ORDER OF THE COURT (Second Chamber)

4 May 2006 *

In Joined Cases C-23/03, C-52/03, C-133/03, C-337/03 and C-473/03,

REFERENCES for a preliminary ruling under Article 234 EC made by the Tribunale ordinario di Torino (C-23/03, C-52/03, C-133/03 and C-337/03) and the Tribunale ordinario di Milano (C-473/03) (Italy), by decisions of 13 and 29 January, 25 February, 15 July and 23 October 2003, received at the Court on 23 January, 10 February, 25 March, 1 August and 13 November 2003 respectively, in the criminal proceedings against

Michel Mulliez and Others and Giuseppe Momblano (Joined Cases C-23/03 and C-52/03),

Alessandro Nizza and Giacomo Pizzi (C-133/03),

Fabrizio Barra (C-337/03),

Adelio Aggio and Others (C-473/03),

* Language of the case: Italian.

THE COURT (Second Chamber),

composed of C.W.A. Timmermans (Rapporteur), President of Chamber, J. Makarczyk, R. Silva de Lapuerta, G. Arestis and J. Klučka, Judges,

Advocate General: J. Kokott,
Registrar: R. Grass,

the Court proposing to rule by way of reasoned order pursuant to the first subparagraph of Article 104(3) of its Rules of Procedure,

after hearing the Advocate General,

makes the following

Order

1 The references for preliminary rulings relate to the interpretation 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, with a view to making such safeguards equivalent throughout the Community (OJ, English Special Edition 1968 (I), p. 41) ('the First Companies Directive'), in particular

Article 6 thereof, of Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies (OJ 1978 L 222, p. 11) ('the Fourth Companies Directive'), in particular Article 2 thereof, and of Seventh Council Directive 83/349/EEC of 13 June 1983 based on Article 54(3)(g) of the Treaty on consolidated accounts (OJ 1983 L 193, p. 1) ('the Seventh Companies Directive'), in particular Article 16 thereof, as well as Article 5 of the EEC Treaty (subsequently Article 5 of the EC Treaty, which in turn became Article 10 EC) and Article 54(3)(g) of the EEC Treaty (subsequently Article 54(3)(g) of the EC Treaty, which in turn became, after amendment, Article 44(2)(g) EC).

2 Those requests have been submitted in the course of criminal proceedings which have been brought against Mr Mulliez and Others (Joined Cases C-23/03 and C-52/03), Mr Nizza and Pizzi (Case C-133/03), Mr Barra (Case C-337/03) and Mr Aggio and Others (Case C-473/03), alleging breach of the provisions governing false information on companies (false accounting) set out in the Codice civile (the Italian Civil Code).

Legal context

Community law

3 Article 2 of the First Companies Directive provides as follows:

'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. The document containing the balance sheet shall give particulars of the persons who are required by law to certify it.

However, in respect of the Gesellschaft mit beschränkter Haftung, société de personnes à responsabilité limitée, personenvennootschap met beperkte aansprakelijkheid, société à responsabilité limitée and società a responsabilità limitata under German, Belgian, French, Italian or Luxembourg law, referred to in Article 1, and the besloten naamloze vennootschap under Netherlands law, the compulsory application of this provision shall be postponed until the date of implementation of a Directive concerning co-ordination of the contents of balance sheets and of profit and loss accounts and concerning exemption of such of those companies whose balance sheet total is less than specified in the Directive from the obligation to make disclosure, in full or in part, of the said documents. The Council will adopt such a Directive within two years following the adoption of the present Directive.

...'

4 Article 6 of the First Companies 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);

...'

5 Article 2 of the Fourth Companies Directive provides as follows:

1. The annual accounts shall comprise the balance sheet, the profit and loss account and the notes on the accounts. These documents shall constitute a composite whole.

2. They shall be drawn up clearly and in accordance with the provisions of this Directive.

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

4. Where 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.

5. 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.

