OPINION OF ADVOCATE GENERAL FENNELLY

delivered on 16 July 1998 *

Introduction

1. This case raises the question whether a form of extraordinary administration and protection from execution by creditors which is accorded to certain insolvent companies by Italian law constitutes, in the case of a steel company, a State aid prohibited by Article 4(c) of the ECSC Treaty. [1]

Legal and factual context

2. Law No 95/1979 of 3 April 1979, [2] commonly known as the Prodi Law after the then Minister for Industry, establishes a procedure of extraordinary administration for insolvent companies which have 300 or more employees and which have debts which exceed both LIT 80.444 billion [3] and five times the paid-up capital of the company. The debts in question must be owed to credit establishments or undertakings or social assistance and welfare institutions, [4] or companies in which the State owns a majority stake. [5] It appears that extraordinary administration is available only to companies engaged in industrial activity. Furthermore, where a company is eligible for extraordinary administration under Law No 95/1979, other insolvent companies in the same group may also be placed under extraordinary administration even if they do not comply with the criteria regarding the number of employees and their level of indebtedness.

3. For a qualifying company to be placed under special administration, it must first be declared insolvent by the courts either pursuant to the Law on Insolvency [6] or due to failure to pay salaries for at least three months. Where the competent court finds that the company fulfils the criteria set out in Law No 95/1979, it refrains from subjecting the company to the ordinary liquidation process. A decree placing the company under extraordinary administration is then issued by the Minister for Industry, in consultation with the Minister for Finance. The Minister for Industry also decides, at this stage, in consultation with the Minister for Finance, whether or not to permit the company under extraordinary administration to continue trading for up to two years (extendable by a maximum

* Original language: English.

1 — Treaty establishing the European Coal and Steel Community.

2 — *GURI* No 94, 4 April 1979, p. 3055.

3 — Law No 95/1979 initially provided for a level of indebtedness of LIT 20 billion. This amount is revised annually. The figure quoted in the text was established by a ministerial decree of 30 April 1996. The amount applicable in 1992 has not been given in the order for reference or the pleadings; that established by a ministerial decree of 30 April 1993 was LIT 71.832 billion.

4 — Article 1, first indent, Law No 95/1979.

5 — Law No 452/1987 of 3 November 1987. Extraordinary administration is also possible where an insolvent company must repay a sum of LIT 50 billion or more, being 51% or more of the paid-up capital, where the grant of this sum has been condemned as unlawful State aid incompatible with the common market: Article 1a, Law No 95/1979.

6 — Royal Decree 267/1942.

of a further two years). [7] This decision is discretionary in nature, unlike, apparently, that to place the company in extraordinary administration in the first place; it has been submitted that the two decisions are invariably taken together. When taking the decision on continuation of trading, the Minister for Industry must take full account of the interests of the creditors.

4. The normal liquidation procedure under the Italian Law on Insolvency is conducted under judicial supervision, with decisions being taken in consultation with or subject to the approval of a committee of creditors. It includes the possibility of permitting the company in liquidation to continue trading in order to maximise the value of its assets in the creditors' interests. [8] The limits on such continued trading have not been described to the Court; presumably it would not be permitted to trade at a loss, since that would further damage the interests of the creditors.

5. Companies under extraordinary administration are subject to the general rules set out in the Law on Insolvency, in the absence of express derogations in Law No 95/1979. Thus, under extraordinary administration, as under normal Italian liquidation procedure, the owner of the insolvent company is denied the enjoyment of its assets, which are, in principle, to be used to satisfy the creditors' claims. A decree of extraordinary administration, like the normal liquidation procedure, results in the suspension of the collection by individual creditors of debts owed by the company, as well as the execution of any judicial remedies. [9] In the case of extraordinary administration, however, the suspension extends to fiscal debts, penalties and interest, which are not subject to such a suspension in the ordinary course. [10] Interest on existing debts is suspended during the period of extraordinary administration, as under the normal liquidation procedure. [11]

6. A company under extraordinary administration is excused from payment of penalties for failure to make obligatory social security contributions; [12] the value of such penalties may, it seems, rise to up to 50% of the basic amount owed. The property of a company under extraordinary administration may be sold, subject to a nominal registration tax of LIT 1 million (in lieu of the normal rate of 3% of the value of the property concerned). [13] It is not clear to what extent these special rules apply to an undertaking under extraordinary administration which is not permitted to continue trading.

7. Where a company in extraordinary administration is permitted to continue trading, the

7 — Article 2, first indent, Law No 95/1979.
8 — Article 90, Law on Insolvency.

