Reports of Cases

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 20 May 2021 [1]

Case C-25/20

ALPINE BAU GmbH, Salzburg, Celje Branch, in liquidation,
NK, liquidator in the main insolvency proceedings
v
ALPINE BAU GmbH

(Request for a preliminary ruling from the Višje sodišče v Ljubljani (Court of Appeal, Ljubljana, Slovenia))

(Reference for a preliminary ruling – Judicial cooperation in civil matters – Insolvency proceedings – Interpretation of Article 32(2) of Regulation (EC) No 1346/2000 – Failure to indicate a time limit for the lodgement of claims in insolvency proceedings – Lodgement of claims in secondary proceedings by the insolvency liquidator for the main proceedings – Time limit for the lodgement of claims laid down by national law)

1. This reference for a preliminary ruling concerns the interpretation of Article 32(2) of Regulation (EC) No 1346/2000, [2] which is applicable *ratione temporis* to the dispute in view of the date on which the main insolvency proceedings were opened. [3]

2. The Višje sodišče v Ljubljani (Court of Appeal, Ljubljana, Slovenia) asks the Court of Justice whether the liquidator in the main insolvency proceedings conducted in Austria, who is seeking to file, in secondary proceedings conducted against the same debtor in Slovenia, claims which he already filed in the former proceedings, is subject to the time limits (and the consequences of failure to comply with those time limits) laid down in Slovenian law.

3. The Court has given rulings on cross-border insolvencies on a number of occasions, [4] but, unless I am mistaken, it has not yet done so in relation to Article 32 of Regulation No 1346/2000, the implementation of which is beset by a number of difficulties. [5]

1 Original language: Spanish.

2 Council Regulation of 29 May 2000 on insolvency proceedings (OJ 2000 L 160, p. 1). It was in force from 31 May 2002 until it was repealed by Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (OJ 2015 L 141, p. 19).

3 Article 91 of Regulation 2015/848.

4 On the subject of Article 4(2)(h) of Regulation No 1346/2000, which is relevant to this case, see judgments of 9 November 2016, *ENEFI* (C-212/15, EU:C:2016:841; 'judgment in *ENEFI*'), and of 18 September 2019, *Riel* (C-47/18, EU:C:2019:754).

5 Commentators agree that, as a result of its complexity, Article 32(2) does not apply de facto, which meant that it was not amended in Regulation 2015/848. See Koller, C. and Slonina, M., 'Information for creditors and lodging of claims', in Hess, B. and Oberhammer, P., *European Insolvency Law (Heidelberg-Luxembourg-Vienna Report)*, C. H. Beck, Hart, Nomos, 2014, paragraph 945 et seq., in particular paragraph 951; and Maesch, S.C. and Knof, B., 'Art. 45', in Brinkmann, M., *European Insolvency Regulation*, C. H. Beck, Hart, Nomos, 2019, paragraph 18.

I. Legal framework

A. European Union law. Regulation No 1346/2000

4. In accordance with recital 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. …'

5. Recital 23 is worded as follows:

'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.'

6. Article 4 ('Law applicable') states:

'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;

…'

7. According to Article 28 ('Applicable law'):

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

8. Article 32 ('Exercise of creditors' rights') states:

'1. Any creditor may lodge his claim in the main proceedings and in any secondary proceedings.

2. The liquidators in the main and any secondary proceedings shall lodge in other proceedings claims which have already been lodged in the proceedings for which they were appointed, provided that the interests of creditors in the latter proceedings are served thereby, subject to the right of creditors to oppose that or to withdraw the lodgement of their claims where the law applicable so provides.

3. The liquidator in the main or secondary proceedings shall be empowered to participate in other proceedings on the same basis as a creditor, in particular by attending creditors' meetings.'

B. National law

1. Austrian law. Insolvenzordnung[6]

9. Paragraph 107(1) provides that a special hearing is to be held in order to verify claims lodged after the expiry of the period laid down for that purpose, which were not assessed at the general hearing to determine the liabilities. Paragraph 105(1) applies to such claims. Claims lodged less than 14 days before the hearing to verify the liabilities are not to be taken into consideration.

2. Slovenian law. Zakon o finančnem poslovanju, postopkih zaradi insolventnosti in prisilnem prenehanju[7]

10. Pursuant to Article 59(2), in insolvency proceedings a creditor must lodge his claim in respect of an insolvent debtor within three months of publication of the notice of the opening of such proceedings, save as otherwise provided for in paragraphs 3 and 4 of that article.[8]

11. In accordance with Article 298(1), if the claim is guaranteed by a preferential right, the creditor is required also to lodge the preferential right in the insolvency proceedings, within the period laid down for lodging a claim, save as otherwise provided for in Article 281(1),[9] or Article 282(2).[10]

12. Article 296(5) provides that, where a creditor does not lodge his claim in respect of the insolvency debtor within the period provided for that purpose, the claim is to be extinguished and the court is to refuse the creditor's claim lodged out of time.

13. According to Article 298(5), where a creditor does not comply with the time limit for lodging a preferential right, that right is to be extinguished.

II. Facts, procedure and question referred for a preliminary ruling

14. By order of 19 June 2013, the Handelsgericht Wien (Commercial Court, Vienna, Austria) opened insolvency proceedings against the company ALPINE Bau GmbH.

15. The proceedings were initially brought as restructuring proceedings but were reclassified as insolvency proceedings on 4 July 2013.

16. It is clear from the order of the Handelsgericht Wien (Commercial Court, Vienna) of 5 July 2013 that the insolvency proceedings conducted against ALPINE Bau GmbH are the 'main insolvency proceedings' for the purposes of Article 3(1) of Regulation No 1346/2000.