6. The Member States may authorise or require the disclosure in the annual accounts of other information as well as that which must be disclosed in accordance with this Directive.'

6 Article 16(2) to (6) of the Seventh Companies Directive essentially set out, in regard to consolidated accounts, the same provisions as those of Article 2(2) to (6) of the Fourth Companies Directive in regard to annual accounts, as cited in the previous paragraph of this judgment.

National law

7 Legislative Decree No 61 of 11 April 2002 regulating criminal and administrative offences in respect of commercial companies, in accordance with Article 11 of Law No 366 of 3 October 2001 (GURI No 88 of 15 April 2002, p. 4) ('Legislative Decree No 61/2002'), which came into force on 16 April 2002, replaced Title XI of Book V of the Italian Civil Code by a new Title XI, entitled 'Criminal provisions in respect of companies or groups of companies'.

8 That legislative decree was introduced in the context of the reform of Italian company law carried out by a series of legislative decrees adopted on the basis of the authorisation provided for by Law No 366 of 3 October 2001 (GURI No 234 of 8 October 2001).

9 Article 2621 of the Italian Civil Code, entitled 'False notification and unlawful distribution of profits or dividends', as worded in the version prior to the entry into force of Legislative Decree No 61/2002 ('the former Article 2621 of the Italian Civil Code'), provided:

'Unless the act constitutes a more serious offence, the following persons shall be liable to imprisonment for a term of one to five years and to a fine of EUR 1 032 to EUR 10 329:

1. organisers, founding members, administrators, directors, auditors and receivers who, in reports, balance sheets or other company documents, fraudulently

make untrue statements of substantive fact as to the constitution or economic position of the company or conceal in full or in part facts relating thereto;

...'

10 In particular, Legislative Decree No 61/2002 introduced into Articles 2621 and 2622 of the Italian Civil Code new criminal provisions penalising the submission of false information on a company, an offence also referred to as 'false accounting' (hereinafter, as appropriate, 'the new Article 2621 of the Italian Civil Code', 'the new Article 2622 of the Italian Civil Code', or 'the new Articles 2621 and 2622 of the Italian Civil Code'), which provide as follows:

'Article 2621 (False information on a company)

Save as otherwise provided in Article 2622, managers, directors, auditors and receivers who, with the intention of deceiving members or the public and with the aim of securing for themselves or others an unjust profit, make statements of substantive fact which are untrue in the company's balance sheets, report or other company documents provided for by law which are intended for members or for the public, even if such facts are the subject of valuations, or who omit information, the communication of which is prescribed by law, concerning the economic position, assets, liabilities or financial position of the company or the group to which that company belongs, in a manner which is capable of giving those to whom that information is addressed a false impression of that position, shall be liable to imprisonment for a term of up to one year and six months.

The same criminal liability shall also extend to cases where the information concerns assets held or administered by the company on behalf of third parties.

Criminal liability shall be excluded in any event where the false statements do not distort to an appreciable extent the representation of the assets, liabilities, economic position or financial position of the company or the group to which that company belongs. Criminal liability shall also be excluded where the false statements or omissions distort the pre-tax financial results for the year by no more than 5% or distort the net assets by no more than 1%.

Such acts shall not be punishable in any circumstances where they are the result of estimates which, viewed individually, do not differ from the true values by more than 10%.

Article 2622 (False information on a company detrimental to members or creditors)

Managers, directors, auditors and receivers who, with the intention of deceiving members or the public and with the aim of securing for themselves or others an unjust profit, make statements of substantive fact which are untrue in the company's balance sheets, report or other company documents provided for by law which are intended for members or for the public, even if such facts are the subject of valuations, or who omit information, the communication of which is prescribed by law, concerning the economic position, assets, liabilities or financial position of the company or the group to which that company belongs, in a manner which is capable of giving those to whom that information is addressed a false impression of that position and thereby occasion financial loss to members or creditors, shall, on complaint by the injured party, be liable to imprisonment for a term of between six months and three years.