9 — Article 51, Law on Insolvency; Article 4, Law No 544/1981.
10 — Article 4, Law No 544/1981.
11 — Article 55, Law on Insolvency.
12 — Article 3(2), Law No 19/1987 of 6 February 1987.
13 — Article 5a, Law No 95/1979.

administrator appointed to run the company must then prepare an appropriate business plan. The compatibility of the business plan with the broad lines of national industrial policy is determined by the interministerial industrial policy committee [14] before its approval by the Minister for Industry. It appears that the administrator may not proceed to the liquidation of the company unless it is impossible to save it; liquidation should, where possible, take place through disposal as a going concern of the operational assets of the company. The Commission has suggested that the administrator has the facility to sell units of the company at negative prices, that is, that other undertakings would be paid to take on such units and to maintain their operations. [15] The State may guarantee some or all of the debts contracted by the company to finance its continued operations during this period. [16] The expenses of extraordinary administration, including debts contracted, have priority over those of the existing creditors; this is also the case where a company continues trading within the framework of the normal liquidation procedure. [17]

8. The process of extraordinary administration remains subject to ministerial supervision: decisions regarding matters such as restructuring, asset disposals, liquidation or the ultimate termination of the period of extraordinary administration must be approved by the Minister for Industry. The Court has received conflicting submissions regarding whether the Minister's decisions are subject to review limited to their legality by the administrative courts, or are, on the contrary, amenable to a more far-reaching action before the civil courts regarding whether they are consistent with the economic interests of the creditors. It appears that some creditors may be represented on the supervisory committee, which has a purely consultative role in the extraordinary administration procedure.

9. The Minister for Industry also approves the termination of the period of extraordinary administration. The creditors may seek satisfaction of their debts, in whole or in part, only at the end of that period, either through the liquidation of the company's assets or from the company's renewed profits.

10. Law No 95/1979 has been the subject of a number of Commission measures, pursuant in part to the complaints of the applicant in the main proceedings, the steel company Ecotrade Srl (hereinafter 'Ecotrade'). In response to a Commission request under Article 93(1) of the EC Treaty [18] for further information on Law No 95/1979 with a view to a State aid enquiry, [19] Italy refused to notify the Law except in respect of the guarantee provisions of Article 2a. The Commission then decided, by Notice C 7/97 (ex E 13/92), [20] to open the procedure provided for in Article 93(2) of the EC Treaty. Furthermore, the Commission decided that the grant of a State

14 — Article 2, second indent, Law No 95/1979.

15 — Law No 212/1984, amending Article 6a, Law No 95/1979.

16 — Article 2a, Law No 95/1979.

17 — Articles 111 and 212, Law on Insolvency.

18 — Treaty establishing the European Community.

19 — Letter E 13/1992 of 30 July 1992, OJ 1994 C 395, p. 4.

20 — OJ 1997 C 192, p. 4.

guarantee pursuant to Article 2a of Law No 95/1979 to a steel company in extraordinary administration, Altiforni e Ferriere di Servola SpA (the defendant in the main proceedings, hereinafter 'AFS'), was an aid incompatible with the common market in coal and steel. [21] The Commission also decided that the suspension of payment of certain public debts by another steel company under extraordinary administration, Ferdofin Siderurgica Srl, was an aid incompatible with the common market in coal and steel and that the debts in question must be recovered. [22]

11. The present case relates to a debt of LIT 149 108 190 owed by AFS to Ecotrade for deliveries of steel. The Pretore (Magistrate) di Trieste (Italy) granted an order on 30 July 1992, upon the failure of AFS to pay its debt to Ecotrade, transferring to the latter, up to the amount due, a debt owed to the former by a bank. On 28 August 1992, AFS informed Ecotrade that, pursuant to a finding of insolvency by the Tribunale (District Court) di Trieste of 2 July 1992, the company had been placed under extraordinary administration by a ministerial decree of 23 July 1992, under Law No 95/1979, which permitted it to continue trading. AFS sought repayment of the money obtained, on the basis that the execution of the debt after the issue of such a decree was contrary to Article 4 of Law No 544/1981. Ecotrade commenced an action on 4 October 1992 before the Tribunale di Trieste, seeking a declaration that the demand by AFS for reimbursement was ill-founded, being based on a decree which was incompatible with Community law in the field of State aids. On 23 October 1993, the Tribunale rejected this request and granted AFS's counter-claim for reimbursement. This judgment was confirmed on appeal by the Corte d'Appello (Court of Appeal) di Trieste. Ecotrade then appealed in cassation to the Corte Suprema di Cassazione (Supreme Court of Cassation, hereinafter 'the national court').

12. The national court referred the following question to the Court for a preliminary ruling pursuant to Article 177 of the EC Treaty:

'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;

21 — Commission Decision No 96/515/ECSC of 27 March 1996 concerning aid granted by Italy to Altiforni e Ferriere di Servola, an ECSC company in special administration, located in Trieste, Italy, OJ 1996 L 216, p. 11.

22 — Commission Decision No 97/754/ECSC of 30 April 1997 concerning the application to the steel firm Ferdofin Srl of Italian Law No 95/1979 on receivership arrangements for large firms in crisis, OJ 1997 L 306, p. 25. The Commission also decided that the extension of extraordinary administration to companies obliged to reimburse unlawful State aids constituted an aid incompatible with the common market: Commission Decision 96/434/EC of 20 March 1996 on aid which Italy plans to grant to enterprises in a state of insolvency resulting from the obligation to repay State aid pursuant to Community decisions adopted under Articles 92 and 93 of the Treaty, OJ 1996 L 180, p. 31.

