



Reports of Cases

OPINION OF ADVOCATE GENERAL

BOT

delivered on 4 April 2019¹

Case C-47/18

Skarb Państwa Rzeczypospolitej Polskiej — Generalny Dyrektor Dróg Krajowych i Autostrad

v

Stephan Riel, acting as administrator in the insolvency proceedings opened against Alpine Bau GmbH

(Request for a preliminary ruling from the Oberlandesgericht Wien (Higher Regional Court, Vienna, Austria))

(Reference for a preliminary ruling — Regulation (EU) No 1215/2012 — Jurisdiction in civil and commercial matters — Scope — Article 1(2)(b) — Bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings — Action for a declaration of the existence of a claim for the purpose of registering it in insolvency proceedings — Insolvency proceedings — Regulation (EC) No 1346/2000 — Article 41 — Content of the lodgement of a claim — Maximum requirements — Incomplete claim — Missing information inferred from the supporting documents — Conditions for the application of the law of the Member State of the opening of the main insolvency proceedings)

I. Introduction

1. This request for a preliminary ruling concerns the interpretation of Article 1(2)(b) and Article 29(1) of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters² and of Article 41 of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings.³

2. The request has been made in proceedings between the Skarb Państwa Rzeczypospolitej Polskiej — Generalny Dyrektor Dróg Krajowych i Autostrad (State Treasury of the Republic of Poland — National Director for Main Roads and Motorways, Poland, ('the applicant') and Mr Stephan Riel, acting as administrator in the main insolvency proceedings opened in Austria against Alpine Bau GmbH, concerning an action for a declaration of the existence of a claim.

3. By its fourth and fifth questions referred for a preliminary ruling, which form the main subject of my analysis, the Oberlandesgericht Wien (Higher Regional Court, Vienna, Austria) expresses uncertainty as to the standard required under EU law in order for a claims form in main insolvency proceedings to be valid, where that form contains no details regarding the date on which the claim arose although that date may be inferred from the supporting documents submitted.

¹ Original language: French.

² OJ 2012 L 351, p. 1.

³ OJ 2000 L 160, p. 1.

4. I shall explain why a flexible interpretation of Article 41 of Regulation No 1346/2000 is needed, which will lead me to take the view that the requirements of that provision are fulfilled so long as the details concerning the date on which the claim arose may be inferred from the documents submitted by the creditor, and to note that the consequences of the absence of such details at the stage of verification of the claim are governed by the law of the Member State of the opening of the proceedings (*lex concursus*).

II. Legal context

A. *European Union law*

1. *Regulation No 1215/2012*

5. Article 1 of Regulation No 1215/2012 provides:

‘1. This Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (*acta jure imperii*).

2. This Regulation shall not apply to:

...

(b) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings;

...’

2. *Regulation No 1346/2000*

6. Recitals 2, 8, 12, 18 to 21 and 23 of Regulation No 1346/2000 state:

‘(2) The proper functioning of the internal market requires that cross-border insolvency proceedings should operate efficiently and effectively and this Regulation needs to be adopted in order to achieve this objective ...

...

(8) In order to achieve the aim of improving the efficiency and effectiveness of insolvency proceedings having cross-border effects, it is necessary, and appropriate, that the provisions on jurisdiction, recognition and applicable law in this area should be contained in a Community law measure which is binding and directly applicable in Member States.

...

(12) This Regulation enables the main insolvency proceedings to be opened in the Member State where the debtor has the centre of his main interests. These proceedings have universal scope and aim at encompassing all the debtor’s assets. 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. The effects of secondary proceedings are limited to the assets located in that State. Mandatory rules of coordination with the main proceedings satisfy the need for unity in the Community.

...

- (18) Following the opening of the main insolvency proceedings, this Regulation does not restrict the right to request the opening of insolvency proceedings in a Member State where the debtor has an establishment. 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 insolvency proceedings.
- (19) Secondary insolvency proceedings can 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.
- (20) Main insolvency proceedings and secondary proceedings can, however, contribute to the effective realisation of the total assets only if all the concurrent proceedings pending are coordinated. The main condition here is that the various liquidators must cooperate closely, in particular by exchanging a sufficient amount of information. In order to ensure the dominant role of the main insolvency proceedings, the liquidator in such proceedings should be given several possibilities for intervening in secondary insolvency proceedings which are pending at the same time. For example, he should be able to propose a restructuring plan or composition or apply for realisation of the assets in the secondary insolvency proceedings to be suspended.
- (21) Every creditor, who has his habitual residence, domicile or registered office in the Community, should have the right to lodge his claims in each of the insolvency proceedings pending in the Community relating to the debtor's assets. ...

