ORDER OF THE COURT (Fifth Chamber)
24 July 2003 *

In Case C-297/01,

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

Sicilcassa Spa

and

IRA Costruzioni SpA,

Francesco Gaetano Restivo Graci and Others,

and between

Francesco Gaetano Restivo Graci and Others

* Language of the case: Italian.

and

IRA Costruzioni SpA,

Amministrazione straordinaria della Holding personale Graci Gaetano,

Sicilcassa SpA

on the interpretation of Articles 87 EC and 88 EC,

THE COURT (Fifth Chamber),

composed of: M. Wathelet (Rapporteur), President of the Chamber, C.W.A. Timmermans, A. La Pergola, P. Jann and S. von Bahr, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: R. Grass,

the national court having been informed that the Court proposes to give its decision by reasoned order pursuant to Article 104(3) of its Rules of Procedure, the persons referred to in Article 20 of the EC Statute of the Court of Justice having been invited to submit any observations they may have on that proposal,

after hearing the Opinion of the Advocate General,

makes the following

Order

1 By order of 12 July 2001, received at the Court on 26 July 2001, the Tribunale di Catania (District Court, Catania) referred to the Court for a preliminary ruling under Article 234 EC three questions on the interpretation of Articles 87 EC and 88 EC.

2 The questions were raised in proceedings brought by Sicilcassa SpA (hereinafter 'Sicilcassa') and Mr Restivo Graci and Others against the judgment of the Tribunale di Catania of 18 January 1997 declaring Gaetano Graci, deceased, bankrupt in accordance with Article 3 of Law No 95 of 3 April 1979 (*Gazzetta ufficiale della Repubblica Italiana* No 94 of 4 April 1979), as amended (hereinafter 'Law No 95/79') so as to enable the extension to the personal shareholding of the late Mr Graci (hereinafter referred to as 'the Graci Holding') of a special administration procedure initiated against IRA Costruzioni SpA ('IRA').

Law

3 Law No 95/79 instituted a special administration procedure for large undertakings in difficulty.

4 In accordance with the first paragraph of Article 1(1) of Law No 95/79, 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 85 277 billion 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.

5 Under Article 1a of Law No 95/79 the procedure is also applicable where the cause of insolvency is an obligation to reimburse sums of at least ITL 50 billion, that are 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 the repayment of State aid which is unlawful or incompatible with the common market or in connection with financing provided for technological innovation and research.

6 In accordance with the fifth paragraph of Article 1 of Law No 95/79, in order for the special administration procedure to apply, the undertaking concerned must have been declared insolvent by the courts, either pursuant to the Law of Insolvency, or on account of a 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, in accordance with the first paragraph of Article 2 of the

same law, permit it, having regard to the interests of 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').

7 Under Article 3 of Law No 95/79 the special administration procedure, once initiated with respect to one undertaking, may be extended to undertakings controlled by or controlling the first undertaking, provided that the latter undertakings have also been declared insolvent.

8 Undertakings in special administration are governed by the general rules of the Law of 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 creditors' claims; interest on existing debt is suspended; debt payments made during a certain 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.

9 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 recommission 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.

10 As part of the process of restoring an insolvent undertaking to health, all its premises may be sold off in accordance with the procedures laid down by Law

No 95/79. Under Article 5a thereof, the transfer of ownership of all or part of the undertaking is then subject to a flat-rate registration duty of ITL 1 million.

11 Moreover, the second paragraph of Article 3 of Law No 19 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.

12 In accordance with the fifth indent of Article 2 of Law No 95/79, where a company in special administration is permitted to continue trading, the administrator appointed to manage it must draw up an appropriate business plan, which will be 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, the sale of assets, liquidation or termination of the period of special administration are subject to the approval of that minister.

13 It is only at the end of the period of special administration that creditors of the undertaking placed under special administration can obtain payment of their debts, in whole or in part, through realisation of the undertaking's assets or from new profits. In addition, Articles 111 and 212 of the Law of Insolvency provide that 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 commenced.

14 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.

15 Law No 95/79 was repealed by Legislative Decree No 270 of 8 July 1999 introducing new rules on the special administration of large insolvent firms (GURI No 185 of 9 August 1999, hereinafter 'Legislative Decree No 270/99'), which was adopted in execution of the enabling Law No 274 of 30 July 1998.

16 However, Article 106(1) and (2) of Legislative Decree No 270/99 provides:

'1. Except as provided for in paragraph 3, special administration procedures pending on the date of entry into force of this decree shall continue to be governed by the provisions previously in force; this shall also apply to the subsequent placing under special administration of controlled companies or undertakings having the same directors and guarantors, as provided for in Article 3 of Decree-Law No 26 of 30 January 1979, converted, with amendments, by Law No 95 of 3 April 1979.

