JUDGMENT OF THE COURT (Fifth Chamber)
17 June 1999 *

In Case C-295/97,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Tribunale di Genova (Italy) for a preliminary ruling in the proceedings pending before that court between

Industrie Aeronautiche e Meccaniche Rinaldo Piaggio SpA

and

International Factors Italia SpA (Ifitalia),

Dornier Luftfahrt GmbH,

Ministero della Difesa

on the interpretation of Article 92 of the EC Treaty (now, after amendment, Article 87 EC),

* Language of the case: Italian.

THE COURT (Fifth Chamber),

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

Advocate General: D. Ruiz-Jarabo Colomer,

Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

— Industrie Aeronautiche e Meccaniche Rinaldo Piaggio SpA, by Tomaso Galletto, of the Genoa Bar,

— Dornier Luftfahrt GmbH, by Antonio Fusillo and Alessandro Fusillo, both of the Rome Bar, and Gianfranco Nasuti, of the Genoa Bar,

— the Italian Government, by Umberto Leanza, Head of the Foreign Litigation Department at the Ministry of Foreign Affairs, acting as Agent, assisted by Oscar Fiumara, Avvocato dello Stato,

— the Commission of the European Communities, represented by Gérard Rozet, Legal Adviser, and Paolo Stancanelli, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Industrie Aeronautiche e Meccaniche Rinaldo Piaggio SpA, represented by Tomaso Galletto and Ivano Cavanna, of the

Genoa Bar, Dornier Luftfahrt GmbH, represented by Antonio and Alessandro Fusillo, the Italian Government, represented by Oscar Fiumara, and the Commission, represented by Paolo Stancanelli, at the hearing on 27 January 1999,

after hearing the Opinion of the Advocate General at the sitting on 4 March 1999,

gives the following

Judgment

1 By order of 29 July 1997, received at the Court on 11 August 1997, the Tribunale di Genova (District Court, Genoa) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) two questions on the interpretation of Article 92 of the EC Treaty (now, after amendment, Article 87 EC).

2 The questions were raised in proceedings between Industrie Aeronautiche e Meccaniche Rinaldo Piaggio SpA ('Piaggio') and the German company Dornier Luftfahrt GmbH ('Dornier') concerning the repayment of a sum of ITL 30 028 894 382 paid by Piaggio to Dornier.

3 Piaggio bought three aircraft from Dornier for the Italian armed forces. In payment, as from December 1992, Piaggio made various transfers and assignments in favour of Dornier.

4 By decree of 28 November 1994, adopted jointly by the Ministers for Industry and the Treasury (GURI No 281 of 1 December 1994), Piaggio was placed under special administration pursuant to Law No 95/79 of 3 April 1979 (GURI No 94 of 4 April 1979; 'Law No 95/79'). That decision followed a judgment of the Tribunale di Genova of 29 October 1994, declaring that Piaggio was insolvent and that it was possible to allow the company the benefit of the special administration procedure.

5 On 14 February 1996, Piaggio applied to the Tribunale di Genova for, first, a declaration that all the payments and assignments in favour of Dornier during the two years preceding its placing in special administration were null and void *vis-à-vis* the creditors generally, and, secondly, an order that Dornier repay the corresponding sums with interest. Piaggio maintained in that respect that Dornier, whilst knowing that Piaggio was in a situation of cessation of payments, received from it a series of preferential payments totalling ITL 30 028 894 382 for the sale of three aircraft, in breach of the principle that all creditors should be treated equally.

6 Piaggio based its action on Article 67 of the Law on Insolvency, applicable to the present case by virtue of the references in Article 1 of Law No 95/79 and Article 203 of the Law on Insolvency, which provides that payments made within two years prior to the declaration of insolvency and the initiation of the special administration procedure may be set aside in favour of the body of creditors.

7 In its defence, Dornier has argued, *inter alia*, that Law No 95/79 is incompatible with Article 92 of the Treaty.

8 Law No 95/79 established the 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 ITL 80.444 thousand million or more, and exceeding five times the paid-up capital of the company, to credit institutions, social welfare or social security institutions, or companies in which the State has a majority shareholding.

