



Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

4 September 2014*

(Request for a preliminary ruling — Judicial cooperation in civil matters — Insolvency proceedings — Definition of ‘establishment’ — Group of companies — Establishment — Right to request the opening of secondary insolvency proceedings — Criteria — Person empowered to request the opening of secondary insolvency proceedings)

In Case C-327/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Cour d’appel de Bruxelles (Belgium), made by decision of 7 June 2013, received at the Court on 17 June 2013, in the proceedings

Burgo Group SpA

v

Illochroma SA, in liquidation,

Jérôme Theetten, acting in his capacity as liquidator of Illochroma SA,

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, A. Borg Barthet, E. Levits, M. Berger (Rapporteur) and S. Rodin, Judges,

Advocate General: M. Szpunar,

Registrar: L. Carrasco Marco, Administrator,

having regard to the written procedure and further to the hearing on 2 April 2014,

after considering the observations submitted on behalf of:

- Burgo Group SpA, by R. Huberty and S. Voisin, avocats,
- Illochroma SA, in liquidation, and Mr Theetten, acting in his capacity as liquidator of Illochroma SA, by J. E. Kuntz, avocat,
- the Belgian Government, by M. Jacobs and L. Van den Broeck, acting as Agents, and by F. Gosselin, avocat,
- the German Government, by T. Henze and J. Kemper, acting as Agents,

* Language of the case: French.

- the Greek Government, by M. Germani, acting as Agent,
- the Spanish Government, by J. García-Valdecasas Dorrego, acting as Agent,
- the Polish Government, by B. Czech and M. Arciszewski, acting as Agents,
- the European Commission, by M. Wilderspin, acting as Agent,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,
gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Articles 3, 16 and 27 to 29 of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (OJ 2000 L 160, p. 1) ('Regulation No 1346/2000').
- 2 The request has been made in proceedings between, on the one hand, Burgo Group SpA ('Burgo Group') and, on the other, Illochroma SA ('Illochroma'), in liquidation, and Maître Theetten, acting in his capacity as liquidator of Illochroma, concerning the opening, in Belgium, of secondary insolvency proceedings ('secondary proceedings') relating to the assets of Illochroma.

Legal context

- 3 Recitals 11, 12 and 17 to 19 in the preamble to Regulation No 1346/2000 state as follows:
 - '(11) This Regulation acknowledges the fact that as a result of widely differing substantive laws it is not practical to introduce insolvency proceedings with universal scope in the entire Community. The application without exception of the law of the State of opening of proceedings would, against this background, frequently lead to difficulties. ... This Regulation should take account of this ... [by making provision for] national proceedings covering only assets situated in the State of opening [which] should also be allowed alongside main insolvency proceedings ["the main proceedings"] with universal scope.
 - (12) ... To protect the diversity of interests, this Regulation permits secondary proceedings to be opened to run in parallel with the main proceedings. Secondary proceedings may be opened in the Member State where the debtor has an establishment. ...
- ...
- (17) Prior to the opening of the main ... proceedings, the right to request the opening of insolvency proceedings in the Member State where the debtor has an establishment should be limited to local creditors and creditors of the local establishment or to cases where main proceedings cannot be opened under the law of the Member State where the debtor has the centre of his main interest. The reason for this restriction is that cases where territorial insolvency proceedings are requested before the main ... proceedings are intended to be limited to what is absolutely necessary. If the main ... proceedings are opened, the territorial proceedings become secondary.

- (18) Following the opening of the main ... proceedings, the right to request the opening of insolvency proceedings in a Member State where the debtor has an establishment is not restricted by this Regulation. The liquidator in the main proceedings or any other person empowered under the national law of that Member State may request the opening of secondary ... proceedings.
- (19) Secondary ... proceedings may serve different purposes, besides the protection of local interests. Cases may arise where the estate of the debtor is too complex to administer as a unit or where differences in the legal systems concerned are so great that difficulties may arise from the extension of effects deriving from the law of the State of the opening to the other States where the assets are located. For this reason the liquidator in the main proceedings may request the opening of secondary proceedings when the efficient administration of the estate so requires.’

4 Article 2 of Regulation No 1346/2000, entitled ‘Definitions’, provides:

‘For the purposes of this Regulation:

...

- (h) “establishment” shall mean any place of operations where the debtor carries out a non-transitory economic activity with human means and goods.’

