JUDGMENT OF THE COURT (Fifth Chamber)
1 December 1998 *

In Case C-200/97,

REFERENCE to the Court under Article 177 of the EC Treaty by the Corte Suprema di Cassazione, Italy, for a preliminary ruling in the proceedings pending before that court between

Ecotrade Srl

and

Altiforni e Ferriere di Servola SpA (AFS)

on the interpretation of Article 92 of the EC Treaty,

THE COURT (Fifth Chamber),

composed of: J.-P. Puissochet, President of the Chamber, J. C. Moitinho de Almeida, C. Gulmann, D. A. O. Edward and M. Wathelet (Rapporteur), Judges,

Advocate General: N. Fennelly,
Registrar: L. Hewlett, Administrator,

* Language of the case: Italian.

after considering the written observations submitted on behalf of:

— Ecotrade Srl, by G. Conte and A. M. Rossi, of the Genoa Bar, and A. Picone, of the Rome Bar;

— Altiforni e Ferriere di Servola SpA (AFS), by P. Vitucci and A. Guarino, of the Rome Bar;

— the Italian Government, by Professor Umberto Leanza, Head of the Legal Service in the Ministry of Foreign Affairs, acting as Agent, and Oscar Fiumara, Avvocato dello Stato,

— the Commission of the European Communities, by P. F. Nemitz and P. Stancanelli, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Ecotrade Srl, Altiforni e Ferriere di Servola SpA (AFS), the Italian Government and the Commission, at the hearing on 28 May 1998,

after hearing the Opinion of the Advocate General at the sitting on 16 July 1998,

gives the following

Judgment

1 By order of 10 February 1997, received at the Court on 26 May 1997, the Corte Suprema di Cassazione (Supreme Court of Cassation) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty a question on the interpretation of Article 92 of that Treaty.

2 That question was raised in proceedings between Ecotrade Srl, a capital company engaged in selling steel products, and Altiforni e Ferriere di Servola SpA ('AFS'), a company engaged in manufacturing in the steel industry, concerning a debt of LIT 149 108 190 owed by AFS to Ecotrade for a delivery of slag.

3 Since that debt remained unpaid, on 30 July 1992 the Pretore (Magistrate), Trieste, made an order by way of enforcement for the transfer to Ecotrade, up to the amount due, of a debt owed to AFS by a bank.

4 On 28 August 1992, AFS informed Ecotrade that it had been placed under special administration by Ministerial Decree of 23 July 1992, pursuant to Law No 95/79 of 3 April 1979 (GURI No 94 of 4 April 1979), with permission to continue trading, and sought from it repayment of the sum in question on the ground that the enforcement of the debt was contrary to Article 4 of Law No 544/81 of 2 October 1981 (GURI No 272 of 3 October 1981), which prohibits any individual actions for enforcement after the initiation of the special administration procedure.

5 On 4 October 1992, Ecotrade brought an action before the Tribunale (District Court), Trieste, seeking a declaration that AFS's demand for repayment was not well founded, as it was based on a ministerial decree incompatible with Community law in the field of State aid.

6 By judgment of 23 October 1993, the Tribunale rejected Ecotrade's application and granted AFS's counterclaim for reimbursement.

7 That judgment was upheld by decision of 27 January 1996 of the Corte d'Appello (Court of Appeal), Trieste. Ecotrade then appealed on a point of law to the Supreme Court of Cassation.

8 Law No 95/79 establishes a special administration procedure for large companies in difficulties.

9 In accordance with Article 1(1) of that Law, that procedure may be applied to undertakings which have employed 300 or more workers for at least a year and owe debts amounting to LIT 80.444 thousand million or more, and exceeding five times the paid-up capital of the company, to credit institutions, social assistance or welfare institutions, or companies in which the State has a majority holding.

10 Under Article 1a of Law No 95/79, the procedure is also applicable where the cause of insolvency is the obligation to reimburse sums of at least LIT 50 thousand million, equivalent to at least 51% of the paid-up capital, to the State, to public bodies or to companies in which the State has a majority holding, by way of repayment of State aid which is unlawful or incompatible with the Common Market, or in connection with financing provided for technological innovation and research.

