JUDGMENT OF THE COURT (Grand Chamber)

3 May 2005 *

In Joined Cases C-387/02, C-391/02 and C-403/02,

REFERENCES for preliminary rulings under Article 234 EC from the Tribunale di Milano (Cases C-387/02 and C-403/02) and from the Corte d'appello di Lecce (Case C-391/02) (Italy), made by decisions of 26 October 2002, 29 October 2002 and 7 October 2002, received at the Court on 28 October 2002, 12 November 2002 and 8 November 2002 respectively, in the criminal proceedings against

Silvio Berlusconi (C-387/02),

Sergio Adelchi (C-391/02),

Marcello Dell'Utri and Others (C-403/02),

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans (Rapporteur), A. Rosas and A. Borg Barthet, Presidents of Chambers, J.-P. Puissochet, R. Schintgen, N. Colneric, S. von Bahr, M. Ilešič, J. Malenovský, U. Lõhmus and E. Levits, Judges,

* Language of the cases: Italian.

Advocate General: J. Kokott,
Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 13 July 2004,

after considering the observations submitted on behalf of:

— Mr Berlusconi, by G. Pecorella and N. Ghedini, avvocati,

— Mr Adelchi, by P. Corleto, avvocato,

— Mr Dell'Utri, by G. Roberti and P. Siniscalchi, avvocati,

— the Procura della Repubblica, by G. Colombo, G. Giannuzzi, E. Cillo and I. Boccassini, acting as Agents,

— the Italian Government, by I.M. Braguglia, acting as Agent, and O. Fiumara, avvocato dello Stato,

— the Commission of the European Communities, by V. Di Bucci and C. Schmidt, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 14 October 2004,

gives the following

Judgment

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 against the background of criminal proceedings which have been brought against Mr Berlusconi (Case C-387/02), Mr Adelchi (Case C-391/02) and Mr Dell'Utri and Others (Case C-403/02), alleging breach of the provisions governing false information on companies (false accounting) set out in the Codice civile ('the Italian Civil Code').

The legal framework

The Community rules

3 Under Article 54(3)(g) of the Treaty, the Council of the European Union and the Commission of the European Communities are required to work for the abolition of restrictions on freedom of establishment by coordinating to the necessary extent the safeguards which, for the protection of the interests of members and others, are required by Member States of companies or firms within the meaning of the second paragraph of Article 58 of the EEC Treaty (subsequently the second paragraph of Article 58 of the EC Treaty, which itself became the second paragraph of Article 48 EC) with a view to making such safeguards equivalent throughout the Community.

4 A number of directives have accordingly been adopted by the Council on that basis, in particular the following directives referred to in the disputes in the main proceedings.

5 According to Article 1, the First Companies Directive applies to companies having a share capital, that is to say, in the case of Italy, to the following corporate forms: the *società per azioni* (public limited company) ('the SpA'), the *società in accomandita per azioni* (limited partnership), and the *società a responsabilità limitata* (private limited company) ('the Srl').

6 The First Companies Directive sets out three measures designed to protect third parties dealing with those companies: the establishment of a file containing certain mandatory information, maintained for each company in the commercial register covering a given area; harmonisation of the national rules relating to the validity of obligations entered into on behalf of a company (including companies in the process of being formed) and the ability to hold the company liable for those obligations; and the establishment of an exhaustive list of cases of nullity of companies.

7 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 coordination of the contents of balance sheets and of profit and loss accounts and concerning exemption of such of those companies whose balance sheet total is less than specified in the Directive 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;

...'

8 Paragraphs 1 and 2 of Article 3 of the First Companies Directive provide:

'1. In each Member State a file shall be opened in a central register, commercial register or companies register, for each of the companies registered therein.

2. All documents and particulars which must be disclosed in pursuance of Article 2 shall be kept in the file or entered in the register; the subject-matter of the entries in the register must in every case appear in the file.'

9 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);

...'

10 The Fourth Companies Directive, which, in regard to Italy, applies to the same forms of companies as those covered by the First Companies Directive and cited in paragraph 5 of this judgment, harmonises national provisions relating to the establishment, content, structure and publication of the annual accounts of companies.

11 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.'

