

JUDGMENT OF THE COURT (First Chamber)

15 December 2011 \*

In Case C-191/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Cour de cassation (France), made by decision of 13 April 2010, received at the Court on 19 April 2010, in the proceedings

**Rastelli Davide e C. Snc**

v

**Jean-Charles Hidoux**, in his capacity as liquidator appointed by the court for the company Médiasucre international,

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, M. Safjan, A. Borg Barthet, M. Ilešič and M. Berger (Rapporteur), Judges,

\* Language of the case: French.

Advocate General: P. Mengozzi,  
Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Mr Hidoux, in his capacity as liquidator appointed by the court for the company Médiasucre international, by B. Kuchukian, avocat,
- the French Government, by G. de Bergues and B. Cabouat, acting as Agents,
- the Netherlands Government, by C. M. Wissels and B. Koopman, acting as Agents,
- the Austrian Government, by E. Riedl, acting as Agent,
- the European Commission, by A.-M. Rouchaud-Joët and M. Wilderspin, acting as Agents,

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

gives the following

### **Judgment**

- 1 This reference for a preliminary ruling concerns the interpretation of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (OJ 2000 L 160, p. 1, ‘the Regulation’).
  
- 2 The reference has been made in the course of proceedings between the company Rastelli Davide e C. Snc (‘Rastelli’) and Mr Hidoux, in his capacity as liquidator appointed by the court for the company Médiasucre international (‘Médiasucre’), concerning the joinder of Rastelli to insolvency proceedings opened in respect of Médiasucre.

### **Legal context**

#### *European Union law*

- 3 According to recital 6 in its preamble, the Regulation is confined to ‘provisions governing jurisdiction for opening insolvency proceedings and judgments which are delivered directly on the basis of the insolvency proceedings and are closely connected with such proceedings.’

4 Article 3 of the Regulation, dealing with international jurisdiction, 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 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.

...’

5 Recital 13 in the preamble to the Regulation states that ‘the “centre of main interests” should correspond to the place where the debtor conducts the administration of his interests on a regular basis and [which] is therefore ascertainable by third parties.’

6 Article 4 of the Regulation, relating to the law applicable, 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 ...

...’

*National law*

- 7 Judicial liquidation proceedings are governed by Articles L. 640-1 et seq of the French Code de commerce (Commercial Code). With regard to the court having jurisdiction to open such proceedings, Article L. 641-1 of that Code refers to Article L. 621-2 of the same Code which, in the version resulting from Law No 2005-845 of 26 July 2005 on the protection of undertakings provides:

‘The competent court will be the Tribunal de commerce (Commercial Court) if the debtor is a trader or he is registered with the craftsmen’s register. The Tribunal de grande instance (High Court) shall be competent in other cases.

One or more other persons may be joined to opened proceedings where their property is intermixed with that of the debtor or where the legal entity is a sham. The court that has opened the initial proceedings shall remain competent for this purpose.’

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

- 8 By judgment of 7 May 2007, the Tribunal de commerce de Marseille (Commercial Court, Marseille) (France) put Médiasucre, which had its registered office in Marseille, into liquidation and appointed Mr Hidoux as liquidator.
- 9 Following that judgment, Mr Hidoux brought proceedings before that court against Rastelli, which had its registered office in Robbio (Italy). It requested that Rastelli be joined to the insolvency proceedings that had been opened against Médiasucre on the ground that the property of the two companies was intermixed.

