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Press and Information

PRESS RELEASE No 38/05

3 May 2005

Judgment of the Court of Justice in Joined Cases C-387/02, C-391/02 and C-403/02

Berlusconi and Others

THE AUTHORITIES OF A MEMBER STATE MAY NOT, IN CRIMINAL PROCEEDINGS RELATING TO FALSE ACCOUNTING, RELY ON A DIRECTIVE AS SUCH AGAINST AN ACCUSED PERSON

A directive cannot – by itself and independently of national legislation adopted by a Member State for purposes of its application – have the effect of determining or increasing the criminal liability of an accused person

Several natural persons are being prosecuted before Italian courts for offences relating to false accounting committed prior to 2002, the year in which new criminal provisions covering those offences entered into force in Italy.

According to the Italian courts, application of those new provisions, which are more favourable than the previous provisions, will prevent criminal prosecutions being brought against the accused. The provisions set out a significantly shorter limitation period (four and a half years instead of seven and a half years maximum), make the bringing of a prosecution subject to the requirement that a complaint be lodged by a member or creditor who considers that he has been adversely affected by the false accounts, and exclude any penalty in respect of false accounting which has no significant effect or is of minimal importance and does not exceed certain thresholds.

This is the context in which the Tribunale di Milano (Milan District Court) and the Corte d'appello di Lecce (Court of Appeal, Lecce) have asked the Court of Justice of the European Communities whether the offence of false accounting is covered by the First Companies Directive¹ and whether the new Italian provisions are compatible with the Community-law

¹ Article 6 of First Council Directive 68/151/EEC of 9 March 1968 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community (OJ, English Special Edition 1968 (I), p. 41).

requirement that penalties provided for under national legislation for breaches of Community provisions must be appropriate (that is to say, effective, proportionate and dissuasive).

The scope of application of the penalties referred to by the First Directive

The Court first of all finds that the penalties for false accounting are designed to punish serious infringements of the fundamental principle of the Fourth and Seventh Companies Directives² that the annual accounts of companies must provide a true and fair view of a company's assets and liabilities, financial position and profit or loss.

It follows from the context and objectives of the applicable directives on company law that the system of penalties provided for by the First Companies Directive applies not only to **failure to publish** accounts but also to **publication of false accounts**.

While the choice of penalties remains within their discretion, Member States must ensure in particular that those penalties are appropriate in character, that is to say, that they are effective, proportionate and dissuasive.

The principle of the retroactive application of the more lenient penalty

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

It follows that this is a general principle of Community law **which national courts must respect** when applying national legislation adopted for the purpose of implementing Community law and, in the present cases, the directives on company law.

The ability to rely on the First Companies Directive

The Court takes the view that it is unnecessary to resolve the question of whether the principle of the retroactive application of the more lenient penalty must be applied in the case in which that penalty is contrary to Community law.

If the Italian courts were to conclude that the new national provisions are incompatible with the requirement that penalties be appropriate, they would, on the basis of the Court's case-law, be obligated to set those provisions aside under their own authority.

In the present case, non-application of the more lenient penalties could have as a consequence the imposition of manifestly more severe criminal penalties such as those in force at the time when the acts were carried out.

According to the Court's consistent case-law, a directive (such as the First Companies Directive) cannot, in itself, impose obligations on an individual and cannot therefore be relied on as such against that individual. The Court has also ruled in its case-law that a directive cannot, of itself and independently of national legislation adopted for the purpose of its application, have the effect of increasing the criminal liability of accused persons.

² Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies (OJ 1978 L 222, p. 11).

Seventh Council Directive 83/349/EEC of 13 June 1983 based on Article 54(3)(g) of the Treaty on consolidated accounts (OJ 1983 L 193, p. 1).

The Court concludes that, in a situation such as that in issue in the main proceedings, the First Companies Directive cannot be relied on as such against accused persons by the authorities of a Member State within the context of criminal proceedings, in view of the fact that a directive cannot, of itself and independently of national legislation adopted by a Member State for its implementation, have the effect of determining or increasing the criminal liability of those accused persons.

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Languages available: EN, FR, DE, GR, IT, ES, HU, PL, PT

The full text of the judgment may be found on the Court's internet site

<http://curia.eu.int/jurisp/cgi-bin/form.pl?lang=en>

It can usually be consulted after midday (CET) on the day judgment is delivered.

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*Pictures of the delivery of the judgment are available on EbS "Europe by Satellite",
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