11 In accordance with Article 2(1) of Law No 95/79, in order for the special administration procedure to apply, the undertaking must have been declared insolvent by the courts, either pursuant to the Law on Insolvency, or on account of failure to pay employees' salaries for at least three months. After consultation with the Minister for Finance, the Minister for Industry may then issue a decree placing the undertaking under special administration and permit it, having regard to the interests of the creditors, to continue trading for a period of up to two years, which may be extended for a further two years at most, subject to the assent of the Interdepartmental Committee for Industrial Policy Coordination ('the Committee').

12 Undertakings under special administration are governed by the general rules of the Law on Insolvency, subject to derogations expressly provided for by Law No 95/79 or subsequent laws. Thus, under special administration as under the ordinary liquidation procedure, the owner of the insolvent company may not dispose of its assets, which must in principle be used to settle the creditors' claims; interest on existing debts is suspended; no individual action for enforcement may be taken or pursued in respect of the property of the undertaking concerned. However, in the case of special administration, unlike the usual insolvency procedure, suspension of any action for enforcement is extended by Article 4 of Law No 544/81 to tax debts, in addition to the penalties, interest and increases charged in respect of belated payment of company tax.

13 Furthermore, under Article 2a of Law No 95/79, the State may guarantee some or all of the debts contracted by undertakings placed under special administration to finance their current operations and to reactivate or complete plant, buildings and industrial equipment, in accordance with the terms and detailed rules laid down by decree of the Minister for the Treasury, subject to the assent of the Committee.

14 It is permitted, in the course of reorganisation, to sell off all the premises belonging to the insolvent undertaking in conformity with the conditions laid down by Law

No 95/79. Under Article 5a thereof, the transfer of all or part of the undertaking is then subject to a flat-rate registration charge of LIT 1 million.

15 Moreover, Article 3(2) of Law No 19/87 of 6 February 1987 (GURI No 32 of 9 February 1987) exempts undertakings placed under special administration from payment of fines and financial penalties imposed for failure to pay compulsory social security contributions.

16 In accordance with the second indent of Article 2 of Law No 95/79, where an undertaking in special administration is permitted to continue trading, the administrator appointed to manage it must draw up an appropriate business plan, which is examined by the Committee to determine whether it is compatible with the broad outlines of national industrial policy before it can be approved by the Minister for Industry. Decisions in matters such as restructuring, sale of assets, liquidation or termination of the period of special administration are subject to the approval of that minister.

17 It is only at the end of the period of special administration that creditors of the undertaking under special administration can obtain payment of their debts, in whole or in part, through realisation of the undertaking's assets or from renewed profits. In addition, Articles 111 and 212 of the Law on Insolvency provide that the expenses arising from special administration and from the company's continued operation, including debts which have been contracted, are to be paid out of the proceeds from the realisation of the assets and enjoy priority over claims in existence at the date when the special administration procedure was initiated.

18 The special administration procedure comes to an end following composition with the creditors, distribution of all the assets, discharge of all debts owed or inadequacy of the assets, or when the undertaking is once again in a position to meet its obligations and has thus recovered its financial stability.

19 A further point to note is that Law No 95/79 has been the subject of a number of decisions adopted by the Commission.

20 First, with regard to Law No 95/79 as a whole, the Commission sent the Italian Government a letter pursuant to Article 93(1) of the EC Treaty in which, having considered that the legislation in question seemed to be caught in several respects by Article 92 et seq. of the Treaty, it sought prior notification of all cases in which that Law was to be applied so that they might be examined in the context of the rules concerning aid for undertakings in difficulties (Letter E 13/92, of 30 July 1992, OJ 1994 C 395, p. 4).

21 The Italian Government replied to the Commission's request by stating that it was prepared to give prior notification only where the State had provided a guarantee pursuant to Article 2a of the Law in question. In those circumstances, the Commission decided to initiate the procedure provided for in Article 93(2) of the EC Treaty.

