JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)

21 June 2006 *

In Case T-47/02,

Manfred Danzer, residing in Linz (Austria),

Hannelore Danzer, residing in Linz,

represented initially by J. Hintermayr, M. Krüger, F. Haunschmidt, G. Minichmayr and P. Burgstaller, and subsequently by J. Hintermayr, F. Haunschmidt, G. Minichmayr, P. Burgstaller, G. Tusek, T. Riedler and C. Hadeyer, lawyers,

applicants,

v

Council of the European Union, represented by M. Giorgi Fort and M. Bauer, acting as Agents,

defendant,

* Language of the case: German.

APPLICATION, first, for compensation under Article 288 EC in respect of damage allegedly suffered by the applicants due to the obligation to disclose certain information in the annual accounts of the companies of which they are managers under Article 2(1)(f) 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 (subsequently the second paragraph of Article 58 of the EC Treaty, now the second paragraph of Article 48 EC), with a view to making such safeguards equivalent throughout the Community (OJ, English Special Edition 1968 (I), p. 41), and Article 47 of Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54(3)(g) of the Treaty (subsequently Article 54(3)(g) of the EC Treaty, now, after amendment, Article 44(2)(g) EC) on the annual accounts of certain types of companies (OJ 1978 L 222, p. 11) and, second, for a declaration that the aforementioned provisions are invalid,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Third Chamber),

composed of M. Jaeger, President, V. Tiili and O. Czúcz, Judges,

Registrar: I. Natsinas, Administrator,

having regard to the written procedure and further to the hearing on 16 November 2005,

gives the following

Judgment

Facts and legal framework of the case

1 Article 2(1)(f) 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 (subsequently the second paragraph of Article 58 of the EC Treaty, now the second paragraph of Article 48 EC), with a view to making such safeguards equivalent throughout the Community (OJ, English Special Edition 1968 (I), p. 41) ('the First Companies Directive'), in the version in force at the time of the facts of the case, provides:

'1. Member States shall take the measures required to ensure compulsory disclosure by companies of at least the following documents and particulars:

...

(f) The balance sheet and the profit and loss account for each financial year. ...'

2 Article 6 of that directive provides:

'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)'.

3 According to Article 47(1) of Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54(3)(g) of the Treaty (subsequently Article 54(3)(g) of the EC Treaty, now, after amendment, Article 44(2)(g) EC) on the annual accounts of certain types of companies (OJ 1978 L 222, p. 11) ('the Fourth Companies Directive'), as amended by Seventh Council Directive 83/349/EEC of 13 June 1983 (OJ 1983 L 193, p. 1):

'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 [the First Companies Directive].

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 upon request. The price of such a copy must not exceed its administrative cost.'

4 Articles 9 and 10 of the Fourth Companies Directive describe the layouts to be prescribed by the Member States for the structure of the balance sheet and Articles 22 to 27 the layouts of the structure of the profit and loss account. Articles 43 to 45 describe the contents of the notes on the accounts and Article 46 those of the annual report.

5 Those provisions were transposed into Austrian law by the Rechnungslegungsgesetz (Law on Accounting) (BGBl. 475/1990) and by the EU-Gesellschaftsrechtsänderungsgesetz (Law amending Company Law for EU Purposes) (BGBl. 304/1996), amending certain paragraphs of the Handelsgesetzbuch (Austrian Commercial Code; 'the HGB'). In accordance with the Fourth Companies Directive, the HGB provides for a differentiated disclosure obligation, depending on the size of the companies.

6 Mr Danzer is the managing partner of Dan-Küchen Möbelfabrik M. Danzer Gesellschaft mbH ('Dan-Küchen Möbelfabrik') and manager of Danzer Holding Gesellschaft mbH ('Danzer Holding'), while Mrs Danzer is the manager of those two companies (collectively 'the companies in question').

7 After the applicants repeatedly refused to comply with the obligation to disclose the annual accounts of the companies in question, in accordance with the requirements of the HGB, penalties were imposed on them by the competent Austrian authorities. Thus, at the time of the facts giving rise to these proceedings, the applicants had paid ATS 334 940, that is, EUR 24 341.04, with a further EUR 20 800 in penalties to be expected.