...

- (23) This Regulation should set out, for the matters covered by it, uniform rules on conflict of laws which replace, within their scope of application, national rules of private international law. Unless otherwise stated, the law of the Member State of the opening of the proceedings should be applicable (*lex concursus*). This rule on conflict of laws should be valid both for the main proceedings and for local proceedings. The *lex concursus* determines all the effects of the insolvency proceedings, both procedural and substantive, on the persons and legal relations concerned. It governs all the conditions for the opening, conduct and closure of the insolvency proceedings.'

7. Article 3(1) to (3) of that regulation provides:

'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 the 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 it 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.'

8. Article 4 of that regulation provides:

'1. Save as otherwise provided in this Regulation, the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened, hereafter referred to as the "State of the opening of proceedings".

2. The law of the State of the opening of proceedings shall determine the conditions for the opening of those proceedings, their conduct and their closure. It shall determine in particular:

...

(h) the rules governing the lodging, verification and admission of claims;

...'

9. Article 27 of Regulation No 1346/2000 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 insolvency proceedings without the debtor's insolvency being examined in that other State. These latter proceedings must be among the proceedings listed in Annex B. Their effects shall be restricted to the assets of the debtor situated within the territory of that other Member State.'

10. Article 31(1) and (2) of Regulation No 1346/2000 reads as follows:

'1. Subject to the rules restricting the communication of information, the liquidator in the main proceedings and the liquidators in the secondary proceedings shall be duty bound to communicate information to each other. They shall immediately communicate any information which may be relevant to the other proceedings, in particular the progress made in lodging and verifying claims and all measures aimed at terminating the proceedings.

2. Subject to the rules applicable to each of the proceedings, the liquidator in the main proceedings and the liquidators in the secondary proceedings shall be duty bound to cooperate with each other.'

11. Article 32(1) of that regulation states that 'any creditor may lodge his claim in the main proceedings and in any secondary proceedings'.

12. Article 39 of that regulation provides:

'Any creditor who has his habitual residence, domicile or registered office in a Member State other than the State of the opening of proceedings, including the tax authorities and social security authorities of Member States, shall have the right to lodge claims in the insolvency proceedings in writing.'

13. Article 40 of Regulation No 1346/2000 reads as follows:

‘1. 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.

2. That information, provided by an individual notice, shall in particular include time limits, the penalties laid down in regard to those time limits, the body or authority empowered to accept the lodgement of claims and the other measures laid down. Such a notice shall also indicate whether creditors whose claims are preferential or secured in rem need lodge their claims.’

14. Article 41 of that regulation provides:

‘A creditor shall send copies of supporting documents, if any, and shall indicate the nature of the claim, the date on which it arose and its amount, as well as whether he alleges preference, security in rem or a reservation of title in respect of the claim and what assets are covered by the guarantee he is invoking.’

15. Article 42 of that regulation provides:

‘1. The information provided for in Article 40 shall be provided in the official language or one of the official languages of the State of the opening of proceedings. For that purpose a form shall be used bearing the heading “Invitation to lodge a claim. Time limits to be observed” in all the official languages of the institutions of the European Union.

2. Any creditor who has his habitual residence, domicile or registered office in a Member State other than the State of the opening of proceedings may lodge his claim in the official language or one of the official languages of that other State. In that event, however, the lodgement of his claim shall bear the heading “Lodgement of claim” in the official language or one of the official languages of the State of the opening of proceedings. In addition, he may be required to provide a translation into the official language or one of the official languages of the State of the opening of proceedings.’

B. Austrian law

16. Paragraph 102 of the Bundesgesetz über das Insolvenzverfahren (Insolvency Code)⁴ of 10 December 1914, in the version applicable in the main proceedings, provides:

‘Creditors shall lodge their claims in insolvency proceedings pursuant to the following provisions even if a dispute is pending with respect to such claims.’

17. Paragraph 103(1) of the IO provides:

‘The claims form shall state the amount of the claim, the basis of the claim, the rank sought for such claim and the evidence available that can be submitted to prove the claim.’

18. Under Paragraph 104(1) of the IO, claims must be lodged with the insolvency court in writing or put on the record after being made orally.

19. Paragraph 105(1) to (3) of the IO, under the title ‘Verification hearing’, provides:

‘1. The administrator and the debtor shall attend the verification hearing ...