22 Second, the Commission adopted a number of decisions relating to individual cases:

— Decision 96/434/EC of 20 March 1996 (OJ 1996 L 180, p. 31), in which the Commission found that Law No 80/93 providing for the application of the special administration procedure to undertakings whose insolvency is caused by the obligation to repay to the State, to public bodies or to companies in which the State has a majority holding a sum equal to or greater than 51% of the paid-up capital and, in any event, of not less than LIT 50 thousand million, in pursuance of decisions taken by the Community institutions under Articles 92 and 93 of the EC Treaty, constituted State aid. By that decision, the Commission found the aid in question incompatible with the Common Market and with the operation of the Agreement on the European Economic Area, and demanded the repeal of the provisions that were incompatible;

— Decision No 96/515/ECSC of 27 March 1996 (OJ 1996 L 216, p. 11), in which the Commission found that the guarantee granted to AFS by the State to cover the sum of LIT 26.5 thousand million, without the payment of any premium, under Article 2a of Law No 95/79, constituted aid within the meaning of Article 4(c) of the ECSC Treaty. By that decision, the Commission found the aid in question illegal and incompatible with the common market for coal and steel, and instructed the Italian State to recover it;

— Decision No 97/754/ECSC of 30 April 1997 (OJ 1997 L 306, p. 25), in which the Commission found that a series of measures in favour of Ferdofin Siderurgica Srl taken in connection with the application of Law No 95/79 — in particular suspension of payment of substantial debts owed to various public bodies — constituted aid within the meaning of Article 4(c) of the ECSC Treaty. By that decision, the Commission found the aid in question incompatible with the common market for coal and steel and instructed the Italian Government to recover the aid that had been paid and to cease to apply the provisions of Law No 95/79 as regards the failure by Ferdofin Siderurgica Srl to pay debts contracted with public bodies and enterprises.

23 Those were the circumstances in which the national court decided to stay proceedings and seek a preliminary ruling from the Court on the following question:

'This court is not clear as to the interpretation of:

(a) Article 92 of the Treaty, inasmuch as the provision of aid "granted by a Member State" or, alternatively, "through State resources" might lead to the conclusion that even a State measure which, whilst it does not provide for disbursement of funds by the State, enables the same result to be achieved by special procedures as would have been obtained by the disbursement of State funds, constitutes aid;

(b) the abovementioned decision (E13/1992), inasmuch as the conclusion at which it arrives — set forth above — is preceded by the statement that the legislation (Law No 95/79) "is caught in several respects by Article 92 et seq of the EC Treaty".

The court is therefore uncertain whether, according to the Treaty and the abovementioned Commission decision, a State measure which was adopted pursuant to Law No 95/1979 and which provides:

(1) solely for the exemption of large enterprises from the usual insolvency proceedings; and

(2) for such exemption and, simultaneously, for the enterprise to continue trading;

may be regarded as aid, in view of the fact that Decree Law No 414 of 31 July 1981 (converted into Law No 544/1981) provides in Article 4 that "individual actions for enforcement may not be taken or pursued after the measure initiating the special administration procedure has been adopted".'

Admissibility of the reference

24 During the hearing, AFS cast doubt on the relevance of the question referred for a preliminary ruling on the ground that, if AFS had from the very outset been subject to the usual insolvency procedure, Ecotrade would still not have been able to enforce payment of its debt.

25 It should be borne in mind that it is solely for the national court before which the 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 (see, *inter alia*, Case C-415/93 *Union Royale Belge des Sociétés de Football Association ASBL and Others* v *Bosman and Others* [1995] ECR I-4921, paragraph 59).

26 Furthermore, it is not apparent from the order for reference that, if the national measures in issue had not been applied on the ground that they constituted prohibited State aid, Ecotrade would have fallen outside the rule prohibiting individual actions for enforcement, since that rule also applies to the usual insolvency procedure.

27 There is, however, nothing to support the assertion that if AFS had been subject to the usual insolvency procedure, Ecotrade's position would have been in all respects identical, particularly with regard to its chances of recovering at least a proportion of its debts, which is a matter for the national court to determine.

28 An answer must, therefore, be given to the question referred for a preliminary ruling.

The question referred

29 As a preliminary point, it should be noted that AFS is engaged in production in the steel industry and is thus an undertaking within the meaning of Article 80 of the ECSC Treaty. Consequently, the question referred by the national court must be set in the context of that Treaty.

30 By its question, the national court is asking, in substance, whether application to an undertaking within the meaning of Article 80 of the ECSC Treaty of a system of the kind introduced by Law No 95/79, and derogating from the rules of ordinary law relating to insolvency, is to be considered capable of giving rise to the grant of State aid which is prohibited by Article 4(c) of the ECSC Treaty.