6 Law on insolvency.

7 Law on financial transactions, insolvency proceedings and compulsory liquidation ('ZFPPIPP') (Uradni list RS No 126/2007 and subsequent amendments).

8 Those two paragraphs relate to claims arising on the basis of legal acts which are open to challenge or have been challenged.

9 This paragraph deals with priority rights acquired in enforcement proceedings, on which the notice of the opening of insolvency proceedings has no effect.

10 This paragraph governs preferential rights which may be relied on out of court.

17. On 6 August 2013, the liquidator in the main insolvency proceedings [11] lodged with the Okrožno sodišče v Celju (Regional Court, Celje, Slovenia) an application for the opening of secondary insolvency proceedings against ALPINE BAU GmbH, Salzburg – Celje Branch.

18. By decision of 9 August 2013, the Okrožno sodišče v Celju (Regional Court, Celje):

– opened the secondary insolvency proceedings against that branch;

– informed the creditors and the liquidators that, pursuant to Article 32 of Regulation No 1346/2000, they had the right to lodge their claims in the main proceedings and in any secondary proceedings. This was set out in a notice published on the website of the Agencija Republike Slovenije za javnopravne evidence in storitve (Agency of the Republic of Slovenia for statutory public registers and related services) on the same date.

19. According to the notice, claims (preferential or otherwise) were required to be lodged in the secondary proceedings within three months of publication of the notice. The notice also pointed out that, if claims and preferential rights were not lodged within the time limit, those claims and preferential rights would be extinguished vis-à-vis the debtor in those secondary proceedings and the court would dismiss the application pursuant to Article 296(5) or Article 298(5) of the ZFPPIPP.

20. On 30 January 2018, NK submitted an application to lodge claims (pursuant to Article 32(2) of Regulation No 1346/2000) in the secondary insolvency proceedings. NK asked the Okrožno sodišče v Celju (Regional Court, Celje) to grant that application and include it in any subsequent distribution of sums to the creditors in those insolvency proceedings.

21. By order of 5 July 2019, the Okrožno sodišče v Celju (Regional Court, Celje) refused that application on the grounds that it was out of time, pursuant to Article 296(5) of the ZFPPIPP.

22. NK appealed against that order to the Višje sodišče v Ljubljani (Court of Appeal, Ljubljana), which has referred the following question to the Court of Justice for a preliminary ruling:

'Is Article 32(2) of Regulation No 1346/2000 to be interpreted as meaning that the rules on the time limits for lodging creditors' claims, and the consequences of lodging claims out of time under the law of the State in which the secondary proceedings are being conducted, apply to the lodgement of claims in secondary proceedings by the liquidator in the main insolvency proceedings?'

III. Procedure

23. The request for a preliminary ruling was received at the Registry of the Court on 20 January 2020.

24. Observations were lodged by ALPINE BAU GmbH, NK, the Polish and Slovene Governments, and the Commission. It was not considered necessary to hold a hearing.

[11] To whom I shall refer as 'NK'.

IV. Analysis

A. Preliminary points

25. Article 32(2) of Regulation No 1346/2000 provides that any liquidator, in either the main proceedings or secondary proceedings, is entitled (or, as the case may be, required) [12] to *lodge*, [13] in other insolvency proceedings which have been opened against the same debtor, claims which have already been lodged in the proceedings for which he or she was appointed.

26. Regulation No 1346/2000 does not expressly stipulate the point in time when that option should be exercised. That is why the referring court asks whether the liquidator in the main insolvency proceedings is subject to the time limits (and to the consequences of failure to comply with those time limits) laid down in the law of the State in which the secondary proceedings were opened.

27. With the exception of NK, those who have appeared before the Court favour the view that the time limits for lodging claims, and the effects of lodging a claim out of time, are governed by the *lex concursus* of each proceedings.

28. In NK's submission, however, the verification and admission of claims in the main proceedings must precede the lodgement of those claims in any other proceedings. NK maintains implicitly that the time limits for lodging claims in any other proceedings are determined in accordance with the *lex concursus* of the former proceedings.

29. I concur with the majority view put forward regarding the law governing the time limits for the lodging of claims in secondary proceedings. Furthermore, I disagree with NK's argument concerning the verification and admission of claims before those claims are lodged in secondary proceedings.

30. I must deal first with certain aspects of the European cross-border insolvency system, which will help to understand better what is at issue in this reference for a preliminary ruling.

[12] Point 68 et seq. of this Opinion.

[13] There are nuances in the expressions used in the different language versions which help to define that term. The action carried out by the liquidator is described as: 'presentar su crédito' (Spanish version); 'produire sa créance' (French version); 'lodge his claim' (English version); 'insinuare il propio credito' (Italian version); 'reclamar o respectivo crédito' (Portuguese version); and 'seine Forderung anmelden' (German version). As a result of that action, claims are deemed to have been lodged, declared, notified, filed or entered, qualifiers which may be used interchangeably. However, I shall refer in general to the phrase 'claims lodged'.

B. Cross-border insolvencies

1. The legislation [14]

31. The first proposals for regulating cross-border insolvencies in (what is now) the European Union date back to the 1960s. Already at that time, the prevailing belief was that only a common regulatory framework would be able to address opportunist conduct by insolvent debtors, or their creditors, and would enable the efficient administration of undertakings in difficulty whose assets were located in a number of Member States.

