Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 24 May 2012 [1]

Case C-116/11

Bank Handlowy and Ryszard Adamiak
v
Christianapol sp. z o.o.

(Reference for a preliminary ruling from the Sąd Rejonowy Poznań Stare Miasto w Poznań (Poland))

(Regulation (EC) No 1346/2000 — Insolvency proceedings — Time when insolvency proceedings are closed — Examination of insolvency in secondary proceedings — Relationship between main proceedings and secondary proceedings where the main proceedings are rescue proceedings)

I – Introduction

1. This reference for a preliminary ruling concerns the interpretation of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings [2] ('the Insolvency Regulation' or 'the Regulation'). In cases of insolvency involving an overseas dimension, that regulation provides in principle for two possibilities: the institution of main proceedings and the institution of territorial or secondary proceedings. [3]

2. Main insolvency proceedings are instituted in the Member State where the debtor has the centre of his main interests. They cover all assets held by the debtor in all Member States, have universal effect and are governed by the law of the State in which they were instituted. Territorial or secondary proceedings, on the other hand, are geographically restricted to the territory of the Member State in which they were instituted and cover only the assets situated in that Member State. They are governed by the law of that State. In the case of concurrent main and secondary or territorial proceedings, the Regulation lays down numerous obligations relating to cooperation and coordination between the proceedings concerned.

3. The special feature of this case lies in the fact that the main proceedings instituted in France are rescue proceedings (*procédure de sauvegarde*) ('*sauvegarde* proceedings') aimed at restructuring the company in question. It is that special feature which has given rise to the three questions referred to the Court by the Sąd Rejonowy Poznań Stare Miasto w Poznań. [4] This reference for a preliminary ruling therefore gives the Court an opportunity to clarify the relationship between main proceedings and secondary proceedings.

1 — Original language: German.

2 — OJ 2000 L 160 p. 1, as amended by Council Regulation (EC) No 630/2005 of 12 April 2005 (OJ 2005 L 100, p. 1) and Council Regulation (EC) No 694/2006 of 27 April 2006 (OJ 2006 L 121, p. 1).

3 — Article 3 of the Regulation differentiates between these two terms. In accordance with Article 3(3), secondary proceedings are those which are instituted *after* the opening of the main proceedings. Territorial proceedings, on the other hand, are, in accordance with Article 3(4), those which are instituted *before* the opening of the main proceedings. I too shall use this terminology in the remainder of this Opinion.

4 — Stare Miasto District Court, Poznań.

II – Legal context

A – *European Union law*

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

5. For the purposes of the Regulation, Article 2(a) defines 'insolvency proceedings' as 'the collective proceedings referred to in Article 1(1). These proceedings are listed in Annex A'. Point (c) concerns 'winding-up proceedings' and defines these as 'insolvency proceedings within the meaning of point (a) involving realising the assets of the debtor, including where the proceedings have been closed by a composition or other measure terminating the insolvency, or closed by reason of the insufficiency of the assets. Those proceedings are listed in Annex B'.

6. With regard to international jurisdiction, Article 3 provides as follows:

'1. The courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary.

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

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.

4. Territorial insolvency proceedings referred to in paragraph 2 may be opened prior to the opening of main insolvency proceedings in accordance with paragraph 1 only:

(a) where insolvency proceedings under paragraph 1 cannot be opened because of the conditions laid down by the law of the Member State within the territory of which the centre of the debtor's main interests is situated;

(b) where the opening of territorial insolvency proceedings is requested by a creditor who has his domicile, habitual residence or registered office in the Member State within the territory of which the establishment is situated, or whose claim arises from the operation of that establishment.'

7. Under the heading 'Law applicable', Article 4 of the Regulation provides as follows:

'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;

(k) creditors' rights after the closure of insolvency proceedings;

…'

8. Article 16 concerns the recognition of insolvency proceedings and provides in paragraph 1:

'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.'

9. Article 26 contains a public policy exception, providing:

'Any Member State may refuse to recognise insolvency proceedings opened in another Member State or to enforce a judgment handed down in the context of such proceedings where the effects of such recognition or enforcement would be manifestly contrary to that State's public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual.'

10. Article 27 opens Chapter III, entitled 'Secondary insolvency proceedings', and, under the heading 'Opening of proceedings', provides:

'The opening of the proceedings referred to in Article 3(1) by a court of a Member State and which is recognised in another Member State (main proceedings) shall permit the opening in that other Member State, a court of which has jurisdiction pursuant to Article 3(2), of secondary insolvency proceedings without the debtor's insolvency being examined in that other State. These latter proceedings must be among the proceedings listed in Annex B. Their effects shall be restricted to the assets of the debtor situated within the territory of that other Member State.'

11. Article 33 governs the 'Stay of liquidation' and reads:

'1. 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.

2. The court referred to in paragraph 1 shall terminate the stay of the process of liquidation:

— at the request of the liquidator in the main proceedings,

— of its own motion, at the request of a creditor or at the request of the liquidator in the secondary proceedings if that measure no longer appears justified, in particular, by the interests of creditors in the main proceedings or in the secondary proceedings.'

12. Article 34 concerns 'Measures ending secondary insolvency proceedings':

'1. 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.

