Reports of Cases

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 5 April 2017 [1]

Case C-245/16

Nerea S.p.A.
v
Regione Marche

(Request for a preliminary ruling from the Tribunale Amministrativo Regionale per le Marche (Regional Administrative Court, Le Marche, Italy))

(Preliminary ruling — State aid — Regulation (EC) No 800/2008 — Application for an arrangement with creditors by a company in receipt of European Union funds — Definition of undertaking in difficulty — Definition of procedure for an arrangement with creditors — Conditions for refusal or withdrawal of aid from European Union funds — Obligation to refund aid)

1. This request for a preliminary ruling provides the Court with the opportunity of giving an interpretation of the terms 'undertaking in difficulty' [2] and 'collective insolvency proceedings', which are used in Article 1(6)(c) and (7)(c) of Regulation (EC) No 800/2008. [3]

2. The referring court's uncertainties arose in proceedings brought by an undertaking (Nerea S.p.A; 'Nerea') objecting to the withdrawal of public assistance granted to it by the Italian regional administrative authorities from a European Regional Development Fund (ERDF) programme.

3. When it was allocated the incentive (March 2012), Nerea fulfilled the conditions stipulated by the contract notice, including the condition of not being an undertaking in difficulty, but the body administering the assistance took the view that Nerea did not fulfil those conditions because, in December 2013, it applied to open a 'concordato preventivo' ('arrangement with creditors'), which that body classified as collective insolvency proceedings within the meaning of Regulation No 800/2008; this led the administering body to revoke the original decision and reclaim the amount concerned from the recipient.

4. The parties to the proceedings disagree with regard to the nature of the insolvency procedure applied for by Nerea, and also with regard to the classification of Nerea as an 'undertaking in difficulty'. The disagreement has been extended also to the time at which the assessment of whether an undertaking is in difficulty (either at the outset or subsequently) must be made.

1 — Original language: Spanish.

2 — [The Advocate General in the Spanish text uses the expression] 'empresa en crisis', which corresponds to the Spanish version of Regulation No 800/2008, but remarks that the expression 'empresa en dificultades' would be closer to that used in other language versions, for example, in the Italian (*imprese in difficoltà*), the French (*entreprises en difficulté*), the English (*undertakings in difficulty*), the Portuguese (*empresas em dificuldade*), the German (*Unternehmen in Schwierigkeiten*) or the Dutch (*ondernemingen in moeilijkheden*).

3 — Commission Regulation of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (OJ 2008 L 214, p. 3).

I. **Legislative framework**

A. **European Union law**

1. ***Regulation No 800/2008***

5. Recital 15 reads:

‘Aid granted to undertakings in difficulty within the meaning of the Community guidelines on State aid for rescuing and restructuring firms in difficulty … should be assessed under those Guidelines in order to avoid their circumvention. Aid to such undertakings should therefore be excluded from the scope of this Regulation. In order to reduce the administrative burden for Member States, when granting aid covered by this Regulation to [small and medium-sized enterprises] SMEs, the definition of what is to be considered an undertaking in difficulty should be simplified as compared to the definition used in those Guidelines. Moreover, SMEs which have been incorporated for less than three years should not be considered, for the purposes of this Regulation, to be in difficulty with regard to that period, unless they fulfil the criteria under the relevant national law for being the subject of collective insolvency proceedings. That simplification should be without prejudice to the qualification of those SMEs under those Guidelines with regard to aid not covered by this Regulation and without prejudice to the qualification as undertakings in difficulty of large enterprises, under this Regulation, which remain subject to the full definition provided in those Guidelines.’

6. Article 1 provides

‘…

6. This Regulation shall not apply to the following aid:

…

(c) aid to undertakings in difficulty.

7. For the purposes of point (c) of paragraph 6, an SME shall be considered to be an undertaking in difficulty if it fulfils the following conditions:

(a) in the case of a limited liability company, where more than half of its registered capital has disappeared and more than one quarter of that capital has been lost over the preceding 12 months; or

(b) in the case of a company where at least some members have unlimited liability for the debt of the company, where more than half of its capital as shown in the company accounts has disappeared and more than one quarter of that capital has been lost over the preceding 12 months; or

(c) whatever the type of company concerned, where it fulfils the criteria under its domestic law for being the subject of collective insolvency proceedings.

An SME which has been incorporated for less than three years shall not be considered, for the purposes of this Regulation, to be in difficulty with regard to that period unless it meets the condition set out in point (c) of the first subparagraph.’

2. ***Community Guidelines on State aid for rescuing and restructuring firms in difficulty*** [4]

7. According to point 9:

‘There is no Community definition of what constitutes “a firm in difficulty”. However, for the purposes of these Guidelines, the Commission regards a firm as being in difficulty where it is unable, whether through its own resources or with the funds it is able to obtain from its owner/shareholders or creditors, to stem losses which, without outside intervention by the public authorities, will almost certainly condemn it to going out of business in the short or medium term.’