5 Article 3 of Regulation No 1346/2000, entitled ‘International jurisdiction’, states:

‘1. The courts of the Member State within the territory of which the centre of a debtor’s main interests is situated shall have jurisdiction to open insolvency proceedings. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary.

2. Where the centre of a debtor’s main interests is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if he possesses an establishment within the territory of that other Member State. The effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State.

3. Where insolvency proceedings have been opened under paragraph 1, any proceedings opened subsequently under paragraph 2 shall be secondary proceedings. These latter proceedings must be winding-up proceedings.

4. Territorial insolvency proceedings referred to in paragraph 2 may be opened prior to the opening of main ... proceedings in accordance with paragraph 1 only:

...

- (b) where the opening of territorial insolvency proceedings is requested by a creditor who has his domicile, habitual residence or registered office in the Member State within the territory of which the establishment is situated, or whose claim arises from the operation of that establishment.’

6 Under Article 16(1) of Regulation No 1346/2000, ‘[a]ny judgment opening insolvency proceedings handed down by a court of a Member State which has jurisdiction pursuant to Article 3 shall be recognised in all the other Member States from the time that it becomes effective in the State of the opening of proceedings’.

7 Article 27 of that regulation, entitled ‘Opening of proceedings’, provides:

‘The opening of the proceedings referred to in Article 3(1) by a court of a Member State and which is recognised in another Member State (main proceedings) shall permit the opening in that other Member State, a court of which has jurisdiction pursuant to Article 3(2), of secondary ... proceedings without the debtor’s insolvency being examined in that other State. ... Their effects shall be restricted to the assets of the debtor situated within the territory of that other Member State.’

8 Article 28 of Regulation No 1346/2000, entitled ‘Applicable law’, states:

‘Save as otherwise provided in this Regulation, the law applicable to secondary proceedings shall be that of the Member State within the territory of which the secondary proceedings are opened.’

9 Article 29 of that regulation, entitled ‘Right to request the opening of proceedings’, provides:

‘The opening of secondary proceedings may be requested by:

- (a) the liquidator in the main proceedings;
- (b) any other person or authority empowered to request the opening of insolvency proceedings under the law of the Member State within the territory of which the opening of secondary proceedings is requested.’

10 Article 40(1) of Regulation No 1346/2000 provides:

‘As soon as insolvency proceedings are opened in a Member State, the court of that State having jurisdiction or the liquidator appointed by it shall immediately inform known creditors who have their habitual residences, domiciles or registered offices in the other Member States.’

The dispute in the main proceedings and the questions referred for a preliminary ruling

11 On 21 April 2008, the Tribunal de commerce de Roubaix-Tourcoing (Commercial Court, Roubaix-Tourcoing) (France) placed all the companies in the Illochroma group — including Illochroma, established in Brussels (Belgium) — into receivership and appointed Maître Theetten as agent. On 25 November 2008, the Tribunal de commerce de Roubaix-Tourcoing placed Illochroma in liquidation and appointed Maître Theetten as liquidator.

12 Burgo Group, established in Altavilla-Vicentina-Vicenza (Italy), is owed money by Illochroma for the supply of goods. On 4 November 2008, Burgo Group presented Maître Theetten with a statement of liability in the amount of EUR 359 778.48.

13 By letter of 5 November 2008, Maître Theetten informed Burgo Group that the statement of liability could not be taken into account because it was out of time.

14 On 15 January 2009, Burgo Group requested the opening of secondary proceedings in respect of Illochroma before the Tribunal de commerce de Bruxelles (Commercial Court, Brussels) (Belgium). Since that request was rejected at first instance, Burgo Group brought an appeal before the referring court by which it continues to seek the form of order sought at first instance.

15 The referring court observes in that regard that Regulation No 1346/2000 defines ‘establishment’ as any place where the debtor carries out a non-transitory economic activity with human means and goods, which is the situation in the present case. Illochroma is a company with two establishments in Belgium, where it is the owner of a building, buys and sells goods and employs staff.

