Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

26 September 2013*

(Company law — Freedom of establishment — Eleventh Directive 89/666/EEC — Disclosure of accounting documents — Branch of a capital company established in another Member State — Pecuniary penalty in the event of failure to disclose within the prescribed period — Right to effective judicial protection — Principle of respect for the rights of the defence — Effective, proportionate and dissuasive nature of the penalty)

In Case C-418/11,

REQUEST for a preliminary ruling under Article 267 TFEU from the Oberlandesgericht Innsbruck (Austria), made by decision of 29 July 2011, received at the Court on 10 August 2011, in the proceedings

Texdata Software GmbH,

THE COURT (Fourth Chamber),

composed of L. Bay Larsen, President of the Chamber, J. Malenovský, U. Lõhmus (Rapporteur), M. Safjan and A. Prechal, Judges,

Advocate General: P. Mengozzi,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 27 November 2012,

after considering the observations submitted on behalf of:

— Texdata Software GmbH, by N. Arnold and T. Raubal, Rechtsanwälte,

— the Austrian Government, by C. Pesendorfer and F. Koppensteiner, acting as Agents,

— the United Kingdom Government, by S. Ossowski, acting as Agent,

— the European Commission, by G. Braun and K.-P. Wojcik, acting as Agents,

after hearing the opinion of the Advocate General at the sitting on 31 January 2013,

gives the following

* Language of the case: German.

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 6(1) and (3) TEU, Articles 49 TFEU and 54 TFEU, Articles 47 and 50 of the Charter of Fundamental Rights of the European Union ('the Charter'), Article 6(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR'), Article 6 of 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 (OJ, English Special Edition 1968 (I), p. 41; 'the First Directive'), Article 60a of Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies (OJ 1978 L 222, p. 11), as amended by Directive 2009/49/EC of the European Parliament and of the Council of 18 June 2009 (OJ 2009 L 164, p. 42; 'the Fourth Directive'), and Article 38(6) of 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; 'the Seventh Directive').

2 The request has been made in proceedings initiated by Texdata Software GmbH ('Texdata'), contesting the periodic penalties imposed on it by the Landesgericht Innsbruck (Regional Court, Innsbruck) for its breach of the obligation to submit its annual accounts to that court, which is responsible for maintaining the commercial register.

Legal context

International law

3 Paragraphs 1 and 2 of Article 6 of the ECHR, which is entitled 'Right to a fair trial', state:

'1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.'

European Union law

The First Directive and Directive 2009/101/EC

4 The First Directive was repealed, with effect from 21 October 2009, by Directive 2009/101/EC of the European Parliament and of the Council of 16 September 2009 on coordination of safeguards which, for the protection of the interests of members and third parties, are required by Member States of companies within the meaning of the second paragraph of Article 48 of the Treaty (OJ 2009 L 258, p. 11).

5 Article 2(f) of Directive 2009/101 provides that Member States are to take the measures required to ensure compulsory disclosure by companies as referred to in Article 1 of that directive of at least the accounting documents for each financial year, which are required to be published in accordance with, inter alia, the Fourth and Seventh Directives.

6 Under Article 7(a) of Directive 2009/101, the wording of which is identical to that of Article 6(a) of the First Directive, Member States are to provide for appropriate penalties at least in the case of failure to disclose accounting documents as required by Article 2(f) of Directive 2009/101.

The Fourth Directive

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

8 Article 60a of the Fourth Directive provides:

'Member States shall lay down the rules on penalties applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all the measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive.'

Eleventh Directive 89/666/EEC

9 Eleventh Council Directive 89/666/EEC of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State (OJ 1989 L 395, p. 36; 'the Eleventh Directive') relates to branches of companies with share capital. According to the first, fourth and ninth recitals in the preamble to that directive:

'… in order to facilitate the exercise of the freedom of establishment in respect of companies covered by Article 58 of the Treaty, Article 54(3)(g) and the general programme on the elimination of restrictions on the freedom of establishment require coordination of the safeguards required of companies and firms in the Member States for the protection of the interests of members and others;

...

… in respect of branches the lack of coordination, in particular concerning disclosure, gives rise to some disparities, in the protection of shareholders and third parties, between companies which operate in other Member States by opening branches and those which operate there by creating subsidiaries;

...

... national provisions in respect of the disclosure of accounting documents relating to a branch can no longer be justified following the coordination of national law in respect of the drawing up, audit and disclosure of companies' accounting documents; ... it is accordingly sufficient to disclose, in the register of the branch, the accounting documents as audited and disclosed by the company.'

10 Paragraphs 1 and 2 of Article 1 of the Eleventh Directive are worded as follows:

'1. Documents and particulars relating to a branch opened in a Member State by a company which is governed by the law of another Member State and to which Directive 68/151/EEC applies shall be disclosed pursuant to the law of the Member State of the branch, in accordance with Article 3 of that Directive.

2. Where disclosure requirements in respect of the branch differ from those in respect of the company, the branch's disclosure requirements shall take precedence with regard to transactions carried out with the branch.'