2. Any restriction of creditors' rights arising from a measure referred to in paragraph 1 which is proposed in secondary proceedings, such as a stay of payment or discharge of debt, may not have effect in respect of the debtor's assets not covered by those proceedings without the consent of all the creditors having an interest.

3. During a stay of the process of liquidation ordered pursuant to Article 33, only the liquidator in the main proceedings or the debtor, with the former's consent, may propose measures laid down in paragraph 1 of this Article in the secondary proceedings; no other proposal for such a measure shall be put to the vote or approved.'

13. Article 37 governs situations in which territorial proceedings are instituted before the main proceedings are opened, and provides:

'The liquidator in the main proceedings may request that proceedings listed in Annex A previously opened in another Member State be converted into winding-up proceedings if this proves to be in the interests of the creditors in the main proceedings.'

14. Annex A to the Regulation lists the proceedings in the Member States which constitute insolvency proceedings under Article 2(a). Annex B contains a corresponding list of winding-up proceedings under Article 2(c).

B – *National law*

15. French law provides for three types of insolvency proceedings, which are listed in Annex A to the Regulation: *sauvegarde* proceedings, *redressement judiciaire* and *liquidation judiciaire*.

16. *Sauvegarde* proceedings are governed by Article L 620-1 et seq. of the French Commercial Code (*Code de Commerce*), as amended by Law No 2005-845 of 26 July 2005. These provide that the opening of such preventive restructuring proceedings may be requested only by the debtor himself, if and in so far as he is able to demonstrate the existence of difficulties connected with the payment of debts.

17. The purpose of *sauvegarde* 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*). At the same time, however, preventive rescue proceedings are also intended to enable the undertaking to be reorganised (*réorganisation*).

III – Main proceedings and questions for a preliminary ruling

18. By judgment of 1 October 2008, the Tribunal de commerce de Meaux (Meaux Commercial Court) (France) opened insolvency proceedings against the debtor, Christianapol sp.z. o.o. ('Christianapol'), established in Poland. Those insolvency proceedings were *sauvegarde* proceedings under French law.

19. The French court appointed a person to represent the interests of creditors and an insolvency administrator, [5] and held that Christianapol 'is not in a situation calling for the cessation of payments, since its projected cash-flow position is positive'. [6] The French court based its jurisdiction on the finding that the centre of the debtor's main interests was in France, on the grounds that Christianapol belongs to a group of undertakings which has the centre of its main interests in France. All Christianapol's assets, including its production works, are, however, in Poland.

20. The proceedings instituted by the Tribunal de commerce de Meaux are, in the view of that court and in the view of the referring court, main insolvency proceedings within the meaning of Article 3(1) of the Regulation.

21. On 21 April 2009, a creditor of Christianapol, which has its seat in Poland, Bank Handlowy w Warszawie SA ('Bank Handlowy') requested the Sąd Rejonowy Poznań (the referring court) to open secondary insolvency proceedings under Article 27 of the Insolvency Regulation. In the alternative, if the judgment of the Tribunal de commerce de Meaux were not to be recognised in Poland for breach of public policy, in accordance with Article 26 of the Regulation, it made an application on 26 June 2009 for the opening of insolvency proceedings to realise the debtor's assets. In that application, Bank Handlowy did not specify whether it was thereby seeking the opening of main proceedings under Article 3(1) or territorial proceedings under Article 3(4)(b) of the Regulation.

22. On 20 July 2009, the Tribunal de commerce de Meaux approved the rescue plan submitted by the debtor, under which debts to the creditors covered by the payment plan would be paid off in instalments spread over 10 years. In that decision, the court also appointed a person to see that the plan was put into effect (*commissaire à l'exécution du plan*). It maintained the appointment, made previously, of the persons responsible for representing the interests of creditors for the period until the closure of the procedure for the verification of claims and the submission of a final report on the activities of those representatives.

23. On 2 August 2009, another creditor of Christianapol, P.P.H.U. 'Adax' Ryszard Adamiak (established in Poland), also asked the referring court to open winding-up proceedings under Polish law, again without specifying whether it had in mind the opening of main proceedings or of territorial proceedings.

24. Christianapol had originally contended that the application for the opening of secondary proceedings in Poland should be dismissed, such proceedings being contrary to the objectives and nature of the *sauvegarde* procedure. Once the rescue plan had been approved, Christianapol contended that the secondary insolvency proceedings should be discontinued, the main proceedings having been closed. It also contended that the other insolvency applications should be dismissed, on the grounds that it was fulfilling its obligations under the composition agreement approved by the French court, with the result that no pecuniary claims were outstanding against it.

5 — *Mandataire judiciaire* and *administrateur judiciaire*.

6 — 'Que Christianapol sp. z. o.o. n'est [pas] en état de cessation de paiements, puisque la trésorerie prévisionnelle s'avère positive'.

25. In this connection, the Polish court asked the Tribunal de commerce de Meaux whether any main insolvency proceedings were still pending in France following the approval of the rescue plan. Neither the answer given by the Tribunal de commerce de Meaux nor the expert's report on that question provided clarification in this regard.

