OPINION OF ADVOCATE GENERAL KOKOTT delivered on 14 October 2004 [1]

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1 — Original language: German.

I — Introduction

1. Two Italian courts, the Tribunale di Milano (District Court, Milan) and the Corte di Appello di Lecce (Court of Appeal, Lecce) (hereinafter also called 'the referring courts') have pending before them a number of criminal cases in which the respective defendants are charged with having published false company documents (in Italian, *false comunicazioni sociali*), a practice usually referred to colloquially as 'falsifying accounts'.

2. After the acts in question had been committed and the prosecutions relating to them had been initiated, the Italian legislature relaxed the relevant criminal provisions and made prosecution more difficult than under the previous legislation. Against the background of that legislative amendment, the referring courts wish, in essence, to ascertain the meaning of 'appropriate penalties' in relation to the publication of false company documents. They also ask whether, for the purposes of the relevant company law directives, the publication of *false* company documents is to be treated in the same way as their *non-publication*.

3. In the event that legislation such as the amendment to Italian law is regarded as being contrary to the relevant company law directives, it must also be clarified whether, in criminal proceedings, a more lenient subsequent criminal provision may, despite being contrary to Community law, be applied retroactively for the benefit of a defendant.

II — Legislative framework

A — *Community law*

1. Overview

4. Article 44(1) EC contains a legal basis for the adoption of directives to attain freedom of establishment. Under paragraph 2(g) of Article 44 EC, it is the duty of the Council and the Commission

'[to] coordinat[e] 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 48 with a view to making such safeguards equivalent throughout the Community'.

5. The Community has adopted several company law directives. Of particular relevance to this case are:

— 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 [2] (hereinafter, 'the First Directive' or 'Directive 68/151'); and

— 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 [3] (hereinafter, 'the Fourth Directive' or 'Directive 78/660'),

which, in the case of Italy, are applicable to the following capital companies: *società per azioni* (public companies limited by shares, abbreviated to SpA), *società in accomandita per azioni* (partnerships limited by shares) and *società a responsabilità limitata* (private companies limited by shares, abbreviated to Srl). [4]

6. Regard must also be had to Seventh Council Directive 83/349/EEC of 13 June 1983 based on Article 54(3)(g) of the Treaty on consolidated accounts [5] (hereinafter, 'the Seventh Directive' or 'Directive 83/349'). [6]

2. The relevant provisions of the First Directive

7. Article 2(1)(f) of the First Directive requires Member States to take the measures necessary to ensure that the compulsory disclosure of documents by companies extends at least to the balance sheet and

2 — OJ, English Special Edition 1968 (I), p. 41. Article 58 of the EEC Treaty corresponds to Article 48 EC.

3 — OJ 1978 L 222, p. 11. Article 54(3) of the EEC Treaty corresponds to Article 44(2) EC.

4 — See Article 1 of the First Directive and Article 1(1) of the Fourth Directive.

5 — OJ 1983 L 193, p. 1. Article 54(3) of the EEC Treaty corresponds to Article 44(2) EC.

6 — The First, Fourth and Seventh Directives were most recently amended by Annex II(4) to the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded (OJ 2003 L 236, p. 338). The provisions relevant to these proceedings were, however, unless otherwise indicated hereinafter, already contained in the original versions of the directives. Moreover, for reasons of time, the amendments to the First Directive introduced by Article 1 of Directive 2003/58/EC of the European Parliament and of the Council of 15 July 2003 (OJ 2003 L 221, p. 13) are likewise immaterial for the purposes of this case.

the profit and loss account for each financial year. The provision also announces that, within two years of the adoption of the First Directive, the Council is to adopt a further directive to coordinate the contents of balance sheets and profit and loss accounts.

9. Under the first indent of Article 6 of the First Directive, Member States are to 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)'.

8. Article 3(1) to (3) of the First Directive provides as follows:

3. The relevant provisions of the Fourth Directive

10. Article 2 of the Fourth Directive provides inter alia:

'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.

'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. 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.

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

3. A copy of the whole or any part of the documents or particulars referred to in Article 2 must be obtainable by application in writing at a price not exceeding the administrative cost thereof ...'.

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.'

11. The first subparagraph of Article 47(1) of the Fourth Directive provides 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.'

12. Article 47(1a) of the Fourth Directive [7] reads inter alia as follows:

'The Member State [of the entity concerned] may exempt that entity from publishing its accounts in accordance with Article 3 of Directive 68/151/EEC, provided that those accounts are available to the public at its head office, where ... .

Copies of the accounts must be obtainable upon request. The price of such a copy may not exceed its administrative cost. Appropriate sanctions must be provided for failure to comply with the publication obligation imposed in this paragraph.'

13. Under Article 51(1) of the Fourth Directive, companies are required to have their annual accounts audited by one or more persons approved to carry out audits of annual accounts under national law.

4. Provisions of the Seventh Directive

14. Article 16 of the Seventh Directive contains, in respect of the consolidated accounts of groups of undertakings, provisions which are in essence the same as those contained in Article 2 of the Fourth Direc-

7 — Fourth Directive as amended by Council Directive 90/605/EEC of 8 November 1990 amending Directive 78/660/EEC on annual accounts and Directive 83/349/EEC on consolidated accounts as regards the scope of those Directives (OJ 1990 L 317, p. 60; hereinafter 'Directive 90/605').

tive; consolidated accounts must, in particular, give a true and fair view of the assets, liabilities, financial position and profit or loss of the undertakings included therein taken as a whole. Article 37 of the Seventh Directive corresponds to Article 51 of the Fourth Directive and provides for the compulsory auditing of consolidated accounts. Article 38 (1) of the Seventh Directive makes the same reference to Article 3 of the First Directive in connection with the publication of consolidated accounts as the Fourth Directive (Article 47(1)(1)) does in connection with annual accounts. Moreover, Article 38(6) of the Seventh Directive requires Member States to provide for appropriate sanctions for failure to comply with that publication obligation.

B — *National law*

15. The provisions of Italian law which are of interest here were fundamentally amended by Decreto Legislativo [8] No 61 of the President of the Republic of 11 April 2002, which entered into force on 16 April 2002 (hereinafter, 'Legislative Decree No 61/02'). [9] I shall therefore describe below, first, the previous legislation and, then, the new legislation in force at present.

1. Previous legislation

16. Under the previous legislation, the publication of false company documents was punishable in Italy under Article 2621 of the Codice civile [10] (hereinafter, 'the old Article 2621 of the Italian Civil Code'). That provision was worded as follows:

'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 a fine of LIT 2 million to 20 million:

(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; ...'.

17. In this earlier version, Article 2621 of the Italian Civil Code provided for an indictable

8 — Legislative Decree.

9 — The Decreto Legislativo is reproduced in GURI No 88 of 15 April 2002, p. 4. It is based on an enabling provision contained in Article 11 of Law No 366 of 3 October 2001 (GURI No 234 of 8 October 2001).

10 — Italian Civil Code.

offence (*delitto*) which could be prosecuted *ex officio* and was subject to a limitation period of 10 years. If interrupted, that period could be extended by another five years. [11]

18. The Italian courts took the view that Article 2621 of the Civil Code served to protect not only the specific interests of members and creditors of companies but also the general interest inherent in regulating the way in which commercial companies operate. The protective function of that provision extended to any activity intended to alter the objective position of a company. [12]

19. Under the previous legislation, the fact that the publication of false company documents within the meaning of the old Article 2621 had occasioned loss on an appreciable scale to the company was regarded as an aggravating factor. In those circumstances, the penalty increased by up to one half, pursuant to Article 2640 of the Italian Civil Code (hereinafter, 'the old Article 2640 of the Italian Civil Code').

11 — See paragraph 42 of the order for reference in Case C-391/02.

12 — See to this effect the findings of the Corte di Appello di Lecce in paragraphs 19 and 20 of its order for reference in Case C-391/02, with reference to Judgment No 6889 of the Corte Suprema di Cassazione (Supreme Court of Cassation), Fifth Chamber, of 20 February 2001.

2. New legislation

20. Pursuant to Legislative Decree No 61/02, the old Article 2621 (among others) of the Italian Civil Code was replaced by the following provisions:

'*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 or omissions 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 that 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%.'

21. The new Article 2621 can be regarded as a residual provision in relation to the new Article 2622 of the Italian Civil Code. [13] Because of the lighter penalty which the new Article 2621 prescribes by comparison with the previous legislation, the conduct for which it provides now constitutes only a summary offence (*contravvenzione*). The correspondingly shorter limitation period applicable to that offence is now three years. If that period is interrupted, limitation becomes effective at the latest after four years and six months in total.

22. As regards the newly-introduced requirement of a complaint, laid down in the first paragraph of the new Article 2622 of the Italian Civil Code, Article 5 of Legislative Decree No 61/02 lays down a transitional rule to the effect that the period for lodging complaints in respect of acts committed before the entry into force of Legislative Decree No 61/02 is to run from the date of its entry into force.

23. Article 2630 of the Italian Civil Code, as amended by Legislative Decree No 61/02 (hereinafter, 'the new Article 2630 of the Italian Civil Code') provides for fines of from EUR 206 to EUR 2 065 for failure to submit company documents prescribed by law within the time-limit. The fine increases by a third where balance sheets are not submitted at all.

24. Mention must also be made of a new provision laying down administrative fines for companies, which was likewise introduced by Legislative Decree No 61/02. However, it was incorporated not into the Italian Civil Code but as Article 25b into Legislative

13 — The Tribunale di Milano expressly says as much in its order for reference in Case C-403/02.

Decree No 231 of 8 June 2001 [14] (hereinafter, 'Legislative Decree No 231/01') and governs the 'administrative liability of companies' [15] as follows:

'1. For company law offences governed by the Civil Code, where they have been committed in the interests of the company by managers, directors or receivers, or by persons under their supervision if the act would not have occurred had the former exercised supervision in accordance with the obligations attaching to their position, the following fines shall apply:

(a) for the summary offence of publishing false company documents, provided for in Article 2621 of the Civil Code, a fine in the amount of 100 to 150 units;

(b) for the summary offence of publishing false company documents to the detriment of members or creditors, provided for in the first paragraph of Article 2622 of the Civil Code, a fine in the amount of 150 to 330 units;

(c) for the summary offence of publishing false company documents to the detriment of members or creditors, provided for in the third paragraph of Article 2622 of the Civil Code, a fine in the amount of 200 to 400 units;

...

3. If the entity has derived an appreciable profit from the commission of the offences referred to in paragraph 1, the fine shall be increased by a third.'

3. General provisions of criminal law

25. The principle of legality in relation to crime and punishment is laid down in the second paragraph of Article 25 of the Italian Constitution and in the second paragraph of Article 2 of the Codice penale. [16]

26. In the event of a discrepancy between the criminal provision applicable at the material time and a subsequent criminal provision, the third paragraph of Article 2 of the Italian Criminal Code provides that the applicable legislation must always be that whose provisions are more favourable to the defendant, unless a final judgment has already been given in the case.

14 — GURI No 140 of 19 June 2001.

15 — The fact that these fines constitute *penalties for companies* is clear from the heading of Article 3 of Legislative Decree No 61/02 and from the general scheme of Legislative Decree No 231/01, which is concerned with the administrative liability of legal persons, companies and associations, both with and without legal personality ('responsabilità amministrativa delle persone giuridiche, delle società e delle associazioni anche prive di personalita giuridica').

16 — Italian Criminal Code.

27. As for the legislation governing limitation periods applicable to criminal prosecution, Italian law provides in particular as follows. Under Article 157 of the Italian Criminal Code, limitation extinguishes the offence inter alia after the following periods:

— ten years, in the case of an indictable offence for which the law prescribes a term of imprisonment of no less than five years;

— five years, in the case of an indictable offence for which the law prescribes a term of imprisonment of less than five years or a fine;

— three years, in the case of a summary offence for which the law prescribes a term of imprisonment;

The third paragraph of Article 160 of the Italian Criminal Code provides that, if the limitation period is interrupted, time starts to run again from the day of the interruption. If there is more than one interruption, time runs from the last such interruption. However, the periods laid down in Article 157 must not under any circumstances be extended by more than half.

III — Facts, main proceedings and questions referred

A — *General*

28. The defendants in the three sets of proceedings are in each case charged with having published false company documents, all the acts in question having been committed, and the criminal proceedings relating to them having been initiated, prior to the entry into force of Legislative Decree No 61/02, that is to say, at a time when the old Article 2621 of the Italian Civil Code was still in force.

29. In each case, Legislative Decree No 61/02 entered into force during the criminal proceedings. The defendants are therefore now seeking application of the new Articles 2621 and 2622 of the Italian Civil Code, which, according to the information from the referring courts, would have the effect of exempting them from punishment.

30. The referring courts' questions relate essentially to the following aspects of the new legislation:

31. In both the new Article 2621 and the new Article 2622 of the Italian Civil Code, the penalty for publishing false company

documents has been significantly reduced by comparison with the previous legislation. With regard to the new Article 2621 of the Italian Civil Code, for example, the Tribunale di Milano states, in Case C-403/02, that 'summary offences are punishable by sentences which are derisory in quantitative terms', and that the penalties provided for are 'almost always less than two years' imprisonment and therefore fall within the scope of suspended sentences'.

32. A comparison of the new Article 2621 and the new Article 2622 of the Italian Civil Code shows that the new statutory rules differentiate according to whether or not the publication of false company documents occasions loss to members or creditors. Only where such loss does occur is the act still classified as an indictable offence (new Article 2622 of the Italian Civil Code), it being otherwise classified merely as a summary offence (new Article 2621 of the Italian Civil Code).