- 16 On the other hand, the respondents in the main proceedings contend that, since Illochroma has its registered office in Belgium, it cannot be regarded as an establishment within the meaning of Regulation No 1346/2000. Secondary proceedings are restricted to establishments without legal personality.
- 17 According to the referring court, Belgian law applicable to the present case provides that any creditor, including a creditor established outside Belgium, may bring an action before a Belgian court for the opening of insolvency proceedings against its debtor. However, Illochroma maintains that that right is restricted to creditors established in the Member State of the court before which the action seeking the opening of secondary proceedings has been brought, since the sole purpose of such proceedings is to protect local interests.
- 18 Lastly, the referring court observes that Regulation No 1346/2000 does not state whether the possibility for the persons referred to in Article 29 thereof to request, in the Member State within the territory of which the establishment is situated, the opening of secondary proceedings is a right that must be recognised by the court having jurisdiction in that regard or whether that court enjoys a discretion as to whether it is appropriate to grant that request, with a view, in particular, to protecting local interests.
- 19 In those circumstances, the Cour d'appel de Bruxelles decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'Must [Regulation No 1346/2000] and, in particular, Articles 3, 16 and 27 to 29 thereof, be interpreted to the effect that:

1. "establishment", as referred to in Article 3(2), must be understood as referring to a branch of the debtor against which main insolvency proceedings have been opened and precludes, in the context of the concurrent winding-up of a number of companies belonging to a single group, secondary proceedings from being brought against those companies in the Member State in which their registered office is situated, on the ground that they possess legal personality?
2. the person or authority empowered to request the opening of secondary proceedings must reside or have its registered office in the territory of the Member State of the court before which the action seeking the opening of secondary proceedings has been brought or must all European Union citizens have that right of action, provided that they can demonstrate a legal link to the establishment concerned? and
3. in so far as main ... proceedings are winding-up proceedings, the opening of secondary ... proceedings against an establishment is possible only if they meet the criteria as to appropriateness, which lie within the discretion of the court ... before which the action seeking the opening of secondary proceedings has been brought?'

Consideration of the questions referred

The first question

- 20 By its first question, the referring court asks, in essence, whether Article 3(2) of Regulation No 1346/2000 must be interpreted to the effect that, where winding-up proceedings are opened in respect of a company in a Member State other than that in which it has its registered office, secondary proceedings may also be opened in respect of that company in the Member State in which its registered office is situated and in which it possesses legal personality.

- 21 Burgo Group, the German, Greek, Spanish and Polish Governments and the European Commission submit that Regulation No 1346/2000 does not preclude, in a situation such as that at issue in the main proceedings, the opening of secondary proceedings.
- 22 In particular, Burgo Group considers that the definition of ‘establishment’ in Article 2(h) of Regulation No 1346/2000 is clear and that no account is taken of the concept of ‘branch’ or that of ‘legal personality’. Moreover, there is nothing in the wording of Article 3(2) of that regulation to preclude the opening of secondary proceedings in respect of a legal person whose registered office is situated within the same territory as the establishment unit which justifies the jurisdiction of the court before which such secondary proceedings are brought, as long as it is established that the centre of that legal person’s main interests is situated in another Member State.
- 23 On the other hand, the respondents in the main proceedings submit that Illochroma does not possess an ‘establishment’ in Belgium. They maintain that Illochroma is a legal person governed by Belgian law and, therefore, in Belgium, it would be possible to open main proceedings in respect of Illochroma only if such proceedings had not already been opened in France, where the centre of Illochroma’s main interests is situated.
- 24 The Belgian Government adds that it was incorrect for the main proceedings to be opened in France, as the centre of Illochroma’s main interests is situated in Belgium.
- 25 At the hearing, the Polish Government stated that, while Article 3(2) of Regulation No 1346/2000 must be interpreted as permitting, in a situation such as that at issue in the main proceedings, the opening of secondary proceedings, it should be ensured that the place in which the centre of a company’s main interests is situated is determined strictly in accordance with the criteria laid down by the Court in its judgment in *Eurofood IFSC*, C-341/04, EU:C:2006:281.
- 26 In that regard, it should be borne in mind that Article 3(1) of Regulation No 1346/2000 states that the courts of the Member State within the territory of which the centre of a debtor’s main interests is situated are to have jurisdiction to open main proceedings.
- 27 In that context, under Article 16(1) of Regulation No 1346/2000, main proceedings in one Member State are to be recognised in all the other Member States from the time that they become effective in the State in which the proceedings were opened. That rule means that the courts of the other Member States are to recognise the judgment opening main proceedings, without being able to review the assessment made by the first court as to its jurisdiction (judgment in *Bank Handlowy and Adamiak*, C-116/11, EU:C:2012:739, paragraph 41 and the case-law cited).
- 28 It follows that the decision taken by the court of a Member State to open main proceedings in respect of a debtor company, and the finding, at least by implication, that the centre of the debtor company’s main interests is situated in that Member State, cannot, in principle, be called into question by the courts of the other Member States.
- 29 As regards the centre of such a debtor’s main interests, the second sentence of Article 3(1) of Regulation No 1346/2000 provides that, in the case of a company or legal person, the place of the registered office is presumed to be the centre of its main interests, in the absence of proof to the contrary. It is thus apparent from the very wording of that provision that the centre of a company’s main interests may, for the purposes of applying that regulation, be different from the place of its registered office.
- 30 Moreover, it should be borne in mind that recital 18 in the preamble to Regulation No 1346/2000 states that, following the opening of the main proceedings, the regulation does not preclude a request to open insolvency proceedings in a Member State where the debtor has an establishment. Article 3(2)