26. According to the Polish Court, however, any further action on its part depends on whether the French proceedings are closed: if they are closed, the Polish court will be able, if necessary, to commence new main proceedings in Poland. If the proceedings in France are not yet closed, the Polish court will simply open secondary proceedings.

27. By order of 21 February 2011, the national court therefore stayed the proceedings and referred the following questions to the Court:

'1. Is Article 4(1) and (2)(j) of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings 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 Regulation No 1346/2000 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 Regulation No 1346/2000 permit secondary insolvency proceedings, the nature of which is specified in the second sentence of Article 3(2) of the 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?'

Bank Handlowy, Christianapol, the French, Spanish and Polish Governments and the Commission took part in the proceedings before the Court.

IV – Legal assessment

A – *The first question*

28. The referring court wishes to ascertain first of all whether the time when insolvency proceedings are closed is determined in accordance with national law or must rather be defined autonomously for the purposes of European Union law. It refers in this regard to the Court's judgment in *Eurofood*,[7] and asks whether the principles established there with respect to the opening of insolvency proceedings can also be transposed to the closure of such proceedings.

7 — Case C-341/04 *Eurofood IFSC* [2006] ECR I-3813.

29. The French Republic and Christianapol take the view that the question of the closing of the proceedings must be interpreted autonomously for the purposes of European Union law, to the effect that insolvency proceedings are to be regarded as being closed as soon as the debtor has recovered the power to manage its assets and the insolvency administrator has ceased performing his functions. I do not share that view, however.

30. The law applicable to insolvency proceedings is governed by Article 4 of the Regulation. Paragraph 1 of that article provides that the law applicable is that of the Member State in which the proceedings are opened (*lex concursus*). Paragraph 2 specifies in a non-exhaustive list[8] the areas covered by the *lex concursus*. Article 4(2)(j) refers in this regard to 'the conditions for and the effects of closure of insolvency proceedings, in particular by composition'. The wording of Article 4 indicates that it is a conflict-of-laws rule which leaves to national law the question as to when insolvency proceedings are closed.

31. This is further confirmed by recital 23 in the preamble to the Regulation, which provides that the Regulation should set out 'uniform rules on conflict of laws which replace … national rules of private international law'. It states that the *lex concursus* governs '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'.

32. 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. However, a definition of the term 'closure of insolvency proceedings' which is autonomous for the purposes of European Union law, as proposed by France and Christianapol, would directly determine at European Union level the point at which the proceedings are closed (which would amount to the direct laying down of a substantive provision), instead of simply referring to the national law of the State of the opening of the proceedings. This would be contrary to the wording of Article 4 and recital 23 in the preamble to the Regulation.

33. The French Government rightly submits 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.[9] However, in the case of rules on conflict of laws, this should not cause the conflict-of-laws content of a provision to be lost because the question of substantive law has already been answered at European Union level. Accordingly, the Court has also held that the principle of the uniform interpretation and application of Community law applies only to those provisions which make *no* express *renvoi* to the law of the Member States for the purpose of determining their meaning and scope.[10] Because of its express reference to the *lex concursus*, however, Article 4 is not amenable to an autonomous interpretation for the purposes of European Union law.

34. The objectives of the Regulation also militate against an interpretation of the closure of proceedings that is autonomous for the purposes of European Union law. As is clear from recital 11 in its preamble, the Regulation is not actually *intended* to create a uniform insolvency law, either by way of a uniform insolvency procedure applicable throughout the European Union or by creating uniform substantive laws. Rather, it assumes that a uniform insolvency procedure of universal application cannot be achieved. As recital 6 in its preamble shows, the Regulation therefore confines itself to provisions governing jurisdiction, the coordination of parallel proceedings and co-existing

8 — Case C-444/07 *MG Probud Gydnia sp. z.o.o.* [2010] ECR I-417, paragraph 25.

9 — See my Opinion in Case C-396/09 *Interedil* [2011] ECR I-9915, point 39, and the judgments in Case C-523/07 *A* [2009] ECR I-2805, paragraph 34, and Case C-98/07 *Nordania Finans A/S and BG Factoring A/S* [2008] ECR I-1281, paragraph 17, and the case-law cited there.

10 — See Case C-204/09 *Flachglas Torgau* [2012] ECR, paragraph 37, and Case C-523/07 *A* [2009] ECR I-2805, paragraph 34 and the case-law cited.

different national rules, and the recognition of judgments given in connection with insolvency proceedings. In short, autonomous determination of fundamental questions of procedure such as the closure of proceedings would lead, by a process of gradual conversion, to a uniform insolvency law, for which the Regulation does not provide.

35. It is true that, in *Eurofood*,[11] the Court defined the conditions for the 'opening of insolvency proceedings'. However, contrary to the view taken by France and Christianapol, that judgment cannot be transposed to the present case.

36. First of all, the subject-matter of the question referred for a preliminary ruling in *Eurofood* was the meaning of the term 'opening of insolvency proceedings' as it is used in Article 16 of the Regulation, not as it is used in Article 4. However, Article 16 itself has no conflict-of-laws content but lays down a substantive rule by prescribing that the first insolvency proceedings opened are to take priority. Consequently, Article 16, unlike Article 4, is amenable to an interpretation which is autonomous for the purposes of European Union law.