⁴ RGBl. 337/1914, ‘the IO’.

2. The claims lodged shall be verified according to their rank or, in the case of the same rank, verified in the order in which they were lodged.

3. The administrator shall issue a statement concerning the validity and rank of each claim lodged; he shall not be permitted to enter reservations when making that statement.'

20. Under Paragraph 108(1) of the IO, 'the results of the verification hearing shall be recorded in the register of claims lodged'.

21. In accordance with Paragraph 109(1) of the IO, a claim is deemed to be established in insolvency proceedings if it has been admitted by the administrator and has not been contested by any insolvency creditor entitled to do so.

22. Paragraph 110(1) of the IO provides:

'Creditors, the validity or rank of whose claims remain in dispute, may bring an action for a declaration of the existence of those claims against all contesting parties, where the remedy in question is permissible ... The forms of order sought in such an action must be based only on the grounds relied on in the claims form and at the verification hearing and may not seek an amount higher than the amount stated at that time.'

23. Under Paragraph 112(1) of the IO:

'Final decisions concerning the validity and rank of disputed claims shall be effective against all creditors who are parties to the insolvency proceedings.'

III. Facts of the main proceedings and the questions referred for a preliminary ruling

24. The applicant, the authority responsible for administering the Polish State highways, awarded contracts to Alpine Bau, following public tendering procedures, to carry out a number of road construction projects in Poland. Each of the contracts for those projects contained detailed rules about the damages to be paid in the event of a delay in its performance.

25. On 19 June 2013, administration proceedings were opened in Austria in respect of Alpine Bau and Mr Riel was appointed as the administrator for that company.

26. On 4 July 2013, those proceedings were reclassified as winding-up proceedings. The next day, following a decision of the Handelsgericht Wien (Commercial Court, Vienna, Austria), it was recorded in the register of insolvency proceedings that those proceedings were the main insolvency proceedings within the meaning of Regulation No 1346/2000.

27. Secondary insolvency proceedings were opened in Poland in respect of Alpine Bau before the Sąd Rejonowy Poznań (District Court, Poznań, Poland).

28. Claims were lodged by the applicant, on 16 August 2013 and 22 June 2016, in the main insolvency proceedings opened in Austria and on 16 May 2014 and 16 June 2015 in the secondary insolvency proceedings opened in Poland.

29. Most of the claims lodged were contested by Mr Riel, appointed in the context of the main insolvency proceedings in Austria, and by the administrator appointed in the context of the secondary insolvency proceedings in Poland.

30. On 1 April 2015, the applicant brought an action, in Poland, for a declaration of the existence of a claim of 309 663 865 Polish złotych (PLN) (approximately EUR 73 898 402).⁵

31. According to the applicant, on 1 April 2015 Alpine Bau brought an action contesting the admission of a claim of PLN 23 037 496.51 (approximately EUR 5 497 684). It also states that the two actions were joined and are pending before the Sąd Rejonowy Poznań-Stare Miasto w Poznaniu (District Court, Poznań-Stare Miasto, Poland) and that those actions ‘with at most virtually negligible exceptions’, have the same cause of action as the application for a declaration of a claim brought before the Austrian court.

32. On 31 October 2016, the applicant also brought, before the Handelsgericht Wien (Commercial Court, Vienna), an action for a declaration of the existence of a claim in the amount of EUR 64 784 879.43, and requested, under Articles 29 and 30 of Regulation No 1215/2012, that proceedings be stayed until final judgment had been given in the proceedings pending in Poland on the verification of claims.

33. By an interim order of 25 July 2017, that court dismissed the applicant’s action in respect of an amount of EUR 265 132.81, without ruling on the request for a stay of proceedings.

34. The applicant lodged an appeal against that judgment before the Oberlandesgericht Wien (Higher Regional Court, Vienna), claiming, inter alia, a procedural irregularity in that the Handelsgericht Wien (Commercial Court, Vienna) had refused to stay proceedings although this was a strict requirement under Article 29 of Regulation No 1215/2012.

35. The referring court is unsure, first, whether the action for a declaration of a claim pending before it falls within the scope of Regulation No 1215/2012 or Regulation No 1346/2000.

36. Second, it asks whether the rules on *lis pendens* deriving from the first of those regulations would be applicable, directly or analogously, in the event that the second regulation, which does not contain any comparable provisions, were to apply.

