OPINION OF ADVOCATE GENERAL POIARES MADURO delivered on 12 January 2006 [1]

1. By order of 14 May 2004, the Tribunale di Cagliari (Italy) referred two questions to the Court for a preliminary ruling, one on the interpretation of Articles 87 EC and 88 EC, and the other on the interpretation of Articles 43 EC, 44 EC, 48 EC and 49 EC. The first of these questions entails considering anew the parameters of the concept of State aid.

I — Factual and legal background to the dispute in the main proceedings

2. The case arises from a dispute between Enirisorse SpA ('Enirisorse') and Società Tecnologie Avanzate Carbone SpA ('Sotacarbo'). That dispute came about in the following circumstances. Enirisorse is a subsidiary of the Ente Nazionale Idrocarburi group ('ENI'), a State enterprise responsible for managing State holdings in the energy sector. Under Law 351 of 27 June 1985 (GURI No 166 of 16 July 1985, p. 5019, 'Law No 351/1985'), ENI and two other State enterprises, ENEL and ENEA, were authorised jointly to form a public limited company with a view to developing innovative and advanced technologies in the use of coal. The same law provided that the venture was to be financed entirely out of the State budget. The company thus formed was Sotacarbo. As a contribution to the creation of a coal research centre in Sardinia, ENI paid Sotacarbo the sum of ITL 12 708 900 033 by way of a capital injection.

3. In 1992, ENI and ENEL were privatised and converted into public limited companies. In the light of that process, Law No 140 of 11 May 1999 (GURI No 117 of 21 May 1999; p. 4, 'Law No 140/1999') authorised those two companies to withdraw from Sotacarbo, subject to paying up the unpaid balance on their shares. Enirisorse, which had taken over ENI's holding in Sotacarbo, elected to exercise the right of withdrawal conferred by Law No 140/1999. It accordingly paid up the unpaid balance on its shares and requested Sotacarbo to give effect to the withdrawal by redeeming its shares in accordance with Article 2437 of the Italian Civil Code.

1 — Original language: Portuguese.

4. That article provides as follows:

'Members opposing a resolution to change the company's objects or legal form or to transfer its headquarters abroad shall have the right to withdraw from the company and to have their shares redeemed at the average price ruling over the previous six months, in the case of quoted shares, or, otherwise, in proportion to the company's assets as per the accounts for the previous financial period.'

'In order to ensure that Sotacarbo has the financial resources necessary to carry out the programme of work referred to in Article 7 (5) of Law No 140 of 11 May 1999, the members of the company shall pay up the unpaid balance on their shares within 60 days after the entry into force of this law and shall have the right to withdraw from the company subject to relinquishing all claims over its assets and paying up the unpaid balance on their shares. Notices of withdrawal already given to Sotacarbo SpA under Article 7(4) of Law No 140 of 11 May 1999 may be retracted up to 30 days after the entry into force of this law. Thereafter, withdrawal shall be deemed final and the withdrawing member shall be deemed to have fully agreed to the above conditions.'

5. At an extraordinary general meeting held on 12 February 2001, Sotacarbo gave effect to the withdrawal and passed a resolution cancelling Enirisorse's shares. However, it refused the request for redemption of the shares on the ground that that would affect the fulfilment of its public interest obligations under the law. By proceedings commenced on 8 June 2001 in the Tribunale di Cagliari, Enirisorse sought an order for the recovery of the value of its shares.

6. That was the state of the dispute when Law No 273 was enacted on 12 December 2002 (GURI No 293 of 14 December 2002, 'Law No 273/2002'). Article 33 of that law provides:

7. In the national court, Enirisorse raised doubts as to the compatibility of that law with various provisions of the EC Treaty. Taking the view that those doubts were well founded, the national court decided to stay the proceedings and to refer the following questions to the Court under Article 234 EC:

'(1) Does Article 33 of Law No [273/2002] constitute State aid to Sotacarbo SpA that is incompatible with Article 87 of the Treaty and also unlawful, not having been notified in accordance with Article 88(3) EC?