37. Accordingly, the purpose of the interpretation given in *Eurofood* was not to lay down general criteria for establishing when insolvency proceedings can in principle be regarded as opened. This remains a question to be determined by the *lex concursus* identified by Article 4. Its purpose was rather to ensure the uniform application of Article 16, which, in the light of its prescriptive content, was moreover necessary. Article 16 serves to identify the relevant *lex concursus*. In order to be able to make the *renvoi* identified in Article 4, it is necessary to determine the legal order to which such *renvoi* is to be made. This is governed by Article 16, in so far as that article gives priority to the proceedings which were *opened first*. However, that rule of priority would be deprived of its practical effect if every Member State were to determine differently which proceedings are opened first. To avoid that outcome, a uniform interpretation of the term 'opening' in Article 16 was necessary, and was provided in *Eurofood*.

38. However, the closure of insolvency proceedings is not comparable with the situation that obtains before proceedings are opened. As soon as insolvency proceedings within the meaning of the Insolvency Regulation have been opened, those proceedings are recognised in all the other Member States, in accordance with Article 16(1), and thus preclude the opening of any other main proceedings. Before the opening of proceedings, conflicts of jurisdiction may arise as a result of differences between the rules applied by the Member States, as shown by *Eurofood*.[12] Once main proceedings have been opened, no further conflicts of jurisdiction can arise – Article 16 of the Regulation has created a mechanism specifically aimed at preventing such conflicts.

39. The fact that leaving the question of the closure of proceedings to national law may give rise to practical difficulties is demonstrated by the present case. However, even an autonomous interpretation of the term 'closure of proceedings' would not smooth out those difficulties. If autonomous criteria were to be established, the courts of the Member State in which secondary proceedings are to be opened would have to determine whether those criteria were fulfilled in the Member State of the main proceedings. That could prove equally difficult in practice.

40. The European Union legislature could profitably provide some clarity in this regard, for example by requiring the Member States to indicate when the proceedings listed in Annexes A and B are to be regarded as closed from the national point of view, or by creating an information system to that end. The practical difficulties do not, however, justify any departure from the wording and broad logic of the Regulation.

11 — Cited in footnote 7, paragraph 54.

12 — Cited in footnote 7.

41. The answer to the first question referred for a preliminary ruling must therefore be that Article 4(1) and (2)(j) of the Regulation is to be interpreted to the effect that it is for national law alone to decide when 'closure of insolvency proceedings' takes place. Accordingly, in the present case, it is for French law alone to determine whether or not the proceedings pending there have been closed.

42. Since the referring court alluded to this issue in its order for reference, I shall take the liberty of making one further, final comment with a view to giving a useful answer: if the proceedings in France were closed, the referring court would indisputably be precluded from opening secondary proceedings. However, it would also be precluded from opening new main proceedings.

43. The French court based its jurisdiction on the fact that the debtor has its centre of main interests in France and therefore opened main insolvency proceedings as referred to in Annex A to the Regulation. In the present case, however, that finding appears to be in some doubt; after all, Christianapol has all its assets and its production facilities in Poland. In *Interedil*,[13] the Court held that the centre of main interests must be identified by reference to criteria that are both objective and ascertainable by third parties, as recital 13 in the preamble to the Regulation also makes clear.[14] Furthermore, in the case of companies, the second sentence of Article 3(1) of the Regulation establishes a presumption that the centre of main interests is the place of the registered office. In the light of all the foregoing, there is much to support the view that Christianapol has the centre of its main interests in Poland.

44. However, the referring court must not disregard the French court's finding that the centre of main interests is in France. The French court's decision opening the proceedings is to be recognised by the courts of all the other Member States[15] and is not open to review.[16] Article 25 extends that principle of recognition to all judgments concerning the course and closure of insolvency proceedings. Consequently, that principle also covers the referring court's decision that the centre of main interests is in France. In order to be able to open main proceedings, the Polish court would first have to establish that the debtor's centre of main interests is in Poland, in accordance with Article 3(1). However, in so far as the factual circumstances have not changed since the opening of the French *sauvegarde* proceedings, the principle of recognition explained above, which has already been confirmed by the Court on a number of occasions, precludes that finding. A finding to that effect would amount to a review, as an incidental question, of the French judgment, which is not permitted by the Regulation.

45. Nor can recognition be refused by recourse to Article 26 of the Regulation. As the Court has earlier held in *Eurofood*,[17] Article 26 must be interpreted strictly. There is a potential breach of public policy only if recognition or enforcement, by jeopardising a fundamental legal principle of the State of recognition, would come into unacceptable conflict with the legal order of that State.[18] That would not appear to be the case in this instance and, moreover, none of the parties to the proceedings has claimed that it is.

13 — *Interedil* [2011] ECR I-9915, paragraph 49. In this regard, see also my Opinion in that case, cited in footnote 9, point 57.

14 — 'The "centre of main interests" should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties'.

15 — See recital 22 in the preamble to the Regulation: 'This Regulation should provide for immediate recognition of judgments concerning the opening, conduct and closure of insolvency proceedings which come within its scope (…). Recognition of judgments delivered by the courts of the Member States should be based on the principle of mutual trust. (…) The decision of the first court to open proceedings should be recognised in the other Member States …'.

