JUDGMENT OF THE COURT

7 January 2003 *

In Case C-306/99,

REFERENCE to the Court under Article 234 EC by the Finanzgericht Hamburg (Germany) for a preliminary ruling in the proceedings pending before that court between

Banque internationale pour l'Afrique occidentale SA (BIAO)

and

Finanzamt für Großunternehmen in Hamburg,

on the interpretation 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 (OJ 1978 L 222, p. 11),

* Language of the case: German.

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, J.-P. Puissochet (President of Chamber), D.A.O. Edward (Rapporteur), A. La Pergola, P. Jann, V. Skouris, F. Macken, N. Colneric and S. von Bahr, Judges,

Advocate General: F.G. Jacobs,
Registrar: L. Hewlett, Principal Administrator,

after considering the written observations submitted on behalf of:

— the Finanzamt für Großunternehmen in Hamburg, by M. Wagner, acting as Agent,

— the German Government, by W.-D. Plessing and A. Dittrich, acting as Agents,

— the Commission of the European Communities, by J. Sack, acting as Agent, and R. Karpenstein, Rechtsanwalt,

having regard to the Report for the Hearing,

after hearing the oral observations of the German Government, represented by H. Heitland, acting as Agent, and the Commission, represented by J. Sack, assisted by R. Karpenstein at the hearing on 3 July 2001,

after hearing the Opinion of the Advocate General at the sitting on 15 November 2001,

gives the following

Judgment

1 By order of 29 April 1999, received at the Court on 13 August 1999, the Finanzgericht Hamburg (Finance Court, Hamburg) referred to the Court for a preliminary ruling under Article 234 EC a series of questions on the interpretation 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 (OJ 1978 L 222, p. 11; 'the Fourth Directive').

2 Those questions were raised in proceedings between the Banque Internationale pour l'Afrique Occidentale SA ('BIAO'), a bank incorporated under French law, and the Finanzamt für Großunternehmen (Tax office for large undertakings) in Hamburg ('the Finanzamt').

3 At the time of the facts in the main proceedings, BIAO, which is established in Paris (France), had a subsidiary in Hamburg acting as a credit institution under

the name of BIAO-Africa Bank Niederlassung Hamburg ('BIAO-Afribank'). The latter was not legally autonomous and was not in the nature of a capital company. It specialised in loans in developing countries and drew up its balance sheet in that sector.

4 The dispute concerns the amount of trade tax due from BIAO-Afribank for the 1989 financial year. That amount depends upon the correct valuation of a provision for possible losses arising from operations current at the balance-sheet date, namely 31 December 1989.

Legal background

Community legislation

5 According to the first recital in its preamble, the Fourth Directive is intended to coordinate national provisions concerning, in particular, the presentation and content of annual accounts and annual reports, the valuation methods used therein and their publication, for the purposes of protecting members and third parties.

6 To that end, the Fourth Directive is subdivided into a number of distinct sections relating both to the manner of presenting annual accounts and to the content and valuation of the items concerned. So far as relevant in this case, Sections 1 and 2 lay down general provisions concerning annual accounts, Section 3 concerns the

structure and presentation of the balance sheet, and Section 4 sets out the purposes and the content of certain balance-sheet items. Section 7 specifies the rules for valuing items appearing in the annual accounts.

7 Under Article 1 of the Fourth Directive, as it stood at the time of the facts in the main proceedings, the coordination measures prescribed by that directive applied in particular to the laws, regulations and administrative provisions of the Federal Republic of Germany concerning the public company limited by shares ('Aktiengesellschaft'), the 'Kommanditgesellschaft auf Aktien' (a form of public company whose directors are personally liable for the company's debts), and the private company limited by shares ('Gesellschaft mit beschränkter Haftung').

8 By virtue of directives subsequent to the Fourth Directive, certain provisions of the latter — particularly those requiring publication of accounting documents — currently apply, first, to banks and other financial establishments and their subsidiaries, and, secondly, to German subsidiaries of companies registered in other Member States. At the time of the facts in the main proceedings, however, the Federal Republic of Germany was not required to apply the provisions of the Fourth Directive to traders other than those referred to in Article 1 thereof.

9 Article 2(3) of the Fourth Directive, which appears in Section 1 thereof, provides:

'The annual accounts shall give a true and fair view of the company's assets, liabilities, financial position and profit or loss.'

10 Article 2(4) of the Fourth Directive provides that '[w]here the application of the provisions of this Directive would not be sufficient to give a true and fair view within the meaning of paragraph 3, additional information must be given'.

11 Under Article 2(5) of that directive:

'Where in exceptional cases the application of a provision of this Directive is incompatible with the obligation laid down in paragraph 3, that provision must be departed from in order to give a true and fair view within the meaning of paragraph 3. Any such departure must be disclosed in the notes on the accounts together with an explanation of the reasons for it and a statement of its effect on the assets, liabilities, financial position and profit or loss. The Member States may define the exceptional cases in question and lay down the relevant special rules.'

12 Section 3 of the Fourth Directive establishes two compulsory layouts for the presentation of balance-sheet items. As regards the presentation of commitments by way of guarantee, Article 14, which also appears in Section 3, states:

'All commitments by way of guarantee of any kind must, if there is no obligation to show them as liabilities, be clearly set out at the foot of the balance sheet or in the notes on the accounts, and a distinction made between the various types of guarantee which national law recognises; specific disclosure must be made of any

valuable security which has been provided. Commitments of this kind existing in respect of affiliated undertakings must be shown separately.'

13 Section 4 of the Fourth Directive lays down special provisions relating to certain balance-sheet items. Concerning individual assets, Article 19 in Section 4 provides:

'Value adjustments shall comprise all adjustments intended to take account of reductions in the values of individual assets established at the balance-sheet date whether that reduction is final or not.'

14 Article 20(1) of the Fourth Directive, which also appears in Section 4, refers to provisions and is worded as follows:

'Provisions for liabilities and charges are intended to cover losses or debts the nature of which is clearly defined and which at the date of the balance sheet are either likely to be incurred, or certain to be incurred but uncertain as to amount or as to the date on which they will arise.'

