OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER
delivered on 4 March 1999 *

1. By the questions which it has referred to the Court the Tribunale Civile di Genova seeks to ascertain, first, whether it is possible by means of a reference to the Court to obtain a ruling on the compatibility of a national law with the provisions of Article 92 of the Treaty and, second, whether certain provisions of that law may constitute public aid to the large undertakings at which it is aimed.

Facts, procedure and questions referred to the Court

2. As described in the order for reference, the most relevant facts of the case are as follows:

— Industrie Aeronautiche e Meccaniche Rinaldo Piaggio SpA (hereinafter 'Piaggio') bought three military aircraft from the German undertaking Dornier Luftfahrt GmbH (hereinafter 'Dornier') for the Italian Air Force and took possession of them.

— Between 1992 and 1994, by way of payment for the aircraft, Piaggio handed over various sums of money to Dornier and assigned, delegated or transferred credits which it held in its favour against the Italian Ministry of Defence and the undertaking International Factors Italia SpA.

— By decision of 29 October 1994 the Tribunale di Genova declared Piaggio insolvent and recognised that Law No 95/79 of 3 April 1979 (hereinafter 'Law No 95/79') might be applicable to it. [1]

— By order of 28 November 1994 of the Ministries of Industry and the Treasury, Piaggio was placed under special administration.

— On 14 February 1996 Piaggio brought a revocatory action before the Tribunale di Genova for a declaration that all the payments and assignments of

1 — Law No 95/79 of 3 April 1979 (GURI No 94 of 4 April 1979), known as the 'Prodi Law', validating and amending Decree-Law No 26 of 30 January 1979 on urgent measures for the special administration of large undertakings in a state of crisis (GURI No 36 of 6 February 1979).

* Original language: Spanish.

credit in favour of Dornier during the two years preceding the date of the order (known as the 'period of suspicion'), which amounted to LIT 30 028 894 382, were void and an order that they be repaid. Dornier opposed that claim and argued, *inter alia*, that Law No 95/79 was incompatible with Community law.

— The Tribunale di Genova, which entertained doubts in that regard, referred the following two questions to the Court for a preliminary ruling:

'1. Can a national court request the Court of Justice of the European Communities to rule directly on whether a legislative provision of a Member State is compatible with the provisions of Article 92 of the Treaty (State aid)?

2. If the answer is in the affirmative: can it be argued that, by Law No 95 of 3 April 1979 establishing a special administration procedure for large undertakings in a state of crisis, and in particular by the provisions of that Law set out in the grounds of the present order, the Italian State has granted to such undertakings as are covered by that Law (that is to say, large undertakings) aid contrary to Article 92 of the Treaty?'

Preliminary observation

3. The Court recently ruled, in its judgment of 1 December 1998 in *Ecotrade*,[2] on the nature of State aid which the application of Law No 95/79 may entail in relation to Article 4 of the ECSC Treaty. In that judgment, in answer to a question for a preliminary ruling referred by the Corte Suprema di Cassazione, the Court ruled that '[a]pplication to an undertaking... 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'.

2 — Case C-200/97 *Ecotrade* v *Altoforni e Ferriere di Servola* [1998] ECR I-7907.

4. Although the legal system applicable to State aids under the ECSC Treaty undoubtedly differs from that applicable under the EC Treaty, the term 'State aid' is none the less to be given the same interpretation in both contexts and the principle established in the *Ecotrade* judgment will in principle be applicable to the question now before the Court. Owing to the particular features of Articles 91 to 93 of the EC Treaty, however, it is necessary to examine certain aspects which differ from the ECSC system and it is therefore impossible to speak of 'manifestly identical' questions for the purpose of applying Article 104(3) of the Rules of Procedure.

5. In any event, before dealing with the substance of the case, I consider it necessary to examine the problems of admissibility raised by the questions referred by the Italian court.

Admissibility of the questions

(i) *The 'imprecise references to the factual and legal situations envisaged by the national court'*

6. The Court of Justice has already pointed out that the need to provide an interpretation of Community law which will be of use to the national court makes it essential to define the factual and legal context in which the interpretation requested should be placed,[3] and in one case it answered only some of the questions referred because the necessary information was not provided.[4] The *Telemarsicabruzzo* judgment[5] reinforced that requirement to the extent of making it the most significant and important condition which the national court must observe when making use of the preliminary ruling procedure.