Proceedings shall likewise be initiated on complaint where the act constitutes a separate, more serious offence detrimental to the assets of persons other than members or creditors, unless it has been committed to the detriment of the State, other public institutions or the European Communities.

In the case of companies subject to the provisions of Part IV, Title III, Section II, of Legislative Decree No 58 of 24 February 1998, the penalty for the acts provided for in the first paragraph shall be one to four years' imprisonment and a prosecution in respect of the offence may be brought ex officio.

Criminal liability for the acts referred to in the first and third paragraphs of this article shall extend to cases where the information concerns assets held or administered by the company on behalf of third parties.

Criminal liability for the acts provided for in the first and third paragraphs shall be excluded where the false statements or omissions do not distort to an appreciable extent the representation of the economic position, assets, liabilities or financial position of the company or the group to which the company belongs. Criminal liability shall in any event be excluded where the false statements or omissions distort the pre-tax financial results for the year by no more than 5% or distort the net assets by no more than 1%.

Such acts shall not be punishable in any circumstances where they are the result of estimates which, viewed individually, do not differ from the true values by more than 10%.'

The main proceedings and the questions referred for a preliminary ruling

11 According to the decisions for reference, in the sets of criminal proceedings in the main cases, the offences of false accounting which the accused are alleged to have committed were carried out while the former Article 2621 of the Italian Civil Code was in force, and thus prior to the entry into force of Legislative Decree No 61/2002 and the new Articles 2621 and 2622 of that code.

12 In Case C-23/03, the Tribunale ordinario di Torino decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) May Article 6 of Directive 68/151/EEC be interpreted as imposing an obligation upon the Member States to establish appropriate penalties not only for failure on the part of commercial companies to publish their balance sheet and profit and loss statement but also for publishing inaccurate versions of those statements or of other company information addressed to shareholders or the public or of any other information concerning their economic, asset or financial position which they are required to provide and which concern the company itself or the group of companies to which it belongs?

(2) With reference to the obligation upon each Member State to adopt "appropriate penalties" for the infringements provided for in the First Directive 68/151/EEC and the Fourth Directive 78/660/EEC, must those directives and, in particular, the combined provisions of Article 44(2)(g) [EC], Article 2(1)(f) and Article 6 of the First [Companies] Directive and Article 2(2), (3) and (4) of the Fourth [Companies] Directive, as amended by Directive 83/349/EEC and Directive 90/605/EEC, be interpreted as precluding the legislation of a Member State under which no penalty may be imposed for breach of the duty to publish true and fair company documents (including the balance sheet and profit and loss statement) where:

(a) the falsehood is qualitative only;

(b) the falsehood in, or omission from, the company statement in question gives rise to a distortion of year-end profits or of the value of net company assets that, nevertheless, remains below a certain threshold expressed in percentage terms;

(c) information is given, albeit with the aim of misleading shareholders or the public in order to obtain unjust enrichment, which is the result of valuations or appraisals which, taken individually, diverge by no more than a certain percentage from a correct valuation or appraisal;

(d) the falsehood, fraudulent omission or other information which does not faithfully depict the asset or financial position or profit and loss of the company does not "appreciably affect" the portrayal of the asset or financial position of the company or group of companies to which it belongs?

(3) With reference to the obligation upon each Member State to adopt "appropriate penalties" for the infringements provided for in the First Directive 68/151/EEC and Fourth Directive 78/660/EEC, must those directives and, in particular, the combined provisions of Article 44(2)(g) [EC], Article 2(1)(f) and Article 6 of the First [Companies] Directive and Article 2(2), (3) and (4) of the Fourth [Companies] Directive, as amended by Directive 83/349/EEC and Directive 90/605/EEC, be interpreted as precluding the legislation of a Member State under which, in the case of breach of the duty to publish true and fair company documents, which is intended to protect "the interests of shareholders and third parties", creates a system of penalties which:

(a) in the most serious cases (where material damage or loss is caused) permits only shareholders or creditors to apply for the imposition of penalties, thus depriving third parties generally of effective protection;

(b) in less serious cases (where no material damage is caused and no complaint is submitted) provides for a minor or summary offence ("contravvenzione") which, in the context of the Italian procedure system, is, for the reasons set out in the grounds for the present order, ineffectual;

(c) permits individuals, by means of deferred withdrawal of their complaint, to undo entirely any protection of the right to transparency in company matters?'