11 Under Articles 2(1)(g) of the Eleventh Directive, read in conjunction with Article 3 thereof, the compulsory disclosure provided for in Article 1 covers only the accounting documents as drawn up, audited and disclosed pursuant to the law of the Member State by which the company is governed in accordance with, inter alia, the Fourth and Seventh Directives.

12 Under Article 12 of the Eleventh Directive, 'the Member States shall provide for appropriate penalties in the event of failure to disclose the matters set out in Articles 1, 2, 3 …'

Austrian law

13 Under Paragraph 277(1) of the Unternehmensgesetzbuch (Commercial Code; dRBl 219/1897), in the version applicable to the case before the referring court ('the UGB'), the statutory representatives of companies with share capital must submit to the court maintaining the commercial registry in whose district they are established the annual accounts and the annual report, as well as, where appropriate, the corporate governance report, after these have been considered at the shareholders' general meeting, but no later than nine months after the balance sheet date, together with an auditor's report certifying them or a report rejecting them or certifying them with qualification.

14 Paragraph 280a of the UGB, entitled 'Disclosure by the branches of foreign capital companies', provides that the representatives of branches of foreign companies with share capital are to disclose, in the German language, the accounting documents as drawn up, audited and disclosed pursuant to the law applicable to the company's principal place of business, in accordance with Paragraphs 277, 281 and 282 of the UGB.

15 Paragraph 283 of the UGB, entitled 'Periodic penalties', as amended by the Budgetbegleitgesetz (Law accompanying the budget) 2011 (BGBl. I, 111/2010; 'the BBG'), provides as follows:

'1. Notwithstanding the general rules of commercial law, the members of the management board or liquidators must, within the periods prescribed, comply with Paragraphs … 277 to 280 of the UGB, the members of the supervisory board must comply with Paragraph 270 and, in the case of a national branch of a foreign company with share capital, the persons authorised to represent it must comply with Paragraph 280a of the UGB, failing which the court shall impose on them a periodic penalty of between EUR 700 and EUR 3 600. The periodic penalty shall be imposed once the period for disclosure has expired and must be re-imposed for every two-month period thereafter until the abovementioned bodies have fulfilled their obligations.

2. If the disclosure referred to in Paragraph [283(1)] has not been carried out before the last day of the prescribed period, and the accounting documents have not been received by the court before the day preceding the adoption of the order imposing the periodic penalty, a periodic penalty of EUR 700 must be imposed, by means of an order, without the need for any preliminary procedure. That penalty shall not be imposed where an unforeseeable and unavoidable event clearly prevented the body referred to in Paragraph [283(1)] from making the disclosure in a timely manner. In that case,

and to the extent that the disclosure has still not been carried out, the order shall be suspended for a period of four weeks subsequent to the date on which the obstacle to disclosure ceases to exist. Orders imposing a periodic penalty shall be notified in the same manner as applications. The body concerned shall have 14 days to submit an objection to the order, which, otherwise, shall become final. The objection must state the reasons justifying the failure to fulfil the obligations referred to in Paragraph [283(1)]. *Restitutio in integrum* may be granted in the event of the expiry of the period in which the order may be challenged … If the objection is out of time or states no reasons, it must be rejected by a decision.

3. The submission in due time of a reasoned objection to the order imposing the periodic penalty shall render the order inoperative. The imposition of a periodic penalty shall be determined under an ordinary procedure, by means of a decision. If it is not necessary to close the procedure, a periodic penalty of between EUR 700 and EUR 3 600 may be imposed without prior notice. The body concerned shall have the opportunity to appeal against the imposition of the periodic penalty under the ordinary procedure ...

4. If disclosure has still not been made within two months following the expiry of the last day of the prescribed period, a further periodic penalty of EUR 700 shall be imposed. If the failure to comply with the disclosure requirement persists, the order shall be repeated in respect of each subsequent two-month period; if an objection is raised against that order, the decision imposing the periodic penalty must be published.

…

6. The periodic penalties must also be enforced where the persons on whom they are imposed have fulfilled their obligation or the fulfilment of that obligation has become impossible.

7. The obligations incumbent on the statutory representatives pursuant to Paragraphs … 277 and 280a shall apply also to the company. If a company fails to comply with those obligations through its bodies, the company itself must be concurrently ordered to pay the periodic penalty by analogy with Paragraphs 1 to 6.'

16 It emerges from the file before the Court that, under the transitional provisions of the recast, Paragraph 283 of the UGB, as amended by the BBG, entered into force on 1 January 2011 and was applicable only to infringements occurring after that date. Nevertheless, it follows from the explanations accompanying the government bill proposing the BBG that, where the disclosure obligation has not been fulfilled from 1 January 2011 until 28 February 2011 inclusive, a periodic penalty procedure may be initiated, at the earliest, on 1 March 2011 and only by means of an order.