of that regulation thus provides that, in such a case, the courts of another Member State are to have jurisdiction to open secondary proceedings against a debtor only if he possesses an establishment within the territory of that other Member State.

- 31 'Establishment' is defined in Article 2(h) of Regulation No 1346/2000 as 'any place of operations where the debtor carries out a non-transitory economic activity with human means and goods'. As the Court has already held, the fact that that definition links the pursuit of an economic activity to the presence of human resources shows that a minimum level of organisation and a degree of stability are required. It follows that, conversely, the presence alone of goods in isolation or bank accounts does not, in principle, satisfy the requirements for classification as an 'establishment' (judgment in *Interedil*, C-396/09, EU:C:2011:671, paragraph 62).
- 32 On the other hand, it is not disputed that there is no reference in the definition in Article 2(h) of that regulation to the place of the registered office of a debtor company or to the legal status of the place in which the operations in question are carried out. The wording of that provision does not therefore rule out the possibility that, for the purposes of that provision, an establishment may possess legal personality and be situated in the Member State where that company has its registered office, provided that it meets the criteria set out in that provision.
- 33 Such an interpretation is further supported by the objectives underlying the possibility, provided, *inter alia*, in Article 29(b) of Regulation No 1346/2000, of requesting the opening of secondary proceedings.
- 34 Recital 11 in the preamble to Regulation No 1346/2000 states that 'as a result of widely differing substantive laws it is not practical to introduce insolvency proceedings with universal scope in the entire Community', that '[t]he application without exception of the law of the State of opening of proceedings would, against this background, frequently lead to difficulties' and, lastly, that the regulation should take account of this by making provision for, *inter alia*, 'national proceedings covering only assets situated in the State of opening'. Thus, recital 12 states that the opening of secondary proceedings is permitted, *inter alia*, 'to protect the diversity of interests', and recital 19 adds that, besides the protection of local interests, secondary proceedings may serve 'different purposes'.
- 35 Accordingly, if the definition of 'establishment' were to be interpreted as not encompassing a place in which a debtor company conducts operations and which meets the criteria expressly set out in Article 2(h) of Regulation No 1346/2000, being situated within the territory of the Member State in which that company has its registered office, 'local interests' — including the interests of creditors established in that Member State — would be denied the protection afforded by that regulation, in the form of secondary proceedings which may be opened in that Member State.
- 36 In that regard, it should be noted, first, that while the protection afforded to local creditors is, admittedly, not the only objective underlying the possibility of requesting the opening of secondary proceedings, the fact remains that an interpretation such as that set out in paragraph 35 above would clearly be contrary to that primary objective of Regulation No 1346/2000, especially since, in general, it seems likely that 'local' interests worthy of the protection conferred by that regulation may indeed be present in the Member State in which the registered office of the debtor company concerned is situated, even if the centre of that company's main interests is situated in another Member State.
- 37 Such interests may lie, *inter alia*, in the legitimate expectation of a creditor to be able to request the enforcement of a right *in rem* in respect of the assets of a debtor who is part of the establishment concerned, or to be granted other preferential rights, in accordance with the rules applicable in the Member State where that establishment is situated, since those rules were foreseeable for the creditor when the business relationship was established with the debtor.