15 Under Article 31 of the Fourth Directive, which appears in Section 7, headed 'Valuation rules':

'1. The Member States shall ensure that the items shown in the annual accounts are valued in accordance with the following general principles:

(a) the company must be presumed to be carrying on its business as a going concern;

(b) the methods of valuation must be applied consistently from one financial year to another;

(c) valuation must be made on a prudent basis, and in particular:

(aa) only profits made at the balance-sheet date may be included;

(bb) account must be taken of all foreseeable liabilities and potential losses arising in the course of the financial year concerned or of a previous

one, even if such liabilities or losses become apparent only between the date of the balance sheet and the date on which it is drawn up;

(cc) account must be taken of all depreciation, whether the result of the financial year is a loss or a profit;

(d) account must be taken of income and charges relating to the financial year, irrespective of the date of receipt or payment of such income or charges;

(e) the components of asset and liability items must be valued separately;

(f) the opening balance sheet for each financial year must correspond to the closing balance sheet for the preceding financial year.

2. Departures from these general principles shall be permitted in exceptional cases. Any such departures must be disclosed in the notes on the accounts and the reasons for them given together with an assessment of their effect on the assets, liabilities, financial position and profit or loss.'

16 In relation to value adjustments, Article 39(1)(b) and (c) of the Fourth Directive, which also appear in Section 7, provide:

'(b) Value adjustments shall be made in respect of current assets with a view to showing them at the lower market value or, in particular circumstances, another lower value to be attributed to them at the balance-sheet date.

(c) The Member States may permit exceptional value adjustments where, on the basis of a reasonable commercial assessment, these are necessary if the valuation of these items is not to be modified in the near future because of fluctuations in value. The amount of these value adjustments must be disclosed separately in the profit and loss account or in the notes on the accounts.'

17 Under Article 42 of the Fourth Directive, which appears in Section 7:

'Provisions for liabilities and charges may not exceed in amount the sums which are necessary.

The provisions shown in the balance sheet under "Other provisions" must be disclosed in the notes on the accounts if they are material.'

National legislation

Transposition of the Fourth Directive

18 The Fourth Directive was transposed into German law by the Bilanzrichtliniengesetz (Accounting Directives Law) of 19 December 1985 (BGBl. 1985 I, p. 2355). That Law was subsequently incorporated into Book III of the Handelsgesetzbuch (German Commercial Code) of 10 May 1897 (BGBl. 1987 III, p. 4100-1; 'the HGB').

19 In its order for reference, the Finanzgericht Hamburg states that, in transposing the Fourth Directive, the German legislature decided to apply its rules not only to the capital companies referred to in Article 1 of the directive, but more generally to all traders, including subsidiaries of companies registered in other Member States.

20 Accordingly, certain features of the Fourth Directive were integrated into Book III, Section I, of the HGB, comprising Articles 238 to 263, concerning the provisions common to all traders. The specific provisions applicable to capital companies appear in Section II of the same book, comprising Articles 264 to 365.

Provisions common to all traders (Book III, Section I, of the HGB)

21 Paragraph 238(1) of the HGB provides:

'Every trader shall keep accounts recording his business transactions and the state of his assets in accordance with the principles of proper accounting. The accounts must be such as to give an outside expert within a reasonable time an overview of the situation of the undertaking....'

22 Paragraph 239(2) of the HGB provides:

'The accounting entries and the other records required must be carried out in a complete, correct, timely and orderly manner.'

23 According to Paragraph 242(1) of the HGB:

'A trader must at the start of his business and at the end of each trading year draw up accounts (opening balance, balance sheet) showing his assets and his liabilities....'

24 Paragraph 243(1) and (2) of the HGB provide:

'(1) The annual accounts must be drawn up in accordance with the principles of proper accounting.

(2) They must be clear.'

25 In the words of the first sentence of Paragraph 249(1) of the HGB:

'Provisions must be made for uncertain debts and risks of losses arising from current operations.'

26 The first sentence of Paragraph 251 of the HGB is worded as follows:

'If there is no obligation to record them as liabilities, commitments arising from the issuing and transfer of bills, from guarantees, from the backing of bills or cheques, from contracts of guarantee or from undertakings by way of security for the commitments of others must appear at the foot of the balance sheet;...'

27 Paragraph 252(1), point 4, of the HGB provides:

'Valuation shall be done on a prudent basis, taking account in particular of all risks and foreseeable losses arising before the date of the balance sheet, even if they became apparent only between the date of the balance sheet and the date on which it is drawn up; only profits made at the balance-sheet date may be taken into account.'

28 The second sentence of Paragraph 253(1) of the HGB reads:

'Debts must be accounted for at their repayment value, pensions commitments... at their current value, and provisions only up to the amount necessary in accordance with a reasonable commercial assessment...'

29 Under Paragraph 268(7) of the HGB:

'The commitments listed in Paragraph 251 must be mentioned separately at the foot of the balance sheet or in the notes to the accounts...'

30 The referring court observes that Section I of Book III of the HGB has not adopted *verbatim* the 'true and fair view' principle set out in Article 2(3) of the Fourth Directive (see paragraph 9 of this judgment). However, it considers that the provisions common to all traders must be understood in a manner consistent with that principle by virtue of the obligation to give a correct picture of the assets and liabilities contained in Paragraphs 239 and 242(1) of the HGB.

Specific provisions applicable to capital companies

31 Unlike the provisions of Section I of Book III of the HGB, the provisions applicable to capital companies expressly adopt the 'true and fair view' principle contained in Article 2(3) of the Fourth Directive. Accordingly, Paragraph 264(1) and (2) of the HGB provide:

'(1) The legal representatives of capital companies must supplement the annual accounts (Paragraph 242) with notes that form a unity with the balance sheet and the profit and loss account, and an annual report.

...

(2) The annual accounts of capital companies must, observing the principles of proper accounting, give a "true and fair view" of the company's assets, financial situation and profit or loss. If particular circumstances have the result that the annual accounts do not give a true and fair view within the meaning of the first sentence, then additional information is to be provided in the notes on the accounts.'

32 In addition, Article 289(1) of the HGB provides:

'In the annual report, at least the course of business and the situation of the capital company are to be presented in such a way that a "true and fair view" is given; in addition, the risks of future developments must also be mentioned.'

The tax rules concerning the drawing up of the balance sheet

33 According to the Körperschaftsteuergesetz (Corporation Tax Law) of 31 August 1976 (BGBl. 1976 I, p. 2597; "the KStG"), tax on corporate earnings is determined on the basis of trading profits calculated pursuant to the Einkommensteuergesetz (Income Tax Law) of 16 October 1934, as amended (BGBl. 1990 I, p. 1898, and BGBl. 1991 I, p. 808; "the EStG"). In accordance with the EStG, the assessment of profit is to be made on the basis of accounts drawn up pursuant to the rules contained in the HGB.

