — 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.

38 — 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.

39 — See Case 74/82 *Commission* v *Ireland* [1984] ECR 317, paragraph 13.

40 — See, for instance, 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.

41 — According to Article 155 of the Treaty, the Commission is to 'ensure that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied ...'.

42 — See point 18 above.

43 — Article 228 of the consolidated version of the Treaty establishing the European Community, which was adopted at the Amsterdam Conference but has not yet been ratified.

imposition of a lump sum or penalty payment. In other words, a Member State to which a reasoned opinion is addressed does not simply risk a vague judgment against it that is devoid of consequences, but may suffer serious repercussions of a financial nature. Furthermore, even if the reasoned opinion does not constitute a legally binding finding of illegality on the part of a Member State, it may prompt individuals who are affected by the allegedly unlawful conduct of the State to institute legal proceedings for compensation for the damage caused by that conduct, in accordance with the recent case-law of the Court. [44]

34. That remark is of particular interest in this case. I would point out that the Commission alleges that Germany has not correctly transposed Council Directives 68/151/EEC and 78/660/EEC concerning the penalties that should be imposed by the Member States if annual accounts of companies with share capital are not disclosed. On that question the Court held in its recent *Daihatsu* judgment [45] that failure to transpose the above provisions correctly did not preclude the Member States from being obliged to make good loss and damage caused to individuals by reason of that failure. [46] Consequently, the issue of a reasoned opinion, inasmuch as it constitutes the solemnly expressed conviction of the Commission, as 'guardian of the Treaties', that a Member State has infringed Community law, is likely to prompt citizens to seek legal redress for that infringement, *even if the reasoned opinion does not lead to a finding against that Member State by the Court in an action under Article 169 of the Treaty.*

35. In brief, the reasoned opinion is of some importance for the legal situation of its addressee, for whom it might have significant repercussions of a financial nature. Thus the reasoned opinion may not have direct negative legal consequences for its addressee, such as, for instance, those of a fine pursuant to Articles 85 and 86, but nevertheless it strikes a blow against the interests of the Member State, with perhaps greater consequences for the addressee than those of the Commission's acts finding a competition infringement or unlawful State aid.

36. To summarise, even it were accepted that the principle of collegiality may be complied with in two ways, one more strict and the other more flexible, as the Commission maintains, the reasoned opinion belongs to the group of Commission decisions to which the Court's findings in the *PVC* case apply fully.

C — The difficulties caused by strict compliance with the principle of collegiality

37. At many points in their pleadings, the Commission's Agents referred to the burden

44 — Community law requires the Member States to make good damage caused to individuals by reason of the non-transposition or incorrect transposition of a directive: Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029, paragraph 51, and Case C-392/93 *British Telecommunications* [1996] ECR I-1631, paragraph 39.

45 — Case C-97/96 *Daihatsu Händler* v *Daihatsu Deutschland* [1997] ECR I-6843.

46 — Paragraph 25 of *Daihatsu*.

of work involved in handling cases of Community infringements by the Member States. They stated that in the last few years approximately 5 000 cases of such infringements have been pending and that, particularly in 1996, they sent more than 1 000 letters of formal notice to the Member States, whilst 93 cases are pending before the Court. At another point they stressed the delays that would follow from application of the *PVC* case-law to the procedure for adopting the reasoned opinion, were the draft text of that decision required to be submitted in the three working languages of the college of Commissioners and subsequently translated into the 11 languages of the Union.

38. I could ignore the question of the burden of work to which the number of infringements gives rise. I would point out that the official number of reasoned opinions issued is not as high as the Commission's Agents would lead us to believe; [47] it suffices to make the obvious point, that is to say, if the hitherto settled practice of the Commission for the adoption of reasoned opinions is unlawful, then the frequency of the unlawfulness and the difficulties to which lawfulness gives rise do not cause it to be lawful. Moreover, the delays that would supposedly be caused by translation of the texts into the different languages are not in fact a real problem.

39. Let me explain: the Commission's Agents attempted to prove to the Court that when the Commissioners take what they call a 'basic decision' (*sic*) on a reasoned opinion, they do so in full knowledge of the facts of the case because they have before them the record of infringement and possibly the complete file in the case. However, according to the Commission's Rules of Procedure, that information should be submitted to the Commissioners in the three working languages of that body, that is to say in French, English and German. Consequently, even if it were accepted that there is no need for the text of the reasoned opinion adopted to exist but that it suffices for the Commissioners to have before them the record of infringement, at all events the latter should be translated into the three working languages of the Commission, which requires additional time and work. What the Commission's Agents did not mention, however, at the second hearing, was that the record of infringement is not submitted in the three languages, but solely in one, either English or French. Even on that argument, therefore, it cannot be accepted that the Commissioners act in full knowledge of the 'basic decision' (*sic*) that they are adopting!