32. After several unsuccessful attempts, a Convention on insolvency proceedings ('the Convention') [15] was opened for signature on 23 November 1995 but did not actually enter into force. The Convention was accompanied by a report drawn up and negotiated by the Member States. [16] Although that document was never officially adopted, it is used as reference for the interpretation of texts postdating the Convention, where those texts reproduce its content. [17]

33. Regulation No 1346/2000 was drafted on the basis of the Convention. Article 32, in particular, reproduces one of the provisions of the Convention.

34. In 2012, in accordance with Article 46 of Regulation No 1346/2000, the Commission drafted a report on the application of the regulation. It appended a proposed amendment [18] which resulted in Regulation 2015/848, which has been generally applicable since 26 June 2017 to proceedings opened on or after that date.

35. The 2015 text preserves the essence of the earlier text while, in so far as is relevant to the present case, introducing improvements regarding the interconnection of parallel insolvency proceedings, the provision of information to creditors, and the lodgement of creditors' claims in a Member State other than their State of domicile, residence or establishment. [19]

36. In particular, the provision the interpretation of which forms the subject of this reference for a preliminary ruling remains unchanged and is now Article 45 of Regulation 2015/848.

[14] I will leave aside the legislation governing the insolvency of insurance undertakings, credit institutions, investment undertakings which provide services involving the holding of funds or securities for third parties, and collective investment undertakings, to which Regulation No 1346/2000 is not applicable (Article 1(2), reproduced in Regulation 2015/848).

[15] Council document CONV/INSOL/X1.

[16] The report is known by its authors' names: M. Virgós and E. Schmit. It is dated 8 July 1996 and its reference is Council document 6500/1/96 REV1 DRS (CFC).

[17] See, inter alia, the references to the report in the Opinions of the following Advocates General: Jacobs in *Eurofood IFSC* (C-341/04, EU:C:2005:579, points 2, 95, 103, 131, 141, 143 and 150); Ruiz-Jarabo Colomer in *Seagon* (C-339/07, EU:C:2008:575, point 30 et seq.); Szpunar in *Lutz* (C-557/13, EU:C:2014:2404, points 48, 58 and 60); Bobek in *ENEFI* (C-212/15, EU:C:2016:427, point 70); and Bot in *Riel* (C-47/18, EU:C:2019:292, points 52 and 55).

[18] Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings, COM/2012/0744 final.

[19] Other innovations are not relevant to the subject matter of this dispute: they concern the inclusion of 'pre-insolvency' and 'hybrid' proceedings, which many Member States had established following the adoption of Regulation No 1346/2000; the registration of proceedings and the interconnection of registers; and the rules governing the cross-border insolvency of groups of companies.

2. The model laid down in Regulation No 1346/2000

37. Regulation No 1346/2000 contains provisions on international jurisdiction, applicable law, the recognition and enforcement of judgments and the coordination of proceedings. Overall, it creates a system in line with the 'mitigated' or 'attenuated universalism' model. [20]

(a) Multiple proceedings (main and secondary)

38. The model adopted acknowledges that it may not be practical to introduce insolvency proceedings having universal scope. Therefore, alongside main insolvency proceedings, it allows other 'territorial' (independent, if they are opened prior to the main proceedings, and secondary, if they are opened later) proceedings covering only assets situated in the State of opening. [21]

39. The main proceedings are opened before 'the courts of the Member State within the territory of which the centre of a debtor's main interests is situated'. [22] The main proceedings have general scope to deal with the liabilities and the assets. The opening of proceedings in another Member State requires the debtor to have an establishment in that State. The insolvency estate consists solely of the debtor's property in that territory. [23]

40. In territorial and secondary proceedings, the liabilities extend to all the debtor's creditors. Every creditor who has his habitual residence, domicile or registered office in the Union [24] has the right 'to lodge his claims in each of the insolvency proceedings … relating to the debtor's assets' in any proceedings opened in Member States which are bound by Regulation No 1346/2000. [25]

41. Where a number of different insolvency proceedings are pending at the same time in relation to the same debtor, there is a need to coordinate those proceedings. Regulation No 1346/2000 lays down substantive rules for that purpose, such as the rule governing the distribution of the proceeds from the liquidation of assets, [26] and rules on cooperation between liquidators, in particular through the sufficient exchange of information. [27]

42. With the same aim (ensuring the coordination of pending proceedings), the legislature affords a dominant role to proceedings which are opened in the State where the centre of the debtor's main interests is located. As a result, it is possible for the liquidator appointed for the main proceedings also to intervene in secondary proceedings for certain purposes (such as proposing a restructuring plan or applying for realisation of the assets in the secondary proceedings to be suspended). [28]

[20] It takes elements from the *territorial* model, which splits the treatment of insolvency into as many proceedings as there are States in which the debtor has property and also separates the assets and liabilities in each one, and from the *universal* model, which, in its most extreme form, envisages a single set of proceedings for all property and the application of a single legal system to all of the insolvent debtor's assets, regardless of where these are situated.

[21] See recital 11 of Regulation No 1346/2000. The reasons for applying for secondary proceedings to be opened vary depending on who the applicant is; in this case, it was the liquidator in the main proceedings (NK).

[22] Article 3(1) of Regulation No 1346/2000.

[23] Article 3(2) of Regulation No 1346/2000.

[24] The discussion concerning whether this also applies to creditors domiciled in third countries is not relevant to this case.

[25] Recital 21 and Articles 32(1) and 39.

[26] Recital 21 and Article 20(2).

[27] Recital 21 and Article 31.

[28] Recital 21 and Articles 31, 33, 34 and 37.

(b) Law applicable

43. Regulation No 1346/2000 does not lay down *European insolvency law* but rather uniform conflict rules which identify the national law that is to govern each set of proceedings, together with the effects thereof.