16 — See also *Eurofood*, cited in footnote 7, paragraph 42, and *MG Probud Gdynia*, cited in footnote 8, paragraph 29.

17 — Cited in footnote 7, paragraph 62 et seq.

18 — See also recital 22, which states that '… grounds for non-recognition should be reduced to the minimum necessary'.

B – *The third question*

46. By its third question, the referring court essentially wishes to ascertain whether secondary proceedings can also be opened in the circumstances of the present case, that is to say, where the main proceedings are rescue proceedings and all the debtor's assets are situated in the Member State in which the opening of secondary proceedings is requested. Inasmuch as, logically, the question whether secondary proceedings may be opened at all in such circumstances comes before the second question referred, that is to say, the conditions for opening those proceedings, where necessary, I shall examine the third question first.

47. The background to this question is that all Christianapol's assets are situated in Poland. The referring court has submitted that, under Polish law, the opening of winding-up proceedings would constrain Christianapol to suspend production and close its business, thus preventing any restructuring. This would frustrate the objectives of the French rescue proceedings and jeopardise the achievement of the rescue plan. The referring court therefore asks whether the main proceedings' being rescue proceedings excludes the opening of secondary proceedings.

1. Applicability of the Regulation

48. We must first of all settle the question whether the Regulation is applicable also to rescue proceedings. According to Bank Handlowy's submissions, the Regulation is indeed applicable to the proceedings listed in Annex A but only in so far as, in the case in question, those proceedings actually satisfy the conditions set out in Article 1(1) of the Regulation. The Tribunal de commerce de Meaux having found, when opening the *sauvegarde* proceedings, that Christianapol was not unable to meet its liabilities, the Regulation is not applicable to the proceedings conducted in France. The Polish court is therefore entitled to refuse to recognise the French proceedings and to open new main proceedings independently of those in France.

49. I take the view, however, that the Insolvency Regulation is applicable in this case too, in which the main proceedings are rescue proceedings. Making reference to Article 1(1), Article 2(a) defines the insolvency proceedings falling within the scope of the Regulation and, to that end, mentions the proceedings listed in Annex A. If proceedings are listed there, it must be assumed that the Regulation is applicable. This is also true, therefore, of the French *sauvegarde* proceedings, which are listed in Annex A.

50. That said, the recitals in the preamble [19] and the wording of Article 2 show that a further requirement for the applicability of the Regulation is that the conditions laid down in Article 1(1) must be fulfilled. However, the Regulation contains no definition of the term 'insolvency'. Because of the differences in the substance of the insolvency rules in place in the Member States and the, in some cases extensive, differences in the understanding of what insolvency means, a definition of 'insolvency' could not be found. Moreover, it is not the purpose of the Insolvency Regulation to harmonise insolvency proceedings. [20] Accordingly, as the explanatory report on the European Union Convention on insolvency proceedings [21] makes clear, [22] the applicability of the Regulation depends on whether the Member State concerned regards the proceedings at issue as insolvency proceedings. If there is any doubt about whether proceedings are proceedings within the meaning of Article 1(1) of the Regulation, in particular whether they arise out of the insolvency of the debtor, it is necessary to refer to the understanding of the Member State in which the proceedings are being conducted.

19 — See recital 10: '… In order for this Regulation to apply, proceedings … should … have to comply with the provisions of this Regulation. …'.

20 — See recital 11.

21 — Virgós/Schmit Report. Many of the recitals in the preamble to the Regulation refer to this report. With regard to its relevance to the interpretation of the Regulation, see the Opinion of Advocate General Jacobs in Case C-341/04 *Eurofood* [2006] ECR I-3813, point 2. Although not published in the Official Journal, it exists as an EU Council document of 8 July 1996 (6500/1/96).

22 — Virgós/Schmit, Report on the Convention on Insolvency Proceedings, paragraph 49.

51. The French Government submitted at the hearing that the condition for opening *sauvegarde* proceedings is the impending insolvency of the debtor. In the view of the French legislature, therefore, this case concerns an insolvent debtor. The conditions set out in Article 1(1) are accordingly fulfilled.

52. Consequently, the Regulation is also applicable to French *sauvegarde* proceedings.

2. Admissibility of proceedings secondary to main rescue proceedings

53. However, given that rescue and winding-up proceedings pursue different objectives, the question now arises whether secondary proceedings may be excluded when, as in this case, the main proceedings are rescue proceedings.

54. As the Spanish Government, too, has observed, with respect to the opening of secondary proceedings, the Regulation draws no distinction according to the nature of the main proceedings. Once proceedings have been instituted that are main proceedings as referred to in Annex A, Articles 3(3) and 27 allow secondary proceedings to be opened, irrespective of the nature of the main proceedings. The wording of the Regulation thus allows secondary proceedings to be instituted even where the main proceedings take the form of rescue proceedings.