2. An undertaking shall be deemed to have been placed under special administration where on the date of entry into force of this decree it has been declared insolvent by a court, even if the decree providing for special administration pursuant to Article 1(5) or Article 3(2) of Decree-Law No 26/79 has not been adopted.'

17 The Court should mention that, by letter E 13/92 of 30 July 1992 (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 of the European Communities had indicated that Law No 95/79 appeared to it in various respects to fall within the scope of Article 92 of the EC Treaty (now, after amendment, Article 87 EC) and the articles following it and had asked that it be given prior notification of all

cases in which that law was to be applied so that it might examine them with reference to the rules on aid for undertakings in difficulties.

18 The Italian authorities 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, whereupon the Commission decided to initiate the procedure provided for in Article 93(2) of the Treaty (OJ 1997 C 192, p. 4).

19 Meanwhile in its judgment in Case C-200/97 *Ecotrade* [1998] ECR I-7907, the Court of Justice held that application to an undertaking within the meaning of Article 80 of the ECSC Treaty 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, which is prohibited by Article 4(c) of the ECSC Treaty, where it is established that the undertaking

— has been permitted to continue trading in circumstances in which it would not have been permitted to do so if the rules of ordinary law relating to insolvency had been applied, or

— has enjoyed one or more advantages, such as a State guarantee, a reduced rate of tax, exemption from the obligation to pay fines and other pecuniary penalties or *de facto* waiver of public debts wholly or in part, which could not have been claimed by another insolvent undertaking if the rules of ordinary law relating to insolvency had been applied.

20 Also, in its judgment in Case C-295/97 *Piaggio* [1999] ECR I-3735, the Court of Justice held 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 if the rules of ordinary law relating to insolvency had been applied.

— 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, once notified, not until 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 notification, not until that period has expired.

21 Following that judgment, the Commission, by letter of 12 August 1999 (OJ 1999 C 245, p. 27), first of all expressed its intention to withdraw its previous decisions proposing appropriate measures and initiating the procedure provided for in Article 93(2) of the Treaty, at the same time inviting the Italian authorities and interested third parties to submit their observations thereon and, secondly, initiated the procedure provided for in Article 88(2) EC in respect of the State aid schemes instituted by Law No 95/79, which it had now entered in the register of non-notified State aid.

22 The Italian authorities submitted observations by letters of 14 September and 2 November 1999.

23 On 16 May 2000 the Commission adopted Decision 2001/212/EC of 16 May 2000 on the aid scheme implemented by Italy to assist large firms in difficulty (Law No 95/1979 converting Decree Law No 26/1979 on special measures for the extraordinary administration of large firms in crisis) (OJ 2001 L 79, p. 29), in which it observed that the various advantages arising under Law No 95/79 constituted a State aid scheme within the meaning of Article 87(1) EC incompatible with the common market. The Commission stated that, in view of the judgment in *Piaggio*, cited above, and by contrast with its previous view, the State aid scheme instituted by Law No 95/79 was a scheme not of existing aid, but of new aid unlawfully implemented by the Italian Republic in breach of its obligations under Article 88(3) EC. The Commission nevertheless emphasised that its error regarding classification of the scheme as one of 'existing aid' had engendered a legitimate expectation on Italy's part and on the part of those concerned, namely the undertakings receiving the aid. Consequently it would not demand the repayment of any aid unlawfully granted. Lastly, it took notice of the

fact that Law No 95/79 had been repealed by Legislative Decree No 270/99.

The main proceedings and the questions referred for a preliminary ruling

24 The special administrators of IRA made an application for extension of the special administration procedure to which IRA was already subject to the Graci Holding, which contained a controlling interest in IRA. That application was initially rejected by the Tribunale di Catania on 3 January 1997 and subsequently granted by the Corte d'appello di Catania (Italy) on 17 January 1997. Consequently, by judgment of 18 January 1997, the Tribunale di Catania declared the Graci Holding insolvent, in accordance with Article 3 of Law No 95/79, so that the special administration procedure could be extended to include it.

25 On 3 February 1997 Sicilcassa, the principal creditor of the late Mr Graci, appealed against that judgment, as did the heirs of Mr Graci, Mr Francesco Gaetano Restivo Graci and another, on 13 and 14 February 1997. The latter parties subsequently withdrew their action whereupon the Tribunale di Catania pronounced those proceedings discontinued.

26 The referring court now questions whether the special administration procedure introduced by Law No 95/79 and maintained in effect by Article 106 of Legislative Decree No 270/99 is compatible with Article 87 EC et seq.

