OPINION OF MR ADVOCATE GENERAL MISCHO
delivered on 28 November 1989 *

Mr President,
Members of the Court,

1. On 13 May 1986 the Commission introduced Recommendation 86/198/ECSC on the establishment of preferential treatment for debts in respect of levies on the production of coal and steel (Official Journal 1986, L 144, p. 40) which requires Member States to confer, not later than 1 January 1988 and in accordance with the detailed rules laid down therein, a preferential rank on debts arising from the application of the levies referred to in Articles 49 and 50 of the ECSC Treaty in all cases where national legislation provides for competition between creditors.

2. As Italy has not yet adopted the implementing measures necessary for it to meet that obligation, the European Coal and Steel Community, acting through the Commission, relied directly on that recommendation in its claim, made in the context of the decision of 3 February 1987 declaring Acciaierie e ferriere Busseni insolvent, that preferential treatment ought to be accorded to a number of debts owed to it under two decisions of 23 February 1982 and 5 September 1986.

3. That was the background against which the tribunale civile e penale di Brescia (District Court, Brescia), to which the ECSC had appealed following the rejection of its claim by the official receiver in charge of the insolvency procedure, was called on to consider 'the validity and effects of Recommendation 86/198/ECSC in Italian law' [1] and referred to the Court for a preliminary ruling under Article 41 of the ECSC Treaty the three questions which are the subject of this Opinion.

4. Those three questions, for the exact wording of which I refer to the Report for the Hearing, concern in turn:

(1) the 'direct and immediate effect' of, in particular, Articles 1 and 2 of Recommendation 86/198;

(2) in the event that the recommendation does have such effect, its applicability to debts arising prior to the date of its introduction;

(3) in the event that the recommendation does not have such effect, the mandatory nature of the time-limit of 1 January 1988 and the consequences in national law of the failure to observe that time-limit.

5. In the written observations which it submitted to the Court, the Commission raised two prefatory questions, the first of which related to the admissibility of the third question which, in the Commission's view, concerns a problem exclusively of national law, and the second, to the admissibility of the other two questions which, as they concern the interpretation, rather than the validity, of an act of the High Authority of the ECSC, appear to fall outside the wording of Article 41 of the ECSC Treaty.

* Original language: French.

1 — P. 2 in the order for reference.

6. Unlike the Commission, however, I am not going to begin by examining the admissibility of the third question, as that question only arises if the first question is answered in the negative and can in any case be divided into two parts, of which only the second expressly relates to a question of national law, while the first part may be treated as concerning the interpretation of that provision in the recommendation which lays down the time-limits for its implementation.

7. Moreover, the second prefatory question is by far the more important in so far as it questions the Court's own jurisdiction under Article 41 of the ECSC Treaty to give rulings on requests for the interpretation of the ECSC Treaty and on acts implementing its provisions.

I — The jurisdiction of the Court to give preliminary rulings on the interpretation of the law of the ECSC

8. Article 41 of the ECSC Treaty provides that:

'The Court shall have sole jurisdiction to give preliminary rulings on the validity of acts of the High Authority and of the Council where such validity is in issue in proceedings brought before a national court or tribunal.'

9. The ECSC Treaty thus does not provide expressly for an optional or compulsory preliminary reference on a matter of interpretation, as do Article 177 of the EEC Treaty and Article 150 of the EAEC Treaty.

10. The explanation for this which is normally given is that under the ECSC Treaty, unlike the EEC Treaty, the Commission has very extensive powers of direct management, with the result that national authorities and national courts or tribunals are less often called upon to implement or apply the law of the ECSC.[2] The need for a system enabling preliminary references to be made on matters of interpretation thus appears to have been less manifest when the ECSC Treaty was being drafted than when the EEC and EAEC Treaties were being drafted.

11. Does that mean that a reference on a matter of interpretation is not possible under the ECSC Treaty?

12. The judgment of the Court of 24 October 1985 in Case 239/84 *Gerlach* v *Minister for Economic Affairs* [1985] ECR 3507, cannot, in my opinion, be regarded as having implicitly recognized the jurisdiction of the Court in that matter. Neither the first nor the third preliminary questions in that case related to problems exclusively of the interpretation of ECSC recommendations, as the Commission claims. The first sought to ascertain whether an EEC regulation also applied to products falling within the ambit of the ECSC Treaty and the third related to the validity of an ECSC recommendation of the Commission. The fact that the Court, in the reasons given in support of its answer to those two questions, based itself on secondary legal acts of the ECSC which it also interpreted, shows, at most, that the examination of the validity of an act often implies the interpretation of that same act or of other acts.