8. Point 10 is worded as follows:

‘In particular, a firm is, in principle and irrespective of its size, regarded as being in difficulty for the purposes of these guidelines in the following circumstances:

(a) in the case of a limited liability company, where more than half of its registered capital has disappeared and more than one quarter of that capital has been lost over the preceding 12 months;

(b) in the case of a company where at least some members have unlimited liability for the debt of the company, where more than half of its capital as shown in the company accounts has disappeared and more than one quarter of that capital has been lost over the preceding 12 months;

(c) whatever the type of company concerned, where it fulfils the criteria under its domestic law for being the subject of collective insolvency proceedings.’

9. Point 11 reads:

‘Even when none of the circumstances set out in point 10 are present, a firm may still be considered to be in difficulties, in particular where the usual signs of a firm being in difficulty are present, such as increasing losses, diminishing turnover, growing stock inventories, excess capacity, declining cash flow, mounting debt, rising interest charges and falling or nil net asset value. In acute cases the firm may already have become insolvent or may be the subject of collective insolvency proceedings brought under domestic law. In the latter case, these Guidelines apply to any aid granted in the context of such proceedings which leads to the firm’s continuing in business. In any event, a firm in difficulty is eligible only where, demonstrably, it cannot recover through its own resources or with the funds it obtains from its owners/shareholders or from market sources.’

4 — OJ 2004 C 244, p. 2, ‘the 2004 Guidelines’. The version now in force is contained, under the title ‘Guidelines on State aid for rescuing and restructuring firms in difficulty’, in Communication from the Commission 2014/C 249/01, OJ 2014 C 249, p. 1.

B. **National law**

10. Article 186 bis of Regio Decreto No 267,[5] in the version applicable *ratione temporis* to the facts at issue in the proceedings, governs the so-called 'concordato preventivo' ('arrangement with creditors' or 'arrangement with creditors as a going concern') as follows:

'When the insolvency plan referred to in Article 161(2)(e) provides for the activity of the undertaking to be continued by the debtor, for the transfer of the continuing business, or for the continuing business to be assigned into one or more companies, including newly formed companies, the provisions of this article shall apply. The plan may also provide for the sale of assets that are not instrumental to the operation of the undertaking.

In the cases for which the present article provides:

(a) The plan referred to in Article 161(2)(e) must also contain an analysis of the anticipated costs and proceeds of the business activity set out in the insolvency plan, of the financial resources required and of the means of covering them.

(b) The expert report referred to in Article 161(3) must confirm that continuance of the business activity as provided for in the insolvency plan will contribute to meeting the needs of the creditors.

(c) Subject to the provisions of Article 160(2), the plan may provide for a moratorium of up to one year from the date of its approval for the payment of preferential creditors and creditors holding pledges or mortgages, unless there is provision for the sale of assets or rights to which preferential rights attach. In that circumstance, the creditors with preferential rights referred to in the previous sentence shall not have the right to vote.

Subject to the provisions of Article 169 bis, contracts in the course of performance at the date when the application was submitted, including contracts entered into with public authorities, shall not be terminated as a result of the opening of the procedure. Any agreements to the contrary shall be without effect. Admission to an arrangement with creditors shall not prevent the continuation of public contracts if the expert appointed by the debtor pursuant to Article 67 has confirmed compliance with the plan and a reasonable capacity to fulfil the contract. If the legal requirements are met, the transferee company or company assigned the business or areas of the business to which the contracts are transferred may also benefit from that continuation. When transfer or assignment takes place, the court-appointed receiver shall arrange for the entries to be removed.

After the application has been submitted, participation in procedures for the award of public contracts must be authorised by the court, after hearing the opinion of the judicial auditor, if appointed; if no judicial auditor has been appointed, the court shall decide.

Admission to an arrangement with creditors shall not prevent participation in procedures for the award of public contracts provided that the undertaking submits in the tender:

(a) a report by an expert fulfilling the conditions set out in Article 67(3)(d) confirming compliance with the plan and reasonable capacity to fulfil the contract; and;

(b) a declaration by another operator fulfilling the general conditions and those relating to financial, technical and economic standing, and to certification as well, required for the award of the contract, who has undertaken, in relation to the tenderer and the contracting authority, to make

5 — Royal Decree of 16 March 1942 (GURI No 81 of 6 April 1942), 'Law on insolvency', as amended by Decree-Law No 83 of 22 June 2012, converted into Law No 134 of 7 August 2012.

available, for the duration of the contract, the resources necessary to perform the contract, and to take over from the assisted undertaking if the latter becomes insolvent during the tender or after the contract has been entered into, or is for any other reason no longer in a position properly to perform the contract. Article 49 of Legislative Decree No 163 of 12 April 2006 shall apply.

Subject to the provisions of the previous paragraph, the undertaking that has entered into an arrangement with creditors may also tender as part of an ad hoc tendering consortium, provided it is not acting as principal and that the other undertakings forming the consortium are not subject to collective proceedings. In that circumstance, the declaration referred to in the fourth subparagraph under (b) may also be made by an operator belonging to the consortium.

If, in the course of a procedure opened in accordance with the present article, the business activity of the undertaking ceases or proves to be manifestly prejudicial to the creditors, the court shall take a decision within the meaning of Article 173. It shall remain open to the debtor to amend the application for an arrangement.'