44. In addition to conflict rules, the regulation contains directly applicable substantive and procedural provisions which supplant those of the Member States' legal systems. [29]

45. Unless otherwise provided for in Regulation No 1346/2000, the law of the State in which proceedings are opened (*lex concursus*) is to apply to all proceedings, whether main, territorial or secondary. [30]

46. The choice of the *lex concursus*, which is usual in instruments governing cross-border insolvency, is based on three arguments: [31]

– Unity of approaches, which is essential in order to bring collective proceedings, like insolvency proceedings, to a successful conclusion and to afford those involved certainty regarding their obligations and their rights.

– Facilitating the administration of the proceedings by ensuring that the forum and the law coincide. This also avoids costs associated with evidence and the application of foreign law.

– Ensuring that all creditors of the same debtor are, as regards their position in the body of creditors, subject to a single legal system in respect of each set of proceedings.

47. The substantive and procedural aspects of the opening, conduct and closure of the insolvency proceedings must be governed by the *lex concursus*.

48. In accordance with that rule, Article 4 of Regulation No 1346/2000, by means of a non-exhaustive list, [32] assigns the determination, in particular, of certain matters, to the law of the State of the opening of proceedings. Those matters include, subject to the reservations laid down by that regulation, [33] 'the rules governing the lodging, verification and admission of claims'. [34]

[29] Some of those provisions concern the lodging of claims by foreign creditors and, to that extent, they are relevant to this case. However, none of those provisions deals with the question of time limits.

[30] Article 4, for the purposes of the main proceedings, and Article 28, for the purposes of secondary proceedings. Conflict rules which derogate from the *lex concursus* are set out in Articles 5 to 15, which, despite their schematic position, also concern the *lex concursus* of secondary proceedings.

[31] Virgós Soriano, M. and Garcimartín Alférez, F.J., *Comentario al Reglamento Europeo de Insolvencia*, Thomson-Civitas, 2003, paragraph 118.

[32] Judgment in *ENEFI*, paragraph 21.

[33] Article 32(1) and (2), which lays down directly applicable provisions relating to the submission of claims, is one of these.

[34] Article 4(2)(h). As I have pointed out, Article 28, governing the law applicable to secondary insolvency proceedings, has the same scope.

(c) The law governing the lodgement of claims

49. Three consequences for creditors (certainly those located in the European Union) in cases of cross-border insolvency are apparent from the above:

– Creditors have the right to lodge their claims in any main or secondary (or territorial, as the case may be) proceedings which are opened against the same debtor in a Member State bound by Regulation No 1346/2000.

– A creditor must assert that right in accordance with the law applicable to the proceedings in which he or she chooses to lodge the claim.

– The admission of a claim in one set of proceedings does not automatically mean that that claim will be admitted in other proceedings. The verification and admission of claims are subject to the law applicable to each set of proceedings. [35]

50. Conscious of the difficulties associated with the lodgement of claims in proceedings opened abroad, the legislature included a number of specific provisions in Regulation No 1346/2000:

– Pursuant to Article 32(2), there is no need for the creditors themselves to lodge the claims; instead, this can be done in their stead by the liquidator appointed for proceedings, in relation to claims already lodged in those proceedings. [36]

– In accordance with Article 40, there is a duty to notify the opening of proceedings to all known creditors whose domicile, habitual residence or registered office is situated in a Member State other than that in which the proceedings are opened. Notification, by way of an individual notice, must have a minimum content which includes a reference to the time limits for the lodgement of claims and the consequences of failure to comply with those time limits. [37]

51. Regulation No 1346/2000 does not harmonise the time limits for the lodgement of claims. It does not do this in relation to any proceedings or any party in particular. [38]

52. Within the scope of the *lex concursus* of each set of proceedings, Member States may, therefore, regulate time limits one way or another, provided that they observe the principles of effectiveness and equivalence. [39]

[35] Judgment of 18 September 2019, *Riel* (C-47/18, EU:C:2019:754, paragraph 53): 'the rules on the verification and admission of claims continue … to be determined by the law of the Member State within the territory of which the insolvency proceedings have been opened.' There is no reason why the conditions and the persons who are entitled to oppose the lodgement of claims have to be identical in each legal system.

[36] Virgós-Schmit Report, point 236. The report refers also to the aim of strengthening the influence of liquidators in other proceedings opened against the same debtor. The reality of that statement depends on the interpretation of Article 32(3), in relation to which uncertainty exists (see Maesch, S.C., and Knof, B., loc. cit., paragraphs 21 and 22). In particular, one of the disputed points is whether the liquidator's right of participation in accordance with that article is conditional on the liquidator having notified the claims of the creditors he represents (Wessels, B., *International Insolvency Law (Part II – European Insolvency Law)*, Wolters Kluwer, 2017, paragraphs 10866 and 10868).

[37] Other provisions in the same vein, such as those relating to the content of the lodgement of a claim (Article 41) and the languages of the notification (Article 42), are not relevant to this reference for a preliminary ruling.

[38] That was one of the areas described as problematic in the Commission's report on the application of Regulation No 1346/2000, to which I referred above. See, now, Article 55(6) of Regulation 2015/848.

[39] On the application of those principles in relation to Regulation No 1346/2000, see judgment of 15 October 2015, *Nike European Operations Netherlands* (C-310/14, EU:C:2015:690, paragraph 28).

C. Time limit for the lodgement of claims by the liquidator

53. I shall deal with the interpretation of Article 32(2) of Regulation No 1346/2000 by setting out the reasons why, in my view, the liquidator in the main proceedings must comply with the time limits laid down by the law of the State of opening of secondary proceedings if he or she is seeking to assert, in those proceedings, claims already lodged in the main proceedings.

