Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

22 November 2012*

(Judicial cooperation in civil matters — Regulation (EC) No 1346/2000 — Insolvency proceedings — Concept of 'closure of insolvency proceedings' — Possibility for a court before which secondary insolvency proceedings have been brought to examine the debtor's insolvency — Possibility of opening winding-up proceedings as secondary insolvency proceedings where the main proceedings are sauvegarde proceedings)

In Case C-116/11,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Sąd Rejonowy Poznań-Stare Miasto w Poznaniu (Poland), made by decision of 21 February 2011, received at the Court on 7 March 2011, in the proceedings

Bank Handlowy w Warszawie SA,

PPHU 'ADAX'/Ryszard Adamiak,

v

Christianapol sp. z o.o.,

THE COURT (First Chamber),

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

Advocate General: J. Kokott,

Registrar: K. Sztranc-Sławiczek, Administrator,

having regard to the written procedure and further to the hearing on 22 March 2012,

after considering the observations submitted on behalf of:

— Bank Handlowy w Warszawie SA, by Z. Skórczyński, Legal Adviser,

— Christianapol sp. z o.o., by M. Barłowski, Legal Adviser, assisted by P. Saigne and M. Le Berre, adwokaci,

— the Polish Government, by M. Szpunar and M. Arciszewski and by B. Czech, acting as Agents,

— the Spanish Government, by S. Centeno Huerta, acting as Agent,

* Language of the case: Polish.

— the French Government, by G. de Bergues and by B. Beaupère-Manokha and N. Rouam, acting as Agents,

— the European Commission, by M. Wilderspin and A. Stobiecka-Kuik, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 24 May 2012,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 4(1) and (2)(j) and 27 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 788/2008 of 24 July 2008 (OJ 2008 L 213, p. 1) ('the Regulation').

2 The reference was made in the context of proceedings relating to the opening of insolvency proceedings, in Poland, further to an application made by Bank Handlowy w Warszawie SA ('Bank Handlowy') and PPHU 'ADAX'/Ryszard Adamiak ('Adamiak'), in respect of Christianapol sp. z o.o. ('Christianapol'), a company governed by Polish law in respect of which rescue proceedings (*procédure de sauvegarde*) ('*sauvegarde* proceedings') had previously been opened in France.

Legal context

European Union law

3 Recitals 2, 12, 19, 20 and 23 in the preamble to the Regulation state as follows:

'(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 which comes within the scope of judicial cooperation in civil matters within the meaning of Article 65 of the Treaty.

...

(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.

...

(19) Secondary insolvency proceedings may serve different purposes, besides the protection of local interests. Cases may arise where the estate of the debtor is too complex to administer as a unit or where differences in the legal systems concerned are so great that difficulties may arise from the extension of effects deriving from the law of the State of the opening to the other States where the assets are located. For this reason the liquidator in the main proceedings may request the opening of secondary proceedings when the efficient administration of the estate so requires.

(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. ... 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.

...

(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.'

4 Under Article 1(1) of the Regulation, it is to apply 'to collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator'.

5 Article 2(a) of the Regulation defines 'insolvency proceedings' as 'the collective proceedings referred to in Article 1(1). These proceedings are listed in Annex A'.

6 The list of proceedings in Annex A to the Regulation includes, for France, *sauvegarde* proceedings.

7 Article 3 of the 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 a debtor's main interests is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if he possesses an establishment within the territory of that other Member State. The effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State.

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

...'

8 Article 4 of the 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:

...

(j) the conditions for and the effects of closure of insolvency proceedings, in particular by composition;

...'

9 Article 16 of the Regulation lays down the principle of recognition of insolvency proceedings in the following terms:

'1. 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.

...'

10 Article 25 of the Regulation defines the scope of that principle 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. …'

11 Article 26 provides for an exception to that principle and allows a Member State to refuse to recognise insolvency proceedings opened in another Member State 'where the effects of such recognition … would be manifestly contrary to that State's public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual'.

12 Article 27 of the Regulation 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 [insolvency] 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.'

13 The conduct of the secondary proceedings is governed by Articles 28 to 38 of the Regulation. In order to ensure coordination between main proceedings and secondary proceedings, Article 31(1) provides that the liquidators in the main proceedings and secondary proceedings are to have a duty to cooperate and provide information to each other.