The dispute in the main proceedings and the question referred for a preliminary ruling

17 Texdata is a limited company, established in Germany, which designs and markets software. It pursues its activities in Austria through a branch which has been registered since 4 March 2008 in the Austrian commercial register as a branch of a company established in another Member State.

18 By two orders of 5 May 2011, the Landesgericht Innsbruck imposed two periodic penalties on Texdata under Paragraph 283(2) of the UGB, as amended by the BBG, in the amount of EUR 700 each, on the ground that Texdata had failed to submit annual accounts for two fiscal years – ending on 31 December 2008 and 31 December 2009 respectively – within the prescribed period, that is to say, pursuant to the transitional measures, either before 28 February 2011 or the day before the delivery of those orders.

19 On 23 May 2011, Texdata lodged, within the prescribed period, two objections against those orders before the same court. In support of those objections, it claimed, first, that in the absence of prior notice, the imposition of a penalty for infringement of the disclosure obligation referred to in Paragraph 283 of the UGB, as amended by the BBG, was unlawful, and, secondly, that the annual accounts had been filed within the prescribed period at the Amtsgericht Karlsruhe (Local Court, Karlsruhe (Germany)), which has territorial jurisdiction in view of the location of Texdata's registered office, and that those accounts had long been accessible there via electronic means.

20 On the same date, Texdata filed the annual accounts at issue before the Landesgericht Innsbruck, which entered them in the commercial registry on 25 and 26 May 2011.

21 By two decisions of 25 May 2011, the Landesgericht Innsbruck rendered inoperative the orders adopted on 5 May 2011 on the ground that the objections had been raised in good time. However, in the light of the fact that the annual accounts at issue had not been filed within the prescribed period, that court again imposed, under the ordinary procedure pursuant to Paragraph 283(3) and (7) of the UGB, as amended by the BBG, two periodic penalties in the same amount.

22 Seised of Texdata's appeal against those decisions, the Oberlandesgericht Innsbruck (Higher Regional Court, Innsbruck), the referring court, is uncertain as to whether the Austrian rules on penalties, as amended in 2011, which provide for a periodic penalty to be imposed immediately on a company which fails to file its annual accounts with the relevant court, are compatible with EU law.

23 The referring court notes that, before the reform of 2011, it had become standard practice for the courts keeping the commercial register in Austria first to send a non-compliant company, after the nine-month period laid down in Paragraphs 277 and 283 of the UGB had expired, an informal notice granting an additional period of four weeks. Upon the expiry of that period, if the failure to comply persisted, further notice would be given to the effect that, if the annual accounts were not forthcoming within a particular period or if it was not demonstrated that the obligation did not apply, a periodic penalty would be imposed. Only if the second notice also proved unfruitful and no obstacle to the disclosure had been invoked would the courts impose periodic penalties.

24 The referring court notes the following elements, which it regards as 'structural shortcomings' inherent in the national procedure: (i) the excessive formal requirements in that objections which are submitted out of time or which fail to state any reasons are simply rejected and new pleas at the appeal stage are not allowed, except where the omission is excusable; (ii) the lack of any guarantee that a hearing will be held; (iii) the breach of the rights of the defence arising from the fact that there is no opportunity to submit observations prior to the imposition of the periodic penalty; (iv) the reliance on a statutory presumption of liability whereby the burden of proof is placed on the company; (v) the unreasonable rules on time-barring and the lack of prior notice, resulting in a lack of legal certainty for companies established in another Member State; and (vi) the fact that, in the event of continued failure to fulfil the disclosure obligation, further periodic penalties may be imposed when the initial decisions imposing a periodic penalty have not yet acquired the force of *res judicata*.

25 In those circumstances, the Oberlandesgericht Innsbruck decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Does [EU] law, as it stands at present, and in particular:

[(a)] freedom of establishment, as laid down in Articles 49 TFEU and 54 TFEU;

[(b)] the general legal principle (Article 6(3) TEU) of effective judicial protection (principle of effectiveness);

[(c)] the principle of the right to a fair hearing laid down in [the second paragraph of] Article 47 of the [Charter] (Article 6(1) TEU) and in Article 6(2) of the [ECHR] (Article 6(1) TEU);

[(d)] the principle of *non bis in idem* laid down in Article 50 of the [Charter]; or

[(e)] the rules governing penalties in the disclosure procedure under Article 6 of [the First Directive], Article 60a of [the Fourth Directive] and Article 38(6) of [the Seventh Directive];

preclude national rules under which, in cases where the statutory nine-month period allowed for compiling and disclosing annual accounts to the relevant court maintaining the commercial register is exceeded, that court is required, first, to impose immediately a minimum periodic penalty of EUR 700 on the company and on each of the bodies authorised to represent it, on the ground that, in the absence of proof to the contrary, they are liable for that failure to effect timely disclosure and, secondly, to impose immediately a new minimum periodic penalty of EUR 700 on the company and on each of the bodies authorised to represent it, in respect of further failure for every two-month period thereafter, on the basis of the same presumption of liability, and in both cases

— without first allowing them an opportunity to state views on the existence of the obligation to disclose or to invoke any obstacles to doing so and, in particular, without prior examination as to whether those annual accounts have in fact already been submitted to the court which maintains the register in the judicial district of which the principal place of business is situated; and

— without first giving the company or the bodies authorised to represent it notice to comply with the disclosure obligation?'