55. The fact that secondary winding-up proceedings can disrupt or even frustrate the purpose of such rescue proceedings is made clear by the submissions of the referring court. This is indeed an undesirable outcome. It is apparent, not least from the shift in many Member States' insolvency laws away from pure winding-up proceedings towards rescue and reorganisation proceedings, and the resulting additions made to Annex A to the Regulation in recent years,[23] which have increasingly included rescue proceedings, that the latter proceedings are gaining increasing importance and ought therefore also to fall within the ambit of the Regulation.

56. Apart from the additions to the Annex, however, the wording of the Regulation has remained otherwise unchanged, which can lead to contradictions and practical problems in individual cases, as the present case demonstrates. In order that rescue proceedings may be conducted effectively and efficiently within the framework of the Regulation, the relevant rules on the coordination of procedures must therefore be interpreted in a manner consistent with the objectives pursued by the Regulation, which interpretation, as Christianapol rightly submits, must take into account the way in which the Regulation has evolved. Such an interpretation may at the same time serve to mitigate the adverse consequences of initiating secondary proceedings, as described by the referring court.

57. In my opinion, there is therefore no need to impose a general prohibition on proceedings secondary to main rescue proceedings.

58. Furthermore, in the light of the objectives pursued by secondary proceedings, the interpretation advocated by Christianapol and France, to the effect that secondary proceedings cannot generally be opened where the main proceedings are rescue proceedings, is untenable. Secondary proceedings serve in particular to protect local creditors, the intention being to enable them to pursue insolvency proceedings at local level, in their own language and in the context of a legal system with which they are familiar, and thus to make it easier for them to assert their rights. A general prohibition of secondary proceedings when the main proceedings are rescue proceedings would strike at the very heart of the Regulation by completely precluding an essential combination of proceedings provided for by the Regulation. That consequence would no longer be compatible with the rationale of the Insolvency Regulation and would go beyond what is necessary in order to protect rescue proceedings.

23 — Thus, for example, it was only subsequently that the French *sauvegarde* proceedings were included in Annex A of the Regulation by Council Regulation (EC) No 694/2006 of 27 April 2006 (OJ 2006 L 121, p. 1).

3. Coordination of main and secondary proceedings in the case of rescue proceedings

59. It remains to be examined how main and secondary proceedings within the meaning of the Regulation can be coordinated where the main proceedings are rescue proceedings and the secondary proceedings are winding-up proceedings.

60. On the one hand, the Regulation provides for numerous measures that make it possible to take account of the objectives of the main proceedings and to guarantee the unity of insolvency proceedings,[24] even when the secondary proceedings are conducted as winding-up proceedings. Furthermore, the parties to the secondary proceedings concerned must have regard to the objectives pursued by the Regulation and help ensure that the main proceedings are not disrupted and that their purpose is not frustrated. Finally, the substantive effects of the main proceedings must also be taken into account in the secondary proceedings.

a) Measures in the Regulation

61. The dominant role which the Regulation gives to the main proceedings[25] in relation to the secondary proceedings allows the insolvency liquidator in the main proceedings to influence the secondary proceedings in many ways. For example, he can request a stay of liquidation under Article 33(1)[26] whether or not the national law provides for the possibility of such a measure. Article 33 thus establishes an autonomous ground for a stay of liquidation. Moreover, Article 34(1) confers on the liquidator in the main proceedings the right to propose a rescue plan, a composition or a comparable measure to close the secondary proceedings. Indeed, during a stay of liquidation under Article 33, Article 34(3) of the Regulation grants that right exclusively to him. He is, therefore, in part at least, able to prevent or delay the process of realising the debtor's assets so that they may be used for the rescue proceedings. He can also initiate any rescue arrangements in the secondary proceedings.

62. On the other hand, the Regulation also allows rescue arrangements to be adopted in the secondary proceedings whether or not they have been proposed by the liquidator in the main proceedings. After all, as the Spanish Government rightly observes, the second sentence of Article 27 provides only that the secondary proceedings must be among the proceedings listed in Annex B. It does not, however, stipulate precisely how the proceedings in question are to be closed. It is therefore sufficient if, in principle, the proceedings in question *may* be brought to a close by the realisation of the debtor's assets. If, however, the relevant *lex concursus*[27] in the secondary proceedings also provides for rescue arrangements, these too may be used.[28] This interpretation is confirmed by Article 2(c) of the Regulation, which includes within the term 'winding-up proceedings' proceedings which may be 'closed by a composition or other measure terminating the insolvency', and therefore assumes that winding-up proceedings need not necessarily be brought to a close with the realisation of the debtor's assets.

24 — See recital 12: '… Mandatory rules of coordination with the main proceedings satisfy the need for unity in the Community'.

25 — In addition to the provisions on the coordination of procedures, see also recital 20 in the preamble to the Regulation, which refers to the 'dominant role' of the main proceedings.

26 — Albeit only for a period of three months at a time. However, the fourth sentence of Article 33(1) shows that that period can be extended without restriction. In this regard, see also the English version: 'It may be continued or renewed for similar periods', the French version: '*Elle peut être prolongée ou renouvelée pour des périodes de même durée*', or the Spanish version: '*Podrá prolongarse o renovarse por períodos de la misma duración*'.

27 — For secondary proceedings, this is defined in Article 28.

28 — This is the case, for example, in all Member States whose insolvency rules are based on a single procedure.