14 Article 33(1) of the Regulation allows for the secondary proceedings to be stayed, providing as follows:

'The court, which opened the secondary proceedings, shall stay the process of liquidation in whole or in part on receipt of a request from the liquidator in the main proceedings, provided that in that event it may require the liquidator in the main proceedings to take any suitable measure to guarantee the interests of the creditors in the secondary proceedings and of individual classes of creditors. Such a request from the liquidator may be rejected only if it is manifestly of no interest to the creditors in the main proceedings. Such a stay of the process of liquidation may be ordered for up to three months. It may be continued or renewed for similar periods.'

15 Article 34(1) of the Regulation, which deals with closure of the secondary proceedings, provides:

'Where the law applicable to secondary proceedings allows for such proceedings to be closed without liquidation by a rescue plan, a composition or a comparable measure, the liquidator in the main proceedings shall be empowered to propose such a measure himself.

Closure of the secondary proceedings by a measure referred to in the first subparagraph shall not become final without the consent of the liquidator in the main proceedings; failing his agreement, however, it may become final if the financial interests of the creditors in the main proceedings are not affected by the measure proposed.'

National law

16 Under French law, *sauvegarde* proceedings for undertakings are governed by Articles L.620-1 et seq. of the French Commercial Code (Code de Commerce). In the version as amended by Law No 2005-845 of 26 July 2005, applicable to the dispute in the main proceedings, Article L.620-1 thereof provided as follows:

'S*auvegarde* proceedings are hereby established, which may be opened at the request of a debtor referred to in Article L.620-2 where and in so far as he is able to demonstrate the existence of difficulties, which he is not able to overcome, such as to lead to the cessation of payments. The purpose of those proceedings is to help the undertaking to carry on its business [poursuite de l'activité économique de l'entreprise], to save jobs [maintien de l'emploi] and to settle liabilities [apurement du passif].

Sauvegarde proceedings shall give rise to a plan decided on by judgment at the end of a period of observation …'

Facts and the questions referred for a preliminary ruling

17 Christianapol, which is established in Łowyń (Poland), purports to be a wholly-owned subsidiary of a German company, which in turn is 90% owned by a French company.

18 By judgment of 1 October 2008, the Tribunal de commerce de Meaux (Meaux Commercial Court) (France) opened insolvency proceedings against Christianapol. That court based its jurisdiction on the finding that the centre of the debtor's main interests is situated in France. The court opened *sauvegarde* proceedings on the ground that the debtor was not in a situation calling for the cessation of payments, but that it would be in that situation if financial restructuring was not undertaken quickly.

19 On 21 April and 26 June 2009, Bank Handlowy, established in Warsaw (Poland), in its capacity as creditor of Christianapol, asked the referring court to open secondary insolvency proceedings against Christianapol under Article 27 of the Regulation. In the alternative, in the event that the judgment of the Tribunal de commerce de Meaux of 1 October 2008 was held to be a breach of public policy, in accordance with Article 26 of the Regulation, it made an application for the opening of winding-up proceedings under Polish law.

20 On 20 July 2009, the Tribunal de commerce de Meaux approved a rescue plan for Christianapol, under which debts would be paid off in instalments spread over 10 years and prohibiting the transfer of the undertaking situated in Łowyń and of certain defined assets belonging to the debtor. The French court maintained the appointment, made previously, of the persons responsible for representing the

interests of creditors for the period up to the closure of the procedure for the verification of claims and the submission of a final report on the activities of those representatives. In its judgment it also appointed a person to oversee the implementation of the plan (*commissaire à l'exécution du plan*).

21 On 2 August 2009, another creditor, Adamiak, established in Łęczyca (Poland), also asked for winding-up proceedings to be opened under Polish law.

22 Christianapol had originally contended that the application for the opening of secondary proceedings in Poland should be dismissed, since such proceedings were contrary to the objectives and nature of the *sauvegarde* proceedings. Following the approval of the rescue plan by the French court, Christianapol contended that the secondary insolvency proceedings should be discontinued, since the main proceedings had closed. It also contended that it was fulfilling its obligations under the plan approved by the French court, with the result that no pecuniary claims were outstanding against it under Polish law and there were therefore no grounds supporting a declaration of insolvency in respect of it.