33. The classification of an act as an indictable or a summary offence not only results in a different penalty but also has other far-reaching practical consequences. Thus, for example, the punishment of ancillary offences such as money laundering or the receipt of stolen goods presupposes that the principal offence with which the ancillary offences are connected (the connecting factor) is indictable; if, however, it is only summary, like that created by the new Article 2621 of the Italian Civil Code, such ancillary offences cannot be established.

34. Moreover, the two new criminal provisions at issue require, as a subjective element additional to the intention to deceive, an intention to secure some form of enrichment.

35. Under both the new Article 2621 and the new Article 2622 of the Italian Civil Code, criminal liability is excluded where the act does not distort to an appreciable extent the representation of the profit or loss, assets, liabilities and financial position of the company or group. This follows from the tolerance limits laid down in the third and fourth paragraphs of the new Article 2621 and in the fifth and sixth paragraphs of the new Article 2622 of the Italian Civil Code.

36. The limitation period for criminal prosecution under the new Article 2621 is significantly shorter than under the previous legislation. Since that period starts to run as soon as the offence has been committed, the — often complicated and protracted — preliminary investigation and the judicial proceedings, which regularly involve three tiers of judicial bodies, usually cannot be completed before limitation becomes effective.

37. Criminal prosecution under the new Article 2622 of the Civil Code is conditional upon the lodging of a complaint by the injured party, unless the undertaking in

question is listed on the stock exchange or commission of the offence is detrimental to the State, other public bodies or the European Communities. [17]

38. The Public Prosecutors acting in the main proceedings consider that, in view of its characteristics as described above, the new legislation now in force is contrary to the Italian Constitution and Community law.

B — *Case C-387/02, Silvio Berlusconi*

39. The defendant, Silvio Berlusconi, is charged, as chairman and majority shareholder of Fininvest SpA and other undertakings belonging to the same group, with having published false company documents for the years 1986 to 1989. According to the bill of indictment, the conduct giving rise to the offence was aimed at concealing financial transactions and at accumulating liquid reserves [18] not disclosed in the company accounts in order then to use them for secret and illegal purposes. The charge in respect of this conduct was brought under the old Article 2621 of the Italian Civil Code. [19]

40. In the defendant's submission, following the entry into force of Legislative Decree No 61/02, only the new Article 2621 of the Italian Civil Code is now applicable. This means, however, that prosecution of the offence is already time-barred. Indeed the time bar came into operation long before the criminal proceedings were initiated. Application of the new Article 2622 of the Italian Civil Code is precluded because a valid complaint was not lodged and, at the material time, the undertakings concerned were not listed on the stock exchange, with the result that an *ex officio* prosecution is likewise ruled out.

41. By order of 26 October 2002, the Tribunale di Milano, before the First Criminal Division of which Mr Berlusconi and others are being tried, stayed proceedings and referred to the Court for a preliminary ruling three questions which can be summarised as follows: [20]

(1) Does Article 6 of Directive 68/151 concern not only cases of failure to publish the balance sheet and profit and

17 — The main proceedings do not concern either an undertaking listed (at the material time) on the stock exchange or offences detrimental to the State, other public bodies or the European Communities.

18 — Also known colloquially as a 'slush fund'.

19 — The documents in the main proceedings and the supplementary information provided by the defendant Berlusconi show that the charge is also based on other provisions, such as the old Article 2640 of the Italian Civil Code.

20 — See also OJ 2003 C 19, p. 10.

loss account, but also cases where those documents are published but their contents are false, given that the harm to the interests of members and third parties is clearly greater in the latter case? Is the directive intended in that respect to lay down a minimum level of protection at Community level leaving it to the Member States to put in place means of protection against the submitting of false balance sheets or the publishing of false company accounts?

(2) Do the criteria of effectiveness, proportionality and dissuasiveness, which the penalties to be adopted by the Member States must satisfy in order to be regarded as 'appropriate', refer to the nature or type of penalty considered in the abstract, or rather 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 Directives 78/660, 83/349 and 90/605, upon which national measures relating to the drafting and contents of annual accounts and annual reports, in particular, of capital companies, must be based, to be interpreted as precluding a Member State from setting minimum thresholds below which inaccurate statements in annual accounts and annual reports relating to companies limited by shares, partnerships limited by shares and limited liability companies are not punishable?

C — *Case C-391/02, Sergio Adelchi*

42. On 9 January 2001, the Tribunale di Lecce found the defendant, Sergio Adelchi, guilty at first instance under the old Article 2621 of the Italian Civil Code of having published, in the years 1992 and 1993, false company documents relating to the companies La Nuova Adelchi Srl and Calzaturificio Adelchi Srl. Mr Adelchi was the sole director of those companies. The balance sheets relating to them were indisputably false because false invoices had been issued and fictitious imports and exports in excess of the Community customs limits had been declared. Those practices had the effect of distorting the costs and sales figures of both companies.

43. The defendant lodged an appeal against the judgment of the trial court before the Corte di Appello di Lecce (Court of Appeal, Lecce). In his submission, following the entry into force of Legislative Decree No 61/02, the legislation applicable, if any, is now the new

Article 2621 of the Italian Civil Code. In this regard, the defendant contends that limitation has become effective and, moreover, that the profit or loss, assets, liabilities and financial position of the companies of which he is director were not distorted to an appreciable extent.[21] Application of the new Article 2622 of the Italian Civil Code is precluded from the outset, since a valid complaint was not lodged and, moreover, the undertakings concerned are not listed on the stock exchange, with the result that an *ex officio* prosecution is likewise ruled out.

44. By order of 7 October 2002, the Corte di Appello di Lecce, Criminal Division, stayed the proceedings before it and referred 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 68/151 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?

21 — The pre-tax financial results for the year were not distorted by more than 5%, nor the net assets by more than 1% (see the third paragraph of the new Article 2621 of the Italian Civil Code).

(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 prosecution 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?'

D — *Case C-403/02, Marcello Dell'Utri and Others*

45. The defendants Marcello Dell'Utri, Romano Luzi and Romano Comincioli are charged, inter alia, with having falsified balance sheets in the period up to 1993. [22] At the time of their commission, those acts were punishable offences under the old Article 2621 and the old Article 2640 of the Italian Civil Code. Since the entry into force of Legislative Decree No 61/02, they have fallen within the scope of the new Article 2622 of the Italian Civil Code.

22 — As the defendant Dell'Utri explains at greater length in his written observations, his case concerns an allegation of accounting irregularities in the balance sheets of the firm Publitalia '80 SpA, which operated an advertising concession for the Fininvest Group and of which Mr Dell'Utri was chairman. The charge is based, inter alia, on the alleged accumulation of slush funds ('hidden reserves').

46. By order of 29 October 2002, the Tribunale di Milano, Fourth Criminal Division, stayed proceedings and referred 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 new Articles 2621 and 2622 of the Civil Code, as amended by Legislative Decree

No 61 of 11 April 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 non-disclosure of 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?'

E — *Procedure before the Court*

47. By order of 20 January 2003, the President of the Court of Justice joined the three cases, C-387/02, C-391/02 and C-403/02, for the purposes of the written and oral procedures and the judgment.

48. The defendants Berlusconi and Dell'Utri, the Procura Generale [23] attached to the Corte di Appello di Lecce, the Italian Government and the Commission have submitted written observations to the Court. At the hearing on 13 July 2004, agents representing the defendants Berlusconi, Adelchi and Dell'Utri, the Procura della Repubblica [24] attached to the Tribunale ordinario di Milano, the Principal Public Prosecutor's Office attached to the Corte di Appello di Lecce, the Italian Government and the Commission presented oral argument to the Court.

IV — Legal assessment

A — *Admissibility of the reference for a preliminary ruling*

49. The defendants Berlusconi and Dell'Utri and the Italian Government express doubts as to the admissibility of the references for a preliminary ruling.

1. Description of the relevant facts

50. The defendant Dell'Utri takes the view first of all that the reference for a preliminary

23 — Principal Public Prosecutor's Office.

24 — Public Prosecutor's Office.

ruling in Case C-403/02 does not contain any description of the relevant facts in the main proceedings and is therefore inadmissible.

51. I do not share that concern. It is true that the Tribunale di Milano has confined itself to informing the Court in very few words that the persons being tried before it are charged, inter alia, with the falsification of balance sheets in the period up to 1993, that that act was originally a punishable offence under the old Article 2621 and the old Article 2640 of the Italian Civil Code, and that it now falls under the new Article 2622 of the Italian Civil Code. However, those details are sufficient for an understanding of the questions referred to the Court.

52. It is of course not the task of the Court in the context of a reference for a preliminary ruling to comment on how Italian national criminal law is to be interpreted and applied in this particular instance. More specifically, it will not give a ruling on the substantive question whether or not the defendant has committed the offence of falsifying balance sheets. For that reason, it is not crucial for the Court to be told in detail which acts the defendant is alleged to have committed. Rather, it is sufficient for it to be aware that certain acts — described in no greater detail than that — have led to the bringing of a charge of falsification of balance sheets and that that charge is currently the subject of criminal proceedings.

53. Moreover, the two key questions which the Court has to address in this case, namely whether, for the purposes of the relevant company law directives, [25] the publication of *false* company documents is to be treated in the same way as the *non-publication* of such accounts, and what 'appropriate penalties' means in relation to the publication of false company documents, can usefully be answered on the basis of the summary information which has been submitted.

2. Description of the relevant legislation

54. The defendants Berlusconi and Dell'Utri also take the view that the orders for reference in Cases C-387/02 and C-403/02 give only an abridged account of the relevant national legislation, referring as they do all but exclusively to the old Article 2621, the new Article 2621 and the new Article 2622 of the Italian Civil Code, without presenting an overall picture of the Italian provisions applicable to the publication of false company documents and those adopted in implementation of the company law directives.

55. I do not share this concern either. The purpose of the requirement of a sufficient

25 — For the sake of simplicity, this term will henceforth be used to refer collectively to the First, Fourth and Seventh Directives.

description of the law involved in the case is, first, to enable the Court to arrive at an interpretation of Community law which may be of use to the national court and, second, to give the governments of the Member States and other interested parties the opportunity to submit observations pursuant to Article 23 of the Statute of the Court of Justice. [26] The question whether or not the information contained in an order for reference is sufficient must be examined in the light of that objective.

56. In both the references for a preliminary ruling at issue the essential elements of the old and the new Italian legislation are described and compared. In particular, the referring courts have described to a sufficient extent the provisions which they have been called upon to apply in the criminal proceedings pending before them. This case is therefore in no way comparable with those proceedings in which the Court has declared the questions referred to be inadmissible because of a serious failure to give an indication of the facts and law involved. [27]

57. It is true to say that the orders for reference do not also consider all the other provisions adopted in Italy in transposition of the company law directives. Nor, as the Commission observes, do they, for example, contain any reference to the possibility of annulling company resolutions, [28] or to the civil liability of company directors in the event of falsification of balance sheets. However, the lack of such additional information does not in any way make the orders for reference misleading or unusable. Supplementary information of this kind is not essential as a basis for the answers to be given to the questions referred or for the interested parties' pleadings. Indeed, a party which considers it useful can — as in this case — introduce such information into the preliminary ruling proceedings by submitting observations under Article 23 of the Statute of the Court of Justice.

3. Relevance to the decision

58. Finally, the defendants Berlusconi and Dell'Utri and the Italian Government also consider the reference for a preliminary ruling to be inadmissible on the ground that the questions raised are irrelevant to the main proceedings in each case. In view of the principle of legality in relation to crime and punishment (*nullum crimen, nulla poena sine lege*) and the principle of the retroactive application of more lenient criminal provisions, it is established from the outset that the charges must in any event be heard under the new legislation, that is to say, the new Article 2621 and the new Article 2622 of

26 — Judgment in Joined Cases C-480/00, C-481/00, C-482/00, C-484/00, C-489/00, C-490/00, C-491/00, C-497/00, C-498/00 and C-499/00 *Ribaldi* [2004] ECR I-2943, paragraph 73, order in Joined Cases C-438/03, C-439/03, C-509/03 and C-2/04 *Cannito and Others* [2004] ECR I-1605, paragraphs 6 to 8, with further references, judgment in Joined Cases C-320/90 to C-322/90 *Telemariscabruzzo and Others* [1993] ECR I-393, paragraph 6.

27 — See, for example, the order in *Cannito* (in particular paragraphs 9 and 10) and the judgment in *Telemariscabruzzo* (in particular paragraphs 8 and 9), both cited in footnote 26.

28 — For example, annulment of the resolution adopting a company's balance sheet.

the Italian Civil Code, as amended by Legislative Decree No 61/02. The provision in force at the material time, the old Article 2621 of the Italian Civil Code, cannot be applied under any circumstances. Neither a preliminary ruling by the Court of Justice nor the application for review as to constitutionality made by the referring courts to the Corte Costituzionale (Italian Constitutional Court) [29] can do anything to change this. There is therefore no need to examine the compatibility of the new legislation with Community law.

59. That view is unconvincing for the following reasons:

60. The questions referred in all three cases relate to specific criminal proceedings. It is crucial to the continuation of those criminal proceedings to ascertain whether provisions of national law such as those introduced by the Italian legislature by means of Legislative Decree No 61/02 infringe the company law directives or are compatible with them. That question would be irrelevant to the continuation of the main proceedings only *if it were in fact established from the outset* that provisions such as the new Article 2621 and the new Article 2622 of the Italian Civil Code are applicable, as more lenient criminal provisions, *in any event*, that is to say, even if they are contrary to Community law. That is not the case, however. On the contrary, it is by no means axiomatic that more lenient criminal provisions should be applicable retroactively despite the fact that they are contrary to Community law. Indeed, it is at least equally conceivable that new criminal legislation should, in so far as it infringes the provisions of Community law, *be set aside*, and the previous legislation in force at the material time applied instead. [30] The Court has not as yet addressed this issue in any depth.