(2) Is Article 33 of Law No 273/2002 contrary to Articles 43 EC, 44 EC, 48 EC, 49 EC et seq. on freedom of establishment and the freedom to provide services?'

8. Under Article 87(1) EC, '[s]ave as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market'. Article 88(3) EC provides that '[t]he Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the common market having regard to Article 87, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision'.

II — The admissibility of the questions referred

A — *The reference as a whole*

9. The defendant in the main proceedings complains that by omitting the precise details of the factual and legal background to the dispute and by siding with the plaintiff's arguments, the national court has failed to provide a sufficiently clear and impartial account of the dispute. The defendant contends that the reference is therefore inadmissible.

10. It is true 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'. [2] But once it does provide the Court of Justice with sufficient material for it to give a useful answer, there is nothing wrong with the national court including in the order for reference its own view of the arguments submitted to it. Such a practice is perfectly in accordance with the system of judicial cooperation under Article 234 EC which calls for the active involvement of the national courts. [3]

11. In the present case, the order for reference sets out briefly yet precisely the

2 — See, in particular, Joined Cases C-320/90 to C-322/90 *Telemarsicabruzzo and Others* [1993] ECR I-393, paragraph 6.

3 — The Court's recently updated information note on references for preliminary rulings by national courts states that 'the referring court may, if it considers itself to be in a position to do so, briefly state its view on the answer to be given to the questions referred for a preliminary ruling' (OJ 2005 C 143, p. 1).

origin and nature of the dispute as well as the relevant national law. While a typographical error occurred in the numbering of the national legislation,[4] that on its own does not render the reference inadmissible.

12. The defendant's arguments as to the form of the order for reference must therefore be dismissed. There are other, more weighty ones, which concern the substance of the questions referred.

B — *The first question*

13. By its first question, the national court asks the Court to rule on whether a provision of national law is compatible with Articles 87 EC and 88 EC.

14. That question must be reformulated. It is settled law that in the context of proceedings brought under Article 234 EC, the Court does not have jurisdiction to interpret national law or to rule on the compatibility of a national measure with Community law.[5] Moreover, the issue of the compatibility of aid measures with the common market falls within the exclusive competence of the Commission, subject to review by the Court. Consequently, it is not open to a national court, in a preliminary reference, to ask the Court for a ruling on the compatibility of a State aid measure with the common market.[6]

15. However, where the national court entertains doubts as to whether the national measure at issue should be categorised as State aid, it may or must, as the case may be, request the Court for a preliminary ruling on the interpretation of Article 87 EC.[7] If a measure does constitute State aid, the national court must ascertain whether the ex ante scrutiny procedure of Article 88(3) EC has been complied with. If not, the national court must offer those concerned the certain prospect that all appropriate conclusions will be drawn from an infringement of that provision, in accordance with their national law, as regards the validity of measures giving effect to the aid, and the recovery of financial support granted in disregard of that provision.[8]

4 — The order for reference wrongly cites Law No 240/2002 instead of Law No 273/2002.

5 — See, in particular, Case C-188/91 *Deutsche Shell* [1993] ECR I-363, paragraph 27.

6 — See, in particular, order in Case C-297/01 *Sicilcassa and Others* [2003] ECR I-7849, paragraph 47.

7 — See, to this effect, Case C-39/94 *SFEI and Others* [1996] ECR I-3547, paragraphs 49 to 51.

8 — See, in particular, Case C-143/99 *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* [2001] ECR I-8365, paragraph 27, and Case C-174/02 *Streekgewest* [2005] ECR I-85, paragraph 17), and the Opinion of Advocate General Jacobs in Case C-368/04 *Transalpine Ölleitung in Österreich* (pending before the Court, paragraph 67 et seq.).

16. It follows from the foregoing that while the Court cannot answer the first question in the terms in which it is couched by the national court, it must instead construe it as asking whether an arrangement such as that provided for under Article 33 of Law No 273/2002, giving the members of a State-controlled company a right of withdrawal on condition of disclaiming any interest in the assets of that company, falls to be categorised as State aid for the purposes of Article 87 EC and should have been notified to the Commission in accordance with Article 88(3) EC.