13 In Case C-52/03, the Tribunale ordinario di Torino decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) May Article 6 of Directive 68/151/EEC be interpreted as imposing an obligation upon the Member States to establish appropriate penalties not only for failure on the part of commercial companies to publish their balance sheet and profit and loss statement but also for publishing inaccurate versions of those statements or of other company information addressed to shareholders or the public or of any other information concerning their economic, asset or financial position which they are required to provide and which concern the company itself or the group of companies to which it belongs?

(2) With reference to the obligation upon each Member State to adopt "appropriate penalties" for the infringements provided for in the First Directive 68/151/EEC and the Fourth Directive 78/660/EEC, must those directives and, in particular, the combined provisions of Article 44(2)(g) [EC], Article 2(1)(f) and Article 6 of the First [Companies] Directive and Article 2(2), (3) and (4) of the Fourth [Companies] Directive, as amended by Directive 83/349/EEC and Directive 90/605/EEC, be interpreted as precluding the legislation of a Member State under which no penalty may be imposed for breach of the duty to publish true and fair company documents and which lays down a system of penalties which are not responsive to the criteria of effectiveness, proportionality and deterrent effect?

(3) Must the directives mentioned, and in particular the provisions of Article 44(2)(g) [EC], Article 2(1)(f) and Article 6 of the First [Companies] Directive and

Article 2(2), (3) and (4) of the Fourth [Companies] Directive, as amended by Directive 83/349/EEC and Directive 90/605/EEC, be interpreted as precluding the legislation of a Member State under which, in the case of breach of the duty to publish true and fair company information, which is intended to protect "the interests of shareholders and third parties", permits only shareholders and creditors to apply for the imposition of penalties, thus depriving third parties generally of effective protection?

(4) Must the directives mentioned, and in particular the provisions of Article 44(2)(g) [EC], Article 2(1)(f) and Article 6 of the First [Companies] Directive and Article 2(2), (3) and (4) of the Fourth [Companies] Directive, as amended by Directive 83/349/EEC and Directive 90/605/EEC, be interpreted as precluding the legislation of a Member State under which, in the case of breach of the duty to publish true and fair company information, which is intended to protect "the interests of shareholders and third parties", lays down rules for the prosecution of offences and a system of penalties which are differentiated, reserving to cases where material damage or loss is caused to shareholders or creditors the right to submit a complaint and apply for the imposition of sanctions and reserving to such cases sanctions which are serious and effective?'

14 In Case C-133/03, the Tribunale ordinario di Torino decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) May Article 6 of Directive 68/151/EEC be interpreted as imposing an obligation upon the Member States to establish appropriate penalties not only for failure on the part of commercial companies to publish their balance sheet and profit and loss statement but also for publishing inaccurate versions of those statements or of other company information addressed to shareholders or the public or of any other information concerning their economic, asset or financial position which they are required to provide and which concern the company itself or the group of companies to which it belongs?

(2) With reference to the obligation upon each Member State to adopt "appropriate penalties" for the infringements provided for in the First Directive 68/151/EEC and the Fourth Directive 78/660/EEC, must those directives and, in particular, the combined provisions of Article 44(2)(g) [EC], Article 2(1)(f) and Article 6 of the First [Companies] Directive and Article 2(2), (3) and (4) of the Fourth [Companies] Directive, as amended by Directive 83/349/EEC and Directive 90/605/EEC, be interpreted as precluding the legislation of a Member State under which no penalty may be imposed for breach of the duty to publish true and fair company documents and which lays down a system of penalties which are not responsive to the criteria of effectiveness, proportionality and deterrent effect?