37. Third, it expresses uncertainty regarding the scope of the requirements laid down in Article 41 of Regulation No 1346/2000 concerning the content of the lodgement of a claim by creditors established in a Member State. Since details concerning the nature of the claim, the date on which it arose and its amount are set out in that provision in order to assist creditors in exercising their rights, they are required although they are not provided for in the relevant law, namely that of the State of the opening of the proceedings (*lex concursus*).

38. The referring court states, first, that in accordance with national case-law relating to Paragraph 103 et seq. of the IO, the legal requirements governing the content of claims forms in respect of the debtor’s assets must be applied strictly in order have available, at the hearing to verify the claims lodged, all the facts giving rise to the rights on which the action for a declaration of the existence of the claim will subsequently be based. It proceeds to add that, under Austrian law, the date on which the claim arose does not need to be stated. It notes, lastly, that, in the present case, the explanations with regard to the merits of the claim have remained general and the date on which the claim arose is apparent only from the documents submitted by the creditor.

39. It therefore expresses uncertainty as to whether it is possible to take the view that Article 41 of Regulation No 1346/2000 lays down a maximum standard and that the more favourable provisions of the *lex concursus* may be applied, whilst noting that that law governs the effects of the incomplete lodging of a claim within the meaning of that regulation.

⁵ Exchange rate as at 16 May 2014, the date on which the claim was lodged in the insolvency proceedings in Poland. This provides the reference point for the sum quoted subsequently.

40. In those circumstances, the Oberlandesgericht Wien (Higher Regional Court, Vienna) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Is Article 1(2)(b) of Regulation (EU) No 1215/2012 to be interpreted as meaning that an action for a specific declaration in insolvency proceedings under Austrian law concerns insolvency for the purposes of [that provision] and is, therefore, excluded from the material scope of that regulation?

(2) (only in the event that the first question is answered in the affirmative):

Is Article 29(1) of Regulation No 1215/2012 to be applied analogously to related actions falling within the scope of Regulation No 1346/2000?

(3) (only in the event that the first question is answered in the negative or that the second question is answered in the affirmative):

Is Article 29(1) of Regulation No 1215/2012 to be interpreted as meaning that proceedings involving the same cause of action and between the same parties exist when a creditor (the applicant) who has lodged a (largely) identical claim in the main proceedings in Austria and in the secondary proceedings in Poland, which (in the main) was contested by the respective administrator, brings actions for a declaration of the existence of insolvency claims of a certain amount first in Poland against the administrator acting in the secondary proceedings in that country and then in Austria against the administrator acting in the main proceedings ([Mr Riel])?

(4) Is Article 41 of Regulation No 1346/2000 to be interpreted as meaning that the requirement to indicate the “nature of the claim, the date on which it arose and its amount” is satisfied where,

(a) — as is the case here — the creditor established in a Member State other than the State of the opening of proceedings (the applicant), describes the claim simply by assigning a specific amount to it without stating the date on which that claim arose (for example, as a “claim by the subcontractor JSV Slawomir Kubica in respect of the carrying out of roadworks”);

(b) does not state the date on which the claim arose in the claims form itself, but such a date may be inferred from the annexes submitted with that form (for example, on the basis of the date stated on the invoice submitted)?

(5) Is Article 41 of Regulation No 1346/2000 to be interpreted as not precluding the application of national provisions — for example those relating to the requirement to state the day on which a claim arose — which are more favourable in the particular case to the creditor lodging the claim, who is established in a Member State other than the State of the opening of proceedings?’

IV. My assessment

41. Before setting out my assessment, which at the request of the Court is confined to the fourth and fifth questions, concerning Article 41 of Regulation No 1346/2000, I shall briefly explain what, in my view, should be considered to be the answer to the first question, and concerns a preliminary point underlying my thinking, namely that the action before the referring court comes within the scope of that regulation.

42. First, it should be noted that Regulation No 1346/2000, which was in force between 31 May 2002⁶ and 25 June 2017,⁷ is applicable in the present case in view of the date on which the main insolvency proceedings were opened, namely 19 June 2013.

43. Second, in the light of the principles recalled in the judgment of 20 December 2017, *Valach and Others*,⁸ in paragraphs 24 to 27 and 37, concerning the respective scopes of Regulations No 1346/2000 and No 1215/2012,⁹ reiterated for the most part in three recent judgments, namely the judgment of 4 October 2018, *Feniks*,¹⁰ and the judgments of 14 November 2018, *Wiemer & Trachte*,¹¹ and of 6 February 2019, *NK*,¹² concerning the scope of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters,¹³ repealed by Regulation No 1215/2012, I consider that the action for a declaration of claims provided for in Paragraph 110 of the IO falls within the scope of Regulation No 1346/2000.