2 — See, in that connection, Waelbroeck, Louis, Vignes, Dewost and Vandersanden: *Le droit de la Communauté économique européenne*, Vol. 10, Éditions de l'université de Bruxelles, 1983, p. 179 and Joliet: *Le droit institutionnel des Communautés européennes, le contentieux*, Faculty of Law, Economics and Social Sciences of Liège, 1981, p. 167.

13. Thus, the question of the jurisdiction of the Court still awaits an answer and along with the Commission I believe that that answer should be in the affirmative.

14. *Article 31 of the ECSC* Treaty, which is the counterpart of *Article 164 of the EEC* Treaty, provides that:

'The Court shall ensure that in the interpretation and application of this Treaty, and of rules laid down for the implementation thereof, the law is observed.'

15. While those articles do not in themselves constitute a basis for jurisdiction, they do define the task which devolves upon the Court under the two treaties and on that ground form part of the backbone of the judicial system of the European Communities.

16. It was for that reason that the Court referred in particular to Article 164 of the EEC Treaty in the reasoning which led it to hold, in its judgment of 23 April 1986 in 'Les Verts',[3] that an action for annulment may also lie against measures of the European Parliament which are intended to have legal effects *vis-à-vis* third parties, even though Article 173 of the EEC Treaty, unlike Article 38 of the ECSC Treaty, expressly mentions only acts of the Council and the Commission. In the words of the Court,

'an interpretation of Article 173 of the Treaty which excluded measures adopted by the European Parliament from those which could be contested would lead to a result contrary both to the spirit of the Treaty as expressed in *Article 164* and to its system' (paragraph 25).

17. In its judgment of 11 November 1981 in the *IBM* case,[4] the Court had already given a broad interpretation to the concept of measures liable to actions for annulment under Article 173 of the [EEC] Treaty by reasoning that

'that remedy is available in order to ensure, as required by *Article 164*, that in the interpretation and application of the Treaty the law is observed, and it would be inconsistent with that objective to interpret restrictively the conditions under which the action is admissible by limiting its scope merely to the categories of measures referred to in Article 189' (paragraph 8).

18. In its judgment of 4 October 1983 in the *Fediol* case,[5] the Court also referred to 'the spirit of the principles which lie behind *Articles 164* and 173 of the Treaty' in order to acknowledge that complainant undertakings in anti-dumping proceedings had

'the right to avail themselves . . . of a review by the Court appropriate to the nature of the powers reserved to the Community institutions on the subject' (paragraph 29).

19. Finally, in its judgment of 22 October 1987 in the *Foto-Frost* case,[6] the Court affirmed its exclusive jurisdiction to declare acts of the Community institutions invalid on the basis of the need for a *uniform application of Community law* and *coherence in the system of judicial protection* instituted by the EEC Treaty, as well as on the fact that it is itself in the best position to rule on

3 — Judgment of 23 April 1986 in Case 294/83 *Parti écologiste 'Les Verts'* v *European Parliament* [1986] ECR 1339.

4 — Judgment of 11 November 1981 in Case 60/81 *IBM* v *Commission* [1981] ECR 2639.

5 — Judgment of 4 October 1983 in Case 191/82 *Fediol* v *Commission* [1983] ECR 2913.

6 — Judgment of 22 October 1987 in Case 314/85 *Foto-Frost* v *Hauptzollamt Lübeck-Ost* [1987] ECR 4199.

the validity of Community acts, despite the fact that Article 177 of the EEC Treaty, in contrast this time to Article 41 of the ECSC Treaty, does not expressly exclude a divergent interpretation which would also confer such a competence on national courts against whose decisions there is a judicial remedy under national law (see paragraphs 12 to 20).

20. Those different judgments show that the Court has on a number of occasions relied on Article 164 of the EEC Treaty and the principles deriving from it for the purpose of giving a broad and coherent interpretation to those provisions of the Treaty which deal with the various means of redress, even going so far, when the need arises, as to remedy omissions and lacunae within it.

21. In my opinion nothing ought to prevent the Court from following the same course of action in the present case and from affirming, with reference to Article 31 of the ECSC Treaty, its jurisdiction to deliver preliminary rulings also on the interpretation of the law of the ECSC. That is a view which I base essentially on the following reasons.

22. In the first place, to the extent — albeit limited — to which national authorities are called on to implement the law of the ECSC and national courts are required to apply it, the need for a uniform application of Community law is every bit as vital as in the case of the EEC Treaty. In its judgment of 16 January 1974 in the *Rheinmühlen* case,[7] the Court affirmed emphatically that the system of references for preliminary rulings is

'*essential* for the preservation of the Community character of the law established by the Treaty and has the object of ensuring that *in all circumstances* this law is the same in all States of the Community', and concluded that 'any gap in the system so organized could undermine *the effectiveness* of the provisions of the Treaty and of the secondary Community law' (paragraph 2).