(b) the abovementioned decision (E 13/1992), inasmuch as the conclusion at which it arrives ... is preceded by the statement that the legislation (Law No 95/1979) "is caught in several respects by Article 92 *et seq.* of the EC Treaty";

This 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".'

Observations

13. Written and oral observations were submitted by Ecotrade, AFS, the Italian Republic and the Commission of the European Communities.

14. Ecotrade and the Commission submit that the application of the regime of extraordinary administration established by Law No 95/1979 to a steel company constitutes State aid within the meaning of Article 4(c) of the ECSC Treaty, which should have been notified pursuant to Article 6 of Commission Decision No 3855/91/ECSC of 27 November 1991 establishing Community rules for aid to the steel industry. [23] They submit that Law No 95/1979 constitutes a derogation from the general law on insolvency, in that its application is confined to industrial companies of a certain size with debts of a specified amount to specified creditors, many of them in the public sector, and, furthermore, in that the decision to permit an insolvent company under extraordinary administration to continue trading is a matter of ministerial discretion, [24] excluding any significant role for creditors. Article 4(c) of the

23 — OJ 1991 L 362, p. 57. This Decision has now been replaced by Commission Decision No 2496/96/ECSC of 18 December 1996 establishing Community rules for State aid to the steel industry, OJ 1996 L 338, p. 42.

24 — See Case C-241/94 *France* v *Commission* [1996] ECR I-4551.

ECSC Treaty extends to negative aids, which mitigate the charges which are normally included in the budget of an undertaking and, thus, are similar in character to and have the same effect as subsidies.[25] The excusing of payment of social security penalties, the prohibition of execution of fiscal debts and penalties,[26] the possibility of a State guarantee of debts incurred during extraordinary administration and the merely symbolic registration tax on assets disposed of by the company are, in their view, direct subventions from State resources which represent advantages compared with normal insolvency procedure. The suspension of execution of State debts and of the running of interest also constitutes aid, within the framework of continued trading under the extraordinary administration regime, whose objective is to maintain in operation the economic activities of the company in question, even though private creditors are also affected and similar suspensions apply under the normal insolvency procedure. Ecotrade argues that legislatively ordained suspension of execution of private debts is a form of aid, even though it does not entail any charge on State resources;[27] the Commission, on the other hand, submits that such a suspension results in a charge on public funds, as it normally results in the extinction of the debts concerned and thus, indirectly, in lower taxation receipts for the Italian Treasury from those creditors.

15. AFS and Italy argue that special administration is a perfectly normal response to insolvency, consistent with the work of UNCITRAL (United Nations Commission on International Trade Law), which seeks to avoid unnecessary liquidation of companies but which none the less serves the same purpose: the ultimate satisfaction of creditors' debts. Although prepared to admit that the State guarantee of debts should be notified as an aid, they argue that continued trading by a company during insolvency, without assistance from State resources, is not, as such, incompatible with the rules of free competition. Extraordinary administration is a general and automatic procedure, contingent on satisfaction of certain conditions; only the grant of a State guarantee is discretionary. There is parallelism between extraordinary administration and normal insolvency procedure: both are initiated by a finding of insolvency; both entail the suspension of execution of debts and of the running of interest; both permit, in the light of prevailing circumstances, continued trading by the insolvent company. Continued trading under Article 90 of the Law on Insolvency is only approved by a court-appointed committee of representative creditors, whose decision cannot be reviewed, and, in contrast with the position under extraordinary administration, can continue indefinitely. Extraordinary administration does not involve any additional cost for the State, which is a stranger to the debtor-creditor relationship; charges sustained by private parties do not constitute aid.[28] The suspension of payment of debts does not result in a different level of receipts for the Treasury in the long run, and may lead to

25 — Case 30/59 *Steenkolenmijnen* v *High Authority* [1961] ECR 1, hereinafter '*Steenkolenmijnen*', p. 19; see also Case 173/73 *Italy* v *Commission* [1974] ECR 709, paragraph 15.

26 — See, for example, Case C-387/92 *Banco Exterior de España* [1994] ECR I-877.

27 — Case 78/76 *Steinike und Weinlig* v *Germany* [1977] ECR 595, hereinafter '*Steinike und Weinlig*', paragraph 21; see also the Opinion of Advocate General Darmon in Joined Cases C-72/91 and C-73/91 *Sloman Neptun* v *Bodo Ziesemer* [1993] ECR I-887, hereinafter '*Sloman Neptun*', paragraph 40.

28 — Case 82/77 *Openbaar Ministerie of the Netherlands* v *Van Tiggele* [1978] ECR 25, hereinafter '*Van Tiggele*'; Joined Cases 213/81 to 215/81 *Norddeutsches Vieh- und Fleischkontor* v *BALM* [1982] ECR 3583, hereinafter '*Fleischkontor*'.

higher receipts if the company is able to trade its way into a position to pay off its debts in their entirety. AFS disputes the pertinence of the reference by the national court, as execution of Ecotrade's debt would be suspended even under the normal insolvency procedure. The provision regarding exoneration from social security debts only applied to social security debts incurred up to 1986. The non-execution of fiscal debts under the extraordinary administration regime does not constitute a charge on public funds, because the possibility of executing such debts under the normal insolvency rules confers only a procedural advantage; pursuant to the principle of equality among creditors, the State must still account to the other creditors for any sums executed in excess of its proper share of the proceeds of the eventual liquidation. The special low registration tax benefits purchasing undertakings rather than the company which sells its assets.