44. That action for a declaration of claims can only be brought in the context of insolvency proceedings in the event of a dispute relating to the amount, validity or rank of the claims lodged by the creditors taking part in those proceedings. Moreover, its purpose is to verify that the requirements with regard to the lodgement of claims have been met. Lastly, at the end of that action for a declaration of claims, the amount of the total assets of the insolvent debtor to be distributed is determined and effective, depending on the existence and rank of the disputed claims, against all the creditors party to the insolvency proceedings.

45. Therefore, in my view, an action such as that at issue in the main proceedings derives directly from insolvency proceedings and is closely linked to them, so that it does not come within the scope of Regulation No 1215/2012.

46. Having explained all this, I can now propose answers to the referring court's last two questions, concerning the scope of Article 41 of Regulation No 1346/2000, which I suggest the Court should consider together.

47. The referring court has expressed uncertainty regarding the consequences of there being no indication in the applicant's claims form of the date on which the applicant's claim arose, although that date could be inferred from the supporting documents which were lodged and that detail is not required by national law.

48. The Court is thus called upon to interpret, for the first time, Article 41 of Regulation No 1346/2000 in order to give a ruling as to the mandatory nature of the content of the lodgement of a claim as that content is provided for in that provision.

49. In accordance with the settled case-law of the Court, the interpretation of a provision of EU law requires that account be taken not only of its wording and the objectives it pursues, but also of its context and the provisions of EU law as a whole.¹⁴

⁶ See Article 47 of that regulation.

⁷ See Article 84(2) and Articles 91 and 92 of Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (OJ 2015 L 141, p. 19), which repealed and replaced Regulation No 1346/2000, applicable, for the most part, from 26 June 2017.

⁸ C-649/16, EU:C:2017:986.

⁹ See, also, the case-law cited in those paragraphs.

¹⁰ C-337/17, EU:C:2018:805 (paragraphs 30 and 31).

¹¹ C-296/17, EU:C:2018:902 (paragraphs 29 and 30).

¹² C-535/17, EU:C:2019:96 (paragraphs 24 to 26).

¹³ OJ 2001 L 12, p. 1.

¹⁴ See judgment of 10 December 2018, *Wightman and Others* (C-621/18, EU:C:2018:999, paragraph 47).

50. Therefore, in the first place it should be noted that there is no discussion of any divergence in the wording of Article 41 of Regulation No 1346/2000 in the language versions which I have been able to check.¹⁵

51. In the second place, it should be noted that a similarly worded provision appeared in the Convention of 23 November 1995 on Insolvency Proceedings.¹⁶ Although that convention did not enter into force due to the lack of the signature of one Member State, it provided the base on which Regulation No 1346/2000 was drafted.¹⁷

52. In the third place, as has already been made clear to the Court, it must be considered that the Explanatory Report of Miguel Virgós and Étienne Schmit on the Convention on insolvency proceedings,¹⁸ provides guidance for the interpretation of Regulation No 1346/2000,¹⁹ in particular with regard to the objectives it pursues.

53. Those authors noted that the special provisions of the Convention of 23 November 1995 concerning the lodging of claims, which constitute an exception to the application of the law of the State of the opening of proceedings, are meant to facilitate the exercise of creditors' rights within the European area by laying down requirements intended to identify what they are seeking.²⁰

54. The same applies in Regulation No 1346/2000. Accordingly, under Article 4(2)(h) of that regulation, the rules governing the lodging, verification and admission of claims are determined by the law of the State of the opening of proceedings. Chapter IV of that regulation, entitled 'Provision of information for creditors and lodgement of their claims', comprising Articles 39 to 42, constitutes an exception to that rule, since Articles 39 and 41 together with Article 42(2) of that regulation lay down certain detailed rules concerning the right of creditors situated in a Member State other than the State of the opening of proceedings to lodge claims in insolvency proceedings.

55. In the fourth place, regarding the scope of those rules concerning the lodgement of claims, the Virgós-Schmit report states that, in the light of the objective pursued,²¹ national legislation may impose no additional conditions on the content of such lodgement.²² Those rules make it possible to ensure the validity of the lodgement of the claim under the law of the State of the opening of proceedings applicable for the purposes of verifying it.