7. In that case the Court pointed out that 'the need to provide an interpretation of Community law which will be of use to the national court makes it necessary that the national court define the factual and legislative context of the questions it is asking or, at the very least, explain the factual circumstances on which those questions are based' and refused to answer the questions referred on the ground that the Italian court had failed to provide sufficient information. The Court went on to say that those requirements 'are of particular importance in the field of competition, which is characterised by complex factual and legal situations'.[6]

8. The *Telemarsicabruzzo* principle has been applied and developed by the Court

3 — Case 244/78 *Union Laitière Normande* v *French Dairy Farmers* [1979] ECR 2663, paragraph 5, and Joined Cases 36/80 and 71/80 *Irish Creamery Milk Suppliers Association* v *Ireland* [1981] ECR 735, paragraph 6.

4 — Case 52/76 *Benedetti* v *Munari* [1977] ECR 163, paragraph 22.

5 — Joined Cases C-320/90, C-321/90 and C-322/90 *Telemarsicabruzzo and Others* v *Circostel and Others* [1993] ECR I-393.

6 — *Telemarsicabruzzo*, cited above, paragraphs 6 and 7.

in a significant number of orders [7] in which the questions referred were declared inadmissible. The reasoning employed in all those cases is very similar: the Court requires that the order of reference sufficiently define the factual context and the legislative framework in which the questions referred arose. That requirement is regarded as essential so that the Court can provide an interpretation of Community law which will be of use to the national court.

9. Furthermore, the explanation in the order of reference of the factual context and legislative framework in which the questions arose is a requirement which the Court imposes in order to ensure that the Governments of the Member States and other interested parties are able to exercise their right to submit observations pursuant to Article 20 of the Statute (EC) of the Court of Justice. [8] Since the order of reference is the only document notified to them, it must contain a sufficient statement of reasons, thus obviating the need to refer to the documents relating to the main proceedings.

10. It must be observed in the present case is that the domestic provisions described by the national court are extremely fragmentary and inadequate: it observes that the purpose of Law No 95/79, which applies to large undertakings with more than 300 employees, is to enable them to be rationalised rather than liquidated, [9] and then states that 'the provisions [of the Law] which, to the present court, appear to display the characteristics of "aid" prohibited by the Community provision... are... as follows:

(a) debts which the company placed under special administration incurs with credit institutions in order to finance current operations and for the reactivation and completion of plant, premises and industrial equipment are guaranteed by the State Treasury (Article 2a);

(b) transfers of businesses or commercial premises belonging to the undertakings placed under special administration are subject to a fixed-rate registration duty of LIT one million (Article 5a).

Other rules establish, albeit only indirectly, financing mechanisms, which the defendant has defined as "compulsory", consisting of

7 — The cases in which the Court has made orders declaring references inadmissible in application of the Telemarsicabruzzo decision are as follows: Case C-157/92 *Pretore di Genova* v *Banchero* [1993] ECR I-1085, Case C-386/92 *Monin Automobile — Maison Deux Roues* [1993] ECR I-2049, Case C-378/93 *La Pyramide* [1994] ECR I-3999, Case C-458/93 *Saddik* [1995] ECR I-511, Case C-167/94 *Grau Gomis and Others* [1995] ECR I-1023, Case C-307/95 *Max Mara Fashion Group* v *Ufficio del Registro di Reggio Emilia* [1995 ECR I-5083, Case C-257/95 *Bresle* v *Préfet de la Région Auvergne and Préfet du Puy-de-Dôme* [1996] ECR I-233, Case C-326/95 *Banco de Fomento e Exterior* v *Pechim and Others* [1996] ECR I-1385, Case C-2/96 *Sunino and Data* [1996] ECR I-1543, Case C-101/96 *Testa* [1996] ECR I-3081, Case C-191/96 *Modesti* [1996] ECR I-3937, Case C-196/96 *Hassan* [1996] ECR I-3945, Case C-66/97 *Banco de Fomento e Exterior* v *Pechim and Others* [1997] ECR I-3757, Joined Cases C-128/97 and C-137/97 *Testa and Modesti* [1998] ECR I-2181, and C-9/98 *Agostini* v *Ligue Francophone de Judo et Disciplines Associées and Ligue Belge de Judo* [1998] ECR I-4261.

