JUDGMENT OF THE COURT
29 September 1998 *

In Case C-191/95,

Commission of the European Communities, represented by Jürgen Grunwald, Legal Adviser, acting as Agent, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Federal Republic of Germany, represented by Ernst Röder, Ministerialrat in the Federal Ministry of the Economy, and Alfred Dittrich, Regierungsdirektor in the Federal Ministry of Justice, acting as Agents, assisted by Hans-Jürgen Rabe, Rechtsanwalt, Hamburg and Brussels, D-53107 Bonn,

defendant,

APPLICATION for a declaration that, by failing to provide for appropriate penalties in cases where companies limited by shares fail to disclose their annual accounts, as prescribed in particular by the 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), and the 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

* Language of the case: German.

companies (OJ 1978 L 222, p. 11), the Federal Republic of Germany has failed to fulfil its obligations under the EC Treaty and those directives,

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, C. Gulmann, H. Ragnemalm (Rapporteur), M. Wathelet and R. Schintgen (Presidents of Chambers), G. F. Mancini, J. C. Moitinho de Almeida, P. J. G. Kapteyn, J. L. Murray, D. A. O. Edward, J.-P. Puissochet, G. Hirsch, P. Jann, L. Sevón and K. M. Ioannou, Judges,

Advocate General: G. Cosmas,

Registrar: H. A. Rühl, and subsequently D. Louterman-Hubeau, Principal Administrators,

having regard to the Report for the Hearing,

the Sixth Chamber of the Court having heard oral argument from the parties at the hearing on 12 December 1996,

the Sixth Chamber of the Court having heard the Opinion of the Advocate General at the sitting on 5 June 1997,

having regard to the decision of the Sixth Chamber of 18 September 1997 referring the case to the full Court,

having regard to the order reopening oral argument on 14 October 1997,

having regard to the Report for the Hearing,

after hearing oral argument from the Commission, represented by Christiaan Timmermans, Deputy Director-General of the Legal Service, acting as Agent, and Jürgen Grunwald, and from the German Government, represented by Hans-Jürgen Rabe, at the hearing on 9 December 1997,

after hearing the Opinion of the Advocate General at the sitting on 17 February 1998,

gives the following

Judgment

By application lodged at the Registry of the Court on 16 June 1995, the Commission of the European Communities commenced proceedings under Article 169 of the EC Treaty for a declaration that, by failing to provide for appropriate penalties in cases where companies limited by shares fail to disclose their annual accounts, as prescribed in particular by the 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, hereinafter 'the First Directive'), and the 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, hereinafter 'the Fourth Directive'), the Federal Republic of Germany has failed to fulfil its obligations under the EC Treaty and those directives.

The rules in question

The First Directive

2 In terms of Article 1, the First Directive is to apply, in Germany, to the Aktiengesellschaft (public limited company), the Kommanditgesellschaft auf Aktien (partnership limited by shares), and the Gesellschaft mit beschränkter Haftung (limited liability company).

3 Article 2 of the First Directive provides that the Member States are to take the measures required to ensure compulsory disclosure by companies of at least the documents and particulars that it lists. Under Article 2(1)(f) the disclosure requirement is to apply in particular to 'the balance sheet and the profit and loss account for each financial year'.

4 However, the third sentence of Article 2(1)(f) provides, *inter alia* in respect of the Gesellschaft mit beschränkter Haftung, that the abovementioned obligation to make disclosure is to 'be postponed until the date of implementation of a Directive concerning coordination of the contents of balance sheets and of profit and loss accounts and concerning exemption of such of those companies whose balance sheet total is less than specified in the Directive'. According to the last sentence of Article 2(1)(f), the Council is to adopt such a directive within two years following the adoption of the First Directive.

5 Under Article 3(2) and (4) of the First Directive, all documents and particulars which must be disclosed are to be entered in the register opened in each Member State and their disclosure is to be effected by publication in the national gazette

appointed for that purpose by the Member State, either of the full or partial text, or by means of a reference to the document which has been deposited in the file or entered in the register.