Analysis

16. It appears that AFS is an undertaking engaged in production in the steel industry and is thus an undertaking within the meaning of Article 80 of the ECSC Treaty. As the provisions of the EC Treaty do not affect the provisions of the ECSC Treaty as regards the rules laid down by that Treaty for the functioning of the common market in coal and steel, [29] the question posed by the national court should be recast as a reference to the Court for a preliminary ruling pursuant to Article 41 of the ECSC Treaty regarding the interpretation of Articles 4(c) and 67 of that Treaty. [30] Article 4 of the ECSC Treaty provides, in relevant part:

'The following are recognised as incompatible with the common market for coal and steel and shall accordingly be abolished and prohibited within the Community, as provided in this Treaty:

...

(c) subsidies or aids granted by States, or special charges imposed by States, in any form whatsoever;

... .'

Article 67 is the sole provision of Chapter VII of Title Three of the ECSC Treaty, entitled 'Interference with conditions of com-

29 — Article 232, EC Treaty.

30 — Although the text of Article 41 of the ECSC Treaty is apparently more restrictive than that of Article 177 of the EC Treaty, it has been construed by the Court so as to permit references regarding the interpretation of rules deriving from the ECSC Treaty as well as the validity of acts of the institutions under that Treaty; see Case C-221/88 *Busseni* [1990] ECR I-495, paragraph 16. It should be noted that the question whether Law No 95/1979 constitutes State aid within the meaning of Article 92(1) of the EC Treaty is raised in Case C-295/97 *Industrie Aeronautiche e Meccaniche Rinaldo Piaggio* v *International Factors Italia and Others*, in which the written and oral procedure is not complete on the date of delivery of this Opinion.

petition'. Article 67(1) states that '[a]ny action by a Member State which is liable to have appreciable repercussions on conditions of competition in the coal or the steel industry shall be brought to the knowledge of the High Authority by the Government concerned'. Article 67(2) enables the High Authority (the Commission) to take certain steps if an action is liable to provoke a serious disequilibrium. Article 67(3) empowers the High Authority to make recommendations to Member States whose actions allow special benefits to or impose special charges on the coal or steel undertakings within its jurisdiction in comparison with other industries in the same country.

17. The Court stated in *Banks* that 'Article 4 applies by itself only in the absence of more specific rules; if they have been adopted or are governed by other provisions of the [ECSC] Treaty, texts relating to the same provision must be considered as a whole and applied together'. [31] It is clear from the analysis in that case and in *Hopkins and Others* v *National Power and Powergen* [32] that Article 4(c) of the ECSC Treaty, read with sections (2) and (3) of Article 67, is not capable of direct effect, due to the level of discretion granted to the Commission in the application of the latter provisions. However, the present case does not, in my view, fall within the scope of application of Article 67(2), because there is no suggestion that a serious disequilibrium has been provoked by the alleged aid, or within that of Article 67(3), as Law No 95/1979 does not grant special advantages to coal or steel undertakings in comparison with other industries. The selection of undertakings to enjoy the alleged advantages of the extraordinary administration is made in accordance with quite different criteria. As regards Article 67(1), the notification obligation which it sets out is by no means inconsistent with the clear and unconditional application of the unqualified prohibition of State aid in Article 4(c). I conclude, therefore, that, in the circumstances of the present case, Article 4(c) of the ECSC Treaty is directly effective.

18. There are a number of important differences between the State aids regime established by Articles 92 and 93 of the EC Treaty and the more laconic, but also more sweeping and unconditional, terms of Article 4(c) of the ECSC Treaty. It seems clear, however, for reasons outlined further below, that the definition of State aid, which is central to the present case, is the same under both Treaties, even though Article 4(c) does not refer expressly to State resources.

19. It also appears that the Commission document E 13/1992 referred to by the national court in the question is not a decision but merely a request addressed to Italy, pursuant to Article 93(3) of the EC Treaty, to notify as aid all cases in which the provisions of Law No 95/1979 are applied. The Commission subsequently decided to initiate proceedings

31 — Case C-128/92 [1994] ECR I-1209, paragraph 11. The case concerned the interpretation of Articles 4(d), 65 and 66(7) of the ECSC Treaty.