61. Moreover, contrary to the view expressed by the defendants, the question whether the answers given by the Court may subsequently be used in proceedings before the Italian Constitutional Court has no bearing on the admissibility of the questions referred. The relevance of the questions referred is to be assessed by reference not to any subsequent proceedings before the Italian Constitutional Court but to the criminal proceedings currently pending before the national courts. Those courts have an obligation *under Community law*

29 — According to the information from the referring courts, proceedings for review as to constitutionality before the Corte Costituzionale might be concerned, for example, with whether Legislative Decree No 61/02 is contrary to the Italian Constitution because the legislature failed to fulfil Italy's obligations under Community law.

30 — See in this regard point 131 et seq. of this Opinion.

to set aside *of their own motion* any provision of national law which infringes Community law. The prior completion of proceedings before the Italian Constitutional Court is unnecessary for this purpose. [31]

62. Even if it were *assumed* that the referring courts had raised their questions *exclusively* with a view to the preparation of subsequent proceedings for judicial review as to constitutionality before the Italian Constitutional Court, the task of determining whether their questions are necessary would have to be left first of all to those three national courts, in accordance with settled case-law. For, according to that case-law, it is solely for the national court before which a dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Where the questions referred concern the interpretation of Community law, the Court is therefore bound in principle to give a ruling. It can refuse to give a preliminary ruling on a question submitted by a national court only where it is quite obvious that the ruling sought by that court on the interpretation or validity of a provision of Community law bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it. [32]

63. In this case, it is by no means obvious that the questions referred bear no relation to the actual facts or purpose of what may be preparatory proceedings for an application to the Italian Constitutional Court, or that they relate to a hypothetical problem. It is true that the Italian Constitutional Court recently declared inadmissible applications for judicial review as to constitutionality brought by three Italian courts in connection with the new Article 2621 and the new Article 2622 of the Italian Civil Code. [33] On the same day, however, in other proceedings for judicial review as to constitutionality, it expressly deferred its examination of those *aspects of Community law* which may have a bearing in particular on the first paragraph of Article 117 of the Italian Constitution [34] until the Court gives a preliminary ruling in these proceedings. Indeed, in so doing, it made direct reference to Joined Cases C-387/02, C-391/02 and C-403/02, pending before the Court of Justice. [35] Against that background also, therefore, it is not possible to contend that the questions referred to the Court for a preliminary ruling lack relevance.

31 — For further detail in this regard, see points 132 et seq. of this Opinion.

32 — *Ribaldi*, cited in footnote 26, paragraph 72, Case C-306/99 *BIAO* [2003] ECR I-1, paragraphs 88 and 89, Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraphs 38 and 39, and Case C-415/93 *Bosman* [1995] ECR I-4921, paragraphs 59 to 61.

33 — Judgment No 161/2004 of the Italian Constitutional Court of 26 May/1 June 2004.

34 — The first paragraph of Article 117 of the Italian Constitution provides that legislative power is to be exercised by the State and the Regions with due regard for the Constitution and for commitments deriving from Community law and international obligations.

35 — Order No 165/2004 of the Italian Constitutional Court of 26 May/1 June 2004.

4. Interim conclusion

64. For the reasons given I consider the three references for a preliminary ruling to be admissible. [36]

B — *Substantive assessment of the questions referred*

65. For reasons of clarity, it is appropriate to group the various questions raised by the referring courts according to their substance and to classify them under two major subject headings: on the one hand, the question of the scope *ratione materiae* of the first indent of Article 6 of the First Directive, and, on the other hand, the question of the appropriateness of penalties for the publication of false company information in annual accounts.

66. In the case of consolidated accounts, the same issues of interpretation arise in connection with Article 38(6) of the Seventh Directive; to that extent, the following comments apply *mutatis mutandis*.

1. The scope *ratione materiae* of Article 6 of the First Directive

67. First, the referring courts all seek, in essence, to ascertain whether the first indent of Article 6 of the First Directive requires Member States to provide for *appropriate penalties* only in cases where annual accounts [37] are not disclosed at all, or whether it also applies to cases where substantively false annual accounts are published. [38]

68. According to its wording, the first indent of Article 6 of the First Directive places an obligation on Member States to provide for appropriate penalties in case of *failure* to disclose documents as required by Article 2 (1)(f) of that directive. [39]

69. Unlike the Commission and the two Public Prosecutors, the defendants Berlusconi and Dell'Utri, in common with the Italian Government, proceed on the assumption that, in view of the above wording, the obligation to provide for appropriate penalties entails only a minimum degree of harmonisation and does not extend to the

36 — I would point out purely incidentally that the Court has hitherto always found questions referred for a preliminary ruling in circumstances similar to these to be admissible. See the judgment in Case C-341/94 *Allain* [1996] ECR I-4631, paragraphs 12 and 13, the judgment in Joined Cases C-304/94, C-330/94, C-342/94 and C-224/95 *Tombesi and Others* [1997] ECR I-3561, paragraphs 39 and 40, and the order in Case C-235/02 *Saetti and Frediani* [2004] ECR I-1005, paragraph 26. See also the comments in points 25 to 27 of my Opinion of 10 June 2004 in Case C-457/02 *Niselli* [2004], judgment of 11 November 2001, ECR I-16853 at I-16555.

37 — For the meaning and composition of annual accounts, see Article 2(1) of the Fourth Directive. For the sake of simplicity, I shall use the term 'annual accounts' from now on.

38 — See to this express effect the first question in Cases C-387/02 and C-403/02 respectively. The order for reference in Case C-391/02 already presupposes, in paragraph 35, that appropriate penalties must also be prescribed in the event of disclosure of substantively false annual accounts.

39 — Article 38(6) of the Seventh Directive lays down a substantively identical rule in relation to the consolidated accounts of groups of undertakings.

disclosure of *false* annual accounts. In their submission, the First Directive provides only for 'formal disclosure'. The substance of such disclosure is not defined until the Fourth Directive. However, that directive does not actually contain a separate provision on penalties comparable to Article 6 of the First Directive.

70. It must be pointed out first of all in this regard that the wording of Article 6 of the First Directive is by no means so clear-cut. It can quite easily also be interpreted as meaning that penalties are to be provided for not only in the event of failure to disclose *per* se but also in the event of failure to disclose *in the manner prescribed*, that is to say, in the event of failure to disclose *substantively accurate* annual accounts for the purposes of Article 2 and the first subparagraph of Article 47(1) of the Fourth Directive in conjunction with Article 3 of the First Directive.

71. None the less, even from the narrow perspective favoured by the defendants and the Italian Government, the following must be taken into account: it is settled case-law that, in interpreting a provision of Community law, it is necessary to consider not only its wording but also the context in which it occurs and the objects of the rules of which it forms part. [40] An examination of the legislative context and objects of the first Directive shows the following.

72. On the one hand, protection of the interests of third parties is a particularly important factor in any directive. This is expressly emphasised by the Treaty itself in the mandate it gives to the Community legislature (Article 44(2)(g) EC). Moreover, the importance of protecting third parties is given prominent expression in the second and fourth recitals in the preamble to the First Directive, as well as in the first recital in the preamble to the Fourth Directive and the first recital in the preamble to the Seventh Directive. The disclosure obligation laid down in those directives is intended to enable third parties to obtain information on the essential documents of a company, such as, for example, its annual accounts.

73. On the other hand, Article 2(3) of the Fourth Directive and the fourth recital in the preamble to that directive lay down the fundamental principle that the annual accounts must give a true and fair view of the company's assets, liabilities, financial position and profit or loss. [41] That principle has a role to play not only within the Fourth

40 — See, inter alia, the judgment in Case C-294/01 *Granarolo* [2003] ECR I-13429, paragraph 34, with further references.

41 — See also in this respect the judgment in *BIAO* (cited in footnote 32, paragraph 72 et seq.), as well as the judgments in Case C-275/07 *DE + ES Bauunternehmung* [1999] ECR I-5331, paragraphs 26 and 27, and Case C-234/94 *Tomberger* [1996] ECR I-3133, paragraph 17, rectified by order of the Court of Justice of 10 July 1997, not published in the ECR. The same follows, in relation to consolidated accounts, from Article 16(3) of the Seventh Directive in conjunction with the fifth recital in the preamble to that directive.

Directive but also in the interpretation and application of the First Directive. For, since the Fourth Directive fills the lacunae left by the First Directive in relation to the substance of annual accounts, [42] and both directives refer to each other, in one case expressly, [43] for that purpose, they must be read and interpreted in conjunction with each other.

74. Consequently, when it comes to interpreting and applying Article 6 of the First Directive, particular consideration must be given both to the protection of the interests of third parties and to the principle of the need to give a true representation of the company's assets, liabilities, financial position and profit or loss. Not only present but future business partners, in particular potential creditors and investors from other Member States, must be able at any time to obtain a reliable picture of an undertaking in order better to be able to assess the risks involved in entering into a business relationship with it and the funds it has at its disposal. Being external to the company, they are by definition in greater need of protection than, say, its principal members, who have disproportionately greater knowledge of the assets, liabilities, financial position and profit or loss of the undertaking concerned and are involved in, or can at least obtain information on, the decisions it takes. [44] The fact that all third parties are able to consult companies' annual accounts wins the trust of potential business partners and therefore ultimately stimulates business activity — at both the domestic and cross-border level — on the internal market. [45]

75. The need for protection is particularly great in a situation where annual accounts are disclosed but present a false picture of the company's assets, liabilities, financial position and profit or loss. Whereas, in a situation where a company's annual accounts are not disclosed, a third party is forewarned and certainly cannot place his trust initially in a given representation of the assets, liabilities, financial position and profit or loss of the company concerned, he is likely to find it extremely difficult, if not impossible, without an in-depth knowledge of the undertaking, to identify errors in annual accounts which have been disclosed. The view taken by the Italian Government, to the effect that anyone can check the probity of annual accounts which have been disclosed, is therefore unconvincing. On the contrary, third parties will as a rule place their trust in

42 — Judgments in Case C-97/96 *Daihatsu Deutschland* [1997] ECR I-6843, paragraph 14, and Case C-191/95 *Commission* v *Germany* [1998] ECR I-5449, paragraph 66.

43 — Article 47(1) of the Fourth Directive refers expressly to the First Directive; conversely, Article 2(1)(f) of the First Directive announces the adoption of a directive concerning coordination of the contents of balance sheets and of profit and loss accounts, which was effected by the Fourth Directive.

44 — On the question of the lack of knowledge among third parties of the company's accounting and financial position, see also the judgment in *Daihatsu Deutschland* (cited in footnote 42, paragraph 22). Advocate General Cosmas likewise points out in point 32 of his Opinion in Case C-191/95 *Commission* v *Deutschland* [1998] ECR I-5449, at I-5452, that the purpose of the requirement to disclose annual accounts 'is the provision of information to persons who have insufficient knowledge of the company's situation and its plans, precisely in order to enable them to judge whether it is advisable to enter into any kind of legal relationship with it'.

45 — The importance of directives adopted on the basis of Article 44(2)(g) EC in achieving the internal market is also emphasised by the Court in the judgment in *Daihatsu Deutschland* (cited in footnote 42, paragraph 18); similarly, see the judgment in Case 32/74 *Haaga* [1974] ECR 1201, paragraph 6.

the probity of the statements made in annual accounts which have been disclosed. It is therefore all the more important to protect that trust — and, ultimately, the trust of the public and the markets. [46]

76. It is therefore clear from the legislative context of Article 6 of the First Directive and from the meaning and purpose of that provision that Member States have an obligation to provide for appropriate penalties not only in the event of failure to disclose annual accounts but also and in particular in the event of disclosure of substantively false annual accounts.

77. It is not possible to raise, as against that conclusion, the objection that the wording of the Fourth Directive does not contain separate obligations requiring Member States to provide for penalties. [47] For, in view of the aforementioned relationship between the First and the Fourth Directives, it makes absolutely no difference whether the Fourth Directive itself contains a provision comparable to Article 6 of the First Directive. It is precisely because the Fourth Directive adds to the substance of the First Directive and the first subparagraph of Article 47(1) of the Fourth Directive expressly refers to the provisions on disclosure contained in the First Directive, that a separate provision on penalties in the Fourth Directive was not absolutely necessary. Conversely (and logically), where it does *not* refer to the provisions on disclosure in the First Directive (see Article 47(1a) of the Fourth Directive), [48] the Fourth Directive does impose a separate obligation on Member States to provide for appropriate penalties. All of which points to the conclusion that, through the First and Fourth Directives, the Community legislature sought to require Member States to provide for a *system of penalties free from lacunae*, and that, because of the reference in the Fourth Directive to the First Directive, the penalties provided for in Article 6 of the latter were intended, under normal circumstances, to apply automatically alongside the relevant provisions of the former; only the lacunae, in relation to which *no* reference is made to the First Directive, are filled by means of a separate obligation to provide for penalties in the Fourth Directive (see the last sentence of Article 47(1a) of the Fourth Directive).

78. The view taken by the defendant Dell'Utri, to the effect that the Member States are under an obligation to provide penalties for the publication of substantively false annual accounts *only* in the exceptional circumstances expressly referred to in the Fourth Directive, is unconvincing in my view. After

46 — The vital importance of the accuracy of annual accounts not only for company members and creditors but also for the financial markets and the economy generally is also emphasised, for example, in the report published in Brussels on 4 November 2002 by a high-level group of experts asked by the Commission to make recommendations relating to European company law: *Report of the high-level group of company law experts on a modern regulatory framework for company law in Europe*, p. 71 et seq., paragraph 4.3, first subparagraph; the report can be downloaded (20 July 2004) from 'http://europa.eu.int/comm/internal_market/en/company/ company/modern/index.htm'.