23. As the task assigned to the Court under the EEC and ECSC Treaties is the same and extends in both cases to an interpretation of the law, the Court should have the powers necessary to carry out that task effectively also under the ECSC Treaty.

24. Secondly, in the same way as the application of the law cannot be divorced from its interpretation (Article 164 of the EEC Treaty and Article 31 of the ECSC Treaty stress that point), no examination of the validity of an act can be made without an interpretation of the act itself or of the law in relation to which its validity is brought into question. We have seen that the *Gerlach* judgment, already cited, provides an example in this respect. Mr Advocate General Verloren van Themaat, in his Opinion delivered on 2 March 1983 in Case 168/82 *ECSC* v *Ferriere Sant'Anna* [1983] ECR 1681, at p. 1701, had expressed the same view in endorsing an observation made by the Commission that

'... it is not possible to appraise the validity of a decision without at the same time interpreting the provisions of the Treaty from which the Commission derived the power to adopt that decision' (see the section 'Facts

7 — Judgment of 16 January 1974 in Case 166/73 *Rheinmuhlen-Dusseldorf* v *Einfuhr- und Vorratsstelle fur Getreide und Futtermittel* [1974] ECR 33.

and Issues' of the judgment of the Court of 17 May 1983 [1983] ECR 1681, at p. 1689).[8]

25. In its judgment of 21 March 1985 in the *Celestri* case,[9] the Court itself declared, admittedly in the context of the separation of functions between national courts and itself under Article 41 of the ECSC Treaty, that

'... it is ... for the Court to set the measure whose validity is contested in context in Community law and to examine the criteria for interpretation established by Community law in order to be able to give the national court an appropriate answer for the purpose of resolving the main dispute' (paragraph 12).

26. The judgment of the Court of 17 November 1983 in Case 292/82 *Merck* v *Hauptzollamt Hamburg-Jonas* [1983] ECR 3781, which was delivered pursuant to Article 177 of the EEC Treaty, is a case in point. The Court, which had been questioned expressly as to the validity of several Community regulations, had first of all carried out a detailed interpretation of the relevant provisions before stating that

'In view of that interpretation of the provisions at issue the questions concerning their validity have no purpose' (paragraph 18).

27. In the circumstances I have no hesitation in agreeing with those who believe that the Court, which has the jurisdiction to deliver preliminary rulings on the validity of acts of the institutions of the ECSC, must equally have jurisdiction to rule on their interpretation, and indeed also on the interpretation of the Treaty.[10]

28. Finally, I am of the opinion that since the ECSC Treaty predates the EEC Treaty, the differences between the two Treaties cannot be used as a pretext for denying the Court jurisdiction to deliver preliminary rulings on the interpretation of the law of the ECSC. In its judgment in the *Foto-Frost* case, which I have already cited, the Court chose to ignore the fact that Article 177 of the EEC Treaty, despite being later in date than Article 41 of the ECSC Treaty, does not expressly confirm the Court's exclusive jurisdiction to declare acts of the Community institutions invalid. It thereby remedied a lacuna in the EEC Treaty which, on the face of it, could not have been due to a simple omission, bearing in mind that the authors of the EEC Treaty had before them as a model Article 41 of the ECSC Treaty. The same may be said with regard to the judgment in 'Les Verts', cited above, where the Court relied on Article 38 of the ECSC Treaty in ruling that an action for annulment brought under Article 173 of the EEC Treaty may also lie against acts of the European Parliament, although the latter article, which was adopted later than Article 38 of the ECSC Treaty, may have been considered as reflecting the more recent opinion on the matter held by the authors of the Treaty. Since it has already interpreted Articles 173 and 177 of the EEC Treaty in accordance with the requirements of both Articles 38 and 41 of the ECSC Treaty, I believe that the Court may, *a fortiori*, draw guidance from Article 177 of the EEC Treaty in its

8 — See also the Opinion delivered by Advocate General Sir Gordon Slynn on 27 March 1984 in Case 36/83 *Mabanaft* v *Hauptzollamt Emmerich* [1984] ECR 2528, at p. 2530: 'It is, in my opinion, clear that, if the validity of an act is in question, the first task almost inevitably is to ask what is the nature of the act in question. That involves, where the act is in a document, interpreting the words used. If the compatibility of an act of the High Authority with provisions of the Treaty is in question, that inexorably involves the Court in directing itself as to the proper meaning of the Treaty.'