- 10 By judgment of 19 May 2008, the Tribunal de commerce de Marseille declined jurisdiction with regard to Article 3 of the Regulation, on the grounds that Rastelli's registered office was in Italy and that it had no establishment in France.
- 11 Ruling on the procedural question raised by Mr Hidoux, the Cour d'appel d'Aix-en-Provence (Court of Appeal, Aix-en-Provence), by judgment of 12 February 2009, set aside that judgment and held that the Tribunal de commerce de Marseille had jurisdiction. In that regard, the Cour d'appel held that the liquidator's application was not intended to open insolvency proceedings against Rastelli but to join it to the judicial liquidation already opened against Médiasucre and that, under Article L. 621-2 of the Commercial Code, the court which has jurisdiction to rule on the application for joinder is the court before which the proceedings were initially brought.
- 12 Ruling on an appeal brought against that judgment, the Cour de cassation decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
- '(1) Where a court in a Member State opens the main insolvency proceedings in respect of a debtor, on the view that the centre of the debtor's main interests is situated in the territory of that Member State, does [the Regulation] preclude the application, by that court, of a rule of national law conferring upon it jurisdiction to join to those proceedings a company whose registered office is in another Member State solely on the basis of a finding that the property of the debtor and the property of that company have been intermixed?
- (2) If the action for joinder falls to be categorised as the opening of new insolvency proceedings in respect of which the jurisdiction of the court of the Member State first seised is conditional on proof that the company to be joined has the centre of its main interests in that Member State, can such proof be inferred solely from the finding that the property of the two companies has been intermixed?'

## **The questions referred for a preliminary ruling**

### *The first question*

- 13 By its first question, the national court is essentially asking whether the Regulation is to be interpreted as meaning that a court of a Member State that has opened main insolvency proceedings against a company, on the view that the centre of the debtor's main interests is situated in the territory of that Member State, can, under a rule of its national law, join to those proceedings a second company whose registered office is in another Member State solely on the basis that the property of the two companies has been intermixed.
  
- 14 It should be borne in mind at the outset that the Regulation does not contain a rule concerning judicial or legislative competence that expressly refers to the joinder to insolvency proceedings opened in one Member State of a company whose registered office is in another Member State on the ground that the property of the two companies has been intermixed.
  
- 15 With regard to judicial competence, the Regulation provides, in Article 3, that two criteria correspond to two different types of proceedings. According to paragraph 1 of that article, the centre of the debtor's main interests, presumed to be the place of the company's registered office, gives jurisdiction to the courts of the Member State in which it is situated to initiate the 'main' proceedings, which produce universal effects in that the proceedings apply to the debtor's assets situated in all the Member States in which the Regulation applies. Under Article 3(2) 'secondary' or 'territorial' proceedings may be opened by the courts of the Member State where the debtor has an establishment, the effects of which are restricted to the assets of the debtor

situated in the territory of that Member State (see, to that effect, Case C-341/04 *Eurofood IFSC* [2006] ECR I-3813, paragraph 28, and Case C-112/10 *Zaza Retail* [2011] ECR I-11525, paragraph 17).

- 16 With regard to the applicable law, Article 4(1) of the Regulation provides that this is dependent on the determination of the court with international jurisdiction. In relation to both the main insolvency proceedings and to the 'secondary' or 'territorial' proceedings, the law of the Member State in which the proceedings are opened is applicable to those insolvency proceedings and to their effects (see, to that effect *Eurofood IFSC*, paragraph 33, and Case C-444/07 *MG Probud Gdynia* [2010] ECR I-417, paragraph 25).
- 17 In view of its importance as a criterion, it is appropriate to ascertain which court has jurisdiction in the main proceedings.
- 18 In that regard, it does not seem to have been argued that Rastelli has in France an establishment within the meaning of the case-law of the Court, namely a structure with a minimum level of organisation and a degree of stability for the purpose of pursuing an economic activity (Case C-396/09 *Interedil* [2011] ECR I-9915, paragraph 64). In these circumstances Article 3(2) of the Regulation is not applicable.
- 19 It is, therefore, necessary to examine only whether jurisdiction to hear an action for the purposes of joinder of insolvency proceedings can be based on Article 3(1) of the Regulation.
- 20 In that context, it should be noted that the Court has held that Article 3(1) of the Regulation must be interpreted as meaning that it also confers international

jurisdiction on the courts of the Member State within the territory of which insolvency proceedings were opened to hear an action which derives directly from the initial insolvency proceedings and which is closely connected with them, within the meaning of recital 6 in the preamble to the Regulation (Case C-339/07 *Seagon* [2009] ECR I-767, paragraphs 19 to 21). It must therefore be examined whether an application for joinder of insolvency proceedings on the ground that property has been intermixed can be deemed to be such an action.