47 — See, in a similar vein — albeit only in relation to penalties for *failure to disclose* annual accounts –, Advocate General Cosmas's comments in his Opinion in Case C-191/95 (cited in footnote 44, point 30).

48 — Article 47(1a) of the Fourth Directive was added by Directive 90/605.

all, since the derogating provisions in the Fourth Directive, in particular Article 47(1a), relate primarily to smaller undertakings, the absurd consequence of such a view would be that smaller undertakings would have to be dealt with more severely than larger undertakings in the event of publication of false company documents.

79. Even the judgment in *Rabobank*, [49] cited by the defendant Berlusconi, does not lead to a different conclusion. That judgment is concerned not with the disclosure provisions of the First Directive but with the powers of representation enjoyed by the organs of capital companies. It does not support the conclusion that all the provisions of the First Directive must be interpreted as restrictively and literally as possible. There too, the Court's approach is one of systematic interpretation, inasmuch as it takes into account in its findings the Commission's proposal for a Fifth Directive on company law. [50] In terms of approach, therefore, the Court proceeds in much the same way in *Rabobank* as I suggested above when referring to the legislative connection between the First and the Fourth Directives.

80. Moreover, even if the interpretation of Article 6 of the First Directive proposed here were not adopted, Member States would still be required, by virtue of their duty of loyalty under Community law, to ensure effective punishment for the disclosure of substantively false annual accounts. For, where Community legislation does not provide any penalty for an infringement or refers for that purpose to national laws, regulations and administrative provisions, Article 10 EC requires the Member States to take all measures necessary to guarantee the application and effectiveness of Community law. [51]

81. In summary, therefore, it is appropriate to find that:

The first indent of Article 6 of the First Directive, in conjunction with Article 2(3) and the first subparagraph of Article 47(1) of the Fourth Directive and Article 10 EC, requires Member States to provide for appropriate penalties not only in the event that annual accounts are not disclosed at all but also in the event that substantively false annual accounts are disclosed. Article 38(6) of the Seventh Directive, which applies to consolidated accounts, must be interpreted *mutatis mutandis*.

49 — Case C-104/96 *Coöperatieve Rabobank 'Vecht en Plassengebied'* [1997] ECR I-7211, in particular paragraphs 22 to 25.

50 — *Rabobank* (cited in footnote 49, paragraphs 25 to 27).

51 — Settled case-law since the judgment in Case 68/88 *Commission* v *Greece* [1989] ECR 2965, paragraph 23; see also the judgment in *Allain* (cited in footnote 36, paragraph 24) and the judgments in Case C-167/01 *Inspire Art* [2003] ECR I-10155, paragraph 62, and Case C-230/01 *Penycoed* [2004] ECR I-937, paragraph 36.

2. Appropriateness of penalties for the publication of false company documents

82. The referring courts also seek in essence to ascertain what the term 'appropriate penalties' means in relation to the publication of false company documents. On the one hand, they ask in very general terms about the criteria for assessing the appropriateness of penalties; [52] on the other hand, their questions are concerned in particular with provisions such as those contained in Italian Legislative Decree No 61/02, which introduce a graduated system of penalties, [53] affect the time-limits applicable to prosecution, [54] introduce the requirement of a criminal complaint [55] and lay down tolerance limits below which the publication of false company documents is exempt from punishment. [56]

83. The defendants and the Italian Government proceed on the assumption that provisions such as those introduced by Legislative Decree No 61/02 are in conformity with Community law. The Commission and the two Public Prosecutors taking part in the proceedings before the Court take the opposite view.

84. It is true that the Court itself may not, under Article 234 EC, give a ruling on the compatibility of provisions of domestic law with Community law or on the interpretation of provisions of national law. Nor, for that reason, can it comment on the level of the penalty in the new Article 2621 of the Italian Civil Code. [57] It does, however, have jurisdiction to supply the national courts with an interpretation of Community law on all such points as may enable those courts to determine the issue of the compatibility of national law with Community law for the purposes of the cases before them. [58]

(a) Effectiveness, proportionality and dissuasiveness of penalties

85. The first indent of Article 6 of the First Directive requires Member States only to

52 — See in particular the second question in Cases C-387/02 and C-403/02 respectively and the first question in Case C-391/02.

53 — See in particular in this regard the sixth question in Case C-391/02.

54 — See in this regard the grounds for the second question in Cases C-387/02 and C-403/02 respectively and the grounds for the first question in Case C-391/02.

55 — See in this regard the fifth and sixth questions in Case C-391/02 and the third question in Case C-403/02.

56 — See in this regard the third question in Case C-387/02 and the second, third and fourth questions in Case C-391/02.

57 — That is the object of the first part of the third question in Case C-403/02, for example.

58 — Settled case-law; see, inter alia, the judgment in *Tombesi* (cited in footnote 36, paragraph 63) and the judgments in Case C-151/02 *Jaeger* [2003] ECR I-8389, paragraph 43, Case C-28/99 *Verdonck and Others* [2001] ECR I-3399, paragraph 28, and Case C-292/92 *Hünermund and Others* [1993] ECR I-6787, paragraph 8. Similarly, see the judgment in *Inspire Art* (cited in footnote 51, paragraph 63).

provide *appropriate penalties* for infringement of the aforementioned disclosure obligation. It thus leaves to the national authorities the choice of form and methods, in accordance with the third paragraph of Article 249 EC, and therefore extends not inconsiderable discretion to them.

86. However, that discretion is not unlimited. For, in accordance with the case-law cited above, where Community legislation does not specifically provide any penalty for an infringement or refers for that purpose to national laws, regulations and administrative provisions, Article 10 EC requires the Member States to take all measures necessary to guarantee the full effectiveness of Community law. While the choice of penalties remains within the discretion of the Member States, they 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. [59]

87. There is no evidence in this case of any discrimination between situations at purely national level and those at Community level.

The following observations are therefore directed exclusively towards the criteria of *effectiveness, proportionality and dissuasiveness*; in this case, they form the yardstick for determining whether provisions such as those introduced by Legislative Decree No 61/02 are compatible with Article 6 of the First Directive. In the light of the respective preambles to the First and Fourth Directives, [60] particular importance is to be attached in this context not only to the interests of company members and creditors but also to protection of the interests of other third parties and the trust they have in a true representation of the company's assets, liabilities, financial position and profit or loss. The penalties to be provided for in national law must ensure protection in those areas also, and in those areas in particular, in an effective, proportionate and dissuasive manner.

88. Rules laying down penalties are *effective* where they are framed in such a way that they do not make it practically impossible or excessively difficult to impose the penalty provided for (and, therefore, to attain the objectives pursued by Community law [61]).

59 — Settled case-law since the judgment in *Commission* v *Greece* (cited in footnote 51, paragraphs 23 and 24). See also the judgments in *Allain* (cited in footnote 26, paragraph 24) and *Inspire Art* (cited in footnote 51, paragraph 62).

60 — See the second recital in the preamble to the First Directive and the first recital in the preamble to the Fourth Directive, as well as the observations in points 72 to 75 of this Opinion.

61 — The latter factor is emphasised by Advocate General Van Gerven in point 8 of his Opinion in Case C-326/88 *Hansen* [1990] ECR I-2911, at I-2919. In his view, *effective* means, 'amongst other things, that the Member States must endeavour to attain and implement the objectives of the relevant provisions of Community law'.

This follows from the principle of *effectiveness*, [62] which, according to case-law, is applicable wherever a situation exhibits a connection with Community law, but there are no Community rules governing that situation (the appropriate procedure, for example) and the Member States therefore apply provisions of national law. In this regard, the principle of effectiveness obtains not only where an individual asserts his rights under Community law against a Member State but also, conversely, where a Member State transposes the provisions of Community law in relation to an individual. [63]

89. A penalty is *dissuasive* where it prevents an individual from infringing the objectives pursued and rules laid down by Community law. [64] What is decisive in this regard is not only the nature and level [65] of the penalty but also the likelihood of its being imposed. Anyone who commits an infringement must fear that the penalty will in fact be imposed on him. There is an overlap here between the criterion of dissuasiveness and that of effectiveness.

90. A penalty is *proportionate* where it is appropriate (that is to say, in particular, *effective* and *dissuasive*) for attaining the legitimate objectives pursued by it, and also necessary. Where there is a choice between several (equally) appropriate penalties, recourse must be had to the least onerous. Moreover, the effects of the penalty on the person concerned must be proportionate to the aims pursued. [66]

91. The question whether a provision of national law contains a penalty which is effective, proportionate and dissuasive within the meaning defined above must be analysed by reference to the role of that provision in the legislation as a whole, including the progress and special features of the procedure before the various national authorities, in each case in which that question arises. [67]

92. In summary, it is therefore appropriate to find that:

Penalties are appropriate within the meaning of Article 6 of the First Directive where they

62 — See the judgments in Case C-201/02 *Delena Wells* [2004] ECR I-723, paragraph 67, with further references, and Case C-312/93 *Peterbroeck* [1995] ECR I-4599, paragraph 12.

63 — See, for example, the judgments in Case C-404/00 *Commission* v *Spain* [2003] ECR I-6695, paragraph 24, Case C-298/96 *Oelmühle Hamburg and Schmidt Söhne* [1998] ECR I-4767, paragraph 24, and Joined Cases 205/82 to 215/82 *Deutsche Milchkontor and Others* [1983] ECR 2633, paragraph 19.

64 — See, in a similar vein, Advocate General Van Gerven's comments in his Opinion in *Hansen* (cited in footnote 61, point 8): '"Proportionate and dissuasive" means that the penalties must be sufficiently, though not excessively, strict, regard being had to the objectives pursued'.

65 — Judgment in Case C-354/99 *Commission* v *Ireland* [2001] ECR I-7657, paragraph 47, and point 27 of the Opinion of Advocate General Geelhoed in the same case ([2001] ECR I-7660). See also the judgments in Case C-382/92 *Commission* v *United Kingdom* [1994] ECR I-2435, paragraphs 56 to 58, and Case C-383/92 *Commission* v *United Kingdom* [1994] ECR I-2479, paragraphs 41 and 42.

66 — On the principle of proportionality see, for example, the judgments in Case C-220/01 *Lennox* [2003] ECR I-7091, paragraph 76, Joined Cases C-27/00 and C-122/00 *Omega Air and Others* [2002] ECR I-2569, paragraph 62, and Case 265/87 *Schräder* [1989] ECR 2237, paragraph 21. See also the judgment in Case C-29/95 *Pastoors and Trans-Cap* [1997] ECR I-285, paragraphs 24, last sentence, and 25 to 28.

67 — See to this effect — in relation to the compatibility of national procedural provisions with the principle of effectiveness — the Court's settled case-law: for example, the judgment in *Peterbroeck* (cited in footnote 62, paragraph 14) as well as the judgments in Case C-276/01 *Steffensen* [2003] ECR I-3735, paragraph 66, Case C-327/00 *Santex* [2003] ECR I-1877, paragraph 56, and Case C-473/00 *Cofidis* [2002] ECR I-10875, paragraph 37.

are effective, proportionate and dissuasive. In this regard, particular importance is to be attached not only to the interests of company members and creditors but also to the interests of other third parties and the protection of their trust in a true representation of the company's assets, liabilities, financial position and profit or loss. The question whether a provision of national law contains an effective, proportionate and dissuasive penalty must be examined by reference to the role of that provision in the legislation as a whole, including the progress and special features of the procedure before the various national authorities, in each case in which that question arises.

94. Regard must be had in the assessment of these provisions to the scheme of the Fourth Directive. Thus, Article 2(3) of the Fourth Directive requires that the annual accounts should give a true and fair view of the company's assets, liabilities, financial position and profit or loss. That principle is of central importance in the context of the provisions of the directive concerning annual accounts.[68] This is illustrated in particular by Article 2(4) and (5) of the Fourth Directive. Thus, where there is any doubt, other provisions of the Fourth Directive must actually be departed from in order to ensure that the annual accounts give a true and fair view (the first sentence of Article 2 (5)), and there may even be a need, for that purpose, to go beyond the requirements laid down in the Fourth Directive.[69]

(b) Tolerance limits

93. Under both the first sentence of the third paragraph of the new Article 2621 and the first sentence of the fifth paragraph of the new Article 2622 of the Italian Civil Code, criminal liability for the publication of false company documents is excluded where the act does not distort to an appreciable extent the representation of the assets, liabilities and financial position of the company or group. Moreover, both provisions contain tolerance limits expressed as percentages (see the second sentence of the third paragraph, and the fourth paragraph, of the new Article 2621 and the second sentence of the fifth paragraph, and the sixth paragraph, of the new Article 2622 of the Italian Civil Code). Since those provisions are the same in both articles, it is appropriate to discuss them first.

95. As I have already said, those provisions are intended to protect the trust which both members and third parties have in the substantive probity of annual accounts.

96. Two conclusions can, in principle, be drawn from this. In accordance with the principle of effective penalties, errors in annual accounts or in consolidated accounts which are capable of undermining trust in the probity of the representation of a company's assets, liabilities, financial posi-

68 — See also in this regard the case-law cited in footnote 41.

69 — The corresponding provisions relating to consolidated accounts are contained in Article 16 of the Seventh Directive.

tion and profit or loss cannot be tolerated. If they were, the objective pursued by the directive would be frustrated. On the other hand, errors in annual accounts which are *not* capable of betraying that trust may be subject to lighter penalties or to no penalty at all.

97. Provisions which leave sufficient scope for account to be taken of individual circumstances may, if interpreted and applied in a manner consistent with the directive, satisfy those principles. However, the purely quantitative effects of an error, as referred to by the second sentence of the third paragraph, and the fourth paragraph, of the new Article 2621, and the second sentence of the fifth paragraph, and the sixth paragraph, of the new Article 2622 of the Italian Civil Code, can only be an initial factor in the assessment of whether that error is capable of undermining trust in the probity of the representation of a company's assets, liabilities, financial position and profit or loss.

