

JUDGMENT OF THE COURT (First Chamber)

21 January 2010\*

In Case C-444/07,

REFERENCE for a preliminary ruling under Article 234 EC from the Sąd Rejonowy Gdańsk-Północ w Gdańsku (Poland), made by decision of 27 June 2007, received at the Court on 27 September 2007, in the insolvency proceedings opened against

**MG Probud Gdynia sp. z o.o.,**

THE COURT (First Chamber),

composed of A. Tizzano, President of Chamber, acting for the President of the First Chamber, E. Levits, A. Borg Barthet, M. Ilešič and J.-J. Kasel (Rapporteur), Judges,

Advocate General: M. Poiares Maduro,  
Registrar: K. Malaček, Administrator,

\* Language of the case: Polish.

having regard to the written procedure and further to the hearing on 18 June 2009,

after considering the observations submitted on behalf of:

- MG Probud Gdynia sp. z o.o., by A. Studziński, radca prawny, and M. Żytny, aplikant radcowski trzeciego roku,
- the Polish Government, by M. Dowgielewicz, C. Herma and A. Witzak-Słoczyńska, acting as Agents,
- the German Government, by M. Lumma and J. Kemper, acting as Agents,
- the Italian Government, by G. Palmieri, acting as Agent, assisted by W. Ferrante, avvocato dello Stato,
- the Commission of the European Communities, by S. Petrova and K. Mojzesowicz, acting as Agents,

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

gives the following

### **Judgment**

- <sup>1</sup> This reference for a preliminary ruling concerns the interpretation of certain provisions of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (OJ 2000 L 160, p. 1), as amended by Council Regulation (EC) No 603/2005 of 12 April 2005 (OJ 2005 L 100, p. 1) ('the Regulation').
- <sup>2</sup> The reference was made in proceedings initiated by the Polish liquidator entrusted with the winding up of MG Probud Gdynia sp. z o.o. ('MG Probud') that were intended to recover, for inclusion in the pool of assets of the insolvent company, company assets in respect of which an attachment order had been made in Germany.

### **Legal context**

#### *Community legislation*

- <sup>3</sup> Article 3 of the Regulation, headed 'International jurisdiction', is worded as follows:

'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.

...'

<sup>4</sup> Article 4 of the Regulation, headed 'Law applicable', states:

'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:

(a) against which debtors insolvency proceedings may be brought on account of their capacity;

(b) the assets which form part of the estate and the treatment of assets acquired by or devolving on the debtor after the opening of the insolvency proceedings;

(c) the respective powers of the debtor and the liquidator;

...

(f) the effects of the insolvency proceedings on proceedings brought by individual creditors, with the exception of lawsuits pending;

...'

<sup>5</sup> As provided in Article 5(1) of the Regulation, 'the opening of insolvency proceedings shall not affect the rights in rem of creditors or third parties in respect of tangible or intangible, moveable or immoveable assets ... belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings'.

6 Article 10 of the Regulation provides:

‘The effects of insolvency proceedings on employment contracts and relationships shall be governed solely by the law of the Member State applicable to the contract of employment.’

7 In Chapter II of the Regulation, which is headed ‘Recognition of insolvency proceedings’, Article 16(1) states:

‘Any 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.

...’

8 Article 17 of the Regulation, headed ‘Effects of recognition’, provides:

‘The judgment opening the proceedings referred to in Article 3(1) shall, with no further formalities, produce the same effects in any other Member State as under [the] law of the State of the opening of proceedings, unless this Regulation provides otherwise and as long as no proceedings referred to in Article 3(2) are opened in that other Member State.

...'

9 Article 18 of the Regulation, headed 'Powers of the liquidator', states:

'1. The liquidator appointed by a court which has jurisdiction pursuant to Article 3(1) may exercise all the powers conferred on him by the law of the State of the opening of proceedings in another Member State, as long as no other insolvency proceedings have been opened there nor any preservation measure to the contrary has been taken there further to a request for the opening of insolvency proceedings in that State. He may in particular remove the debtor's assets from the territory of the Member State in which they are situated, subject to Articles 5 and 7.

...'