23 The referring court asked the Tribunal de commerce de Meaux whether the insolvency proceedings in France, which were main proceedings for the purposes of the Regulation, were still pending. The answer given by the French court did not provide the necessary clarification. The referring court then consulted an expert.

24 In those circumstances, the Sąd Rejonowy Poznań-Stare Miasto w Poznaniu decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Is Article 4(1) and (2)(j) of [the Regulation] to be construed as meaning that the term "closure of insolvency proceedings" used in that provision should be interpreted autonomously, independently of the rules applicable in the legal systems of the individual Member States, or is it solely for the national law of the State of the opening of proceedings to decide when closure of insolvency proceedings occurs?

2. Is Article 27 of [the Regulation] to be interpreted as meaning that the national court dealing with an application for the opening of secondary insolvency proceedings may never examine the insolvency of a debtor in respect of whom main insolvency proceedings have been opened in another State, or rather that the national court may in certain situations examine the existence of the debtor's insolvency – particularly where the main proceedings are protective proceedings in which the court has established that the debtor is not insolvent (French *sauvegarde* proceedings)?

3. Does interpretation of Article 27 of [the Regulation] permit secondary insolvency proceedings, the nature of which is specified in the second sentence of Article 3(3) of [that] regulation, to be opened in the Member State in which the whole of the assets of the insolvent person are situated, when the main proceedings, which are subject to automatic recognition, are of a protective nature (French *sauvegarde* proceedings), a scheme of payment has been accepted and confirmed in those proceedings, that scheme is being implemented by the debtor and the court has forbidden the disposal of the debtor's assets?'

The request to have the oral procedure reopened

25 The oral procedure was closed on 24 May 2012 after the Advocate General delivered her Opinion.

26 By letter of 29 June 2012, received at the Court the same day, Christianapol asked the Court to order that the oral procedure be reopened.

27 It argued in support of that request that the Advocate General's Opinion raised a number of questions relating to the role and influence of the liquidator in the main insolvency proceedings as compared to the secondary proceedings, including whether the *sauvegarde* proceedings under French law are insolvency proceedings for the purposes of the Regulation and whether a court before which an application for opening of secondary proceedings has been made may examine the debtor's insolvency.

28 It should be observed that regard that the Court may at any moment, having heard the Advocate General, order the reopening of the oral procedure under Article 83 of its Rules of Procedure, inter alia if it considers that it lacks sufficient information or that the case must be dealt with on the basis of an argument which has not been debated between the parties or the parties concerned referred to in Article 23 of the Statute of the Court of Justice (see, to that effect, in respect of Article 61 of the Rules of Procedure in the version thereof in force prior to 1 November 2012, order of 4 July 2012 in Case C-62/11 *Feyerbacher*, paragraph 6 and the case-law cited).

29 In the present case, the Court, having heard the Advocate General, takes the view that it has all the information necessary to answer the questions referred and that that information has been debated before it.

30 Consequently, Christianapol's application to reopen the oral procedure must be rejected.

The questions referred for a preliminary ruling

Preliminary observations

31 It is appropriate to begin by recalling the scope of the Regulation.

32 It should be observed in that regard that Article 1(1) provides that the Regulation applies to collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator. Article 2(a) thereof defines 'insolvency proceedings' as being the collective proceedings referred to in Article 1(1), adding that they are listed in Annex A thereto.

33 It follows that, once proceedings are listed in Annex A to the Regulation, they must be regarded as coming within the scope of the Regulation. Inclusion in the list has the direct, binding effect attaching to the provisions of a regulation.

34 It is common ground that the *sauvegarde* proceedings opened in the main proceedings by the Tribunal de commerce de Meaux are among the proceedings included for France in Annex A to the Regulation.

35 It follows from that inclusion in the list, the merits of which are not the subject-matter of a question referred for a preliminary ruling, first, that the French *sauvegarde* proceedings come within the scope of the Regulation and, second, that the situation of a debtor such as Christianapol, in respect of which insolvency proceedings have been opened, must be regarded as being in a situation of insolvency for the purposes of application of that regulation.

The first question

36 By its first question, the referring court asks, in essence, whether Article 4(2)(j) of the Regulation must be interpreted as meaning that the concept of 'closure of the insolvency proceedings' has an independent meaning, specific to the Regulation, or whether it is for the national law of the Member State in which insolvency proceedings have been opened to determine at which moment the closure of those proceedings occurs.