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 ITL 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 shareholding, 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 the first paragraph of Article 2 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 the Treasury, 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 Inter-departmental 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; debt payments made during a period preceding the declaration of insolvency may be set aside; 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 corporation 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 procedures 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 duty of ITL 1 million.

15 Moreover, the second paragraph of Article 3 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 pecuniary 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 By letter E 13/92 (OJ 1994 C 395, p. 4), sent to the Italian Government pursuant to Article 93(1) of the EC Treaty (now Article 88(1) EC), the Commission indicated that Law No 95/79 appeared to it in various respects to fall within the scope of Article 92 et seq. of the Treaty and 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.

20 The Italian authorities having replied that they were prepared to give prior notification only where the State had provided a guarantee pursuant to Article 2a of Law No 95/79, the Commission decided to initiate the procedure provided for in Article 93(2) of the Treaty. It does not appear from the documents before the Court that that procedure has as yet led to a final decision of the Commission.

21 It was in those circumstances that the national court, having doubts as to whether Law No 95/79 was compatible with Article 92 of the Treaty, decided to stay proceedings and refer the following questions to the Court of Justice 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?'

The admissibility of the reference

22 Piaggio argues that the reference is inadmissible because, first, the order for reference does not sufficiently and clearly define the legislative context of the interpretation requested and, secondly, the questions raised are not relevant for the determination of the dispute in the main proceedings, its action for the payments to be set aside being based on ordinary insolvency legislation providing that payments made during the two years preceding the declaration of insolvency may be set aside.

23 In that respect, whilst it is true that the order for reference only briefly describes its legal context, that fact is not in this case such as to render the reference

inadmissible. That description is sufficient, since it enables the questions posed to be clearly understood.

24 It should, moreover, 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-200/97 *Ecotrade* v *Altiforni e Ferriere di Servola* [1998] ECR I-7907, paragraph 25).

25 In this case it need merely be observed that the question whether a system such as that established by Law No 95/79 must be classified as a new or as an existing aid, which the Court will examine of its own motion hereinafter in the context of the close cooperation which it is required to establish with national courts, is not irrelevant to the resolution of the dispute in the main proceedings, bearing in mind the inferences which the national court may have to draw, in the light of Articles 92 and 93 of the Treaty, from the absence of any prior notification to the Commission of the aid system that may be in issue.

26 There is, moreover, nothing which would justify stating at the outset that, if Piaggio had been entirely subject to the ordinary insolvency procedure, Dornier's position would have been identical in all respects, particularly as regards its chances of recovering, at least in part, the debts owing to it, notwithstanding the fact that the ordinary insolvency procedure also provides for the setting aside of payments made during the suspect period preceding the declaration of insolvency. That question is a matter for the national court to determine.

27 It is therefore necessary to answer the questions referred.

Question 1

28 In its first question, the national court asks whether it can request the Court to rule directly on whether a national measure is compatible with Article 92 of the Treaty.

29 It is settled case-law that, within the framework of proceedings brought under Article 177 of the Treaty, the Court does not have jurisdiction to interpret national law or to give a ruling on the compatibility of a national measure with Community law (Case C-188/91 *Deutsche Shell* v *Hauptzollamt Hamburg-Harburg* [1993] ECR I-363, paragraph 27).

30 More particularly concerning the review of Member States' compliance with their obligations under Articles 92 and 93 of the Treaty, the national courts and the Commission fulfil complementary and separate roles, as the Court pointed out in its judgment in Case C-39/94 *SFEI and Others* v *La Poste* [1996] ECR I-3547, paragraph 41 et seq.).

31 Whilst assessment of the compatibility of aid measures with the common market falls within the exclusive competence of the Commission, subject to review by the Court, it is for the national courts to ensure that the rights of individuals are safeguarded where the obligation to give prior notification of State aids to the Commission pursuant to Article 93(3) of the Treaty is infringed.

32 In order to determine whether a State measure introduced without taking account of the preliminary examination procedure laid down in Article 93(3) of the Treaty should have been subject to that procedure, a national court may have cause to interpret the concept of aid contained in Article 92 of the Treaty. If, as the order for reference shows to be the case here, that court has doubts as to whether the measure in question should be classified as a State aid, it may ask the Commission for clarifications on that point or, in accordance with the second and

third paragraphs of Article 177 of the Treaty, it may or must put a question to the Court for a preliminary ruling on the interpretation of Article 92 of the Treaty (*SFEI*, paragraphs 49 to 51).