6 Article 6 of the First Directive provides *inter alia*:

'Member States shall provide for appropriate penalties in case of:

— failure to disclose the balance sheet and profit and loss account as required by Article 2(1)(f);

— ...'

7 Under the first paragraph of Article 13 of the First Directive, the Member States were to transpose the directive into national law within 18 months following its notification, which took place on 11 March 1968.

The Fourth Directive

8 The Fourth Directive lays down, for the forms of company which it lists, provisions concerning annual accounts. Article 2 provides: 'The annual accounts shall comprise the balance sheet, the profit and loss account and the notes on the accounts. These documents shall constitute a composite whole.'

9 With regard to disclosure of annual accounts, Article 47(1) of the Fourth Directive provides:

'The annual accounts, duly approved, and the annual report, together with the opinion submitted by the person responsible for auditing the accounts, shall be published as laid down by the laws of each Member State in accordance with Article 3 of Directive 68/151/EEC.

The laws of a Member State may, however, permit the annual report not to be published as stipulated above. In that case, it shall be made available to the public at the company's registered office in the Member State concerned. It must be possible to obtain a copy of all or part of any such report free of charge upon request.'

10 According to Article 55(1), the Fourth Directive was to be transposed into national law within two years of its notification, which took place on 31 July 1978.

The national legislation

11 In Germany the Gesetz über die Rechnungslegung von bestimmten Unternehmen und Konzernen of 15 August 1969 (Law on the Accounts to be disclosed by certain Undertakings and Groups, BGBl. I, 1969, p. 1189, hereinafter 'the Publizitätsgesetz' (Disclosure Law)) entered into force on 21 August 1969.

12 Paragraphs 9 and 10 of the Publizitätsgesetz contained specific provisions on the requirement to file annual accounts and the annual report in the commercial register and to publish annual accounts in the *Bundesanzeiger* (Official Gazette of the Federal Republic).

13 The Publizitätsgesetz was recast in particular by the Bilanzrichtlinien-Gesetz of 19 December 1985 (Accounting and Reporting Law, BGBl. I, 1985, p. 2355), which transposed the Fourth Directive together with the 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) and the Eighth Council Directive 84/253/EEC of 10 April 1984 based on Article 54(3)(g) of the Treaty on the approval of persons responsible for carrying out the statutory audits of accounting documents (OJ 1984 L 126, p. 20). The version currently in force provides, in Paragraph 9, that undertakings covered by the Law are to ensure that their annual accounts and annual report are disclosed, in particular by filing them in the commercial register. Compliance with that obligation may be enforced, under Paragraph 21, first sentence, point 8, of the Bilanzrichtlinien-Gesetz, by means of a periodic penalty payment.

14 The Bilanzrichtlinien-Gesetz also introduced into the Handelsgesetzbuch (German Commercial Code, hereinafter 'the HGB') Book III (Paragraphs 238 to 339) concerning accounting records.

15 Paragraph 325 of the HGB contains provisions relating to disclosure, in particular those concerning the requirement that the legal representatives of companies limited by shares present their annual accounts to the commercial register and inform the public thereof by an announcement in the *Bundesanzeiger*.

16 Paragraph 335 of the HGB provides for periodic penalty payments to be set where the members of the body authorised to represent a company limited by shares do not comply with the requirement to disclose its accounts laid down in Paragraph 325 of the HGB. However, under Paragraph 335, first sentence, point 6, of the HGB, in conjunction with the second sentence of that paragraph, the periodic

penalty payment procedure may not be initiated except at the request of a member, a creditor, the central works council or the company's works council.

17 The Bilanzrichtlinien-Gesetz was notified to the Commission early in January 1986. That notification was made subsequent to an application by the Commission, in Case 18/85, for a declaration that the Federal Republic of Germany had delayed in transposing the Fourth Directive. The Commission withdrew its application and the proceedings were terminated by an order of 11 February 1987 (OJ 1987 C 80, p. 6) removing the case from the register.