98. It is true that the interests of members and third parties, and the protection of the trust they have in the probity of annual accounts, are not *normally* jeopardised provided that any accounting errors do not distort to an appreciable extent the representation, in terms of figures alone, of the profit or loss, assets, liabilities and financial position of the company or group. However, in order to prevent any impropriety and to provide an incentive to ensure that the utmost care is taken in the preparation of annual accounts, the question whether an error is an inaccuracy of no consequence or, on the other hand, an unacceptable distortion must always be assessed on a case-by-case basis. Otherwise, there would be a considerable danger that the tolerance limits granted by the legislature might result in widespread and intentionally included inaccuracies in annual accounts. Such a development could inflict permanent damage on the trust which third parties in particular, and, therefore, the business community as a whole, have in the probity of annual accounts.

99. More specifically, there can also be no tolerance where, as is presupposed in the new Articles 2621 and 2622 of the Italian Civil Code, false information is included in annual accounts and then disclosed *deliberately* and *with the intention to deceive or secure enrichment*, however negligible the effects of the distortion may be in purely quantitative terms. The principle of the need to present a true picture of a company's assets, liabilities, financial position and profit or loss is intended, as I have said before, to protect the interests of third parties and the trust which the business community places in the probity of annual accounts. Making it permissible to include false statements in annual accounts deliberately and with the intention to deceive or secure enrichment would undermine that trust on a lasting basis and would thus run counter to the objective pursued by the company law directives.

100. Against that background, tolerance limits and grounds for exemption from criminal penalty such as those provided for in the third and fourth paragraphs of the new Article 2621 and the fifth and sixth paragraphs of the new Article 2622 of the Italian Civil Code do not seem capable of satisfying the requirements of Community law relating to effective (and dissuasive) penalties.

101. I would point out purely incidentally that quantitative tolerance limits are also considered inappropriate in the United States of America, for example in the administrative practice of the Securities and Exchange Commission, at least in so far as such limits serve to substantiate an irrebuttable presumption and there is *no* possibility of a comprehensive assessment of all the circumstances of the particular case. [70]

102. Moreover, this view cannot be countered with the argument that '*de minimis*' rules are generally recognised in Community law. [71] Certain tolerance thresholds do exist in Community competition law. However, such thresholds are applicable only in cases where it is guaranteed that the meaning, purpose and practical effectiveness of the competition rules will not be adversely affected.

103. Thus, for example, in the field of State aid, Article 3 of the relevant group exemption regulation [72] requires that certain checks be carried out in order to ensure that the grant of *de minimis* aid does not affect trade between Member States or distort competition. [73] If a comparison of this case with those *de minimis* rules leads to any conclusion at all, it is that tolerance limits are permissible only where they do not have the effect of undermining the spirit and purpose of the relevant legal provisions, that is to say, in the case of annual accounts, to protect the trust which third parties and the public have in company documents.

104. A comparison with the *de minimis* rules applicable in the context of Article 81 EC is no less instructive. For, in that context, particularly onerous restrictions, such as price fixing or the conclusion of market-sharing agreements ('hardcore' restrictions) are automatically excluded from the scope of the *de minimis* rules; they therefore remain

70 — SEC Staff Accounting Bulletin No 99, 17 CFR Part 211 [Release No. SAB 99], dated 12 August 1999, downloadable (13 July 2004) from www.sec.gov/interps/account/sab99.htm. In the view of the SEC administration, '*exclusive reliance on certain quantitative benchmarks to assess materiality in preparing financial statements and performing audits of those financial statements is inappropriate; misstatements are not immaterial simply because they fall beneath a numerical threshold*'. Moreover, one of several criteria referred to in the Bulletin as being used in assessing whether a quantitatively small deviation is none the less qualitatively material is '*whether the misstatement involves concealment of an unlawful nature*'. The intentional making of a false statement may also have a bearing on the assessment of the deviation: '*[i]n certain circumstances, intentional immaterial misstatements are unlawful*'.

71 — This is the argument put forward by the defendant Berlusconi in his written observations.

72 — Commission Regulation (EC) No 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid (OJ 2001 L 10, p. 30).

73 — See the fifth and seventh recitals in the preamble to the group exemption regulation (cited in footnote 72).

wholly within the scope of European antitrust law.[74] If this consideration too is applied to the sphere of false company documents, the most that can be concluded is that, for particularly onerous breaches of the trust which third parties and the public have in the probity of a company's documents, in particular the making of false statements in annual accounts deliberately and with the intention to deceive or secure enrichment, there can be no tolerance, even if the false statements do not distort to an appreciable extent the representation, in terms of figures alone, of the profit or loss, assets, liabilities and financial position of a company or group.

105. In summary, it is therefore appropriate to find that:

The first indent of Article 6 of the First Directive, in conjunction with Article 2(3) and Article 47(1)(1) of the Fourth Directive, does not preclude national legislation under which criminal liability for the publication of false company documents is excluded where the act in question does not distort to an appreciable extent the representation of the profit or loss, assets, liabilities and financial position of the company of group, unless the act was carried out deliberately and with the intention to deceive or secure enrichment.

However, those provisions do preclude national legislation under which criminal liability for the publication of false company documents is always excluded where the false statements or omissions result in a distortion which does not differ from the correct value by more than a certain percentage, and which makes no provision for an examination of all the circumstances of each individual case.

Article 38(6), in conjunction with Article 38 (1) and Article 16(3), of the Seventh Directive, must be interpreted *mutatis mutandis.*

(c) Limitation periods applicable to criminal prosecution

106. Legislative Decree No 61/02 has substantially shortened the relevant limitation periods. This particularly affects prosecutions under the new Article 2621 of the Italian Civil Code. For the summary offence created under that article, which is the general offence in relation to the publication of false company documents, the limitation period is now three years; if that period is interrupted, limitation becomes effective at the latest after four years and six months in total.[75]

74 — See paragraph 11 of the Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (*de minimis*), OJ 2001 C 368, p. 13.

75 — By comparison, the old Article 2621 of the Italian Civil Code provided for a limitation period of 10 years; if that period was interrupted, limitation became effective at the latest after 15 years (see, for example, paragraph 42 of the order for reference in Case C-391/02).

107. There is in principle no reason why Member States should not subject to limitation penalties which they are required to introduce under Community law. Such limitation periods serve to ensure legal certainty and the principle of legal certainty is also recognised at Community level as a general principle of law. [76] It follows that Community law likewise applies similar limitation periods, for example in the context of its provisions on the protection of the financial interests of the Communities [77] and in the field of competition policy. [78]

108. Moreover, as the existence of such limitation periods shows, Community law does not by any means require that a penalty must actually be imposed in every single case. It must be ensured, however, that the limitation rules applicable do not have the general effect of undermining the effectiveness and dissuasiveness of the penalties provided for. [79] Consequently, the publication of false company documents must not be subject to penalties in theory alone. The system of penalties must rather be framed in such a way as to ensure that anyone who submits false annual accounts does in fact fear that penalties will be imposed on him. [80]

109. The question whether provisions on limitation such as those applicable to the new Article 2621 and the new Article 2622 of the Italian Civil Code satisfy the aforementioned conditions relating to effective and dissuasive penalties must be assessed by reference, first, to the nature and seriousness of the offences concerned and, secondly, to the scheme of the rules on limitation periods laid down in national law. [81] Consideration must be given in this regard not only to the length of the limitation period but also, for example, to the point from which that period starts to run, any events suspending or interrupting it and the effects of such suspension or interruption. It is also important not to leave out of account how much time the preparation and conduct of judicial

76 — Judgment in Case C-278/02 *Handlbauer* [2004] ECR I-6171, paragraph 40, the German version of which was corrected by order of the Court of 14 July 2004, not published in the ECR.

77 — Article 3 of Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests (OJ 1995 L 312, p. 1; hereinafter, 'Regulation 2988/95').

78 — Articles 25 and 26 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2002 L 1, p. 1). A time-limit similar to a limitation period can also be found in Article 15 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ 1999 L 83, p. 1). It should be pointed out, however, that the periods under Article 25(6) of Regulation No 1/2003 and Article 15 (2)(4) of Regulation No 659/1999 respectively are suspended for as long as proceedings are pending before the Court of Justice.

79 — Similar views can also be found in other contexts, in particular in the Court's decisions relating to the applicability of certain procedural time-limits under national law to situations having a connection with Community law. There the Court has held that, although the laying down of (peremptory) time-limits is in principle permissible, such time-limits must not, in accordance with the principle of effectiveness, render the enforcement of Community law virtually impossible or excessively difficult; see in this regard the judgments in Case C-231/96 *Edis* [1998] ECR I-4951, paragraphs 34 and 35, and Case C-30/02 *Recheio — Cash & Carry* [2004] ECR I-6051, paragraphs 17 and 18.

80 — See also points 88 and 89 of this Opinion.

81 — If, in assessing the Italian rules on limitation periods, the referring courts also wished to have regard to statistics, as suggested by the defendant Berlusconi, they would properly have to ensure that such statistics are *meaningful*, that is to say, that they relate specifically to the offences at issue here and allow a comparison to be drawn between the effects of limitation under the old and the new legislation.

proceedings normally take, having regard to the complexity of the facts and the structure of the justice system in terms of personnel and procedure. On the other hand, it should be borne in mind that the first sentence of Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms [82] and the first sentence of the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union [83] protect everyone, in particular the defendant in a criminal trial, from excessively long legal proceedings; in the assessment of the length of such proceedings, regard must none the less also be had to the circumstances and complexity of each particular case. [84]

110. If, following an assessment in the light of all those criteria, it is found that the effect of rules on limitation periods is that the penalty provided for is, in reality, likely to be imposed in fact only rarely, if at all, that penalty cannot be said to be effective and dissuasive.

111. According to information from all the referring courts, the — often expensive and protracted — preliminary investigation and judicial proceedings, which regularly involve three tiers of judicial bodies, usually cannot be completed before limitation becomes effective, in particular in the case of summary offences under the new Article 2621 of the Italian Civil Code. In that light, there are serious doubts whether a provision such as the new Article 2621 of the Italian Civil Code can be regarded as an effective and dissuasive penalty for the purposes of the first indent of Article 6 of the First Directive.

112. In summary, it is therefore appropriate to find that:

The first indent of Article 6 of the First Directive, in conjunction with Article 2(3) and Article 47(1)(1) of the Fourth Directive, precludes rules on limitation periods under which the penalties provided for are likely to be imposed in fact only rarely, if at all. Article 38(6), in conjunction with Article 38(1) and Article 16(3), of the Seventh Directive, must be interpreted *mutatis mutandis*.

82 — Signed in Rome on 4 November 1950.

83 — OJ 2000 C 364, p. 1. Although this Charter does not yet have binding legal effect comparable to that of primary law, it does at least, as a legal reference, provide information on the fundamental rights guaranteed by the Community legal order; see also to this effect point 51 of the Opinion of Advocate General Poiares Maduro of 29 June 2004 in Case C-181/03 P *Nardone*, ECR I-199, at I-2001, point 126 of the Opinion of Advocate General Mischo in Joined Cases C-20/00 and C-64/00 *Booker Aquaculture and Hydro Seafood* [2003] ECR I-7411, at I-7415, point 28 of the Opinion of Advocate General Tizzano in Case C-173/99 *BECTU* [2001] ECR I-4881, at I-4883, and points 82 and 83 of the Opinion of Advocate General Léger in Case C-353/99 P *Hautala* [2001] ECR I-9565, at I-9576.

84 — Judgments in Case C-185/95 P *Baustahlgewebe* [1998] ECR I-8417, in particular paragraphs 21, 29 and 47, and Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P, C-251/99 P, C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others* [2002] ECR I-8375, in particular paragraph 187.

(d) Graduated system of penalties and requirements in respect of criminal complaints

113. It is true that the offence provided for in the new Article 2622 of the Italian Civil Code attracts a substantially heavier penalty than that under the new Article 2621 and is subject to longer limitation periods. However, it can as a rule be prosecuted only on complaint by the injured member or creditor. It cannot therefore be prosecuted *ex officio* or on complaint by third parties other than the injured member or creditor.

114. Member States are of course at liberty to introduce a graduated system of penalties and, for example, to provide harsher penalties for cases where the publication of false company documents occasions financial loss above and beyond the non-material damage usually arising as a result of a betrayal of the trust in the probity of annual accounts. It is in fact consistent with the principle of the proportionality of penalties to introduce qualifying criminal provisions which prescribe heavier penalties in the event of the accrual of financial loss than are applicable under the general provision, and under which prosecution may correspondingly depend on the lodging of a complaint by the injured party.

115. In themselves, however, provisions which carry a requirement to lodge a complaint are not capable of fulfilling the obligation under Community law to provide for appropriate penalties, as imposed on Member States under Article 6 of the First Directive. Because of its rules restricting prosecutions to those brought on complaint by injured members or creditors, a provision such as the new Article 2622 of the Italian Civil Code cannot effectively protect the interests of *all* third parties, but only, at best, those of certain third parties. However, as the Court held in the judgment in *Daihatsu Deutschland*, Article 6 of the First Directive precludes the legislation of a Member State from restricting to members or creditors of the company, the central works council or the company's works council the right to apply for imposition of the penalty provided for.[85] For the reasons given above,[86] the findings reached in the judgment in *Daihatsu Deutschland* are by no means confined to cases of *non-disclosure of annual accounts*; indeed, contrary to the view expressed by the defendants Berlusconi and Dell'Utri, they are particularly applicable to cases involving the *disclosure of false annual accounts*.