8 The applicants contested some of those penalties before the competent Austrian courts. The applicants' actions were dismissed inter alia by the Oberlandesgericht Linz (Higher Regional Court, Linz) and the Oberster Gerichtshof (Austrian Supreme Court) by two orders of 20 June and 31 January 2002. On that occasion, the Oberster

Gerichtshof found, inter alia, that the Austrian legislation in question was compatible with Community law and fundamental rights and also with the principles of objectivity and proportionality. It also found that it was not necessary to grant the applicants' request for a reference to the Court of Justice for a preliminary ruling.

Procedure and forms of order sought

9 By application lodged at the Court Registry on 27 February 2002, the applicants brought the present action.

10 By order of the President of the Fourth Chamber of the Court of First Instance of 8 July 2003, the procedure in this case was suspended until delivery of the Court of Justice's final judgment in Joined Cases C-435/02 and C-103/03 between Axel Springer AG and Zeitungsverlag Niederrhein GmbH & Co. Essen KG and Hans-Jürgen Weske, pursuant to Article 77(c) of the Rules of Procedure of the Court of First Instance, given the similarities to the issues raised in those cases.

11 By decision of 13 September 2004 on the composition of the Chambers of the Court, the Judge-Rapporteur was assigned to the Third Chamber, to which this case was accordingly allocated.

12 On 23 September 2004, the Court of Justice adjudicated on the aforementioned cases by making an order (order of the Court of Justice in Joined Cases C-435/02 and C-103/03 *Springer* [2004] ECR I-8663; 'the order in *Springer*').

13 Proceedings in the present case resumed following delivery of the order in *Springer*. The Court of First Instance (Third Chamber) asked the parties to submit their comments on the further conduct of the case. They submitted their comments on 22 and 26 November 2004.

14 On hearing the Report of the Judge-Rapporteur, the Court decided to open the oral procedure and, by way of measure of organisation of procedure provided for in Article 64 of the Rules of Procedure, requested the applicants to reply to certain written questions. That request was complied with.

15 The parties presented oral argument and answered the questions put by the Court at the hearing on 16 November 2005.

16 At that time, the Court took formal notice of the applicants' withdrawal of their initial claim for the disputed provisions to be declared invalid.

17 The applicants claim that the Court should:

— order the Council to pay, within 14 days, the amount of EUR 24 341.04, subject to increase;

— order the Council to pay the costs.

18 The Council contends that the Court should:

— dismiss the action as inadmissible;

— in the alternative, dismiss it as unfounded;

— order the applicants to pay the costs.

Law

Arguments of the parties

19 The Council, although not formally putting forward a plea of inadmissibility, contests the admissibility of the action on the grounds, first, that it in reality seeks the annulment of Article 2(1)(f) of the First Companies Directive and Article 47 of the Fourth Companies Directive ('the disputed provisions') and, second, that the applicants should have waited for the outcome of the case brought by them before the Oberster Gerichtshof against the penalties imposed by the Landesgericht Linz (Regional Court, Linz) before bringing an action before the Court of First Instance. According to the settled case-law of the Court of Justice, where an individual feels that he has been adversely affected by the application of a measure of Community law which he considers to be illegal, he may, when the implementation of the measure is entrusted to the national authorities, contest the validity of the measure, when it is implemented, before a national court in proceedings between himself and the national authority. Under the conditions set out in Article 177 of the EC Treaty

(now Article 234 EC), that court may, or even must, refer to the Court of Justice a question on the validity of the Community measure in question. The existence of this action, however, will be able to ensure effective protection for the individuals concerned only if it can lead to compensation for the alleged damage (Case 281/82 *Unifrex* v *Commission and Council* [1984] ECR 1969, paragraph 11).

20 In the present case, if the Court of Justice, hearing a reference for a preliminary ruling from the Oberster Gerichtshof, were to declare the disputed provisions to be invalid, that court would be bound to annul the penalties in question and the present action would become devoid of purpose.