II. **Facts**

11. On 9 November 2010, the Government of the Regione Marche [6] approved a contract notice for the grant of subsidies for certain activities of small and medium-sized undertakings from an ERDF regional operational programme for the period 2007-2013. [7]

12. Annex I to the contract notice included, inter alia, the clauses applicable to 'recipients' (No 1), 'grounds for non-admissibility' to the procedure (No 10(3) and No 19), 'obligations relating to the stability of the project' (No 17(3)), and 'grounds for withdrawal' of the assistance granted' (No 20).

13. As regards the recipients, clause 1 set out the necessary conditions for undertakings seeking to obtain the incentives, the most important of which, for the purposes of the proceedings, is the requirement that 'at the time of submission of the application, [undertakings] should not be in a situation of difficulty within the meaning of Article 1(7) of Regulation No 800/2008'. [8]

14. In accordance with clause 17(3), 'recipients of the assistance are required to comply with the project stability constraint, by guaranteeing, for the five years following the date on which the co-financed project is completed, that there will be no substantial changes in relation to the project that affect its nature or methods of implementation or create undue advantages for an undertaking or public body and lead to a change in the nature of the ownership of infrastructure or the cessation of an activity'.

15. On 13 April 2011, Nerea lodged an application for assistance which was accepted and therefore, on 20 March 2012, it was granted assistance in the amount of EUR 144052.58.

16. After having received 50% of the assistance (EUR 72026.29) by way of an advance, Nerea made the investments to which it had committed itself [9] and submitted a declaration of expenditure on 18 November 2013, while at the same time requesting settlement of the outstanding balance.

6 — Specifically, the administrative authority signing the decree governing the assistance, numbered 267/IRE_11, was the 'Director for innovation, research, economic development and competitiveness of productive sectors'.

7 — Regional Operational Programme (ROP) of ERDF Marche 2007-2013, approved by the European Commission by Decision No 3986 of 17 August 2007.

8 — A footnote added that 'undertaking in difficulty means [an SME] which fulfils the following conditions …' and then transcribed the conditions included in Regulation No 800/2008.

9 — As stated by the referring court at point 1.2 of the order for reference.

17. Just over one month later, on 24 December 2013, Nerea lodged an application for an arrangement with creditors with the Tribunale di Macerata (District Court, Macerata), which commenced the relevant procedure on 15 October 2014.

18. On 11 February 2015, the body administering the assistance [10] notified Nerea of the opening of the procedure for withdrawal of the incentive because 'the admissibility conditions were no longer satisfied … as a result of the admission of the undertaking to a procedure for an arrangement with creditors, pursuant to article 1 in conjunction with article 20 of the contract notice'.

19. Nerea sought annulment of the withdrawal procedure, a claim that was rejected on 20 March 2015 by the administering body on the grounds that the fact that Nerea was the subject of a procedure for an arrangement with creditors precluded receipt of the assistance, in accordance with Article 1(7)(c) of Regulation No 800/2008 and clause 1 of the contract notice.

20. By decision of 11 May 2015, the competent body of the Regione Marche withdrew the assistance granted and reclaimed the amount already paid, increased by EUR 4997.30 in respect of interest.

21. An administrative appeal having been lodged with the Tribunale Amministrativo Regionale per le Marche (Regional Administrative Court, Le Marche, Italy), the latter has sought a preliminary ruling from the Court of Justice.

III. **The questions referred for a preliminary ruling**

22. The questions referred for a preliminary ruling, which were lodged with the Court of Justice on 28 April 2016, are worded as follows:

'(1) First of all, does Article 1(7)(c) of Regulation No 800/2008 concern only those procedures that may be opened by administrative or judicial authorities of the Member States of their own motion (in Italy, for example, insolvency procedures) or does it also concern procedures that may be opened only at the request of the economic operator concerned (as is the case in the national law for an arrangement with creditors)? The question arises because the provision refers to "being the subject of" collective insolvency proceedings.

(2) If were to be concluded that Regulation No 800/2008 concerns all collective proceedings, then, with specific reference to the instrument of an arrangement with creditors as a going concern under Article 186a of Royal Decree No 267/1942, must Article 1(7)(c) of Regulation No 800/2008 be interpreted as meaning that the mere fact that the requirements for opening collective proceedings exist in relation to an operator who applies for assistance from the structural funds prevents such financing being granted, or requires the administering national authority to withdraw the financing already granted or, on the contrary, that the situation of difficulty must be appraised in the specific case, bearing in mind, for instance, the timing of the procedure, the economic operator's honouring of the undertakings given and any other relevant factor?'

23. According to the referring court, Nerea is, in principle, in a situation incompatible with the grant of the assistance at issue because the contract notice stipulated the obligation to comply for five years with the assisted project stability constraint, on the one hand, and on the other 'it is hard to deny the existence of "difficulty" within the meaning of Article 1(6) and (7)(c) of Regulation No 800/2008 when the application for admission to an arrangement with creditors is made just days after the final declaration in respect of the assistance [for] [c]learly, a situation in which an undertaking is "in difficulty" in terms of fulfilling its commitments does not arise out of the blue'. [11]

10 — According to the order for reference, called the 'Organismo intermedio Medio Credito centrale (MMC)'.

11 — Paragraph 9, third indent, of the order for reference.