Pre-litigation procedure and forms of order sought by the parties

18 By letter of formal notice of 26 June 1990 the Commission informed the German Government that, according to the publications available to it, 93% of German companies limited by shares had not complied with the obligation to disclose their annual accounts, which constituted a breach of the combined provisions of Article 3 of the First Directive and Article 47 of the Fourth Directive. The Commission pointed out that under Article 6 of the First Directive Member States are required to provide for appropriate penalties in case of breach of the disclosure requirement laid down in the directive. It called upon the Federal Government, pursuant to Article 169 of the Treaty, to submit its observations within a period of two months.

19 In a communication of 30 July 1990, the German Government denied that there had been a breach of the combined provisions of Article 3 of the First Directive and Article 47 of the Fourth Directive. Relying on its own statistics and referring to the provisions of German law in force, the Federal Government disputed the figures put forward by the Commission and concluded that there was no need to introduce additional penalties for cases where companies limited by shares had not complied with their obligations of disclosure.

20 In those circumstances, on 2 June 1992 the Commission sent a reasoned opinion to the Federal Republic of Germany, complaining that it had failed to fulfil its obligations under the First and Fourth Directives by not making provision for appropriate penalties in cases where companies limited by shares failed to disclose their annual accounts as prescribed in particular by those directives. The Commission called upon the Federal Republic of Germany to adopt the necessary measures within a period of two months in order to comply with the reasoned opinion. At the request of the German Government that period was extended until 30 September 1992.

21 On 25 August 1993 the German Government declared itself ready to reinforce the penalties in cases where documents concerning annual accounts had not been disclosed, provided that the Commission indicated that it agreed to the legislative amendments envisaged and refrained from commencing proceedings before the Court. It therefore submitted to the Commission a draft concerning the introduction of reinforced penalties to enter into force, for all companies limited by shares, with progressive effect from 1 January 1995 to 1 January 1999. In that connection, the German Government pointed out that if such provisions were introduced with immediate effect, the *Länder*, which had competence in such matters, would be unable to ensure immediate compliance, in view of the large number of proceedings that would have to be brought and the sizeable number of civil servants in the former *Länder* who had been assigned to the reconstruction of the new *Länder* following German reunification.

22 On 3 March 1994, the Commissioner responsible replied that the penalties envisaged must be applicable immediately and without distinction to all companies of the types concerned which were not complying with their obligation of disclosure. He nevertheless stated that he was prepared to propose that the Commission suspend the procedure if the Federal Government presented, during the current legislative session, a draft Law amended to that effect.

23 By letter of 19 May 1994 the German Government informed the Commission that it was not able, under those conditions, to withdraw from its position of principle,

to the effect that Article 54(3)(c) of the EC Treaty did not require any reinforcement of the existing penalties under German law.

24 Subsequent discussions failed to produce a solution and the Commission decided to bring the present action, in which it asks the Court to declare that the Federal Republic of Germany has failed to fulfil its obligations and to order it to pay the costs.

25 The German Government asks the Court to dismiss the action, principally, as inadmissible, or, in the alternative, as unfounded, and to order the Commission to pay the costs.

Admissibility

26 The German Government has put forward three pleas of inadmissibility alleging, first, breach of the principle of collegiality as regards the issuance of the reasoned opinion and the commencement of proceedings, second, a change in the subject-matter of the dispute and, lastly, erroneous assessment as regards the alleged failure to fulfil obligations.

Breach of the principle of collegiality as regards the issuance of the reasoned opinion and the commencement of proceedings

27 The German Government maintains that the reasoned opinion was issued and proceedings before the Court commenced under the delegation procedure. In its view,

although recourse to that procedure is compatible with the principle of collegiality for the purpose of adopting measures of management or administration, it is excluded for decisions of principle such as the adoption of a reasoned opinion and the commencement of proceedings before the Court. Article 169 of the Treaty requires the reasoned opinion and the bringing of proceedings before the Court to be the subject of a decision by the Commission acting as a college.

28 The Commission replies that the decisions to send the letter of formal notice, to notify the reasoned opinion and to commence proceedings before the Court were taken at meetings of the Commission acting as a college.