10 Article 25 of the Regulation is worded as follows:

'1. Judgments handed down by a court whose judgment concerning the opening of proceedings is recognised in accordance with Article 16 and which concern the course and closure of insolvency proceedings, and compositions approved by that court shall also be recognised with no further formalities. Such judgments shall be enforced in accordance with Articles 31 to 51, with the exception of Article 34(2), of the ...

Convention [of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (OJ 1978 L 304, p. 36)], as amended by the Conventions of Accession to this Convention [“the Brussels Convention”].

The first subparagraph shall also apply to judgments deriving directly from the insolvency proceedings and which are closely linked with them, even if they were handed down by another court.

The first subparagraph shall also apply to judgments relating to preservation measures taken after the request for the opening of insolvency proceedings.

2. The recognition and enforcement of judgments other than those referred to in paragraph 1 shall be governed by the Convention referred to in paragraph 1, provided that that Convention is applicable.

3. The Member States shall not be obliged to recognise or enforce a judgment referred to in paragraph 1 which might result in a limitation of personal freedom or postal secrecy.’

<sup>11</sup> As provided in Article 26 of the Regulation, ‘any Member State may refuse to recognise insolvency proceedings opened in another Member State or to enforce a judgment handed down in the context of such proceedings where the effects of such recognition or enforcement would be manifestly contrary to that State’s public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual.’

*National legislation*

- 12 In Poland, insolvency proceedings are governed by the Law on insolvency and restructuring (Prawo upadłościowe i naprawcze) of 28 February 2003 (Dz. U. (Journal of Laws) 2003, No 60, heading 535), as amended.
- 13 By virtue of Article 146(1) and (2) of that Law, enforcement proceedings, whether judicial or administrative, opened against the debtor before the declaration of insolvency are to be stayed by operation of law on the date of the declaration of insolvency and sums obtained in stayed enforcement proceedings which have not been paid out are to be transferred to the pool of assets in the insolvency.
- 14 Under Article 146(3) of the Law, the same provisions apply where security has been provided in respect of the assets of the debtor within the framework of proceedings to secure claims.
- 15 Under Article 146(4), once insolvency proceedings have been opened it is no longer possible to bring against the debtor enforcement proceedings relating to the pool of assets in the insolvency.

**The facts in the main action and the questions referred for a preliminary ruling**

- 16 It is apparent from the order for reference that, by judgment of 9 June 2005, the Sąd Rejonowy Gdańsk-Północ w Gdańsku (North Gdansk District Court, Gdansk) ordered that insolvency proceedings be opened in respect of MG Probud, an undertaking in the building sector whose registered office was in Poland but which engaged in construction work in Germany through the activities of a branch.

- 17 Upon application by the Hauptzollamt Saarbrücken (Principal Customs Office, Saarbrücken) (Germany), the Amtsgericht Saarbrücken (Local Court, Saarbrücken), by decision of 11 June 2005, ordered attachment of that undertaking's assets held by banks in the amount of EUR 50 683.08, and of various claims of the undertaking against German parties with whom it had entered into contracts. Those measures were prompted by procedures initiated by the Hauptzollamt Saarbrücken against the manager of MG Probud's German branch, who was suspected of having infringed the legislation on the posting of workers by reason of failure to pay a number of Polish workers and to make social security contributions in their regard.
- 18 The appeal lodged against that decision was dismissed by order of the Landgericht Saarbrücken (Regional Court, Saarbrücken) of 4 August 2005. In the grounds of its order, it stated in particular that, as insolvency proceedings had been opened in Poland, there was reason to fear that those responsible within MG Probud would shortly collect the sums payable and transfer the corresponding amounts to Poland in order to prevent the German authorities from having access to them. The Landgericht Saarbrücken held that the opening of the insolvency proceedings relating to MG Probud's assets did not prevent attachment in Germany. It stated that national insolvency proceedings opened in other Member States must be recognised in Germany when they meet the conditions laid down in Article 1(1) of the Regulation and are referred to in the list in Annex A thereto, but it could not be determined from the copy of the judgment enclosed with the appeal whether insolvency proceedings opened in Poland that had to be recognised in Germany pursuant to Annex A to the Regulation were in fact involved.
- 19 In the insolvency proceedings, the Sąd Rejonowy Gdańsk-Północ w Gdańsku questions whether the attachment effected by the German authorities is lawful since Polish law, which is the law applicable to the insolvency proceedings because the Republic of Poland is the State of the opening of those proceedings, would not allow such attachment after the undertaking has been declared insolvent.