40. In other words, on the basis of the practice described by the Commission's Agents, the preparatory work involved in translating the record of infringement as a prerequisite of proper compliance with the principle of collegiality, cannot be avoided. I do not therefore see why the purportedly settled practice hitherto is more flexible than correct and safe compliance with the procedural formalities.

47 — The Commission adopted and sent 411 reasoned opinions in 1991, 248 in 1992, 352 in 1993, 546 in 1994 and 192 in 1995. Those statistics come from the Commission's departments and are included in the Third Annual Report on monitoring the application of Community law (1995), COM(96) 600 of 29 May 1996.

41. In reality, what is required by the principle that the Commission should act as a college and the ancillary principle of incorporation of the decisions of the Commission in a text, amounts to nothing other than the need for the content of the reasoned opinion, the germ of which is already to be found in the record of infringement, to be transferred to a draft text of the reasoned opinion before the decision is taken by the college of Commissioners. The work which, one way or another, the Commission's competent administrative departments are required to carry out, that is to say, the drawing up of the text of the reasoned opinion, should simply be performed at an earlier point in time than it is at present. I do not therefore believe that work which will have to be done one way or another is capable of short-circuiting the Commission's administrative machinery if scheduled at an earlier point in time for the sake of legality. As regards translations, I would merely point out that instead of relating to the record of infringement in the working languages of the Commission (which sooner or later would be necessary) they will relate, as is preferable for reasons of legal certainty, to the text of the draft reasoned opinion in those same languages and in addition, which ought not in any case to be disputed, in the language of the Member State to which the reasoned opinion refers.

42. In brief, the principle that the Commission should act as a college, properly applied, requires nothing other than the prior preparation of the draft reasoned opinion with the basic points of the statement of reasons and operative part, before the meeting of the Commissioners who will take a decision on it takes place, and at the end of that meeting the text in question will be approved and can be recorded in the minutes of the meeting. That text, which will exist in three or four languages, might, of course, have to be reformulated and finalised by the competent administrative departments of the Commission, under the supervision of the competent Commissioner, provided that the essential sense of its content is not affected. [48]

D — *The claim that the consequences of this decision should be limited in time*

43. The Commission asks the Court, in conclusion, should the latter not accept the argument it proposes and dismiss the action as inadmissible on account of breach of an essential procedural requirement in the adoption of the reasoned opinion, to restrict the results of its decision so that they will apply only *ex nunc* and only to pending cases in which, at the pre-litigation stage, the lawfulness of the reasoned opinion was disputed on the same grounds. [49]

48 — On that point I would not object to the Court's allowing the Commission's administrative departments which deal with finalising the text of the reasoned opinion more flexibility than they have in cases of individual administrative acts having direct legal effects. In respect of the latter, the Court accepts that only amendments to the grammar or spelling may be made (see Case 131/86 *United Kingdom* v *Council* [1988] ECR 905 (the '*Laying Hens*' case). At all events, however, the closer the text of the reasoned opinion sent to the Member State to that adopted by the Commission as a college, the fewer possible doubts there will be.

49 — On that point the Commission's Agents remind me of the king in the Hans Christian Andersen story who, when he appeared in front of his subjects with no clothes on, was deceived by cunning courtiers who convinced him that he was dressed in the most beautiful outfit. Thus the Commission's Agents, like another naked king, ask the Court, if it finds that a procedural irregularity has been committed, to react in the least formal way.

44. I understand the Commission's unease, but do not consider that the risk it identifies is a real one or, at all events, that it should be dealt with by restricting the effects of the present decision in time. As Germany's Agent correctly observed at the second hearing, it is not procedurally possible to overturn the effects of judgments that the Court has already delivered in actions which are supported by a reasoned opinion adopted in breach of the proper procedure. The same should be accepted as regards actions before the Court in which the oral procedure has been completed. On a correct reading, in my view, of the Rules of Procedure, in such cases it is not permissible to reopen the oral procedure and no application for revision is allowed. I would refer on that point to the extensive analysis contained in my Opinion in the '*Polypropylene*' cases. [50]

45. Consequently I do not consider it necessary to restrict *ex nunc* the effects of the present judgment, although I do not think it would be wrong to do so.

IV — Conclusion

46. In view of all the foregoing I propose that the Court should:

(1) dismiss the present action as inadmissible, and

(2) order the Commission to pay all the costs.

50 — See my Opinion of 15 July 1997, in particular in Case C-199/92 P *Hüls* v *Commission* (not yet published in the ECR), point 70 et seq.