54. For that purpose, I shall employ the usual criteria for interpretation: literal, historical, purposive and systematic.

1. Literal criterion

55. Having accepted that multiple insolvency proceedings may exist against a single debtor, Article 32(2) of Regulation No 1346/2000 provides that 'the liquidators in the main and any secondary proceedings shall lodge in other proceedings claims which have already been lodged in the proceedings for which they were appointed …'.

56. Nothing in the wording suggests that claims must be lodged at one point in time or another. Therefore, it is necessary to apply the general rule, that is, the rule derived from the basic conflict-of-law provisions (Articles 4 and 28 of Regulation 1346/2000) which, as I have observed, designate the *lex concursus* of the State of opening of each set of proceedings. [40]

57. In particular, it can be inferred from Article 4(2)(h) that the law of the State of opening determines the rules governing the lodging, verification and admission of claims, which include the time limits for lodging a claim. The procedural classification of this matter would also have led to the application of the law of the court seised, including in the absence of an express provision. [41]

58. The judgment in *ENEFI* confirms that interpretation. That judgment held, in addition, that the *lex concursus* applies to the consequences of failure to observe the rules governing the filing of claims and, in particular, time limits. [42]

2. Historical and purposive criteria

59. Article 32(2) of Regulation No 1346/2000 reproduces the associated provision of the (failed) Convention. The continuity between the two instruments implies that the lodging of claims by the liquidator plays the same role and pursues an identical objective in both texts. The conditions for lodging a claim must, therefore, also be the same.

[40] Point 45 et seq. of this Opinion.

[41] In relation to that rule in Regulation 2015/848, see Piekenbrok, A., 'Art 7', in Brinkmann, M., loc. cit., paragraph 69. Article 55(6) of that regulation expressly provides for the application of the *lex concursus* of the Member State of the opening of proceedings to the period for the lodgement of claims.

[42] Judgment in *ENEFI*, paragraph18: '… the consequences of a failure to respect the rules of the *lex fori concursus* concerning the filing of claims and, in particular, the time limits laid down in that regard must also be assessed on the basis of that *lex fori concursus*'.

60. Article 32 of the Convention was included as part of the attenuated universalism model, where multiple insolvency proceedings against the same debtor are possible. Article 32(1) provided, by way of derogation from the general rule that the lodgement of claims is governed by the *lex concursus*, that any creditor had the right to assert his claims in the proceedings of his choice,[43] or even in a number of proceedings.[44]

61. To facilitate the exercise of that right,[45] a mechanism was created whereby the liquidator in each set of proceedings was entrusted with the provision of a *service*[46] to the creditors he or she represented: the liquidator was to notify those claims in other proceedings which had been opened,[47] with the right to oppose this being reserved to each creditor.

62. For the purpose of carrying out his task, the liquidator was *authorised* by the Convention to assert in other proceedings claims already lodged in the proceedings in which he or she was acting.[48] To some extent, the liquidator acts in the creditors' stead, in their names and on their behalf, and he or she *must* notify claims in so far as it is in those creditors' interests to do so.

63. However, the decision to lodge a claim does not mean that the holder of that claim changes: the claim continues to belong to each individual creditor. The Convention protected the rights of creditors by allowing them to oppose the lodgement of their claims by the liquidator and to withdraw a claim previously lodged in other proceedings.[49]

64. In accordance with that principle, notification by the liquidator produces the same effects as notification by the creditor himself.[50] Therefore, the associated conditions and time limits, which, according to the Convention, were governed by the *lex concursus* regardless of who filed the claims, are also identical.[51]

43 Needless to say, the filing of the claim is not an objective in itself but rather a step towards enabling creditors to assert their rights (as creditors of the insolvent debtor) and to participate in the distribution of proceeds.

44 Virgós-Schmit Report, paragraph 235. Article 39 of the Convention (which Regulation No 1346/2000 reproduces) reiterates that right in relation to creditors whose domicile, habitual residence or registered office is located in a Member State other than the State of the opening of proceedings.

45 Particularly for 'small creditors', whose claims may be registered in more than one set of proceedings without great expense. Virgós-Schmit Report, paragraph 36, point 2.

46 The notion of 'service' appears in Kemper, J., 'Art. 32', in Kübler, B.M., Prütting, H. and Bork, R., *Kommentar zur Insolvenzordnung*, C. H. Beck, 2015, paragraph 4; in relation to the current Article 45, in Mankowski, P., Müller, M. and Schmidt, J., *Europäische Insolvenzverordnung 2015*, C. H. Beck, 2016, paragraph 51.

47 Virgós-Schmit Report, paragraph 236.

48 Virgós-Schmit Report, paragraph 238. Ideally, *only* the creditor *or* the liquidator lodges the claim in parallel proceedings. However, one of the difficulties associated with the provision is that it opens up the possibility of a single claim being lodged twice in the same proceedings: by the liquidator *and* by the creditor. See point 95 of this Opinion.

49 Article 32(2), *in fine*, of Regulation No 1346/200. Virgós-Schmit Report, paragraph 237. The independence of the creditor's right and his decision to assert it is the premiss underlying Article 32(1).

50 Virgós-Schmit Report, paragraph 238.

51 Article 4(2)(h) of the Convention and Virgós-Schmit Report, paragraphs 238 and 267.

3. Systematic criterion

(a) The liquidator's duty, extension of the creditor's right

(1) The liquidator's position under Article 32 of Regulation No 1346/2000

65. The duty incumbent on the liquidator under Article 32 of Regulation No 1346/2000 follows the rule which authorises creditors to lodge their claims in any insolvency proceedings.