In those circumstances, the Sąd Rejonowy Gdańsk-Północ w Gdańsku decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

- ‘(1) Having regard to Articles 3, 4, 16, 17 and 25 of [the] Regulation ..., that is to say, in the light of the rules concerning the jurisdiction of the courts of the State in which insolvency proceedings are opened, the law applicable to those proceedings and the conditions for, and the effects of, recognition of those proceedings, are the administrative authorities of a Member State entitled to attach funds held in the bank account of an economic operator following a declaration of his insolvency made in another Member State (application of the so-called seizure of assets), thereby contravening the national legal rules of the State of the opening of proceedings (Article 4 of the Regulation), where the conditions for the application of the provisions of Articles 5 and 10 of the Regulation are not met?
- (2) In the light of Article 25(1) et seq. of [the] Regulation ..., may the administrative authorities of a Member State in which secondary insolvency proceedings have not been opened and which must recognise the insolvency proceedings pursuant to Article 16 of the Regulation refuse, on the basis of domestic legal rules, to recognise judgments made by the State of the opening of insolvency proceedings concerning the course and closure of insolvency proceedings pursuant to Articles 31 to 51 of the Brussels Convention ...?’

### **Consideration of the questions**

By its questions, which it is appropriate to consider together, the national court essentially asks whether, in circumstances such as those in the main action, after main insolvency proceedings have been opened in a Member State the competent authorities of another Member State are permitted, in accordance with their legislation, first, to order the attachment of assets of the debtor who has been declared insolvent that are situated in the territory of the latter Member State and, second, to refuse to recognise

and, as the case may be, to enforce judgments concerning the course and closure of insolvency proceedings opened in the first Member State.

22 For the purpose of answering the questions as reformulated, it should be noted first of all that Article 3 of the Regulation makes provision for two types of insolvency proceedings. Insolvency proceedings opened, in accordance with Article 3(1), by the competent court of the Member State within the territory of which the centre of a debtor's main interests is situated, described as the 'main proceedings', produce universal effects in that the proceedings apply to the debtor's assets situated in all the Member States in which the Regulation applies. Although, subsequently, proceedings under Article 3(2) may be opened by the competent court of the Member State where the debtor has an establishment, those proceedings, described as 'secondary proceedings', produce effects which are restricted to the assets of the debtor situated in the territory of the latter State (see Case C-341/04 *Eurofood IFSC* [2006] ECR I-3813, paragraph 28).

23 The universal effect of the main insolvency proceedings also has an impact upon the liquidator's powers since, under Article 18(1) of the Regulation, the liquidator appointed by a court which has jurisdiction pursuant to Article 3(1) of the Regulation may exercise in another Member State all the powers conferred on him, *inter alia* as long as no other insolvency proceedings have been opened there.

24 It follows that only the opening of secondary insolvency proceedings is capable of restricting the universal effect of the main insolvency proceedings.

25 In addition, by virtue of Article 4(1) of the Regulation, determination of the court with jurisdiction entails determination of the law which is to apply. As regards both the main insolvency proceedings and secondary insolvency proceedings, the law of the Member

State within the territory of which proceedings are opened, referred to as the ‘State of the opening of proceedings’, is applicable to the insolvency proceedings and their effects. In this respect, Article 4(2) of the Regulation contains a non-exhaustive list of the various matters in the proceedings which are governed by the law of State of the opening of proceedings, including in particular, in subparagraph (b), the assets which form part of the estate, in subparagraph (c), the respective powers of the debtor and the liquidator, and in subparagraph (f), the effects of the insolvency proceedings on proceedings brought by individual creditors.

26 Furthermore, it follows from Article 16(1) of the Regulation, read in conjunction with Article 17(1), that the judgment opening insolvency proceedings in a Member State is to be recognised in all the other Member States from the time that it becomes effective in the State of the opening of proceedings and that it is, with no further formalities, to produce the same effects in any other Member State as under the law of the State of the opening of proceedings. In accordance with Article 25 of the Regulation, recognition of all judgments other than that relating to the opening of insolvency proceedings also occurs automatically.