8 — That point had already been made in the judgment in Joined Cases 141/81 to 143/81 *Holdijk* [1982] 1299, paragraphs 5 and 6.

9 — The court recognises, none the less, that special administration is aimed not only at preserving and rationalising undertakings in a state of crisis but also, where appropriate, at liquidating them, as is the case in every insolvency.

actions to prevent the diminution of a debtor's estate by his fraud which can be brought in relation to creditors, the amount realised thereby forming part of the resources earmarked for the rationalisation of the undertaking itself.'

11. That is the sum total of what the national court tells us about the legislation on the compatibility of which with Article 92 of the Treaty it seeks a reply from the Court of Justice. The reference to the three measures concerned — State guarantee of debts, reduction in transfer duty and exercise of the action to prevent diminution of a debtor's estate by his fraud — is incomplete, as was pointed out in the proceedings before the Court, since:

(a) As regards the guarantee of debts, the national court fails to say that it is not granted automatically but on a case-by-case basis. [10] The Italian Government states that it communicated in advance to the Commission its proposal to notify individually any guarantees which it is prepared to grant, and to make such grant subject to the approval of the Commission in each case. [11]

(b) As regards the registration duty payable in respect of transfers, the Italian Government emphasises that this is a measure which benefits those acquiring the assets in question, who are liable to pay the duty, not the undertaking in a state of crisis.

(c) As regards the action to prevent diminution of a debtor's estate by his fraud, the relevant rules are essentially that same as those in the legislation on insolvency, [12] to which Article 3 of Law No 95/79 refers. The Law establishes an 'exceptional' action to prevent diminution of debtor's estates, the effect of which is to extend the period of suspicion beyond the two years applicable in relation to the ordinary action. However, the order for reference does not refer either to that temporal factor or to any other.

12. The explanation is also inadequate because it does not provide a detailed description of the relations (differences and similarities) between the system of special administration and the ordinary insolvency system, which also includes a procedure of compulsory administrative

10 — Article 2a of the Law provides that the State Treasury may guarantee some or all of the debts which companies placed under special administration incur with banking institutions to finance their current operations and to reactivate and complete their plant, premises and industrial equipment.

11 — See footnote 23 below.

12 — The relevant provision is Decree No 267 of 16 March 1942 on insolvency procedure, preventive agreement, supervised administration and compulsory administrative liquidation, Section III of which is headed 'The effects of insolvency on acts which adversely affect creditors'. Article 65 provides that payments... effected by the insolvent person during the two years preceding the declaration of insolvency have no effect *vis-à-vis* the creditors. Under Article 66, which governs 'ordinary' actions to prevent diminution of a debtor's estate by his fraud, pursuant to which the liquidator may apply for a declaration that acts carried out by the debtor to the detriment of creditors are inoperative in accordance with the rules of the Civil Code. Article 67 refers to acts done for consideration, to payments and to guarantees and provides that they will be revoked, except where the other party proves that it was not aware that the debtor was insolvent; the acts include the following: (1) acts for consideration carried out during the two years preceding the declaration of insolvency, in so far as the as services provided or obligations assumed by the insolvent person significantly exceed what it was given or promised; and (2) acts in settlement of monetary debts which are due and payable, effected other than in the form of money or other normal means of payment within two years preceding the declaration of insolvency.

liquidation. It was, specifically, the possible discordance between special administration and the general rules of the ordinary law on insolvency that was the deciding factor in the Court's decision in *Ecotrade*.

13. None the less, the arguments of the parties in the present proceedings have provided sufficient information about the Italian legislative background, which, moreover, the Court has already considered in the *Ecotrade* judgment. Accordingly, the inadmissibility of the questions referred to the Court, in so far as it results from the inadequacy of the explanation provided in the order for reference, could be regarded as cured. The same is not true of the lack of objective necessity of the questions themselves, to which I now turn.