32 — Case C-18/94 [1996] ECR I-2281. The case concerned the interpretation of Articles 4(b) and 63(1) of the ECSC Treaty.

pursuant to Article 93(2) of the EC Treaty, [33] but no decision of a general character had been reached under that provision by the date on which the question was referred in the present case. The only Commission decision regarding the provisions of Law No 95/1979, other than those on repayment of unlawful State aid and the granting of a State guarantee for further debts incurred by companies trading while under extraordinary administration, which are not material to the instant case, is Decision No 97/754/ECSC, which relates to a single company, Ferdofin Srl. While that individual Commission decision is based on reasoning which is of obvious relevance to the present case, it is not in itself binding on either of the parties to the main proceedings, nor on the national court in deciding the outcome of those proceedings. Furthermore, the fact that Italy did not pursue its annulment action in respect of Decision No 97/754/ECSC cannot have as a result that the reasoning and operative part of that Decision must be applied, without possibility of challenge, in national proceedings to which neither Italy nor Ferdofin is a party. [34] Thus, although certain of the arguments which appear in the various Commission measures just cited are alluded to in the pleadings and in the analysis which follows, it is best to recast the question referred by the national court by reference solely to Article 4(c) of the ECSC Treaty.

20. It is possible to read subsections (1) and (2) of the question referred by the national court disjunctively. However, the present case relates to factual circumstances in which the insolvent company in question, AFS, has not only been placed under extraordinary administration but has also been permitted to continue trading within the framework of such administration. Furthermore, it is not clear what are the consequences of extraordinary administration for the ultimate liquidation of an insolvent company in the event that continuation of trading is not permitted. I shall, therefore, concentrate on the effect on competition of the extraordinary administration regime as it applies to companies which continue trading. It is for the national court to determine the applicability of the answer furnished by the Court to its question in the case of a company in extraordinary administration which ceases to trade, in the light of a comparison of the provisions of Italian law which apply in that case and those under the general law on insolvency.

21. Thus, I interpret the question referred by the national court as asking whether the placing of an undertaking, within the meaning of Article 80 of the ECSC Treaty, which is insolvent, under extraordinary administration under Law No 95/1979, whereby individual execution of debts against the company is suspended, certain provisions of the ordinary law on insolvency are inapplicable or apply subject to special conditions, and the company in question is authorised to continue trading, constitutes State aid prohibited by Article 4(c) of the ECSC Treaty, in light of the fact that State measures which do not provide for disbursement of funds by the State but which enable the same result to be achieved by special procedures as would have been obtained by such disbursement may be said to constitute such aid.

33 — Commission Notice C 7/97 (ex E 13/92), loc. cit.

34 — On the relationship of actions for annulment under Article 173 of the EC Treaty and preliminary references under Article 177 of that Treaty, see Case C-188/92 *TWD Textilwerke Deggendorf* [1994] ECR I-833.

22. The leading authority regarding negative forms of aid, by which the State forgoes monies which are owed to it by companies, is an ECSC case, *Steenkolenmijnen*, in which the Court stated the following: [35]

'The concept of aid is nevertheless wider than that of a subsidy because it embraces not only positive benefits, such as subsidies themselves, but also interventions 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.'

23. This definition has also been adopted in the EC context, for example in *Banco Exterior de España*, [36] which concerned a selective tax exemption placing the company in question in a more favourable financial position than other taxpayers. [37] The Court has interpreted the term 'aid' in Article 92(1) of the EC Treaty as necessarily involving advantages granted directly or indirectly through State resources [38] or some additional burden for the State. [39] The wording of this provision and the procedural rules laid down in Article 93 of the EC Treaty 'show that advantages granted from resources other than those of the State do not fall within the scope of the provisions in question. The distinction between aid granted by the State and aid granted through State resources serves to bring within the definition of aid not only aid granted directly by the State, but also aid granted by public or private bodies designated or established by the State'. [40] The furthest limits of this definition appear to have been reached in *Commission* v *France*, [41] where the Court treated as aid a grant made to certain farmers which was decided and financed by a public body, the Caisse National de Crédit Agricole, the implementation of which was subject to the approval of the public authorities, [42] and the detailed rules for the grant of which corresponded to those for State aid, despite the fact that the operating surplus from which the grant funds were drawn was initially generated from private contributions. [43] In so far as Article 4(c) of

35 — Loc. cit., p. 19.

36 — Loc. cit., paragraph 13.

37 — Ibid., paragraph 14.

38 — *Van Tiggele*, loc. cit., paragraphs 23 to 25; *Fleischkontor*, loc. cit., paragraph 22; *Sloman Neptun*, loc. cit., paragraph 19; Case C-189/91 *Kirsammer-Hack* v *Nurhan Sidal* [1993] ECR I-6185 (hereinafter '*Kirsammer-Hack*'), paragraph 16; Joined Cases C-52/97 to C-54/97 *Viscido and Others* v *Ente Poste Italiane* [1998] ECR I-2629, hereinafter '*Viscido*', paragraph 14.

39 — *Sloman Neptun*, loc. cit., paragraph 21.

40 — Ibid., paragraph 19.

41 — Case 290/83 [1985] ECR 439.

42 — Ibid., paragraph 15.