29 By order of 23 October 1996, the Court (Sixth Chamber) ordered the Commission to produce the decisions, authenticated in accordance with its Rules of Procedure, which it had adopted, as a college, to issue the reasoned opinion sent on 2 June 1992 to the Federal Republic of Germany and to bring the present action for failure to fulfil obligations.

30 The Commission responded by producing to the Court minutes of a number of meetings and a number of documents to which those minutes refer.

31 At the hearing on 9 December 1997, the German Government claimed that, in the light of the documents produced, the Commission had not established that the members of the college, when they decided to issue the reasoned opinion and commence proceedings before the Court, had sufficient information available to them as regards the content of those measures. The college of Commissioners ought to have had available all the relevant information of fact and law to enable it to ensure that its decisions were devoid of ambiguity and to guarantee that the measures notified had actually been adopted by the college and corresponded to its intention, since it is the college which takes political responsibility for them.

32 The Commission states that for reasons of efficiency, given the number of proceedings for failure to fulfil obligations, Commissioners do not have available draft reasoned opinions when they adopt the decision to issue such measures; this is not necessary in view of the fact that reasoned opinions do not have immediate binding legal effect. However, the crucial information is available to the members of the college, in particular the facts complained of and the provisions of Community law which, in the view of the Commission's services, have been breached. Thus the college reached its decision on the proposals of its services to issue the reasoned opinion and to commence proceedings before the Court in full knowledge of the facts. Drafting of reasoned opinions takes place at administrative level, under the responsibility of the member of the Commission with competence in the matter, following the adoption of the decision by the college to take such a step.

33 It is important to remember, at the outset, that the functioning of the Commission is governed by the principle of collegiate responsibility (Case C-137/92 P *Commission* v *BASF and Others* [1994] ECR I-2555, paragraph 62).

34 It is common ground that the decisions to issue the reasoned opinion and to commence proceedings are subject to that principle of collegiate responsibility.

35 Recourse to Article 169 provides one of the means by which the Commission ensures that the Member States give effect to the provisions of the Treaty and those adopted under the Treaty by the institutions (Case C-422/92 *Commission* v *Germany* [1995] ECR I-1097, paragraph 16). The decisions to issue a reasoned opinion and to commence proceedings before the Court thus come within the general scope of the supervisory task entrusted to the Commission under the first indent of Article 155 of the EC Treaty.

36 In issuing a reasoned opinion, the Commission formally sets out its position with regard to the legal position of the Member State concerned. Moreover, by formally stating the infringement of the Treaty with which the Member State concerned is charged, the reasoned opinion concludes the pre-litigation procedure provided for

in Article 169 (Case 74/82 *Commission* v *Ireland* [1984] ECR 317, paragraph 13). The decision to issue a reasoned opinion cannot therefore be described as a measure of administration or management and may not be delegated.

37 The same is true of the decision to apply to the Court for a declaration of failure to fulfil obligations. In its role as guardian of the Treaty, the Commission is competent to decide whether it is appropriate to bring proceedings against a Member State for failure to fulfil its obligations (see, to that effect, Case C-431/92 *Commission* v *Germany* [1995] ECR I-2189, paragraph 22). Such a decision falls within the discretionary power of the institution (see, in particular, Case C-200/88 *Commission* v *Greece* [1990] ECR I-4299, paragraph 9) and cannot be described as a measure of administration or management.

38 Thus the first plea of inadmissibility, as refined during the current proceedings, concerns the consequences of compliance with the principle of collegiality as regards the conditions in which the college could, first, consider that the Federal Republic of Germany had failed to fulfil one of its obligations under the Treaty and issue a reasoned opinion on that matter and, second, when it considered that that State had not complied with that opinion within the period prescribed, decide to bring the present action.

39 According to settled case-law, the principle of collegiality is based on the equal participation of the Commissioners in the adoption of decisions, from which it follows 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 (Case 5/85 *AKZO Chemie* v *Commission* [1986] ECR 2585, paragraph 30; Joined Cases 46/87 and 227/88 *Hoechst* v *Commission* [1986] ECR 2859, and Case 137/92 P *Commission* v *BASF and Others*, cited above, paragraph 63).