31 As is apparent from paragraph 20 of this judgment, Letter E 13/92 of the Commission, to which the national court refers, is simply a request addressed to the Italian Government pursuant to Article 93(1) of the EC Treaty requiring it to notify all cases involving the application of Law No 95/79, a request which gave rise to the initiation of the procedure under Article 93(2) of the EC Treaty. When the order for reference was lodged at the Court, that procedure had not yet resulted in a final decision by the Commission.

32 In accordance with Article 4(c) of the ECSC Treaty, subsidies or aids granted by States in any form whatsoever are recognised as incompatible with the common market for coal and steel and they are accordingly abolished and prohibited within the Community.

33 Nevertheless, Commission Decision No 3855/91/ECSC of 27 November 1991 establishing Community rules for aid to the steel industry (OJ 1991 L 362, p. 57), which entered into force on 1 January 1992 and applied until 31 December 1996, authorises the grant of aid to the steel industry in the cases exhaustively listed, in particular aid for closure, so long as it has been notified in advance to the Commission in accordance with Article 6(2) of that decision.

34 As the Court has already held, the concept of aid is wider than that of a subsidy because it embraces not only positive benefits, such as subsidies themselves, but also measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without therefore being subsidies in the strict meaning of the word, are similar in character and have the same effect (Case 30/59 *De Gezamenlijke Steenkolenmijnen in Limburg* v *High Authority* [1961] ECR 1, 19, and Case C-387/92 *Banco Exterior de España* v *Ayuntamiento de Valencia* [1994] ECR I-877, paragraph 13).

35 Furthermore, as the Court has ruled in connection with Article 92(1) of the EC Treaty, the expression 'aid', for the purposes of Article 4(c) of the ECSC Treaty,

necessarily implies advantages granted directly or indirectly through State resources or constituting an additional charge for the State or for bodies designated or established by the State for that purpose (see Case 82/77 *Openbaar Ministerie of the Netherlands* v *Van Tiggele* [1978] ECR 25, paragraphs 23 to 25; Joined Cases 213/81 to 215/81 *Norddeutsches Vieh- und Fleischkontor Will and Others* v *BALM* [1982] ECR 3583, paragraph 22; Joined Cases C-72/91 and C-73/91 *Sloman Neptun* v *Bodo Ziesemer* [1993] ECR I-887, paragraphs 19 and 21; Case C-189/91 *Kirsammer-Hack* v *Sidal* [1993] ECR I-6185, paragraph 16; and Joined Cases C-52/97 to C-54/97 *Viscido and Others* v *Ente Poste Italiane* [1998] ECR I-2629, paragraph 13).

36 Contrary to the view taken by the Commission, the possible loss of tax revenue for the State as a result of the application of the system of special administration, on account of the absolute prohibition on individual actions for enforcement and the suspension of interest on all debts owed by the undertaking in question, and the correlated reduction in creditors' profits, does not in itself justify treating that system as aid. That consequence is an inherent feature of any statutory system laying down a framework for relations between an insolvent undertaking and the general body of creditors, and the existence of an additional financial burden borne directly or indirectly by the public authorities as a means of granting a particular advantage to the undertakings concerned may not automatically be inferred therefrom (see, to that effect, *Sloman Neptun*, cited above, paragraph 21).

37 On the other hand, several features of the system introduced by Law No 95/79, especially having regard to the facts of the case, could, if the national court were to confirm the significance attributed to those features below, make it possible to demonstrate the existence of aid prohibited by Article 4(c) of the ECSC Treaty.

38 In the first place, it is apparent from the documents before the Court that Law No 95/79 is intended to apply selectively to large industrial undertakings in difficulties which owe particularly large debts to certain, mainly public, classes of creditors.

As the Advocate General has stated at paragraph 26 of his Opinion, it is even highly probable that the State or public bodies will be among the principal creditors of the undertaking in question.

39 Furthermore, even if the decisions of the Minister for Industry to place the undertaking in difficulties under special administration and to permit it to continue trading are taken with regard, as far as possible, to the interests of the creditors and, in particular, to the prospects for increasing the value of the undertaking's assets, they are also influenced, as the Italian Government itself has acknowledged in its pleadings and at the hearing, by the concern to maintain the undertaking's economic activity in the light of national industrial policy considerations.