66. The position of the provision confirms what I said about its origins and purpose: the position of the liquidator appointed in the proceedings, who files claims in any other proceedings, is one of continuity and dependence vis-à-vis the position held by the creditors themselves. [52]

67. Since the link between the liquidator and the creditors justifies the application to them of the same body of rules when lodging claims in other proceedings, the priority conferred on the creditor confirms that it is his situation which determines those rules. In that connection:

– The *lex concursus*, applicable to claims pursuant to Articles 4 and 28 of Regulation No 1346/2000, concerns creditors and liquidators equally.

– The exemption of the liquidator in proceedings from the time limits for the lodging of claims laid down by the *lex concursus* which governs other proceedings would be possible if the creditors also qualify for that exemption. Chapter IV of Regulation No 1346/2000, which lays down substantive rules derogating from the *lex concursus* for the benefit of creditors whose habitual residence, domicile or registered office is in a Member State other than the State of the opening of proceedings, does not, however, provide for that possibility. [53]

(2) The usefulness of the lodgement of claims by the liquidator

68. The liquidator is not only *authorised* to lodge in other proceedings claims which have been lodged in his proceedings but he or she is *required* to do so, where that serves the interests of creditors. [54]

69. The *authority* to lodge claims confers legal standing on the liquidator in all proceedings, regardless of whether or not the law of the State of the opening of proceedings provides for it. That allows the liquidator to fulfil his legal obligation [55] and ensures the aim of Article 32(2) of Regulation No 1346/2000.

[52] That subordinate position of the liquidator is specific; it is directly linked to the cross-border nature of the insolvency. Furthermore, in Regulation No 1346/2000, the liquidator does not represent only the debtor's or creditors' interests; his task is to seek the best outcome for both sides, under the supervision of an authority (which may be judicial).

[53] See, by contrast, Article 55 of Regulation 2015/848.

[54] It is commonplace in legal literature to refer to an *authority* or option granted to liquidators: see, for example, Geroldinger, A., *Verfahrenskoordination im Europäischen Insolvenzrecht*, Manzsche Veerlags- und Universitätsbuchhandlung, 2010, p. 317; in relation to Regulation 2015/848, Maesch, S.C. and Knof, B., loc. cit., paragraph 12. The Virgós-Schmit Report, point 236, uses the word *right*. In fact, Regulation No 1346/2000 lays down a *duty* of the liquidator to notify, in other insolvency proceedings, claims previously lodged in his proceedings. It is possible that national legal systems may require a liquidator to have specific authorisation. Regulation No 1346/2000 implicitly grants that authorisation in Article 32(2), supplanting the *lex concursus* in that respect.

[55] Some commentators infer from the fact that it is an obligation that, in the event of non-fulfilment, the liquidator incurs liability: Raimon, M., *Le règlement communautaire 1346/2000 du 29 mai 2000 relatif aux procédures d'insolvabilité*, LGDJ, 2007, paragraph 716.

70. However, the liquidator's *duty* is not absolute: it requires an examination of the usefulness [56] or of the potential advantages derived from the filing, in secondary proceedings, of claims already asserted in the proceedings for which the liquidator was appointed.

71. That examination does not concern each individual claim and its prospects of payment. [57] It is, rather, an overall examination of all the claims [58] lodged in the proceedings for which the liquidator was appointed.

72. A specific assessment, in accordance with the law applicable to the claim and, as regards the rank of the claim, the law of the State in which that claim was lodged, has to be conducted by the individual creditor for eminently practical reasons. [59]

73. The final say on the lodgement of a claim therefore rests with the holder of that claim (in other words, the creditor), to whom Regulation No 1346/2000 reserves, in Article 32(2), *in fine*, the right to oppose notification by the liquidator and to withdraw the claim if he or she concludes that notification of that claim does not suit him. [60]

74. In reality, the liquidator does not defend a different, or higher, interest than that of the creditors, which would justify the application to him of special rules when it comes to the notification of claims in other proceedings. The shut-off valve for the system, which restores to each individual creditor the decision concerning whether not to lodge his claim, confirms the convergence of the liquidator's and creditors' interests.

75. The reasons why a liquidator's assessment is not the same as a creditor's assessment are not dogmatic but practical. [61] A creditor who has lodged his claim in proceedings demonstrates, as a rule, an interest in collecting payment of that claim from the debtor's assets in the place where he or she is located. [62] On that basis, it is legitimate to limit the liquidator's task to weighing up the advantages and disadvantages in respect of all the claims lodged in the proceedings in which he or she is acting.

[56] The Virgós-Schmit Report, paragraph 239, cites as an example of usefulness the situation where the liquidator finds that the assets to be distributed in other proceedings are so significant that even ordinary creditors in his proceedings may receive a 'dividend' concurrently with the ordinary creditors who have lodged their claims in those other proceedings.

[57] Notification must be carried out in such a way that each claim and its holder can be identified individually by the liquidator in the proceedings in which the claim is lodged.

[58] This can mean every claim or those claims corresponding to a particular class of creditors (Virgós-Schmit Report, paragraph 239).

[59] Virgós-Schmit Report, paragraph 239. On the law applicable to the ranking of claims, see Article 4(2)(i) of Regulation No 1346/2000.

[60] Conversely, if the liquidator does not notify a claim, the creditor retains the option to do so.

[61] The purpose of each operator's assessment does not change but the depth of that assessment does.