27 As is shown by recital 22 in the preamble to the Regulation, the rule of priority laid down in Article 16(1) of the Regulation, which provides that insolvency proceedings opened in one Member State are to be recognised in all the Member States from the time that they produce their effects in the State of the opening of proceedings, is based on the principle of mutual trust (*Eurofood IFSC*, paragraph 39).

28 It is indeed that mutual trust which has enabled not only the establishment of a compulsory system of jurisdiction which all the courts within the purview of the Regulation are required to respect, but also as a corollary the waiver by the Member States of the right to apply their internal rules on recognition and enforcement in favour of a simplified mechanism for the recognition and enforcement of judgments handed down in the context of insolvency proceedings (*Eurofood IFSC*, paragraph 40, and by analogy, with regard to the Brussels Convention, Case C-116/02 *Gasser* [2003] ECR I-14693, paragraph 72, and Case C-159/02 *Turner* [2004] ECR I-3565, paragraph 24).

- 29 The Court has pointed out in this connection that it is inherent in that principle of mutual trust that the court of a Member State hearing an application for the opening of main insolvency proceedings check that it has jurisdiction in the light of Article 3(1) of the Regulation, that is to say examine whether the centre of the debtor's main interests is situated in that Member State. In return, the courts of the other Member States recognise the judgment opening main insolvency proceedings, without being able to review the assessment made by the first court as to its jurisdiction (*Eurofood IFSC*, paragraphs 41 and 42).
- 30 As regards the enforcement of judgments relating to insolvency proceedings, the Regulation does not contain specific rules but refers, in Article 25(1), to the system of enforcement established by Articles 31 to 51 of the Brussels Convention; it excludes, however, the grounds for refusal provided for by that Convention and replaces them with grounds of its own.
- 31 In accordance with recital 22 in the preamble to the Regulation, which states that grounds for refusal are to be reduced to the minimum necessary, there are only two such grounds.
- 32 First, under Article 25(3) of the Regulation, the Member States are not obliged to recognise or enforce a judgment concerning the course and closure of insolvency proceedings which might result in a limitation of personal freedom or postal secrecy.
- 33 Second, under Article 26 of the Regulation, any Member State may refuse to recognise insolvency proceedings opened in another Member State or to enforce a judgment handed down in the context of such proceedings where the effects of such recognition or enforcement would be manifestly contrary to that State's public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual.

34 With regard to this second ground for refusal, the Court stated initially in the context of the Brussels Convention that, since recourse to the public policy clause contained in Article 27(1) of that Convention constitutes an obstacle to the achievement of one of the fundamental aims of the Convention, namely to facilitate the free movement of judgments, such recourse is reserved for exceptional cases (Case C-7/98 *Krombach* [2000] ECR I-1935, paragraphs 19 and 21, and *Eurofood IFSC*, paragraph 62). The case-law relating to Article 27(1) of the Convention is transposable to the interpretation of Article 26 of the Regulation (*Eurofood IFSC*, paragraph 64).

35 The questions asked by the national court must be ruled upon in the light of the foregoing considerations.

36 In the present case, it is not in dispute that MG Probud's registered office is in Poland and that, by a judgment of 9 June 2005, MG Probud was declared insolvent by a Polish court.

37 It is clear from Article 3(1) of the Regulation that, in the case of a company, the place of the registered office is to be presumed to be the centre of its main interests in the absence of proof to the contrary. The Court has stated in this regard that the simple presumption laid down by the Community legislature in favour of the registered office of a company can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that the actual situation is different from that which locating the centre of the company's main interests at the registered office is supposed to reflect (*Eurofood IFSC*, paragraph 34). That could be so in particular in the case of a company not carrying out any business in the territory of the Member State in which its registered office is situated. By contrast, where a company carries on its business in the territory of the Member State where its registered office is situated, the fact that its economic choices are or can be controlled by a parent company established in another Member State is not enough to rebut the presumption laid down by the Regulation (*Eurofood IFSC*, paragraph 37).

38 Since the documents available to the Court contain nothing to affect the presumption laid down in Article 3(1) of the Regulation, it appears that the centre of MG Probud's main interests is situated in Poland.