12 Article 11 of the Fourth Companies Directive provides that Member States may permit companies which do not exceed certain limits in relation to the balance sheet total, net turnover and number of employees to draw up abridged balance sheets. Article 12 of that directive sets out further details in that regard.

13 Article 47(1) of the Fourth Companies Directive, which features in Section 10 thereof, entitled 'Publication', is worded as follows:

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

...'

14 Article 51 of the Fourth Companies Directive, which is contained in Section 11 thereof, entitled 'Auditing', provides as follows:

'1. (a) Companies must have their annual accounts audited by one or more persons authorised by national law to audit accounts.

(b) The person or persons responsible for auditing the accounts must also verify that the annual report is consistent with the annual accounts for the same financial year.

2. The Member States may relieve the companies referred to in Article 11 from the obligation imposed by paragraph 1.

Article 12 shall apply.

3. Where the exemption provided for in paragraph 2 is granted the Member States shall introduce appropriate sanctions into their laws for cases in which the annual accounts or the annual reports of such companies are not drawn up in accordance with the requirements of this Directive.'

15 The Seventh Companies Directive, which, in regard to Italy, applies to the same forms of companies as those which are covered by the First and Fourth Companies Directives and have been mentioned in paragraphs 5 and 10 of this judgment, sets out measures for the coordination of national provisions relating to the consolidated accounts of companies with share capital.

16 Paragraphs 2 to 6 of Article 16 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 paragraph 11 of this judgment.

17 Paragraphs 1, 4 and 6 of Article 38, featuring in Section 5 of the Seventh Companies Directive, entitled 'The publication of consolidated accounts', provide as follows:

'1. Consolidated accounts, duly approved, and the consolidated annual report, together with the opinion submitted by the person responsible for auditing the consolidated accounts, shall be published for the undertaking which drew up the consolidated accounts as laid down by the laws of the Member State which govern it in accordance with Article 3 of Directive 68/151/EEC.

...

4. However, where the undertaking which drew up the consolidated accounts is not established as one of the types of company listed in Article 4 and is not required by its national law to publish the documents referred to in paragraph 1 in the same manner as prescribed in Article 3 of Directive 68/151/EEC, it must at least make them available to the public at its head office. ...

...

6. The Member States shall provide for appropriate sanctions for failure to comply with the publication obligations imposed in this Article.'

National legislation

Company law

18 Legislative Decree No 61 of the President of the Republic 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'.

19 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).

20 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;

...'

21 Legislative Decree No 61/2002, inter alia, 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 provided for 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%.'

General criminal law

22 Under paragraphs 2 to 4 of Article 2 of the Codice penale ('the Italian Criminal Code'), entitled 'Succession of criminal legislation':

'No person may be punished, under later legislation, for an act which was not a criminal offence when carried out; if a person is found guilty, the punishment shall not be implemented and there shall be no criminal consequences.

If the legislation in force when the offence was committed and the later legislation differ, the legislation which is to apply shall be that which is more favourable in its provisions to the accused person, unless a final and irreversible judgment has been delivered in the case.

The provisions of the preceding paragraphs shall not apply to derogating or temporary legislation.'

23 Under Article 39 of the Italian Criminal Code, offences consist essentially of indictable offences and summary offences, the former attracting, in accordance with Article 17 of that code, certain types of more serious penalties than summary offences.

24 Under Article 158(1) of the Italian Criminal Code, limitation periods start to run from the time of commission of the offences and not from the time at which they were discovered.

25 It follows, further, from Articles 157 and 160 of the Italian Criminal Code that the limitation periods are from three years to four and a half years maximum for summary offences such as those provided for under the new Article 2621 of the Italian Civil Code and from five years to seven and a half years maximum for indictable offences such as those set out in the former Article 2621 of the Italian Civil Code and those provided for under the new Article 2622 of that code. Article 160 of the Italian Criminal Code lays down the maximum duration of limitation periods in the event of interruption thereof.

The disputes in the main proceedings and the questions referred for preliminary ruling

26 According to the decisions for reference, in the three sets of criminal proceedings in the main cases, the offences 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.

