DEVELOPMENTS

Casenote – Berlusconi at the European Court of Justice – C-387/02

By Flaminia Tacconi[*]

A. Case Summary

On the 3rd of May 2005, the ECJ gave judgment in the *Silvio Berlusconi and Others*[1] case dealing with the provisions of the First (D68/151/EEC), Fourth (D78/660/EEC) and Seventh (D83/349/EEC) Companies Directives and the transposing Italian national provisions. The case is a preliminary ruling referred to the ECJ by several Italian courts (*Tribunale di Milano, Corte d'Appello di Lecce*) on the basis of Art.234 EC Treaty. It has been decided by the Grand Chamber of the ECJ, which is quite indicative of a significant judgment. Furthermore, the Grand Chamber did not follow the opinion of the Advocate General Kokott. Finally, it is interesting to note that no other government except the Italian Government contributed to the case. This last fact seems very strange having regard to the highly sensitive issue. Indeed the decision deals with the criminal sanctions for false accounting.

I. The Facts of the Case

Several defendants, including the Italian Prime Minister, were charged with having published false company documents. The trials related to the offences occurred before 2002 and the trials were still pending in 2002 when a new criminal law was introduced. The new provisions of Legislative Decree No 61/02, introduced a relaxation of the offences. The penalty for publishing false documents was initially an imprisonment for a term of one to five years and provided for an indictable offence (so called *delitto*) while the new Decree-Law reduced the penalty to an imprisonment of less than two years so that publishing of false documents became a summary offence (so called *contravvenzione*). Correspondingly the limitation

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[1] Joined Cases C-387/02, *Silvio Berlusconi*, C-391/02, *Sergio Adelchi*, C-403/02, *Marcello dell'Utri and Others*, 2005 ECR I-0000.

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periods, which were a maximum of ten years, if interrupted, shrank to a maximum of four and one-half years.

Furthermore, criminal prosecution under the new Article 2622 of the Civil Code is conditional upon the lodging of a complaint by the injured party, which means the company members or creditors. Consequently, an action can only be initiated by a member of the company or by a creditor. Finally, an exclusion of the criminal liability has been introduced when it is ascertained that the false statements or omissions distort the pre-tax financial results of the year by no more than 5% or distort the net assets by no more than 1%: so called tolerance limits.

II. The Preliminary Questions

The Italian Courts introduced three main questions. Since the First Council Directive 68/151/EEC did not deal explicitly with publication of false accounting but rather with the mere disclosure of accounting, the Italian Courts asked whether the offence of publicizing false accounting was covered by the First Companies Directive. Secondly, the Courts asked whether the new Italian provisions were compatible with Article 6 of the Fourth Companies Directive 78/660/EEC. Finally, the Italian Courts asked whether the sanctions introduced by the new legislation could be considered as effective, proportionate and dissuasive sanctions for the breaching of EC law.

III. Findings of the Court

The Court first established that Article 6 of the Fourth Companies Directive is not limited to the imposing of an obligation on Member States to provide for appropriate penalties in the case of failure to disclose companies accounting. Rather it sets down a similar obligation in respect of failure to disclose those documents in the manner required by the objective of the Directive which is that annual accounts of companies must give a true and fair view of the company's assets and liabilities, financial position and profit or loss. In its argument, the Court stressed the importance of protecting the interests of third parties and not only the interests of the members of the company or of the creditors.

To the appropriateness of the sanctions, keeping in mind its case law, the Court reaffirmed that while the choice of penalties remains in the discretion of the Member States, they must ensure that infringements of EC law are punished under conditions which make the penalty effective, proportionate and dissuasive. Having made this general statement, in a quite expedited way, the Court stated for the first time so explicitly in its jurisprudence, that the principle of the retroactive application of the more lenient penalties should be considered one of the general

principles of EC law as it forms part of the *constitutional traditions common* to the Member States.

Finally, the Court recalled its traditional case law on the lack of horizontal effect of directives. The Court held that a directive cannot of itself impose obligations on an individual and cannot therefore be relied upon as such against an individual. In particular, in a situation in which a directive is relied on against an individual by the authorities of a Member State within the context of criminal proceedings, 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.