9 — Judgment of 21 March 1985 in Case 172/84 *Celestri* v *Ministry of Finance* [1985] ECR 963.

10 — See, in particular, Wohlfahrt, in Grabitz: *Kommentar zum EWG-Vertrag*, at paragraph 13 on Article 177: 'If the European Court of Justice is entitled to give a preliminary ruling on the validity of a legal provision, which always presupposes the interpretation of that provision, it must, *a fortiori*, be entitled to interpret such a provision, if requested to do so by a national court.'

interpretation of Article 41 of the ECSC Treaty.

29. It is not necessary in the present case to determine the conditions governing the exercise of the interpretative jurisdiction which must thus be recognized as vested in the Court under the ECSC Treaty, nor to decide whether it is necessary to observe the distinctions laid down in the second and third paragraphs of Article 177 of the EEC Treaty. Since the tribunale civile e penale di Brescia has referred to the Court the preliminary questions under consideration, it is immaterial, for the purpose of establishing the Court's jurisdiction in the matter, whether it did so by its own option or because it was required so to do.

30. Should the Court consider it useful, however, to lay down principles regarding preliminary rulings on matters of interpretation relating to the ECSC, I believe that it could consider as applicable those concerning Article 177 of the EEC Treaty. They have proved their usefulness in the past and to depart from them now would only cause confusion. Moreover, the need to prevent the development in any Member State of national judicial practice at variance with the rules of Community law and the resultant differences in judicial practice within the Community on questions of Community law argues in favour of a distinction being drawn between national courts depending on whether or not a judicial remedy under national law is available against their decisions and particularly in favour of the obligation on the part of those against whose decisions no appeal lies under national law to refer matters to the Court of Justice. Finally, this would not be the first time that the Court would be drawing guidance from the provisions of the EEC (or of the EAEC) Treaty in order to transpose them into the ECSC Treaty. In its judgment of 16 December 1960 in the *Humblet* case,[11] the Court took the view that Article 171 of the EEC Treaty and Article 143 of the EAEC Treaty confirmed the limits to the jurisdiction which it exercised under Article 16 of the Protocol on the Privileges and Immunities of the ECSC to rule on the interpretation or application of that Protocol. In its judgment of 21 January 1965 in the *Merlini* case,[12] the Court implicitly transposed the provision in the final paragraph of Article 192 of the EEC Treaty, which reserves to the courts of the Member State concerned jurisdiction to review measures enforcing decisions imposing pecuniary obligations, to Article 92 of the ECSC Treaty, which is silent on the matter.

31. Since the Court therefore has jurisdiction to deliver a preliminary ruling on questions concerning the interpretation of the Treaty establishing the ECSC and of acts adopted thereunder, I may now go on to examine the questions submitted in the present case.

II — The question of the 'direct effect' of Commission Recommendation 86/198

32. In its first question, the national court asks in particular if Articles 1 and 2 of Commission Recommendation 86/198 have

'... direct and immediate effect in a Member State so that [they] may be applied by a national court or tribunal without the need for any subsequent measures giving effect to the recommendation to be adopted by the State to which [they are] addressed ...'.

11 — Judgment of 16 December 1960 in Case 6/60 *Humblet* v *Belgium* [1960] ECR 559

12 — Judgment of 21 January 1965 in Case 108/63 *Merlini* v *High Authority* [1965] ECR 1

33. In order to answer that question, we must first establish whether an ECSC recommendation is in principle capable of having direct effect, in the same way as an EEC decision or directive. The third paragraph of Article 14 of the ECSC Treaty provides that:

'recommendations shall be binding as to the aims to be pursued but shall leave the choice of the appropriate methods for achieving these aims to those to whom the recommendations are addressed'.

34. An ECSC recommendation, in so far as it is addressed to Member States, is thus exactly equivalent to an EEC directive which, under paragraph 3 of Article 189 of the EEC Treaty

'... shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods'.

35. ECSC recommendations thus impose on Member States to which they are addressed, in exactly the same way as do EEC directives, an obligation to achieve the desired result within the prescribed period. As the Court pointed out in its judgment of 26 February 1986 in the *Marshall* case, [13] the view consistently expressed by the Court on the 'direct effect' of directives is based precisely on

'... the consideration that it would be incompatible with the binding nature which Article 189 confers on the directive to hold as a matter of principle that the obligation imposed thereby cannot be relied on by those concerned. From that the Court deduced that a Member State which has not adopted the implementing measures required by the directive within the prescribed period may not plead, as against individuals, its own failure to perform the obligations which the directive entails'.