27 In Case C-387/02, the guidice per le indagini preliminari (judge responsible for preliminary investigations) of the Tribunale di Milano (Milan District Court) referred, by decision of 26 November 1999, the case against Mr Berlusconi to the First Criminal Chamber of that court. The charge brought against the accused was that he had, between 1986 and 1989, drawn up false documents relating to the annual accounts of the company Fininvest SpA and of other companies in the group of that name in his capacity as chairman of Fininvest and reference shareholder in the companies belonging to that group. Those false documents, it was claimed, had made it possible to increase hidden reserves earmarked for the financing of certain allegedly unlawful transactions.

28 According to the decision for reference in Case C-403/02, proceedings are at present pending against Messrs Dell'Utri, Luzi and Comincioli before the Fourth Criminal Chamber of the Tribunale di Milano in respect of the preparation of false balance sheets up to 1993.

29 Case C-391/02 has its origin in the appeal brought by Mr Adelchi against the judgment handed down on 9 January 2001 by the Tribunale di Lecce (Lecce District Court) finding him guilty of publishing false documentation in respect of the companies Nuova Adelchi Srl and Calzaturificio Adelchi Srl, of which he was the sole manager. Those acts, which had been committed in 1992 and 1993, related to allegedly fictitious export and import customs transactions and to the issuing, by those companies, of invoices that were alleged to be false. The inevitable result was to indicate in the balance sheets of those companies costs which were higher than the real costs and purely notional receipts, and, consequently, a turnover that diverged from the true turnover.

30 Following the entry into force of Legislative Decree No 61/2002, the accused parties in those three sets of proceedings argued that the new Articles 2621 and 2622 of the Italian Civil Code ought to be applied to them.

31 The national courts making the references point out that the effect of applying those new provisions 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.

32 First, 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 set out 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.

33 Second, according to those courts, that change in the classification of the offence also means that the related offences, such as criminal conspiracy, money laundering or unlawful receipt of funds, may no longer give rise to criminal prosecutions as those offences are linked to the prior existence of an indictable offence and not to that of a summary offence.

34 Third, if, in regard to the indictable offence set out in the new Article 2622 of the Italian Civil Code, the acts in 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 in issue in the main cases, the false documentation related to companies that are not quoted on the stock exchange.

35 Finally, 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 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%.

36 In the light of those considerations, the national courts making the references, in the same way as 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 5 of the Treaty, from which, according to case-law which has been well established since Case 68/88 *Commission* v *Greece* [1989] ECR 2965, paragraphs 23 and 24, it follows that penalties for infringements of provisions of Community law must be effective, proportionate and dissuasive.

37 It was in those circumstances that, in Case C-387/02, the Tribunale di Milano decided to stay proceedings and to refer to the Court for a preliminary ruling a number of questions, which, in the light of the grounds given for the decision to refer, may be understood in the following terms:

(1) Does Article 6 of the First Companies Directive concern not only cases of failure to publish information relating to companies but also cases in which false information on companies is published?

(2) Is compliance with the requirement of effectiveness, proportionality and dissuasiveness which penalties for infringement of Community provisions must satisfy to be assessed in regard to the nature or type of penalty considered in the abstract, or rather in regard to its application in practice having regard to the structural characteristics of the legal system within which it takes effect?

(3) Are the principles set out in the Fourth and Seventh Companies Directives to be interpreted as precluding national legislation setting thresholds below which

inaccurate statements in annual accounts and annual reports relating to public limited companies, limited partnerships and private limited companies are not punishable?

38 In Case C-391/02, the Corte d'appello di Lecce (Lecce Appeal Court) decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) With reference to the duty of each Member State to adopt "appropriate penalties" for the infringements established by Directives 65/151 and 78/660, must the directives themselves and in particular the combined provisions of Article 44(2)(g) EC, Articles 2(1)(f) and 6 of Directive 68/151 and Article 2(2), (3) and (4) of Directive 78/660, as consolidated by Directives 83/349 and 90/605, be interpreted as meaning that that legislation precludes a law of a Member State which, in amending the system of penalties already in force in respect of company law offences concerning the infringement of the obligations imposed in order to safeguard the principle of public and accurate information on companies, lays down a system of sanctions which in the specific instance is not informed by the criteria of effectiveness, proportionality and dissuasiveness of the sanctions imposed in order to ensure that that principle is upheld?