21 At the hearing, however, the Council acknowledged that the applicants had exhausted the legal remedies available to them in Austria, since the Oberster Gerichtshof had dismissed, by order of 31 January 2002, their application for annulment of some of the penalties and stated at that time that it would not consider the applicants' request for a reference for a preliminary ruling on the validity of the disputed provisions.

22 The Council nevertheless reiterated its doubts as to whether the action is admissible, since it, in reality, asks the Court of First Instance for a general finding of illegality of the disputed provisions which the Austrian authorities and the Community legislature would be required to take into consideration. According to the Council, that cannot be the subject of an action for damages.

23 The applicants state that the penalties imposed by the Landesgericht Linz, referred to in the present proceedings, were upheld by the Oberster Gerichtshof and have already been recovered. Moreover, the Member States had no discretion in the transposition of the unconditional provisions of the First and Fourth Companies Directives, so that the disclosure obligation which adversely affected the applicants

is attributable to the Community, even though the penalties in question were imposed on the basis of the relevant Austrian provisions.

24 Lastly, the applicants take the view that, since the competent Austrian courts refused to make a reference for a preliminary ruling on validity to the Court of Justice, even though they were required to do so and the validity of the disputed provisions could legitimately be challenged, their rights can be effectively safeguarded only through the bringing of the present action. They maintain that the reference made to Case C-97/96 *Daihatsu Deutschland* [1997] ECR I-6843 by the Oberlandesgericht Linz and by the Oberster Gerichtshof in the orders dismissing their actions is irrelevant to the present case. They conclude from the foregoing that, although the action for damages before the Community Courts is only an alternative to the national legal remedies, this action must be regarded as being admissible, since those legal remedies do not allow for the effective safeguarding of their rights in accordance with the case-law of the Court of Justice (Case 175/84 *Krohn* v *Commission* [1986] ECR 753, and Case 20/88 *Roquette frères* v *Commission* [1989] ECR 1553).

Findings of the Court

25 The Council initially raised essentially two objections of inadmissibility alleging, first, the failure to exhaust national legal remedies available to the applicants and, second, that the present action for damages in reality seeks to have the disputed provisions annulled.

26 The Council acknowledged at the hearing that the first of those pleas no longer had any basis, since the applicants' actions against the penalties in question had been rejected by the Oberster Gerichtshof, as evidenced by the annexes to the reply. The Council's arguments in the statement in defence asking for the action to be dismissed on the ground that national legal remedies have not been exhausted must accordingly be rejected.

27 As to the second point raised by the Council, however, the Court notes that it is settled case-law that the action for damages provided for in the second paragraph of Article 288 EC is an independent form of action with a particular purpose to fulfil within the system of actions and subject to conditions as to its use dictated by its specific nature. It differs from an action for annulment in that its end is not the abolition of a particular measure but compensation for damage caused by an institution (Case 5/71 *Zuckerfabrik Schöppenstedt* v *Council* [1971] ECR 975, paragraph 3; *Krohn* v *Commission*, cited in paragraph 24 above, paragraphs 26 and 32; and Case C-87/89 *Sonito and Others* v *Commission* [1990] ECR I-1981, paragraph 14). The principle of the independent character of the action for damages is thus explained by the fact that the purpose of such an action differs from that of an action for annulment (Case T-178/98 *Fresh Marine* v *Commission* [2000] ECR II-3331, paragraph 45).

28 It is on this basis that it has been held, exceptionally, that an action for damages must be declared inadmissible where it is actually aimed at securing withdrawal of a measure which has become definitive and would, if upheld, nullify the legal effects of that measure (*Krohn* v *Commission*, cited in paragraph 24 above, paragraph 30; Case T-514/93 *Cobrecaf and Others* v *Commission* [1995] ECR II-621, paragraph 59; and *Fresh Marine* v *Commission*, cited in paragraph 27 above, paragraph 50). That is particularly the case where the action for damages seeks the payment of an amount precisely equal to the duty paid by the applicant pursuant to the measure which has become definitive (*Krohn* v *Commission*, cited in paragraph 24 above, paragraph 33).