34 The Finanzgericht Hamburg considers that, in the absence of higher-ranking special tax rules on the drawing up of the balance sheet, it is the commercial-law 'principles of proper accounting' which apply, in accordance with the first sentence of Paragraph 5(1) of the EStG, which is worded as follows:

'Traders who are legally required to keep accounting records and regularly draw up accounts or who keep accounting records and regularly draw up accounts although not so required shall at the end of the trading year evaluate the assets... in accordance with the commercial-law principles of proper accounting.'

35 According to the referring court, the principles of proper accounting apply not only to tax on the income of natural persons but also to the basis for assessing tax

on capital companies by reason of the reference to the EStG appearing in Paragraph 8(1) of the KStG, which provides:

'What constitutes income and how it is to be calculated shall be determined in accordance with the provisions of the Einkommensteuergesetz and of the present law.'

36 The principles of proper accounting also apply to the determination of trade tax — the subject-matter of the present dispute — according to Paragraph 7 of the Gewerbesteuergesetz (Trade tax law) of 1 December 1936 (RGBl. 1936 I, p. 979; 'the GewStG') in the following terms:

'Trading profit is the profit, determined in accordance with the provisions of the Einkommensteuergesetz or the Körperschaftsteuergesetz, of a business, which is to be taken into account in calculating the income for the... period of assessment...'

37 Those provisions show that the reference to the 'principles of proper accounting' in the first sentence of Paragraph 5(1) of the EStG is of general application, and therefore applies to capital companies. Those principles include the procedural and substantive requirements applicable to annual accounts, as well as the provisions on posting and valuation, codified in Book III, Section I of the HGB (including, in particular, the first sentence of Paragraph 238(1) and Paragraph 243(1)) and binding on all traders.

38 The principles of proper accounting also apply to the making of provisions. However, the referring court states that German legislation on the accounting treatment of provisions makes a distinction between provisions for losses and provisions for debts.

39 As regards provisions for losses, the principles of proper accounting, applicable by virtue of the first sentence of Paragraph 5(1) of the EStG, include the principle set out in the second sentence of Paragraph 253(1) of the HGB and in Article 42 of the Fourth Directive, according to which provisions must not exceed the amount which is necessary on the basis of a reasonable commercial assessment.

40 Concerning the valuation of provisions for losses, by contrast, the EStG contains higher-ranking special tax rules which take precedence over those in the first sentence of Paragraph 5(1) of the EStG. More particularly, the Finanzgericht states that German tax law refers indirectly to concepts or criteria concerning the drawing up of the balance sheet. Essentially, those rules require a reasonable commercial assessment. According to that court, the case-law recognises that recourse must be made in that context to the principles of proper accounting.

The requirements concerning the revaluation of provisions

41 According to the referring court, the first part of the sentence in point 4 of Paragraph 252(1) of the HGB corresponds to the provision in Article 31(1)(c)(bb) of the Fourth Directive. In accordance with the rule of prudent assessment, account should be taken in particular of all foreseeable risks and losses which

arose before the balance-sheet date and were known about between that date and the date on which the annual accounts were drawn up.

42 The court adds that revaluation of a provision forms part of the principles of proper accounting and is therefore also applicable in tax matters by virtue of Paragraph 5(1) of the EStG.

43 Under German tax law, the decisive period is the proper period for drawing up the commercial balance sheet, not the date of any later tax balance sheet. Revaluation also applies in the valuation of debts or loans and in the case of a globally ascertained value adjustment or a loan-risk provision.

44 However, according to International Accounting Standard (IAS) No 10, facts coming to light after the balance-sheet date and before the drawing up of the accounts are to be taken into account if they reveal circumstances which already existed on that balance-sheet date.

Background to the dispute in the main proceedings

45 The parties are in dispute over the valuation of a provision for potential losses arising from sub-participation by BIAO-Afribank in the risks of non-repayment of an eight-figure loan granted by the New York subsidiary of Berliner Handels- und Frankfurter Bank KGaA ('BHF Bank') to a Chilean State-owned mining company, 'Corporación del Cobre').

Sub-participation in foreign loan risks

46 On 5 and 7 March 1987, BHF Bank signed a framework contract with Corporación del Cobre concerning an unsecured line of credit for ensuring the revolving pre-financing of exports of copper to purchasers in Germany. The framework contract was supplemented by successive short-term loans and remained in existence during the entire period of the lending commitment, that is until 1994.

47 For the repayment of the loan, customers of Corporación del Cobre paid sums for the purchase of copper into its account at the New York branch of BHF Bank. In compliance with Chilean legislation, those sums were then to be transferred to Chile, where the Chilean Central Bank had to make the necessary foreign currency available to Corporación del Cobre when the loans were due.

48 BHF Bank distributed part of the risk arising from that lending to other credit institutions. On 31 March 1987, both BIAO and BIAO-Afribank concluded a participation agreement, providing for a proportionate guarantee in the event of default by Corporación del Cobre.

49 The sub-participations were extended on several occasions in line with the amount and the term of the loans granted by BHF Bank to the Corporación del Cobre to finance its exports. There were never any delays in payment by the latter.

50 The sub-participation at issue in this case, relating to the balance-sheet date for 1989, arises from an offer made on 1 July 1989 by BHF Bank to BIAO and BIAO-Afribank. By accepting that offer on 7 August 1989, the latter both agreed to participate to the extent of USD 1.5 million each (making a total of USD 3 million) in the risk incurred by BHF Bank, valued at a maximum of USD 30 million, arising from a loan which it had granted to Corporación del Cobre. (Such an undertaking is described as a 'risk sub-participation agreement'). The guarantee fee amounted to 7/8% per annum of the loan amount outstanding under the sub-participation. It was payable in arrears if no default occurred.

51 The Corporación del Cobre repaid the two partial loan amounts requested in 1989 to BHF Bank within the time allowed. BHF Bank transferred to the New York branch of BIAO guarantee fees totalling USD 8 750 on 8 February 1990 and of USD 4 350 shortly after 27 April 1990, that is to say after the balance-sheet date of BIAO-Afribank for 1989.

Balance-sheet treatment of the sub-participation

52 The 1989 balance sheet of BIAO-Afribank was prepared and the various items on that balance sheet audited before the balance-sheet date of 31 December 1989, at a time when the sub-participation relating to that financial year was not yet repaid. On 20 November 1989, the sub-participation was submitted for preliminary auditing at the same time as the documents relating to the loan and figures from the balance sheet of Corporación del Cobre, production of those items being required by German legislation.

53 On 23 March 1990, the annual accounts were drawn up and signed within the time-limits laid down by the Kreditwesengesetz (Banking and Financial Dealings Law). The sub-participation — totalling around DEM 2.55 million — corresponded to 6% of BIAO-Afribank's balance-sheet total (of around DEM 42.45 million) and 3.5% of its total lending risk including contingent liabilities noted as off-balance-sheet items (totalling around DEM 72.33 million).