(ii) *The objective necessity of the questions*

14. According to Community case-law it is for the national court to determine both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it refers to the Court. However, the Court established an exception to that rule, when it held in the *Salonia* judgment [13] that a question may be declared inadmissible if it is quite obvious that the interpretation of Community law or the examination of the validity of a rule of Community law sought by the national court bears no relation to the actual nature of the case or to the subject-matter of the main action. That dictum has since been repeated in a large body of case-law, which reached a peak during the 1990s. [14]

15. However, that requirement has led to the questions referred to the Court of Justice being declared inadmissible in whole or in part in a much smaller number of cases. In some cases (*Falciola*, [15] *Monin Automobiles II* [16] and *Rouhollah Nour*, *Margarita Karner* and *Arthur Lindau* [17]), the Court declared the questions referred to it inadmissible on the ground that there was no relation between any of the questions and the subject-matter of the action. On the other hand, the requirement of a relation between the questions and the subject-matter of the main action has led the Court to declare some of the questions formulated by the national courts inadmissible in, *inter alia*, *Lourenço Dias*, [18] *Corsica Ferries*, [19] *USSL No 47 di Biella*, [20] and *Grado and Bassir*. [21]

16. In the present case it seems clear to me that there is no objective need to refer the

13 — Case 126/80 *Salonia* v *Poidomani and Giglio* [1981] ECR 1563, paragraph 6.

14 — See, *inter alia*, Joined Cases C-297/88 and C-197/89 *Dzodzi* v *Belgian State* [1990] ECR I-3763, paragraph 40; Case C-186/90 *Durighello* v *Istituto Nazionale delle Previdenza Sociale* [1991] ECR I-1563, paragraph 9; C-67/91 *Dirección General de la Defensa de la Competencia* v *Asociación Española de Banca Privada and Others* [1992] ECR I-4785, paragraph 26; Joined Cases C-332/92, C-333/92 and C-335/92 *Eurico Italia and Others* v *Ente Nazionale Risi* [1994] ECR I-711, paragraph 17; Case C-143/94 *Furlanis Costruzioni Generali* v *Azienda Nazionale Autonoma Strade and Itinera Co.Ge.* [1995] ECR I-3633, paragraph 12, and Case C-129/94 *Ruiz Bernáldez* [1996] ECR I-1829, paragraph 7.

15 — Order in Case C-286/88 *Falciola Angelo* v *Comune di Pavia* [1990] ECR I-191.

16 — Order in Case C-428/93 *Monin Automobiles — Maison du Deux-Roues* [1994] ECR I-1707.

17 — Orders of 25 May 1998 in Case C-361/97 *Nour* v *Burgenländische Gebietskrankenkasse* [1998] ECR I-3101, Case C-362/97 *Karner* and Case C-363/97 *Lindau*, not published in the ECR.

18 — Case C-343/90 *Lourenço Dias* v *Director da Alfândega do Porto* [1992] ECR I-4673.

19 — Case C-18/93 *Corsica Ferries* v *Corpo dei Piloti del Porto di Genova* [1994] ECR I-1783, paragraphs 14 to 16.

20 — Case C-134/95 *Unità Socio-Sanitaria Locale No 47 di Biella* v *Istituto Nazionale per l'Assicurazione contro gli Infortuni sul Lavoro* [1997] ECR I-195.

21 — Case C-291/96 *Grado and Bassir* [1997] ECR I-5531.

questions. In so far as they refer to 'the provisions of [the] Law set out in the grounds of the... order', the questions either bear no relation to the facts of the action or are of no relevance to its determination.

17. Of the three provisions of the Law referred to in the order for reference, the first two bear no relation whatsoever to the facts. As regards the first, there is no indication that in the present case the Italian State guaranteed Piaggio's debts, and, accordingly, the reference to that aspect of the Law is superfluous. As regards the second, since no assessment of transfer duty was made (as the undertaking was not transferred), there is just as little reason to take into account the article of the Law which grants the corresponding reduction.

18. In so far as the reference to the action to prevent diminution of a debtor's estate by his fraud is concerned, it must be emphasised that in the present case the general, ordinary action provided for under the insolvency system was the remedy exercised, within the limitation period of two years which was then applicable. Since Piaggio was declared insolvent (before the order placing it under special administration was made), the action to prevent diminution of debtor's estates was available irrespective of whether a normal insolvency was concerned or whether the special procedure applied. The procedures, the aims pursued, the persons claiming payment and those liable to make such payment, the amounts claimed and the other conditions governing the exercise of the remedy are the same in both cases. It is therefore impossible to see what impact recourse to that type of action can have *vis-à-vis* the consideration of State aid.