(2) Must those directives and, in particular, Article 44(2)(g) EC, Articles 2(1)(f) and 6 of Directive 68/151 and Article 2(2), (3) and (4) of Directive 78/660, as consolidated by Directives 83/349 and 90/605, be interpreted as meaning that that legislation precludes a law of a Member State which does not make it a punishable offence for companies to infringe obligations concerning disclosure and the provision of accurate information on certain company documents (including the balance sheet and the profit and loss account) where the disclosure of false company accounts or the failure to provide information result

in a distortion of the financial results for a given period, or a distortion in the net assets, which does not exceed a certain percentage threshold?

(3) Must those directives and, in particular, Article 44(2)(g) EC, Articles 2(1)(f) and 6 of Directive 68/151 and Article 2(2), (3) and (4) of Directive 78/660, as consolidated by Directives 83/349 and 90/605, be interpreted as meaning that that legislation precludes a law of a Member State which does not make it a punishable offence for companies to infringe obligations concerning disclosure and the provision of accurate information where statements are made which, although aimed at deceiving members or 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?

(4) Irrespective of progressive limits or thresholds, must those directives and, in particular, Article 44(2)(g) EC, Articles 2(1)(f) and 6 of Directive 68/151 and Article 2(2), (3) and (4) of Directive 78/660, as consolidated by Directives 83/349 and 90/605, be interpreted as meaning that that legislation precludes a law of a Member State which does not make it a punishable offence for companies to infringe obligations concerning disclosure and the provision of accurate information where the false statements or the fraudulent omissions and, thus, the disclosures and statements which do not give a true and fair view of the company's assets and liabilities and financial position do not distort "to an appreciable extent" the company's assets, liabilities and financial position (even though it is for the national legislature to define the concept of "appreciable distortion")?

(5) Must those directives and, in particular, Article 44(2)(g) EC, Articles 2(1)(f) and 6 of Directive 68/151 and Article 2(2), (3) and (4) of Directive 78/660, as consolidated by Directives 83/349 and 90/605, be interpreted as meaning that that legislation precludes a law of a Member State which, in response to an infringement by companies of those obligations concerning disclosure and the provision of accurate information imposed on them in order to safeguard "the interests of both members and third parties", allows only members and creditors to seek imposition of a penalty, thereby excluding third parties from any general and effective protection?

(6) Must those directives and, in particular, Article 44(2)(g) EC, Articles 2(1)(f) and 6 of Directive 68/151 and Article 2(2), (3) and (4) of Directive 78/660, as consolidated by Directives 83/349 and 90/605, be interpreted as meaning that that legislation precludes a law of a Member State which, in response to the infringement by companies of those obligations concerning disclosure and the provision of accurate information imposed on them in order to safeguard "the interests of both members and third parties", provides for prosecutory machinery and a system of sanctions which are markedly differentiated, whereby the possibility of the imposition of a punishment upon complaint being made, together with more serious and effective penalties, is reserved solely for infringements occasioning loss to members and creditors?'

39 In Case C-403/02, the Tribunale di Milano 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 be understood as requiring Member States to establish appropriate penalties not only for non-disclosure by commercial companies of balance sheets and profit and loss accounts but also for false

disclosure of such documents, of other company documents addressed to members or to the public, or of any information on a company's assets and liabilities, and economic and financial situation which the company is required to provide in relation to itself or to the group of which it forms part?

(2) Must the concept of the "appropriateness" of the penalty, for the purposes of Article 5 of the EEC Treaty, be understood in terms to be specifically assessed within the legislative scope (both criminal and procedural) of the Member States as requiring a penalty which is "efficacious, effective and genuinely dissuasive"?

(3) Do the combined provisions of the new Articles 2621 and 2622 of the Civil Code, as amended by Legislative Decree No [61/2002], satisfy those criteria: in particular, can Article 2621 of the Civil Code, which summarily punishes by a term of imprisonment of one year and six months offences in connection with false information in balance sheets not occasioning financial loss or occasioning loss but in respect of which no prosecution may be brought under Article 2622 of the Civil Code owing to the absence of a complaint, be described as "effectively dissuasive" and "genuinely appropriate"? Finally, is it appropriate, in terms not least of the specific protection of the collective interest in the "transparency" of the corporate market, and the possibility that that interest may assume a Community dimension, to provide in respect of offences under Article 2622(1) of the Civil Code (those committed in regard to companies not listed on the stock exchange) that proceedings may only be brought upon a complaint by members of the company concerned or its creditors?'