40 The Court has also held that compliance with that principle is of concern to individuals affected by the legal consequences of a Commission decision (see, to that effect, *Commission* v *BASF and Others*, cited above, paragraph 64).

41 Nevertheless, the formal requirements for effective compliance with the principle of collegiality vary according to the nature and legal effects of the acts adopted by that institution.

42 Thus the Court has held that, with regard to decisions adopted for the purpose of ensuring observance of the competition rules, in which the Commission finds that there has been an infringement of those rules, issues directions to undertakings and imposes pecuniary penalties upon them, that the undertakings or associations of undertakings addressed by such decisions must be assured that the operative part and the statement of reasons were actually adopted by the college of Commissioners (see, to that effect, *Commission* v *BASF and Others*, cited above, paragraphs 65 to 67).

43 In this case the detailed procedure governing the collective deliberation by the college of Commissioners concerning the issue of the reasoned opinion and the bringing of an action for failure to fulfil obligations must therefore be determined in the light of the legal effects of those decisions with regard to the State concerned.

44 The issue of a reasoned opinion constitutes a preliminary procedure (Joined Cases 142/80 and 143/80 *Essevi and Salengo* [1981] ECR 1413, paragraph 15), which does not have any binding legal effect for the addressee of the reasoned opinion. It is merely a pre-litigation stage of a procedure which may lead to an action before the Court (Joined Cases 6/69 and 11/69 *Commission* v *France* [1969] ECR 523, paragraph 36). The purpose of that pre-litigation procedure provided for by Article 169 of the Treaty is to enable the Member State to comply of its own accord with the requirements of the Treaty or, if appropriate, to justify its position (Case C-157/94 *Commission* v *Netherlands* [1997] ECR I-5699, paragraph 60; Case C-158/94 *Commission* v *Italy* [1997] ECR I-5789, paragraph 56; and Case C-159/94 *Commission* v *France* [1997] ECR I-5815, paragraph 103).

45 If that attempt at settlement is unsuccessful, the function of the reasoned opinion is to define the subject-matter of the dispute. The Commission is not, however, empowered to determine conclusively, by reasoned opinions formulated pursuant

to Article 169, the rights and duties of a Member State or to afford that State guarantees concerning the compatibility of a given line of conduct with the Treaty. According to the system embodied in Articles 169 to 171 of the Treaty, the rights and duties of Member States may be determined and their conduct appraised only by a judgment of the Court (see, to that effect, *Essevi and Salengo*, cited above, paragraphs 15 and 16).

46 The reasoned opinion therefore has legal effect only in relation to the commencement of proceedings before the Court (see *Essevi and Salengo*, cited above, paragraph 18) so that where a Member State does not comply with that opinion within the period allowed, the Commission has the right, but not the duty, to commence proceedings before the Court (see, to that effect, Case 247/87 *Star Fruit* v *Commission* [1989] ECR 291, paragraph 12).

47 The decision to commence proceedings before the Court, whilst it constitutes an indispensable step for the purpose of enabling the Court to give judgment on the alleged failure to fulfil obligations by way of a binding decision, nevertheless does not *per se* alter the legal position in question.

48 It follows from all the foregoing considerations that both the Commission's decision to issue a reasoned opinion and its decision to bring an action for a declaration of failure to fulfil obligations must be the subject of collective deliberation by the college of Commissioners. The information on which those decisions are based must therefore be available to the members of the college. It is not, however, necessary for the college itself formally to decide on the wording of the acts which give effect to those decisions and put them in final form.

49 In this case it is not disputed that the members of the college had available to them all the information they considered would assist them for the purposes of adopting the decision when the college decided, on 31 July 1991, to issue the reasoned opinion, and approved, on 13 December 1994, the proposal to bring the present action.

50 In those circumstances, it must be held that the Commission complied with the rules relating to the principle of collegiality when it issued the reasoned opinion with regard to the Federal Republic of Germany and brought the present action.

51 Consequently the plea of inadmissibility alleging breach of the principle of collegiate responsibility must be dismissed as unfounded.