(3) Must the directives mentioned, and in particular the provisions of Article 44(2)(g) [EC], Article 2(1)(f) and Article 6 of the First [Companies] Directive and Article 2(2), (3) and (4) of the Fourth [Companies] Directive, as amended by Directive 83/349/EEC and Directive 90/605/EEC, be interpreted as precluding the legislation of a Member State under which, in the case of breach of the duty to publish true and fair company information, which is intended to protect "the interests of shareholders and third parties", permits only shareholders and creditors to apply for the imposition of penalties, thus depriving third parties generally of effective protection?

(4) Must the directives mentioned, and in particular the provisions of Article 44(2)(g) [EC], Article 2(1)(f) and Article 6 of the First [Companies] Directive and Article 2(2), (3) and (4) of the Fourth [Companies] Directive, as amended by Directive 83/349/EEC and Directive 90/605/EEC, be interpreted as precluding the legislation of a Member State under which, in the case of breach of the duty to publish true and fair company information, which is intended to protect "the interests of shareholders and third parties", lays down rules for the prosecution of offences and a system of penalties which are differentiated, reserving to cases where material damage or loss is caused to shareholders or creditors the right to submit a complaint and apply for the imposition of sanctions and reserving to such cases sanctions which are serious and effective?'

15 In Case C-337/03, the Tribunale ordinario di Torino decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Must Article 44(3)(g) of the Treaty, Articles 2(1)(f) and 6 of the First Directive ... 68/151/EEC and Article 2(2), (3) and (4) of the Fourth Directive ... 78/660/EEC, as amended by Directive 83/349 and Directive 90/605, be interpreted as meaning that that legislation precludes a law of a Member State according to which it is not a punishable offence for companies to infringe their obligations concerning disclosure and the provision of accurate information where statements are made which, although intended to deceive members of the public with a view to securing an unjust profit, are the consequence of estimated valuations which, taken individually, depart from actual values to an extent not greater than a certain threshold?

(2) With reference to the duty of each Member State to adopt "appropriate penalties" for the infringements established by the First and Fourth [Companies] Directives ..., must the directives themselves and in particular the combined provisions of Article 44(3)(g) [EC], Articles 2(1)(f) and 6 of the First [Companies] Directive ... and Article 2(2), (3) and (4) of the Fourth [Companies] Directive ..., as amended by Directive 83/349 and Directive 90/605, be interpreted as meaning that that legislation precludes a law of a Member State which, in the case of infringement of the obligations imposed in order to safeguard the principle of public and accurate company information, lays down a sanctionative system which actually allows false accounting to the extent of one fifth of the company's net assets?'

16 In Case C-473/03, the Tribunale ordinario di Milano decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is Article 6 of Directive 68/151/EEC to be understood as requiring the Member States to establish appropriate penalties not only for failing to disclose company

balance sheets and profit and loss accounts but also for falsifying those documents, or other company documents addressed to the members or the public or any information on a company's assets and liabilities, and economic and financial situation which the company is required to provide in relation to the company or the group of which it forms a part?

(2) Do the requirements that the penalty be effective, proportionate and dissuasive, with which terms the Court defined the concept of "appropriate penalty" in its judgment of 21 September 1989 in Case 68/88 *Commission* v *Hellenic Republic* [1989] ECR I-2965, refer to the nature or type of penalty considered in the abstract, or rather also to its application in practice having regard to the structural characteristics of the legal system within which it takes effect?

(3) Finally, does Article 2621 of the Codice Civile (as amended by Legislative Decree No 61 of 11 April 2002), which provides for a sentence of imprisonment of up to 18 months and consequently a maximum limitation period from the time when the offence is committed of four and a half years, satisfy those requirements? That occurs in a legal system which provides, after the investigating judge completes his investigation and the public prosecutor brings criminal proceedings, for review by the investigating judge to ascertain that there is sufficient evidence to commit the accused for trial and for the possibility of three tiers of courts before judgment is definitive and thus, in the case of a conviction, the penalty is actually imposed. In addition, account must be taken of the complexity of the findings required under Article 2621 of the Codice Civile, given the thresholds of criminal relevance set by Articles 2621, paragraphs 3 and 4.'