19. It is however true that in the *Ecotrade* case the Court of Justice, faced with a similar objection, held that the question referred was admissible. In that case the suspension of individual actions for enforcement on the part of the body of creditors was common to the system of special administration and to the ordinary insolvency procedure. In spite of that, the Court held that '[t]here [was]... 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 [was] a matter for the national court to determine.'

20. To my mind, such a generous interpretation of the assessment of the relevance of the questions referred to the Court results in practice in the admission of abstract and hypothetical referrals which the Court should avoid; and that is particularly so where the underlying reason for the questions is a problem of compatibility of national legislation with the Community legal order.

21. If the circumstances in the main action are such that the answer which the Court of Justice gives to the doubts as to the interpretation of Community law raised by a national court cannot affect the outcome of that action, the Court's answer becomes a didactic exercise or a purely

abstract opinion rather than a judicial ruling which plays a decisive role in the national court's decision.

22. That, in my view, is the position in the present case: the only issue in the main action is whether Dornier is required to restore to the body of creditors the amounts which it received from Piaggio during the period to which the insolvency applies retroactively. The fact that the payments made during that period are ineffective has nothing to do with the insolvency procedure, whether ordinary or extraordinary, since it is a general measure found in the majority of insolvency systems. The declaration that such payments are ineffective is therefore completely extraneous to the particular characteristics of special administration provided for in the special Italian law. And as regards the greater or lesser probability of covering its debts in the future (a key argument in the admissibility of the *Ecotrade* case, as I have already said), that is a question which bears no relation to recourse to the action to protect the debtor's estate.

23. In short, I consider that the procedural conditions necessary for the Court to be able to provide a useful answer to the questions referred by the national court are not met. In any event, and in the alternative, in case that view should not be shared by the Chamber responsible for giving judgment, I shall take time to analyse the two questions referred to the Court.

First question

24. The Tribunale Civile di Genova asks whether a national court may request the Court of Justice to rule directly on the compatibility of a legislative measure of a Member State with the provisions of Article 92 of the Treaty.

25. The answer to that question, as formulated, must necessarily be in the negative. First, it has consistently been held that the preliminary ruling procedure under Article 177 of the Treaty is not an appropriate mechanism for ruling directly on the compatibility of a domestic measure with Community law. Within that procedure, however, the Court of Justice may provide the national courts with the elements of interpretation of Community law which it considers appropriate for the resolution of the dispute.

26. Second, and as regards more specifically the respective functions of the national courts and the Court of Justice in determining whether State aid is compatible with Community law, the case-law of the Court of Justice may be summarised in

the terms of the judgment in *SFEI and Others*:[22]

— In the system of reviewing State aid established by the Treaty it is necessary to take into consideration that the prohibition, as a matter of principle, of State aid is neither absolute nor unconditional since, in particular, Article 92(3) confers on the Commission a wide discretion to allow aid by way of derogation from the general prohibition laid down in Article 92(1). The determination in such cases of the question whether a State aid is or is not compatible with the common market raises problems which presuppose the examination and appraisal of economic facts and circumstances which may be both complex and liable to change rapidly.

— That was the reason for which the Treaty provided in Article 93 for a special procedure under which the Commission would monitor aid schemes and keep them under constant review. With regard to new aid which Member States might be intending to grant, a preliminary procedure was established; if this procedure was not followed, the aid could not be regarded as having been properly granted.

— The involvement of national courts is the result of the direct effect which the prohibition on implementation of planned aid laid down in the last sentence of Article 93(3) has been held to have. In this respect, the Court has stated that the immediate applicability of the prohibition on implementation referred to in that article extends to all aid which has been implemented without being notified and, in the event of notification, operates during the preliminary period and if the Commission sets in motion the consultative examination procedure, until the final decision.

— National courts must offer to individuals the certain prospect that all the appropriate conclusions will be drawn from an infringement of the last sentence of Article 93(3) of the Treaty, as regards the validity of measures giving effect to the aid and the recovery of financial support granted in disregard of that provision.

— In drawing the appropriate conclusions from an infringement of the last sentence of Article 93(3), national courts cannot rule on the compatibility of the aid with the common market, that determination being a matter for the Commission, subject to review by the Court.