33 In order therefore to give a useful answer to the national court, it is necessary to consider whether a system of the kind established by Law No 95/79, and derogating from the rules of ordinary insolvency law, must be classified as State aid within the meaning of Article 92 of the Treaty and should have been notified to the Commission prior to its implementation pursuant to Article 93(3) of the Treaty.

Classification as aid

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 C-387/92 *Banco Exterior de España* v *Ayuntamiento de Valencia* [1994] ECR I-877, paragraph 13; *Ecotrade*, paragraph 34).

35 The expression 'aid', within the meaning of Article 92(1) of the 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, in particular, Joined Cases C-52/97 to C-54/97 *Viscido and Others* v *Ente Poste Italiane* [1998] ECR I-2629, paragraph 13).

36 By analogy with what the Court held in *Ecotrade* concerning Article 4c of the ECSC Treaty, several characteristics of the system established by Law No 95/79,

particularly in the light of the facts in the main proceedings, might, if the significance attributed to them below were to be confirmed by the national court, make it possible to establish the existence of aid within the meaning of Article 92(1) of the Treaty.

37 First, it is apparent from the documents before the Court that Law No 95/79 is intended to apply selectively for the benefit of large industrial undertakings in difficulties which owe particularly large debts to certain, mainly public, classes of creditors. As the Court held in paragraph 38 of its judgment in *Ecotrade*, it is even highly probable that the State or public bodies will be among the principal creditors of the undertaking in question.

38 It is also important to note that, even if the decisions of the Minister for Industry to place the undertaking in difficulties under special administration and to allow 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 Court held in paragraph 39 of its judgment in *Ecotrade* and as the national court has confirmed, by the concern to maintain the undertaking's economic activity in the light of national industrial policy considerations.

39 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).

40 Next, 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 ordinary insolvency rules were applied, since under those rules protection of creditors' interests is the determining factor. In view of the priority accorded to debts connected with the pursuit of economic activity, authorisation to continue to pursue that activity 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 principal creditors of the undertaking in difficulties, all the more so because, by definition, that undertaking owes debts of considerable value.

41 Furthermore, apart from 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 for belated payment of corporation 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 duty of ITL 1 million, whereas the ordinary rate of registration duty is 3% of the value of the property sold.

42 Those advantages, conferred by the national legislature, could also entail an additional burden for the public authorities in the form of a State guarantee, a *de facto* waiver 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 established that placing the undertaking under special administration and allowing it to continue trading did not in fact entail or should not entail an additional burden for the State, compared to the situation that would have arisen had the ordinary insolvency provisions been applied. It is for the national court to verify those matters, after seeking clarification from the Commission if need be.

43 In the light of the foregoing, it must be concluded that application to an undertaking 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, within the meaning of Article 92(1) of the 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 *de facto* waiver of public debts wholly or in part, which could not have been claimed by another insolvent undertaking under the application of the rules of ordinary law relating to insolvency.

The consequences of lack of prior notification

44 Article 93 of the Treaty provides that aid is to be kept under constant review by the Commission and lays down the procedures for that purpose. In relation to new aid which Member States may intend to grant, there is a preliminary procedure without which no aid can be considered properly granted. In accordance with the first sentence of Article 93(3) of the Treaty, the Commission must be informed of any plans to grant or alter aid prior to such plans being put into effect.

45 The Commission has, however, classified the system under Law No 95/79 as an 'existing State aid', whilst recognising that that Law, although promulgated after the entry into force of the Treaty, was not notified to it in accordance with the

provisions of Article 93(3) of the Treaty. Its position is based on reasons of practical expediency, including, in particular, its own doubts, which extended over 14 years, concerning the classification of Law No 95/79 as State aid, the expectations of traders subject to that system, the infrequent application of the system, and the impossibility in practice of obtaining repayment of the sums which might be recoverable.

46 That position cannot be accepted.

47 The answer to the question whether aid is new and its introduction therefore requires the preliminary examination procedure under Article 93(3) of the Treaty to be put in motion cannot depend on a subjective assessment by the Commission.