29 In the present case, the action brought by the applicants is aimed at obtaining compensation for the loss allegedly suffered because of the penalties imposed on them by the competent Austrian authorities on the basis of national law implementing the disputed provisions of the First and Fourth Companies Directives. The applicants thus set their loss at the exact amount of the penalties they had to pay, namely EUR 24 341.04, a point they confirmed at the hearing, adding that the purpose of their action was to obtain compensation in that amount. It is clear that the applicants have not alleged any other loss which might be regarded as being distinct from the effects arising immediately and solely from the implementation of those decisions.

30 It follows that the applicants are seeking to obtain, through the present action for damages, the same result as would be obtained if the penalties decisions taken by the competent national authorities were to be annulled, a matter which does not fall within the jurisdiction of the Court of First Instance. In accordance with the case-law referred to in paragraph 28 above, the action must accordingly be dismissed as inadmissible.

31 Furthermore, even if the disputed provisions could be regarded as being directly behind those national penalties decisions, even though Article 6 of the First Companies Directive provides merely that Member States must provide for 'appropriate penalties' in case of failure by the companies concerned to disclose their annual accounts as required by the First and Fourth Companies Directives, and even if the applicants thus have an interest in having the disputed provisions declared unlawful, it must be emphasised that the present action for damages is not the appropriate means to achieve that end.

32 According to the case-law, where an individual feels that he has been adversely affected by the application of a measure of Community law which he considers to be

illegal, he may, when the implementation of the measure is entrusted to the national authorities, contest the validity of the measure, when it is implemented, before a national court in proceedings between himself and the national authority. Under the conditions set out in Article 234 EC, that court may, or even must, refer to the Court of Justice a question on the validity of the Community measure in question (*Unifrex* v *Commission and Council*, cited in paragraph 19 above, paragraph 11; Case 81/86 *De Boer Buizen* v *Council and Commission* [1987] ECR 3677, paragraph 9; and Case T-167/94 *Nölle* v *Council and Commission* [1995] ECR II-2589, paragraph 35).

33 In the present case, since the applicants are actually seeking annulment of the national decisions on the ground that they are based on Austrian legal provisions adopted pursuant to allegedly unlawful provisions of the First and Fourth Companies Directives, which are Community legislation of general application, the Court finds that, in the system of legal remedies provided for by the Treaty, the appropriate legal remedy would have been to request, from the national court before which the action to have those decisions annulled was brought, a reference for a preliminary ruling on the validity of the disputed provisions from the Court of Justice, which alone has competence to declare a Community act to be invalid (see, to that effect, Case C-6/99 *Greenpeace France and Others* [2000] ECR I-1651, paragraph 54).

34 This finding is not affected by the mere fact, relied on by the applicants, that both the Oberlandesgericht Linz and the Oberster Gerichtshof rejected their requests for a reference to be made.

35 On the contrary, according to settled case-law, in the context of the cooperation between the Court of Justice and the national courts provided for by Article 234 EC, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine

in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court (Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 38; Case C-373/00 *Adolf Truley* [2003] ECR I-1931, paragraph 21; and Case C-145/03 *Keller* [2005] ECR I-2529, paragraph 33).

36 It is true that, where a question of interpretation of Community law is raised before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal is, in principle, required under the third paragraph of Article 234 EC to bring the matter before the Court of Justice through a reference for a preliminary ruling. Nevertheless, and without prejudice to the lessons to be drawn from the judgment in Case C-224/01 *Köbler* [2003] ECR I-10239, where the correct application of Community law is so obvious as to leave no scope for any reasonable doubt (Case 283/81 *CILFIT* [1982] ECR 3415, paragraph 21), that court, in exercising discretion which it alone has, may decide to refrain from referring to the Court of Justice a question concerning the interpretation of Community law which has been raised before it (Case C-495/03 *Intermodal Transports* [2005] ECR I-8151, paragraph 37).