C — *The second question*

17. By its second question, the national court asks the Court whether the legislation at issue is compatible with Articles 43 EC, 44 EC, 48 EC and 49 EC, which deal with freedom of establishment and freedom to provide services within the Community.

18. Apart from the fact, already noted, that the Court does not have jurisdiction to rule on the compatibility of a national measure with Community law, it is not clear from the order for reference how an interpretation of the provisions of Community law mentioned in this question would be relevant to the resolution of the dispute in the main proceedings.

19. The Court has held that it is essential that the national court should give at the very least some explanation of the reasons for the choice of the Community provisions which it requires to be interpreted and on the link it establishes between those provisions and the national legislation applicable to the dispute. [9]

20. That requirement has not been satisfied in the instant case. The national court has failed to provide any relevant explanation of the link it establishes, in its question, between Articles 43 EC, 44 EC, 48 EC and 49 EC and the national legislation at issue in the dispute. It merely expresses doubts as to the compatibility of that legislation 'with the principle of equal treatment in a market economy'.

21. In those circumstances, the second question referred by the national court must be ruled inadmissible. Accordingly, the rules laid down by Law No 273/2002 will be considered with regard to the Treaty rules on State aid only.

9 — Case C-72/03 *Carbonati Apuani* [2004] I-8027, paragraph 11.

III — Categorisation as State aid

22. In order for a national measure to be classified as State aid for the purposes of the Treaty, it must satisfy four cumulative conditions. [10] Before considering whether those conditions are met, however, we must establish whether the rules on State aid are in fact applicable to the case at hand.

A — *Whether the company in question constitutes an undertaking*

23. It is well settled that the Treaty rules on competition, of which the State aid rules form an integral part, are applicable only if the entity concerned is an undertaking. Whether that is the case here is a matter of dispute. The defendant in the main proceedings and the Italian Government, an intervener before the Court, submit that a company such as Sotacarbo, whose activities are in the public interest and prescribed by law, does not fall to be considered an undertaking if those activities are not-for-profit and financed entirely by the State.

24. That argument is unconvincing. The Court has previously held that non-profit-making institutions governed by public law do not, as a general rule, fall outside the meaning of undertaking for the purposes of Article 87 EC. [11] In any event, it was no longer in dispute between the parties represented at the hearing that Sotacarbo was in fact a for-profit organisation. Likewise, it is settled law that the legal form of the entity and the way in which it is financed are irrelevant for this purpose. [12] Furthermore, the fact that the entity in question has had certain responsibilities of a general interest nature conferred on it by statute cannot be regarded as conclusive [13] if those responsibilities do not embody the principle of solidarity as defined by the Court. [14]

25. The key feature of an undertaking, for the purposes of the competition rules, is that it carries on an 'economic activity'. By economic activity, the Court means 'any activity consisting in offering goods and services on a given market'. [15] In the instant case, it appears that Sotacarbo's objects include developing new technologies for the use of coal and providing specialist support services for authorities, public bodies and companies interested in the development of those technologies. Subject to further infor-

10 — See, in particular, Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747, paragraph 75.

11 — See, to this effect, Case 78/76 *Steinike & Weinlig* [1977] ECR 595, paragraphs 16 to 18, and Case C-244/94 *FFSA and Others* [1995] ECR I-4013, paragraph 21.

12 — Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraph 21.

13 — See, to this effect, Case C-475/99 *Ambulanz Glöckner* [2001] ECR I-8089, paragraph 21.

14 — See, on this point, my Opinion in Case C-205/03 P *FENIN* v *Commission* (pending before the Court).

15 — Joined Cases C-180/98 to C-184/98 *Pavlov and Others* [2000] ECR I-6451, paragraph 75.

mation and inquiries which are solely a matter for the referring court, it seems to me reasonable to assume that such activities, consisting of participating in the development of new industrial products and offering goods on a given market, are economic in nature.

26. Accordingly, the rules on State aid fall to apply to the present case and it must therefore be ascertained whether the various conditions for categorisation as State aid are fulfilled.