- 21 Mr Hidoux and the French Government contend that the action for the purposes of joinder of insolvency proceedings on the ground that property has been intermixed must be considered as an action which derives directly from the initial insolvency proceedings and which is closely connected with them. In support of their contention, they argue that such a joinder does not have the consequence of instituting new proceedings, which would be independent in relation to the proceedings initially opened, but has the sole consequence of extending the initial proceedings to another entity (under French law, which is the law applicable to the initial proceedings under Article 4(1) of the Regulation). They infer from this that a French court that has opened main insolvency proceedings with regard to a company in France also has jurisdiction to join to the proceedings another company that has its registered office in another Member State.
- 22 That contention is based, essentially, on the argument that, in French law, extending the main insolvency proceedings does not institute new proceedings but simply joins an additional debtor, whose property is inseparable from that of the first debtor, to the proceedings that have already been opened.
- 23 That single procedure does not, however, alter the fact, referred to by the Netherlands and Austrian governments and by the European Commission, that joining to the initial proceedings an additional debtor, legally distinct from the debtor concerned by

those proceedings, produces with regard to that additional debtor the same effects as the decision to open insolvency proceedings.

<sup>24</sup> That analysis is supported by the fact, referred to by the national court, that although the single procedure is justified by the finding that the two debtors form a *de facto* unit because their property is intermixed, that finding has no bearing on the legal personality of the two debtors.

<sup>25</sup> The Court has held that in the system established by the Regulation for determining the competence of the Member States, which is based on the centre of the debtor's main interests, each debtor constituting a distinct legal entity is subject to its own court jurisdiction (*Eurofood IFSC*, paragraph 30).

<sup>26</sup> It follows that a decision producing, with regard to a legal entity, the same effects as the decision to open main insolvency proceedings can only be taken by the courts of the Member State that would have jurisdiction to open such proceedings.

<sup>27</sup> In that regard, it should be noted that Article 3(1) of the Regulation confers exclusive jurisdiction to open such proceedings on the courts of the Member State within the territory of which the centre of the debtor's main interests is situated.

<sup>28</sup> Therefore, the possibility that a court designated under that provision as having jurisdiction, with regard to a debtor, to join another legal entity to insolvency proceedings on the sole ground that their property has been intermixed, without considering where the centre of that entity's main interests is situated, would constitute a circumvention of the system established by the Regulation. This would result, *inter alia*, in a risk of conflicting claims to jurisdiction between courts of different Member

States, which the Regulation specifically intended to prevent in order to ensure uniform treatment of insolvency proceedings within the European Union.

- 29 The answer to the first question is therefore that the Regulation is to be interpreted as meaning that a court of a Member State that has opened main insolvency proceedings against a company, on the view that the centre of the debtor's main interests is situated in the territory of that Member State, can, under a rule of its national law, join to those proceedings a second company whose registered office is in another Member State only if it is established that the centre of that second company's main interests is situated in the first Member State.

*The second question*

- 30 By its second question, the national court is essentially asking whether the Regulation is to be interpreted as meaning that, where a company, whose registered office is situated within the territory of a Member State, is subject to an action that seeks to extend to it the effects of insolvency proceedings opened in another Member State against another company established within the territory of that other Member State, the mere finding that the property of those companies has been intermixed is sufficient to establish that the centre of the main interests of the company concerned by the action is also situated in that other Member State.
- 31 It should be noted at the outset that the term 'the centre of a debtor's main interests', within the meaning of Article 3(1) of the Regulation, is a concept that is peculiar to the Regulation, thus having an autonomous meaning, and must therefore be interpreted in a uniform way, independently of national legislation (*Eurofood IFSC*, paragraph 31, and *Interedil*, paragraph 43). While the Regulation does not define that

concept, guidance as to its scope is, nevertheless, to be found in recital 13 in the preamble to the Regulation, which states that ‘the “centre of main interests” should correspond to the place where the debtor conducts the administration of his interests on a regular basis and [which] is therefore ascertainable by third parties’ (*Eurofood IFSC*, paragraph 32, and *Interedil*, paragraph 47).