15 The Spanish, German, English and Italian versions.

16 Document of the Council of the European Union CONV/INSOL/X1, available at: <https://www.lynxlex.com/fr/text/insolvabilit%C3%A9-r%C3%A8gl-13462000/rapports-explicatifs-utiles/3519>. A similar provision appeared also in the Draft Convention on Bankruptcy, Winding-up, Arrangements, Compositions, and Similar Proceedings of 1980, published with the explanatory report of J. Lemontey in *European Communities Bulletin*, Supplement 2/82, available at: <https://publications.europa.eu/fr/publication-detail/-/publication/bdfe47f1-678d-45f3-94cb-6aff207d4fc1/language-en/format-PDF/source-88176377>

17 Regarding the origins of Regulation No 1346/2000, see Opinion of Advocate General Jacobs in *Eurofood IFSC* (C-341/04, EU:C:2005:579, point 2 and footnotes 3 and 4), and Opinion of Advocate General Szpunar in *Senior Home* (C-195/15, EU:C:2016:369, points 19 and 20).

18 Council document 6500/96, REV 1, of 8 July 1996 ('the Virgós-Schmit report'), available at: <https://www.lynxlex.com/fr/text/insolvabilit%C3%A9-r%C3%A8gl-13462000/rapports-explicatifs-utiles/3519>. The definitive version of the full text in English appears in the work Moss, G., Fletcher, I., Isaacs, S., *The EC Regulation on Insolvency Proceedings : a Commentary and Annotated Guide*, Oxford University Press, Oxford, 2002, pp. 261 to 327 (with regard to the exact date of this report, see p. 261).

19 See Opinion of Advocate General Jacobs in *Eurofood IFSC* (C-341/04, EU:C:2005:579, point 2, cited in the Opinion of Advocate General Szpunar in *Senior Home* (C-195/15, EU:C:2016:369, footnote 11), and footnote 5, which reads: 'the Virgós-Schmit Report, which was the source of many of the recitals in the preamble to the regulation, was never published in the Official Journal, although it exists as ... document of the Council 6500/1/96. The final version of the full text in English may however be found in [Moss, G., Fletcher, I., Isaacs, S., *The EC Regulation on Insolvency Proceedings: a Commentary and Annotated Guide*, Oxford University Press, Oxford, 2002]. See also [Balz, M., 'The European Union Convention on insolvency proceedings', *American Bankruptcy Law Journal*, 1996]. Mr Balz chaired the working party of the [EU Council] Group on Bankruptcy which authored the Convention. He states that the Virgós-Schmit Report was "discussed extensively and agreed to by the expert delegates but, unlike the Convention, was not formally approved by the Council of Ministers. Nevertheless, it will have considerable authority for courts in Member States" (footnote 51)').

20 See paragraph 273, p. 163 of the Virgós-Schmit report.

21 See point 53 of this Opinion.

22 See paragraph 273, p. 163 of the Virgós-Schmit report.

56. That view is shared by many commentators on Regulation No 1346/2000,²³ who take into account the innovative context in which the question of the right of creditors has been considered and the very pragmatic angle from which it has been approached.

57. Accordingly, having established in respect of main insolvency proceedings the idea of the universality of bankruptcy, by laying down in Article 39 of Regulation No 1346/2000 the principle of freedom to lodge claims for creditors having their habitual residence, domicile or registered office in a Member State other than the State of the opening of proceedings, and by correlating it with the opportunity to lodge claims not only in the main proceedings but also in any secondary proceedings, provided for in Article 32(1) of Regulation No 1346/2000, the EU legislator laid down rules ensuring equality between creditors.

58. That equality is based on the unity of assets and on the principle of non-discrimination, although the criterion applied here is that of the domicile of the creditors concerned and not that of their nationality.²⁴

59. That is why, in order to ensure efficient conduct of insolvency proceedings,²⁵ the EU legislature opted to lay down in Article 41 of Regulation No 1346/2000 maximum common standards protecting creditors situated in a Member State other than that in which the insolvency proceedings were opened. It should be noted that, for the same reasons, the content of the forms was laid down without any changes in Regulation 2015/848.²⁶

60. Those are rules of substantive law.²⁷ Like the Spanish and Polish Governments, I take the view that they should be interpreted flexibly, for the reasons set out below.