27 More precisely, it asks, first, whether the transitional scheme laid down by Legislative Decree No 270/99 constitutes a new aid scheme or the modification of an existing aid scheme, within the meaning of Article 87 EC et seq. and Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88] of the EC Treaty (OJ 1999 L 83, p. 1), given the consequences which might flow from failure to give the Commission prior notification.

28 The national court observes that the transitional scheme differs from the previous scheme, now repealed, in two respects. First, since it forms part of the new rules for the special administration of large insolvent firms adopted specifically to comply with Community law, its purpose is to prevent distortion of competition, to ensure that the discontinuance of the preceding scheme has no dramatic repercussions on the level of employment maintained by current special administrators and to dispel the grave uncertainty that would otherwise hover over all the legal relationships entered into in the past by undertakings under special administration. Secondly, it is merely a transitional scheme and as such is meant solely to govern special administrations already pending. The scheme is reasonably degressive and this has the effect of eliminating the broad margin of discretion which the Minister for Industry enjoyed under the previous scheme in authorising undertakings to continue trading. There is, therefore, serious doubt that the scheme is one that could affect intracommunity trade.

29 Next, the national court asks whether the transitional scheme is compatible with the common market, particularly in light of Article 87(3)(b) EC.

30 Lastly, in the event of a negative reply to that last question, the national court asks whether the transitional scheme might be regarded as compatible with the Treaty in light of the general principles of Community law and, in particular, the principles of legal certainty and the protection of legitimate expectations, the principles of non-discrimination and proportionality and the principle of effectiveness.

31 In this connection the national court observes, with specific reference to the aid scheme introduced by Law No 95/79, that, in Decision 2001/212, the Commission applied the principle of the protection of legitimate expectations with regard both to the Italian Republic, which had already granted the aid, and to the undertakings which had received it and refrained from demanding that the aid be repaid. The lack of transitional rules or their disapplication by the Italian courts would make it necessary to recover from undertakings already under special administration any State aid unlawfully granted. That would be contrary to the case-law of the Court of Justice which holds that Community law does not preclude national law from ensuring the protection of legitimate expectations, even where it addresses matters such as the recovery of aid that is incompatible with Community law (see Case C-5/89 *Commission* v *Germany* [1990] ECR I-3437).

32 Consequently, the Tribunale di Catania stayed proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

'1. On an interpretation of Article 87 EC et seq. may a scheme, such as the transitional arrangements laid down in Article 106 of Legislative Decree No 270/99, constitute new State aid falling within the scope of the prohibition laid down in Article 87 EC?

2. If the answer to Question 1 is affirmative,

In light of the considerations set out in the grounds of the present order can the transitional arrangements under examination come within the provision in Article 87(3)(b) EC?

3. If the answer to Question 2 is negative,

In light of the general principles of Community law and in particular [those of legal certainty, the protection of legitimate expectations, non-discrimination, proportionality and effectiveness], can the transitional arrangements under examination be deemed compatible with the EC Treaty and the Community legal order?'

The questions referred

33 The Court took the view that the answers to those questions left no room for reasonable doubt and, pursuant to Article 104(3) of its Rules of Procedure, informed the national court that it was proposing to give its decision by reasoned order and invited the interested parties referred to in Article 20 of the EC Statute of the Court of Justice to submit any observations they might have in that regard.

34 In response, Sicilcassa, IRA, the Italian Government and the Commission drew the Court's attention to Article 7 of Law No 273 of 12 December 2002 laying down measures to promote private-sector initiative and to develop competition (ordinary supplement to the GURI, No 293 of 14 December 2002) (hereinafter 'Law No 273/2002') from which it is apparent, in substance, that the effects of Law No 95/79, retained by Article 106 of Legislative Decree No 270/99 with regard to undertakings in respect of which an extraordinary administration

procedure has already been commenced, relate only to the procedural aspects of a liquidation, not to the part of the law which instituted the State aid held to be incompatible with the Treaty. The Italian Government submits that Article 7 of Law No 273/2002 thus offers correct interpretation of Article 106 of Legislative Decree No 270/99.

35 Sicilcassa says that it no longer has any interest in pursuing the main proceedings, whilst IRA, the Italian Government and the Commission have informed the Court that they have no objection to Article 104(3) of the Rules of Procedure being applied.

The first question

36 By its first question, the national court asks, in essence, whether transitional rules such as those laid down by Article 106 of Legislative Decree No 270/99, which maintain the effects of a new State aid scheme which has not been notified to the Commission and has been declared incompatible with Community law, in themselves constitute a new State aid scheme within the meaning of Articles 87 EC and 88 EC.