Admissibility of the request for a preliminary ruling

26 In the first place, the Austrian Government objects that the request for a preliminary ruling is inadmissible, on the ground that the way in which the referring court has described the national legislation applicable to the dispute is inaccurate and that, accordingly, it seems unlikely that the Court will be able to give a useful, rather than a purely hypothetical, answer to the question referred.

27 Moreover, according to the Austrian Government, it follows from that request – in particular, from the aspects of the question touching upon the principle of effectiveness – that the Court is being called upon to interpret national law. However, it is exclusively for the national courts to determine whether the relevant national legislation effectively satisfies the requirements as regards equivalence and effectiveness.

28 On that point, it should be noted that, according to settled case-law, the procedure laid down in Article 267 TFEU is based on a clear separation of functions between national courts and tribunals and the Court of Justice, and the latter is empowered only to rule on the interpretation or the validity of the acts of EU law referred to in that provision. In that context, it is not for the Court to rule on the interpretation of provisions of national law or to decide whether the referring court's interpretation of them is correct (see, inter alia, Case C-220/05 *Auroux and Others* [2007] ECR I-385, paragraph 25; Case C-515/08 *dos Santos Palhota and Others* [2010] ECR I-9133, paragraph 18; and Case C-81/09 *Idryma Typou* [2010] ECR I-10161, paragraph 35).

29 It follows that the Court must take account of the factual and legal context of requests for preliminary rulings, as described in the order for reference (Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri* [2004] ECR I-5257, paragraph 42, and Joined Cases C-378/07 to C-380/07 *Angelidaki and Others* [2009] ECR I-3071, paragraph 48). It is therefore necessary to adhere to the interpretation of the Austrian legislation set forth in the request for a preliminary ruling and on which the question referred to the Court is predicated.

30 As regards the argument that the Court is called upon to interpret national law, suffice it to note that it is clear from the very wording of the question referred that the interpretation sought concerns provisions and principles of EU law.

31 In the second place, the United Kingdom Government ('the UK Government'), while not expressly raising a preliminary plea of inadmissibility, submits that certain parts of the question referred are not relevant to the resolution of the dispute in the main proceedings, either because they refer to directives which are not applicable to the facts of the case, or because they concern situations which did not arise in that case.

32 In particular, the UK Government argues, first, that the First and Seventh Directives are not applicable to the facts of the dispute before the referring court, whereas the Eleventh Directive, which that court does not mention, is applicable.

33 Secondly, according to the UK Government, the provisions of Austrian legislation allowing penalties to be imposed both on the company and on the bodies authorised to represent it, and permitting the imposition of further periodic penalties at the end of every two-month period in the event of persistent failure to file the annual accounts should not be taken into account by the Court, since they are inapplicable in the circumstances of the case before the referring court.

34 The UK Government also voices doubts as to the possibility of applying, retroactively, the national legislation in force since 1 January 2011 to failure to comply with the obligation to file accounts for the fiscal years ending on 31 December 2008 and 31 December 2009 respectively.

35 As regards the relevance of the provisions referred to, it is settled case-law that the fact that the terms in which a national court has framed a question referred for a preliminary ruling mention certain provisions of EU law does not preclude the Court from providing that court with all the elements of interpretation which may be of assistance in adjudicating the case pending before it, whether or not that court has referred to them in the wording of its questions (see, inter alia, Case C-152/03 *Ritter-Coulais* [2006] ECR I-1711, paragraph 29; Joined Cases C-307/09 to C-309/09 *Vicoplus and Others* [2011] ECR I-453, paragraph 22; and Case C-248/11 *Nilaş and Others* [2012] ECR, paragraph 31). In that context, it is for the Court to extract from all the information provided by the national court - and, in particular, from the grounds of the decision referring the questions - the points of EU law which require interpretation, regard being had to the subject matter of the dispute (see Case C-115/08 *ČEZ* [2009] ECR I-10265, paragraph 81, and *Idryma Typou*, paragraph 31).

36 Accordingly, the first argument put forward by the UK Government cannot affect the admissibility of the request for a preliminary ruling.

37 As regards hypothetical situations, it must be noted that the provisions of national legislation described in paragraph 33 above have been specified by the referring court with a view, inter alia, to ascertaining whether they are consistent with the principle of *ne bis in idem.*

38 According to that principle, no one is to be liable to be tried or punished again in criminal proceedings for an offence for which he has already been finally acquitted or convicted within the European Union in accordance with the law.

39 As is clear from the facts summarised in paragraphs 18 to 21 above and confirmed by Texdata and the Austrian Government at the hearing, Texdata was ordered to pay two periodic penalties in relation to two distinct periods, namely 2008 and 2009. Since it fulfilled its disclosure obligation shortly after the adoption of the contested orders, there was no repetition of penalties for those same periods.