- 38 Second, an interpretation such as that set out in paragraph 35 above may give rise to discrimination against creditors established in the Member State where the registered office of the debtor company is situated, by comparison with, inter alia, creditors established in other Member States in which the debtor may have other establishments.
- 39 In those circumstances, the answer to the first question is that Article 3(2) of Regulation No 1346/2000 must be interpreted to the effect that, where winding-up proceedings are opened in respect of a company in a Member State other than that in which it has its registered office, secondary proceedings may also be opened in respect of that company in the other Member State in which its registered office is situated and in which it possesses legal personality.

The second question

- 40 By its second question, the referring court asks, in essence, whether Article 29(b) of Regulation No 1346/2000 must be interpreted to the effect that the person or authority empowered to request the opening of secondary proceedings must reside or have its registered office in the Member State in which the action seeking the opening of secondary proceedings has been brought, or that any citizen whose claim arises from the operation of that establishment may request the opening of such proceedings.
- 41 Burgo Group and, in essence, the Belgian and Greek Governments as well as the Commission submit that it is not necessary for the creditor requesting the opening of secondary proceedings to reside or have its registered office in the Member State of the relevant establishment or to prove that its claim arises from the operation of that establishment. Those conditions apply, pursuant to Article 3(4)(b) of Regulation No 1346/2000, only where the opening of independent territorial proceedings is requested prior to the opening of main proceedings in another Member State. By contrast, after the opening of main proceedings, the conditions for the opening of secondary proceedings are, in principle, governed by the national law of the Member State in which the relevant establishment is situated.
- 42 The respondents in the main proceedings maintain, on the other hand, that, under Belgian law, a request to open secondary proceedings may be properly made only by a creditor residing or having its registered office in Belgium, the Court of Justice not having jurisdiction to interpret the provisions of Belgian law, which are alone decisive for the outcome of the main proceedings.
- 43 According to the German Government, it follows from, inter alia, the objectives pursued by Regulation No 1346/2000 that, while it is national law which determines who, in addition to the liquidator appointed in the main proceedings, is empowered to request the opening of secondary proceedings, that law cannot be based on the registered office or residence, in the Member State concerned, of the creditor or the authority submitting that request.
- 44 The Spanish Government adds that since secondary proceedings do not serve only to protect local interests, *locus standi* cannot be limited to persons with a 'local' link.
- 45 In that regard, it should be borne in mind that, in accordance with Article 29(b) of Regulation No 1346/2000, in addition to the liquidator appointed in the main proceedings, 'any other person or authority empowered to request the opening of insolvency proceedings under the law of the Member State within the territory of which the opening of secondary proceedings is requested' may request the opening of secondary proceedings. It is therefore clear from that provision that the right to request the opening of secondary proceedings must be assessed, in the first place, on the basis of the national law in question.

- 46 However, when adopting national rules governing who is empowered to request the opening of secondary proceedings, the Member States are required, in accordance with settled case-law, to ensure that Regulation No 1346/2000 is effective, bearing in mind its object (see to that effect, *inter alia*, the judgment in *Endress*, C-209/12, EU:C:2013:864, paragraph 23 and the case-law cited).
- 47 On the one hand, as is apparent from paragraph 34 above, the provisions of Regulation No 1346/2000 regarding the right of a creditor to request the opening of secondary proceedings are intended, *inter alia*, to mitigate the effects of the universal application of the law of the Member State within the territory of which the main proceedings have been opened, by permitting, under certain conditions, the opening of secondary proceedings to protect the ‘diversity of interests’, including interests other than ‘local interests’.
- 48 On the other hand, it is apparent from recitals 17 and 18 in the preamble to Regulation No 1346/2000 and from Article 3(2) and (4) thereof that a clear distinction is drawn by that regulation between territorial proceedings opened prior to the opening of main proceedings and secondary proceedings. It is only in relation to such territorial proceedings that the right to request the opening of proceedings is limited to creditors who have their domicile, habitual residence or registered office within the Member State in which the relevant establishment is situated, or whose claims arise from the operation of that establishment (see, to that effect, the judgment in *Zaza Retail*, C-112/10, EU:C:2011:743, paragraph 30). It follows, *a contrario*, that those limitations do not apply to secondary proceedings.
- 49 Lastly, as regards, more specifically, the possibility of limiting the right to request the opening of secondary proceedings to local creditors, such a limitation would draw a distinction based on criteria liable to operate mainly to the detriment of nationals of other Member States, since non-residents are in the majority of cases foreigners. Such a distinction would constitute indirect discrimination on grounds of nationality, which, in accordance with settled case-law, is, in principle, prohibited (see, *inter alia*, the judgment in *Commission v Italy*, C-388/01, EU:C:2003:30, paragraph 14 and the case-law cited).
- 50 While, with regard to the opening of territorial proceedings prior to the opening of main proceedings, recital 17 in the preamble to Regulation No 1346/2000 gives express justification for the preferential treatment, provided for in Article 3(4)(b) of that regulation, of creditors who have their domicile or registered office in the Member State within the territory of which the relevant establishment is situated and of creditors whose claims arise from the operation of that establishment, a justification based on the concern that the opening of independent territorial proceedings prior to the opening of main proceedings should be limited to what is absolutely necessary, such justification has not been put forward and could not, on the basis of Regulation No 1346/2000, be justified so far as concerns secondary proceedings.
- 51 In the light of all the foregoing, the answer to the second question is that Article 29(b) of Regulation No 1346/2000 must be interpreted to the effect that the question as to which person or authority is empowered to seek the opening of secondary proceedings must be determined on the basis of the national law of the Member State within the territory of which the opening of such proceedings is sought. The right to seek the opening of secondary proceedings cannot, however, be restricted to creditors who have their domicile or registered office within the Member State in whose territory the relevant establishment is situated, or to creditors whose claims arise from the operation of that establishment.