B — *Whether there is an economic advantage*

27. In order to determine whether the legislation at issue constitutes State aid, the first point to be considered is whether it gives an economic advantage to the beneficiary. There seems no doubt but that Law No 273/2002 generates an advantage for an undertaking. But in these proceedings there is disagreement as to the source and the beneficiary of that advantage. According to Enirisorse, the advantage derives from the measure relieving Sotacarbo of its obligation to redeem its members' shares in the event of withdrawal. The other parties to the dispute take the contrary view that the advantage lies in the exceptional right of withdrawal accorded to Enirisorse under the Italian legislation.

28. The difficulty, in my view, stems from the ambiguity of the national legal situation.

29. According to settled case-law, in the assessment of whether an advantage constitutes State aid the circumstances of the individual case are all-important. [16] In the instant case, uncertainty remains as to whether or not the withdrawal at issue is covered by the general law on withdrawal from commercial companies set out in Article 2437 of the Civil Code. On this point the parties differ, the order for reference is inconclusive and the hearing failed to provide clarification. But its resolution will to a large extent determine the answer the Court must give to the question referred by the national court. In order to ensure that the preliminary ruling will be of use either way, I therefore believe it necessary to consider two alternative scenarios.

30. If it is established that Enirisorse's withdrawal was in exercise of an exceptional right

16 — Case C-200/97 *Ecotrade* [1998] ECR I-7907, paragraph 37.

of withdrawal not provided for under the general law, then in my opinion the disputed provision of Law No 273/2002 should be held not to be in the nature of a State aid.

31. It is true that according to settled case-law 'the concept of aid ... embraces not only positive benefits, 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'.[17] From that perspective, a measure which relieved a company of the obligation to redeem the shares held by its members in consideration of funds invested in the company would appear to confer an economic advantage on its beneficiary, in so far as no such dispensation would apply under the general law on withdrawal from companies.

32. But such an analysis is inadequate. It is based on a partial view of the factors involved. It compares only the situation resulting from the application of Law No 273/2002 (loss of right to redemption of shares in the event of exercise of right of withdrawal) and that resulting from the application of Article 2437 of the Civil Code (right to have shares redeemed upon withdrawal). But it seems that Law No 273/2002 cannot be divorced from Law No 140/1999. The two enactments form a single body of law. It is that body of law which falls to be considered for the purposes of this categorisation exercise. Law No 140/1999 grants an *exceptional* right of withdrawal to Sotacarbo's members. According to that scenario, those members would have no right of withdrawal under the general law. As a consequence, Sotacarbo would normally have no reason to fear any loss of assets. In those circumstances, it could not be argued that a law such as Law No 273/2002, which restricts members' rights of redemption where they exercise an exceptional right of withdrawal, relieves the company of a burden which it would normally have to bear. That law simply ensures that the asset position of Sotacarbo is not affected by the advantage thereby accorded to some of its shareholders. All it does, in effect, is to cancel out the advantage Enirisorse was given in the form of an exceptional right of withdrawal. In no way, therefore, does it give rise to an economic advantage for Sotacarbo for the purposes of the Treaty rules.

33. The conclusion would be very different, however, were it the case that Enirisorse would have been entitled to withdraw under the general law. Under that second scenario, Law No 140/1999 has to be construed as confirming the right of withdrawal of certain members under the general law. The only effect of Law No 273/2002 would then be to exempt Sotacarbo from its obligation of

17 — See, for example, Case C-172/03 *Heiser* [2005] ECR I-1627, paragraph 36.

redemption under the general law. Such a dispensation clearly confers an economic advantage on the beneficiary company. To the extent that that advantage is not a quid pro quo for an exceptional right of withdrawal, it now has to be considered whether the other conditions for categorisation as aid are satisfied.