17 By order of the President of the Court of 17 March 2003, Cases C-23/03 and C-52/03 were joined for the purposes of the written and oral procedure and for the judgment. As the cases are related, they must in addition be joined to Cases C-133/03, C-337/03 and C-473/03 for the purposes of the present order.

18 Following the judgment in Joined Cases C-387/02, C-391/02 and C-403/02 *Berlusconi and Others* [2005] ECR I-3565, the Court requested the national courts which had referred questions for a preliminary ruling which were, *prima facie*, analogous to those which gave rise to that judgment, to give their observations on whether, in the light of that judgment, they intended to continue their references for a preliminary ruling.

19 In the five cases which are the subject of the present order, the national court informed the Court either that it had first to hear the parties' views with regard to the possible withdrawal of the reference (Joined Cases C-23/03 and C-52/03) or that it intended to continue the reference (C-133/03, C-337/03 and C-473/03).

The questions

20 Pursuant to the first subparagraph of Article 104(3) of the Rules of Procedure, where a question referred to the Court for a preliminary ruling is identical to a question on which the Court has already ruled, the Court may, after hearing the Advocate General, at any time give its decision by reasoned order.

21 It is appropriate to note that such is the case in the five cases which are the subject of the present order.

22 The five cases fall within the same legal and factual framework as the three cases which gave rise to the judgment in *Berlusconi and Others* (see paragraphs 31 to 36 of that judgment).

23 The national courts point out that the effect of applying the new Articles 2621 and 2622 of the Italian Civil Code would be that a criminal prosecution in respect of the acts, initially charged as constituting the indictable offence referred to in the former Article 2621 of the Italian Civil Code, could no longer be brought for the following reasons.

24 Firstly, if proceedings may, in principle, be brought ex officio against acts, and thus in the absence of a complaint, by the public prosecuting authorities on the basis of the new Article 2621 of the Italian Civil Code, that offence would from that point on be a summary offence and consequently subject to a maximum limitation period of four and a half years and would no longer be the indictable offence, having a maximum limitation period of seven and a half years, which was referred to in the former Article 2621 of the Italian Civil Code. In the cases in the main proceedings, the offence referred to in the new Article 2621 of the Italian Civil Code is, according to those national courts, absolutely time-barred.

25 Secondly, if, in regard to the indictable offence set out in the new Article 2622 of the Italian Civil Code, the acts at issue in the main proceedings were not yet time-barred, they could not give rise to prosecutions under that article in the absence of a complaint from a member or a creditor who regarded himself as having been adversely affected by the false documentation, the lodging of a complaint being in fact a necessary precondition for the bringing of proceedings under that provision if, in any event, as has been pointed out in the criminal proceedings at issue in the main cases, the false documentation related to companies that are not quoted on the stock exchange.

26 Thirdly, those courts point out that prosecutions brought in respect of the acts in question might also come up against the thresholds laid down, in identical terms, in the new Articles 2621, third and fourth paragraphs, and 2622, fifth and sixth paragraphs, of the Italian Civil Code, which exclude any penalty, on the one hand, for false accounting which has no significant effect and is of minimal importance, that is to say, false accounting which, inter alia, results only in a variation either of the pre-tax financial results for a period of not more than 5%, or a variation of the net assets of not more than 1% and, on the other, in any event, for such acts which are the result of estimates which, viewed individually, do not differ from the true values by more than 10%.