- 32 For companies, the centre of main interests is presumed, according to the second sentence of Article 3(1) of the Regulation, to be the place of the company’s registered office. That presumption and the reference in recital 13 in the preamble to the Regulation to the place where the debtor conducts the administration of his interests reflect the European Union legislature’s intention to attach greater importance to the place in which the company has its central administration as the criterion for jurisdiction (*Interedil*, paragraph 48).
- 33 With reference to that recital, the Court held that the centre of a debtor’s main interests must be identified by reference to criteria that are both objective and ascertainable by third parties, in order to ensure legal certainty and foreseeability concerning the determination of the court with jurisdiction to open the main insolvency proceedings (*Eurofood IFSC*, paragraph 33, and *Interedil*, paragraph 49).
- 34 With regard to a company, the Court held that, where the bodies responsible for its management and supervision are in the same place as its registered office and the management decisions of the company are taken, in a manner that is ascertainable by third parties, in that place, the presumption in the second sentence of Article 3(1) of the Regulation is wholly applicable (*Interedil*, paragraph 50).
- 35 That presumption may be rebutted where, from the viewpoint of third parties, the place in which a company’s central administration is located is not the same as that of its registered office. In that event, the simple presumption laid down by the European Union legislature in favour of the registered office of that company can be rebutted if factors which are both objective and ascertainable by third parties enable it to be

established that an actual situation exists which is different from that which locating it at that registered office is deemed to reflect (*Eurofood IFSC*, paragraph 34, and *Interedil*, paragraph 51).

- <sup>36</sup> Those factors must be assessed in a comprehensive manner, account being taken of the individual circumstances of each particular case (*Interedil*, paragraph 52).
- <sup>37</sup> With regard to the situation, referred to in the second question, where the property of two companies is intermixed, it is apparent from the explanations provided by the French government that, to characterise such a situation, the national court uses two alternative criteria drawn, respectively, from the existence of intermingled accounts and from abnormal financial relations between the companies, such as the deliberate organisation of transfers of assets without consideration.
- <sup>38</sup> As has been submitted by the French, Netherlands and Austrian governments and by the European Commission, such factors are in general difficult to ascertain by third parties. Furthermore, intermixing of property does not necessarily imply a single centre of interests. Indeed, it cannot be excluded that such intermixing may be organised from two management and supervision centres situated in two different Member States.
- <sup>39</sup> The answer to the question is, therefore, that the Regulation is to be interpreted as meaning that where a company, whose registered office is situated within the territory of a Member State, is subject to an action that seeks to extend to it the effects of insolvency proceedings opened in another Member State against another company established within the territory of that other Member State, the mere finding that the property of those companies has been intermixed is not sufficient to establish that the centre of the main interests of the company concerned by the action is also situated in that other Member State. In order to reverse the presumption that this centre is

the place of the registered office, it is necessary that an overall assessment of all the relevant factors allows it to be established, in a manner ascertainable by third parties, that the actual centre of management and supervision of the company concerned by the joinder action is situated in the Member State where the initial insolvency proceedings were opened.

## Costs

- <sup>40</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:

- 1. Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings is to be interpreted as meaning that a court of a Member State that has opened main insolvency proceedings against a company, on the view that the centre of the debtor's main interests is situated in the territory of that Member State, can, under a rule of its national law, join to those proceedings a second company whose registered office is in another Member State only if it is established that the centre of that second company's main interests is situated in the first Member State.**

2. **Regulation No 1346/2000 is to be interpreted as meaning that, where a company, whose registered office is situated within the territory of a Member State, is subject to an action that seeks to extend to it the effects of insolvency proceedings opened in another Member State against another company established within the territory of that other Member State, the mere finding that the property of those companies has been intermixed is not sufficient to establish that the centre of the main interests of the company concerned by the action is also situated in that other Member State. In order to reverse the presumption that this centre is the place of the registered office, it is necessary that an overall assessment of all the relevant factors allows it to be established, in a manner ascertainable by third parties, that the actual centre of management and supervision of the company concerned by the joinder action is situated in the Member State where the initial insolvency proceedings were opened.**

[Signatures]