Change in the subject-matter of the dispute

52 The German Government maintains that the action is inadmissible because the contents of the application differ from those of the letter of formal notice. The Commission stated in its letter of formal notice that the Federal Republic of Germany had failed to fulfil its obligations under the combined provisions of Article 47 of the Fourth Directive and Article 3 of the First Directive, whereas in the reasoned opinion and the application it alleged that there was a breach of Articles 2(1)(f), 3 and 6 of the First Directive. Consequently the subject-matter of the dispute was modified in the course of the pre-litigation procedure.

53 The Commission replies that the wording of both the letter of formal notice and the communication from the German Government of 30 July 1990 shows that the Commission's concerns were clearly expressed and properly understood.

54 The preliminary point must be made that, although the reasoned opinion provided for in Article 169 of the 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 letter of formal notice cannot be subject to such strict requirements of precision, since it cannot, of neces-

sity, contain anything more than an initial brief summary of the complaints. There is therefore nothing to prevent the Commission from setting out in detail in the reasoned opinion the complaints which it has already made more generally in the letter of formal notice (Case C-279/94 *Commission* v *Italy* [1997] ECR I-4743, paragraph 15).

55 It is true that the letter of formal notice from the Commission to the Member State and then the reasoned opinion issued by the Commission delimit the subject-matter of the dispute, so that it cannot thereafter be extended. The opportunity for the State concerned to be able to submit its observations, even if it chooses not to avail itself thereof, constitutes an essential guarantee intended by the Treaty, adherence to which is an essential formal requirement of the procedure under Article 169 (Case 124/81 *Commission* v *United Kingdom* [1983] ECR 203, paragraph 6). Consequently, the reasoned opinion and the proceedings brought by the Commission must be based on the same complaints as those set out in the letter of formal notice initiating the pre-litigation procedure.

56 However, that requirement cannot be carried so far as to mean that in every case the statement of complaints in the letter of formal notice, the operative part of the reasoned opinion and the form of order sought in the application must be exactly the same, provided that the subject-matter of the proceedings has not been extended or altered but simply limited (see, to that effect, Case C-279/94 *Commission* v *Italy*, cited above, paragraph 25).

57 In this case, it is clear from the file that in its letter of formal notice the Commission sufficiently identified the alleged failure of the Federal Republic of Germany to fulfil its obligations, in stating that the combined provisions of Article 3 of the First Directive and Article 47 of the Fourth Directive had been infringed since a large proportion of companies limited by shares were failing to comply with the disclosure requirements, and in reminding it of the obligation incumbent on the Member States, pursuant to Article 6 of the First Directive, to provide for appropriate penalties where the disclosure requirement was breached. That letter therefore informed the German Government of the nature of the complaints against it and gave it the opportunity to put forward a defence.

58 Accordingly, the fact that the Commission did not persist in the complaints based on the fact that a large proportion of companies limited by shares were failing to comply with the disclosure requirements, whilst it detailed the complaints based on the need to provide appropriate sanctions, which it had already set out more generally in the letter of formal notice, merely limited the subject-matter of the action.

59 It follows that the second plea of inadmissibility must also be dismissed as unfounded.

Erroneous statement of reasons as regards the alleged failure

60 In the submission of the German Government, the Commission was not entitled to question the conformity with Community law of the German provisions concerning the requirement to disclose annual accounts by basing itself on unverified figures relating to the level of compliance with that requirement on the part of undertakings. It should have conducted its own investigation to ensure that the figures which it was using to support its allegation of such a failure were accurate. The Commission cannot therefore be considered to have given a coherent and detailed statement of the reasons which led it to conclude that the Federal Republic of Germany should be charged with having failed to fulfil its obligations under Community law.

61 The Commission replies that it remains convinced that there was such a failure and points out that the Federal Republic of Germany admitted as much itself in its communication of 25 August 1993.

62 In that connection it need merely be pointed out that, at the stage of the proceedings before the Court, the Commission did not persist in its complaint to the effect that a large proportion of companies limited by shares were failing to comply with

the disclosure requirements. The third plea of inadmissibility therefore refers to an alleged failure at the pre-litigation stage which does not form part of the subject-matter of this action, and must thus be dismissed.