[62] That is the case, in particular, when a claim is lodged in proceedings opened in the debtor's centre of interests, where the insolvency estate is universal. The subsequent opening of proceedings in another State (in other words, secondary proceedings) leads to the exclusion of the debtor's assets in the territory from that insolvency estate. It is reasonable to assume that each creditor who has lodged his claim in the main proceedings has an interest, in principle (unless he or she makes a statement to the contrary, therefore), in that claim also being considered in any secondary proceedings.

(b) Duty of the liquidator in any proceedings?

76. Article 32(2) of Regulation No 1346/2000 is part of Chapter III, relating to *secondary* insolvency proceedings. However, the duty laid down in that provision concerns, literally, all the liquidators – those for the main proceedings and those for the secondary proceedings. All liquidators are required to 'lodge in other proceedings claims which have already been lodged in the proceedings for which they were appointed'. [63]

77. It cannot be assumed that, as a result of the schematic position of the article, the liquidator for the *main* proceedings, enjoys a special status compared with the liquidators for the other proceedings that are pending when it comes to the assertion of claims lodged in the main proceedings.

78. The subordinate nature of secondary proceedings vis-à-vis proceedings which are opened in the debtor's centre of main interests certainly leads to the liquidator for those proceedings having a special status in relation to the others. [64] However, Regulation No 1346/2000 does not grant that liquidator a privileged position when it comes to the lodgement of claims, which could result in the non-application to him of the time limits laid down by the *lex concursus* of each set of proceedings.

(c) Relationship to Chapter IV of Regulation No 1346/2000

79. Under the heading 'Provision of information for creditors and lodgement of their claims', Chapter IV of Regulation No 1346/2000 lays down provisions derogating from the *lex concursus*, which, like Article 32(2), are intended to facilitate the lodgement of claims.

80. Those provisions, which are directly applicable, favour creditors whose habitual place of residence, domicile or registered office is in the territory of a Member State other than that in which the insolvency proceedings were opened. I believe that they may also be applied, *mutatis mutandis*, to the liquidator for foreign proceedings.

81. The professional knowledge which a liquidator may legitimately be assumed to have does not necessarily extend to *cross-border* insolvency or contribute to stricter conditions in relation to acts which the creditors themselves could carry out, when the liquidator, by assuming responsibility for those acts, is providing the creditors with a service by taking their place. [65]

82. In Regulation No 1346/2000, none of the provisions cited refer specifically to the rules on time limits. [66] The meaning of that silence is twofold: (a) it makes it difficult to claim that the liquidator is not subject to the general approach, that is to the *lex concursus* of each set of proceedings; and (b) if that were not the case, it would make it necessary to decide, by means of interpretation, which approach would apply instead of the general approach. [67]

[63] In practice, the most likely scenario is that the liquidator for the main proceedings will file those claims in any secondary proceedings (Virgós Soriano, M. and Garcimartín Alférez F.J., loc. cit., paragraph 425).

[64] Point 42 of this Opinion.

[65] Point 61 of this Opinion.

[66] See, by contrast, Article 55(6) of Regulation 2015/848. The situation is different where the *lex concursus* lays down a special rule in respect of the liquidator for the foreign proceedings or for foreign creditors specifically in the light of that characteristic. In my view, Regulation No 1346/2000 does not preclude that difference in treatment which is, in fact, intended to restore substantive equality between all creditors.

[67] With the added problem that the approach has to be uniform.

83. The fact that the liquidator is not subject to the time limits laid down in the *lex concursus* of each set of proceedings ultimately results in unforeseen and unregulated different treatment of the liquidator (and by extension, of the creditors whose claims he lodges),[68] compared with local creditors who are subject to those time limits and to the consequences of the lodgement of their claims out of time.[69]

4. Summary

84. In summary, I believe that the lodgement of claims by the liquidator (for the main insolvency proceedings) in secondary proceedings is subject to the time limits laid down by the law of the State of the opening of secondary proceedings.

85. That is also the correct solution from a pragmatic point of view. If the liquidator were not subject to those time limits in the secondary proceedings, the management, progress and conduct of those proceedings would be destined for serious inconvenience.

D. Claims lodged (not 'verified and admitted')

86. For the sake of completeness, I shall briefly examine the interpretation of Article 32(2) of Regulation No 1346/2000 put forward by NK. In NK's submission, only claims which have already been lodged in the main proceedings can be lodged in secondary insolvency proceedings, provided that they have been *verified and admitted* in those proceedings.

87. In my view, NK's argument is not supported by the wording, the origins or the aim of that article; nor does it follow from a systematic interpretation. Moreover, acceptance of NK's argument would undermine the effective management of each set of insolvency proceedings.

88. That argument – I repeat – cannot be accepted because:

– It does not state in the wording of any of the language versions that, in addition to being *lodged* in proceedings, claims must also be *verified* and *admitted* as a prerequisite for subsequently being asserted in other proceedings.

– Neither the Convention nor the report accompanying it limit the lodgement of claims by the liquidator to those which have been verified and admitted in the proceedings for which the liquidator was appointed.

– That limitation conflicts with the aim of Article 32(2) of Regulation No 1346/2000: it generates expenditure and delays the notification of claims, without providing any benefits. Since the admission and verification of claims in each set of proceedings depends on the *lex concursus*, the completion of those stages in one set of proceedings does not guarantee what their outcome will be in the others.[70]

[68] Individual lodgement by each creditor would also continue to be subject to the *lex concursus* of the Member State of the proceedings in which the claims are lodged.

[69] In the final analysis, given that the lodgement of claims is linked to participation in the distribution of proceeds, it is the *pari passu* rule which is affected.

[70] Point 49, *in fine*, of this Opinion.