40 By order of the President of the Court of 20 January 2003, Cases C-387/02, C-391/02 and C-403/02 were joined for the purposes of the written and oral procedure and for the judgment.

The questions referred for preliminary ruling

Observations submitted to the Court

41 Mr Berlusconi and Mr Dell'Utri challenge the admissibility of the questions referred for preliminary ruling in Cases C-387/02 and C-403/02. The Italian Government also expresses doubts in that regard.

42 The questions referred, they argue, seek to circumvent application of the new Articles 2621 and 2622 of the Italian Civil Code in such a way as to enable criminal proceedings to be brought on the basis of the former Article 2621 of the Italian Civil Code, a provision which is significantly less favourable to the accused.

43 Even assuming, they argue, that the new Articles 2621 and 2622 of the Italian Civil Code prove to be incompatible with the First or the Fourth Companies Directive, the accused cannot, in the absence of any applicable penal provision of national law, be prosecuted and have a different and more onerous penalty imposed on them on the basis of those directives.

44 They submit that it follows from the Court's case-law that a directive cannot, by itself, give rise to obligations on the part of an individual and for that reason cannot be relied on as such against that individual. Nor can a directive have the effect, by itself and independently of any domestic legislation of a Member State adopted for

its application, of determining or increasing the criminal liability of those who infringe its provisions.

45 The reply sought from the Court, they continue, is irrelevant for the purposes of resolving the disputes pending before the courts which have made the references inasmuch as the former Article 2621 of the Italian Civil Code cannot in any event be applied in the cases in the main proceedings.

46 Mr Berlusconi and Mr Dell'Utri contend that the principle of the retroactive application to an accused person of more favourable criminal legislation, a fundamental right which, in the same way as the principle of legality, of which it constitutes an important aspect, forms part of the Community legal order, precludes such an outcome.

47 The Commission, by contrast, argues that the questions submitted for preliminary ruling are admissible.

48 The admissibility of those questions, it submits, is not affected by any possible application of the principle of legality in the event that the reply to be given by the Court might give rise to incompatibility of the new Articles 2621 and 2622 of the Italian Civil Code with Community law, with the possible consequence that proceedings may be brought on the basis of the former Article 2621 of that code, which is less favourable to the accused.

49 It is, the Commission argues, important to point out that, at the time when the acts giving rise to the criminal proceedings against the accused in the cases in the main proceedings were confirmed, prosecutions could have been brought in respect of those acts, that is to say, on the basis of the former Article 2621 of the Italian Civil Code, and that it was only later that national provisions were adopted which were more favourable to the accused, but the compatibility of which with Community law has been questioned in some regards, with the result that the national court might, if appropriate, be obliged to set aside the application of those national provisions.

50 In such a situation, the Commission continues, it would not be the Community legislation which determines or increases criminal liability. The case would involve simply maintaining the effects of the national legislation in force at the time of the acts and in conformity with Community law, by refraining from the application of later legislation which is more favourable but contrary to Community law.

51 The principle of the primacy of Community law, the Commission argues, precludes the application of new national provisions, which are more favourable to an accused person, to acts which pre-date those provisions if it should turn out that those provisions do not punish in an appropriate manner an infringement of the rules of Community law and are, for that reason, incompatible with Community law, as interpreted by the Court.

Findings of the Court

52 By the questions which they have referred, the national courts which have made the references are essentially seeking to ascertain whether, by reason of certain of their

provisions, the new Articles 2621 and 2622 of the Italian Civil Code are compatible with the requirement imposed by Community law that penalties for infringement of Community law provisions be appropriate (see paragraph 36 of this judgment).