The third question

- 52 By its third question, the referring court asks, in essence, whether, where the main proceedings are winding-up proceedings, the opening of secondary proceedings against an establishment is possible only if they meet the criteria as to appropriateness, which lie within the discretion of the court before which the action seeking the opening of secondary proceedings has been brought.
- 53 Burgo Group submits that the right, not merely the option, to request the opening of secondary proceedings operates as a corrective to the principle that insolvency proceedings should have universal scope as referred to in Regulation No 1346/2000, and that regulation does not provide for the examination of criteria as to appropriateness by the court before which the action seeking the opening of secondary proceedings has been brought.
- 54 The respondents in the main proceedings maintain, on the other hand, that the opening of secondary proceedings is merely an option available to the courts and that the insolvency claimant must establish an interest in the opening of those proceedings and show that they will enable him to obtain a higher ranking or other preferential right.
- 55 The Belgian Government notes the broad discretion, with regard to the opening of secondary proceedings, enjoyed by the court before which an action seeking the opening of secondary proceedings has been brought under Article 29 of Regulation No 1346/2000.
- 56 The German and Greek Governments agree, in essence, with the position of the Burgo Group. The overall scheme and objectives of Regulation No 1346/2000 support an interpretation to the effect that the court concerned may not, in that context, examine criteria as to appropriateness. The question as to whether the main proceedings which have already been opened are winding-up or rescue proceedings is not, in that regard, a determining factor.
- 57 The Spanish Government notes that, unlike the proceedings in the case giving rise to the judgment in *Bank Handlowy and Adamiak* (EU:C:2012:739, paragraph 63), the main proceedings at issue in the present case are winding-up proceedings. Moreover, in *Bank Handlowy and Adamiak*, the Court did not refer to the option of whether or not to request the opening of secondary proceedings, but simply to the role of the court once secondary proceedings have been opened.
- 58 In the light of the judgment in *Bank Handlowy and Adamiak* (EU:C:2012:739), the Commission concludes that Regulation No 1346/2000 does not require the opening of secondary proceedings but merely provides for such an option. If the creditor seeking the opening of secondary proceedings has failed to lodge his claim in the main proceedings within the period prescribed, his interest in lodging it in the secondary proceedings may be accepted only where he has not been duly notified of the opening of the main proceedings in accordance with Article 40 of Regulation No 1346/2000.
- 59 For the purpose of answering the third question, it should be borne in mind, first of all, that, under Article 27 of Regulation No 1346/2000, the opening of main proceedings means that it is possible to open secondary proceedings in another Member State, a court of which has jurisdiction pursuant to Article 3(2) of that regulation. As is apparent from the Court's case-law, the opening of such proceedings is possible both where the main proceedings have a protective purpose and, *a fortiori*, where the main proceedings are winding-up proceedings (see, to that effect, the judgment in *Bank Handlowy and Adamiak*, EU:C:2012:739, paragraph 63).
- 60 In addition, it should be recalled that, under Article 28 of Regulation No 1346/2000, save as otherwise provided in that regulation, the law applicable to secondary proceedings is that of the Member State within the territory of which the secondary proceedings are opened.