63. Thanks to the mechanisms described above, the Insolvency Regulation therefore makes it possible to mitigate the adverse effects of secondary proceedings. They do not, however, represent a final, satisfactory solution to the problem. On the one hand, account must be taken of secondary proceedings opened in Member States in which there is no single procedure. In order to satisfy the requirements laid down in the second sentence of Article 3(3), such Member States must have recourse to proceedings capable of culminating in the winding-up of the debtor. Under national law, it is possible that such proceedings do not include rescue as a potential form of closure. Outcomes can vary, therefore, depending on the substance of the insolvency rules applied by the Member States. This is contrary to the principle of legal certainty.

64. On the other hand, because they provide only a fragmentary solution to the problem, not even the existing obligations with respect to coordination and the provision of information can fully eliminate the risk to which rescue is exposed generally. For example, the putting in hand of any rescue measures that are possible in the secondary proceedings too, such as a stay of payment or discharge of debt, depends on the consent of all creditors having an interest, as Article 34(2) of the Regulation makes clear. A stay of liquidation for periods of three months at a time is not comparable to a final stay of liquidation either. Nor does the insolvency liquidator's right to propose measures, as granted to him in Article 34(1), prevent the assets from being realised if this is the decision of the competent body in the secondary proceedings.

65. A set of express rules on the coordination of proceedings where the main proceedings are rescue proceedings would therefore be welcome. In my view, there is something to be said for allowing secondary proceedings to take the form of rescue proceedings too. As I have shown above, the Regulation already permits parallel rescue proceedings to a large extent. It would therefore be only logical for it also to give express permission for such proceedings and to lay down corresponding rules on coordination. This, however, is a decision for the European Union legislature.

b) Obligation to safeguard the objectives of the main proceedings

66. Until such time as the Regulation is amended in such a way as to clarify the situation, however, all parties have an obligation to safeguard the objectives of the main proceedings through the existing mechanisms and within the framework of national law. In addition, the principle of sincere cooperation with the European Union (Article 4(3) TEU) requires the court hearing the secondary proceedings, in any measures which it may have to adopt, to have regard to the objectives of the main proceedings and to take account of the scheme of the Regulation, which is based on the principle of mutual trust, the need for the coordination of main and secondary proceedings, the objective of creating more efficient and effective cross-border proceedings and the priority of the main proceedings. [29]

67. This applies to all measures under national law, such as discretionary decisions or situations involving a choice between several possible courses of action, in which case it is always necessary to select the measure best suited to safeguarding the objectives of the main proceedings. National law must also ensure that the liquidator in the main proceedings takes part in the secondary proceedings.

68. Moreover, as the Commission rightly points out, the Regulation does not lay down any general obligation to open secondary proceedings; it simply permits them. Consequently, whether secondary proceedings are opened at all continues to be a matter for the decision of the court having jurisdiction. In making that decision too, it must take account of the objectives of the Regulation and the effects of the main proceedings, in particular whether the creditors who were involved in the main proceedings and who consented to a rescue plan would be able to evade their obligations under that plan by instituting secondary proceedings.

29 — See recitals 23, 2 and 12.

c) Effects of the main proceedings

69. What is more, the effects of the judgment given by the Tribunal de commerce de Meaux must also be taken into consideration from a substantive point of view. Article 25 lays down an obligation to recognise all 'judgments handed down by a court ... which concern the course and closure of insolvency proceedings'. A rescue plan such as that adopted in France is undoubtedly a judgment in that sense. The measures ordered in that rescue plan must therefore be taken into account, from both a procedural and a substantive point of view.

70. The relevant effects in this regard are those attributed by French law to the rescue plan.[30] As the Commission points out, the judgments given under French law are to be taken into consideration at a substantive level, for example, in relation to the question of the extent to which the rescue plan has changed the content of claims held by creditors who have filed a secondary insolvency petition, or whether an application to open secondary proceedings by a creditor who is a party to the main proceedings and has consented to the rescue plan is an abuse of rights.

71. The answer to the third question must therefore be that Article 27 of the Regulation permits secondary proceedings to be opened even where the main proceedings are rescue proceedings.

C – *The second question*

72. By its second question, the referring court wishes to ascertain whether Article 27 of the Regulation, which governs the opening of secondary proceedings, prohibits the court dealing with the secondary proceedings from examining the insolvency of the debtor or whether that court may examine the existence of the debtor's insolvency in certain situations.

73. The referring court takes the view that, in certain language versions of the Regulation, the first sentence of Article 27 could be understood as meaning that the insolvency of the debtor does not *have to* (but may) be examined when secondary proceedings are opened; in other language versions, on the other hand, it can also be read as meaning that the question of the debtor's insolvency *may not* be examined by the competent court.

74. In my view, however, a comparison of the language versions does not reveal any such discrepancy. Rather, the language versions which I have compared[31] comprise an optional element. In relation to the language versions it has examined, the Commission reaches the same conclusion. Contrary to the findings of the referring court, that conclusion also emerges in particular from the German ('*kann eröffnen*') and French ('*permet d'ouvrir*') versions. The Finnish version too, which, alongside the German version, is of particular importance given that the Regulation was adopted at the initiative of Finland and Germany,[32] clearly contains an optional element ('*voi*').