36. There is thus no reason in principle why that statement should not equally be applied in the case of ECSC recommendations addressed to Member States.

37. The first consequence thereof is that where a Member State has failed to implement an ECSC recommendation in national law within the prescribed period or where it has failed to implement the recommendation correctly, an individual may rely, as against the State, on those provisions of the recommendation which appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise (see paragraph 46 of the *Marshall* judgment).

38. With regard to the recommendation in question in the present case, a distinction must be drawn for our purposes according to whether that recommendation is to apply to proceedings involving competition between creditors which had not yet been commenced at the date on which the recommendation came into force or to those which had already been commenced at that date, which, should the recommendation have 'direct effect', would coincide with the date laid down for its implementation, 1 January 1988.

39. Articles 1 and 2 of the recommendation impose on the Member States to which they are addressed a clear and precise obligation which allows for no independent action whatever on their part. As the Commission quite properly pointed out, those articles merely place Member States under the obligation of

'... extending to ECSC levies the treatment accorded by the legal system of each

13 — Case 152/84 [1986] ECR 723, paragraph 47.

Member State to the tax debts owed to that Member State' (final recital in the recommendation).

40. It is clear that those articles do not create new types of preferential treatment for which Member States must introduce rules, nor do they oblige Member States which do not already confer a preferential rank on tax debts owed to them to introduce legal provisions for that purpose.

41. To the extent to which they apply to 'new' proceedings involving competition between creditors, Articles 1 and 2 of Recommendation 86/198 are certainly unconditional and sufficiently precise for individuals to rely upon them directly.

42. That conclusion, however, must be modified slightly with regard to the application of those two provisions of the recommendation to proceedings already commenced at the date of its implementation. That is a matter to which I shall return later.

43. The most difficult problem to resolve in the present case, however, relates to the second consequence of the view consistently expressed by the Court on the 'direct effect' of EEC directives, as applicable to ECSC recommendations.

44. In the *Marshall* judgment, which I have already cited, the Court also emphasized that, according to Article 189 of the EEC Treaty,

'... the binding nature of a directive, which constitutes the basis for the possibility of relying on the directive before a national court, exists only in relation to "each Member State to which it is addressed". It follows that a directive may not of itself impose obligations on an individual and that a provision of a directive may not be relied upon as such against such a person' (paragraph 48).

45. In the judgment of 8 October 1987 in Case 80/86 *Kolpinghuis Nijmegen* [1987] ECR 3969, the Court drew the consequence that

'... a national authority may not rely, *as against an individual*, upon a provision of a directive whose necessary implementation in national law has not yet taken place' (paragraph 10).

46. The Court has thus used alternatively, and, as it appears to me, interchangeably, the expressions '*to impose obligations on* an individual', 'to rely upon a directive *against* an individual' or '*to rely as against* an individual upon a provision of a directive', in order to state, substantially, that a directive which has not yet been implemented cannot involve negative and direct consequences for an individual.

47. Let us now consider what happens when the ECSC relies, before the relevant national authorities, on the preferential status conferred upon it by Recommendation 86/198. In that case, the ECSC is simply claiming a preferential rank for debts owed to it over debts which are lower in rank than those owed to the State in respect of value-added tax. In other words, it is relying on a provision in the recommendation 'as such' 'against' or 'as against' an indeterminate number of individuals who do not hold claims of a rank equal to that

which the recommendation confers on the ECSC.

48. The case-law cited above demonstrates that such a view is inadmissible.

49. I cannot accept the reasoning of the Commission when it argues that, in the present case, it asserted its rights against the Italian State, rather than against individuals simply by applying to the liquidator, a person entrusted by the State with a particular task.

50. The person or the body to which one applies, or the precise legal status of that body, is of no relevance in the present context.

51. The question which arises is whether or not a directive may impose a precise obligation directly on a State authority which may be relied upon *as against* that State by individuals.

52. When the Court declared that the State may not plead, as against individuals, its own failure to perform the obligations imposed by a directive which has not yet been implemented, it meant that the State cannot continue to apply to an individual a rule of national law which it ought to have repealed for the purpose of complying with the directive (for example, the imposition of value-added tax on a certain type of transaction, see the judgment of 19 January 1982 in Case 8/81 *Becker* v *Finanzamt Münster-Innenstadt* [1982] ECR 53, or that the State cannot refuse to an individual a right which it ought already to have introduced in its national legislation (for example, the principle of equal pay for men and women, see the judgment in *Marshall*, cited above).