37 Nor can that court be bound to grant all requests it receives for a reference for a preliminary ruling on the validity of a Community act. The mere fact that a party contends that the dispute gives rise to a question concerning the validity of Community law does not mean that the court concerned is compelled to consider that a question has been raised within the meaning of Article 234 EC (Case C-344/04 *International Air Transport Association and Others* [2006] ECR I-403, paragraph 28). It may, in particular, find that there is no doubt as to the validity of the contested Community act and that, accordingly, it is not necessary to make a reference to the Court of Justice on that point. It has thus been held that the court in question may consider the validity of a Community act and, if it considers that the grounds put forward before it by the parties in support of invalidity are unfounded, it may reject them, concluding that the measure is completely valid. By taking that action, it is not calling into question the existence of the Community measure (Case 314/85 *Foto-Frost* [1987] ECR 4199, paragraph 14).

38 It is in the exercise of the exclusive jurisdiction they have in this area that, in the present case, the Austrian national courts found that the pleas put forward by the applicants challenging the validity of the First and Fourth Companies Directives did not justify making a reference to the Court of Justice for a preliminary ruling on the validity of the disputed provisions of those directives.

39 It is not for the Court of First Instance to assess, in the context of an action for damages, the appropriateness of that decision. To allow the present action as admissible would moreover enable the applicants to circumvent both the rejection of their applications for annulment of the national decisions imposing penalties by the national courts, which alone are competent to do so, and the refusal by those courts to grant their request for a reference to the Court of Justice for a preliminary ruling, which would undermine the very principle of judicial cooperation underlying the preliminary reference procedure. The Court notes that the applicants themselves indicated in their written submissions and at the hearing that they considered their action to be the only means still available to them to turn directly to the Community Courts with a view to obtaining from them an assessment of the validity of the disputed provisions, which is a distortion of the very object of an action for damages.

40 For the sake of completeness, the Court notes that the Austrian courts were correct in finding that there was no doubt as to the validity of the First and Fourth Companies Directives.

41 It must be borne in mind that the applicants' line of argument is based, first, on the alleged breach of protection of business secrets, the principles of free competition and proportionality, and property rights and its corollary the 'principle of private autonomy', the Court having noted, at the hearing, that the complaints relating to infringement of the principles of equal treatment, freedom of establishment and

freedom to pursue economic activities had been withdrawn. Second, the applicants rely on breach of the right to protection of personal data and fiscal secrecy. Third, they allege that the disputed provisions are in breach of the right against self-incrimination. Fourthly and lastly, they argue that there is no legal basis for the disputed provisions and that there has been infringement of Article 44(2)(g) EC.

42 Regarding, first, the complaints alleging breach of protection of business secrets, the principles of free competition and proportionality, and also property rights, it suffices to recall that in the order in *Springer* the Court of Justice had occasion to rule, in substance, on the validity of Council Directive 90/605/EEC of 8 November 1990 amending Directive 78/660/EEC on annual accounts and Directive 83/349/EEC on consolidated accounts as regards the scope of those directives (OJ 1990 L 317, p. 60), read together with Article 47 of the Fourth Companies Directive; Directive 90/605 extends the disclosure obligation under the Fourth Companies Directive to general partnerships and limited partnerships. The Court of Justice's reasoning in that context may also be applied, in substance, to the situation of capital companies and to these arguments put forward by the applicants, as submitted by the Council.

43 On that basis, the Court accordingly finds that, even if the disclosure obligations in question were to have a sufficiently direct and significant effect on the use of the rights relied on by the applicants, the restriction they involve, in particular on the right of a company to keep secret certain potentially sensitive data, appears in any event to be clearly justified. First, the measures imposed by the First and Fourth Companies Directives pursue the twofold objective of general economic interest laid down in Article 44(2)(g) EC, namely the protection of third parties against the financial risks associated with corporate forms which offer only share assets as guarantees to third parties, and the introduction into the Community of equivalent minimum legal conditions in terms of the scope of financial information which competing companies must make available to the public. Second, the potential harm