27 In the light of those considerations, the national courts, like the public prosecuting authorities, take the view that the proceedings in the present cases raise questions as to whether or not the penalties provided for under the new Articles 2621 and 2622 of the Italian Civil Code are appropriate when considered in the light of, either, Article 6 of the First Companies Directive, as interpreted by the Court in, inter alia, Case C-97/96 *Daihatsu Deutschland* [1997] ECR I-6843, or Article 10 EC, from which, according to case-law which has been well established since Case 68/88 *Commission* v *Greece* cited above, it follows that penalties for infringements of provisions of Community law must be effective, proportionate and dissuasive.

28 The questions referred in the five cases which are the subject of the present order relate to points analogous to those already raised in the three cases which led to the judgment in *Berlusconi and Others* (paragraphs 37 to 39):

— in each of the five cases, the question is referred whether the obligation upon each Member State to adopt 'appropriate penalties' concerns not only cases of failure to publish annual accounts but also cases in which false accounts are published (see the first questions in Cases C-387/02, C-391/02 and C-403/02 which gave rise to that judgment);

— in two of the cases (C-23/03 and C-337/03, second questions), the question central to the dispute is whether the tolerance thresholds are appropriate (see the second question in Case C-387/02, first question in Case C-391/02 and second question in Case C-403/02);

— in two of the cases (C-23/03 and C-473/03, third questions), the question is raised whether the time-limit applicable to the infringement referred to in the new Article 2621 of the Italian Civil Code is appropriate (see the second question in Case C-387/02, first question in Case C-391/02 and second questions in Case C-403/02);

— in three of them (C-52/03, C-133/03 and C-473/03, second questions), the question is raised whether the appropriateness of the legal penalty is to be assessed in the abstract, or on the basis of its application in practice having regard to the structural characteristics of the legal system within which it takes effect (see the second question in Case C-387/02, first question in Case C-391/02 and second question in Case C-403/02);

— in three of the cases (C-23/03, C-52/03 and C-133/03), the question is raised of the appropriateness of the penalty punishing the crime defined in the new Article 2622 of the Italian Civil Code, having regard to the fact that breach of the duty to publish true and fair company information in principle can give rise to criminal proceedings only upon a complaint by shareholders or creditors (see the second question in Case C-387/02, fifth and sixth questions in Case C-391/02 and third question in Case C-403/02);

— finally, in two of the cases (C-52/03 and C-133/03, fourth questions), questions are referred concerning the compatibility of the differentiated system of penalties laid down in the new Articles 2621 and 2622 of the Italian Civil Code in that an appreciably greater level of protection against crime is given to the interests of shareholders and creditors than to those of other third parties, such as competitors or employees' representatives, or indeed to the general and fundamental public and market interest in the proper functioning of companies and, in particular, to the transparency and accuracy of information supplied by companies (see the first question in Case C-387/02, first and sixth questions in Case C-391/02 and third question in Case C-403/02).

29 It should be recalled that, in paragraph 63 of the judgment in *Berlusconi and Others*, the Court held that the requirement that penalties, such as those provided for under the new Articles 2621 and 2622 of the Italian Civil Code for offences resulting from false accounting, be appropriate is laid down in Article 6 of the First Companies Directive.

30 Furthermore, it follows from the grounds set out in paragraphs 75 and 77 of that judgment that, in the situation in the present cases, reliance on Article 6 of the First Companies Directive for the purpose of assessing whether the new Articles 2621 and 2622 of the Italian Civil Code are compatible with that provision could have the effect of setting aside application of the system of more lenient penalties provided for by those articles. The limits entailed by the essential nature of a directive are such as to preclude a directive from having the effect of determining or increasing the liability in criminal law of accused persons.

31 It is in substance on that basis that the Court answered, in paragraph 78 of the judgment in *Berlusconi and Others* that, in a situation such as that in issue in the main proceedings, the First Companies Directive cannot be relied on as such against accused persons by the authorities of a Member State within the context of criminal proceedings, in view of the fact that a directive cannot, of itself and independently of national legislation adopted by a Member State for its implementation, have the effect of determining or increasing the criminal liability of those accused persons.