54 BIAO-Afribank entered as such in its 1989 balance sheet the risk sub-participation guarantee to BHF Bank in respect of the loan granted to Corporación del Cobre at the foot of the balance sheet on the liabilities side ('unter dem Bilanzstrich auf der Passifseite'), as a commitment by way of guarantee within the meaning of Article 14 of the Fourth Directive.

55 At the same time, it entered on the liabilities side of the balance sheet, as a '"country" risk' for Chile, a provision for possible losses arising from current operations, as envisaged by Article 20(1) of the Fourth Directive and the first sentence of Paragraph 249(1) of the HGB.

56 In order to do that, BIAO-Afribank had recourse to an individual assessment of the risks presented by Chile in the light of its political and economic situation, using a points table developed by its auditors on the basis of the index known as 'Institutional Investor's Country Ratings'.

57 The points thus obtained, rounded up to the nearest whole 10, were taken as the basis for calculating the rate of value adjustment applicable to loans granted in

the countries concerned. It was by reference to that rate that an individual determination was made, by country and by loan, as to whether or not it was necessary to adjust value or to make provisions for contingent liabilities.

58 Despite good results by Corporación del Cobre in 1988, BIAO-Afribank felt obliged, when using that individual assessment, to increase the 'country' risk by 5 points, fixing it at a total of 25. In that respect, the main factors taken into account were the fall in copper prices in 1989 and a threat of strikes in Chilean State copper mines, reported in the press on 10 November 1989.

59 Thus, DEM 638 000, around 25% of the sub-participation in the risk, amounting to around DEM 2.55 million (after conversion), was allocated to provisions for losses.

60 In accordance with the method used by BIAO-Afribank, the global assessment of the value of the loans resulted from the combined assessment, first, of the amounts corresponding to the value adjustments and the provisions relating to each of the loans of the various countries using the adjustment rates applicable for 'country' risk and, second, insolvency risks for certain internal loans. Since, in the main proceedings, the solvency of Corporación del Cobre was not in any doubt, it was not necessary to take a specific insolvency risk into account.

61 It was, however, necessary to constitute, in addition to the provision for possible losses on account of 'country' risk, a global provision on account of the latent risk

in lending. That global provision, based on the average rate of default recorded by BIAO in the past, converted into a value adjustment rate, amounted to 0.42% for guarantees with an average residual term of six months.

62 However, the global value adjustment for insolvency was no longer related to the total amount, but only to the amount reduced by the individual value adjustments.

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

63 The dispute in the main proceedings, concerning the valuation of the provision for possible losses resulting from BIAO-Afribank's sub-participation in the risk of non-repayment of the loan granted to Corporación del Cobre, is relevant only to trade tax. After an external check carried out by the eventual purchaser of BIAO in 1993, the disputed provision was no longer accepted by the Finanzamt für Körperschaften Hamburg-West (Hamburg-West tax office for corporations)('the Finanzamt Hamburg-West'), which at that time had competence in the matter of trade tax. In its view, showing the off-balance-sheet transaction under liabilities was possible, as in the case of a surety, only if there was a serious likelihood of recourse being had to the surety because of the anticipated insolvency of the principal debtor.

64 Therefore, given that Paragraph 10a of the GewStG does not permit the loss which was recognised for tax purposes for 1990 to be carried back, the Finanzamt Hamburg-West raised the basis of assessment and the amount of trade tax by decision of 10 November 1993.

65 On 19 November 1993, BIAO lodged an objection to that decision. Following the dismissal of the objection by a decision of the Finanzamt Hamburg-West of 18 December 1996, it brought an action before the Finanzgericht Hamburg claiming that the decision of 10 November 1993 should be amended so as to take the 'country' risk for Chile into account and that the basis of assessment and the amount of trade tax due for the financial year in question should be reduced in consequence.

66 The Finanzamt, which acquired competence with respect to BIAO during the national court proceedings, contended as defendant that the action should be dismissed on the ground that interpretation of the Fourth Directive is not decisive for the application of the national rules on the taxation of earnings.

67 In those circumstances, the Finanzgericht Hamburg decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

'I. Jurisdiction of the Court of Justice to give a preliminary ruling

Does the Court of Justice have jurisdiction in the procedure for preliminary rulings under Article 177 of the EC Treaty (old version) (Article 234 EC in the version in force from 1 May 1999 under the Treaty of Amsterdam of 2 October 1997 (new version)) to interpret the Fourth Council Directive 78/660/EEC of 25 July 1978 on the annual accounts of certain types of companies (OJ 1978 L 222, p. 11, "the Directive") not only where there is doubt as to the application

in conformity with the Directive of the national commercial law on accounts of capital companies (in this case, Paragraph 264 et seq. of the German Handelsgesetzbuch (Commercial Code, "the HGB")), but also:

1. where elements of the Directive were taken over when it was transposed into the national commercial accounting law applicable to all traders (in this case Paragraph 238 et seq. of the HGB), even though for them the "true and fair view" requirement set out in the preamble to and Article 2 of the Directive was not adopted in the wording of the legislation (unlike in the case of capital companies, Paragraphs 264(2) and 289(1) of the HGB);

2. where national tax law (in this case the first sentence of Paragraph 5(1) of the German Einkommensteuergesetz (Income Tax Law, "the EStG") in conjunction with Paragraph 8(1) of the German Körperschaftsteuergesetz (Corporation Tax Law, "the KStG") and Paragraph 7 of the German Gewerbesteuergesetz (Trade Tax Law, "the GewStG")) assumes that the commercial-law principles of proper accounting are applicable for ascertaining the profits of traders who draw up balance sheets, and

   (a) where these are regulated in the provisions for all traders (Paragraph 238 et seq. of the HGB) harmonised (by the Directive) or

   (b) where the specific accounting provisions for capital companies (Paragraph 264 et seq. of the HGB) apply;

3. where national tax law refers in another connection to concepts or criteria from commercial accounting law?

II. Balance-sheet treatment of loan risks

1. Where foreign loans have been granted, is a country risk (foreign currency risk or transfer risk) to be included in the balance sheet as a value adjustment — on the "Assets" side by means of writing down of foreign debts (Articles 19 and 39(1)(b) and (c) of the Directive, Paragraph 253(3) and (4) of the HGB) — and on the "Liabilities" side by means of provisions (Article 20(1) of the Directive, first sentence of Paragraph 249(1) of the HGB) for off-balance-sheet contingent liabilities under guarantees for foreign debts due to third parties (Article 14 of the Directive, Paragraph 251 of the HGB; "risk sub-participation agreement")?