which might result from the disclosure obligations imposed by those provisions appears to be limited, as it seems doubtful that those rules are such as to alter the competitive position of the companies concerned. Lastly, the provisions of the Fourth Companies Directive, in particular Articles 11, 27, and 44 to 47, themselves provide for the possibility of reducing the information which must be included in the annual accounts and in the annual report of companies which do not exceed the limits relating to certain criteria, and reducing the disclosure of the accounts of such companies, while the purpose of Article 45 of the directive is, inter alia, to prevent the disclosure of certain data from causing serious harm to the companies concerned. Likewise, according to Article 46, the information which it is mandatory to include in the annual report may be provided in general terms (see, to that effect, the order in *Springer*, paragraphs 49 to 55).

44 It follows that, even if it were to be accepted that the disputed provisions are such as to undermine, to a certain extent, the protection of business secrets, the principles of free competition and property rights, the obligations they impose on the companies in question do not constitute excessive and unacceptable intervention which undermines the very substance of those rights and accordingly cannot be regarded as disproportionate in the light of the general interest objective referred to in Article 44(2)(g) EC. The same is true for the alleged breach of the right to protection of personal data, which encompasses fiscal secrecy, without it even being necessary to consider whether a fundamental right to protection of personal data exists for legal persons.

45 With respect to the applicants' second argument, namely breach of the right to protection of personal data pertaining to their own income, it is clear that, although the data in the profit and loss account, disclosure of which has been made mandatory by the First and Fourth Companies Directives, must indeed state staff costs (in particular wages and salaries and social security costs under Article 23(6)(a) and (b) and Article 24(3)(a) and (b) of the Fourth Companies Directive), and also the amount of the emoluments granted to the members of the administrative,

managerial and supervisory bodies by reason of their responsibilities (Article 43(1)(12) of the Fourth Companies Directive), those directives do not in any way require the identification of the recipients of that income and, in principle, do not make those persons identifiable, either. In particular, Article 43(1)(12) expressly provides that the emoluments referred to therein must be given with an indication of the total for each category. At the hearing the applicants acknowledged that these facts were true but stated, first, that in their case the boards of directors of the companies in question consist of one member, Mr Danzer, and, second, that those companies have only two managers, Mr and Mrs Danzer. Since the Firmenbuch (register of companies kept by the competent courts in Austria) identifies the partners and managers of companies, the applicants' income is indirectly identifiable.

46 Even if that were to be established, suffice it to note that it is not Article 43(1)(12) of the Fourth Companies Directive which, in itself, would lead to the disclosure of the applicants' emoluments and would therefore be in breach of the fundamental rights asserted, but rather the fact, first, that the identity of the partners and managers of companies would be disclosed in the Firmenbuch and, second, that Mr Danzer would be the sole member of the boards of directors of the companies in question and Mr and Mrs Danzer would be the sole managers of those companies. It would thus be the combination of these various elements, which are extraneous to the requirements under the disputed provisions, which would be such as to make disclosure of the applicants' emoluments possible. It follows that any harm which might be suffered by the applicants due to the disclosure required by the disputed provisions would not be directly attributable to those provisions.

47 Third, regarding the alleged breach, raised in the reply, of the right against self-incrimination provided for in Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), signed in Rome

on 4 November 1950, without its even being necessary to consider the admissibility of that line of argument as it is closely linked to one of the pleas put forward in the application, the Court finds that, even if there is such a principle which may be relied on by legal persons, for it to apply, that legal person must have been charged with a criminal offence in the broad sense of the term, which the European Court of Human Rights has defined as being the official notification from the competent authority of the complaint that a criminal infringement has been committed or in certain cases of measures implying such a complaint and also having significant repercussions on the suspect's circumstances (European Court of Human Rights, *Oztürk v. Germany*, judgment of 21 February 1984, Series A No 73, § 55).

48 It is clear that the obligation imposed on the companies in question, in general, by the disputed provisions, to disclose their annual accounts, is in no way part of a charge brought against the applicants and does not, by itself, imply any complaint about them. In those circumstances, the applicants do not qualify as accused persons or suspects as contemplated by the case-law referred to above. It follows that they cannot rely on a right against self-incrimination.