– It is not possible to conclude that the qualifier 'lodged' in Article 32(2) encompasses the qualifiers 'verified and admitted'. Regulation No 1346/2000 distinguishes those terms in other provisions,[71] reflecting the different procedures or stages typical of insolvency proceedings.

– This would also seem to be suggested by the schematic link between Article 32 and Chapter IV of Regulation No 1346/2000, which exclusively lays down the formalities for lodging such claims. In the interests of consistency, the meaning of the word 'lodged' must be the same in both places.

– The right of any creditor to assert a claim in a number of proceedings is not dependent on that claim first being verified and admitted in any of those proceedings. Since the liquidator acts in the name and on behalf of the creditor, it is logical that his duty is not subject to the completion of those steps either.

E. Additional considerations (shortness of the time limits laid down in the law applicable)

89. I have explained that, in my opinion, there are no arguments supporting the interpretation of Article 32(2) of Regulation No 1346/2000 as meaning that the liquidator's duty is limited to claims which have already been verified and admitted in the proceedings for which he or she was appointed.

90. Nor do I believe that there are persuasive arguments for concluding that, for that or another reason, the rules on time limits applicable to the liquidator derogate from those applicable to local creditors and to creditors who, having asserted their claims in one set of proceedings, choose to lodge those claims individually in other proceedings.

91. NK argues[72] that the time limits laid down in the ZFPPIPP are very short and, to that extent, incompatible with the Austrian model of insolvency proceedings. Accordingly, it is impossible to comply in practice with the obligation laid down in Article 32(2) of Regulation No 1346/2000.

92. Given that, to my mind, NK has committed the initial error indicated above (regarding the characteristics of the claims he or she is required to lodge in other proceedings), his argument, which is linked to that error, cannot be accepted.

93. It is right, however, to stress that the time limits laid down for the lodgement of claims in any Member state must not negate the effectiveness of a provision of EU law. In that sense, the issue of which NK complains may be real.

94. The shortness of the periods laid down for the lodgement of claims in different States,[73] in addition to the differences between them, with regard also to the consequences of lodging claims out of time,[74] could impede the practical effects of Article 32 of Regulation No 1346/2000.

[71] See Article 4(2)(h) and Article 31.

[72] Paragraph 19 of his written observations.

[73] Most States have set those periods in the *abstract*: they range from 30 days to 3 months. In other States, the court *specifically* determines the duration, although it is usually bound to comply with a minimum time limit. The variations are greater when it comes to lodgement out of time. See McCormack, G., Keay, A. and Brown, S., *European Insolvency Law. Reform and Harmonization*, Edward Elgar 2017, pp. 193-196 (table 5.2).

[74] Ibid.

95. As concerns Article 32(2), its application could give rise to the repeated lodgement of the same claim: a creditor who does not have confidence that the liquidator will consider it useful to lodge the claims in foreign proceedings may feel obliged to notify those claims himself in order to ensure that he or she is within the time limit. [75]

96. However, the EU legislature assumes that there is divergence between the laws of the Member States when it provides for the application of the *lex concursus* in relation to the lodgement of claims.

97. The reform which resulted in Regulation 2015/848 reflected the difficulties faced by creditors, particularly small creditors and small and medium undertakings, when lodging their claims in proceedings which have been opened abroad.

98. Regulation 2015/848 addressed those difficulties by laying down a uniform rule which, on the one hand, expressly confirms the application of the *lex concursus* to time limits, and, on the other hand, amends that rule by stipulating a minimum period (and the day on which that period starts to run) for a foreign creditor to lodge his claim. [76]

99. The duration of that period (30 days) [77] makes clear that the EU legislature adopted the approach already taken in the majority of the Member States.

100. As it appears unlikely that Member States will resolve by themselves the difficulties relating to the adaptation of the different time limits for the lodgement of claims, the implementation of Article 32 of Regulation No 1346/2000 (and of Article 45 of Regulation 2015/848) requires cooperation between liquidators in order to prevent a claim from being lodged multiple times in the same insolvency proceedings. [78]

V. Conclusion

101. In the light of the foregoing considerations, I propose that the Court of Justice reply to the Višje sodišče v Ljubljani (Court of Appeal, Ljubljana, Slovenia) as follows:

Article 32(2) of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings is to be interpreted as meaning that where the liquidator for the main insolvency proceedings lodges claims in secondary proceedings, the time limits for the lodgement of those claims, and the consequences of lodging claims out of time, are governed by the law of the State in which the secondary proceedings were opened.

[75] Reinhart, S., 'Art. 32', in Stürner, R., Eidenmüller, H. and Schoppmeyer, H., *Münchener Kommentar zur Insolvenzordnung*, C. H. Beck, 2016, paragraph 17.

[76] Article 55(6). Regulation 2015/848 also strengthens the mechanisms for ensuring that a foreign creditor learns that proceedings have been opened in another country, by means of provisions governing the registration of proceedings, the interconnection of registers and access to those registers. It also introduces improvements in the chapter relating to the lodgement of claims.

[77] As opposed to the 45 days which was put forward by the Commission in its proposal (footnote 18 above) and accepted by the European Parliament (Position of the European Parliament adopted at first reading on 5 February 2014 with a view to the adoption of Regulation (EU) No …/2014 of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings, P7_TC1-COD(2012)0360 (OJ 2017 C 93, p. 366), Article 41(4)).

[78] Wessels, B., loc. cit., paragraph 10867. Article 41 of Regulation 2015/848, which is more explicit than Regulation No 1346/2000, provides that liquidators have a duty to cooperate in any way, including the conclusion of protocols.