24. However, the referring court considers that attention should be drawn to the fact that 'there may be an internal contradiction within a system which, on the one hand, allows undertakings that are in difficulty but retain objective margins of productivity to restructure, thereby benefiting from undoubted competitive advantages (offset, however, by being subject to external judicial supervision), and, on the other, permits those undertakings to be deprived — even after the event — of financial resources from the public purse which, until proven to the contrary, must be regarded as being used specifically for the purpose of reorganisation and recovery'. [12]

IV. **Proceedings before the Court of Justice and the positions of the parties**

25. Written observations were lodged by the Regione Marche, the Italian and Polish Governments, and the Commission.

26. The Regione Marche submits that the aid had to be withdrawn and the amount paid to Nerea recovered, in accordance with Articles 1 and 17(3) of the contract notice, pursuant to which, for the five years following the date of completion of the co-financed project, recipients were required to comply with the project stability constraint. Since the commencement of the procedure for an arrangement with creditors established that Nerea was in difficulty when it applied for settlement of the balance of the aid, it was in breach of the condition relating to financial soundness stipulated in the contract notice.

27. The Regione Marche further submits that it is irrelevant in the instant case that the application for an arrangement with creditors was ruled admissible, because the ERDF programme was approved before the entry into force of the national legislation governing this new procedure for an arrangement with creditors. Failing any specific derogating provisions at either national or Community level, the particular features of that instrument may not be taken into account.

28. With regard to the first question, the Italian Government contends that the referring court incorrectly begins with the assumption that an undertaking is not the subject of collective insolvency proceedings where those proceedings are commenced at its request. In the Italian Government's submission, it is necessary first of all to determine whether the arrangement with creditors satisfies the definition of collective insolvency proceedings and then, if the answer is negative, to examine whether the conditions for opening collective insolvency proceedings are met, regardless of whether or not an application has been made for an arrangement with creditors.

29. The Italian Government submits that, because an arrangement with creditors implies a situation of difficulty which does not necessarily have to lead to the insolvency of the undertaking concerned, it does not follow that that type of arrangement constitutes collective insolvency proceedings. However, there is nothing to preclude an undertaking which is the subject of an arrangement of that kind from also fulfilling the prerequisites for being the subject of insolvency proceedings.

30. In relation to the second question, the Italian Government states, on the basis of its considerations in relation to the first question, that the mere fact of meeting the conditions for the opening of a procedure for an arrangement with creditors is not to preclude access to structural funds or require the withdrawal of funds already granted. Such action could only with difficulty be reconciled with the purpose of an arrangement with creditors, which is simply to create a favourable environment for the continued existence of the undertaking. The refusal or, as the case may be, withdrawal of aid is only possible, therefore, once it has been established specifically that an undertaking is in difficulty within the meaning of Article 1(7)(c) of Regulation No 800/2008.

12 — Paragraph 15 of the order for reference.

31. In relation to the first question, the Polish Government maintains that, in accordance with the 2004 Guidelines, the term 'collective insolvency proceedings', within the meaning of Article 1(7) of Regulation No 800/2008, must be construed as referring to judicial and administrative procedures without which an undertaking is incapable, using its own resources or those of its shareholders and creditors, of dealing with losses which will condemn it to going out of business in the short or medium term. It is irrelevant whether those procedures have been begun by the authorities of their own motion or at the request of the undertaking concerned, for Regulation No 800/2008 lays down no restrictions in that regard.

32. As regards the second question, the Polish Government argues that the conditions stipulated for eligibility for aid under Regulation No 800/2008 must be satisfied at the time when the aid is granted, without any subsequent change of circumstances creating an obligation to refund that aid.

33. The Commission submits that, in relation to the first question, Article 1(6)(c) and (7)(c) of Regulation No 800/2008 encompasses all collective insolvency proceedings, including an arrangement with creditors under Italian law. It is for the national authorities to establish whether the conditions laid down in national law (to which EU law refers) for conducting such procedures are satisfied, it being irrelevant whether a procedure is initiated by the authorities of their own motion or at the request of the undertaking concerned. The fact that Nerea applied to open the procedure for an arrangement with creditors means that it was an undertaking in difficulty, in accordance with Regulation No 800/2008.

34. In relation to the second question, the Commission submits that Regulation No 800/2008 excludes undertakings which are in difficulty at the time aid is granted but does not require the repayment of that aid, after it has been granted, by undertakings which were not in difficulty at that time. Nerea was not in difficulty when it was granted the incentive and therefore EU law does not require the national authorities to withdraw it. This is all without prejudice to the fact that Member States are free to grant or refuse, in accordance with their national law, aid compatible with the common market and, where appropriate, recover it.

V. **Analysis**

A. **Introductory remarks**

35. In order to provide the referring court with a helpful answer, I think it desirable to distinguish two aspects of the dispute. The first concerns the interpretation of EU law (to be specific, Regulation No 800/2008) in relation to the case in the main proceedings. The second, however, is confined to the interpretation of national provisions (in particular, certain clauses of the contract notice) which do not necessarily require the application of that regulation.

36. As concerns the first aspect, analysis of Article 1(7)(c) of Regulation No 800/2008 might have been appropriate if Nerea had been the subject of insolvency proceedings (and therefore could be classified as an undertaking in difficulty) when it applied for and received the assistance co-financed with ERDF funds. However, as all the parties accept and the referring court points out, at those times (2011, in the case of the application, and 2012, in the case of the grant of assistance), Nerea was not in difficulty or the subject of an insolvency procedure, which was not begun until late 2013.