43 — Ibid., paragraph 5; see also *Steinike und Weinlig*, loc. cit., paragraphs 21 and 22. In the light of the later judgments in *Sloman Neptun*, loc. cit., and *Kirsammer-Hack*, loc. cit., the statement at paragraph 14 in *Commission* v *France*, loc. cit., that 'aid need not necessarily be financed from State resources to be classified as State aid', should be read, in my view, as referring only to hybrid situations where the State or publicly controlled bodies administer funds which were originally private in origin, or the State establishes a scheme whereby a designated private body assists specific undertakings. The definition used by the Court in *Sloman Neptun* is wide enough to embrace the special circumstances of *Commission* v *France*. It may be borne in mind in this context that all State funds which are financed by taxes are ultimately private in origin. It is worth noting that the Court implicitly, but clearly consciously, rejected the argument by Advocate General Darmon at paragraph 42 of his Opinion in *Sloman Neptun* for the definition of aid to be extended to situations where the State does not act as intermediary between those who finance a measure and those who benefit from it.

the ECSC Treaty refers to 'aids granted by States', the same definition of aid by reference to State resources should also apply, in my view, in an ECSC context. This also serves to distinguish the terms used in Article 4(c) from those used in Article 67(3), which entrusts to the Commission supervision of the potentially wider 'special benefits', which could extend to regulatory advantages which have no immediate consequences for the public purse.

24. In this context, I do not accept the Commission's argument that losses sustained by private creditors under the extraordinary administration regime can be qualified as aid, because of the resultant loss in tax receipts to the State. This is simply too remote a connection with the State's disposal of its resources to amount to aid. In so far as Law No 95/1979 distorts the ordinary relationship of debtors and private creditors, any resulting loss of tax revenue should be considered to be inherent in the system and should not be treated as a means of granting a particular State-financed advantage to the debtor undertakings concerned. [44]

25. Unlike Article 92(1) of the EC Treaty, Article 4(c) does not refer to aids as measures which distort or threaten to distort competition 'by favouring certain undertakings or the production of certain goods'. None the less, a distinction between aids, which are selective in nature, and State measures of general application in the fields of taxation, social security, regulation of the economy and so on, appears to me to be implicit in any Community State aids regime. The essential distinction between general measures and selective aids is made in Article 67(3) of the ECSC Treaty, and should also, in my view, be applied in the case of Article 4(c). The alternative would imply a generalised review of all State regulation in such fields, by reference to the yardstick, not of the normally applicable rules in that State (for these themselves would be the subject-matter of examination), but, presumably, of the regulations in the other Member States. This would be counter-productive, by penalising those States whose general economic organisation and regulation was the most competitive. Thus, even measures which benefit the entire coal-producing industry of the Member State in question can constitute aid within the meaning of Article 4(c) of the ECSC Treaty if they are not of general application to other industrial sectors which fall outside the field of application of that Treaty, as was the case in *Steenkolenmijnen*. The condition of selectivity, of a positive or negative alleviation in defined cases of generally applicable rules or burdens, is implicit in the Court's reference in that case to 'interventions which, in various forms, mitigate the charges which are *normally* included in the budget of an undertaking'. [45]

44 — *Sloman Neptun*, loc. cit., paragraph 21.

45 — Loc. cit., p. 19, emphasis added.

26. In the circumstances of the present case, the questions whether the provisions of Law No 95/1979 are selective in nature and whether they constitute an aid funded by State resources are, to a great extent, linked. The decision regarding the possible grant of a State guarantee under Article 2a of Law No 95/1979 is clearly discretionary and, thus, selective, but is not material to the present case: it is the subject of a separate Commission decision in the case of AFS, and is not referred to by the national court. Quite apart from that provision, however, the Law is applied selectively at two stages. First, the companies which, upon insolvency, may be admitted into extraordinary administration are restricted by reference to the number of their employees, their involvement in industrial activity, the degree of their indebtedness relative to their paid-up capital, and the identity of their creditors. The existence of distinct insolvency regimes for companies of different sizes and types may be justified by considerations in respect of which those differences are material, provided the net effect of the various regimes on competitive conditions is the same. Thus, for example, a Member State might seek to subject the liquidation of small companies to a lighter administrative burden, in order that their comparatively small resources might be better preserved to satisfy their creditors. However, the selection criteria employed in Law No 95/1979 appear to have a different objective and effect. In combination, they seem to single out large industrial companies which are predominantly indebted to the State or to public bodies. It is true that the Law does not formally require that the State be the insolvent company's major creditor, but the fact that the categories of creditor taken into account are largely public in nature, combined with the relatively large amounts required to be owed to the nominated categories of creditors, makes it highly probable that the State will almost always be an important creditor.

27. Where selectively applied rules on creditor-debtor relations are, relative to the normal rules, favourable to the debtor, and the State is likely to be the major creditor, the effect of those rules will be to allocate public resources to the debtor company in a way in which the normal rules would not, thus qualifying the measure in question as an aid. Although the general regulation of creditor-debtor relations, like that of relations between employers and employees [46] and between producers and consumers, [47] ordinarily falls outside the scope of Community law regarding State aids, special rules in any of these fields which shift the normal burden in favour of certain categories of undertakings or of production, wholly or predominantly at the expense of the State, constitute, in my view, a form of aid. In such circumstances, the State cannot claim to be a disinterested third party to the debtor-creditor relationship. I should add, for the avoidance of doubt, that I believe that special rules favouring certain insolvent debtor companies could constitute aid even if the State were only a minor creditor, to the extent that the recovery of public resources was effectively renounced. The fact that the private creditors are obliged to sustain losses on the same conditions as the State under a selective system of rules does not detract from the characterisation of those State losses as

46 — See *Steenkolenmijnen*, loc. cit.; *Sloman Neptun*, loc. cit.; *Kirsammer-Hack*, loc. cit.; and *Viscido*, loc. cit.