61. First, we find that the EU legislature restricted the scope of the rules for the lodgement of claims to its content and to the admission of documents submitted by the creditor to support the existence of the claim and the amount of the claim. As was pointed out soon after the entry into force of Regulation No 1346/2000, not all questions linked to the lodging of claims are covered.²⁸ It is therefore possible to take the view that Article 41 of that regulation represented an incomplete form of standardisation of the procedure for lodging claims.²⁹

23 See, inter alia, Raimon, M., *Le règlement communautaire 1346/2000 du 29 mai 2000 relatif aux procédures d'insolvabilité*, Librairie générale de droit et de jurisprudence, collection 'Droit des affaires', Paris, 2007, paragraph 546, p. 180. See, also, Hess, B., Oberhammer, P., and Pfeiffer, T., in cooperation with Piekenbrock, A., and Seagon, C., *External Evaluation of Regulation No 1346/2000/EC on Insolvency Proceedings*, 2014, paragraph 8.2, p. 372, in particular, in footnote 1139, following references: Moss, G., Fletcher, I., Isaacs, S., *The EC Regulation on Insolvency Proceedings: a Commentary and Annotated Guide*, 2nd Ed., Oxford University Press, Oxford, 2009, paragraph 8.410; Riedemann, S., 'Article 41', *Europäische Insolvenzverordnung*, De Gruyter, Berlin, 2007, paragraph 14; but see, also, Ghia, L., 'Regulation No 1346/2000 and Protection of Creditors', *International Insolvency Law Review*, C.H. Beck, Munich, 2011, pp. 313 to 320, in particular p. 320.

24 See Vallens, J.-L., 'La mise en oeuvre du règlement communautaire sur les procédures d'insolvabilité: questions de procédure', *Recueil Dalloz*, Dalloz, Paris, 2003, No 21, pp. 1421 to 1427, in particular Part IX, p. 1427, citing Rémy, J.-P., 'Les aspects européens de la déclaration des créances dans une procédure collective ouverte en France', *Revue de procédures collectives*, LexisNexis, Paris, 2003, No 40, p. 66; and *External Evaluation of Regulation No 1346/2000/EC on insolvency proceedings*, op. cit., paragraph 8.1, p. 369 and footnote 1123. See, also Jazottes, G., 'Article 53', *Le règlement (UE) n° 2015/848 du 20 mai 2015 relatif aux procédures d'insolvabilité, commentaire article par article*, Société de législation comparée, Collection 'Trans Europe Experts', Paris, Vol. 12, pp. 311 to 317, in particular p. 312, second paragraph. See, contra, Raimon, M., op. cit., paragraph 543, p. 179.

25 See recital 2 of Regulation No 1346/2000.

26 See Article 55(2)(b) and (e) of Regulation 2015/848.

27 See, inter alia, Raimon, M., op. cit., paragraph 536, p. 177; and, in the work entitled *Le règlement (UE) n° 2015/848 du 20 mai 2015 relatif aux procédures d'insolvabilité, commentaire article par article*, op. cit., Jazottes, G., 'Article 53', pp. 311 to 317, in particular p. 316, and Maréchal, C., 'Article 55', pp. 323 to 329, in particular p. 326, Part B, first paragraph, in fine.

28 See Vallens, J.-L., op. cit.

29 See Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (COM(2012) 743 final) (Section 9, first paragraph).

62. Therefore, the absence of a uniform procedure for exercising the right to lodge claims and the option to lodge supporting documents lead me to conclude that the only requirement can be that the details relating to the claim, as listed in Article 41 of Regulation No 1346/2000, are to be given in the claims form and may not be inferred from the supporting documents submitted.

63. Second, the admission of supporting documents, required by the EU legislature, appears to me to offer a margin of discretion, based on the relevant national laws, in the absence of a uniform sanction, as regards assessing the validity of the lodgement of a claim or regularising it.

64. The stage at which claims are lodged must necessarily be differentiated from the stage at which they are verified, which continues to be governed by national law, in accordance with Article 4(2)(h) of Regulation No 1346/2000. That law determines the consequences of any irregularity of the creditor's claims forms, and may, if the latter are incomplete, as in the present case, provide for them to be regularised, where appropriate, by means of various documents, at the request of the authority responsible for their verification.³⁰

65. Such procedures appear to me to satisfy the legitimate concerns expressed by the European Commission regarding the need to avoid making the administrator's task more difficult by requiring him to look through a large number of documents.

66. Third, the objective of creditor protection consistently sought, both in Regulation No 1346/2000 and in Regulation 2015/848, means that the level of requirement imposed on creditors when lodging their claims in another Member State depends on the conditions for providing them with information, the time limit imposed for the lodging of claims, and any language difficulties they may face.