40 Accordingly, it must be found that point (d) of the question, relating to the interpretation of the principle of *ne bis in idem*, is inadmissible.

41 Lastly, as regards the allegedly retroactive application of the national legislation at issue, the Court has held that the determination of the applicable national legislation *ratione temporis* is a question of interpretation of national law and thus does not fall within the jurisdiction of the Court in the context of a request for a preliminary ruling (Case C-467/08 *Padawan* [2010] ECR I-10055, paragraph 24).

42 It follows from the foregoing that the present request for a preliminary ruling is admissible, with the exception of point (d) of the question, which concerns the interpretation of the principle of *ne bis in idem*.

Consideration of the question referred for a preliminary ruling

The applicable provisions

43 In order to give a useful answer to the referring court and in the light of the case-law recalled in paragraph 35 above, it is necessary first of all to determine whether the provisions of directives which the Court is called upon by the referring court to interpret are applicable in a situation, such as that at issue, in which the branch located in Austria of a capital company established in Germany has failed to fulfil its obligation to disclose its annual accounts in respect of the fiscal years 2008 and 2009.

44 Such a situation is specifically governed by the Eleventh Directive and, more specifically, by Article 1 of that directive, which provides, in essence, that documents relating to a branch such as that concerned in the main proceedings are to be disclosed in accordance with the law of the Member State in which that branch is located, and by Article 12 of that directive, under which Member States are to provide for appropriate penalties in the event of failure to disclose the matters set out in Article 1 of that directive, among other provisions.

45 Given the specific nature of Articles 1 and 12 of the Eleventh Directive in relation to the circumstances of the dispute before the referring court, it must be found that that dispute is governed by those same provisions, to the exclusion of the provisions of Directive 2009/101 and the provisions of the Fourth and Seventh Directives, which, although they also, admittedly, lay down disclosure obligations, do not relate so specifically to a situation such as that of the case before the referring court.

46 It follows from the foregoing that the question referred must be understood as asking, in essence, whether EU law – and, in particular, Articles 49 TFEU and 54 TFEU, the principles of effective judicial protection and of the rights of the defence, and Article 12 of the Eleventh Directive – precludes national legislation, such as that at issue in the main proceedings, which provides that, where the statutory nine-month period for disclosing accounting documents is exceeded, a minimum periodic penalty of EUR 700 is to be imposed immediately on the capital company whose branch is located in the Member State concerned, without prior notice and without the company first being given an opportunity to state its views on the alleged breach of the disclosure obligation.

47 Since the national scheme at issue is intended to penalise breach of the obligation incumbent upon branches of capital companies to disclose their annual accounts, an obligation which is harmonised under the Eleventh Directive, the following steps are necessary: (i) to address point (e) of the question, concerning the interpretation of the Eleventh Directive; (ii) to examine point (a) of the question, that is to say, to consider whether that scheme constitutes a restriction of the freedom of establishment as provided for in Articles 49 TFEU and 54 TFEU; and (iii) to address points (b) and (c) of the question, relating to the applicability and possible infringement of the principles of effective judicial protection and respect for the rights of the defence.

The Eleventh Directive

48 Disclosure by branches which have been opened in a Member State by a company governed by the law of another Member State is imposed by Article 1 of the Eleventh Directive. That obligation is implemented in Austrian law by Paragraphs 277(1) and 280a of the UGB.

49 Under Article 12 of the Eleventh Directive, Member States are to provide for appropriate penalties in the event of failure to disclose accounting documents. However, that directive does not lay down more precise rules with regard to the establishment of those national penalties and, in particular, it does not establish any explicit criterion for the assessment of the proportionality of such penalties.

50 In those circumstances, it is appropriate to note that, while the choice of penalties remains within their discretion, Member States must ensure in particular that infringements of EU law are penalised under conditions which make the penalty effective, proportionate and dissuasive (see, to that effect, Joined Cases C-387/02, C-391/02 and C-403/02 *Berlusconi and Others* [2005] ECR I-3565, paragraph 65).

51 In particular, the Court has held that the severity of penalties must be commensurate with the seriousness of the infringements for which they are imposed, in particular by ensuring a genuinely deterrent effect, while respecting the general principle of proportionality (see, by analogy, Case C-81/12 *Asociația Accept* [2013] ECR I-0000, paragraph 63 and the case-law cited).

52 In that respect, measures provided for under national legislation must not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question: where there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued (see, to that effect, Joined Cases C-379/08 and C-380/08 *ERG and Others* [2010] ECR I-2007, paragraph 86, and Case C-210/10 *Urbán* [2012] ECR, paragraph 24).

53 In the present case, it is clear both from Article 50(2)(g) TFEU – the basis for the adoption of the company law directives – and from the fourth recital in the preamble to the Eleventh Directive that the purpose of disclosure is to protect the interests both of shareholders and of third parties.