30 — See recital 22: '… Automatic recognition should therefore mean that the effects attributed to the proceedings by the law of the State in which the proceedings were opened extend to all other Member States. …'.

31 — See the German version: '*so kann … eröffnen, ohne dass … die Insolvenz des Schuldners geprüft wird*', the French version '*permet d'ouvrir, … une procédure secondaire d'insolvabilité sans que l'insolvabilité du débiteur soit examinée*', the English version: 'shall permit … the opening of secondary insolvency proceedings without the debtor's insolvency being examined', the Spanish version: '*permitirá abrir … sin que sea examinada en dicho Estado la insolvencia del deudor*', the Italian version: '*permette di aprire … senza che in questo altro Stato sia esaminata l'insolvenza del debitore*', the Greek version: '*καθιστά δυνατή*', and the Finnish version: '*voi … aloittaa sekundäärimenettelyn ilman, että velallisen maksukyvyttömyyttä tutkitaan tässä toisessa valtiossa*'.

32 — See the second citation in the preamble to the Regulation.

75. However, this does not make it clear whether the court hearing the secondary proceedings may examine the insolvency of the debtor when the secondary proceedings are opened. It is not clear to what the option contained in Article 27 relates. It may apply both to the possibility of opening secondary proceedings in general and to the question whether or not the debtor's insolvency is to be examined when the secondary proceedings are opened. Regard must therefore be had to the objectives pursued by the Regulation and the purpose of the provision itself, [33] in order to establish its meaning.

76. The purpose of Article 27 is to make a further examination of the insolvency by the court hearing the secondary proceedings unnecessary, in order thus to help expedite the proceedings. The legislature clearly proceeds on the assumption that a further examination is unnecessary because the debtor's insolvency was examined when the main proceedings were opened. The secondary proceedings inevitably encompass assets held by the debtor which were covered by the divestment in the main proceedings, so that a further examination of the insolvency is not necessary. However, in the light of the aforementioned shift in insolvency laws towards rescue proceedings and the corresponding additions to Annex A, this is no longer always the case.

77. Furthermore, Article 27 of the Regulation assumes that, if the insolvency is examined by the court hearing the secondary proceedings, there is a risk that the competent court will arrive at a different assessment, perhaps because it does not recognise the ground for the insolvency in the main proceedings, and will therefore refuse to open secondary proceedings. The Regulation contains no definition of the meaning of insolvency. As I have already explained, that decision remains a matter for the Member States alone and varies widely across the European Union. Article 27 is intended to avoid any problems resulting from those variations. However, that objective cannot be transposed wholesale to rescue proceedings, because of the objectives pursued by rescue proceedings and the course they follow.

78. The objective of expediting the proceedings is not necessarily adversely affected either in a case such as the present. After all, the intention is merely to avoid a repeated examination of the insolvency. If, however, the Polish court were prohibited from examining Christianapol's insolvency before opening the winding-up proceedings, the result could be that it would open winding-up proceedings against a debtor that may in the interim have become solvent again (including from the point of view of French law). That outcome, however, is not compatible with the objectives pursued by the Regulation and would, moreover, represent an excessive interference in the Member States' procedural rules, in so far as it would create a procedure initiated not only on no ground of insolvency recognised within the State in question, but on no ground of insolvency whatsoever.

79. Moreover, such an understanding of Article 27 of the Regulation might prevent debtors from applying timeously for rescue proceedings. For, on that understanding, they would run the risk of being exposed to winding-up proceedings in another Member State without a prior examination of their insolvency, even though their financial situation may have improved again by then.

80. Examination of the insolvency by the court hearing the secondary proceedings is for that reason, and in the light also of my submissions concerning the third question, [34] always necessary where the main proceedings are rescue proceedings. Where, on the other hand, the main proceedings are not rescue or restructuring proceedings but winding-up proceedings, the court hearing the secondary proceedings is prohibited from conducting a *further* examination of the insolvency for the reasons set out above.

33 — Even if we assume that the optional element in Article 27 relates only to the question of whether or not to open secondary proceedings and we therefore regard that provision as a general prohibition on examining insolvency, that prohibition would have to be interpreted and applied in the light of the purpose and objectives of the Regulation.

34 — See paragraph 56 et seq.

81. The answer to the second question must therefore be that the court hearing an application for the opening of secondary insolvency proceedings may examine the debtor's insolvency if the main proceedings are rescue proceedings that do not presuppose that the debtor is insolvent.

V – Conclusion

In the light of the foregoing observations, I propose that the Court should answer the questions referred as follows:

1. Article 4(1) and (2)(j) of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings must be interpreted as meaning that it is for national law alone to decide when 'closure of insolvency proceedings' takes place.

2. Article 27 of Regulation No 1346/2000 must be interpreted as meaning that the national court dealing with an application for the opening of secondary insolvency proceedings may examine the debtor's insolvency if the main proceedings are rescue proceedings.

3. Interpretation of Article 27 of Regulation No 1346/2000 permits secondary insolvency proceedings to be opened even if the main proceedings, which receive automatic recognition, are rescue or restructuring proceedings (such as the French *sauvegarde* proceedings).