37. Clause 1 of the contract notice, which referred expressly to Article 1 of Regulation No 800/2008 in order to incorporate the definition of an undertaking in difficulty excluded from the incentive scheme, provided that assistance was not to be granted to undertakings which, *on the date of submission of their application*, were in difficulty within the meaning of Article 1 of the regulation. Nerea, I stress, satisfied that (negative) condition and was therefore, on that basis, eligible for the assistance. Article 1 of Regulation No 800/2008 did not preclude the grant of aid and nor, symmetrically, did it require its withdrawal.

38. It is a different matter that another clause of the contract notice (clause 17(3)) imposed a 'project stability' constraint which, as such, was no longer connected to the initial situation of difficulty but rather to circumstances during the course of the five years following the completion of the co-financed project. Neither that clause nor the stability constraint it includes is directly related to EU law (more correctly, Regulation No 800/2008). Whether or not EU law provides interpretative criteria for its application, as the referring court appears to suggest, is something on which I will state my view later.

B. **Whether the two questions referred for a preliminary ruling should be reformulated**

39. As it is worded, the first question submitted by the referring court (in relation to which the referring court uses the expression 'first of all') is confined to establishing only whether the collective insolvency proceedings referred to in Article 1(7)(c) of Regulation No 800/2008 encompass those initiated at the request of the economic operator and those initiated by the administrative or judicial authorities of their own motion.

40. The answer to that question does not raise too many difficulties of interpretation: put simply, Article 1(7)(c) of the regulation does not differentiate between insolvency proceedings according to whether they are begun by the administrative or judicial authorities of their own motion or at the request of a party, and therefore it applies to both types of proceedings. That is a view I share with the governments that have participated in the preliminary ruling proceedings and the Commission.

41. In particular, the 'arrangement with creditors as a going concern', which was introduced by Italian law in 2012 (and which can be requested by undertakings with problems of liquidity as an alternative to their cessation) is a model of arrangement with creditors which is, in my view, covered by the concept of collective insolvency proceedings in Regulation No 800/2008.

42. An affirmative reply to this question would lead to the second question, which asks whether fulfilment of the conditions for the opening of collective insolvency proceedings (either by the authorities of their own motion or at the request of a party) means that a situation of difficulty that precludes the grant of assistance (or requires the withdrawal of assistance already granted) can be deemed to have been established or, on the contrary, that the existence of that situation must be appraised in the specific case.

43. In order to dispel that other uncertainty, it is essential, first of all, to *decipher* the term 'undertakings in difficulty' for the purposes of Article 1(6)(c) of Regulation No 800/2008, since undertakings in difficulty are excluded from aid governed by the regulation. If, under Article 1(7)(c) of that regulation, an SME 'shall be considered to be an undertaking in difficulty' if 'it fulfils the criteria under its domestic law for being the subject of collective insolvency proceedings', the interpretation of the latter term must refer to national law.[13]

13 — I shall, however, attempt to argue that the reference to national law does not preclude the proposition that the concept of undertaking in difficulty is autonomous, that is, a concept of European Union law.

44. Therefore, I believe it more helpful to reformulate the two questions, analysing both what constitutes 'collective insolvency proceedings' for the purposes of Article 1(7)(c) of Regulation No 800/2008 and the concept of 'undertaking in difficulty' used in Article 1(6)(c). The answers to those questions will help to deal with greater certainty with the referring court's doubts regarding the issue which, for that court, is crucial in the dispute: whether, because it finds itself in a situation which necessitates the opening of insolvency proceedings, the undertaking concerned must be categorised as an undertaking in difficulty, so that it is not eligible for the assistance sought or so that that assistance, if already granted, must be withdrawn.

C. **The term 'undertaking in difficulty' for the purposes of Article 1(6)(c) of Regulation No 800/2008**

45. At the time when the 2004 Guidelines were adopted, the Commission acknowledged that 'there is no Community definition of what constitutes "a firm in difficulty"'. As a result, the conceptual features of that term needed to be set out in a text, for on it depended the application of other provisions of EU law (such as, for example, the rules on State aid or those governing the control of concentrations), which must not disregard the legal, economic and social realities represented by undertakings in difficulty.

46. Therefore, recourse had to be had to ad hoc conceptual constructions that could attribute to that complex reality a specific meaning in the context of the application of the relevant Community provisions. It was for that purpose that the 2004 Guidelines were published, which were aimed at guiding the activity of the Commission in the field of State aid for rescuing and restructuring firms in difficulty. Regulation No 800/2008 adopted as its own the assessments made in those Guidelines, affording them legislative value as elements constituting a concept that has to be classified as autonomous, from the perspective of EU law.

47. According to recital 15 of Regulation No 800/2008, aid to undertakings in difficulty 'should be assessed under those Guidelines', although, in the case of SMEs, 'the definition of what is to be considered an undertaking in difficulty should be simplified as compared to the definition used in those Guidelines'.

48. The 2004 Guidelines are, therefore, turned into legally binding criteria constituting the legislative concept of an 'undertaking in difficulty'. That concept is, I repeat, of necessity an autonomous and exclusive concept of EU law in that, being intended to apply in all the Member States, it must be interpreted in the same way in all of them.