54 The Court has already had occasion to rule that the fact that the annual accounts must give a true and fair view of the assets and liabilities, financial position and profit or loss of the company concerned constitutes a fundamental principle (see Case C-234/94 *Tomberger* [1996] ECR I-3133, paragraph 17, rectified by order of 10 July 1997; Case C-306/99 *BIAO* [2003] ECR I-1, paragraph 72; and *Berlusconi and Others*, paragraph 54). The disclosure of those annual accounts is primarily designed to provide information for third parties who do not know or cannot obtain sufficient knowledge of the company's accounting and financial situation (Case C-97/96 *Daihatsu Deutschland* [1997] ECR I-6843, paragraph 22).

55 It is for the referring court to determine whether, under the system of penalties laid down by Paragraph 283 of the UGB, as amended by the BBG, breach of the obligation to disclose accounting documents is penalised under conditions, both procedural and substantive, which make the penalty effective, proportionate and dissuasive. However, the Court may provide the national court with all guidance on the interpretation of EU law that could be useful for its decision (*Asociația Accept*, paragraph 43 and the case-law cited).

56 In the present case, it is clear from the file before the Court that the legislation at issue, in so far as it is relevant to the case before the referring court, provides that, in the event of failure to disclose accounting documents at the latest within nine months of the balance sheet date, the court responsible for maintaining the commercial register is required to impose a minimum periodic penalty of EUR 700 on the company concerned, by means of an order and without prior notice or first allowing the company concerned an opportunity to make known its views. The company

concerned has 14 days in which to submit a reasoned objection to that order, which renders the order inoperative and triggers the ordinary procedure. If the objection is not well founded, a periodic penalty of between EUR 700 and EUR 3 600 may be imposed by means of a decision.

57 As regards, first, the minimum periodic penalty of EUR 700, imposed automatically in the event of failure to disclose within the prescribed period, it must be noted that, according to the Commission, that is the average amount imposed by Member States for breach of the disclosure obligation. As the Commission correctly points out, it is necessary to weigh the severity of that penalty against the interests of commercial partners and interested persons and the financial risks to which they might be exposed if the true financial situation of a company is not disclosed. In those circumstances, it is for the referring court to assess whether the amount imposed is disproportionate to the legitimate objective pursued by the national provisions.

58 As regards the argument that it is not open to the national courts responsible for applying that periodic penalty to depart from the minimum amount by taking into consideration the specific circumstances of each individual case, it should be noted that a reasoned objection submitted by the company on which the penalty is imposed is all that is needed to trigger the ordinary procedure, under which the competent court is free to consider the specific circumstances of the case.

59 Secondly, the period of nine months from the final balance sheet date, within which the disclosure must be made, seems to be sufficiently long to enable the companies to fulfil their disclosure obligations, giving no reason to doubt the proportionality of the system of penalties at issue in the main proceedings. As the Advocate General pointed out in point 50 of his Opinion, a longer period would jeopardise the protection of third parties, since they would not have access to the most recent information reflecting the actual situation of the company concerned.

60 Thirdly, it may be relevant, for the purposes of evaluating whether it is possible to have recourse to less restrictive measures, that – according to the explanations of the Austrian Government at the hearing – the system previously in force proved to be inefficient, given that less than half of the companies subject to the disclosure obligation met that obligation within the prescribed period. Consequently, according to that government, the Republic of Austria had to amend the system of penalties in force before 2011 in order to guarantee, in a more efficient manner, compliance with the disclosure obligation. However, it is for the referring court to determine whether the system of penalties at issue in the case before it is sufficiently dissuasive to ensure that the disclosure obligation is efficiently fulfilled.

61 In the light of the foregoing considerations, and subject to the verification to be carried out by the referring court, it must be found that Article 12 of the Eleventh Directive does not preclude a system of penalties such as that at issue in the main proceedings.

The freedom of establishment

62 As regards the freedom of establishment, the referring court asks, in essence, whether Articles 49 TFEU and 54 TFEU are to be interpreted as precluding a system of penalties, such as that laid down in Paragraph 283 of the UGB, as amended by the BBG, specifically on the ground that it provides for the penalties for failure to disclose also to be imposed on companies governed by the law of a Member State other than the Republic of Austria which have a branch in the Republic of Austria, even though their annual accounts have already been disclosed and may be consulted at the registry of the district in which those companies have their principal place of business.

63 In that connection, it should be recalled that Article 49 TFEU requires the elimination of restrictions of the freedom of establishment. Under Article 54 TFEU, companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal

place of business within the European Union are, for the purposes of the Treaty provisions relating to the freedom of establishment, to be treated in the same way as natural persons who are nationals of Member States. For those companies, that freedom entails the right to exercise their activity in other Member States through a subsidiary, a branch or an agency (see Case C-337/08 *X Holding* [2010] ECR I-1215, paragraph 17, and judgment of 25 April 2013 in Case C-64/11 *Commission* v *Spain*, not published in the ECR, paragraph 23).