34. It must be said that, on the basis of the documents in the file, the first scenario appears more likely. The Civil Code sets out an exhaustive list of cases where a right of withdrawal applies [18] and it does not seem that Enirisorse's withdrawal comes within any of them. What Enirisorse appears to be seeking in the proceedings before the national court is the application of the withdrawal arrangements of Article 2437 of the Civil Code, in other words the redemption of its shares, in circumstances outside the scope of the right of withdrawal contemplated by that article. If that interpretation were to be confirmed by the referring court, the conclusion would have to be that the measure in question confers no advantage on the party concerned and cannot therefore be classified as State aid.

35. It is not competent to the Court, however, to rule on the interpretation of national law and its application to the case at hand. That lies within the sole jurisdiction of the national court. If that court comes to the conclusion that the withdrawal was indeed effected in accordance with Article 2437 of the Civil Code, then it must find that Law No 273/2002 confers an advantage on Sotacarbo and it will then have to ascertain whether the other conditions for treatment as State aid are met.

C — The other conditions for treatment as aid

36. Assuming the advantage condition is satisfied, the Italian Government takes the view that the third and fourth conditions are in any case not met. Should the Court see fit to consider this point, I would note that, in principle, an advantage, such as that granted by the legislation at issue, intended to release an undertaking from costs which it would normally have had to bear in its day-to-day management or normal activities, distorts the conditions of competition. [19] Since it has not been shown that the activities of the beneficiary company have no equivalent anywhere in the single market, it can be presumed that competition is distorted. On the same basis, there can be no doubt but that such a measure has an effect on trade between Member States.

18 — See Campobasso, G.F., *Diritto commerciale*, Vol. 2, Turin, Fifth edition, 2002, p. 485. The law in this area has since been amended to add to the list of legitimate grounds for withdrawal but without changing the exhaustive nature of the list (see, on this point, the special issue of *Rivista delle società*, March-June 2005).

19 — See, to this effect, Case C-156/98 *Germany* v *Commission* [2000] ECR I-6857, paragraph 30.

37. So if an advantage is found to have been conferred, it is primarily the first condition for categorisation as State aid that will require consideration. It may be recalled that, according to the Court, 'for advantages to be capable of being categorised as aid within the meaning of Article 87(1) EC, they must, first, be granted directly or indirectly through State resources and, second, be imputable to the State'. [20]

38. The imputability condition is clearly satisfied in this case. The advantage in question is the result of legislative intervention. The fact that the measure confers only a hypothetical advantage, which is conditional on the exercise of an *option* of withdrawal, is neither here nor there. Whether the option is exercised or not, the effect is that the rights of the members as obligees are cut down and the company's obligations to its members alleviated accordingly. The company thereby finds itself with a non-redeemable share capital, shorn of any trace of a liability and which it no longer has to fear losing in the event of a withdrawal. It follows that the legislative intervention, regardless of what the members concerned might decide to do, is the direct source of an advantage for Sotacarbo.

39. It remains, in that case, to determine whether that advantage can be regarded as flowing from a transfer of State resources.

40. The Italian Government submits that the rules in question do not place any 'additional burden' on the State budget. They were designed merely to alter the parameters of the relationship between a State company and its private shareholders in the former's favour. The advantage conferred on the company concerned was therefore financed from private funds. Moreover, since Sotacarbo's capital had been provided entirely out of State funds, dispensing the company from the obligation of redemption was not the source of a fresh burden for the State. The advantage was not paid for by a financial contribution from the State separate from that made upon the formation of the company.

41. It is true that if one applies the approach adopted by the Court in *Sloman Neptun* then the conclusion must be that the advantage in question is 'inherent' in the system enacted. [21] That would mean that the first condition for State aid was not fulfilled.

20 — Case C-482/99 *France* v *Commission* [2002] ECR I-4397, paragraph 24.

21 — Joined Cases C-72/91 and C-73/91 [1993] ECR I-887, paragraph 21.

42. In my view, however, that approach is not satisfactory.

43. Granted, not every national measure which has the effect of giving an economic advantage to undertakings and which affects the competitive environment in the single market can be treated as State aid. It is well settled that the prohibition in Article 87(1) EC does not apply to advantages which flow from mere differences in legislation between Member States. It follows that the circumstances in which the granting of an advantage can properly be subject to the Community State aid rules need to be carefully circumscribed.