- 61 In that regard, it must also be observed that recital 12 in the preamble to, and Article 27 of, Regulation No 1346/2000 simply permit the opening of secondary proceedings, at the request of the persons identified in Article 29 of that regulation, but do not expressly confer on the courts which have jurisdiction — irrespective of the national law applicable — discretion relating to whether factors demonstrating appropriateness are to be taken into account in that context.
- 62 Moreover, while Chapter III of Regulation No 1346/2000, entitled ‘Secondary insolvency proceedings’, contains a number of provisions concerning, inter alia, the duty of the liquidators appointed in the main proceedings and any ongoing secondary proceedings to cooperate with each other, it does not contain the slightest indication as to any criteria relating to ‘appropriateness’ which should be taken into account by the court before which the action seeking the opening of secondary proceedings has been brought.
- 63 It follows that, in principle, in so far as Regulation No 1346/2000 does not contain any provisions requiring the court which has jurisdiction to open, or prohibiting that court from opening, in certain circumstances, secondary proceedings, the question whether that court enjoys discretion in that regard enabling it, inter alia, to take account of factors demonstrating appropriateness is governed by the national law of the Member State within the territory of which the opening of secondary proceedings is sought.
- 64 However, it should be borne in mind in that context, first, that Member States must, when establishing the conditions to be met for secondary proceedings to be opened, comply with EU law and, in particular, its general principles as well as the provisions of Regulation No 1346/2000 (see, to that effect, the judgment in *Deutsche Lufthansa*, C-109/09, EU:C:2011:129, paragraph 37 and the case-law cited). Accordingly, Member States cannot, inter alia, establish conditions for the opening of secondary proceedings which draw a distinction, in breach of the principle of non-discrimination, between creditors seeking the opening of such proceedings on the basis of their place of residence or registered office.
- 65 Second, the court before which the action seeking the opening of secondary proceedings has been brought must have regard, in applying its national law, to the objectives underlying the possibility of opening such proceedings, as set out in paragraph 34 above.
- 66 Third, it should be observed that, after the opening of secondary proceedings, the court that has opened those proceedings must have regard to the objectives of the main proceedings and take account of the overall scheme of Regulation No 1346/2000, in keeping with the principle of sincere cooperation (judgment in *Bank Handlowy and Adamiak*, EU:C:2012:739, paragraph 63).
- 67 In the light of all the foregoing, the answer to the third question is that Regulation No 1346/2000 must be interpreted to the effect that, where the main proceedings are winding-up proceedings, whether the court before which the action seeking the opening of secondary proceedings has been brought may take account of criteria as to appropriateness is governed by the national law of the Member State within the territory of which the opening of secondary proceedings is sought. However, when establishing the conditions for the opening of secondary proceedings, Member States must comply with EU law and, in particular, its general principles, as well as the provisions of that regulation.

Costs

- 68 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

1. **Article 3(2) of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings must be interpreted to the effect that, where winding-up proceedings are opened in respect of a company in a Member State other than that in which it has its registered office, secondary insolvency proceedings may also be opened in respect of that company in the other Member State in which its registered office is situated and in which it possesses legal personality.**
2. **Article 29(b) of Regulation No 1346/2000 must be interpreted to the effect that the question as to which person or authority is empowered to seek the opening of secondary proceedings must be determined on the basis of the national law of the Member State within the territory of which the opening of such proceedings is sought. The right to seek the opening of secondary proceedings cannot, however, be restricted to creditors who have their domicile or registered office within the Member State in whose territory the relevant establishment is situated, or to creditors whose claims arise from the operation of that establishment.**
3. **Regulation No 1346/2000 must be interpreted to the effect that, where the main insolvency proceedings are winding-up proceedings, whether the court before which the action seeking the opening of secondary insolvency proceedings has been brought may take account of criteria as to appropriateness is governed by the national law of the Member State within the territory of which the opening of secondary proceedings is sought. However, when establishing the conditions for the opening of secondary proceedings, Member States must comply with EU law and, in particular, its general principles, as well as the provisions of that regulation.**

[Signatures]