47 — See *Van Tiggele*, loc. cit.

aid. [48] However, the stronger the causal link is between the State's role as creditor and the application of special rules to the advantage of the debtor undertaking, the greater is the aid-like effect of the rules in question.

28. The second stage of selectivity in the application of Law No 95/1979 arises upon the exercise of the ministerial discretion to permit an insolvent company under extraordinary administration to continue trading. Even if this discretion were not exercised, as it is in fact exercised, in respect of an already limited class of companies, it would leave a degree of latitude to the ministers concerned which would be liable to place certain undertakings in a more favourable situation than others. [49] Although account must be taken in reaching this decision of the perceived best interests of the creditors, the fact that the continued trading of the company is required to be compatible with national industrial policy, and that the decision, by definition, relates to an important company with large numbers of employees, and is specifically designed to preserve the economic activity of the company, must increase the likelihood that the decision will be influenced by factors other than the State's objective commercial interest *qua* creditor. This conclusion is not affected by the fact that the continuation of trading is also possible under normal Italian insolvency procedure, with the sole purpose of maximising the value of the insolvent undertaking's assets.

29. It is now necessary to determine whether Law No 95/1979, and in particular the continuation of trading, operates to the advantage of the limited class of insolvent undertakings to which it applies. It is, perhaps, somewhat misleading to refer to an advantage for the debtor company, as, except for the apparently rare cases in which it trades its way out of its financial difficulties, the company will be wound up; until that time, it is merely a cipher for the creditors. Furthermore, the owners of the company are dispossessed at the outset of both the normal and the extraordinary insolvency procedures, in order to place its assets at the disposal of the creditors, so that they also receive no additional benefit from extraordinary administration. We are, rather, concerned with an advantage secured for the economic activity of the company. The apparent objective of continued trading is to maintain the company's economic activity, even if this is under different ownership, and even if this 'does not represent the most rational distribution of production at the highest level of productivity'. [50] For this reason, the special rate of registration tax on asset disposals clearly constitutes an aid. Even though it can be argued that this benefits the purchaser of the assets in question rather than the insolvent company, it functions as an aid to the continued operation of the related economic activity to the extent that the purchaser might have been deterred by the normal rate of registration tax.

30. It is the orientation of the extraordinary administration regime towards the continuation of economic activity, in circumstances in

48 — See, for example, Joined Cases 67/85, 68/85 and 70/85 *Van der Kooy and Others* v *Commission* [1988] ECR 219, paragraphs 36 and 37, where the prices applied by the State-controlled company Gasunie were deemed capable of constituting State aid even though the company was 50% privately owned.

49 — See *France* v *Commission*, loc. cit., paragraphs 22 to 24.

50 — *Steenkolenmijnen*, loc. cit., p. 19.

which this might not take place under normal Italian insolvency law, which also defeats, in my view, the argument based on the degree of parallelism between the normal and extraordinary insolvency procedures, as well as that regarding the alleged lack of pertinence of the State aids issue to the outcome of the national proceedings, an issue which was argued forcibly by AFS at the hearing. Community law on State aids is concerned with the effects rather than with the objectives of State measures. [51] None the less, it appears more likely that the continuation of trading under extraordinary administration will have the effect of propping up economic activities which would otherwise be unsustainable in market conditions, because the objective served by Law No 95/1979, in accordance with which decisions are made, is the preservation of economic activity. It is the case that both the normal and the extraordinary insolvency procedures entail the suspension of individual execution of debts by creditors and of the running of interest on those debts, and that both procedures permit the continuation of trading. However, the greater likelihood of continued trading under extraordinary administration, and the fact that the decision in this regard rests with the executive rather than with either the creditors or a competent court, and that it is based, at least in part, on general economic policy considerations rather than solely on the maximisation of the value of the company's assets, means that the application of these rules may have very different effects under the two procedures. In particular, the continuation of trading at a loss is likely to affect the priority of the existing creditors' debts, possibly leading to an effective renunciation of its debts by the State. It will be recalled, in this regard, that the business plan need be drawn up only after the ministerial decision to permit continued trading. Despite the imposition of a maximum period of continued trading under extraordinary administration, for which there is no equivalent in Article 90 of the Law on Insolvency, the period of continued trading, and, thus, of suspended execution and interest, appears likely, none the less, to be longer than the period for liquidation of assets under the normal insolvency procedure, with resulting loss to the creditors, including, of course, the State. Therefore, in any given case, the extraordinary administration regime is likely to cost the State more in resources forgone than the application of the ordinary law on insolvency.