— A national court may find it necessary to interpret the concept of aid contained in Article 92 of the Treaty in order to determine whether a State measure introduced without obser-

22 — Case C-39/94 *SFEI and Others* v *La Poste and Others* [1996] ECR I-3547.

vance of the preliminary examination procedure provided for in Article 93(3) ought to have been subject to that procedure. Where it entertains doubts as to whether the measures at issue should be categorised as State aid, it may seek clarification from the Commission on that point and, in accordance with the second and third paragraphs of Article 177 of the Treaty, may or must request the Court for a preliminary ruling on the interpretation of Article 92 of the Treaty.

27. The answer to the first question referred by the Tribunal Civil de Genova should, logically, reiterate those criteria, the effect of which is that a national court may not, by referring a question for a preliminary ruling, request the Court of Justice to rule directly on the compatibility of national legislation with Article 92 of the Treaty. The national court may, however, make use of that procedure to request the Court to interpret the provisions of Community law on State aid.

Second question

28. The second question is asked only in the event that the answer to the first question is in the affirmative. Having regard to the considerations expressed above, there would be no need to rule on the second question. The Commission shares that point of view in its observations and also considers that there is no need in these proceedings to analyse the application of Article 92 of the Treaty to the system of special administration provided for in Law No 95/79.

29. In any event, since the work of cooperation between the Court of Justice and the referring court so allows, I consider that it would not be superfluous to provide the national court with some guidelines to the interpretation of the concept of State aid in relation to a national measure such as the one contained in the Italian law. Similar guidelines to interpretation may be found in the *Ecotrade* judgment, cited above, the operative part of which is set out above (see point 3) and need not be repeated here.

30. I must confess, however, that the solution which the Court reached in the *Ecotrade* judgment does not appear to be without its drawbacks, in so far as it takes as the decisive issue for the purpose of the ruling the comparison rules of ordinary law/rules of special law in the field of insolvency. Leaving to one side the grant of State guarantees, which, as I have already said, the Italian Republic is prepared to notify to the Commission on a case-by-case base (see point 11 above), I am not sure that the criterion of speciality as opposed to the ordinary insolvency system is sufficient to resolve the problem. In such a situation, if the other provisions of Law No 95/79 (that is to say, the provisions relating to exemption from fines, the waiver of certain public debts or the reduction of the rate of transfer duty) were incorporated in the ordinary insolvency system, would that suffice to deprive them of the character of State aid?

31. To my mind it would perhaps have been preferable if, rather than delivering a judgment dealing with all the measures provided for in Law No 95/79, the Court's answer to the national court had been that whether or not there had been State aid could only be determined in the light of the facts of each actual case. However, and perhaps inevitably, given the limitations of the preliminary ruling procedure, the Court considered it necessary in the *Ecotrade* judgment to give a ruling of a much more hypothetical nature and left it to the national court to determine whether the application of the special system involved 'greater losses for the State... than the system under the ordinary law'. Such an assessment is extremely difficult, if not impossible, since in the context of the ordinary insolvency procedures in the case of large undertakings the State is also normally forced to accept solutions which entail a cost for the public treasury, the amount of which is difficult to ascertain in advance.

32. In economic terms, therefore, it is not at all a simple matter to say whether the losses eventually incurred by the State — in other words, the balance of State intervention — would have been greater if the ordinary insolvency system had been applied than if the special administration system had been applied. By its nature the latter system to a certain extent implies a gamble on the future: the State waives the right to recover certain public debts now payable and attempts to maintain the undertaking's activity in the hope of subsequently being able to recover not only the debts already due but also the public revenue (taxes, social security contributions) which will be payable in respect of the undertaking's future activities. The position is in reality not very different from that of a large private creditor (for example a financial institution) which may at times find it more advantageous to maintain the activity of the debtor undertaking, where feasible, than to liquidate its assets and recover only a part of the debt. In such a case it would be the complete absence of feasibility rather than the measures of special administration that would determine whether there was State aid incompatible with the common market.

33. If, those observations notwithstanding, the Court considers it appropriate to uphold the principle laid down in the *Ecotrade* judgment, I must point out that the Commission (which has intervened in respect of Law No 95/79 by means of a series of decisions, some of a general nature [23] and others relating to particular cases [24]) has described the application of that Law as 'existing State aid'. That description gives rise to a problem which the Court was unable to consider in *Ecotrade*, since under the ECSC Treaty system the distinction between existing aid and new aid does not have the same significance as it has under the EC Treaty.