64 It is settled case-law that the term 'restriction' as used in Article 49 TFEU covers measures which prohibit or impede the exercise of freedom of establishment or render it less attractive (see, inter alia, *Idryma Typou*, paragraph 54; Case C-371/10 *National Grid Indus* [2011] ECR I-12273, paragraph 36; and *Commission* v *Spain*, paragraph 26).

65 The disclosure obligation for branches opened in Austria by companies governed by the law of another Member State is laid down in Paragraph 280a of the UGB, which implements Article 1 of the Eleventh Directive. The conformity of Paragraph 280a of the UGB with the Eleventh Directive has not been called in question.

66 Rather, the matter at issue before the referring court is the system of penalties applicable in the event of failure to comply with the disclosure obligation under Paragraph 283 of the UGB, as amended by the BBG. As can be seen from paragraph 15 above, Paragraph 283 provides that a periodic penalty of EUR 700 is to be imposed by order, without a prior procedure, if, on expiry of the period allowed for disclosure, the accounting documents have not been submitted to the court responsible for maintaining the commercial register and no unforeseeable and unavoidable obstacle is invoked. The periodic penalty is to be repeated every two months until the disclosure obligation has been met. The company or body concerned has 14 days in which to enter an objection to any order imposing the periodic penalty. The objection suspends execution of the periodic penalty and triggers an ordinary procedure.

67 In that connection, it should be pointed out, first, that the system of penalties at issue is applied without distinction to companies established in Austria and to those established in other Member States but with a branch in Austria. Accordingly, the system does not place companies which are established in Member States other than the Republic of Austria, but which have a branch there, in a factual or legal situation that is less favourable than that of companies established in Austria.

68 Secondly, as the Commission correctly points out, no penalty is imposed if the company concerned fulfils its legal obligation to disclose, as required under EU law – an obligation applicable in all Member States. Consequently, the penalties that may arise are not capable of prohibiting, impeding or discouraging a company governed by the law of a Member State from establishing itself, through the creation of a branch, in another Member State.

69 It follows that a system of penalties such as that laid down in Paragraph 283 of the UGB, as amended by the BBG, cannot be regarded as constituting a restriction of the freedom of establishment. Accordingly, Articles 49 TFEU and 54 TFEU do not preclude such a system.

The principles of effective judicial protection and respect for the rights of the defence

70 By points (b) and (c) of its question, the referring court asks, in essence, whether the general principle of the right to effective judicial protection and the principle of respect for the rights of the defence, as entrenched in Article 47 of the Charter and in Article 6(2) of the ECHR, are to be interpreted as precluding a system of penalties, which apply in the event of failure to comply with the obligation to disclose accounting documents, such as the system provided for under Paragraph 283 of the UGB, as amended by the BBG.

71 Under Article 51(1) of the Charter, the Charter's provisions are addressed to the Member States only when they are implementing EU law.

72 In that regard, the Court's settled case-law states, in essence, that the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by EU law, but not outside such situations. It is consonant with those limits that the Court has already stated that it has no jurisdiction to appraise, in the light of the Charter, national legislation which falls outside the framework of EU law. On the other hand, if national legislation falls within the scope of EU law, the Court, when requested to give a preliminary ruling, must provide all the guidance as to interpretation needed in order for the national court to determine whether that legislation is compatible with the fundamental rights the observance of which the Court ensures (see, inter alia, Case C-617/10 *Åkerberg Fransson* [2013] ECR, paragraph 19 and the case-law cited).

73 The Court has also had occasion to explain that, construed in the light of that case-law and of the explanations relating to Article 51 of the Charter, the fundamental rights guaranteed by the Charter must be respected where national legislation falls within the scope of EU law. In other words, the applicability of EU law entails the applicability of the fundamental rights guaranteed by the Charter (see, to that effect, *Åkerberg Fransson*, paragraphs 20 and 21).

74 In the present case, the main proceedings concern the penalty imposed for failure to comply with the disclosure obligation, as laid down in the Eleventh Directive. As can be seen from paragraph 49 above, the EU legislature, by Article 12 of the Eleventh Directive, left the Member States responsible for determining the appropriate penalties – that is to say, penalties which are effective, proportionate and dissuasive – in order to ensure compliance with the disclosure obligation. In Austrian law, those penalties are laid down by Paragraph 283 of the UGB, as amended by the BBG.

75 It follows that the Austrian legislation at issue in the main proceedings constitutes a case of the 'implementing of Union law', for the purposes of Article 51(1) of the Charter.

76 The provisions of the Charter are therefore applicable to the facts of the dispute before the referring court.

77 As regards the principle of effective judicial protection, the first paragraph of Article 47 of the Charter states that everyone whose rights and freedoms guaranteed by EU law are infringed has the right to an effective remedy before a tribunal in compliance with the conditions laid down in that provision.

78 In order to ensure the observance of that fundamental right within the European Union, the second subparagraph of Article 19(1) TEU lays down that Member States are to provide remedies sufficient to ensure effective legal protection in the fields covered by EU law.