49. The Court has consistently held that 'it follows from the need for a uniform application of EU law, and the principle of equality, that the terms of a provision of EU law, which make no express reference to the law of the Member States for the purpose of determining its meaning and scope, must normally be given an autonomous and uniform interpretation throughout the European Union, which must take into account the context of the provision and the objective pursued by the legislation in question'. [14]

50. The definition of 'undertakings in difficulty' adopted by Regulation No 800/2008 (in order to exclude such undertakings from its scope) is not exactly the same as that adopted by the Commission in the 2004 Guidelines but rather, as I have observed, a *simplified* version thereof. It may be inferred from a reading of Article 1(7) of Regulation No 800/2008 that that simplification involved adopting only the aspects of the definition of 'firm in difficulty' from point 10 of the 2004 Guidelines and therefore excluded the aspects set out in point 11 thereof.

14 — Judgment of 15 October 2015, *Axa Belgium*, C-494/14, EU:C:2015:692, paragraph 21 and the case-law cited.

51. Point 10 of the 2004 Guidelines is, in fact, reproduced almost verbatim in Article 1(7) of Regulation No 800/2008, with the sole addition of a reference to SMEs that have been incorporated for less than three years, which are also referred to in recital 15 of the regulation. However, no mention is made of the factors which, in line with point 11 of the 2004 Guidelines, may also lead to the same outcome but the establishment of which requires a higher standard of evidence. It was decided to leave out those factors in order to 'reduce the administrative burden for Member States'.

52. Of the three qualifying conditions used in Article 1(7) of Regulation No 800/2008 to identify, for the purposes of the scope of the regulation, when an SME is in difficulty, those in points (a)[15] and (b)[16] are not relevant to these proceedings. In those two cases, the defining criteria are set out in full in Regulation No 800/2008 itself, so that, in order to establish whether they are fulfilled in a specific situation reference need not be made to the laws of the Member States. The autonomy of the Community concept is, therefore, undeniable in relation to both.

53. The third criterion, which is that which matters here (an undertaking which 'fulfils the criteria under its domestic law for being the subject of collective insolvency proceedings'), admittedly refers to the national rules of each Member State. However, it is not an absolute reference, for insolvency proceedings under national law are confined to the definition of the conditions for opening a procedure which, for its part, must also reflect an autonomous concept of EU law.

D. **The term 'collective insolvency proceedings' used in Article 1(7)(c) of Regulation No 800/2008**

54. The same need of uniformity and consistency in the system that requires the definition of the term 'undertaking in difficulty', as a category belonging to EU law, applies to the term 'collective insolvency proceedings', notwithstanding the reference to national law for the purposes of a detailed definition.

55. That legal category must be used within the framework of Regulation No 800/2008 (that is, taking into account its object and its purpose), on the basis that the concept of 'collective insolvency proceedings' is not unknown in EU law, but instead is expressly laid down therein.

56. Regulation (EC) No 1346/2000[17] defined insolvency proceedings in Article 2(a) as 'the collective proceedings referred to in Article 1(1)' of the regulation, in other words, proceedings 'which entail the partial or total divestment of a debtor and the appointment of a liquidator'. Based on that premiss, Article 2(a) of Regulation No 1346/2000 included the list of different national insolvency proceedings, set out in Annex A thereto.

57. As far as Italy is concerned, that annex included the so-called 'concordato preventivo'.[18] No mention was made at that time of the arrangement with creditors as a going concern, because that would be introduced into Italian law later (according to the referring court, in 2012). It is therefore legitimate to question whether the way in which that arrangement was defined in national law makes it a different procedure from the *concordato preventivo* or simply a variation of it.

15 — In the case of a limited liability company, where more than half of its registered capital has disappeared and more than one quarter of that capital has been lost over the preceding 12 months.

16 — In the case of a company where at least some members have unlimited liability for the debt of the company, where more than half of its capital has disappeared and more than one quarter of that capital has been lost over the preceding 12 months.

17 — Council Regulation of 29 May 2000 on insolvency proceedings (OJ 2000 L 160, p. 1).

18 — The Italian *concordato preventivo* also appears in name in Annex A ('Insolvency proceedings referred to in point (4) of Article 2') to Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) (OJ 2015 L 141, p. 19).

58. As is logical, that is a question for the referring court to answer, although the position of Article 186 bis in the scheme of the Italian Law on insolvency and the very wording of that provision appear to support the view that an arrangement with creditors as a going concern is, in general, merely a (new) type of *concordato preventivo*, that is, it does not form a procedure distinct from the latter, broader category. [19] The referring court itself acknowledges that the arrangement with creditors as a going concern is a '*genus* of insolvency proceedings'. [20]

59. Accordingly, I believe that, should the national court confirm that an arrangement with creditors as a going concern is a form of the *concordato preventivo* referred to in Annex A to Regulation No 1346/2000, it must be concluded that that arrangement constitutes insolvency proceedings for the purposes of Article 1(7)(c) of Regulation No 800/2008.

60. Moreover, as I observed above, inasmuch as Article 1(7)(c) of Regulation No 800/2008 does not differentiate between insolvency proceedings opened by the authorities of their own motion and those opened by the economic operator or his creditors, I believe that that is an irrelevant distinction for the present purposes.