53. It is necessary to avoid confusing two types of obligations: the obligation on the State, on the one hand, to implement a directive in its national law and, on the other, the obligations which the actual text of a directive imposes on the State. The obligations which the State cannot shirk are those devolving on it directly *vis-à-vis* individuals.

54. In the case before us, the ECSC is not requesting the liquidator to make a payment to it out of the State budget, something which in any case he would be quite unable to do. What the ECSC is seeking is that the recommendation should be treated by the officers of State created to administer cases of bankruptcy and insolvency (liquidator, receiver, bankruptcy tribunal), as having been already implemented in such a way that debts owed to the ECSC may enjoy a preferential rank over lower-ranking debts.

55. The case-law which I have cited above would suggest that neither the administrative offices of the State, nor its judicial or quasi-judicial offices (such as that of liquidator) are obliged to entertain claims as against individuals, based on an ECSC recommendation which has not yet been implemented.

56. To take the opposite view would be tantamount to contending that directives are nothing other than regulations with a delayed effect and thereby to establishing a new principle that, in cases where a directive has still not been implemented by a Member State at the end of the period stipulated therein, all of its provisions which are unconditional and sufficiently precise shall take effect *erga omnes* as if they were provisions of a regulation. I believe that

such a result would run contrary to the intentions of those who drafted the Treaty.

57. The objection may be raised that the Court has, in some cases, implicitly acknowledged that a directive which has not been properly implemented may still have negative consequences for individuals. I am referring in that respect to a number of judgments [14] dealing with Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (Official Journal, English Special Edition 1971 (II), p. 682). In those cases, individuals contested before national courts decisions of the 'adjudicating authority' rejecting their tender by relying on the fact that those decisions were based on national legislation which did not comply with the directive.

58. Those cases, however, differed in one important respect from that with which we are now dealing, in so far as the 'adjudicating authority', that is to say, the Ministry of Agriculture and Fisheries in the Netherlands or the Municipality of Milan, were administrative bodies or decentralized authorities which had themselves a direct and specific obligation towards the undertakings in question, namely, to award them the contract if the application of the substantive rules and of the procedures laid down by the directive led to their selection. The applicants were thus pressing claims against public authorities and not against other individuals. The fact that acceptance of those claims might have detrimentally affected other individuals does not, however, mean that the directive was directly applied against such individuals.

14 — Judgments of 20 September 1988 in Case 31/87 *Gebroeders Beentjes* v *State of the Netherlands* [1988] ECR 4635, and of 22 June 1989 in Case 103/88 *Fratelli Costanzo* v *Comune di Milano* [1989] ECR 1839.

59. For all those reasons, therefore, my view is that the Commission, acting as the High Authority of the ECSC, cannot rely on Articles 1 and 2 of Recommendation 86/198 as such, that is to say, before their implementation in national law, as against individual creditors of an insolvent undertaking in proceedings before national courts or authorities of a Member State charged with the administration of cases of bankruptcy and insolvency.

60. Even if the Court does not share that view, I believe that it ought none the less to conclude that the recommendation, as such, cannot be relied upon as against private creditors in the context of proceedings for recovery which are already in progress at the date of its implementation.

61. The second paragraph of Article 4 provides as follows:

'Member States shall provide that these laws, regulations and administrative provisions [15] are to be applied to proceedings in progress on the date of actual implementation of this recommendation *and shall ensure*, by means of appropriate transitional measures, adequate legal safeguards for the rights of other creditors of the debtor undertaking.'

62. The seventh recital in the preamble to the recommendation stipulates for its part that

15 — That is to say, the laws, regulations and administrative provisions necessary to comply with the recommendation

'... the Member States should consequently ensure, by means of appropriate transitional measures, adequate legal safeguards for the rights of other creditors of the undertaking liable to levies, *particularly* in respect of means of redress against the ranking of debts carried out following the implementation of this Recommendation'.

63. The first conclusion which may be drawn from those two texts is that the Member States do not have the option, as the Commission suggests, to introduce transitional measures, but are in fact obliged to do so.

64. The second paragraph of Article 4 is not, therefore, an unconditional provision but it does expressly make the application of Articles 1 and 2 to proceedings for recovery which are already in progress dependent on there being adequate legal safeguards for the rights of creditors other than the ECSC.

65. The Commission maintains, however, that transitional measures may possibly already exist in a number of Member States, with the result that those Member States do not have to enact any such provisions. It is for the national courts, according to the Commission, to determine whether or not that is so, and in the event that it is, the second paragraph of Article 4 could have direct effect in those Member States.