31. It is in the nature of insolvency proceedings and of commercial life that one cannot predict with absolute certainty that one procedure rather than another will invariably lead to greater or lesser losses for the creditors, including the State. In my view, it would defeat the purpose of the prohibition of State aids in Article 4(c) of the ECSC Treaty if the considerable likelihood that the application of a special procedure will result in greater losses to the State *qua* creditor were not sufficient to characterise the measure in question as an aid measure. Otherwise, national rules which are designed to aid particular undertakings or economic activities, but whose aid-like effects are subject to a contingency of some kind, would escape the reach of the prohibition of aid. I conclude, therefore, that the central provisions of Law No 95/1979 regarding the undertakings which benefit from its terms, the exercise of ministerial discretion and the

51 — *Italy* v *Commission*, loc. cit., paragraph 13.

criteria in accordance with which continued trading is permitted, combined with otherwise normal rules regarding the suspension of execution of debts and of the running of interest, constitute State aid within the meaning of Article 4(c) of the ECSC Treaty. None the less, this conclusion, based as it is on the perceived likely effects of the extraordinary administration regime, should be open to refutation in any given case, where the undertaking in question is in a position to demonstrate to the satisfaction of the competent court that continued trading under extraordinary administration will not result in greater loss to the State, in its capacity as creditor, than the application of the normal provisions of the Law on Insolvency. However, compliance with this condition will probably necessitate some alteration of the procedural rules regarding commencement of extraordinary administration or, at the very least, those governing the grant of permission for continued trading under that regime.

32. The position under Law No 95/1979 may be contrasted with that under the normal insolvency rules, not just of Italy but of many if not all of the Member States, pursuant to which the fate of insolvent undertakings, including the possibility of continued trading, is determined either directly in accordance with the wishes of the creditors, or a majority thereof, or of certain classes thereof, determined following a prescribed procedure, or at the discretion of a competent court upon consultation of the creditors. Where, as seems everywhere to be the case, such procedures serve the aim of maximising the return to the creditors from the sale of the assets of the insolvent company, no problem need arise. However, even a judicially administered insolvency regime may give rise to problems if judicial discretion is required to be exercised in accordance with wider criteria, which effectively compel the competent court artificially to sustain the insolvent company's activities against the interests of the creditors, including the State. The same analysis regarding State aid would then apply as I propose in the present case. Furthermore, even in an insolvency regime which is entirely subject to the creditors' wishes, it may be necessary to apply the 'commercial actor' criterion to assess the voting behaviour of the State, especially where it is a majority creditor and is in a position to dictate certain outcomes which may not be in its interests *qua* creditor.

33. The possible difference in outcomes as between extraordinary administration and the ordinary insolvency rules also establishes, to my satisfaction, the pertinence of the question referred by the national court to the proceedings before it. The Court has observed that '[i]t is solely for the national court before which the dispute is brought, and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the circumstances of the case, both the need for a preliminary ruling in order to enable it to give judgment and the relevance of the question which it submits to the Court'. [52] If AFS had been subject to the ordinary insolvency procedure from the outset, Ecotrade would also have been prevented from executing its debt, but possibly for a shorter period, and with a potentially less invidious effect on the priority of its debt. It is not for this Court,

52 — Case C-415/93 *Union Royale Belge des Sociétés de Football Association and Others* v *Bosman and Others* [1995] ECR I-4921, paragraph 59.

but, rather, for the national court, to determine the effect on the national proceedings for recovery of the debt executed by Ecotrade of a finding that the application of Law No 95/1979 in this case constituted State aid prohibited by Article 4(c) of the ECSC Treaty. It cannot be argued that the disputed applicability of the extraordinary administration procedure is manifestly irrelevant to those proceedings. [53]

34. I wish, finally, to direct my attention to two remaining provisions of Law No 95/1979 and its accompanying legislation: the suspension of execution of fiscal debts and the renunciation of all fines and penalties for delayed social security payments. It has been argued that the former feature of extraordinary administration does not result in any greater loss to the State *qua* fiscal creditor than the ordinary regime, under which the State enjoys certain procedural privileges in this regard; and that the latter rule regarding social security penalties is no longer applicable. It is for the national court to verify both of these arguments regarding Italian law, and to decide on the existence of State aid by reference to any advantage conferred by the provisions in question, if applicable, as compared with the situation under normal insolvency procedure.

Conclusion

35. In the light of the foregoing, I propose that the Court answer the question referred by the Corte Suprema di Cassazione as follows:

The application to an insolvent undertaking within the meaning of Article 80 of the ECSC Treaty of special national rules on insolvency which are applicable only to specific classes of undertakings, which is likely to result in greater losses to the State in its capacity as creditor than the application of the normal insolvency rules, constitutes State aid within the meaning of Article 4(c) of the ECSC Treaty.

53 — Ibid., paragraph 61; see also Case 126/80 *Salonia* v *Poidomani and Giglio* [1981] ECR 1563, paragraph 6; Case C-343/90 *Lourenço Dias* v *Director da Alfândega do Porto* [1992] ECR I-4673, paragraph 18.