2. Is it compatible with the requirement of separate valuation of balance sheet items (Article 31(1)(e) of the Directive, Paragraph 252(1)(3) of the HGB), instead of taking risks into account purely by individual value adjustments or provisions, alternatively to take them into account by means of globalised value adjustments or provisions, even if a loan default is not preponderantly probable in the individual case:

   (a) May a creditworthiness risk which is not acute but merely latent be covered by a global value adjustment, not only in the form of writing down a debt but also by means of a provision for a contingent (guarantee) liability?

(b) May a not preponderantly probable country risk be taken into account by means of a country-related globalised value adjustment (globalised individual value adjustment), not only in the form of writing down a debt but also by means of a provision for a contingent (guarantee) liability?

3. Is it permitted or required to ascertain the country risk on the basis of one's own connections, experience and information, or of knowledge in the sector or by using rating tables, or by a combination of those methods, or by a different estimation?

4. May a risk be taken into account even if

(a) it already existed when the basic transaction was entered into, and

(b) it is many times greater than the profit or earnings to be made from it (in this case, a guarantee fee for a period of less than one year)?

5. Are the country risk and the creditworthiness risk to be taken into account, if necessary, alongside each other for the same loan by means of a value adjustment or a provision, whether as a single amount or as separate amounts?

6. Is a combination of provisions for risk also permissible if one risk is ascertained individually and the other risk globally?

7. Is double provision for a risk properly avoided by the fact that, after one risk has been taken into account, only the loan amount arithmetically reduced thereby is then used as the basis of assessment of the remaining other risk?

III. Value clarification

1. Must not only increases but also decreases in risks be taken into account as value clarification, going beyond the wording of Article 31(1)(c)(bb) of the Directive (first clause of Paragraph 252(1)(4) of the HGB)?

2. Does a loan repayment between the balance-sheet date and the date on which the balance sheet is drawn up constitute a (retrospectively) value-clarifying fact and not merely a value-influencing fact which has effect only in the year of repayment?

3. For value clarifications of risks which are of relatively slight importance for the undertaking concerned, instead of the period up to the signature of the balance sheet or the establishment of the annual accounts, may the date on which valuation of the relevant balance-sheet item is completed be taken?'

Preliminary observations

68 Before replying to the questions referred, it will be useful to clarify the subject-matter, scope and nature of the provisions of the Fourth Directive.

69 First, as has been recalled in paragraph 5 of this judgment, the Fourth Directive is intended in particular to ensure the coordination of national provisions on the structure and content of annual accounts and reports and methods of valuation, for the purposes of protecting members and third parties. To that end, according to the third recital in its preamble, it is designed only to establish minimum conditions as to the extent of the financial information to be made available to the public.

70 The Fourth Directive is not designed to lay down the conditions in which the annual accounts of companies may or must serve as a basis for the determination by the tax authorities of the Member States of the basis for assessment and the amount of taxes, such as the trade tax at issue in the main proceedings. However, it is in no way excluded that annual accounts might be used by Member States as a reference base for tax purposes.

71 Next, as regards the scope of the Fourth Directive, it was limited, in the version applicable at the material date in the main proceedings, to public limited companies, public limited partnerships and private limited companies. After that date, its scope was extended to subsidiaries of capital companies, such as BIAO-Afribank, by the 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), by Council Directive 86/635/EEC of 8 December 1986 on the annual accounts and consolidated accounts of banks and other financial institutions (OJ 1986 L 372, p. 1), by Council Directive 89/117/EEC of 13 February 1989 on the obligations of branches established in a Member State of credit institutions and financial institutions having their head offices outside that Member State regarding the publication of annual accounting documents (OJ 1989 L 44, p. 40), and by 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).

72 Finally, with regard to the content of the Fourth Directive, both the fourth recital in its preamble and Article 2(3) state as a fundamental principle that annual accounts must give a true and fair view of the company's assets and liabilities, financial position and profit or loss (Case C-234/94 *Tomberger* [1996] ECR I-3133, paragraph 17, rectified by order of 10 July 1997, not published in the ECR). That principle requires, first, that the annual accounts of companies should reflect the activities and transactions which they are supposed to describe and, secondly, that the accounting information be given in the form judged to be the soundest and most appropriate for satisfying third parties' needs for information, without harming the interests of the company (Case C-275/97 *DE+ES Bauunternehmung* [1999] ECR I-5331, paragraphs 26 and 27).

73 It is for that purpose that the Fourth Directive prescribes compulsory layouts for drawing up the balance sheet and the profit and loss account, the minimum content of the notes on the accounts and the annual report and, in accordance with the fifth recital in the preamble to the directive, the coordination of the various valuation methods to the extent necessary to ensure that annual accounts disclose comparable and equivalent information. However, in accordance with Article 2(5) of the Fourth Directive, where the application of a provision of the directive is incompatible with the 'true and fair view' principle, that provision must be departed from in order to give a true and fair view of the assets and liabilities.

74 The 'true and fair view' principle must also be understood in the light of other principles set out in Article 2 of the Fourth Directive. That means, in particular, the principle whereby the annual accounts, comprising the balance sheet, the profit and loss account and the notes on the accounts, are to constitute a composite whole (Article 2(1)), the principle that the annual accounts are to be drawn up clearly and in accordance with the provisions of that directive (Article 2(2)), and the principle that, where the application of the directive would not be sufficient to give a true and fair view within the meaning of Article 2(3), additional information must be given (Article 2(4)).

75 Moreover, when valuing items, the principle of prudence must always be observed (Article 31(1)(c) of the Fourth Directive) and the amount of provisions for liabilities and losses must not exceed what is needed (First paragraph of Article 42 of the directive).

76 It is apparent both from those considerations and from the wording itself of the Fourth Directive that that directive is not intended to regulate in detail all accounting questions which depend on specific facts. Its aim is essentially to set out certain general principles which must guide the drawing up of the annual accounts of companies in all Member States. Those principles necessarily have to be applied through the adoption of national rules which, provided that the requirements of the Fourth Directive are complied with, may vary according to the accounting practices of the Member States concerned.

77 In that respect, it should be noted that, increasingly over the years, national practices have tended to align themselves on international accounting standards, referred to as 'IAS' [see, in that respect, Commission Communication COM(95) 508 final of 14 November 1995, entitled 'Accounting harmonisation: A new

strategy vis-à-vis international harmonisation', referred to by the national court, and Regulation (EC) No 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards (OJ 2002 L 243, p. 1)].