37 The referring court explains that the answer to that question is essential for the purpose of determining whether the main insolvency proceedings opened in France against Christianapol are still pending in order for it to rule on the applications made by Bank Handlowy and Adamiak, seeking to have a second set of main insolvency proceedings opened in Poland against the same debtor. The referring court considers that, if the main insolvency proceedings opened in France are closed, it can allow the application made by Bank Handlowy and Adamiak, after ascertaining Christianapol's insolvency status under Polish law.

38 Those considerations call for the following remarks.

39 The referring court was correct in referring to the insolvency proceedings opened in France as main proceedings. They were opened pursuant to Article 3(1) of the Regulation.

40 As noted by the referring court, those proceedings produce universal effects in that the proceedings apply to the debtor's assets situated in all the Member States. As long as main insolvency proceedings are pending, no other main proceedings may be opened. Under Article 3(2) and (3) of the Regulation, any insolvency proceedings opened during that period may be only secondary and the effects thereof are restricted to the assets of the debtor situated in the territory of the Member State where those proceedings are opened (see, to that effect, Case C-191/10 *Rastelli Davide e C.* [2011] ECR I-13209, paragraph 15 and the case-law cited).

41 Under Article 16(1) of the Regulation, main insolvency proceedings in one Member State are to be recognised in all the other Member States from the time that it becomes effective in the State of the opening of proceedings. That rule implies that the courts of the other Member States are to recognise the judgment opening main insolvency proceedings, without being able to review the assessment made by the first court as to its jurisdiction (see, to that effect, Case C-341/04 *Eurofood IFSC* [2006] ECR I-3813, paragraphs 39 and 42, and also Case C-444/07 *MG Probud Gdynia* [2010] ECR I-417, paragraphs 27 and 29). Article 25 of the Regulation extends that rule of recognition to all judgments relating to the conduct and closure of proceedings.

42 In the main proceedings, the opening of the main insolvency proceedings by the Tribunal de commerce de Meaux was based, in particular, on the finding that the debtor's centre of main interests, the sole criterion for jurisdiction under Article 3(1) of the Regulation, was in France. As noted by the Advocate General in point 44 of her Opinion, that finding follows from the principle of recognition of judgments, by which the referring court is bound.

43 It follows that, should the main insolvency proceedings opened in France against Christianapol be found to be closed, the referring court cannot open a second set of main proceedings in Poland unless it can be established that Christianapol's centre of main interests transferred to Poland subsequently to the opening of the first set of main proceedings in France.

44 It is in the light of the aforegoing remarks that it must be determined which meaning is to be attached to the concept of 'closure of the insolvency proceedings'.

45 As the Court has observed, the Regulation is designed not to establish uniform proceedings on insolvency, but, as is apparent from recital 2 in the preamble thereto, to ensure that cross-border insolvency proceedings operate efficiently and effectively (*Eurofood IFSC*, paragraph 48). To that end, it lays down rules on recognition and jurisdiction as well as rules on the applicable law in that area.

46 The question of the law applicable to insolvency proceedings is governed by Article 4 of the Regulation which, in paragraph 1, designates for that purpose the law of the Member State within the territory of which those proceedings are opened. Article 4(2)(j) provides that that law determines the conditions for and effects of closure of insolvency proceedings.

47 Article 4 of the Regulation thus appears to be a conflict-of-laws rule, a categorisation confirmed by recital 23 in the preamble to the Regulation, which states that the uniform rules on conflict of laws provided for thereunder replace national rules of private international law.

48 As observed by the Advocate General in point 32 of her Opinion, the defining characteristic of a conflict-of-laws rule is that it does not in fact answer a question of substantive law itself, but simply determines the law that governs the answer to that question.

49 Although it is true that, where there are doubts with respect to their wording, provisions of European Union law must be given an autonomous and uniform interpretation, having regard to the context of the provision and the objective pursued by the legislation in question, the Court has nevertheless held that that principle holds true only for those provisions which make no express reference to the law of the Member States for the purpose of determining their meaning and scope (see, to that effect, Case C-396/09 *Interedil* [2011] ECR I-9915, paragraph 42 and the case-law cited).

50 Accordingly, questions such as the conditions for and effects of the closure of insolvency proceedings, about which Article 4(2)(j) of the Regulation makes an express reference to national law, cannot be given an autonomous interpretation, but must be decided under the *lex concursus* designated as applicable.