116. Qualifying criminal provisions such as the new Article 2622 of the Italian Civil Code can therefore, at most, only supplement a system of effective, proportionate and dissuasive penalties which is already in place under national law. Being confined to

85 — Judgment cited in footnote 42, paragraph 23; see also the judgment in *Commission* v *Germany* (cited in footnote 42, paragraph 67) and the order in Joined Cases C-435/02 and C-103/03 *Springer and Weske* [2004] ECR I-8663, paragraphs 28 to 35.

86 — Points 67 to 81 of this Opinion.

protecting the interests of company members and creditors, they are not, however, capable of making good any deficiencies in the protection afforded to the interests of (other) third parties, be it in relation to possible financial loss or simply the non-material damage which can arise where the public's trust in the probity of annual accounts is betrayed.

117. Consequently, if the referring courts come to the conclusion that the general provision in the new Article 2621 of the Italian Civil Code does not constitute an effective and dissuasive penalty, say because of the tolerance limits or the rules on limitation applicable to it, [87] a provision such as the new Article 2622 of the Italian Civil Code, requiring as it does that prosecutions be restricted to those brought on complaint by company members and creditors, will not be capable of remedying that failing.

118. Furthermore, the fact that *ex officio* prosecution does at least remain possible in exceptional circumstances under the second and third paragraphs of the new Article 2622 of the Italian Civil Code can have no bearing on the overall assessment of that provision. It goes without saying that an assessment of the effectiveness and dissuasiveness of penalties must take into account not only any false company documents published by the few undertakings which are listed on the stock exchange and offences which are detrimental to the State or to the European Communities. Account must rather be taken of all cases of false company documentation, not least those which relate to undertakings not listed on the stock exchange and which are detrimental to the public.

119. In summary, it is therefore appropriate to find that:

The first indent of Article 6 of the First Directive, in conjunction with Article 2(3) and Article 47(1)(1) of the Fourth Directive, does not preclude national legislation under which penalties to protect the financial interests of certain persons can as a rule be imposed only on complaint by the injured party. This presupposes, however, that there is also general legislation providing for effective, proportionate and dissuasive penalties to protect the interests of third parties which are applicable independently of any financial loss and which can be imposed *ex officio*.

87 — See in this regard points 93 to 104 and 106 to 111 of this Opinion.

(e) Combined effect of provisions of civil, criminal and administrative law

120. The defendants Berlusconi, Adelchi and Dell'Utri, as well as the Italian Government, submit that, in the assessment of the new Italian rules on penalties for the publication of false company documents, account should also be taken of non-criminal, that is to say, civil and administrative, legislation. The Commission's observations too can, in principle at least, be interpreted to the same effect. In this regard, reference is made, *for example*, to the following provisions:

— the civil liability of those responsible for the publication of false company documents; [88]

— the possibility of challenging the company resolution adopting a (false) balance sheet; [89]

— the possibility of imposing on the company itself certain administrative penalties (fines) for false company documents published in its own interests; [90]

— the possibility of imposing administrative fines for failure to submit balance sheets or for failure to submit them within the prescribed time; [91]

— the provisions governing the audit of annual and consolidated accounts by persons specifically authorised to do so who are subject to special liability. [92]

121. As I have already said, [93] Article 6 of the First Directive grants Member States a not inconsiderable margin of discretion in the formulation of their national systems of penalties. Consequently, it does not by any means follow from Article 6 of the First

88 — In this connection, the defendants Berlusconi and Dell'Utri, for example, refer, inter alia, to Articles 2393 to 2395 of the Italian Civil Code.

89 — In this connection, the defendants Berlusconi and Dell'Utri, for example, make reference to Article 2379 and the new Article 2434a of the Italian Civil Code.

90 — In this connection, reference is made by several parties to the new Article 25b of Legislative Decree No 231/01 (introduced by Legislative Decree No 61/02).

91 — In this connection, reference is made in particular to the new Article 2630 of the Italian Civil Code.

92 — In this connection, the defendants Berlusconi and Dell'Utri, for example, refer, inter alia, to Article 2409a to 2409f of the Italian Civil Code, introduced by Legislative Decree No 6 of 17 January 2003 (GURI No 17 of 22 January 2003).

93 — See points 85 to 87 of this Opinion.

Directive that only criminal penalties are to be imposed. [94] Indeed, from the point of view of Community law, there is no reason in principle why a combination of provisions from criminal, civil and administrative law should not be used. The guiding principle in assessing the combined effect of such provisions must rather be the effectiveness, proportionality and dissuasiveness of penalties.

122. It is for the referring courts to assess the overall effect of the system of penalties provided for by the Italian legislature and to measure that system against the criteria of effectiveness, proportionality and dissuasiveness. [95] In this regard, the Court can only provide guidance on the interpretation of Community law which will enable the national courts to make such an assessment of national law.

123. In this connection, it must be pointed out first of all that penalties which can be imposed only on complaint by certain persons, in particular company members and creditors, are by definition incapable of making good any deficiencies in the protection afforded to the interests of third parties. [96] Nor can protection of the interests of third parties be dependent on the occurrence of some form of loss to those third parties. Protection is to be afforded not only to the financial interests of third parties but also, and in particular, to their non-material interests in the provision of accurate information on the company's assets, liabilities, financial position and profit or loss, and, therefore, to the business community's trust in the probity of annual accounts. If that protection is not guaranteed, the penalties automatically cease to be effective.

124. Even the fact that third parties can in some circumstances obtain civil remedies such as the annulment of company resolutions adopting annual accounts [97] is not in itself sufficient to make a penalty effective. The effectiveness and, above all, the dissuasiveness of penalties presupposes, as I have already said, that anyone who submits false annual accounts must fear that penalties will in fact be imposed on him. Consequently, consideration must also be given at least to whether third parties would actually be likely [98] to pursue a remedy such as an

94 — Judgment in Case C-7/90 *Vandevenne and Others* [1991] ECR I-4371, paragraph 17, and Point 8 of the Opinion of Advocate General Van Gerven in the same case. Similarly, see the judgment in Joined Cases C-58/95, C-75/95, C-112/95, C-119/95, C-123/95, C-135/95, C-140/95, C-141/95, C-154/95 and C-157/95 *Gallotti and Others* [1996] ECR I-4345, paragraphs 14 and 15.

95 — See to this effect, for example, the judgment in *Inspire Art* (cited in footnote 51, paragraphs 62 and 63). See also point 91 of this Opinion.

96 — See in this regard points 115 to 117 of this Opinion, with references to the judgments in *Daihatsu Deutschland* and *Commission* v *Germany* (both cited in footnote 42).

97 — This is referred to, for example, by the defendants Berlusconi and Dell'Utri in their written observations. The Public Prosecutor attached to the Corte di Appello di Lecce, on the other hand, points out in his written observations that, in the case of undertakings listed on the stock exchange, not every third party is able to obtain such an annulment. Even the defendants Berlusconi and Dell'Utri refer in their pleadings to certain limitations on the right of challenge enjoyed by third parties (see for example Article 2434a of the Italian Civil Code).

98 — As Advocate General Cosmas points out in his Opinion in Case C-191/95 (cited in footnote 44, point 33), persons who are entitled to take legal action do not always have an interest in bringing the relevant proceedings.

action for annulment before the competent national courts in the first place, and what their prospects of succeeding would be if they did so.

125. In so far as the new Article 2621 and the new Article 2622 of the Italian Civil Code are referred to, in relation to the offences which they create, in other provisions, it must be noted, for the purposes of assessing the latter, that any inadequacies in the provisions creating the offences, such as the tolerance limits, may also have an impact on the ancillary provisions and, therefore, impair their effectiveness and dissuasiveness. This is true, for example, of a provision such as Article 2641 of the Italian Civil Code, [99] which provides for the forfeiture of unlawfully acquired capital gains and confiscation of the means of acquiring them. It is also true of administrative penalties such as those introduced in Article 25b of Legislative Decree No 231/01; they too make reference to the offences provided for in the new Article 2621 and the new Article 2622 of the Italian Civil Code.

126. It must be noted, moreover, that Article 25b of Legislative Decree No 231/01 applies only to acts which have been committed *in the interests of the company* and that the company can, under certain conditions, exonerate itself. [100] Provisions the scope of which is restricted in this way may well represent a meaningful supplement to the penalty system as a whole but they are not capable of making good any deficiencies in the protection afforded to the interests of third parties. Protection of the interest which third parties have in the provision of accurate information on the assets, liabilities, financial position and profit or loss of the company concerned must also be effectively guaranteed in cases where someone has made false statements in annual accounts for his own personal benefit and not necessarily in the interests of the company or to the detriment of others.

127. What is more, in the case of provisions such as Article 25b of Legislative Decree No 231/01, the level of the penalties provided for must likewise be subject to an examination as to its dissuasive effect. If it is found that the amounts of the fines prescribed are so small as not to be commensurate with the seriousness of the contested infringements of the relevant financial reporting legislation or with the size of the undertakings concerned, such provisions cannot be described as being dissuasive. They would then, for that reason also, be incapable of making good any deficiencies in criminal penalties such as those laid down in the new Articles 2621 and 2622 of the Italian Civil Code.

128. With respect to provisions such as the new Article 2630 of the Italian Civil Code, it

99 — As amended by Legislative Decree No 61/02. Both the defendant Berlusconi and the defendant Dell'Utri make express reference to this provision.

100 — See also Articles 5 and 6 of Legislative Decree No 231/01.

need only be pointed out, as I have already stated, [101] that Article 6 of the First Directive requires that appropriate penalties be provided for not only in the event of non-disclosure of annual accounts but also in the event of disclosure of false annual accounts.

129. The auditing of financial statements by accountants [102] undoubtedly represents a central component of the legislation intended to ensure the substantive probity of company documents. However, auditing is a *preventive form of scrutiny*. By contrast, the very wording ('appropriate penalties') [103] of Article 6 of the First Directive requires Member States to provide — at least — for an appropriate *punitive* procedure. Moreover, the same conclusion also follows from the legislative context of the Fourth and Seventh Directives, as well as from the meaning and purpose of the provisions on the auditing of accounts. The preventive activity carried out by auditors is not by any means intended to replace, or make good the deficiencies of, punitive measures provided for by Member States. It is intended rather to be a second, independent leg in a system aimed at guaranteeing the substantive probity of annual and consolidated accounts. The Community legislature requires Member States to ensure that they have *both* an effective preventive system of scrutiny *and* an effective punitive system of scrutiny.

130. In the context of criminal law, it should be observed finally that certain provisions make the imposition of a penalty conditional on the establishment of an indictable offence (*delitto*), [104] which means that, as far as those provisions are concerned, a summary offence (*contravvenzione*) is automatically precluded from being a connecting factor for the imposition of penalties.

C — Effects on the criminal proceedings pending before the referring courts of an infringement of the directives by the national legislation

131. In order to provide the referring courts with an answer which will be of use to them in disposing of the criminal proceedings pending before them, we must also consider what effect the interpretation of the company law directives which I have proposed would have in national judicial proceedings. [105] In this connection, it is necessary, on

101 — Points 67 to 81 of this Opinion.

102 — In this regard, see Article 51 of the Fourth Directive and Article 37 of the Seventh Directive. See also Articles 23 to 27 of Eighth Council Directive 84/253/EEC of 10 April 1984 based on Article 54(3)(g) of the Treaty on the approval of persons responsible for carrying out the statutory audits of accounting documents (OJ 1984 L 126, p. 20, last amended by Annex XXII to the Agreement on the European Economic Area, OJ 1994 L 1, p. 517). Article 54(3) of the EEC Treaty corresponds to Article 44(2) EC.

103 — Using clearer terminology than the German language version of the provision ('Maßregeln'), the French text, for example, refers to 'sanctions appropriées', the Italian to 'adeguate sanzioni', the Spanish to 'sanciones apropiadas', the Portuguese to 'sanções apropriadas', the Dutch to 'passende sancties' and the English to 'appropriate penalties'.

104 — At the hearing, the Public Prosecutor attached to the Corte di Appello di Lecce pointed out, for example, that the penalty of prohibiting the managers of undertakings from carrying on a trade or profession can be imposed only in relation to an indictable offence (*delitto*).

105 — See, on the same issue, my Opinion in *Niselli* (cited in footnote 36, points 52 to 75).

the one hand, to look at the general and universally-recognised obligation incumbent on national courts to give effect to the provisions of Community law, and, on the other hand, to consider the limits of applying directives in criminal proceedings and, finally, the principle of the retroactive application of a more lenient criminal provision.

133. In this regard, the following should be noted: it goes without saying that it does not fall within the jurisdiction of the Court of Justice to comment on the interpretation of the constitution of a Member State or to examine the compatibility of a national legislative measure with that constitution. It *is* the task of the Court, however, through its case-law, to ensure the uniform and effective implementation of Community law in all the Member States. To that end, the Court has jurisdiction to provide the referring courts with the legal guidance necessary to enable them to interpret Community law.

1. The obligation on national courts to give effect to the provisions of Community law

132. In at least two of the disputes in the main proceedings, the competent Public Prosecutors have claimed before the respective national courts that the legislative amendments introduced by Legislative Decree No 61/02 are unconstitutional. [106] All three national courts are considering referring Legislative Decree No 61/02 to the Italian Constitutional Court for an examination as to its constitutionality. In its order for reference, the Tribunale di Milano states that 'the final determination of the case depends on a decision on the constitutionality or otherwise of the relevant national rules, which [is] a matter for the Corte Costituzionale'.