39 In accordance with the wording of Article 1(1) of the Regulation, insolvency proceedings to which the Regulation applies must have four characteristics. They must be collective proceedings, based on the debtor's insolvency, which entail at least partial divestment of that debtor and prompt the appointment of a liquidator. Those forms of proceedings are listed in Annex A to the Regulation, and the list of liquidators appears in Annex C (*Eurofood IFSC*, paragraphs 46 and 47).

40 In so far as the insolvency proceedings opened in respect of MG Probud are listed in Annex A to the Regulation, it follows from application of Article 3 of the Regulation that the Polish courts have jurisdiction to open main insolvency proceedings and to hand down all the judgments which concern the course and closure of those proceedings. In addition, it follows from application of Article 4 that Polish law is applicable to those insolvency proceedings and their effects.

41 Furthermore, provided that he is referred to in Annex C to the Regulation, the liquidator appointed by the Polish court may, in accordance with Article 18 of the Regulation, exercise all the powers conferred on him by Polish law in the other Member States and, in particular, remove the debtor's assets from the territory of the Member State in which they are situated.

42 As has been pointed out by several of the interested parties which submitted written observations to the Court, no secondary proceedings have been opened in the present instance and none of the exceptions provided for in Articles 5 to 15 of the Regulation, and, more specifically, neither of the exceptions set out in Articles 5 and 10 of the

Regulation, which have been expressly referred to by the national court, is applicable in the context of the main action.

43 In view of those factors, and because of the universal effect which all main insolvency proceedings must be accorded, the insolvency proceedings opened in Poland encompass all of MG Probud's assets, including those situated in Germany, and Polish law determines not only the opening of insolvency proceedings but also their course and closure. On that basis, Polish law is required to govern the treatment of assets situated in other Member States and the effects of the insolvency proceedings on the measures to which those assets are liable to be subject.

44 Given that the Polish Law of 28 February 2003 on insolvency and restructuring, as amended, does not permit enforcement proceedings relating to the pool of assets in the insolvency to be brought against the debtor after insolvency proceedings have been opened, the competent German authorities could not validly order, pursuant to German legislation, enforcement measures relating to MG Probud's assets situated in Germany.

45 As follows from Articles 16 and 17 of the Regulation, the judgment opening insolvency proceedings handed down in Poland must be recognised automatically in all the other Member States, with no further formalities, and producing all the effects which it has under Polish law.

46 Moreover, in so far as nothing in the documents in the case that have been submitted to the Court indicates that either of the grounds for refusal set out in paragraphs 32 and 33 of the present judgment is met, the German court to which application was made was required to recognise not only the judgment opening insolvency proceedings handed down by the Polish court having jurisdiction but also all other judgments relating to those proceedings, and it cannot therefore oppose enforcement of the latter pursuant to Articles 31 to 51 of the Brussels Convention.

<sup>47</sup> In light of all the foregoing considerations, the answer to the questions referred is that the Regulation, in particular Articles 3, 4, 16, 17 and 25, must be interpreted as meaning that, in a case such as that in the main action, after the main insolvency proceedings have been opened in a Member State the competent authorities of another Member State, in which no secondary insolvency proceedings have been opened, are required, subject to the grounds for refusal derived from Articles 25(3) and 26 of the Regulation, to recognise and enforce all judgments relating to the main insolvency proceedings and, therefore, are not entitled to order, pursuant to the legislation of that other Member State, enforcement measures relating to the assets of the debtor declared insolvent that are situated in its territory when the legislation of the State of the opening of proceedings does not so permit and the conditions to which application of Articles 5 and 10 of the Regulation is subject are not met.

## Costs

<sup>48</sup> 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:

**Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, in particular Articles 3, 4, 16, 17 and 25, must be interpreted as meaning that, in a case such as that in the main action, after the main insolvency proceedings have been opened in a Member State the competent authorities of another Member State, in which no secondary insolvency proceedings have been opened, are required, subject to the grounds for refusal derived from Articles 25(3) and 26 of that regulation, to recognise and enforce all judgments relating to the main insolvency proceedings and, therefore, are not entitled to order, pursuant to the legislation of that other Member State, enforcement measures relating to the assets of the debtor declared insolvent that are situated in its territory when the**

**legislation of the State of the opening of proceedings does not so permit and the conditions to which application of Articles 5 and 10 of the regulation is subject are not met.**

[Signatures]