The first part of the questions

78 In the first part of its questions, the referring court is essentially enquiring as to the admissibility of its reference for a preliminary ruling on the ground that, at the material date in the main proceedings, Member States were not required to apply the provisions of the Fourth Directive to the annual accounts of a body like BIAO-Afribank. It has further doubts as to the admissibility of its questions having regard to the fact that, first, the national legislation transposing the Fourth Directive did not reproduce the principles set out in the directive *verbatim*, and, secondly, the legislation on tax accounts is based only indirectly on that national transposing legislation and, therefore, transposes the Fourth Directive outside the context which it envisages.

Observations submitted to the Court

79 The Finanzamt maintains that the reference for a preliminary ruling is inadmissible because the EStG, Paragraph 5(1) of which refers to the principles of proper accounting, has been in force since 1934 and, therefore, was not intended to refer to Community law, or, *a fortiori*, to transpose the Fourth Directive.

80 In the Finanzamt's submission, an interpretation of the Fourth Directive is not decisive for resolving the dispute in the main proceedings. The resolution of that

dispute turns solely on the question whether a provision, admittedly proper in relation to commercial law, must also be taken into account for the purposes of tax on earnings under German tax law. For the purposes of German tax on earnings, the permissible amount of a provision, such as that at issue before the Finanzgericht Hamburg, must in principle be determined in the context of the conditions laid down by the various national tax provisions and by the national case-law of the Bundesfinanzhof (Germany) in relation to the latter.

81 On the other hand, according to the referring court and the observations of the German Government, the national legislature, in transposing the Fourth Directive, intended to do so in such a way that the accounts of bodies like BIAO-Afribank were treated in the same manner as those of companies falling directly within the scope of that directive.

82 In that respect, the referring court refers explicitly to the judgment of the Bundesfinanzhof of 22 November 1988, in which that court held that 'only global valuation of assets and liabilities is capable of giving a true and fair view of the financial position and results [of the company concerned]' (see the judgment in *BFHE* 155, 322, BStBl II 1989, 359, point II 2d). According to the national court, it follows that Section I of Book III of the HGB, applicable to all taxpayers required to draw up a balance sheet, constitutes a transposition of the Fourth Directive, in so far as its provisions are relevant for the present case.

83 More particularly, in its order for reference, the national court has emphasised three aspects of German legislation (including, in particular, the Commercial Code and the tax rules) which, in the submission of the German Government, are capable of constituting a reference, albeit an indirect one, to the provisions of the Fourth Directive.

84 First, it might be considered that the provisions of the Fourth Directive, particularly the 'true and fair view' principle, are in fact transposed by the HGB, even though Section I of Book III of the latter has not reproduced them *verbatim* as regards national provisions common to all traders. Next, the Community provisions might also be applicable through the medium of the principles of proper accounting referred to in the first sentence of Paragraph 5(1) of the EStG. Finally, in the case of valuing provisions for debts, those provisions might apply through the medium of other concepts and criteria appearing in special higher-ranking tax rules.

85 According to the German Government, it was found unnecessary to repeat the 'true and fair view' principle in Paragraphs 238 to 263 of the HGB, there being conformity already since that principle was incorporated in the previous national statute. First, Paragraph 238 of the HGB provides that the position of the undertaking must be stated with precision, and, second, Paragraph 242 of the HGB has always been interpreted by the German courts as imposing an obligation that the balance sheet be truthful, which corresponds to the 'true and fair view' concept.

86 According to that Government, the fact that the 'true and fair view' principle appears expressly in Paragraph 264 of the HGB does not mean that its absence in Paragraphs 238 to 263 of the HGB implies that that principle applies only to capital companies to the exclusion of all other traders. At the hearing, counsel for the German Government maintained that the German legislature always intended to enforce compliance with that principle in practice, in accordance with Article 2(3) of the Fourth Directive. There was therefore no risk of divergence between national provisions and the corresponding provisions of Community law.

87 Accordingly, citing the judgment in Case C-28/95 *Leur-Bloem* [1997] ECR I-4161, both the Commission and the German Government submit that the Court may give a preliminary ruling where national law either refers directly to the Fourth Directive or expressly or impliedly refers to a rule of national law adopted in order to transpose that directive or to adapt to it voluntarily by an indirect reference.

Findings of the Court

88 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 (see, in particular, Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 59, and Case C-218/00 *Cisal* [2002] ECR I-691, paragraph 18).

89 The Court of Justice is therefore bound in principle to give a ruling unless it is obvious that the request is in reality designed to induce the Court to give a ruling by means of a fictitious dispute, or to deliver advisory opinions on general or hypothetical questions, or that the interpretation of Community law requested bears no relation to the actual facts of the main action or its purpose, or that the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, in particular, Case 244/80 *Foglia* v *Novello* [1981] ECR 3045, paragraph 18; *Bosman*, paragraph 61; and Case C-134/95 *USSL No 47 di Biella* [1997] ECR I-195, paragraph 12).

90 In this case, although the questions concern the internal tax situation and appear at first sight to be unconnected with Community law, in reality the problems of interpretation of Community law which the national court seeks to resolve are essentially concerned with the accounting approach required by the Fourth Directive, more particularly as regards the taking into account of possible losses arising from a guarantee of a loan whose outcome was unknown at the date of the balance sheet of the company concerned. It is therefore neither a hypothetical problem nor a question bearing no relation to the actual facts of the main action or its purpose.

91 In that respect, the answer to these questions does not depend upon the distinction between capital companies, to which the Fourth Directive applied at the date of the facts in the main action, and other bodies, such as BIAO-Afribank. Moreover, it is relevant to note that, subsequently to the facts in the main action, the provisions of the Fourth Directive in question were applied without modification to such bodies (see paragraph 71 above).

92 It is true that the provisions of national law applicable at the material time to bodies like BIAO-Afribank did not reproduce the provisions of the Fourth Directive *verbatim*. On the other hand, according to the German Government, nothing in German legislation prevented the aim, the principles and the provisions of that directive from being fully complied with as regards drawing up the annual accounts of such bodies. In that respect, the German Government argues, and the order for reference moreover acknowledges, that any interpretation given by the Court of the provisions of the Fourth Directive would be binding for the resolution of the dispute in the main proceedings by the referring court.