49 Fourthly and lastly, regarding the alleged lack of legal basis for the disputed provisions and infringement of Article 44(2)(g) EC, even if those complaints were to relate to a rule of law intended to confer rights on individuals, it is clear that they are based on an incorrect assumption that a coordinating directive cannot create new provisions which did not exist previously in the various legal systems of the Member States. In respect of directives based on Article 44 EC, the objective of coordinating the different sets of legislation consists in removing impediments to the freedom of establishment arising from the legislative differences in the various Member States by establishing in the Community, particularly with respect to the objective provided

for by Article 44(2)(g) EC, equivalent minimum legal conditions in terms of the scope of financial information which competing companies must make available to the public. The pursuit of that objective may imply, for the Member States, both that certain national provisions must be repealed and that new provisions must be enacted in accordance with the objectives set by that directive, in order to establish equivalent legislative, regulatory and administrative conditions throughout the Community.

50 As to the applicants' argument that, unlike a directive, only a regulation enables the Community to introduce rules which did not exist previously in the legal systems of the Member States, it is clear that that is a mere assertion devoid of any legal basis. Under the second and third paragraphs of Article 249 EC, the difference between a regulation and a directive is that the former is binding in its entirety and directly applicable in all Member States, whereas the latter is binding, as to the result to be achieved, upon each Member State to which it is addressed, but leaves to the national authorities the choice of form and methods. The distinction drawn by the applicants according to whether or not there were previously existing national provisions is therefore manifestly irrelevant.

51 It follows from all the foregoing considerations that the applicants' complaints do not raise any doubts as to the legality of the disputed provisions and that the Austrian courts were thus correct in holding that a mere challenge before them to the validity of those provisions did not justify referring a question to the Court of Justice for a preliminary ruling.

52 It is, in any event, clear that, for the reasons given in paragraphs 41 to 50 above, the present action for damages must also be dismissed as unfounded. As the applicants have been unable to demonstrate that the disputed provisions are unlawful, the adoption of those provisions by the Council cannot constitute wrongful conduct such as to establish the Community's liability. This is all the more so since, as the

Court of Justice and the Court of First Instance have held with regard to the Community's liability in respect of legislative acts involving choices of economic policy, in the drafting of which the Community institutions likewise have a wide discretionary power (*Zuckerfabrik Schöppenstedt* v *Council*, cited in paragraph 27 above, paragraph 11; Joined Cases T-481/93 and T-484/93 *Exporteurs in Levende Varkens and Others* v *Commission* [1995] ECR II-2941, paragraph 81; Case T-390/94 *Schröder and Others* v *Commission* [1997] ECR II-501, paragraphs 62 and 63; and Case T-170/00 *Förde-Reederei* v *Council and Commission* [2002] ECR II-515, paragraph 46), the unlawfulness of a coordinating directive is not in itself sufficient to establish the Community's non-contractual liability, as there is no non-contractual liability on the part of the Community unless there has been a sufficiently serious breach of a rule of law designed to confer rights on individuals (see, to that effect, Case C-63/89 *Assurances du crédit* v *Council and Commission* [1991] ECR I-1799, paragraph 12, and Case C-352/98 P *Bergaderm and Goupil* v *Commission* [2000] ECR I-5291, paragraph 42).

53 It follows from all the foregoing that the action must be dismissed as inadmissible and, in any event, unfounded, without it being necessary to allow the applicants' application for appointment of an expert.

Costs

54 Under Article 87(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 applicants have been unsuccessful, they must be ordered to pay the costs, as applied for by the Council.

On those grounds,

THE COURT OF FIRST INSTANCE

hereby:

1. **Dismisses the action;**

2. **Orders the applicants to bear their own costs and to pay the Council's costs.**

Jaeger Tiili Czúcz

Delivered in open court in Luxembourg on 21 June 2006.

E. Coulon M. Jaeger

Registrar President