63 It follows that the action must be held admissible in its entirety.

Substance

64 The Commission claims that an examination of the provisions existing in German law shows clearly that although disclosure of the annual accounts of companies limited by shares is governed by Paragraph 325 et seq. of the HGB, the German legislature has not created any effective legal means of imposing the disclosure requirement. Paragraph 335, first sentence, point 6, of the HGB provides for the imposition of periodic penalty payments where the members of the body authorised to represent a company limited by shares do not comply with the disclosure requirement, but the court responsible for the register cannot impose such penalties of its own motion.

65 The German Government maintains that the obligation to introduce appropriate penalties for failure to disclose the balance sheet and profit and loss account as required by Article 6 of the First Directive is not yet applicable to German limited liability companies. In the alternative, it submits that Article 6 of the First Directive was correctly transposed. Pursuant to Article 54(3)(g) of the Treaty, the coordination of national company legislation is aimed at protecting the interests of members and others. The latter do not comprise all natural and legal persons but only those who have a legal connection with the company. Lastly, because of the very large number of small and medium-sized limited liability companies, it would be disproportionate to the purpose of the system defined in Article 54(3)(g) of the Treaty to take legal action against them.

66 In that connection, it is sufficient to note that the Court held in Case C-97/96 *Daihatsu Deutschland* [1997] ECR I-6843, at paragraphs 14 and 15, that the legislative lacuna left by the First Directive was filled by the Fourth Directive. The Fourth Directive coordinated the national provisions concerning the presentation and content of annual accounts and reports, the valuation methods used therein and their publication in respect of companies limited by shares, including *inter alia* German limited liability companies.

67 In *Daihatsu Deutschland*, cited above, the Court ruled that Article 6 of the First Directive was to be interpreted as precluding the legislation of a Member State from restricting to members or creditors of the company, the central works council or the company's works council the right to apply for imposition of the penalty provided for by the law of that Member State in the event of failure by a company to fulfil the obligations regarding disclosure of annual accounts laid down by the First Directive.

68 Lastly, it must be pointed out that the lack of appropriate penalties cannot be justified by the fact that, because of the large numbers involved, application of such penalties to all companies that do not publish their accounts would create considerable difficulties for the German administrative authorities which would be disproportionate to the aim pursued by the Community legislature. The Court has consistently held that a Member State may not plead internal circumstances in order to justify a failure to comply with obligations and time-limits resulting from rules of Community law (see, in particular, Case C-374/89 *Commission* v *Belgium* [1991] ECR I-367, paragraph 10; Case C-45/91 *Commission* v *Greece* [1992] ECR I-2509, paragraph 21; and Joined Cases C-109/94, C-207/94 and C-225/94 *Commission* v *Greece* [1995] ECR I-1791, paragraph 11).

69 Consequently, it must be held that, by failing to provide for appropriate penalties in cases where companies limited by shares fail to effect compulsory disclosure of their annual accounts as prescribed, in particular, by Articles 2(1)(f), 3 and 6 of the First Directive, in conjunction with Article 47(1) of the Fourth Directive, the Federal Republic of Germany has failed to fulfil its obligations under those directives.

Costs

70 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission applied for an order that the Federal Republic of Germany pay the costs and the latter has been unsuccessful in its defence, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. Dismisses the pleas of inadmissibility;

2. Declares that, by failing to provide for appropriate penalties in cases where companies limited by shares fail to effect compulsory disclosure of their annual accounts as prescribed, in particular, by Articles 2(1)(f), 3 and 6 of the 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, in conjunction with Article 47(1) of the 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, the Federal Republic of Germany has failed to fulfil its obligations under those directives;

3. Orders the Federal Republic of Germany to pay the costs.

Rodríguez Iglesias Gulmann Ragnemalm

Wathelet Schintgen

Mancini Moitinho de Almeida Kapteyn

Murray Edward

Puissochet Hirsch Jann

Sevón Ioannou

Delivered in open court in Luxembourg on 29 September 1998.

R. Grass

Registrar

G. C. Rodríguez Iglesias

President