E. **Fulfilment of the conditions laid down for initiation of insolvency proceedings**

61. The referring court asks – and this is at the very heart of the uncertainty which led it to seek a preliminary ruling from the Court of Justice – whether the mere satisfying of the conditions for opening insolvency proceedings means that the undertaking concerned is in difficulty for the purposes of Regulation No 800/2008 or whether, on the contrary, any automatic connection is to be avoided and the circumstances of every case must be considered in order to determine whether or not an undertaking is actually in difficulty.

62. While the Regione Marche and the Commission have opted for the first approach, the Italian and Polish Governments have supported the second.

63. I believe that from the aim of Regulation No 800/2008, and from the explicit intention of the legislature, it may be inferred that an undertaking is in difficulty, for the purposes of Article 1(7)(c) of that regulation, if it simply satisfies the objective conditions for being the subject of insolvency proceedings in purely formal terms.

64. Regulation No 800/2008 sought to 'simplify' the definition of 'firm in difficulty' used in the 2004 Guidelines, and did so by leaving out the aspects referred to in point 11 of those Guidelines, in other words, those aspects the assessment of which by the authorities of the Member States is an administrative burden which, according to the regulation, it is intended to reduce.

65. It would with difficulty be reconciled with that aim of simplification – and it would run counter to the legislative desire to exclude the subject matter of point 11 of the 2004 Guidelines – if national authorities did not have to confine themselves to establishing whether the conditions for initiating insolvency proceedings were met, and were to be obliged, thus going further than that assessment – which, moreover, is not always straightforward – to make a substantive judgment of the kind suggested by the referring court.

19 — In her Opinion in *Degano Trasporti*, C-546/14, EU:C:2016:13, point 43, which also concerned Italian insolvency proceedings, Advocate General Sharpston stated that it was not possible to give a ruling in that case on the specific features of national insolvency law. In particular – I add now – it is not for the Court to carry out a classification of its different procedural variations.

20 — Point 10 of the order for reference.

66. In addition to the foregoing, there are two supplementary arguments. The first concerns the fact that it is for the courts with jurisdiction in matters relating to insolvency, before which an arrangement with creditors must be lodged, to decide, having regard to the particular circumstances of every undertaking, whether an undertaking finds itself in a situation requiring the suspension of payments to its creditors (in other words, if it is in financial difficulty). In the instant case, the Tribunale di Macerata (District Court, Macerata), which, according to the referring court, 'approved' [21] the arrangement with creditors, was definitely required to examine whether the conditions laid down in law for that purpose were met.

67. The second supplementary argument, in the same vein, is that it is not the aim of the regulation to declare compatible with the common market any categories of aid, whatsoever they may be, but only those whose purpose is to meet needs for which it is necessary to have recourse to undertakings that are in a position to deal with those needs, which excludes incentives to undertakings in difficulty. To my mind, meeting the conditions for being the subject of insolvency proceedings is, of itself, sufficiently reasonable grounds for casting doubt on the viability of the business for the benefit of which the incentive is sought, and gives rise to the suspicion that the aid applied for is intended to deal with a situation of difficulty, thereby circumventing the 2004 Guidelines, which is what Regulation No 800/2008 seeks to prevent.

68. Lastly, it must be borne in mind that 'as a qualification of the general rule that there is the obligation to notify [State aid], Regulation No 800/2008 and the conditions laid down by it must be interpreted strictly'. [22]

69. Accordingly, I believe that the answer to the question submitted by the referring court must be that, if an undertaking meets the conditions required for being the subject of insolvency proceedings, it is not eligible for public assistance from structural funds.

70. That assertion must immediately be qualified, however, in view of the uncertainty of the referring court which also asks whether, insolvency proceedings having been begun after the assistance was granted (as in the case of Nerea), the national authorities administering the assistance are obliged to withdraw it. That question is linked to what I called in my introductory remarks the second aspect of the dispute, that is, the aspect relating to the interpretation and application of the clauses of the contract notice.

F. **Withdrawal** [23] **of the assistance granted**

71. As I explained above, the standing of an undertaking which applies for aid must be assessed when that aid is granted to it, in other words, 'at the time that the right to receive it is conferred on the beneficiary under the applicable national rules'. [24] The fact that Nerea fulfilled the conditions for receipt of the aid at issue when it was granted is, in fact, not in dispute.

21 — Point 15, in fine, of the order for reference.

22 — Judgment of 21 July 2016, *Dilly's Wellnesshotel*, C-493/14, EU:C:2016:577, paragraph 37. The Court continues in paragraph 38 by stating that such an approach 'is supported having regard to the aims of the general block exemption regulations' because 'while the Commission is authorised to adopt such regulations, with a view to ensuring efficient supervision of the competition rules concerning State aid and simplifying administration, without weakening Commission monitoring in that area, the aim of such regulations is also to increase transparency and legal certainty. Fulfilling the conditions laid down by those regulations, including, therefore, those laid down by Regulation No 800/2008 enables those aims to be fully achieved'.