93 The circumstances of that case are therefore to be distinguished from those at issue in Case C-346/93 *Kleinwort-Benson* [1995] ECR I-615, in which the Court

held, in paragraph 18 of its judgment, that the legislation in question of the United Kingdom of Great Britain and Northern Ireland expressly provided for the authorities of the contracting State in question to adopt modifications 'designed to produce divergence' between the provisions of that legislation and the corresponding provisions of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial matters signed in Brussels on 27 September 1968 (OJ 1972 L 299, p. 32), as amended by the Convention of 9 October 1978 on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland (OJ 1978 L 304, p. 1 and — text of the Convention as amended — p. 77).

94 The reply to the first part of the reference for a preliminary ruling must therefore be that the questions appearing in the second and third parts of the reference, concerning the interpretation of the Fourth Directive, are admissible.

The second part of the questions

95 The dispute in the main proceedings concerns a loan guarantee the outcome of which was unknown at the balance-sheet date.

96 On the one hand, that guarantee offered the prospect of a profit in the shape of the payment to BIAO-Afribank of the guarantee fee, equal to 7/8% per annum of the loans falling within the scope of BIAO-Afribank's sub-participation, payable in the event of the debt guaranteed being repaid by the Corporación del Cobre to BHF Bank.

97 It is undisputed that the solvency of the Corporación del Cobre was not in any doubt and that there had never been any delays in payment on its part. To that extent, the prospect of profit for BIAO-Afribank appears to have been genuine.

98 On the other hand, the likelihood of Corporación del Cobre repaying the guaranteed debt was affected by a dual risk factor. First, copper prices had fallen in 1989. Secondly, in November 1989, the press had referred to a threat of strikes in Chilean copper mines.

99 In those circumstances, it could not be excluded not only that BIAO-Afribank would not receive the guarantee fee stipulated in the participation agreement, but also that it would have to pay the sum guaranteed under that agreement, to the extent of USD 1.5 million, to BHF Bank. In that case, the guarantee would have constituted a significant risk of loss at the balance-sheet date.

100 After the balance-sheet date, but before the date on which the annual accounts were drawn up, Corporación del Cobre repaid the guaranteed amounts to BHF Bank, and BIAO-Afribank received the first instalment of the guarantee fee, in accordance with what had been agreed. Viewed from that perspective, the guarantee was capable of constituting a profit for BIAO-Afribank.

101 In the second part of its questions, the referring court essentially asks whether and in what manner the amount of the commitment undertaken by BIAO-Afribank in

guaranteeing the loan granted by BHF Bank to the Corporación del Cobre should appear in the annual accounts for the year ending on 31 December 1989. More particularly, it asks:

— whether a provision concerning a risk such as the 'country' risk in question, affecting a commitment which appears at the foot of the balance sheet pursuant to Article 14 of the Fourth Directive, may be entered on the liabilities side of the balance sheet, pursuant to Article 20(1) of that directive;

— whether a latent risk of insolvency and a 'country' risk may be taken into account by means of a globalised value adjustment, or provision (as the case may be);

— what are the criteria and methods to be used in assessing the degree of probability of the 'country' risk;

— whether the principle of prudence requires that a provision should take a pre-existing and disproportionate risk into account;

— whether a latent risk of insolvency and a 'country' risk, taken into account simultaneously, must appear as a single amount or separately; and

— which methods should be used in order to avoid risks being taken into account twice over.

102 These questions concern both the presentation of the balance sheet and the methods of valuing the items relating thereto.

The possibility of entering on the liabilities side of the balance sheet a provision concerning a risk, such as 'country' risk, affecting a commitment appearing at the foot of the balance sheet

103 Article 14 of the Fourth Directive, which appears in Section 3 concerning the layout of the balance sheet, provides that all commitments by way of guarantee of any kind must, if there is no obligation to show them as liabilities, be clearly set out at the foot of the balance sheet or in the notes on the accounts. Whether there is an obligation to enter such a commitment as a liability, rather than at the foot of the balance sheet or in the notes, is in principle a matter for national law, read where appropriate in the light of international accounting standards (IAS).

104 In this case, according to the referring court, the commitment in question clearly falls within Article 14 of the Fourth Directive. In addition, the questions put by that court presuppose that, pursuant to German law, that commitment rightly appeared at the foot of the balance sheet and did not have to be entered as such on the liabilities side.

105 As regards the 'liabilities' which may be the subject of a provision under Article 20(1) of the Fourth Directive, it should be noted that that provision

provides for the possibility of entering on the liabilities side of the balance sheet only 'provisions for liabilities and charges' (in French 'provisions pour risques et charges'; in German 'Rückstellungen') which are intended to cover losses or debts which are likely or certain at the balance-sheet date.

106 In this case, the German Government argues that, although at the balance-sheet date the nature of the possible loss arising from default by the Corporación del Cobre was clearly circumscribed and its amount and date of occurrence were more or less determined, that loss could not be described as likely or certain within the meaning of Article 20(1) of the Fourth Directive.

107 The Commission argues that the principle of prudence, set out in Article 31(1)(c) of the Fourth Directive, and the 'true and fair view' principle require that the risk of loss should be taken into account as a provision.

108 In that regard, it should be noted that a 'country' risk, as defined in this case, is not in itself a 'liability' as referred to in Article 20(1) of the Fourth Directive; it constitutes only one of the many factors to be taken into account in order to determine whether a loss resulting from the commitment in question may be described as 'likely or certain' within the meaning of that provision.

109 Therefore, in order to determine whether it is appropriate to constitute a provision under Article 20(1) of the Fourth Directive, in respect of a commitment appearing at the foot of the balance sheet pursuant to Article 14, the relevant

question is whether that commitment gave rise to the likelihood, or indeed the certainty, at the balance-sheet date, of the existence of a 'loss or debt'.

110 In that case, a provision for liabilities and charges relating to that commitment would be necessary. Not to make express mention on the balance sheet of a likely or certain loss would be incompatible with the principles of prudence and a 'true and fair view' (see, to that effect, in another context, *DE+ES Bauunternehmung*, paragraph 26).

111 However, in accordance with the first paragraph of Article 42 of the Fourth Directive, such a provision should not go beyond what is necessary.

112 It is therefore for the referring court to determine whether, at the balance-sheet date, a loss or debt arising from the guarantee commitment undertaken by BIAO-Afribank was likely or certain. If not, there would have been no cause to enter a provision as a liability on the balance sheet.

113 Nevertheless, in relation to a commitment that must be mentioned at the foot of the balance sheet, the principles of prudence and a 'true and fair view' require that mention should also be made there of risks (in the broad sense), such as a 'country' risk which is capable of affecting the consequences of the commitment undertaken and, hence, the assessment of the financial situation.

The methods of valuation

114 The question of which valuation methods apply arises only if the referring court were to hold that a provision must be constituted in relation to the commitment in question.