51 This analysis is not contradicted by the fact that, in paragraph 54 of its judgment in *Eurofood IFSC*, relied on by Christianapol and the French Government, the Court held that the concept of '[judgment] opening insolvency proceedings' under Article 16(1) of the Regulation must be defined by reference to two criteria specific to the Regulation. Unlike Article 4 of the Regulation, Article 16(1) does not make an express reference to national law, but lays down an immediately-applicable rule in the form of a principle that the first judgment opening proceedings is to be recognised.

52 In the light of those considerations, the answer to the first question is that Article 4(2)(j) of the Regulation must be interpreted as meaning that it is for the national law of the Member State in which insolvency proceedings have been opened to determine at which moment the closure of those proceedings occurs.

The third question

53 By its third question, the referring court asks, in essence, whether Article 27 of the Regulation must be interpreted as meaning that it allows for the opening of secondary insolvency proceedings in the Member State in which all of the debtor's assets are situated, where the main proceedings have a protective purpose.

54 It should be observed, as a preliminary point, that the answer to this question will be relevant for deciding the dispute in the main proceedings only if the main insolvency proceedings opened in France are still pending, which it is for the referring court to determine in the light of the answer given to the first question.

55 In providing that the opening of main insolvency proceedings in a Member State permits the opening of secondary proceedings in another Member State within the territory of which the debtor has an establishment, the first sentence of Article 27(1) of the Regulation makes no distinction according to the purpose of the main proceedings.

56 The same general wording is to be found in Article 3(3) of the Regulation, which provides that, where main proceedings have been opened, any insolvency proceedings opened subsequently by a court basing its jurisdiction on the presence of an establishment of the debtor are to be secondary proceedings.

57 Those provisions must therefore be construed as authorising the opening of secondary proceedings also where the main proceedings, like the French *sauvegarde* proceedings, have a protective purpose.

58 The interpretation advocated by Christianapol and the French Government, to the effect that the opening of main proceedings having a protective purpose precludes the opening of secondary proceedings, in addition to being incompatible with the wording of the provisions in question, runs counter to the recognised role of secondary proceedings in the system established by the Regulation. Although secondary proceedings are intended, inter alia, to protect local interests, they may also, as stated in recital 19 in the preamble to the Regulation, serve other purposes, which is why they may be opened at the request of the liquidator in the main proceedings, when the efficient administration of the estate so requires.

59 As observed by the referring court, the fact remains that the opening of secondary proceedings, which, under Article 3(3) of the Regulation, must be winding-up proceedings, risks running counter to the purpose served by main proceedings, which are of a protective nature.

60 It should be noted that the Regulation provides for a certain number of mandatory rules of coordination intended to ensure, as expressed in recital 12 in the preamble thereto, the need for unity in the Community. In that system, the main proceedings have a dominant role in relation to the secondary proceedings, as stated in recital 20 in the preamble to the Regulation.

61 The liquidator in the main proceedings thus has certain prerogatives at his disposal which allow him to influence the secondary proceedings in such a way that the protective purpose of the main proceedings is not jeopardised. Under Article 33(1) of the Regulation, he may request an order for stay of the process of liquidation for up to three months, which may be continued or renewed for similar periods. Under Article 34(1) of the same regulation, the liquidator in the main proceedings may propose closing the secondary proceedings with a rescue plan, a composition or a comparable measure. Article 34(3) provides that, during the stay of the process of liquidation under Article 33(1) of the Regulation, only the liquidator in the main proceedings or the debtor, with the liquidator's consent, may propose such measures.

62 The principle of sincere cooperation laid down in Article 4(3) EU requires the court having jurisdiction to open secondary proceedings, in applying those provisions, to have regard to the objectives of the main proceedings and to take account of the scheme of the Regulation, which, as observed in paragraphs 45 and 60 of this judgment, aims to ensure efficient and effective cross-border insolvency proceedings through mandatory coordination of the main and secondary proceedings guaranteeing the priority of the main proceedings.

63 The answer to the third question is therefore that Article 27 of the Regulation must be interpreted as meaning that it permits the opening of secondary insolvency proceedings in the Member State in which the debtor has an establishment, where the main proceedings have a protective purpose. It is for the court having jurisdiction to open secondary proceedings to have regard to the objectives of the main proceedings and to take account of the scheme of the Regulation, in keeping with the principle of sincere cooperation.