32 The same answer must therefore also be given in the five cases which are the subject of the present order.

33 That conclusion is not called into question by the observations made by the national courts in Cases C-133/03 and C-337/03 in reply to the Court's request relating to whether they intended to continue their references for a preliminary ruling in the light of the judgment in *Berlusconi and Others* (see paragraphs 18 and 19 of the present order).

34 Those courts refer, first, to the judgment in Case C-457/02 *Niselli* [2004] ECR I-10853) which involved a matter more similar to the main proceedings in these cases.

35 Indeed, in paragraph 30 of that judgment, the Court held that if, at the time of the facts which gave rise to the criminal proceedings against Mr Niselli, they could, in an appropriate case, constitute offences under criminal law, it was inappropriate to enquire into such consequences as might derive, for the application of the directive in question in the case. However, in paragraph 29 of that judgment, the Court also noted, as it did in paragraph 74 of the judgment in *Berlusconi and Others*, that a directive cannot, of itself and independently of a national law adopted by a Member State for its implementation, have the effect of determining or aggravating the liability in criminal law of persons who act in contravention of its provisions.

36 Clearly, in paragraphs 75 and 77 of the judgment in *Berlusconi and Others*, the Court held that reliance on Article 6 of the First Companies Directive for the purpose of assessing whether the new Articles 2621 and 2622 of the Italian Civil Code are compatible with that provision could have the effect of setting aside application of the system of more lenient penalties provided for by those articles.

37 It is confirmed by the national court in Case C-133/03 that, according to the principles of Italian constitutional law, it is for the Corte costituzionale (Constitutional Court) alone to decide whether a national provision which the Court of Justice considers contrary to Community law may be without application.

38 In that regard, it should be noted, as the Court did in paragraph 72 of the judgment in *Berlusconi and Others*, that it is established case-law that any incompatibility of a national provision with Community law requires the national courts to set aside, under their own authority, the inappropriate provisions without having to request or await the prior repeal thereof by way of legislation or any other constitutional procedure.

39 The Court also confirmed in Case 106/77 *Simmenthal* [1978] ECR 629, cited in paragraph 72 of the judgment in *Berlusconi and Others*, that the obligation on the national court also applies with regard to the obligation to refer to the Corte costituzionale.

40 Finally, with regard to Case C-337/03, the national court submits that the subject-matter of the case differs from that of the cases giving rise to the judgment in *Berlusconi and Others*.

41 The latter cases concern the problem of the adequacy of the more lenient penalties which took the place of more severe penalties in force at the time the infringements were committed. The operative part of the judgment regarding the 'tolerance' thresholds at issue in Case C-337/03 does not relate to that problem.

42 Clearly, in the judgment in *Berlusconi and Others* which, furthermore, concerned inter alia cases in which those thresholds were at issue, the Court held that reliance on the First Companies Directive could not have the effect of setting aside application of the system of more lenient penalties, since the directive could not have the effect of determining or increasing the liability in criminal law of accused persons.

43 The new provisions putting into place those new tolerance thresholds have the effect, where the latter apply, of preventing any criminal proceedings on the basis of Articles 2621 and 2622 of the Italian Civil Code.

44 Those provisions therefore clearly relate to the degree of criminal liability of the accused persons.

45 In the light of all of the foregoing, the answer to the questions referred for preliminary ruling must be that, in situations such as those in issue in the main proceedings, the First Companies Directive cannot be relied on as such against accused persons by the authorities of a Member State within the context of criminal proceedings, in view of the fact that a directive cannot, of itself and independently of national legislation adopted by a Member State for its implementation, have the effect of determining or increasing the criminal liability of those accused persons.

Costs

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

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

In situations such as those in issue in the main proceedings, First Council Directive 68/151/EEC of 9 March 1968 on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community, cannot be relied on as such against accused persons by the authorities of a Member State within the context of criminal proceedings, in view of the fact that a directive cannot, of itself and independently of national legislation adopted by a Member State for its implementation, have the effect of determining or increasing the criminal liability of those accused persons.

[Signatures]