79 As regards the rights of the defence, the Court has held that they must be observed in all proceedings in which sanctions, especially fines or penalty payments, may be applied (see, to that effect, Case C-194/99 P *Thyssen Stahl* v *Commission* [2003] ECR I-10821, paragraph 30, and Case C-3/06 P *Groupe Danone* v *Commission* [2007] ECR I-1331, paragraph 68).

80 As regards, in the first place, the question as to whether the 14-day period allowed for challenging the penalty for failure to disclose is compatible with the principle of effective judicial protection, it should be borne in mind that the period prescribed must be sufficient in practical terms to enable an effective objection to be prepared and submitted (see, to that effect, Case C-69/10 *Samba Diouf* [2011] ECR I-7151, paragraph 66).

81 However, given that, as a rule, the disclosure obligation applies to all branches of the kind involved in the main proceedings, that it is lawful and generally known to the interested parties, that Austrian law allows a period of nine months from the final balance sheet date for making that disclosure and that

those time-limits may be suspended if an unforeseen and unavoidable event has prevented timely disclosure, a period of 14 days does not seem, in principle, insufficient in practical terms for preparing and submitting an effective objection.

82 As regards, in the second place, doubts relating to the reliance on a legal presumption of liability whereby the burden of proof is placed on the company, it should be noted that, as can be seen from paragraph 58 above, the company concerned need only submit a reasoned objection to that penalty in order to trigger the ordinary procedure, under which the competent court is free to consider the specific circumstances of the case.

83 As regards, in the third place, the absence of prior notice and the lack of any opportunity for the company concerned to make known its views, it should be noted that, in all proceedings initiated against a person which may well culminate in a measure adversely affecting that person, respect for the rights of the defence is a fundamental principle of EU law which must be guaranteed even in the absence of any rules governing the proceedings in question. That principle requires that the addressees of decisions that significantly affect their interests be placed in a position in which they may effectively make known their views on the evidence on which the contested decision is based (Case C-28/05 *Dokter and Others* [2006] ECR I-5431, paragraph 74 and the case-law cited).

84 However, it is settled case-law that fundamental rights do not constitute unfettered prerogatives and may be restricted, provided that the restrictions in fact correspond to objectives of general interest pursued by the measure in question and that they do not involve, in the light of the objectives pursued, a disproportionate and intolerable interference which impairs the very substance of the rights guaranteed (see, to that effect, *Dokter and Others*, paragraph 75, and Joined Cases C-317/08 to C-320/08 *Alassini and Others* [2010] ECR I-2213, paragraph 63 and the case-law cited).

85 However, given the nature of the infringement in question, it does not appear that, in circumstances such as those of the case before the referring court, the imposition of an initial penalty of EUR 700 without prior notice or any opportunity for the company concerned to make known its views before the penalty is imposed impairs the substance of the fundamental right at issue, since the submission of a reasoned objection against the decision imposing the periodic penalty immediately renders that decision inoperable and triggers an ordinary procedure under which there is a right to be heard.

86 Likewise, such a procedure appears to correspond to an objective of general interest recognised by the European Union, since, according to the observations of the Austrian Government, the system of penalties laid down in Paragraph 283 of the UGB, as amended by the BBG, is intended to ensure that the disclosure obligation is met more swiftly and more efficiently, in the general interest of ensuring better protection for third parties and shareholders. Also, there is no evidence that such a procedure is disproportionate in relation to the objective pursued.

87 In the fourth place, as regards the other procedural elements, such as, in particular, the obligation to state reasons in the document instituting proceedings, the barring of new pleas at the appeal stage and the fact that there is no guarantee that a hearing will be held, there is no evidence before the Court that raises any doubts as to the conformity of the system of penalties at issue with the principles of effective judicial protection and respect for the rights of the defence.

88 Consequently, it must be found that the system of penalties at issue in the main proceedings is consistent with the principles of effective judicial protection and respect for the rights of the defence.

89 In the light of all the foregoing considerations, the answer to the question referred is that, subject to the verifications to be carried out by the referring court, Articles 49 TFEU and 54 TFEU, the principles of effective judicial protection and respect for the rights of the defence, and Article 12 of the Eleventh Directive are to be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which provides that, where the statutory nine-month period for disclosing

accounting documents is exceeded, a minimum periodic penalty of EUR 700 is to be imposed immediately on the capital company whose branch is located in the Member State concerned, without prior notice and without the company first being given an opportunity to state its views on the alleged breach of the disclosure obligation.

Costs

90 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

Subject to the verifications to be carried out by the referring court, Articles 49 TFEU and 54 TFEU, the principles of effective judicial protection and respect for the rights of the defence, and Article 12 of Eleventh Council Directive 89/666/EEC of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State are to be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which provides that, where the statutory nine-month period for disclosing accounting documents is exceeded, a minimum periodic penalty of EUR 700 is to be imposed immediately on the capital company whose branch is located in the Member State concerned, without prior notice and without the company first being given an opportunity to state its views on the alleged breach of the disclosure obligation.

[Signatures]