23 — The term 'withdrawal', which (according to the order for reference), was the term used by the body administering the assistance in its original decision, has been used throughout the main proceedings. Without seeking to create controversy in this regard, it could be questioned whether it was really possible to *withdraw* the assistance granted, given that the act which approved it was not vitiated by any ground of nullity or annulment, which is typical in cases of unilateral revocation in this type of administrative relationship. However, clause 20 of the contract notice did not preclude the adoption of that measure in the light of 'the failure to fulfil the obligations … of the beneficiary set out in clause 20(b), (c) and (h) and in the terms and conditions set out in the contract notice'.

24 — Judgment of 21 March 2013, *Magdeburger Mühlenwerke*, C-129/12, EU:C:2013:200, paragraph 40, which reproduces almost verbatim recital 36 of Regulation No 800/2008.

72. Nerea's situation of difficulty, which came to light when the insolvency proceedings were opened on 15 October 2014, came about when the undertaking had already received 50% of the assistance and (according to the referring court) made the assisted investment, in respect of which it made a declaration of expenditure on 18 November 2013.

73. If Nerea was not an 'undertaking in difficulty' until after it had been granted the assistance (and, all the more, until after it had fulfilled its investment commitments), no provision of Regulation No 800/2008 required the withdrawal of that assistance. European Union law does not require the repayment of assistance in situations of this kind.

74. As the Commission observes,[25] the fact that State aid is declared compatible with the internal market does not mean that a Member State is obliged to grant that aid or that it cannot demand repayment of it when national provisions, whether of a general nature or included in the contract notice, so provide.

75. Article 17(3) of the contract notice laid down what I believe could be classified in technical legal terms as a condition subsequent: the recipient was required to 'comply with the stability constraint' of the co-financed project for the five years following the date on which that project was completed. That commitment included an undertaking to avoid any 'substantial changes in relation to the project that affect its nature [that of the project] or methods of implementation or create undue advantages for an undertaking or public body'. Such a condition, whether or not it is a condition subsequent, is not provided for in Regulation No 800/2008, which cannot, therefore, supply guidance for its interpretation or implementation.

76. The Court of Justice lacking jurisdiction to give a ruling on the subject matter and scope of that specific clause of the contract notice, it is for the referring court to determine whether, in fact, it was breached[26] and what the consequences of such a breach would be.

77. There is no solution in the provisions of Regulation No 800/2008 analysed for the problem created by the (subsequent) emergence of a situation of difficulty for an undertaking after it has received aid and fulfilled its investment commitments. The interpretation of the concepts included in that regulation, to which I referred above, provides no guidelines for resolving the paradox which the referring court describes when it contrasts, on the one hand, the aim of encouraging restructuring of SMEs which have liquidity problems but which retain objective productivity margins and, on the other, the national rule which deprives them 'after the event … of financial resources from the public purse suitable for the purpose of reorganisation and recovery'.

78. Ultimately it is for the referring court to decide the extent to which failure to comply with the stability constraint must be reflected in withdrawal of the aid and recovery of the amount paid to Nerea. If, in accordance with the applicable provisions of national law, that aid ought to have been withdrawn and the amount advanced, together with interest, ought to have been recovered, that would not lead to infringement of Regulation No 800/2008, nor would it compromise the compatibility of the aid with the internal market when it was granted, the only issues on which the Court of Justice may give a ruling so far as the interpretation of that regulation is concerned.

25 — Point 44 of its written observations.

26 — This appears to be its finding since it argues that 'substantial changes certainly include the emergence of a situation in which the undertaking is in difficulty, and that situation gives rise, for instance, to an undue advantage, within the meaning of Article 17(3) of the contract notice'.

79. I therefore suggest, in reply to the question referred, that in accordance with Article 1(7)(c) of Regulation No 800/2008, fulfilment of the conditions laid down in national law for an undertaking to be the subject of insolvency proceedings is relevant at the time of the grant of assistance, not when that event takes place later in circumstances like those at issue in the case in the main proceedings. National authorities may, however, withdraw the assistance and recover the amounts already paid if, in accordance with their domestic law, the recipient of the assistance has breached the clauses of the contract notice governing the grant of that assistance.

VI. **Conclusion**

80. In the light of the considerations set out, I propose that the Court of Justice reply as follows to the questions referred for a preliminary ruling by the Tribunale Amministrativo Regionale per le Marche (Regional Administrative Court, Le Marche, Italy):

(1) Article 1(7)(c) of Commission Regulation (EC) No 800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty must be interpreted as referring both to collective insolvency proceedings that may be initiated by the administrative and judicial authorities of their own motion and to those initiated at the request of the undertaking concerned.

(2) If an arrangement with creditors as a going concern falls within the procedural category of a *concordato preventivo* referred to in Annex A to Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, a matter which it is for the referring court to determine, that arrangement will constitute collective insolvency proceedings for the purposes of Article 1(7)(c) of Regulation No 800/2008.

(3) In accordance with Article 1(7)(c) of Regulation No 800/2008, fulfilment of the conditions laid down in national law for an undertaking to be the subject of insolvency proceedings is relevant at the time of the grant of assistance, not when that event takes place later in circumstances like those at issue in the case in the main proceedings. National authorities may, however, withdraw the assistance and order the recovery of the amounts already paid if, in accordance with their domestic law, the recipient has breached the clauses of the contract notice governing the grant of that assistance.