The second question

64 By its second question, the referring court asks, in essence, whether Article 27 of the Regulation must be interpreted as meaning that the court before which an application to have secondary insolvency proceedings opened has been made cannot examine the insolvency of a debtor against which main proceedings have been opened in another Member State, even where the latter proceedings have a protective purpose.

65 The first sentence of Article 27(1) of the Regulation provides that the opening of main insolvency proceedings in a Member State 'shall permit the opening' of secondary proceedings in another Member State within the territory of which the debtor has an establishment, 'without the debtor's insolvency being examined in that other State'.

66 As recognised by the Advocate General in point 75 of her Opinion, the wording used is not entirely clear as to whether, when secondary proceedings are opened, the examination of the debtor's insolvency is not necessary but remains possible, or is not authorised at all.

67 In those circumstances, the wording used in the first sentence of Article 27 of the Regulation must be construed in the light of the overall scheme and purpose of the Regulation of which it forms a part (see, to that effect, Case 803/79 *Roudolff* [1980] ECR 2015, paragraph 7).

68 It should be borne in mind that, as held in paragraph 32 above, the Regulation merely applies to insolvency proceedings. The Regulation does not define insolvency or lay down criteria for determining whether a situation of insolvency exists, but instead refers to national law. It follows that a prerequisite for the opening of main proceedings is that the court having jurisdiction has established that the debtor is insolvent under national law.

69 It should also be remembered that, under Article 16(1) of the Regulation, main insolvency proceedings opened in one Member State are to be recognised in all the other Member States from the time that it becomes effective in the State of the opening of proceedings.

70 In those circumstances, as the Spanish and French Governments maintain, the examination of the debtor's insolvency by the court having jurisdiction to open main proceedings is binding on any other courts before which an application to open secondary proceedings is made.

71 This interpretation is the only one liable to avoid the inescapable difficulties which would arise in the application, by different courts, of diverging national definitions of the concept of insolvency, in the absence of a definition of the concept of insolvency in the Regulation. Moreover, as observed by the French Government, an overall examination of insolvency must be made, having regard to the debtor's estate profile throughout the Member States, and not just based on isolated examinations limited to taking account of localised assets in a given territory.

72 The assessments, which can vary from one court to another, are incompatible with the objective of efficient and effective cross-border insolvency proceedings which the Regulation seeks to achieve through the coordination of main and secondary proceedings, whilst observing the priority of the main proceedings. It must be remembered that, as is apparent from paragraph 58 above, although the opening of secondary proceedings may be requested by, inter alia, local creditors, an application may also be made by the liquidator in the main proceedings when the efficient administration of the estate so requires.

73 It should be noted, however, that when a court before which an application for secondary proceedings has been made draws conclusions from the finding of insolvency in the main proceedings, it must have regard to the objectives of the main proceedings and take account of the scheme of the Regulation as well as the principles on which it is based.

74 The answer to the second question is therefore that Article 27 of the Regulation must be interpreted as meaning that the court before which an application to have secondary insolvency proceedings opened has been made cannot examine the insolvency of a debtor against which main proceedings have been opened in another Member State, even where the latter proceedings have a protective purpose.

Costs

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

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

1. **Article 4(2)(j) of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, as amended by Council Regulation (EC) No 788/2008 of 24 July 2008, must be interpreted as meaning that it is for the national law of the Member State in which insolvency proceedings have been opened to determine at which moment the closure of those proceedings occurs.**

2. **Article 27 of Regulation No 1346/2000, as amended by Regulation No 788/2008, must be interpreted as meaning that it permits the opening of secondary insolvency proceedings in the Member State in which the debtor has an establishment, where the main proceedings have a protective purpose. It is for the court having jurisdiction to open secondary proceedings to have regard to the objectives of the main proceedings and to take account of the scheme of the Regulation, in keeping with the principle of sincere cooperation.**

3. **Article 27 of Regulation No 1346/2000, as amended by Regulation No 788/2008, must be interpreted as meaning that the court before which an application to have secondary insolvency proceedings opened has been made cannot examine the insolvency of a debtor against which main proceedings have been opened in another Member State, even where the latter proceedings have a protective purpose.**

[Signatures]