23 — As regards the Law as a whole, the Commission sent the Italian Government a letter pursuant to Article 93(1) of the EC Treaty in which, after concluding that the legislation in question was caught in several respects by Article 92 et seq. of the Treaty, it requested to be notified in advance of all cases of application of the Law in order to examine them within the framework of the rules applicable to firms in difficulty (letter E 13/92 of 30 July 1992, OJ 1994 C 395, p. 4). The Italian authorities replied that they were only prepared to give prior notification where the State guarantee provided for in Article 2a of the Law was involved. The Commission therefore decided to initiate the procedure provided for in Article 93(2) of the Treaty.

24 — See, in that regard, the decisions referred to in paragraph 22 of the *Ecotrade* judgment, cited above.

34. As we know, under the EC Treaty aid 'existing' in the original Member States when the EC Treaty entered into force (or, in the case of other Member States, before they acceded to the European Communities) may continue to be implemented as long as the Commission has not declared it incompatible with the common market. [25] In so far as no declaration to that effect has been made, there is no need to consider whether — and to what extent — such aid may be exempt from the prohibition in Article 92 of the Treaty pursuant to Article 90(2).

35. 'New' State aid, on the other hand, in each case requires prior notification to the Commission, and failure on the part of the Member State concerned to meet this requirement renders the aid incompatible with Community law. As I have already said, with reference to the *SFEI* judgment, national courts must ensure that the prohibition in Article 93(3) is directly applicable in the case of new aid which has not first been notified to the Commission.

36. The Commission acknowledges that, as is obvious, Law No 95/79 was approved since the entry into force of the EC Treaty and also acknowledges that it was not notified to the Commission in accordance with Article 93(1). It says, however, that it decided to treat the Law as a system of existing aid, for 'reasons of expediency'. Those reasons include: the doubts which the Commission has entertained for 14 years as to whether Law No 95/79 may constitute State aid; the fact that the identification of the elements of State aid contained in that Law are even today 'complex and by no means obvious'; the confidence of economic operators; the absence of complaints from competitors of undertakings placed under that system; the fact that the system is rarely applied; and, finally, the fact that it is impossible in practice to secure repayment of any amounts which may be recoverable.

37. In my view none of those reasons of expediency can prevail over the considerations based on the principle of legality. In that regard, the inevitable conclusion is that if the system adopted by the Italian legislature in Law No 95/79 may be regarded as State aid, it must be classified as new aid for the purposes of Article 93 of the EC Treaty and not as aid existing when the Treaty entered into force.

38. Now that that point has been disposed of, if the Court chooses to answer the second question and considers it appropriate to reiterate the principle expounded in the *Ecotrade* judgment (with reference, in this case, to Article 92 of the EC Treaty rather than to Article 4 of the ECSC Treaty), it should inform the national court that failure to notify State aid to the Commission prevents its implementation, in accordance with Article 93(3) of the Treaty.

25 — Thus judgments in Case C-47/91 *Italy* v *Commission* [1992] ECR I-4145, paragraph 25, and Case C-387/92 *Banco de Crédito Industrial, now Banco Exterior de España* v *Ayuntamiento de España* [1994] ECR I-877, paragraphs 20 and 21.

Conclusion

39. I therefore propose that the Court declare the questions referred by the Tribunal do Genova inadmissible or, in the alternative, answer them as follows:

(1) A national court may not, by referring a question for a preliminary ruling, request the Court to rule directly on the compatibility of a national legislative provision with Article 92 of the Treaty. None the less, the national court may, by means of that procedure, request the Court to interpret the provisions of Community law relevant to the concept of State aid.

(2) The principles set out in the judgment of the Court of 1 December 1998 in *Ecotrade and Others* on the application of a system such as that established in Law No 95/79 of 3 April 1979, which introduces a number of exceptions to the rules of ordinary law in the field of insolvency, are also applicable to the concept of State aid in Article 92 of the EC Treaty. Failure to notify State aid to the Commission prevents its implementation, in accordance with Article 93(3) of the Treaty.