115 It should also be noted that, although the referring court seems to envisage the possibility of writing down assets pursuant to Article 39(1)(b) and (c) of the Fourth Directive, it does not specify in what way such a method of valuation might be relevant in this case.

116 As for the possibility of carrying out a globalised valuation, Article 31(1)(e) of the Fourth Directive provides that the components of asset and liability items must be valued separately. The Court has, however, held that a derogation under Article 31(2) may be appropriate where, in the light of the 'true and fair view' principle, a separate valuation would not give the truest and fairest possible view of the actual financial position of the company concerned (*DE+ES Bauunternehmung*, paragraphs 31 and 32).

117 In a case such as that in point in the main proceedings, where there are many uncertain and even contradictory elements (see paragraphs 95 to 98 of this judgment), it is possible that, in order to ensure compliance with the principles of prudence and a true and fair view, the most appropriate approach would be to carry out a globalised assessment of all the relevant factors.

118 As for the questions seeking to obtain clarification as to the criteria for assessing the degree of likelihood of a risk, the legitimacy of taking 'country' risk and the risk of insolvency into account simultaneously, and the ways of avoiding risks being taken into account twice over, it is sufficient to point out that the Fourth Directive merely sets out general principles without seeking to regulate all their possible applications. In the absence of such particulars, that assessment is a matter for national law, read where appropriate in the light of the international accounting standards (IAS) as they applied at the time of the facts in the main proceedings, provided always that the general principles set out by the Fourth Directive, as referred to in paragraphs 72 to 75 of this judgment, are fully complied with.

119 Having regard to the whole of the above considerations, the answer to the second part of the questions must be that the Fourth Directive does not preclude a provision intended to cover possible losses or debts arising from a commitment appearing at the foot of the balance sheet pursuant to Article 14 of that directive from being entered on the liabilities side of the balance sheet pursuant to Article 20(1), provided that the loss or debt in question may be characterised as 'likely or certain' at the balance-sheet date. Article 31(1)(e) of the Fourth Directive does not exclude the possibility that, in order to ensure compliance with the principle of prudence and the principle that a true and fair view of the assets and liabilities be given, the most appropriate method of valuation might be to carry out a globalised assessment of all the relevant factors.

The third part of the questions

120 In the third part of its questions, the referring court asks, essentially, whether a commitment by way of guarantee should be valued at the balance-sheet date, where the outcome of the guarantee was unknown at that date, or whether it should be revalued retrospectively at the date on which the annual accounts were

drawn up, it being known on that latter date that the debt had been repaid. In so asking, the referring court is seeking to ascertain the relevant date for valuing balance-sheet items and, hence, whether or not the reduction or disappearance of a risk, occurring after the balance-sheet date, constitute facts requiring a retrospective revaluation of those items.

121 Pursuant to Article 31(1)(c)(bb) of the Fourth Directive, for the purposes of valuing items in the annual accounts, account must be taken of all foreseeable liabilities and potential losses arising in the course of the financial year concerned or of a previous one. In principle, therefore, the relevant date for valuing asset and liability items is the balance-sheet date.

122 The Fourth Directive makes no explicit provision for taking account of the fact that a risk (such as the risk of the debtor's insolvency, or 'country' risk) has disappeared before the date of drawing up the balance sheet.

123 However, Article 31(1)(c)(bb) forms part of a list of examples, introduced by the words 'valuation must be made on a prudent basis, and in particular...'. The list is therefore not exhaustive. Similarly, as has already been pointed out a number of times, Article 2(3) of, and the fourth recital in the preamble to, the Fourth Directive, lay down the principle that the balance sheet must present a true and fair view of the company's assets and liabilities. The Court has already held that compliance with that principle requires account to be taken of all elements, such as profits made, charges, products, risks and losses, which actually relate to the financial year in question (*Tomberger*, paragraph 22).

124 It must therefore be held that an event, such as the repayment by the Corporación del Cobre of the loan granted to it, which took place after the balance-sheet date,

does not actually relate to the financial year in question. It does not therefore constitute a fact necessitating retrospective reassessment of the value of a provision relating to that loan appearing on the liabilities side of the balance sheet.

125 However, to omit from the annual accounts all mention of circumstances such as the reduction or disappearance of such a risk could be capable of misleading, and might therefore be contrary to the 'true and fair view' principle (see, to that effect, *Tomberger*, paragraph 22). Compliance with that principle requires that mention must be made somewhere in the annual accounts of the disappearance or reduction of such a risk. Determination of the most appropriate way of showing that mention in the balance sheet is a matter for national law.

126 The answer to the third part of the questions must therefore be that, in circumstances such as those in point in the main proceedings, repayment of a loan, which takes place after the balance-sheet date (that being the relevant date for valuing balance-sheet items), does not constitute a fact necessitating retrospective revaluation of a provision relating to that loan entered on the liabilities side of the balance sheet. However, compliance with the principle that a 'true and fair view' be given of the company's assets and liabilities requires that mention should be made in the annual accounts of the disappearance of the risk covered by that provision.

Costs

127 The costs incurred by the German Government and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Finanzgericht Hamburg by order of 29 April 1999, hereby rules:

1. **The questions appearing in the second and third parts of the reference for a preliminary ruling, concerning the interpretation 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, are admissible.**

2. **The Fourth Directive 78/660 does not preclude a provision intended to cover possible losses or debts arising from a commitment appearing at the foot of the balance sheet pursuant to Article 14 of that directive from being entered on the liabilities side of the balance sheet pursuant to Article 20(1), provided that the loss or debt in question may be characterised as 'likely or certain' at the balance-sheet date. Article 31(1)(e) of that directive does not exclude the possibility that, in order to ensure compliance with the principle of prudence and the principle that a true and fair view of the assets and liabilities be given, the most appropriate method of valuation might be to carry out a globalised assessment of all the relevant factors.**

3. In circumstances such as those in point in the main proceedings, repayment of a loan, which takes place after the balance-sheet date (that being the relevant date for valuing balance-sheet items), does not constitute a fact necessitating retrospective revaluation of a provision relating to that loan entered on the liabilities side of the balance sheet. However, compliance with the principle that a true and fair view of the assets and liabilities be given requires that mention should be made in the annual accounts of the disappearance of the risk covered by that provision.

Rodríguez Iglesias	Puissochet	Edward
La Pergola	Jann	Skouris
Macken	Colneric	von Bahr

Delivered in open court in Luxembourg on 7 January 2003.

R. Grass

Registrar

G.C. Rodríguez Iglesias

President