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Press and Information

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Opinion of Advocate General Kokott in Joined Cases C-387/02, C-391/02 and C-403/02

*Silvio Berlusconi and Others*

# ADVOCATE GENERAL KOKOTT CONSIDERS THAT A MORE LENIENT CRIMINAL LAW ADOPTED AFTER THE EVENT MUST NOT BE APPLIED IN SO FAR AS IT IS CONTRARY TO COMMUNITY LAW

*The publication of false accounts is equivalent to a failure to publish accounts; the Member States must therefore provide for effective, proportionate and dissuasive penalties also for false accounting. The failure to apply a subsequent, more lenient criminal law which infringes Community law is compatible with the principle that penalties must be lawful.*

Silvio Berlusconi and Others have been charged in the Italian courts with false accounting, which they are alleged to have committed prior to 2002, the year in which new Italian criminal rules on false accounting entered into force. According to the competent Italian criminal courts, the consequence of applying the new Italian provisions would be that no penalty could be imposed on the defendants. This is because the Italian legislature has made it more difficult to pursue a criminal prosecution, in comparison with the previous legal situation, in particular by the introduction of margins of tolerance, shorter limitation periods and a requirement that members or creditors lodge a criminal complaint.

The Italian courts are uncertain whether this alteration to the law is compatible with Community law. Essentially they wish the Court of Justice to state whether the publication of false accounts is to be treated as equivalent to a failure to publish accounts for the purposes of the relevant EC Directives,[1] and what type of penalties the Member States must provide for false accounting.

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1 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); 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).

Advocate General Kokott opines that, as Community law currently stands, the publication of false accounts must be treated as equivalent to a failure to publish accounts. The Member States must therefore provide for appropriate penalties for cases of the publication of false accounts. Third parties' need for protection is particularly great where a balance sheet has been published but it does not give a true picture of the company's assets, finances and profitability.

The Member States indeed have considerable discretion when creating their national system of penalties. It would be possible to combine criminal provisions and civil-law provisions, as well as those of administrative law. The Member States' discretion is not, however, unlimited. Penalties must in any event be *effective, proportionate and dissuasive*.

*Margins of tolerance*, as now introduced in Italy, do not satisfy the requirements of Community law. The question whether an inaccuracy in a balance sheet is material is determined not solely by the numbers but also by whether the public's trust would be shaken. That requires an overall assessment of all the circumstances of the individual case.

*Limitation rules* are, in the Advocate General's view, admissible as a matter of principle, but they must not be formulated in such a way that the associated penalty in reality never, or hardly ever, applies.

*A requirement that shareholders and creditors have a right to make a criminal complaint* is unobjectionable in so far as the protection of merely their financial interests is concerned. However, there must be in addition a general provision which provides, in the interests of third parties, for effective, proportionate and dissuasive penalties. It must be possible to impose such penalties *ex officio*, irrespective of any financial damage.

As the Advocate General explains in her Opinion, it is for the national court to decide in the individual case whether the new criminal rules comply with the relevant requirements of Community law. Where a more lenient criminal law adopted after the event is incompatible with the requirements of Community law, the national courts are obliged to give priority to the application of Community law and not to apply the more lenient criminal law. It is not necessary for the matter to be brought first before the national Constitutional Court.

The Advocate General also emphasises that the principle that penalties must be lawful (*nullum crimen, nulla poena sine lege*) is not infringed in such a case, as the acts alleged against the defendants were criminal offences under national law at the time when they were committed. At that time, the defendants could not have any expectation that their conduct was not punishable. The rectroactive application of a more lenient, later law is an *exception* to the principle that penalties must be lawful. Such an exception is justified only if the later, more lenient, law is compatible with Community law.

**IMPORTANT: The Advocate General's Opinion is not binding on the Court. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court of Justice are now beginning their deliberations in this case. Judgment will be given at a later date.**