134. According to the settled and well-established case-law of the Court, national courts have an obligation to apply Community law and to set aside any provision of national law which may conflict with it. This is the logical consequence of the precedence of Community law. [107] In the judgment in *Simmenthal*, the Court held in this regard that a national court must give effect to Community law and must accordingly '... set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule ...'. [108]

135. What is more, a national court is required to ensure that full effect is given

106 — They rely in this respect on Article 3 of the Italian Constitution (principle of equal treatment) and on Articles 11 and 117 of the Italian Constitution (international obligations incumbent on Italy, in particular under Community law); see also in this regard footnote 34.

107 — Settled case-law since the judgment in Case 6/64 *Costa* v *ENEL* [1964] ECR 585, at 593.

108 — Case 106/77 [1978] ECR 629, paragraphs 21 to 23. See also the judgments in Case C-213/89 *Factortame* [1990] ECR I-2433, paragraph 20, and Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357, paragraph 32.

to Community law, 'if necessary refusing *of its own motion* to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means'. [109]

136. The referring courts therefore have an obligation under Community law, and in particular under Article 10 EC and the third paragraph of Article 249 EC, to give effect to the provisions of the company law directives in the criminal proceedings pending before them, there being no need for that purpose for a prior ruling by the Corte Costituzionale on whether or not Legislative Decree No 61/02 is unconstitutional.

137. All of this does not mean of course that a national legislative measure such as Legislative Decree No 61/02 cannot *in addition* also be subjected to constitutional review, in accordance with the relevant provisions of national law, in order to determine generally whether it is constitutional and valid.

138. However, irrespective of whether such constitutional review takes place and whether Legislative Decree No 61/02 is compatible or incompatible with the Italian Constitution, the referring courts have an obligation in this particular case, that is to say, in the criminal proceedings pending before them, *to set aside* that legislative decree *here and now, in so far as* the new provisions it contains are contrary to Community law. The answer which the Court gives to the questions raised by the referring courts will be binding on all the national courts involved in the main proceedings. [110] It should be noted in this regard that the interpretation which the Court of Justice gives clarifies the meaning and scope of the provisions of the company law directives as they must be or ought to have been understood and applied from the time of their coming into force. [111]

2. The limits on the application of directives in criminal proceedings

139. The defendants Berlusconi, Adelchi and Dell'Utri, and the Italian Government, refer to the principle of legality in relation to crime and punishment. In their submission, that principle means that the defendants cannot be subjected, by virtue of the

109 — Judgment in *Simmenthal* (cited in footnote 108, paragraph 24; my emphasis). See also the judgments in Case C-258/98 *Carra and Others* [2000] ECR I-4217, paragraph 16, and Case C-416/00 *Morellato* [2003] ECR I-9343, paragraphs 43 and 44.

110 — Judgment in Case 29/68 *Milch-, Fett- und Eierkontor* [1969] ECR 165, paragraphs 2 and 3. See also the judgment in Case 52/76 *Benedetti* v *Munari* [1977] ECR 163, paragraphs 26 and 27, and the order in Case 69/85 *Wünsche III* [1986] ECR 947, paragraphs 13 to 15; similarly, see Opinion 1/91 *EEA I* [1991] ECR I-6079, paragraph 61.

111 — Judgments in Case 61/79 *Denkavit italiana* [1980] ECR 1205, paragraphs 16 and 17, Joined Cases 66/79, 127/79 and 128/79 *Meridionale Industria Salumi and Others* [1980] ECR 1237, paragraph 9, Joined Cases C-10/97 to C-22/97 *IN.CO.GE'90 and Others* [1998] ECR I-6307, paragraph 23, and Case C-453/00 *Kühne & Heitz* [2004] ECR I-837, paragraph 21.

application of the company law directives, to criminal prosecution or to any penalties additional to or heavier than those provided for in the new Articles 2621 and 2622 of the Italian Civil Code. The Public Prosecutor attached to the Tribunale di Milano who is acting in the proceedings and the Commission take the opposing view.

(a) Principles developed in case-law

140. It is already settled case-law 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. [112]

141. First, that finding follows from the principle of legality in relation to crime and punishment (*nullum crimen, nulla poena sine lege*), [113] which is one of the general legal principles common to the constitutional traditions of the Member States and, furthermore, is established in Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, in the first sentence of the first paragraph of Article 15 of the International Covenant on Civil and Political Rights, [114] and in the first sentence of Article 49(1) of the Charter of Fundamental Rights of the European Union. [115] Moreover, on the basis of that rule, which also prohibits the extensive interpretation of criminal provisions to the disadvantage of the person concerned, the interpretation of national law in accordance with directives in criminal proceedings is subject to strict limits. [116]

142. Second, the Court based the rule that directives cannot be relied upon directly in order to determine or aggravate liability in criminal law on the fact that a directive may not of itself give rise to obligations as against individuals. [117]

143. It is true that, in *Pfeiffer*, Advocate General Ruiz-Jarabo Colomer recently called into question the validity of the principle that

112 — Judgments in Case 14/86 *Pretore di Salò* v *X* [1987] ECR 2545, paragraph 20, Case C-168/95 *Arcaro* [1996] ECR I-4705, paragraph 36, and Case C-60/02 *X* [2004] ECR I-651, paragraph 61.

113 — Opinion of Advocate General Ruiz-Jarabo Colomer in Joined Cases C-74/95 and C-129/95 *X* [1996] ECR I-6609, at I-6612, point 43. Opinion of Advocate General Jacobs in Joined Cases C-304/94, C-330/94, C-342/94 and C-224/95 *Tombesi and Others* [1997] ECR I-3564, point 37.

114 — Opened for signature on 19 December 1996 (UN Treaty Series, Volume 999, p. 171).

115 — See in this regard the judgment of the Court of Justice in Joined Cases C-74/95 and C-129/95 *X* [1996] ECR I-6609, paragraph 25, with reference to the judgments of the European Court of Human Rights in *Kokkinakis*, 25 May 1993, Series A, No 260-A, paragraph 52, and in *S.W.* v *United Kingdom* and *C.R.* v *United Kingdom*, 22 November 1995, Series A, No 335-B, paragraph 35, and No 335-C, paragraph 33. See also the judgment of the Court of Justice in Case 63/83 *Kirk* [1984] ECR 2689, paragraph 22.

116 — See in this regard the judgment in Joined Cases C-74/95 and C-129/95 (cited in footnote 115, paragraphs 24 and 25), as well as the judgment in Case 80/86 *Kolpinghuis Nijmegen* [1987] ECR 3969, paragraph 13, and the judgment in *Arcaro* (cited in footnote 112, paragraph 42).

117 — Judgments in *Pretore di Salò* (cited in footnote 112, paragraph 19), *Arcaro* (cited in footnote 112, paragraph 36) and *Daihatsu Deutschland* (cited in footnote 42, paragraph 24), each of which makes reference to the judgment in Case 152/84 *Marshall* [1986] ECR 723, paragraph 48. See also the judgment in *Tombesi* (cited in footnote 36, paragraph 42) and the judgment in Joined Cases C-74/95 and C-129/95 (cited in footnote 115, paragraph 23).

a directive may not create obligations for individuals, in cases involving the direct application of a directive in relations between private individuals. [118] He pointed out himself, however, that in criminal proceedings, the parties to which are the individual and the State, different criteria apply. [119] In conclusion, it therefore remains indisputable in this regard that the direct effect of a directive cannot, in criminal proceedings at least, lead to the imposition of obligations on individuals.

(b) Discussion of those principles in relation to this case

144. None of the grounds given by the Court for restricting the effect of directives in criminal proceedings is relevant in this case.

145. Indeed, the principle of legality in relation to crime and punishment is not affected, since the company law directives would not directly, and therefore independently of a national law adopted for their implementation, render the defendants in the main proceedings liable in criminal law. [120] Nor would Article 10 EC directly render the defendants criminally liable. Compliance with Article 10 EC and the provisions of the company law directives simply means that the legislative amendments introduced after the fact by Legislative Decree No 61/02, which have lessened the penalties applicable and made prosecution more difficult if not entirely impossible, must, where appropriate, be set aside. The national legislation as it existed at the material time none the less remains applicable. The criminal liability of the defendants is therefore determined by the national legislation in force at the material time, that is to say, the old Article 2621 of the Italian Civil Code.

146. The foregoing cannot be objected to on the ground that, as the offence formerly provided for in the old Article 2621 of the Italian Civil Code was abolished by Legislative Decree No 61/02, it is now 'irretrievably extinct' and cannot be 'revived'. For, since the obligation to ensure that provision is made for effective, proportionate and dissuasive penalties still obtains, Community law precludes the national legislature from simply repealing the existing rules governing penalties without at the same time replacing these with other effective, proportionate and dissuasive penalties. The prohibition against frustrating the objectives of a directive [121] applies not only before the expiry of the

118 — Opinion of 6 May 2003 in Joined Cases C-397/01 to C-403/01, ECR I-5835, at I-8859. Having taken the view that those cases raised a question concerning the principle of the direct effect of directives between individuals, the Court of Justice referred the proceedings to the Grand Chamber and re-opened the oral procedure. In his second Opinion of 27 April 2004, the Advocate General confirmed his views.

119 — Point 38 of the (second) Opinion in Joined Cases C-397/01 to C-403/01 *Pfeiffer*.

120 — See in this regard the evidence in footnote 112.

121 — Judgments in Case C-129/96 *Inter-Environnement Wallonie* [1997] ECR I-7411, paragraph 45, Case C-14/02 *ATRAL* [2003] ECR I-4431, paragraph 58, and Case C-157/02 *Rieser* [2004] ECR I-1477, paragraph 66.

period for its transposition but also and in particular afterwards. Consequently, if repealing legislation such as that contained in Legislative Decree No 61/02 infringes the provisions of Community law, *the repealing legislation too must* a fortiori *be set aside in the main proceedings.* If the repealing legislation itself has been set aside, the old Article 2621 of the Italian Civil Code is not by any means 'irretrievably extinct' and the question whether it can be 'revived' does not arise.

147. However, even if it is assumed that the previous criminal provision, that is to say, the old Article 2621 of the Italian Civil Code, has now been repealed, this does not in any way mean that that provision cannot continue to be applied to *acts committed prior to its repeal.* Indeed, it is in fact consistent with the principle of legality in relation to crime and punishment (*nullum crimen, nulla poena sine lege*) that an act should always be measured against the provision of criminal law which was applicable at the time of its commission. For example, it is unlikely that anyone would seriously question the continued applicability of an earlier, more lenient criminal provision if the legislature had since *increased* the relevant penalties. The fact that the dispute in these proceedings is, by converse implication, concerned with the applicability of the former criminal provision essentially raises the question not so much whether the principle of legality in relation to crime and punishment has been observed as, on the contrary, whether an *exception* can be made to that principle in favour of the *retroactive* application of the later, more lenient criminal provision. [122]

148. In a case such as this, there is no danger that the principle of *nullum crimen, nulla poena sine lege* has been infringed. The Court confirmed this in the judgment in *Tombesi.* [123] In that case, '... at the material time, the facts of the cases before the national courts attracted penalties under national law, and the [national provisions] which made the penalties [under national law] inapplicable to them entered into force only subsequently. In those circumstances, it is inappropriate to enquire into such consequences as might derive, for the application of Regulation ..., from the principle that penalties must have a proper legal basis'.

149. That statement is fully transposable to this case. The *Tombesi* case, and the *Niselli* [124] case for that matter, is the same in its defining characteristics as this case. Neither here nor there is anyone calling into question *the principle* that infringements of the applicable law (waste disposal legislation and financial reporting legislation) attract penalties. What is at issue here and there is rather a change in the definition of the acts on account of which those penalties are imposed. Here and there the effect of the change in the national law is that *certain acts which were previously subject to a penalty are now exempt from penalty.* For example, this case concerns the introduction of new tolerance limits (thresholds) below which the publication of false company documents is exempt from penalty, while *Tombesi* and *Niselli* concerned a new (and narrower) definition of the term 'waste',

122 — See in this regard point 154 et seq. of this Opinion.

123 — Cited in footnote 36, paragraph 43. See also the order in *Saetti* (cited in footnote 36, paragraph 26).

124 — Cited in footnote 36.

and therefore of the penalties applicable to infringements of the legislation on waste disposal. [125] What matters is that, here and there, *the acts in question were, at the material time, subject to penalties under national law.*

150. Moreover, I would also point out, purely for the sake of completeness, that this case does not require national law to be interpreted in such a way as to extend the definition of the offences in question for the sake of conformity with the directives, thus potentially infringing the prohibition of extensive interpretation to the disadvantage of the defendants. For, as I have already said, if Legislative Decree No 61/02 were not applied, criminal liability would be determined by reference, in particular, to the old Article 2621 of the Italian Civil Code, under which, according to information from the referring courts, the publication of false company documents such as that with which the defendants are charged here was without any doubt already subject to a penalty at the material time. Consequently, the law applicable at the material time does not by any means need first of all to be extensively interpreted in order to be brought into conformity with the provisions of the company law directives.

151. Finally, in the circumstances of these cases, the company law directives and Article 10 EC do not, *as such*, impose any obligation on individuals. In any event, the question as to which obligations are incumbent on the individual must always be determined by reference to the legislation in force at the time of the relevant acts, since obligations may be imposed only in relation to future conduct. Obligations (or prohibitions) cannot be created or modified retroactively. When committed, the offences with which the defendants in the main proceedings are charged were subject to a penalty under Italian national law, in particular the old Article 2621 of the Italian Civil Code. At the material time, criminal liability certainly did not derive directly from the directives or from Article 10 EC.