The Community law requirement that penalties be appropriate

53 As a first step, it is necessary to examine whether the requirement that the penalties for offences relating to false accounting, such as those set out in the new Articles 2621 and 2622 of the Italian Civil Code, be appropriate is imposed in Article 6 of the First Companies Directive or follows from Article 5 of the Treaty, which, in accordance with established case-law cited in paragraph 36 of this judgment, means that penalties for infringements of provisions of Community law must be effective, proportionate and dissuasive.

54 It must be stated in this regard that penalties for offences resulting from false accounting, such as the penalties provided for in the new Articles 2621 and 2622 of the Italian Civil Code, are designed to punish serious infringements of the fundamental principle, compliance with which constitutes the core objective of the Fourth Companies Directive, which follows from the fourth recital in the preamble and from Article 2(3) and (5) of that directive, that annual accounts of companies coming within the scope of that directive must give a true and fair view of the company's assets and liabilities, financial position and profit or loss (see, in this regard, Case C-306/99 *BIAO* [2003] ECR I-1, paragraph 72 and the case-law there cited).

55 This finding may, moreover, be transposed to the Seventh Companies Directive, Article 16(3) and (5) of which essentially sets out, in regard to consolidated

accounts, the same provisions as those contained in Article 2(3) and (5) of the Fourth Companies Directive with regard to the annual accounts.

56 Concerning the system of penalties provided for under Article 6 of the First Companies Directive, the wording of that provision in itself indicates that that system is to be understood as covering not only the case of the absence of any disclosure of annual accounts but also the case of the disclosure of annual accounts which have not been drawn up in accordance with the rules prescribed by the Fourth Companies Directive in regard to the content of such accounts.

57 Article 6 of the Fourth Companies Directive is not limited to imposing an obligation on Member States to provide for appropriate penalties in the case of failure to disclose the balance sheet and the profit and loss account, setting down as it does a similar obligation in respect of a failure to disclose those documents in the manner required by Article 2(1)(f) of the First Companies Directive. The latter provision refers expressly to the prospective harmonisation of the rules relating to the content of the annual accounts which was brought about by the Fourth Companies Directive.

58 It follows from the purpose of the Fourth Companies Directive, which supplements, for the same types of companies, the obligations laid down by the First Companies Directive, and in the absence in that directive of general rules on penalties, that, with the exception of the cases covered by the specific exemption contained in Article 51 (3) of the Fourth Companies Directive, the Community legislature did intend to extend the system of penalties referred to in Article 6 of the First Companies Directive to cover infringements of the obligations contained in the Fourth Companies Directive and, in particular, the failure to publish annual accounts which, in respect of their content, satisfy the rules laid down in that regard.

59 By contrast, the Seventh Companies Directive does provide for such a general rule in Article 38(6). It cannot be disputed that that rule also covers the publication of consolidated accounts which have not been drawn up in accordance with the rules laid down in that directive.

60 This difference in content between the Fourth and Seventh Companies Directives may be explained by the fact that Article 2(1)(f) of the First Companies Directive makes no reference whatsoever to consolidated accounts. Article 6 of the First Companies Directive cannot therefore be treated as applying in the case of non-compliance with the obligations relating to consolidated accounts.

61 An interpretation of Article 6 of the First Companies Directive to the effect that it also covers the failure to publish annual accounts drawn up in accordance with the rules laid down in regard to the content thereof is, moreover, confirmed by the context and objectives of the directives in question.

62 As the Advocate General has stressed in points 72 to 75 of her Opinion, it is necessary in this regard to have particular consideration for the fundamental role played by publication of the annual accounts of companies having share capital and a fortiori of the annual accounts drawn up in accordance with the harmonised rules relating to their content, with a view to protecting the interests of third parties, an objective which is stressed in clear terms in the preambles to both the First and the Fourth Companies Directives.

63 It follows 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.

64 The fact none the less remains that, in order to clarify the scope of the requirement that the penalties set out in Article 6 of the First Companies Directive be appropriate, account may usefully be taken of the Court's established case-law on Article 5 of the Treaty, which sets out a similar requirement.

65 According to that case-law, while the choice of penalties remains within their discretion, Member States must ensure in particular that infringements of Community law are penalised under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive (see, inter alia, *Commission* v *Greece*, cited above, paragraphs 23 and 24; Case C-326/88 *Hansen* [1990] ECR I-2911, paragraph 17; Case C-167/01 *Inspire Art* [2003] ECR I-10155, paragraph 62; and Case C-230/01 *Penycoed* [2004] ECR I-937, paragraph 36 and the case-law cited therein).