67. Specifically, it is necessary to take into consideration the fact that the incomplete nature of the provisions of Regulation No 1346/2000 justified substantial amendments, due to practical problems relating to certain aspects of the lodging of claims which were identified in a study on the application of that regulation, contained in a report prepared by the Commission, in accordance with Article 46 of that regulation.³¹

68. The seriousness of those difficulties justified the Commission seeking solutions to ensure the effectiveness of the right to lodge claims, in the absence of harmonisation of national laws in that field,³² and the equality of creditors. Solutions were embodied in the opportunity to lodge a claims form by any means of transmission accepted by the law of the State in which the insolvency proceedings were opened³³ and by the establishment of a standard claims form specifying the mandatory information³⁴ in order to facilitate and ensure the validity of the lodgement of claims.³⁵

30 See, to that effect, concurring written observations of the parties in the main proceedings concerning the option to provide additional details during the claim verification procedure and, inter alia, similar French law and case-law, as set out in Vallansan, J., 'Sauvegarde, redressement et liquidation judiciaires — Déclaration et admission des créances', *JurisClasseur Commercial*, LexisNexis, Paris, fascicule 2352 of 14 September 2015 (most recent update 15 June 2018), paragraphs 84, 88, 89 and 93 to 95. See, also, Raimon, M., op. cit., paragraph 546, p. 180.

31 See the report cited in footnote 29 of this Opinion (paragraphs 1.1., 1.2. and 9.). The following difficulties are referred to in paragraph 9: 'language barriers, costs, time limits for lodging claims and a lack of information on the opening decision, the liquidator and the formalities of the *lex fori concursus* for the lodging of claims'.

32 See Maréchal, C., op. cit., in particular p. 327.

33 See Article 53 of Regulation 2015/848, compare with Article 39 of Regulation No 1346/2000 providing for the lodging of a written claim.

34 See Article 55(1) of Regulation 2015/848 and Commission Implementing Regulation (EU) 2017/1105 of 12 June 2017 establishing the forms referred to in Regulation (EU) 2015/848 of the European Parliament and of the Council on insolvency proceedings (OJ 2017 L 160, p. 1). See, specifically, Annex II, point 6.2., of Implementing Regulation 2017/1105. However, in accordance with Article 55(4) of Regulation 2015/848, the use of that form is optional and the creditor maintains the option to use other means of lodging its claim, provided it contains the same information required by that regulation.

35 See Brulard, Y., and Others, *L'insolvabilité nationale, européenne et internationale, le règlement européen du 20 mai 2015*, Vol. 1, Anthemis, Limal, 2017, paragraph 24, p. 328.

69. Against that background, it does not seem to me that a strict interpretation of Article 41 of Regulation No 1346/2000, as advocated by the Commission, having the effect of excluding the lodgement of a claim accompanied by supporting documents from which could be gleaned, without particular difficulty for the administrator or the court seised, the necessary information for determining the date on which the claim arose, whilst at the same time there is no certainty that the creditor has been properly informed of a requirement to that effect or in sufficient time to enable him to fulfil that obligation, is compatible with the objective of Regulation No 1346/2000 to simplify the procedure for creditors, or with the obligation to ensure respect for their equality.

70. The comparison with the procedure laid down substantively³⁶ in Regulation 2015/848 appears to me decisive in that regard. It should be noted that, by using the standard claims form, the creditor is now clearly informed of the obligation to indicate the date on which the claim arose.³⁷

71. Consequently, I consider that it must be permissible to supplement the claims form with supporting documents, which may be submitted under Article 41 of Regulation No 1346/2000, and that it will be for the competent authority responsible for verification of that form to assess what conclusions are to be drawn from failure to comply with the requirements of that article, in accordance with the law of the Member State on whose territory the main proceedings have been opened.

V. Conclusions

72. In the light of all the foregoing considerations, I propose that the Court should answer the fourth and fifth questions referred for a preliminary ruling by the Oberlandesgericht Wien (Higher Regional Court, Vienna, Austria) as follows:

Article 41 of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings must be interpreted as laying down the maximum requirements that may be imposed by national provisions with regard to the content of the lodgement of a claim, and as providing that the obligation to know the date on which the claim arose is satisfied when it may be inferred from the supporting documents submitted as annexes to the claims form, the validity of the lodgement being governed by the law of the Member State in whose territory the main proceedings have been opened (*lex concursus*).

³⁶ See Maréchal, C., op. cit., p. 326, Part B, first paragraph.

³⁷ See Annex II, point 6.2, to Implementing Regulation 2017/1105.