B. Commentary

Several issues appear to be largely debatable in this decision but emphasis will be put first on the interpretation of Art. 6 of the First Directive on company law. Secondly, the contribution of this decision to the jurisprudence of the court relating to the direct effect of the Directives is of interest bearing in mind the jurisprudence of the Court in the *Niselli*[2] case. Furthermore, the statement regarding the principle of the more lenient penalty appears to be quite relevant as well as the appreciation of the Court to its application.

I. The Protection of Third Parties

To the scope of application of the penalties referred by the First Directive, the ECJ concluded[3], that the First Companies Directive applies not only to the failure to publish accounts but also to the publication of false accounts. This conclusion, which seems a very coherent and logical one, has been reached by analyzing the purpose of the provisions and by concluding that a major objective of the Directive is the protection of third parties as potential investors or business partners. If the failure to publish accounts already deserves a system of penalties *a fortiori* the publication of *false* accounts deserves a punishment. It is clear that a false disclosure amounts to the same result as a failure to disclose as it does not deliver the required information. In addition, it might be even worse as it may lead a third party in believing something erroneous while the failure to disclose at least keeps away a third party from building any kind of representation on the situation of the company. This has been rightly stressed in the opinion of the Advocate General as follows:

[2] Case C-457/02, *Niselli*, 2004 ECR I-0000.

[3] Case C-387/02, *Silvio Berlusconi*, 2005 ECR I-0000, paragraph 56 to 63.

> *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.*[4]

The Court took into account the preventive objective of the directive. This element is exactly the one missing in the national legislation which has been structured in a way as to ensure the protection of creditors or members of the company but which explicitly excludes a possible action of third parties.

II. The Direct Effect of Directives

The decision seems to follow faithfully the precedent jurisprudence[5] limiting the direct effect of directives. The Court concludes that:

> in a situation such as that in issue in the main proceedings, the First Companies Directive 68/151/EEC (…) 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*.[6]

It seems however at least questionable whether this jurisprudence was really applicable. The Directive had already been transposed by the old provisions of the *Codice Civile*. The new national provisions are potentially in breach of this Directive.

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[4] Opinion of the Advocate General Kokott Joined Cases C-387/02, C-391/02 and C-403/02, *Berlusconi and Others*, 2005 ECR I-0000, point 74.

[5] Case 80/86, *Kolpinghuis Nijmegen,* 1987 ECR I-3969, paragraph 14; Case C-168/95, *Arcaro,* 1996 ECR I-4705, paragraph 36, and Case C-60/02, *X,* 2004 ECR I-0000, paragraph 61.

[6] Joined Cases C-387/02, *Silvio Berlusconi*, C-391/02, *Sergio Adelchi*, C-403/02, *Marcello dell'Utri and Others*, 2005 ECR I-0000, conclusions.

The new provisions have been recognized as applicable exclusively on the basis of the principle of the retroactive application of the more lenient penalty. The Court considered that although the new provisions could be in breach of the Directive, the national courts could not avoid applying them as otherwise the directive would deploy a direct effect on individuals increasing their criminal liability. Basing its argument on its previous jurisprudence[7], the Court circumscribes the direct effect of the directive by applying the new national legislation on the basis of the principle of the retroactive application of the more lenient penalty. Indeed the Court avoids challenging the application of the aforementioned principle by stating that the Directive cannot *have the effect of determining or increasing the criminal liability of those accused persons*. The issue here is not properly raised as, in the present constellation, the Directive would not on itself and independently of national legislation have the effect of aggravating the criminal liability of persons involved. It would rely on the old national criminal provisions which were in any case applicable at the material time of the breach and the directive would therefore only have an indirect effect on individuals. The previous jurisprudence always referred to a situation where the EC Law was introducing an aggravation of the liability of an individual while in this case the EC provisions remain the same only the national legislation is changing.