The principle of the retroactive application of the more lenient penalty

66 Setting aside the applicability of Article 6 of the First Companies Directive to the failure to publish annual accounts, it should be noted that, under Article 2 of the Italian Criminal Code, which sets out the principle that the more lenient penalty should be applied retroactively, the new Articles 2621 and 2622 of the Italian Civil

Code ought to be applied even if they entered into force only after the commission of the acts underlying the prosecutions brought in the cases in the main proceedings.

67 It must be pointed out in this regard that, according to settled case-law, fundamental rights form an integral part of the general principles of law, the observance of which the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories (see, inter alia, Case C-112/00 *Schmidberger* [2003] ECR I-5659, paragraph 71 and the case-law there cited, and Joined Cases C-20/00 and C-64/00 *Booker Aquaculture and Hydro Seafood* [2003] ECR I-7411, paragraph 65 and the case-law there cited).

68 The principle of the retroactive application of the more lenient penalty forms part of the constitutional traditions common to the Member States.

69 It follows that this principle must be regarded as forming part of the general principles of Community law which national courts must respect when applying the national legislation adopted for the purpose of implementing Community law and, more particularly in the present cases, the directives on company law.

The ability to rely on the First Companies Directive

70 The question none the less arises as to whether the principle of the retroactive application of the more lenient penalty applies in the case in which that penalty is at variance with other rules of Community law.

71 It is, however, unnecessary to resolve that question for the purpose of the disputes in the main proceedings as the Community rule in issue is contained in a directive on which the law-enforcement authorities have relied against individuals within the context of criminal proceedings.

72 Admittedly, should the national courts which made the references conclude, on the basis of the replies to be given by the Court, that the new Articles 2621 and 2622 of the Italian Civil Code do not, by reason of certain of their provisions, satisfy the Community law requirement that penalties be appropriate, it would follow, according to the Court's well-established case-law, that the national courts which made the references would be required to set aside, under their own authority, those new articles without having to request or await the prior repeal of those articles by way of legislation or any other constitutional procedure (see, inter alia, Case 106/77 *Simmenthal* [1978] ECR 629, paragraphs 21 and 24; Joined Cases C-13/91 and C-113/91 *Debus* [1992] ECR I-3617, paragraph 32; and Joined Cases C-10/97 to C-22/97 *IN. CO.GE'90 and Others* [1998] ECR I-6307, paragraph 20).

73 The Court has, however, also consistently ruled that a directive cannot of itself impose obligations on an individual and cannot therefore be relied on as such against that individual (see, inter alia, Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others* [2004] ECR I-8835, paragraph 108 and the case-law there cited).

74 In the specific context of a situation in which a directive is relied on against an individual by the authorities of a Member State within the context of criminal proceedings, the Court has ruled 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 the provisions of that directive (see, inter alia, Case 80/86 *Kolpinghuis Nijmegen* [1987] ECR 3969, paragraph 13, and Case C-60/02 *X* [2004] ECR I-651, paragraph 61 and the case-law there cited).

75 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.

76 It is clear from the decisions for referral that, if the new Articles 2621 and 2622 of the Italian Civil Code were to remain unapplied by reason of their incompatibility with Article 6 of the First Companies Directive, the result could be to render applicable a manifestly more severe criminal penalty, such as that provided for under the former Article 2621 of that code, which was in force at the time when the acts resulting in the prosecutions brought in the cases in the main proceedings were committed.

77 A consequence of that kind would be contrary to the limits which flow from the essential nature of any directive, which, as follows from the case-law cited in paragraphs 73 and 74 of this judgment, preclude a directive from having the effect of determining or increasing the liability in criminal law of accused persons.

78 In the light of all of the foregoing, the answer to the questions referred for preliminary ruling must be 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.

Costs

79 Since these proceedings are, for the parties to the main proceedings, a step in the actions pending before the national courts, the decisions on costs are a matter for those courts. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) rules as follows:

In a situation such as that in issue in the main proceedings, 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, 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]