66. That contention fails to convince me. On the one hand, it is difficult to imagine how an existing law in a Member State may already contain a transitional measure applying to future amendments of that law. On the other hand it must be stressed that the concept of the 'direct effect' of a directive or an ECSC recommendation is a concept of Community law. A provision, in respect of its content, is either unconditional or it is not. In the case before us, it is not.

67. Moreover, it is neither clear nor specific because there is a great deal of uncertainty as to the nature of the 'appropriate transitional measures' and their possible effect. Was the Commission thinking of a means of redress with the sole purpose of obtaining judicial confirmation that the liquidator had correctly conferred the necessary rank on debts owed to the ECSC?

68. Alternatively, should the transitional measures provide that the preference accorded to the ECSC must be exercised exclusively at the expense of the Member State, in that the latter must 'share' its own rights with the ECSC by charging the preferential debts owed to the ECSC to its own preferential debts, in such a way that other creditors find themselves in the same situation as if the preferential rank in respect of debts owed to the ECSC did not exist?

69. On the other hand, does the provision envisage a transitional measure which provides that when liabilities of an insolvent undertaking have been assessed by the liquidator or when a pro rata allocation of the assets has already been made, the ECSC may no longer call that decision into question?

70. It would appear, for those reasons, that the second paragraph of Article 4 of the recommendation, applicable in the *Busseni* case, cannot, in principle, be regarded as an 'unconditional and sufficiently precise' provision.

71. Nevertheless, cases might arise in which no individual holds a debt of a rank lower than or equal to that of the ECSC and in which only the preferential status of the ECSC and that of the State are in competition. Let us suppose for example that LIT 500 million remain to be distributed and that the two debts mentioned above each amount to LIT 500 million. My view is that in such a case the national authorities would be correct in dividing the available assets in equal amounts between the State and the ECSC, because the State *itself* would thereby be obliged to make a *direct* sacrifice for the benefit of the ECSC. The position would be the same where the total assets still available were, in any case, sufficient only to meet debts owed to the State and where no individual was entitled to a portion of the assets.

72. Since the application of Articles 1 and 2 of Recommendation 86/198 in those potential situations entails consequences as against the State alone, I believe that those provisions should be capable of being relied on directly by an individual, in this case the ECSC itself.

73. Support for that view is to be found in the *Marshall* judgment, already cited, where it was stated that:

'... where a person involved in legal proceedings is able to rely on a directive as against the State he may do so *regardless of the capacity in which the latter is acting*, whether employer or public authority. In either case it is necessary *to prevent the State from taking advantage of its own failure to comply* with Community law' (paragraph 49).

In the present case, the State is affected in its capacity as the creditor of an insolvent undertaking.

74. With some reservations I would even go a step further and observe that, even if there are creditors other than the State and the ECSC, the competent national authorities are entitled, without affecting the rights of those other creditors, to divide the amount normally reserved for the State between it and the ECSC on a pro rata basis in accordance with their respective claims.

75. I do not, however, believe that one should go further and allow the ECSC to set the full amount which it would have received (if the recommendation had been implemented) against that of the State, because that would amount in practice to granting to debts owed to the ECSC, not the same rank as that reserved for tax debts owed to the State, as envisaged by the recommendation, but rather a higher rank.

76. That approach is equally valid in the context of proceedings for recovery which are in progress. The State cannot be allowed to shelter behind its failure to introduce adequate legal safeguards for its own rights as creditor for the purpose of denying to debts owed to the ECSC the same rank as that falling on tax debts owed to itself. According to the case-law of the Court, the State may not rely, as against the ECSC, on its own non-compliance with the obligation devolving on it under the second paragraph of Article 4 and cannot thereby take advantage of its failure to comply with Community law.

77. In view of all the foregoing considerations, I would suggest that the Court replies as follows to the first question submitted by the tribunale civile e penale di Brescia:

'The European Coal and Steel Community cannot rely, to the prejudice of individuals, on provisions of Recommendation 86/198 which have not yet been implemented in national law. It may, however, rely on that recommendation as against the Member State concerned and the national court is obliged to entertain such a claim when it may be satisfied by dividing on a pro rata basis between the ECSC and the State that portion of the assets normally devolving on the State by virtue of its preferential status with regard to tax debts.'

III — The question of the application of Recommendation 86/198 to debts arising prior to its adoption

78. In its second preliminary question, to be considered if Recommendation 86/198 does have 'direct and immediate effect', the national court asks if the recommendation applies not only to debts arising after its adoption on 13 May 1986, but also to those which arose prior to that date. In order to answer that question, three situations may be envisaged.

79. A — In so far as that question concerns the capacity of the recommendation to be relied upon as against individuals, it serves no purpose, in my opinion, bearing in mind the reply to the first question.