40 In those circumstances, having regard to the class of undertakings covered by the legislation in issue and the scope of the discretion enjoyed by the minister when authorising, in particular, an insolvent undertaking under special administration to continue trading, that legislation meets the condition that it should relate to a specific undertaking, which is one of the defining features of State aid (see, to that effect, Case C-241/94 *France* v *Commission* [1996] ECR I-4551, paragraphs 23 and 24).

41 Second, whatever the objective pursued by the national legislature, it would seem that the legislation in question is liable to place the undertakings to which it applies in a more favourable situation than others, inasmuch as it allows them to continue trading in circumstances in which that would not be allowed if the usual insolvency rules were applied, since those rules are decisive when it comes to protecting creditors' interests. In view of the priority accorded to debts connected with the pursuit of economic activity, authorisation to continue trading might, in those circumstances, involve an additional burden for the public authorities if it were in fact

established that the State or public bodies were among the chief creditors of the undertaking in difficulties, all the more so because, by definition, that undertaking owes debts of considerable value.

42 Furthermore, besides the grant of a State guarantee under Article 2a of Law No 95/79 which the Italian authorities agreed to notify to the Commission in advance, placing an undertaking under special administration entails extension of the prohibition and suspension of all individual actions for enforcement to tax debts and penalties, interest and increases in cases of belated payment of company tax, release from the obligation to pay fines and pecuniary penalties in the case of failure to pay social security contributions, and application of a preferential rate where all or part of the undertaking is transferred, the transfer being subject to a flat-rate registration charge of LIT 1 million, whereas the normal rate of the registration charge is 3% of the value of the property sold.

43 Those advantages, conferred by the national legislature, might also entail an additional burden for the public authorities in the form of a State guarantee, waiver in practice of public debts, exemption from the obligation to pay fines or other pecuniary penalties, or a reduced rate of tax. It could be otherwise only if it were shown that placing an undertaking under special administration and allowing it to continue trading did not in actual fact entail an additional burden for the State, compared to the situation that would have arisen had the usual insolvency rules been applied.

44 In that regard, the Italian Government maintains that special administration does not involve greater losses for the State, to which tax debts are owed, than the system under the ordinary law which gives it certain procedural rights, and that the provi-

sions concerning exemption from the obligation to pay fines and penalties for belated payment of social security contributions are no longer applicable. It is for the national court to investigate those assertions.

45 In the light of the foregoing, the answer to the question referred must be that application to an undertaking within the meaning of Article 80 of the ECSC Treaty of a system of the kind introduced by Law No 95/79, and derogating from the rules of ordinary law relating to insolvency, is to be regarded as giving rise to the grant of State aid, which is prohibited by Article 4(c) of the ECSC Treaty, where it is established that the undertaking

— has been permitted to continue trading in circumstances in which it would not have been permitted to do so if the rules of ordinary law relating to insolvency had been applied, or

— has enjoyed one or more advantages, such as a State guarantee, a reduced rate of tax, exemption from the obligation to pay fines and other pecuniary penalties or waiver in practice of public debts wholly or in part, which could not have been claimed by another insolvent undertaking in connection with the application of the rules of ordinary law relating to insolvency.

Costs

46 The costs incurred by the Italian Government and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber)

in answer to the question referred to it by the Corte Suprema di Cassazione by order of 10 February 1997, hereby rules:

Application to an undertaking within the meaning of Article 80 of the ECSC Treaty of a system of the kind introduced by Law No 95/79 of 3 April 1979, and derogating from the rules of ordinary law relating to insolvency, is to be regarded as giving rise to the grant of State aid, which is prohibited by Article 4(c) of the ECSC Treaty, where it is established that the undertaking

— has been permitted to continue trading in circumstances in which it would not have been permitted to do so if the rules of ordinary law relating to insolvency had been applied, or

— has enjoyed one or more advantages, such as a State guarantee, a reduced rate of tax, exemption from the obligation to pay fines and other pecuniary penalties or waiver in practice of public debts wholly or in part, which could not have been claimed by another insolvent undertaking in connection with the application of the rules of ordinary law relating to insolvency.

Puissochet Moitinho de Almeida Gulmann

Edward Wathelet

Delivered in open court in Luxembourg on 1 December 1998.

R. Grass

Registrar

J.-P. Puissochet

President of the Fifth Chamber