44. In its case-law, the Court seems to wish to draw a distinction between distortions resulting from the adoption of measures to regulate economic activities and those caused by a transfer of public resources to certain undertakings. [22] Only the latter are such as to affect the competitive environment. The former must be accepted in as much as their only purpose is to establish the parameters within which business is carried on and goods and services produced.

45. The reason for the distinction is clear to see. The Court is seeking to guard against the scope of the Community rules being broadened to cover distortions of competition that are simply the result of differences in legislative policy between Member States. That caution stems from a concern not to encroach on powers reserved to the Member States. There is a danger that over extension of the State aid rules might result in all economic policy decisions of Member States being brought under the scrutiny of the Community authorities, without any distinction being made between direct interventions in the market and general measures to regulate economic activities. It would also result in a substantial increase in the workload of the Community's supervisory authorities, the Commission and the Court.

46. Clearly, the Community's State aid rules are not intended to be used to vet all legislative decisions of Member States for their impact on competition in the internal market. Their purpose is to identify only those distortions of competition brought about by a Member State seeking to give a particular advantage to certain undertakings by measures that depart from its overall policy approach.

22 — See, to this effect, *Sloman Neptun*, paragraph 21; *Ecotrade*, paragraph 36; and Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 62.

47. The restrictions set by the Court are therefore entirely legitimate. It seems to me, however, that using the transfer of State resources test, as the Court usually does, those restrictions cannot be properly applied and made sense of. The better option would be the selectivity test, also developed by the Court in its case-law. This preference is based on three fundamental reasons.

48. Firstly, the resource transfer test is not always relevant. It can happen that a regulatory measure will entail an indirect charge on the State budget that may be greater than that arising from a measure involving a transfer of public resources. [23]

49. Secondly, the selectivity criterion provides a better rationale for the restrictions set by the Court. It is obvious that economic and fiscal policy differences between Member States are liable to confer relative economic advantages on certain undertakings in the single market. An undertaking whose profits are taxed at a rate of 20% enjoys an economic advantage over counterparts based in another Member State where the rate is 30%. But that situation does not warrant the application of the State aid rules. Such competitive advantages are simply the result of legal and economic disparities that are the consequence of Member States legitimately exercising their legislative autonomy. By contrast, it would indeed be a case of State aid if the same undertaking had its tax rate reduced by 5% while its competitors from other Member States were subject to the same tax rate of 20%, even though the relative advantage enjoyed by the undertaking in question would be less than in the first situation. The reason being that in the latter case a Member State has given preferential treatment to an undertaking or a class of undertakings and in so doing has departed from its general legislative policy. Only distortions resulting from preferential treatment of that kind are the proper subject of sanction.

50. Lastly, with the growing interpenetration of the public and private sectors of the economy, a danger exists that Member States may be tempted to use their regulatory

23 — That would be the case, for example, of legislation making it easier to dismiss employees in a particular sector or of a measure authorising an undertaking to build in a zone requiring major infrastructure to be put in place. In that regard, it will be recalled that for the purposes of categorisation as State aid the Court makes no distinction according to whether the advantages are granted directly or indirectly through State resources (see, in particular, *PreussenElektra*, paragraph 58).

powers to encourage or compel private sector enterprises to alleviate the costs of certain undertakings. Should such measures be regarded as not constituting State aid just because they do not involve any direct transfer of public funds? If that were so, a significant portion of State measures having all the *effects* of State aid would escape the scrutiny of the Community authorities. Such an outcome would be manifestly at variance with the objectives pursued by the Treaty and the principles laid down by the Court in its case-law. That is why I propose a return to the selectivity test.