Furthermore, in the *Niselli* case, where the situation was quite similar: a new national legislation had been introduced with the effect of annulling the criminal liability of the defendant, the Court avoided the debate on the horizontal effect of the Directive and stated:

> However, in this case, it is clear that, *at the time of the facts* which gave rise to the criminal proceedings against Mr Niselli, *they could*, in an appropriate case, *constitute offences under criminal law. In those circumstances, it is inappropriate to enquire* into such consequences *as might derive, for the application of Directive 75/442, from the principle that penalties must have a proper legal basis*.[8]

In the *Niselli* case, the Court implicitly suggests applying the old article applicable at the material time of the breach. The Advocate General Kokott, who is the same Advocate General in both cases, suggested relying on the old legislation which was

[7] Case 80/86, *Kolpinghuis Nijmegen,* 1987 ECR 3969, paragraph 13/14; Case C-168/95, *Arcaro,* 1996 ECR I-4705, paragraph 36, and Case C-60/02, *X,* 2004 ECR I-0000.

[8] Case C-457/02, *Niselli*, 2004 ECR I-0000, paragraph 30.

in conformity with the Directive[9]. The ECJ sustained in the *Berlusconi* case an opposite view by recognising the application of the principle of the more lenient penalty and by rejecting a possible application of the legislation applicable at the time of the facts as well as a direct horizontal effect of the directive. Why did the Court take such divergent views in such similar cases? A guess might be that while the *Niselli* case is dealing with a "higher" interest which is the protection of the environment, the *Berlusconi* case is dealing with issues which do not require such a great interference of EC law on national legislations.

In any event, the real question was less the effect of the Directive than the importance attributed to the principle of the retroactive application of the more lenient penalty and the pertinence of its application in this case.[10] The Court should have based its discussion on evaluating if the conditions for applying such a principle were given, bearing in mind the possible violation of the Companies Directive and balancing the importance of this principle to other principles like the primacy of European Community law. But the Court eliminated this possible discussion by basing the requirements of adopting effective, proportionate and dissuasive sanctions for breaching EC law on the Directive itself and not on Art.10 ECT. This means that this latter requirement relies on a secondary rule instead of resulting from a primary rule so that any pondering between the principle of the retroactive application of the more lenient penalty, a constitutional principle, and the requirement of adopting effective sanctions, resulting from a secondary provision, could not take place. The two interests were lying in two different layers of EC law. If the Court had recognized a general duty to adopt effective sanctions on the basis of Art.10 ECT an assessment would have been inevitable. This discussion seems to be the right one as the ECJ itself, in this judgment, does not exclude this kind of assessment! This makes the whole judgment even more controversial.

III. A Debate Deficit?

The Court, as mentioned previously, recognized in a very brief way the constitutional character of the principle of the retroactive application of the more lenient penalties.[11] This statement seems at first sight very convincing. Although it

[9] Opinion of the Advocate General Kokott Joined Cases C-387/02, C-391/02 and C-403/02, *Berlusconi and Others*, 2005 ECR I-0000, point 163 and 170 ; Opinion of the Advocate General Kokott Case C-457/02, *Niselli*, 2004 ECR I-0000, points 74/75.

[10] In this sense Ivo Gross, *Keine Strafverfolgung wegen Bilanzfälschung auf Grund einer Richtlinie – Berlusconi*, NJW Nr. 12, 369, 372 (2005).

[11] Joined Cases C-387/02, *Silvio Berlusconi and Others*, paragraph 68/69.

can be argued whether it really is correct as only some Member States attribute to this principle a constitutional character while in most Member States it appears in the criminal legislative acts but not in the constitution.[12] Nevertheless, as this principle has recently been included in the Charter of Fundamental Rights of the European Union (Art. 49), this statement is surely defendable. But it might have been exhaustively analyzed by the Court with a more founded argument than a one-line statement.[13] Having been recognized as part of the constitutional traditions common to the Member States, the principle of the application of the more lenient penalty has, for the very first time, been recognized by the Court as a constitutional principal of the EC. National courts are, thus, required to respect this principle when applying national legislation adopted to implement Community law. After stating that, the ECJ went further and affirmed in point 70 and 71:

> The question nonetheless arises as to *whether the principle of the retroactive application of the more lenient penalty applies in the case in which that penalty is at variance with other rules of Community law*. It is, however, unnecessary to resolve that question for the purpose of the disputes in the main proceedings as the Community rule in issue is contained in a directive on which the law-enforcement authorities have relied against individuals within the context of criminal proceedings.[14]

The ECJ seems to imply that in other cases the principle of the retroactive application of the more lenient penalty could be eventually discarded in favor of "*other rules of Community law.*"[15] This statement is not really necessary to achieve a result in the case at stake so that the ECJ seems to let the door open in the coming jurisprudence for possibly giving priority to other rules of Community law. Subsequently two questions arise: What is the statute of this principle in the light of this statement? And secondly, which are, or could be, these other rules of Community law that could lead the ECJ to discard a constitutional principle as it defined to be common to the Member States?

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[12] In this sense Denys Simon, *Primauté du droit communautaire et rétroactivité* in mitius *des lois pénales,* Europe - Actualité du droit communautaire Nr. 7, 12,13 (2005).

[13] Joined Cases C-387/02, *Silvio Berlusconi and Others*, paragraph 68.

[14] Joined Cases C-387/02, *Silvio Berlusconi and Others*, paragraph 70/71.

[15] Joined Cases C-387/02, *Silvio Berlusconi and Others*, paragraph 70.

The principle of the retroactive application of the more lenient penalty seems to remain a constitutional principle of the EC, but maybe with a flat. It might constitute a constitutional principle of a secondary level but due to the brevity of the statement this cannot be further ascertained. How is it than possible to determine these "*other rules of Community law*?" Certainly these other rules must be hierarchically similar. So that if the principle of retroactive application of the more lenient penalty is a constitutional principle these other rules must at least have the character of constitutional EC rules. Furthermore, according to the statement of the Court, these rules must be at variance with the penalty in question. The remaining criteria are unknown. Of course these other rules will be protecting a higher constitutional interest than the principle of retroactive application than the more lenient penalty is protecting. The latter ensures that a defendant is not punished for conduct which in the revised view of the legislator, at the time of the criminal proceedings, is no longer punishable. It deems the coherence of the legal system and ensures an equitable treatment to the defendant. Although recognized as a main principle of criminal law, the principle of the application of the more lenient penalty nevertheless constitutes an exception to the general rule in criminal law which is the application of the principle of legality (*nullum crimen, nulla poena sine lege*).

In the European constellation, it cannot be forgotten that the national legislation level is no longer the ultimate level. Where an obligation to conform European provisions exists, the legislator is not free anymore to set its own national standards discarding obligations undertaken at the EC level.[16] Should then the principle of the application of the more lenient penalty still be applied where the more lenient penalty breaches EC law? Would the primacy and conformity of EC law not be another valuable rule of Community law which could be at variance with the aforementioned principle? Is a threat to the coherence of the whole EC system not to be taken into account?

In the light of the exposed reflections, this case precisely offered an opportunity for the Court to further determine these rules by going into the discussion that the Advocate General Kokott raised in her opinion.[17] Indeed she elevated the

[16] In this sense Marilisa D'Amico, *Il* favor rei *fra legislatore nazionale e vincoli comunitari*, Quaderni costituzionali Nr.1, 177, 180 (2005).

[17] Opinion of the Advocate General Kokott Joined Cases C-387/02, C-391/02 and C-403/02, *Berlusconi and Others*, 2005 ECR I-0000, points 162 to 167. Opinion of the Advocate General Kokott Case C-457/02, *Niselli*, 2004 ECR I-0000, points 69, 74 and 75.

discussion by raising the issue of a possible confrontation of the EC principle of legal coherence and the principle of primacy of the EC law with the principle of retroactive application of the more lenient penalty. The Court did not enter into that debate and circumvented it to a lesser degree by focusing on the horizontal effect of the Directive. The Court avoided this deeper discussion; maybe the principle of legal coherence and the principle of primacy of EC law were not "high" enough or the case politically too sensitive.

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