80. B — Regarding its capacity to be relied upon, as against the State, to the extent outlined above, it may suffice to observe that the recommendation applies to debts in respect of ECSC levies irrespective of the date on which they arose. Indeed, the recommendation draws no distinction between those debts, but simply provides that it applies to 'all cases of competition between creditors provided for by their national laws' (Article 1), including, under the conditions laid down in the second part of the second paragraph of Article 4, 'proceedings in progress on the date of [its] actual implementation'. Moreover, it follows expressly from the seventh recital in the preamble to the recommendation that its application to proceedings in progress is intended to 'ensure the most extensive possible recovery of *debts arising* from the application of levies *in the years preceding the adoption* of the recommendation.'

81. C — As the relevant texts are very clear and do not give rise, in general, to any difficulties of interpretation, it seems possible to me that the second question should be understood as referring in reality to the validity of the recommendation, in so far as the fact that it applies to debts arising prior to its adoption would confer on it an illegal retrospective effect.

82. In that connection it is first of all necessary to state that the recommendation has no truly retrospective effect, of such a kind as might make it applicable to a date preceding its adoption. It is intended to come into force at the moment when national provisions adopted for its implementation enter into effect, by 1

January 1988 at the latest. The provision that in future certain debts, even existing ones, shall have a preferential rank, in respect of competition among creditors, certainly does not amount to a retrospective measure.

83. To the extent to which that may possibly give rise to criticism based on the principle of legal certainty, two comments are necessary.

84. First, since levies are the principal source of revenue of the ECSC (third recital), the Community may have felt justified in ensuring the most extensive possible recovery of debts arising from their application, including those arising in the years preceding the adoption of the recommendation (seventh recital).

85. Secondly, the Court has consistently held that

'... the field of application of the principle of legitimate expectation cannot be extended to the point of generally preventing new rules from applying to the future effects of situations which arose under the earlier rules'. [16]

86. Recommendation 86/198 may thus be applied to situations which arose prior to its entry into force but which had not been definitively settled at that date.

87. Finally, we have seen that, in so far as the recommendation is to apply to proceedings for recovery already in progress at the moment of its implementation, Member States are required to ensure that they do not prejudice rights acquired by other creditors under the provisions of the previously applicable national law. To the extent to which those creditors might have expected, in all confidence, that debts owed to them would continue to be treated in the manner laid down by national law when they first arose, it must be pointed out that the recommendation itself prescribes the adoption of the provisions necessary for their legitimate expectation to be duly protected.

88. On the basis of the preceding considerations, I would suggest that the Court gives the following answer to the second question referred by the tribunale civile e penale di Brescia:

'The aforementioned recommendation could validly stipulate that measures adopted for its implementation should apply to debts arising after the date of its adoption, as well as to those arising prior to that date, on the understanding that in proceedings for recovery already in progress at the date of its implementation, adequate legal safeguards for the rights of creditors other than the ECSC are ensured.'

16 — See in particular the judgment of 14 January 1987 in Case 278/84 *Germany* v *Commission* [1987] ECR 1, paragraph 36.

IV — The mandatory nature of the time-limit laid down for the implementation of Recommendation 86/198

89. In its third question, the national court asks whether the time-limit of 1 January 1988 laid down by Article 4 of the recommendation is mandatory, so that failure to comply with it gives rise, according to the case-law of the Italian Constitutional Court, to doubts as to the constitutionality of the Italian legislation (on the ground of infringement of Article 11 of the Italian Constitution).

90. It is clear that in the context of a reference for a preliminary ruling the Court has no jurisdiction to rule on the consequences in national law of a potential breach of a provision of Community law. However, should the Court wish to reply to the first part of the question, it would suffice to point out that while under the third paragraph of Article 14 of the ECSC Treaty recommendations leave the choice of the methods to those to whom they are addressed, they are none the less *binding* as to the aims to be pursued. The latter include the entry into force, within the periods stipulated, of national provisions necessary for their implementation. It cannot therefore be doubted that the time-limit of 1 January 1988 is mandatory and that any failure to comply with it constitutes, on the part of the Member State involved, a failure to fulfil one of the obligations devolving on it under the ECSC Treaty and which is capable of giving rise to proceedings for failure to fulfil obligations as referred in Article 88 of that Treaty.

91. I therefore propose that the Court answers the third question as follows:

'The time-limit laid down by Article 4 of Recommendation 86/198 for the entry into force of national provisions necessary for the implementation of that Recommendation is mandatory. The Court has no jurisdiction, however, to express an opinion on the consequences in national law of a failure to comply with that time-limit.'