51. As Advocate General Darmon had suggested to the Court in *Sloman Neptun*, only the selectivity criterion is capable of distinguishing general measures to regulate economic activities, which fall outside the scope of the Treaty rules on State aid, and measures of economic and financial intervention, which are properly the subject of scrutiny. [24] Moreover, the Court has held that 'aid need not necessarily be financed from State resources to be classified as State aid'. [25]

52. What is meant by selectivity has still to be carefully defined. The case-law holds that not every measure granting a particular advantage to a class of undertakings is necessarily a 'selective' measure. A distinction has to be made. Any measure which gives *special* treatment to certain situations, resulting in an economic advantage being conferred on economic agents in those situations, must be judged in the context of the general system of which it is part. If the Member State concerned can show that the measure is justified by the nature or general scheme of the statutory system of which it is part, then it cannot be considered a selective measure for Treaty purposes provided that the system in question has a legitimate purpose. [26] It is only where the special treatment cannot be justified on the basis of a general system or where it does not result from a consistent application of the system to which it belongs that the measure can be said to be *selective*. In those circumstances, it is reasonable to assume that the measure has no other justification than to afford preferential treatment to a certain class of economic agents. It is therefore not the measure's legally exceptional character alone that makes it State aid. [27] In this matter, it is necessary to look to the

24 — Point 47 of his Opinion in *Sloman Neptun*. Indeed, this criterion is already used by the Court. In *Ecotrade*, it seems that the decisive factor was that the legislation in question was liable to place the undertakings to which it applies in a more favourable situation than others (paragraphs 41 and 42). See also, to the same effect, the much earlier judgment in Case 173/73 *Italy* v *Commission* [1974] ECR 709, paragraph 33.

25 — Case 290/83 *Commission* v *France* [1985] ECR 439, paragraph 14.

26 — *Italy* v *Commission*, paragraph 33; *Ecotrade*, paragraph 36; and *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementerke*, paragraph 42.

27 — See, in relation to this view, the Opinion of Advocate General Darmon in *Sloman Neptun*, point 53, and that of Advocate General Mischo in *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementerke*, point 43.

substance and not to the form. A measure is selective if it serves to place certain undertakings in a more favourable economic position than undertakings in a comparable situation, without the resulting costs to the wider community being clearly justified by a system of fairly shared charges. [28]

53. If this approach is followed, then it is clear that a measure dispensing Sotacarbo from the obligation to redeem the shares of members exercising their right of withdrawal, when such redemption is a normal requirement under the relevant articles of the Civil Code, constitutes an unwarranted selective advantage for that company. Such a measure meets all the conditions of State aid. I repeat, however, that this conclusion applies only if it is first established that withdrawal could have taken place under the general law.

IV — Summary

54. According to the above analysis, two alternative scenarios must be considered in order to give a useful answer to the referring court.

55. If it is found that the withdrawal at issue in these proceedings was in exercise of an exceptional right of withdrawal outside the scope of the withdrawal provisions of the Civil Code, then it must be held that a regime such as that created by Law No 273/2002, giving the members of a State-controlled company a right of withdrawal on condition of disclaiming any interest in the assets of that company, does not constitute State aid to that company.

56. If, on the other hand, the withdrawal was not effected pursuant to an exceptional right but would in any event have been allowed under the general law, then it must be held that such a regime constitutes State aid for the purposes of the Treaty and ought therefore to have been notified in advance to the Commission.

57. It is a matter for the national court to ascertain whether, in the instant case, the withdrawal was effected in accordance with the requirements laid down by the general law on withdrawal from commercial companies.

28 — Such measures are characterised by the fact that they concentrate the benefits in a group of economic agents while the costs are spread over the whole of society and become, by virtue of that fact, difficult to identify for the other economic agents. It is measures of this kind that are most likely to be adopted for the benefit of certain vested interests rather than being motivated by the wider public interest.

V — Conclusion

58. I am therefore of the opinion that the Court should respond to the reference made by the Tribunale di Cagliari in the following terms:

On a proper interpretation of Article 87(1) EC and Article 88(3) EC, a regime such as that created by Law No 273/2002 of 12 December 2002, giving the members of a State-controlled company a right of withdrawal on condition of disclaiming any interest in the assets of that company, does not constitute State aid for the purposes of those provisions and did not require to be notified in advance to the Commission of the European Communities, unless it is found that such withdrawal could have been effected under the general law on withdrawal. In the latter case, such a regime must be considered to constitute State aid which should have been notified in advance to the Commission.