152. The situation could be assessed otherwise only if the facts forming the subject of the charges had taken place *after* the adoption of Legislative Decree No 61/02. If Legislative Decree No 61/02 were set aside in relation to acts committed *after* its adoption, the application of a directive or of Article 10 EC could more readily be said to create obligations directly. In this case, however, that eventuality need not be examined any further because, as has already been said, all the offences with which the defendants are charged were committed without exception *before* the adoption of Legislative Decree No 61/02. The defendants could not therefore, at the material time, expect that the acts with which they are charged would attract lighter

125 — Incidentally, for the purposes of the comparability of this case with *Tombesi* and *Niselli*, it makes *no difference* whether Legislative Decree No 61/02 effects a (partial) '*abolitio criminis*', as the defendant Dell'Utri contends, or whether, on the other hand, there is a '*legislative continuity*' between the old and new criminal provisions, as the Tribunale di Milano finds in its order for reference in Case C-403/02 and as the Italian Government submits in its written observations. What matters is that, here and there, a legislative amendment has meant that certain acts which were previously (and at the material time) still subject to a penalty are now exempt from penalty. The argument over '*abolitio criminis*' and '*legislative continuity*' is purely academic.

penalties than under the old Article 2621 of the Italian Civil Code or that they would be exempt from penalty altogether.

153. For all those reasons, the principle of legality in relation to crime and punishment does not by any means preclude the non-application of Legislative Decree No 61/02 in this case. Taking into account the company law directives and Article 10 EC does not have the effect of creating obligations for the defendants but has, at most, adverse indirect repercussions on them. However, this does not relieve the national court of its obligation under the third paragraph of Article 249 EC to give effect to the provisions of directives. [126]

3. Retroactive application of a more lenient criminal provision

154. The defendants Berlusconi and Dell'Utri, and the Italian Government take the view, however, that the new Articles 2621 and 2622 of the Italian Civil Code, as more lenient criminal provisions, must in any event be applied retroactively in the main proceedings. The Public Prosecutor attached to the Tribunale di Milano and the Commission take the opposing view.

155. In its previous case-law, the Court has treated the issue of the retroactive applicability of more lenient criminal provisions as a question of national law which falls to be determined by the relevant referring court. [127] Thus, in *Allain*, [128] for example, it recognised that conduct which was originally in breach of Community law and was therefore punishable under national law can be reassessed pursuant to national procedural principles (in particular, the principle of the retroactive application of a more lenient criminal provision), where the facts and law have subsequently changed.

156. However, the principle of the retroactive application of a more lenient criminal provision is not only established in the national legal systems of almost all 25 Member States [129] but is also recognised internationally. [130] What is more, it has for some time now been a part of secondary

126 — See the judgment in *Delena Wells* (cited in footnote 62, paragraph 57) and my Opinion of 29 January 2004 in Case C-127/02 *Landelijke Vereniging tot Behoud van de Waddenzee and Others*, point 146 et seq.

127 — See the judgment in *Allain* (paragraph 12), the order in *Saetti and Frediani* (paragraph 26) and the judgment in *Tombesi* (paragraphs 42 and 43), all cited in footnote 36. Similarly, see also the judgments in Joined Cases C-358/93 and C-416/93 *Bordessa and Others* [1995] ECR I-361, paragraph 9, Joined Cases C-163/94, C-165/94 and C-250/94 *Sanz de Lera and Others* [1995] ECR I-4821, paragraph 14, Case C-193/94 *Skanavi and Chryssanthakopoulos* [1996] ECR I-929, paragraph 17, and Case C-230/97 *Awoyemi* [1998] ECR I-6781, paragraph 38. See also the Opinion of Advocate General Jacobs in *Tombesi* (cited in footnote 113, point 35).

128 — Judgment cited in footnote 36.

129 — In Italy, for example, that principle is laid down in the third paragraph of Article 2 of the *Codice Penale* (Criminal Code), and in Germany in Paragraph 2(3) of the *Strafgesetzbuch* (Criminal Code). As far as I have been able to ascertain, it is only in Ireland and the United Kingdom that it is not recognised.

130 — See, for example, the third sentence of Article 15(1) of the International Covenant on Civil and Political Rights.

Community law, for example in the rules on administrative penalties for irregularities prejudicial to the Community's financial interests. [131] That principle was also incorporated into the third sentence of Article 49 (1) of the Charter of Fundamental Rights of the European Union.

157. It follows from all of the foregoing that that principle is to be regarded by no means as a purely national legal principle but also as a general legal principle of Community law [132] which the national court must in principle take into account when applying national law adopted in implementation of the company law directives. [133]

158. None the less, that conclusion does not resolve the question whether more lenient criminal provisions must be applied retroactively even *where they are contrary to Community law*. In other words, do provisions such as the new Articles 2621 and 2622 of the Italian Civil Code apply retroactively to acts committed prior to their adoption even where they infringe the company law directives? In order to answer that question, it is appropriate to look more closely at the background to the retroactive application of more lenient criminal provisions.

159. The application of later, more lenient criminal provisions constitutes an exception to the aforementioned fundamental principle of legality in relation to crime and punishment (*nullum crimen, nulla poena sine lege*), since it involves the retroactive application of a provision other than that which was in force at the material time.

160. That exception is based ultimately on considerations of fairness, which cannot have the same high status as, for example, the basis for application of the principle of legality in relation to crime and punishment, that is to say, the principle of legal certainty, which itself flows from the principle of the rule of law. Accordingly, even in most national legal systems, the principle of the retroactive application of more lenient criminal provisions does not have constitutional status but is established only in ordinary law. Moreover, it is itself not infrequently subject to limitations, for example in cases where criminal liability for an act was based on a provision the application of which was from the outset limited in time. [134]

131 — See Article 2(2) of Regulation No 2988/95 and, in this regard, the judgment in Case C-295/02 *Gerken* [2004] ECR I-6369, paragraphs 52 to 58.

132 — The question whether this principle is a principle of Community law was raised by Advocate General Fennelly in his Opinion in Case C-341/94 *Allain* [1996] ECR I-4633, point 43, but ultimately remained unanswered. Advocate General Léger, in his Opinion in Case C-230/97 *Awoyemi* [1998] ECR I-6784, points 31 and 32, concluded, by reference to earlier case-law, that it was not.

133 — On the obligation to observe the general principles of Community law, see inter alia the judgment in Case C-36/94 *Siesse* [1995] ECR I-3573, paragraph 21.

134 — In Italy, for example, the retroactive application of a more lenient criminal provision is precluded where a final judgment has already been given or where the legislation in question is a derogating provision or a provision the application of which is limited in time (third and fourth paragraphs of Article 2 of the Italian Criminal Code). Moreover, the Commission refers to judgment No 51 of the Corte Costituzionale (Italian Constitutional Court) of 19/22 February 1985, according to which the principle of the retroactive application of a more lenient criminal provision does not apply to a Decreto Legge (Decree Law) which was not converted into law by parliament following its adoption and therefore lost its validity retroactively; see also in this regard the third paragraph of Article 77 of the Italian Constitution.

161. The retroactive application of more lenient criminal provisions is based on the consideration that a defendant should not be punished for conduct which, in the (revised) view of the legislature at the time of the criminal proceedings, is no longer punishable. The defendant is thus meant to enjoy the benefit of the revised assessment of the legislature. This ensures, in particular, that the legal system is coherent. The retroactive application of a more lenient criminal provision also takes into account the fact that the objectives of general and individual crime prevention pursued through punishment cease to apply once the conduct in question no longer attracts a penalty.

162. In a case relating to Community law, however, the retroactive application of a more lenient criminal provision is justified only where the primacy of Community law is preserved, that is to say, where the value judgments of the Community legislature are also taken into account and the (revised) opinion of the national legislature is in conformity with the provisions laid down by the Community legislature. I do not see why the defendant should retroactively benefit from the national legislature's revised assessment of the punishability of his conduct where that assessment runs counter to the unchanged provisions of Community law. [135]

135 — This would not be so if the situation were the other way round, that is to say, if the criminal provision in force at the material time were more lenient or if no penalty at all were applicable at the material time. In those circumstances, application of the more lenient criminal provision is not an exception to the fundamental constitutional principle of legality in relation to crime and punishment but simply the application of it. Where that is the case, the more lenient criminal provision or the exemption from penalty must be applied even if the national legislation in force at the material time infringed Community law.

163. If the national legislature infringes the provisions of Community law when adopting a new, more lenient criminal provision, it does not help make the applicable legislation any more coherent but, rather, jeopardises the uniformity of the legal system. In such circumstances, there is no reason to make an exception to a fundamental constitutional principle such as legality in relation to crime and punishment. On the contrary, preserving the coherence of the legal system requires that effect be given to the provisions of Community law, which takes precedence over national law.

164. There is also the fact, of course, that the objectives of general and individual crime prevention pursued through punishment do not cease to be relevant where the national legislature alone takes the view that a certain form of conduct is to be exempt from penalty, while, for the same conduct, Community law continues to require that effective, proportionate and dissuasive penalties be provided.

165. In so far as the national legislation is incompatible with Community law, the referring courts therefore remain bound by the obligation to give effect to the provisions of the Community law directives by setting aside such national legislation, even if the latter consists of more lenient criminal provisions. This might be neatly summed up by saying that a criminal provision adopted subsequently which is contrary to Community law does not constitute an *applicable* more lenient criminal provision.

166. Indeed, the situation could not be otherwise if the principle of the retroactive application of a more lenient criminal provision were regarded — contrary to the view expressed here [136] — not as a principle of Community law but as a question of national law alone. For Community law sets limits to the competence of Member States even in the application of national provisions. [137] It follows from the primacy of Community law that, in the proceedings pending before them, the referring courts must observe Community law and, in particular, the provisions and principles laid down by the Community legislature in the company law directives. [138]

168. Not even the Court's findings in the judgment in *Allain* [139] preclude this view. Unlike in the present case, in *Allain*, the factual *and Community law* framework had subsequently changed to the benefit of the defendant. The position is similar in the cases of *Awoyemi* and *Skanavi and Chrysanthakopoulos*, where, once again, it was *Community law* which had changed in the meantime. [140] Such situations cannot therefore be compared with one where *national* rules are subsequently introduced which benefit the defendant *but are contrary to Community law.*

4. Interim conclusion

167. Consequently, the retroactive application of more lenient criminal provisions provided for by national law must not jeopardise the effective application of the company law directives in a uniform manner in all the Member States. Under no circumstances must the consequence of such retroactive application be that conduct which was punishable at the material time is, in breach of the provisions of Community law, retroactively rendered exempt from penalty.

169. It must therefore be concluded that a court of a Member State has an obligation to give effect to the provisions of a directive, without prior recourse to the national constitutional court, by setting aside a more lenient criminal provision enacted after the fact, in so far as that provision is incompatible with the directive.

136 — Points 156 and 157 of this Opinion.

137 — In relation to criminal law and the law of criminal procedure, this idea is expressed, for example, in the judgments in Case 186/87 *Cowan* [1989] ECR 195, paragraph 19, and Case C-274/96 *Bickel and Franz* [1998] ECR I-7637, paragraph 17.

138 — On the obligation to ensure the application and practical effectiveness of Community law, see also points 88 and 134 to 136 of this Opinion.

139 — Cited in footnote 36.

140 — Judgments cited in footnote 127.

V — Conclusion

170. In the light of the foregoing considerations, I propose that the Court should reply as follows to the questions referred to it for a preliminary ruling by the Tribunale di Milano and the Corte di Appello di Lecce:

(1) The first indent of Article 6 of First Council Directive 68/151/EEC of 9 March 1968, in conjunction with Article 2(3) and Article 47(1)(1) of Fourth Council Directive 78/660/EEC of 25 July 1978 and Article 10 EC, requires Member States to provide for appropriate penalties not only in the event that annual accounts are not disclosed at all but also in the event that substantively false annual accounts are disclosed.

(2) Penalties are appropriate within the meaning of Article 6 of the First Directive where they are effective, proportionate and dissuasive. In this regard, particular importance is to be attached not only to the interests of company members and creditors but also to the interests of other third parties and the protection of their trust in a true representation of the company's assets, liabilities, financial position and profit or loss. The question whether a provision of national law contains an effective, proportionate and dissuasive penalty must be examined by reference to the role of that provision in the legislation as a whole, including the progress and special features of the procedure before the various national authorities, in each case in which that question arises.

(3) The first indent of Article 6 of the First Directive, in conjunction with Article 2 (3) and Article 47(1)(1) of the Fourth Directive, does not preclude national legislation under which criminal liability for the publication of false company documents is excluded where the act in question does not distort to an appreciable extent the representation of the profit or loss, assets, liabilities and financial position of the company or group, unless the act was carried out deliberately and with the intention to deceive or secure enrichment.

However, those provisions do preclude national legislation under which criminal liability for the publication of false company documents is always excluded where the false statements or omissions result in a distortion which does not differ from the correct value by more than a certain percentage, and which makes no provision for an examination of all the circumstances of each individual case.

(4) The first indent of Article 6 of the First Directive, in conjunction with Article 2 (3) and the first subparagraph of Article 47(1) of the Fourth Directive, precludes rules on limitation periods under which the penalties provided for are likely to be imposed in fact only rarely, if at all.

(5) The first indent of Article 6 of the First Directive, in conjunction with Article 2 (3) and the first subparagraph of Article 47(1) of the Fourth Directive, does not preclude national legislation under which penalties to protect the financial interests of certain persons can as a rule be imposed only on complaint by the injured party. This presupposes, however, that there is also general legislation providing for effective, proportionate and dissuasive penalties to protect the interests of third parties which are applicable independently of any financial loss and which can be imposed *ex officio*.

(6) Article 38(6), in conjunction with Article 38(1) and Article 16(3), of Seventh Council Directive 83/349/EEC of 13 June 1983, which applies to consolidated accounts, must be interpreted *mutatis mutandis*.

(7) A court of a Member State has an obligation to give effect to the provisions of a directive, without prior recourse to the national constitutional court, by setting aside a more lenient criminal provision enacted after the fact, in so far as that provision is incompatible with the directive.