48 As the Court has already held in Case C-44/93 *Namur-Les Assurances du Crédit* v *OND* [1994] ECR I-3829, at paragraph 13 of the judgment, it is clear from both the terms and purposes of Article 93 that aid which existed before the entry into force of the Treaty and aid which could be properly put into effect under the conditions laid down in Article 93(3) of the Treaty, including aid arising from the interpretation of that article given by the Court in its judgment in Case 120/73 *Lorenz* v *Germany* [1973] ECR 1471, paragraphs 4 to 6, is to be regarded as existing aid within the meaning of Article 93(1), whereas measures to grant or alter aid, where the alterations may relate to existing aid or initial plans notified to the Commission, must be regarded as new aid subject to the obligation of notification laid down by Article 93(3).

49 Accordingly, since it is established that a system such as that introduced by Law No 95/79 is in itself capable of giving rise to the grant of State aid within the meaning of Article 92(1) of the Treaty, that system cannot be put into operation unless it has been notified to the Commission and, if it has been so notified, before the Commission has made a decision acknowledging that the aid plan is

compatible with the common market, or, if the Commission takes no decision within a period of two months from the notification, before that period has expired (see *Lorenz*, paragraph 4).

50 The answer to the first question must therefore be:

Within the framework of proceedings brought under Article 177 of the Treaty, the Court does not have jurisdiction to interpret national law or to give a ruling on the compatibility of a national measure with Article 92 of the Treaty. However, where an application is made to a national court that it should draw the appropriate inferences from infringement of the final sentence of Article 93(3) of the Treaty, it may seek clarification from the Commission on that point or, in accordance with the second and third paragraphs of Article 177 of the Treaty, it may or must refer a question to the Court for a preliminary ruling on the interpretation of Article 92 of the Treaty, in order to determine whether the State measures in question constitute State aid which should have been notified to the Commission.

Application to an undertaking 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, within the meaning of Article 92(1) of the 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 *de facto* waiver of public debts wholly or in part, which could

not have been claimed by another insolvent undertaking under the application of the rules of ordinary law relating to insolvency.

Since it is established that a system such as that established by Law No 95/79 is in itself capable of giving rise to the grant of State aid within the meaning of Article 92(1) of the Treaty, that system cannot be put into operation unless it has been notified to the Commission and, if it has been so notified, before the Commission has made a decision acknowledging that the aid plan is compatible with the common market, or, if the Commission takes no decision within a period of two months from the notification, before that period has expired.

Question 2

51 In the light of the answer to the first question, there is no need to answer the second question.

Costs

52 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 questions referred to it by the Tribunale di Genova by order of 29 July 1997, hereby rules:

1. Within the framework of proceedings brought under Article 177 of the EC Treaty (now Article 234 EC), the Court does not have jurisdiction to interpret national law or to give a ruling on the compatibility of a national measure with Article 92 of the EC Treaty (now, after amendment, Article 87 EC). However, where an application is made to a national court that it should draw the appropriate inferences from infringement of the final sentence of Article 93(3) of the EC Treaty (now Article 88(3) EC), it may seek clarification from the Commission on that point or, in accordance with the second and third paragraphs of Article 177, it may or must refer a question to the Court for a preliminary ruling on the interpretation of Article 92 of the Treaty, in order to determine whether the State measures in question constitute State aid which should have been notified to the Commission.

2. Application to an undertaking of a system of the kind introduced by Italian 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, within the meaning of Article 92(1) of the 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 *de facto* waiver of public debts wholly or in part, which could not have been claimed by another insolvent undertaking under the application of the rules of ordinary law relating to insolvency.

3. Since it is established that a system such as that established by Law No 95/79 is in itself capable of giving rise to the grant of State aid within the meaning of Article 92(1) of the Treaty, that system cannot be put into operation unless it has been notified to the Commission and, if it has been so notified, before the Commission has made a decision acknowledging that the aid plan is compatible with the common market, or, if the Commission takes no decision within a period of two months from the notification, before that period has expired.

Puissochet Jann Gulmann

Edward Wathelet

Delivered in open court in Luxembourg on 17 June 1999.

R. Grass J.-P. Puissochet

Registrar President of the Fifth Chamber