37 On this point, the Court has already held, in *Piaggio*, cited above, that a system of the kind 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 and that, consequently, it cannot be put into operation unless it has been notified to the Commission and, once notified, not until 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 notification, not until that period has expired.

38 Moreover, in Decision 2001/212 the Commission found that the scheme instituted by Law No 95/79 constituted a new State aid scheme unlawfully implemented by the Italian Republic in breach of its obligations under Article 88(3) EC.

39 Those considerations must also apply to a set of transitional rules such as those laid down by Article 106 of Legislative Decree No 270/99 in so far as they maintain the effects of Law No 95/79 with regard to undertakings already in extraordinary administration at the time the legislative decree entered into force. Furthermore, it should also be noted that the transitional rules laid down by Article 106 of Legislative Decree No 270/99 were not formally notified to the Commission by the Italian authorities.

40 However, it is appropriate also to observe that the fact that Article 106 of Legislative Decree No 270/99 maintains the effects of Law No 95/79 and, in particular, any aid granted under that law before the legislative decree entered into force, is not in itself incompatible with Decision 2001/212. Indeed, in that decision, which has not been impugned before the Community court, the Commission expressly declined to require recovery of aid granted under Law No 95/79, even though it regarded such aid as incompatible with the common market.

41 It is for the national court to decide whether, by reason of the fact that it has not been notified, any such new aid should be recovered or not. In this connection, the national court will take account of the general principles of its internal law, including the principle of the protection of legitimate expectations, the circumstances of the case and especially Decision 2001/212.

42 Furthermore, the Commission's refusal to require recovery of aid granted under Law No 95/79 does not relate to aid granted after that law was repealed, even if granted to undertakings already in special administration when Legislative Decree No 270/99 entered into force. The national court ought to order the recovery of any aid of that sort.

43 IRA, the Graci Holding and the Italian Government observe, however, that there are no grounds for interpreting Article 106 of Legislative Decree No 270/99 as meaning that relevant undertakings could in the future effectively be granted new State aid under Law No 95/79, now repealed. Such an interpretation would, they say, be clearly contrary to Community law and should, for that reason, be dismissed.

44 In this connection, it is for the national court to establish the scope of Article 106 of Legislative Decree No 270/99, if necessary, in light of Article 7 of Law No 273/2002, taking care to interpret the provision, in so far as possible, consistently with Community law and having regard also for the judgment in *Piaggio*, cited above, and Decision 2001/212. The national court's interpretation must exclude the possibility of granting any new State aid under Article 106 after the entry into force of Legislative Decree No 270/99.

45 Having regard to the foregoing considerations, the answer to the first question must be that transitional rules such as those laid down by Article 106 of Legislative Decree No 270/99, which maintain the effects of a new State aid scheme which has not been notified to the Commission and has been declared incompatible with Community law, in themselves constitute a new State aid scheme within the meaning of Articles 87 EC and 88 EC.

The second and third questions

46 By its second and third questions the national court asks whether transitional rules such as those laid down by Article 106 of Legislative Decree No 270/99 are compatible with Community law, taking particular account of Article 87(3)(b) EC and the general principles of legal certainty, the protection of legitimate expectations, non-discrimination and proportionality.

47 In this connection it should be borne in mind that, according to the settled case-law of the Court, assessment of the compatibility of aid measures or of an aid scheme with the common market falls within the exclusive competence of the Commission, subject to review by the Court (Case C-354/90 *Fédération nationale du commerce extérieur des produits alimentaires and Syndicat national des négotiants et transformateurs de saumon* [1991] ECR I-5505, paragraph 14, Case C-39/94 *SFEI and Others* [1996] ECR I-3547, paragraph 42, and *Piaggio*, cited above, paragraph 31). Consequently, a national court may not, in a request for a preliminary ruling pursuant to Article 234 EC, ask the Court for guidance on the compatibility with the common market of a given grant of State aid or a State aid scheme.

48 That being so, the second and third questions are inadmissible.

Costs

49 The costs incurred by the Italian Government and by the Commission and the EFTA surveillance authorities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main action, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber)

hereby orders:

1. Transitional rules such as those laid down by Article 106 of Legislative Decree No 270/99 of 8 July 1999 introducing new rules on the special administration of large insolvent firms, which maintain the effects of a new State aid scheme which has not been notified to the Commission and has been declared incompatible with Community law, in themselves constitute a new State aid scheme within the meaning of Articles 87 EC and 88 EC.

2. **The questions asking for the Court's assessment of the compatibility with the common market of transitional rules such as those laid down by Article 106 of Legislative Decree No 270/99 are inadmissible.**

Luxembourg, 24 July 2003.

R. Grass

Registrar

M. Wathelet

President of the Fifth Chamber